

# Chapter 50

## Environment

### Morne van der Linde and Ernst Basson

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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.<sup>1</sup>

## 50.1 Introduction

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<sup>1</sup> Constitution of the Republic of South Africa, 1996 ('Final Constitution' or 'FC') s 24.

Our natural environment is finite.<sup>2</sup> This finitude is brought into sharp relief by a host of harmful human activities:<sup>3</sup> ‘unsustainable development, irresponsible use of natural resources, neglect, abuse, greed, ignorance or a lack of respect’ for nature’s delicate ecosystems.<sup>4</sup> Our systemic disregard for our environment has led to a loss of genetic diversity, de-vegetation, desertification, pollution, degradation of fresh water sources, overpopulation, deterioration and erosion of topsoil, climate and atmospheric quality change, ozone layer depletion and acid rain, reduction of non-renewable energy sources, disruption of biochemical cycles and a loss of cultural heritage.<sup>5</sup> Some have gone so far as to characterise the ineluctable course of environmental destruction as a ‘global security threat’.<sup>6</sup>

A full blown response to such a global security threat lies beyond the scope of this chapter. What follows is what two South African environmental lawyers can offer: an examination of a person’s right to a healthy environment and the right to protection of the environment as made manifest in the Final Constitution. With those more limited goals in mind, we will also briefly consider the origins and recognition of this right in international human rights discourse and its protection at both a global and a regional level. The better part of this chapter goes on to explore the ambit of the constitutional right to a healthy environment against the backdrop of extant environmental legislation in South Africa.<sup>7</sup>

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## 50.2 International perspectives on the right to a healthy environment

Norm setting and protection of the environment takes place on four different levels: the global (United Nations), the regional (African Union), the sub-regional (Southern

2 PM Pevato (ed) *International Environmental Law* (Volume 1, 2003) xiv.

3 Ibid.

4 Ibid.

5 Ibid citing LK Caldwell *International Environmental Policy* (2nd Edition, 1990) 17-8.

6 G Handl ‘Environmental Security and Global Change: The Challenge to International Law’ (1990) (1) *Yearbook of International Environmental Law* 3.

7 The need for capacity building in the field of environmental law at a national level was identified in 2002. The Johannesburg Principles on the Role of Law and Sustainable Development stated that ‘we [judges] are strongly of the view that there is an urgent need to strengthen the capacity of judges, prosecutors, legislators and all persons who play a critical role at national level in the process of implementation, development and enforcement of environmental law, including multilateral environmental agreements (MEAs), especially through the judicial process.’ The Chief Justices of Southern Africa once again reaffirmed this position in 2003 at the Regional Needs Assessment Meeting for Southern Africa. To further these goals, a national symposium on environmental law for judges was held in Pretoria during January 2004. See also *Fuel Retailers Association of Southern Africa v Director-General Environmental Management, Department of Agriculture, Conservation and Environment Mpumalanga Province* 2007 (6) SA 4 (CC), 2007 (10) BCLR 1059 (CC), [2007] ZACC 13 at paras 102-104 (The Constitutional Court emphasised the obligation on South African Courts, in terms of the Johannesburg Principles, to protect the environmental rights in the Constitution for the benefit of present and future generations, regardless of the identity of the party seeking such protection.)

African Development Community) and the national (South Africa). Many governments commit themselves to implementing — at a national level — norms set at a global, regional or sub-regional level. A common critique of international human rights norms is that if these norms were adequately enforced at the national level, the international norms would be superfluous.<sup>8</sup> This insight rings true, and points to the need to distinguish between international norm setting and domestic enforcement. Thus, the environmental rights found in various international instruments rely for their *enforcement* on the Final Constitution.<sup>9</sup> That said, the international norms are not without purpose in our polity: the broad and long-standing norms of international law play an essential part in determining the meaning of the constitutional right to a healthy environment.

### (a) Importance of international perspectives — nature of the right

Why do we want to protect a right to a healthy environment? Two schools of thought answer this question: anthropocentric and deontological. On the anthropocentric approach a healthy sustainable environment is of purely instrumental value: the environment serves the important ends of man. It promotes health, happiness and social cohesion.<sup>10</sup> The deontological approach, on the other hand, views a healthy, sustainable natural environment as an end in itself. Such broad philosophical debates again fall outside the ambit of this chapter; but they inform — if only at an intuitive level — the explication of our constitutionally entrenched right.

In contemporary rights discourse, environmental rights have been categorised as ‘third-generation rights.’ First-generation rights are the traditional civil and political rights — the rights to vote, to a fair trial, freedom of expression and so on. Socio-economic rights — rights to food, housing, healthcare, education — are labelled ‘second-generation’ rights. The third generation of rights emerged only after the adoption of the 1966 human rights covenants<sup>11</sup> and they are often referred to as ‘solidarity rights’. In addition to the right to a healthy environment, the category also embraces the right to peace and the right to development.<sup>12</sup>

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At international law, the content of the broad right to a healthy environment consists of two linked but distinct parts: substantive rights and procedural rights.

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8 C Heyns & F Viljoen ‘An Overview of International Human Rights Protection in Africa’ (1999) 15 *SAJHR* 421.

9 See FC s 24. See also 1981 African Charter on Human and Peoples’ Rights (‘the African Charter’) art 24.

10 For a discussion on the issue of anthropocentrism, see M Anderson ‘Human Rights Approaches to Environmental Protection: An Overview’ in A Boyle & M Anderson (eds) *Human Rights Approaches to Environmental Protection* (1996) 15. See also C Stone ‘Should Trees Have Standing? - Towards Legal Rights for Natural Objects’ (1972) 45 *USC L Rev* 450.

11 International Covenant on Civil and Political Rights (‘ICCPR’) adopted 16 December 1966 (G.A. Res. 2200A (XXI) UN Doc A/6316 (1966) 999 UNTS 171), and the International Covenant on Socio and Economic Rights (‘ICESR’) adopted 16 December 1966 (G.A. Res. 2200A (XXI) UN Doc A/6316 (1966) 993 UNTS 3).

12 A Rosas ‘So-called Rights of the Third Generation’ in A Eide, C Krause & A Rosas (eds) *Economic, Social and Cultural Rights* (1995) 243.

Substantive rights generally take the form of positive state obligations. They encompass the government's duty to prevent pollution and ecological degradation as well as its obligation to promote conservation and sustainable development. Ultimately, determining the substance of these duties depends upon value judgements made by courts or other decision-makers.

Procedural rights address *how* decisions about the environment should be made, rather than what decisions are ultimately taken. The most common procedural rights are: (1) the right to information concerning the environment; (2) the right to receive and disseminate ideas and information; (3) the right to participation in environmental planning and decision-making, including any prior Environmental Impact Assessment ('EIA'); (4) the right to freedom of association in relation to environmental protection; and (5) the right to effective remedies and redress for environmental harm in administrative or judicial proceedings.<sup>13</sup> While the procedural rights have been widely acknowledged and accepted, the recognition of the substantive dimension of the right has not, as yet, secured the same level of international consensus.

### **(b) Global level of protection**

The necessity of organized efforts to protect the environment only rose to public awareness in the early 1970s. At that time, people began to appreciate that the environment was being placed under ever increasing pressure and was unlikely to sustain itself without coordinated participation, management practices and regulatory frameworks both globally and locally.

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RS2, 10-10, ch50-p4

Increased appreciation for the need for systemic intervention led to a shift from a traditional commitment to conservation, to a co-ordinated approach to 'environmental management'. This shift was formalised when, in 1972, the United Nations General Assembly ('UNGA') convened the United Nations Conference on Human Environment in Stockholm.<sup>14</sup> The Stockholm Declaration<sup>15</sup> provided that 'man has a fundamental right to freedom, equality and adequate conditions of life, in an environment where quality permits a life of dignity and well-being'.<sup>16</sup>

The Stockholm Conference also led to the creation of the United Nations Environmental Programme ('UNEP'), as the primary UN agency responsible for the environment.<sup>17</sup> The leading global environmental authority has as its mission 'to provide leadership and encourage partnership in caring for the environment by inspiring, informing and enabling nations and peoples to improve their quality of life

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13 See M Anderson 'An Overview' in A Boyle & M Anderson (eds) *Human Rights Approaches to Environmental Protection* (1996) 8.

14 This Conference was held in June 1972 in Stockholm, Sweden ('Stockholm Conference').

15 Declaration of the United Nations Conference on the Human Environment available at <http://www.unep.org/Documents.Multilingual/Default.asp?DocumentID=97&ArticleID=1503> (accessed on 16 October 2009).

16 UN doc A/Conf.48/14.rev, Chapter 1 (New York 1972).

without compromising that of the future generations.’<sup>18</sup> In 1987, the World Commission on Environment and Development developed a new right: ‘All human beings have the fundamental right to an environment adequate for their health and well-being’.<sup>19</sup>

Support for the new right continued to grow. In 1990, the UN Sub-Commission on the Prevention of Discrimination and Protection of Minorities stressed the ‘need to identify new trends in international law relating to human rights dimensions of environmental protection.’<sup>20</sup> Then, in 1991, the Commission on Human Rights held that ‘all individuals are entitled to live in an environment adequate for their health and well-being.’<sup>21</sup> In the same year, the UN Special Rapporteur on Human Rights and the Environment stressed the need for research into ‘the permissible limits to the exercise of certain guaranteed human rights in order to ensure full enjoyment of the right to the environment.’<sup>22</sup> Twenty years after the Stockholm Declaration another important international soft law instrument was created — Agenda 21.

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Agenda 21 emerged from the United Nations Conference on Environment and Development (‘UNCED’).<sup>23</sup> It serves as a comprehensive plan of action for the implementation of sustainable development. However, the right to a healthy environment played a limited role in the plan. Boyle contends that Agenda 21’s failure to give greater recognition to the right to environment is indicative of the continuing uncertainty of the role of human rights law in international environmental law.<sup>24</sup> Nevertheless, the right gained greater traction in the final report of the Special Rapporteur of the UN Commission on Human Rights. The ‘Sub-Commission on the Prevention of Discrimination of Minorities, Human Rights and the Environment’ contained 27 principles on human rights and the environment’.<sup>25</sup> A more recent development came at the 2002 World Summit on Sustainable Development. The

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- 17 The three core ‘soft law’ instruments that emerged from the Stockholm Conference were presented to the 27th Session of the UN General Assembly (‘UNGA’) in 1972. These instruments were: (1) the Stockholm Declaration, consisting of 26 guiding principles on current environmental challenges; (2) an Action Plan, consisting of 109 recommendations of international action for environmental management; and (3) a framework for the creation of an organization to implement the Action Plan. See UNGA Res 2997 (XXVII) and Res 3004 (XXVII).
  - 18 UNEP (DPDL)/GJS/1/3: *UNEP’s Environmental Law Activities: a 30-year Review (From Stockholm to Johannesburg)* (2002) 2.
  - 19 World Commission on Environment and Development *Our Common Future* (1987) 348.
  - 20 Preamble, Human Rights and the Environment - Resolution 1990/7 of the Sub-Commission adopted on 30 August 1990.
  - 21 Resolution 1991/44 (5 March 1991).
  - 22 UN doc.E/CN.4/Sub.2/1991/8 of 2 August 1991.
  - 23 The Conference — also known as the Rio Conference — was held in June 1992 in Rio de Janeiro, Brazil.
  - 24 A Boyle ‘The Role of International Human Rights Law in the Protection of the Environment’ in A Boyle & M Anderson *Human Rights Approaches to Environmental Protection* (1996) 43.

Summit evaluated progress in environmental protection over the previous 10 years and offered a map of the way forward.

### (c) Regional level of protection<sup>26</sup>

The African Charter on Human and Peoples' Rights provides for a right to a satisfactory environment and creates an internationally binding human rights instrument for African states.<sup>27</sup> However, prior to the adoption of the Charter, environmental concerns in Africa were primarily limited to natural disasters.<sup>28</sup> As a result, it is not surprising that the negotiators did not foresee the importance of the inclusion of the environmental right, nor its potential to address contemporary environmental concerns that can be ascribed to globalisation, industrialisation, unrestricted development, wars, civil conflicts and other humanitarian crises. Article 24 of the African Charter stipulates that 'all people shall have the right to a satisfactory environment favourable to their development'.<sup>29</sup> While its broad outline is promising, the right contains no clear indication as to what the terms 'satisfactory' and 'environment' entail. This ambiguity allows for both broad and restrictive readings.

The African Charter provides for a supervisory body — the African Commission on Human and Peoples' Rights — to ensure that the rights contained in the Charter are promoted and protected by state parties to the African Charter. The Commission has had two opportunities to consider the meaning of article 24. In

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*Free Legal Assistance Group v Zaire*,<sup>30</sup> the Commission might have linked article 24 with article 16 (health) in their consideration of the Zairian government's duty to provide such basic services as clean drinking water. However, the Commission preferred to base its decision solely on article 16.

The Commission could not avoid the problem when, in March 1996, it received a communication from the Social and Economic Rights Action Centre ('SERAC') regarding Nigeria's failure to comply with article 24.<sup>31</sup> In particular, it had to determine the extent to which the degradation of the environment through oil pollution violated the citizens' rights to clean air, water and soil. In October 2001,

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25 UN Doc.E/CN.4./Sub.2/1994/9. These draft principles are reprinted in C Miller *Environmental Rights: Critical Perspectives* (1998) 3.

26 For a more comprehensive discussion see M Van der Linde 'Regional Environmental Law under the Auspices of the African Union' in HA Strydom & ND King *Fuggle and Rabie's Environmental Management in South Africa* (2nd Edition, 2009) 165-189.

27 The African Charter was adopted on 27 June 1981 in Nairobi, Kenya and entered into force on 21 October 1986. All 53 countries in Africa are members of the African Union.

28 The natural disasters that elicited the most concern were drought, deforestation, deterioration of water resources, land concentration and desertification.

29 African Charter art 24.

30 *Free Legal Assistance Group, Lawyers' Committee for Human Rights, Union Interfricaine des Droits de l'Homme, Les Temoins de Jehovah v Zaire* Communications 25/98, 47/90, 56/91 and 100/93.



the Commission concluded that Nigeria had violated this contentious right and offered remedial recommendations pertaining to the position prevalent in the Niger Delta.<sup>32</sup> According to the African Commission, the Nigerian government had failed to fulfil its minimum obligations under the African Charter by participating directly in the contamination of the environment (air, water and soil pollution) which, in turn, adversely affected the health of the Ogoni people. Furthermore, the government had failed to protect the local community against the harm caused by an oil consortium and had failed to conduct the requisite impact and risk assessment studies on the environment and local communities.<sup>33</sup> In making these findings, the Commission gave substantial content to article 24. The right to a satisfactory environment, the Commission held, requires a government to:

- 1 take reasonable measures to prevent pollution and ecological degradation;<sup>34</sup>
- 2 promote conservation and ensure ecological sustainable development and the use of natural resources;<sup>35</sup>
- 3 permit independent scientific monitoring of threatened environments;<sup>36</sup>
- 4 undertake environmental and social impact assessments prior to industrial development;<sup>37</sup>
- 5 provide access to information to communities involved;<sup>38</sup> and
- 6 grant those affected an opportunity to be heard and participate in the development process.<sup>39</sup>

*SERAC* gives content to both the procedural and substantive dimensions of the right. Procedurally, it establishes two rights: (a) the right to access information about the environment or potential threats to the environment; and (b) the right to have one's case heard in the event that one's environmental rights are impaired or threatened. The judgment also delineates the substantive duties borne by the

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31 *The Social and Economic Rights Action Centre and the Centre for Economic and Social Rights v Nigeria* Communication 155/96 ('*SERAC*').

32 For a detailed discussion on the *SERAC* decision, see M van der Linde & L Louw 'Considering the Interpretation and Application of Article 24 of the African Commission on Human and Peoples' Rights in Light of the *SERAC* Communication' (2003) 3 *AHRLJ* 167.

33 *SERAC* (supra) at para 50.

34 *SERAC* (supra) at para 52.

35 *Ibid.*

36 *Ibid* at para 53.

37 *Ibid.*

38 *Ibid.*

39 *Ibid.*

government: to (a) prevent pollution, (b) limit ecological degradation and (c) promote conservation and sustainable development. These obligations reflect two central international environmental principles: the *preventative principle* and the *duty of care principle*.<sup>40</sup> The *SERAC* obligations emphasise the socio-economic nature of these rights and are thus contingent upon the financial resources of the Nigerian — or any other African — government.

A number of smaller instruments also provide recognition of the environmental right at the regional level.<sup>41</sup> The most interesting is the Protocol to the African Charter on the Rights of Women. This protocol places an interesting spin on the protection of environmental rights.<sup>42</sup> The Protocol takes cognisance of the intimate relationship between women and the environment; it contains no fewer than five articles that deal specifically with environmental issues and women's rights.<sup>43</sup> The Protocol provides for a woman's general right to live in a healthy and sustainable environment,<sup>44</sup> but then goes on to oblige state parties to involve women in environmental management at all levels, to promote research into new and renewable energy sources and to facilitate women's access to these resources.<sup>45</sup> A number of other provisions give greater content to these obligations.<sup>46</sup>

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40 M Kidd *Environmental Law: A South African Perspective* (1997) 8.

41 See, for example, the Convention on the Ban of Import into Africa and the Control of Transboundary Movement and Management of Hazardous Waste within Africa ('Bamako Convention') available at [www.chr.up.ac.za/hr\\_docs/african/docs/oau/oau8.doc](http://www.chr.up.ac.za/hr_docs/african/docs/oau/oau8.doc) (accessed on 16 October 2009). The Bamako Convention was adopted in 1991 and entered into force in 1998. For discussions of this Convention see D Tladi 'The Quest to Ban Hazardous Waste Import into Africa: First Bamako and Now Basel' (2000) 33 *CILSA* 210 and M van der Linde 'African Responses to Environmental Protection' (2002) 35 *CILSA* 99.

42 The Protocol places States under an obligation to regulate the management, processing and storage of domestic waste. States must also ensure that proper standards are followed with respect to the storage, transportation and destruction of toxic waste. Art 19(a). Unfortunately, the Protocol fails to engage the transnational movement of hazardous waste.

43 Preamble (para 6), arts 15, 16, 18 & 19.

44 Art 18(1).

45 Art 18(2) (a) & (b). In this regard, the Protocol reaffirms commitment to women and sustainable development provided for in the Preamble to the United Nations Plan of Action on the Environment and Development.

46 The Protocol demands that state parties ensure that women enjoy full participation in the development process (art 19(a)) and in the implementation and evaluation of development policies (art 19(b)). It guarantees women's access to land and their right to property. Art 19(c). Flexible banking and lending systems must be put in place to ensure women's access to credit. Art 19(c) and (d)). Similarly, the Protocol emphasises the traditional exclusion of women from income-generating activities that relate to the use of natural resources. Women must be in a position to provide sustenance to their families and to participate in economies, micro or macro. Art 19(5). Of perhaps greater moment are obligations on member states to ensure access to clean drinking water, land, sources of domestic fuel and the means of producing nutritious food and a duty to establish adequate storage systems. Art 15.

A particularly intriguing dimension of the protections afforded by the Protocol is its recognition of the value of indigenous knowledge. The role of women in traditional agrarian societies often grants them a deep, if tacit, understanding of ecosystems. Traditional medicines constitute a significant and particularly valuable account of this tacit knowledge. In order to safeguard real, if unregistered, intellectual

property rights in such medicines, states are placed under an obligation to ensure indigenous knowledge systems are protected and developed.<sup>47</sup>

A final important, and more recent, African initiative is the Revised African Convention on the Conservation of Nature and Natural Resources.<sup>48</sup> This regulatory environmental treaty recognises numerous 'soft' law instruments and treaties. In particular, it vouchsafes the right of all people to a satisfactory environment favourable to their development.<sup>49</sup> It also places procedural obligations on states to disseminate environmental information, to ensure public access to environmental information, grants access to justice, and requires public participation in environmental decision-making.<sup>50</sup>

#### **(d) National level of protection**

Numerous African countries have constitutionally entrenched some variation on the right to a healthy and a sustainable environment.<sup>51</sup> The protection generally comes in three forms. First, some constitutions require the state to protect the environment. Others grant individual rights to a healthy environment. The third form imposes duties on individuals to protect the environment. Some constitutions require some or all of the above.<sup>52</sup>

A constitutionally entrenched environmental right possesses numerous benefits. First, it can provide a 'safety net' when existing laws or policies fail to address a given environmental problem. Second, an environmental right can place a brake on

47 Art 18(2)(c).

48 For a detailed discussion on the 1968 Convention, the revision process and the Revised 2003 Convention see M van der Linde 'A Review of the African Convention on Nature and Natural Resources' (2002) 1 *AHRLJ* 33.

49 Art III.

50 Art XVI.

51 These countries include: Angola (art 24), Benin (arts 27-29), Burkina Faso (art 29), Cameroon (preamble), Cape Verde (art 72), Chad (arts 47-48), Comoros (preamble), Congo (arts 35-6), Cote d'Ivoire (art 19), Ethiopia (art 44), Gabon (art 1(8)), The Gambia (art 215), Ghana (art 36(g)), Guinea (art 19), Lesotho (art 36), Madagascar (arts 35; 39), Malawi (art 13), Mali (art 15), Mozambique (arts 37;72), Niger (art 27), Nigeria (art 20), Sao Tome & Principe (art 48), Senegal (art 8), Seychelles (art 38), South Africa (art 24), Sudan (art 13), Togo (art 41), and Uganda (art 39).

52 I Koppen & K Lateur 'Environmental Rights' in A Casesse, A Clapham & J Weiler (eds) 'Human Rights and the European Community: Substantive Law' (1991) 21; JB Ojwang 'Environment Law and the Constitutional Order' (1993) 18; and BT Mekete & JB Ojwang 'The Right to a Healthy Environment: Possible Juridical Bases' (1996) 3 *SAJELP* 169.

economic programmes that harm the environment. Third, the provision of procedural environmental rights should promote greater public participation in the process of interpreting and enforcing substantive environmental rights.<sup>53</sup>

## 50.3 South African Constitution

Section 24 of the Final Constitution is the ultimate source of all environmental rights in South Africa. However, FC s 24 must be understood in conjunction

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with the primary piece of environmental legislation: the National Environmental Management Act ('NEMA').<sup>54</sup> NEMA creates the enabling environment (pun intended) for environmental protection.

### (a) Historical context and Interim Constitution

Prior to 1990, the government made but one attempt to create an environmental right or entitlement. A draft bill that ultimately became the Environmental Conservation Act ('ECA') contained a provision that entitled every citizen to a clean and healthy environment.<sup>55</sup> This provision was regrettably deleted from the final version of the Act.<sup>56</sup>

The next move to create an environmental right came during the negotiation of the Interim Constitution.<sup>57</sup> During the Multiparty Negotiating Forum,<sup>58</sup> the various stakeholders offered a broad array of proposals for an environmental right.<sup>59</sup> The ultimate product — the concise right in IC s 29 — accordingly reflects a number of political trade-offs. In its final form, s 29 granted every person an entitlement to an environment 'which is not detrimental to his or her health or well-being.' The wording of IC s 29 was criticized on the grounds that it was anthropocentric: it

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53 For a discussion on the constitutional entrenchment of the environment see C Bruch, W Coker & C van Arsdale 'Breathing Life into Fundamental principles, Implementing Constitutional Environmental Protections in Africa' (2000) 7 *SAJELP* 20.

54 Act 73 of 1998.

55 Act 73 of 1989.

56 R Lyster 'The Protection of Environmental Rights' (1992) 109 *SALJ* 518.

57 Constitution of the Republic of South Africa Act 200 of 1993 ('IC' or 'Interim Constitution').

58 For more on the negotiating process, see S Woolman & J Swanepoel 'Constitutional History' in S Woolman, T Roux & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, June 2008) §2.4.

59 The South African Law Commission had a short environmental right highlighting an entitlement to well-being, conservation, and environmental protection. The Constitutional Committee of the African National Congress proposed an elaborate right consisting of 5 subsections. It articulated entitlements and duties related to environmental management, protection control, conservation, pollution, co-operative governance and penalties relating the environmental degradation. The Inkatha Freedom Party and the Pan Africanist Congress offered further alternatives to the NP and ANC proposals.

protected the environment solely in terms of the needs of human beings. It ignored the inherent value of the environment itself.

The environmental right was engaged, but briefly mentioned, by the Constitutional Assembly. Although the Constitutional Assembly received numerous submissions pertaining to an environmental right, language from the Environmental Portfolio Committee that should have been incorporated into the draft Final Constitution was ignored. At the certification hearings, the Constitutional Court heard that the procedure regarding the adoption of the environmental right did not comply with the Constitutional Principles laid down by the Interim Constitution. Although the Constitutional Court acknowledged receipt of these representations, strangely it made no reference to them in its judgment.<sup>60</sup>

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RS2, 10-10, ch50-p10

## **(b) The Final Constitution**

The Constitutional Assembly revisited the Interim Constitution's environmental right and eventually accepted a compromise formulation. Section 24 consists of two main parts: the right to a healthy environment and the right to protection of the environment. The Final Constitution notably enhances the content of the environmental right as compared to the Interim Constitution. That said, some have expressed concern about the basic law's ability to achieve the full integration of divergent national and provincial environmental laws.<sup>61</sup> While legitimate concerns, the principles of cooperative government contained in FC chapter 3<sup>62</sup> and chapter 3 of NEMA should go some distance in allaying such fears.

To return to the constitutional text, FC s 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:
  - (1) prevent pollution and ecological degradation;
  - (2) promote conservation; and
  - (3) secure ecologically sustainable development and use of natural resources while promoting justifiable economic and social development.

## **(i) Constructing the right**

Through the word 'everyone', s 24 acknowledges that the right is to be enjoyed by all people in South Africa, citizens and non-citizens alike. Likewise, its emphasis on

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60 T Winstanley 'The Final Constitution and the Environment' (1997) 4 *SAJELP* 135. See also *Ex Parte Chairperson of the Constitutional Assembly In re: Certification of the Constitution of the Republic of South Africa 1996* 1996 (4) SA 744 (CC), 1996 (10) BCLR 1253 (CC), [1996] ZACC 26.

61 PGW Henderson *Environmental Laws of South Africa* (Vol 1, 1996) 1-3.

62 For more on co-operative government, see S Woolman & T Roux 'Co-operative Government & Intergovernmental Relations' in S Woolman, T Roux & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, RS 1, September 2009) Chapter 14.

preventing future harm to the environment encourages a relaxed approach to the already loose rules for standing.<sup>63</sup>

Section 24 possesses characteristics of both civil rights and socio-economic rights. As a civil right, subsection (a) places a negative obligation on government (and other actors): they must refrain from actions that create an environment harmful to an individual's health or well-being. As a socio-economic right, the government must, under subsection (b), take positive action to promote, protect and fulfil the right. Subsection (b) of s 24 envisages sound management strategies, conservation, environmental education and an integrated approach to resource utilization.

At the core of FC s 24 is the concept of sustainable development. Sustainable development drives the remaining elements of the right. Several recent cases have interpreted and explored the content and application of sustainable development.<sup>64</sup>

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RS2, 10-10, ch50-p11

In *Fuel Retailers Association of Southern Africa v Director-General Environmental Management, Department of Agriculture, Conservation and Environment Mpumalanga Province*<sup>65</sup> — which instantly became the locus classicus on sustainable development in contemporary South African law — the Constitutional Court identified and emphasised the inherent inter-relationship between s 24's rights to the environment, on the one hand, and s 24's rights to economic and social development, on the other:

What is immediately apparent from section 24 is the explicit recognition of the obligation to promote justifiable 'economic and social development'. Economic and social development is essential to the well-being of human beings .... But development cannot subsist upon a deteriorating environmental base. Unlimited development is detrimental to the environment and the destruction of the environment is detrimental to development. Promotion of development requires the protection of the environment. Yet the environment cannot be protected if development does not pay attention to the costs of environmental destruction. The environment and development are thus inexorably linked. ... Economy is not just about the production of wealth, and ecology is

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63 For more on standing, see C Loots 'Standing, Ripeness & Mootness' in S Woolman, T Roux & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, February 2005) Chapter 7. For more on benefits, see S Woolman 'Application' in S Woolman, T Roux & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, February 2005) Chapter 31.

64 This was not always the case. See *Ex parte Mercer & Another* 2003 (1) SA 203 (CC) (The applicants, convicted in the magistrate's Court for harbouring wild animals without the required permit provided for in Nature and Environmental Conservation Ordinance 19 of 1974 (C), challenged the constitutionality of the ordinance in terms of FC s 9 and FC s 24. The application was dismissed by the Court on the grounds that the matter was still pending before the High Court.); *Johan de Kock v Minister of Water Affairs & Others* 2005 (12) BCLR 1183 (CC), [2005] ZACC 12 (In 2005, the Constitutional Court had the opportunity to consider the positive obligation placed on government in terms of s 24(b), but declined to do so. The applicant approached the Constitutional Court directly under Rule 18 and FC s 167(6)(a). The applicant's substantive claim was the government's failure to implement legislation aimed at containing the pollution or to prosecute the Iron and Steel Company ('ISCOR') for significant environmental pollution. Despite the potential for interpreting this obligation, the Court refused the application for direct access. It did, however, direct the Registrar to bring the judgment to the attention of the Law Society of the Northern Provinces so that they might consider aiding Mr de Kock with a challenge in the High Court.)

65 2007 (6) SA 4 (CC), 2007 (10) BCLR 1059 (CC), [2007] ZACC 13.

not just about the protection of nature; they are both equally relevant for improving the lot of humankind.<sup>66</sup>

Earlier, in *BP Southern Africa (Pty) Limited v MEC for Agriculture, Conservation, Environment & Land Affairs*, Judge Claassen had held that the constitutional right to an environment is on par with the rights to freedom of trade, occupation, profession and property.<sup>67</sup> As such, when a court engages — often contemporaneously — rights to property, land and freedom of trade and s 24's environmental rights, it must enter into a normative and often empirical assessment of how the rights can best be harmonized. And if the rights cannot be harmonized, then the courts must offer a compelling account of why one right must be given precedence over any other right given the facts in play.<sup>68</sup> Such an ineradicable tension between s 24 and other rights is inevitable: '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.'<sup>69</sup>

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RS2, 10-10, ch50-p12

Socio-economic concerns and principles — including the protection of the environment — will, ultimately, 'test' the limits of the Constitution's commitment to more traditional rights to property and land.

### **(aa) Meaning of 'environment'**

What exactly constitutes the environment? Neither international law, nor academic writing, nor legislation provides a uniform answer to this question. Academic interventions reveal an expansive and a restrictive definition. The restrictive approach limits the extension of the term to nature and natural resources. The expansive — and more widely accepted — definition recognizes that the environment encompasses a variety of physical and social elements.<sup>70</sup> A broad denotation of environment was offered in *BP Southern Africa*. The *BP Southern Africa* court defined the environment as 'all conditions and influences affecting the life and habits of man'.<sup>71</sup> That broad definition fits with the Constitutional Court's move in *Fuel Retailers* to integrate environmental protection with economic development and social cohesion.<sup>72</sup>

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66 Ibid at paras 44-45.

67 2004 (5) SA 124 (W) ('*BP Southern Africa*').

68 Ibid at 143.

69 Ibid at 144.

70 See Environment Conservation Act 73 of 1989 ('ECA') s 1 (Defines the environment as inclusive of 'the aggregate of surrounding objects, conditions and influences that influence the life and habits of man or any other organism or collection of organisms.') For discussion of this approach, see P Sands *Principles of International Law* (2003) 15; P Birnie & A Boyle *International Law and the Environment* (2001) 5; RF Fuggle & MA Rabie (eds) *Environmental Management in South Africa* (1999) 83-92.

71 *BP Southern Africa* (supra) at 145.

As for legislation, NEMA provides a similarly wide understanding. It defines 'environment' as:

The surroundings within which humans exist and that are made up of:

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

The wording of NEMA and our FC s 24 jurisprudence make clear that 'environment' encompasses our natural surroundings and those economic entities and social structures that determine — to a large degree — both our being and our well-being in the world. When determining the extension of the term environment under FC s 24, consideration must be given to the needs, interests and values of both traditional communities as well as the more urbanized South African public.

The decision in *Mapochsgronde Action Group v Eagles Quarries (Pty) Ltd & Others* provides an indication of what it means to extend 'environment' from the natural

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RS2, 10-10, ch50-p13

to the cultural.<sup>74</sup> The High Court awarded an interim interdict to halt the commencement of excavations for an open cast granite mine because the mine would not only cause extensive ecological damage to scarce bio-diversity, but also destroy archaeological sites of the Ndundza-Ndebele late Iron Age and 30 Boer forts from the 1882-83 ZAR-Mapoch War. Both sites possess significant educational and historical value.

## **(bb) Meaning of 'health' and 'well-being'**

Subsection (a) grants everyone an entitlement to an environment that satisfies two criteria. First, the environment must not be harmful to a person's health. Second, the environment must not be deleterious to their well-being.

### **(x) Health**

#### **(1) General**

'Health' in subsection (a) signifies human health. The term extends beyond the mere physical state to include both social and mental components; to use the World Health Organisation's definition, 'health' is 'a state of complete physical, mental and social well-being and not merely the absence of disease or infirmity.'<sup>75</sup> The right to health implies the highest attainable standard of health including both access to

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72 *Fuel Retailers Association of Southern Africa v Director-General Environmental Management, Department of Agriculture, Conservation and Environment Mpumalanga Province* 2007 (6) SA 4 (CC), 2007 (10) BCLR 1059 (CC), [2007] ZACC 13.

73 NEMA s 1.

74 *Mapochsgronde Action Group v Eagles Quarries (Pty) Ltd & Others* 2002 (TPD)(Unreported decision on file with the authors).



health services and healthy living conditions. The Bill of Rights addresses these twin elements of human health through different but related provisions: FC s 27(1) guarantees the rights to access to health services, sufficient food and water and social security; FC s 24(a) establishes the right to a healthy environment.

The protection of human health imposes a duty on private parties — as well as organs of state — to prevent and address despoliation of our physical environment. This duty could take the form of the provision of clean uncontaminated water, control of atmospheric emissions, environmental clean-up operations, environmental rehabilitation or integrated waste management. The common law maxim of *sic utere tuo ut alienum non laedas* (literally: ‘so use your own as not to injure another’s property’) expresses the obligation of reasonable use of land and obliges the user of land to extend a certain duty of care towards neighbours — including the prevention of pollution emanating from the land. This rather limited principle — and its close ties to the right to a healthy environment — was confirmed in *Minister of Health and Welfare v Woodcarb (Pty) Ltd.*<sup>76</sup> The *Woodcarb* court allowed an application for an interdict by the Minister of Health and Welfare under the Atmospheric Pollution Prevention Act<sup>77</sup> against a company that had been operating a scheduled incineration process without the required registration certificate. Neighbouring tenants complained to the Minister about the smoke

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RS2, 10-10, ch50-p14

emissions from the sawmill plant. The court held that smoke emissions without the necessary certificate were a violation of the neighbours’ right to ‘an environment that is not detrimental to their health or well-being’ contained in the Interim Constitution.<sup>78</sup> Although the *Woodcarb* court found a violation of the right to an environment that is not detrimental to health or well-being, it did not offer a meaningful interpretation of these concepts.

FC s 24 extends the common law duty of care towards neighbours to excessive ‘noise pollution’. In *Lasky & Another v Showzone CC & Others*, the owner of an existing theatre-restaurant was instructed to reduce the noise from their premise’s club which interfered with the applicant’s right to undisturbed use and possession of the next door property.<sup>79</sup> The court held that even though the applicant had purchased the property knowing it was next to a theatre-restaurant in a central business district, that did not mean the entertainment facility could not be restrained from causing unreasonable, disturbing noise.<sup>80</sup> Similarly, in *Lone Creek River Lodge & Others v Global Forest Products & Others*, the High Court handed down an interdict that prevented a sawmill and plywood plant from driving heavy

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75 Constitution of the World Health Organization, Preamble, available at [www.who.int/governance/eb/who\\_constitution\\_en.pdf](http://www.who.int/governance/eb/who_constitution_en.pdf) (accessed on 16 October 2009).

76 1996 (3) SA 155 (N)(‘*Woodcarb*’).

77 Act 45 of 1965.

78 *Woodcarb* (supra) at 164 F.

79 2007 (2) SA 48 (C).

80 *Ibid* at paras 26-28.

logging trucks that created an unreasonable level of noise past a neighbouring luxury guesthouse at night, over weekends and on public holidays.<sup>81</sup> The court confirmed that the applicants had a 'clear right to use and enjoy their property and to do their business as a guest house free from unlawful interference by others': in this case, that meant to be free from unreasonable noise.<sup>82</sup> For our purposes, it is equally important that the court confirmed that FC s 24 and s 28 of NEMA embraced this 'trite principle of our common law'.<sup>83</sup>

## (2) Pollution: Duty of care

Section 28 of NEMA gives content to the right to a healthy environment by codifying the common-law duty of care against the background of two international environmental soft law principles — introduced into South African law through s 2 of NEMA — 'the polluter pays' and 'life cycle management'. Section 28(1) places an extensive general duty of care on polluters to take reasonable measures to prevent significant pollution or environmental degradation and to take remedial steps to minimise and to rectify unavoidable pollution or environmental degradation.<sup>84</sup> NEMA does not expressly define the meaning of 'significant pollution' for purposes of determining when a duty of care would be triggered. However, while a *de minimis* change in the biological composition of a particular environment would probably not qualify as significant pollution, s 3 of NEMA does expressly cover a wide category of activities that determine whether the duty of care has been discharged:

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RS2, 10-10, ch50-p15

- (i) Conduct an environmental impact assessment by investigating, assessing, and evaluating the impacts of the pollution or environmental degradation;<sup>85</sup>
- (ii) Educate employees of the environmental risks involved in such activities;
- (iii) Cease, modify, control the causes of the pollution;
- (iv) Contain, prevent movement of pollutants;
- (v) Eliminate the source of pollution; and
- (vi) Remedy the effects of the pollution or degradation.<sup>86</sup>

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81 [2007] ZAGPHC 307 ('Lone Creek')

82 Ibid at 8.

83 Ibid.

84 See National Water Act 36 of 1998 s 19 for a similar duty of care to prevent pollution of water sources.

85 See *Hichange Investments (Pty) Ltd v Cape Produce (Pty) Ltd t/a Pelt Products & Others* (EC) (Unreported Case No 1050/2001)(copy on file with the authors) 31. (Leach J held that this duty is discharged only when an EIA occurs after an identified activity has taken place, i.e. as part of reasonable steps to address significant pollution.) See also JHE Basson 'Retrospective Authorisation of Identified Activities for the Purposes of Environmental Impact Assessment' (2003) 10 *SAJELP* 133.

86 NEMA s 28(3).

In the case of environmental emergencies, s 30 of NEMA sets out a similar duty of care, coupled with an obligation to take specific remedial action, to avoid or minimise the effects of the emergency.<sup>87</sup>

### (3) Environmental strict liability<sup>88</sup>

The gamut of legal subjects who are subject to the duty of care is extremely wide. Section 28(2) of NEMA places parties such as the owners, controllers (e.g. lessees) and users (e.g. contractors) of the land or premises under a duty to prevent future or address historical pollution or environmental degradation. The extent of the obligation to remedy past environmental wrongs was the subject of dispute in *Bareki NO v Gencor Ltd & Others*.<sup>89</sup> The High Court had to decide whether the defendants' environmental duty of care in terms of ss 28(1) and (2) of NEMA rendered them liable for historic asbestos fibre pollution and environmental degradation caused by their mining operations from 1976 to 1981. The court analysed the difference between retrospective and retroactive legal effect of statutory provisions in light of the rebuttable common-law presumption against retrospective statutes and the constitutional endorsement of the rule of law. It concluded that the principle of fairness required that s 28 of NEMA should not have retrospective legal effect before the date of its enactment in 1999. In order to address this limitation on liability for the rehabilitation of historic pollution, the legislature passed s 35 of the National Environmental Management: Waste Act.<sup>90</sup> Section 35 expressly extends the obligation to remediate historically contaminated land to contamination that arose before commencement of the Act.

Section 28 of NEMA also allows the government to intervene if a responsible party fails to adequately remedy environmental degradation and to recover all the costs of the operation. The categories of parties that may be liable under s 28 are:

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RS2, 10-10, ch50-p16

- (a) Parties directly or indirectly responsible for the pollution. The latter category may include financial institutions or investors that finance projects that cause significant pollution or degradation (e.g. a mine, road, a dam, a pipeline, an industrial plant or a housing development). These institutions may be liable for environmental rehabilitation costs if they failed to ensure that adequate mechanisms for environmental protection were put in place and strictly adhered to by the borrower who caused the pollution;
- (b) The land-owner at the time of the pollution or degradation or his or her successor in title. New property owners of industrial property are at risk and should, as a standard practice, conduct an environmental due diligence investigation and set off their risk for future environmental rehabilitation liability through indemnification, environmental insurance policies, or reduced purchase consideration for the transaction; or

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87 NEMA s 30. See National Water Act s 20 for the duty of care during emergency incidents that may affect water quality.

88 Although the provisions of NEMA pertaining to strict environmental liability are considered, thought should be given to similar provisions contained in other environmental legislation.

89 2006 (1) SA 432, 436E-445C (T)(De Villiers J).

90 Act 59 of 2008.

- (c) The person in control or using the property at the time when the pollution or degradation occurred; or
- (d) Anyone that had negligently failed to prevent the pollution or degradation.

## (y) Well-being

The second constitutional criterion, 'well-being', proves to be much more elusive. While well-being does not exclude health (mental or physical), the term captures economic, social, aesthetic and emotional considerations. The desire to protect the 'fynbos' unique to the Western Cape from a hazardous building project might, for example, be captured under an expansive understanding of well-being.<sup>91</sup>

*Wildlife Society of Southern Africa & Others v Minister of Environmental Affairs and Tourism of the Republic of South Africa* offers a good example of a situation in which 'well-being' rather than 'health' is at issue.<sup>92</sup> The applicants had challenged the decision of traditional leaders to grant occupation rights to private individuals in a conservation area on the Wild Coast. The new occupants had caused extensive ecological degradation. Since their health was not ill-affected, the applicants contended that the government had a duty to enforce the protected status of the area in terms of the 'well-being' all South Africans experience in having protected and sustainable ecosystems. Unfortunately, the court did not venture an interpretation of 'well-being' and decided the case on other grounds.

So what then is the source of such an argument from well-being? One answer is that the Constitution and NEMA both recognize the 'aesthetic' dimension inherent in the right to an environment that protects one's well-being.

The courts' response to this proposition has been mixed. In *Eagles Landing Body Corporate v Molewa NO & Others*,<sup>93</sup> the High Court declined to waive a cost order against a losing party — as provided for by s 32(2) of NEMA — who had brought an application in the interest of environmental protection. Kroon J found that while the applicants had acted in the interest of the environment, it had used that interest 'to achieve another purpose in the interests of its members,

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RS2, 10-10, ch50-p17

viz the protection of the view from the sectional title land.'<sup>94</sup> In a similar vein, the *Paola v Jeeva NO & Others* court explicitly rejected the applicant's argument that the magnificent view that he enjoyed from his property — which would be obscured by the proposed alterations to his neighbour's property — enjoyed legal protection.<sup>95</sup> The court held that: (a) it would be irrational to bar his neighbours from building a similar house to that of the applicant; (b) it 'would result in chaos and great confusion in the development world'; and (c) it would lead to a 'multiplicity of actions [which] might harm the effective administration of justice by tying the Courts

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91 J De Waal, I Currie & G Erasmus *The Bill of Rights Handbook* (1999) 394.

92 1996 (3) SA 1095 (Tk).

93 2003 (1) SA 412 (T).

94 *Eagles Landing Body Corporate v Molewa NO & Others* (supra) at para 106.

95 2002 (2) SA 391 (D).

up in the adjudication of a new category of claims' relating to the right of one property to insist that another property must refrain from obstructing its view.<sup>96</sup>

The reasoning of the two High Court cases fails to take account of that portion of the definition of 'environment' in NEMA that is designed to protect those 'aesthetic properties and conditions' of the physical environment that positively 'influence human well-being.' A room with a view would seem to clearly fall within that definition.<sup>97</sup> This criticism of the High Court decisions was — by implication — endorsed in the appeal of *Paola v Jeeva No & Others*.<sup>98</sup> The Supreme Court of Appeal reversed the decision of the court *a quo* by protecting the appellant's exceptional view of the Durban coast that would have been severely obscured by the respondent's approval of plans for extensions to the neighbouring property. Although the case was decided on the basis of the unlawfulness of the approval of the extension plans, the Court held that it was clear from the facts that the proposed execution of the plans will 'significantly diminish the value of the applicant's adjoining property' and was therefore contrary to the applicable legislation.<sup>99</sup> The reduction in the value of the property that would result from the applicant's inability to enjoy the magnificent views from his property forms part of the field of protection of the applicant's right to an environment that is not detrimental to his well-being. The Court's reasoning clearly recognizes that the aesthetic value (of a magnificent view or some other feature of the environment) falls within the protective ambit of FC s 24(a).

That such a split in understanding the meaning of 'well-being' should exist — and may continue to exist — was expressly recognized by the High Court in *HTF Developers (Pty) Ltd v the Minister & Others*. The High Court noted that the term 'well-being' is 'open-ended and ... manifestly ... incapable of a precise definition'.<sup>100</sup> That said, the *HTF Developers* Court confirmed that FC s 24(a)'s

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RS2, 10-10, ch50-p18

(and NEMA s 24's) recognition of an entitlement to 'well-being' must, at a minimum, be construed as encompassing 'a sense of environmental integrity; a sense that we ought to utilise the environment in a morally responsible and ethical manner.'<sup>101</sup> Thus, however elusive the definition of 'well-being' may be, the Supreme Court of Appeal and one High Court have recognized its aesthetic and moral dimensions.

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96 *Ibid* at 406.

97 NEMA s 1(1).

98 2004 (1) SA 396 (SCA)(Farlam AJ).

99 *Ibid* at paras 11-16, 23.

100 2006 (5) SA 512 (T)('HTF Developers (HC)') at para 18. The High Court decision was overturned on appeal in *HTF Developers (Pty) Ltd v the Minister of Environmental Affairs* 2007 (5) SA 438 (SCA), which was in turn overturned by the Constitutional Court in *MEC: Department of Agriculture, Conservation and Environment and Another v HTF Developers (Pty) Limited* 2008 (2) SA 319 (CC), 2008 (4) BCLR 417 (CC), [2007] ZACC 25. However, nothing in the later decisions contradicts the High Court's wide construction of 'well-being'.

101 *HTF Developers (HC)* (supra) at para 18 quoting J Glazewski *Environmental Law in South Africa* (2000) 86.

## (cc) Meaning of 'present and future generations'

The concepts of inter-generational equity and intra-generational equity are reflected in FC s 24(b)'s reference to 'present and future generations'. Inter-generational equity places present generations under an obligation to ensure that the environment and extant natural resources are equitably preserved and protected for the full enjoyment of future generations.<sup>102</sup> This principle has also been incorporated in a number of treaties and soft law instruments.<sup>103</sup>

In *The Director, Mineral Development, Gauteng Region & Sasol Mining (Pty) Ltd v Save the Vaal Environment & Others*,<sup>104</sup> the Supreme Court of Appeal heard the objections of the Respondent who opposed, on environmental grounds, an application by SASOL Mining (the mineral rights holder) for a mining license in terms of s 9 of the Minerals Act.<sup>105</sup> The Appellant argued that the respondent would at a later stage have an opportunity to state their objections, i.e. during the approval of the environmental management program ('EMPR') in terms of s 39 of the Act. SASOL Mining intended to start with open-cast, strip mining in an environmentally sensitive area close to the Vaal River. The court accepted evidence that described the irreversible environmental damage that the open cast mine would cause: the destruction of the Rietspruit Wetland, the threat to fauna and flora, constant noise, light, dust and water pollution that would affect the spiritual and aesthetic quality of the area, loss of water quality that would destroy important recreational activities and small businesses and the subsequent devaluation of property in that area.<sup>106</sup>

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RS2, 10-10, ch50-p19

With respect to the principle of inter-generational equity, the court relied solely upon the Brundtland Commission Report.<sup>107</sup> The court's decision to shape its decision in terms of international 'soft' law comes as something of a surprise given that the principle of inter-generational equity is expressly recognized in FC s 24(b) and s 2 of

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102 See E Weiss 'In Fairness to Future Generations: International Law, Common Patrimony and Intergenerational Equity' in P Hayden (ed) *The Philosophy of Human Rights* (1989); E Weiss 'The Planetary Trust: Conservation and Intergenerational Equity' (1984) 11 *Ecology Law Quarterly* 495; E Weiss 'Our Rights and Obligations to Future Generations for the Environment' (1990) 84 *AJIL* 199; L Gundling 'Our Responsibility to Future Generations' (1990) 84 *AJIL* 207.

103 See, for example, the United Nations Convention on Climate Change (1992), text available at <http://unfccc.int/resource/docs/convkp/conveng.pdf> (accessed on 17 October 2009); the Convention on Biodiversity (1992), text available at <http://www.cbd.int/doc/legal/cbd-un-en.pdf> (accessed on 17 October 2009); the African Convention on the Conservation of Nature and Natural Resources (1968), available at [http://www.africa-union.org/root/au/Documents/Treaties/Text/Convention\\_Nature%20&%20Natural\\_Resources.pdf](http://www.africa-union.org/root/au/Documents/Treaties/Text/Convention_Nature%20&%20Natural_Resources.pdf) (accessed on 17 October 2009); Stockholm Declaration (1972), text available at [www.unep.org](http://www.unep.org); and the Rio Declaration (1992), text available at [www.unep.org](http://www.unep.org). See further, *Minors Oposa v Secretary of Department of Environmental and Natural Resources* reprinted in *International Legal Materials* (1994) 173 (Philippine Supreme Court's elucidation of the principle of intergenerational equity).

104 1999 (2) SA 709, 719C-D (SCA), 1999 (8) BCLR 845 (SCA) ('*Save the Vaal*').

105 Act 50 of 1991.

106 *Save the Vaal* (supra) at 714-715.

107 *Save the Vaal* (supra) at 719.

NEMA. But let's leave that oddity of the judgment aside. Let us ask instead what its benefits might be.

Although inter-generational equity is not a principle of international law that is directly enforceable between the legal subjects of international law, it is generally regarded as a principle of international 'soft' law that forms the context for interpretation of international law rules and principles. The reliance on international law creates a precedent whereby, through analogy, the remaining principles of international environmental soft law may have legal effect in South African law as directly enforceable legal principles. Pace s 2 of NEMA, international environmental soft law might have somewhat greater purchase than mere 'interpretational guidelines'. Secondly, although this principle applies directly to the conduct of an organ of state — the decision of the Director to issue the mining licence in terms of s 9 — it also applies, in result, to the conduct of a private party — the mining rights holder who intended to conduct open cast mining in an environmentally sensitive area. Not only does FC s 24 — read with FC s 8(2)<sup>108</sup> — create directly enforceable legal rights between private parties, but the principles of international environmental soft law can now be said to have direct binding legal effect between private parties. In essence, the principle of intergenerational equity underwrites a set of legal duties to conduct construction or manufacturing or mining activities in an ecologically sustainable manner; to manage waste streams effectively in terms of the 'polluter pays' and 'cradle to grave' principles; and to take adequate steps in terms of the precautionary principle to prevent greenhouse gas emissions and their contribution to global warming.

### **(dd) Meaning of 'ecologically sustainable development'**

#### **(x) Sustainable development**

##### **(1) International law**

UNEP's mission statement articulates the basic principles of sustainable development.<sup>109</sup> It describes a co-ordinated set of policies relating to environmental protection and management that enable 'nations and peoples to improve their quality of life without compromising that of future generations.'<sup>110</sup> This proposition captures both the notions of intra-generational equity and inter-generational equity. It echoes the World Commission on Environment and Development's traditional

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RS2, 10-10, ch50-p20

approach. In short, sustainable development is 'development that meets the needs of present generations without compromising the ability of future generations to meet their own needs.'<sup>111</sup>

108 For more on direct application of the Bill of Rights, see S Woolman 'Application' in S Woolman, T Roux & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, February 2005) Chapter 31.

109 2 See generally D Tladi *Sustainable Development in International Law: An Analysis of Key International Instruments* (2007)(discussion of the international dimensions from a South African perspective).

110 UNEP *Capacity Building for Sustainable Development: An Overview of UNEP Environmental Capacity Development Activities* (2002) 11.

111 Brundtland (Commission) Report *Our Common Future* (1987) 43.

Sands teases out the content of sustainable development in international law in terms of four basic principles:

- (i) the principle of intergenerational equity — preservation of natural resources for the benefit of future generations;
- (ii) the principle of sustainable use — the aim of exploiting natural resources in a 'sustainable', 'prudent', 'rational', 'wise' or 'appropriate' manner;
- (iii) the principle of equitable use or intra-generational equity — exploitation of natural resources in an equitable manner where exploiting states take into consideration the needs of other states; and
- (iv) the integration principle — ensure the integration of environmental considerations into economic and other developmental plans, programmes and projects as well as that development needs are taken into consideration when environmental objectives are applied.<sup>112</sup>

In *Gabcikovo-Nagymaros Project (Hungary v Slovakia)* the International Court of Justice dealt with the rights and obligations of the respective parties under a bilateral treaty between Hungary and Slovakia concerning the construction and subsequent operation of the Gabcikovo-Nagymaros Barrage System.<sup>113</sup> The Court attempted to reconcile economic development with a commitment to sustainable development:

Throughout the ages, mankind has, for economic and other reasons, constantly interfered with nature. In the past, this was often done without consideration of the effects upon the environment. Owing to new scientific insights and to a growing awareness of the risks for mankind — for present and future generations — ... new norms and standards have been developed... . Such new norms have to be taken into consideration, and such new norms standards given proper weight, not only when States contemplate new activities but also when continuing with activities begun in the past. This need to reconcile economic development with the protection of the environment is aptly expressed in the concept of sustainable development.<sup>114</sup>

In a separate opinion, Weeramantry J argued that the principle of sustainable development was sufficiently well-accepted to be considered a part of customary international law:

The principle of sustainable development, in my view, is an integral feature of modern international law. ... The principle of sustainable development is thus part of modern

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RS2, 10-10, ch50-p21

international law by reason not only of its inescapable logical necessity, but also by reason of its wide and general acceptance by the global community.<sup>115</sup>

## (2) Application in South African law

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112 P Sands *Principles of International Law* (2003) 253. Cited in *Fuel Retailers Association of Southern Africa v Director-General Environmental Management, Department of Agriculture, Conservation and Environment Mpumalanga Province* 2007 (6) SA 4 (CC), 2007 (10) BCLR 1059 (CC), [2007] ZACC 13 ('Fuel Retailers') at para 51 n 57 and *BP Southern Africa (Pty) Limited v MEC for Agriculture, Conservation, Environment & Land Affairs* 2004 (5) SA 124, 143-144 (W) ('BP Southern Africa').

113 37 ILM 162, available at <http://www.icj-cij.org/docket/files/92/7375.pdf> (accessed on 17 October 2009).

114 *Ibid* at para 140.



South African case-law has considered both inter-generational equity and sustainable development.<sup>116</sup> In *Minister of Public Works & Others v Kyalami Ridge Environmental Association*, the Constitutional Court had an opportunity to consider FC s 24.<sup>117</sup> Heavy rains had destroyed the homes of approximately 300 people living in Alexandria township. A transit camp was to be established on state land, adjacent to Leeuwkop Prison until permanent housing could be provided. A High Court application by existing residents of the area and other stakeholders sought an interdict restraining the respondents from proceeding with the establishment of the camp. The applicants claimed that government's decision was in contravention of the relevant town-planning scheme and applicable environmental legislation. The government contended that it was under a constitutional obligation to assist the flood victims, that this decision by the state as owner of the land was not an administrative decision and that it consequently did not require authorisation or permission. The High Court granted an interim interdict and ordered the Department to consider environmental impact studies and any relevant laws. The Minister appealed directly to the Constitutional Court claiming that the matter raised important constitutional issues.

In a unanimous judgment, the Constitutional Court upheld the appeal. It first found that the government, as owner of the Leeuwkop land, has the same rights and many of the same obligations as other land owners. If the Government complies with binding legislation and works within the framework of the Constitution, then it is entitled to enjoy those rights. Given that government's decision to establish the camp did not violate the rights of residents under environmental, land and township legislation nor infringe s 24 of the Constitution, the government could proceed as it did. Moreover, in considering the correct course of action to be taken, the committee appointed by the government had acted in a procedurally fair manner: it had taken into account the nature of the decision, the rights affected by the decision, the circumstances in which the decision was made, and the consequences of the decision. The constitutional dispute that truly seized the Court was whether the residents' s 26 right to housing had been unconstitutionally limited. Here too the Court found that under the dire and desperate circumstances under which the residents found themselves subsequent to the flood, the government's immediate response to the crisis could not be said to violate the residents' right to adequate housing.

Some commentators have argued that *Kyalami Ridge* would have been an ideal opportunity for the Court to discuss the principle of sustainable development and to tackle an alleged conflict between economic development and environmental

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protection.<sup>118</sup> Although the Court could have considered sustainable development, this argument does not properly appreciate the scope and application of sustainable

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115 Although formally recognised in 1972, Weeramantry J effectively traces and discusses the elements of sustainable development to around 223 B.C.

116 See § 50.3(cc) *supra* for a discussion of intergenerational equity and sustainable development in *Save the Vaal* (*supra*).

117 2001 (3) SA 1151 (CC), 2001 (7) BCLR 652 (CC), [2001] ZACC 19 ('*Kyalami Ridge*').

118 L Ferris & D Tladi 'Environmental Rights' in D Brand & C Heyns *Socio-Economic Rights in South Africa* (2004).

development. The case only raised competing commitments to adequate housing and environmental protection: economic development did not feature.<sup>119</sup> Contemporary definitions of sustainable development recognize three distinct, but necessarily overlapping, domains. Sustainable development must be (1) environmentally appropriate, (2) socially beneficial and (3) economically viable.<sup>120</sup> By framing sustainable development as mediating a tension solely between environmental and economic interests, many commentators fail to engage the second component of sustainable development: the attendant benefit or harm to the community in which the development takes place.

The Court had the opportunity to properly address the issue of sustainable development in *Fuel Retailers*.<sup>121</sup> The case concerned the environmental authorisation for a new petrol filling station in the town of White River. The Court was of the view that the environmental authorities' consideration of the environmental impact study failed to evaluate adequately and consider the socio-economic impact of the new filling station. The Department contended that the need, desirability and sustainability of the new filling station had already been adequately considered by the local authority when it approved the rezoning application for the filling station. This decision ostensibly freed the Department from any obligation to reassess those factors as part of the environmental impact assessment process. Not so, held Justice Ngcobo. The kind of 'triple bottom line' approach that forms an essential part of an environmental impact assessment requires far more of a decision-maker than a mere assessment of need and desirability undertaken by town planners. The environmental impact assessment process used by the environmental authorities is a separate and distinct process from the rezoning processes of local authorities.<sup>122</sup> The environmental authorities should, under s 22 of ECA, have ensured that all of the significant and cumulative environmental, social and economic consequences of the planned development had been investigated. This investigation had to be undertaken, in turn, in terms of the environmental principles in ss 2, 23 and 24 of NEMA in order to achieve the desired goal of sustainable integrated environmental management.

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The Court's analysis of the constitutional guarantee of sustainable development in FC s 24(b) is a *tour de force*.<sup>123</sup> Firstly, the Court accepted the contemporary meaning of the principle of sustainable development in international law,<sup>124</sup> as part of South African law.<sup>125</sup> Secondly, the Court confirmed the interrelationship and interdependence of environmental, economic and social interests. The *Fuel Retailers* Court writes:

The Constitution recognizes the interrelationship between the environment and development; indeed it recognizes the need for the protection of the environment while at the same time it recognizes the need for social and economic development. It

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119 FC ss 24 and 26.

120 See M van der Linde & E Basson 'Sustainability Auditing' in I Sampson (ed) *The Guide to Environmental Auditing in South Africa* (2004); M van der Linde 'Forestry Stewardship, Sustainable Forest Management and Auditing' in I Sampson (ed) *The Guide to Environmental Auditing in South Africa* (2004).

121 *Fuel Retailers* (*supra*).

122 *Fuel Retailers* (*supra*) at para 85.

contemplates the integration of environmental protection and socio-economic development. It envisages that environmental considerations will be balanced with socio-economic considerations through the ideal of sustainable development. ... Sustainable development and sustainable use and exploitation of natural resources are at the core of the protection of the environment... . Sustainable development does not require the cessation of socio-economic development but seeks to regulate the manner in which it takes place. It recognizes that socio-economic development invariably brings risk of environmental damage as it puts pressure on environmental resources. It envisages that decision-makers guided by this concept of sustainable development will ensure that socio-economic developments remain firmly attached to their ecological roots and that these roots are protected and nurtured so that they may support future socio-economic developments... .

NEMA, which was enacted to give effect to section 24 of the Constitution, embraces the concept of sustainable development. Sustainable development is defined to mean 'the integration of social, economic and environmental factors into planning, implementation and decision-making for the benefit of present and future generations. This broad definition of sustainable development incorporates two of the internationally recognized elements of the concept of sustainable development, namely, the principle of integration of environmental protection and socio-economic development, and the principle of inter-generational and intra-generational equity. In addition NEMA sets out some of the factors that are relevant to decisions on sustainable development. These factors largely reflect international experience. But... these factors are not exhaustive... . [NEMA] requires that the interests of the environment be balanced with socio-economic interest. Thus, whenever a development which may have a significant impact on the environment is planned, it envisaged that there will always be a need to weigh considerations of development, as underpinned by the right to socio-economic development, against environmental considerations, as underpinned by the right to environmental protection. ...

[NEMA] contemplates that environmental decisions will achieve a balance between environmental and socio-economic developmental considerations through the concept of

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sustainable development ... NEMA requires that the cumulative impact of a proposed development, together with the existing developments on the environment, socio-economic conditions and cultural heritage must be assessed. The cumulative effect of the proposed development must naturally be assessed in the light of existing developments. A consideration of socio-economic conditions ... includes the consideration of the impact of the proposed development not only in combination with the existing developments, but also its impact on existing ones... .

Unsustainable developments are in themselves detrimental to the environment. ... It is ... not enough to focus on the needs of the developer while the needs of the society are neglected. One of the purposes of the public participation provision of NEMA is to

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123 The Court's approach, however, is not without its critics. See, for example, T Murombo 'From Crude Environmentalism to Sustainable Development: *Fuel Retailers*' (2008) 3 *SALJ* 486; L Ferris 'Sustainable Development in Practice: *Fuel Retailers Association of South Africa v Director-General Environmental Development, Department of Agriculture, Conservation and Environment, Mpumalanga Province*' (2008) 1 *Constitutional Court Review* 235; D Tladi 'Fuel Retailers, Sustainable Development & Integration : A Response to Ferris' (2008) 1 *Constitutional Court Review* 255 (Tladi specifically criticizes the Court's un-nuanced equation of social rights with economic rights as a single coherent socio-economic right which the author argues is based on an incorrect analysis of the principle of sustainable development).

124 See §50.3(c)(i)(dd)(x)(1) supra.

125 *Fuel Retailers* (supra) at paras 46-57.

afford people the opportunity to express their views on the desirability of a [development] that will impact on socio-economic conditions affecting [a local population] ... . [S]ocio-economic development must be justifiable in the light of the need to protect the environment. The Constitution and environmental legislation introduce a new criterion for considering future developments. Pure economic factors are no longer decisive. The need for development must now be determined by its impact on the environment, sustainable development and social and economic interests. The duty of the environmental authorities is to integrate these factors into decision-making and make decisions that are informed by these considerations. This process requires a decision-maker to consider the impact of the proposed development on the environment and socio-economic conditions. ... [Similarly, the developer must] identify and predict the actual or potential impact on socio-economic conditions and consider ways of minimizing negative impact while maximizing benefit. Were it to be otherwise, the earth would become a graveyard for commercially failed developments. And this in itself poses a potential threat to the environment.<sup>126</sup>

## (y) Ecologically

FC s 24(b)(iii) provides that legislative or other measures must 'secure ecologically sustainable development and use of natural resources while promoting justifiable economic and social development'. The meaning of the term 'ecologically' has not been adequately considered in our jurisprudence. The danger exists that without placing special emphasis on ecological interests, as the Final Constitution requires, a mere mechanical evaluation of environmental rights, economic rights and social developmental rights will result in environmental interests being 'balanced away' during the environmental assessment process of s 24 of NEMA. Sachs J's minority decision in *Fuel Retailers* provides a potential alternative. His approach places greater emphasis on ecological interests during the evaluation of the environmental effect of economic and social interests.<sup>127</sup>

Running right through the preamble and guiding principles of NEMA is the overarching theme of environmental protection and its relation to social and economic development. This theme is repeated again and again. Economic sustainability is not treated as an independent factor to be evaluated as a discrete element in its own terms. Its significance for NEMA lies in the extent to which it is inter-related with environmental protection. Sustainable development presupposes accommodation, reconciliation and (in some instances) integration between economic development, social development and environmental

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protection. It does not envisage social, economic and environmental sustainability as proceeding along three separate tracks, each of which has to be weighed separately and then somehow all brought together in a global analysis. The essence of sustainable development is [a] balanced integration of socio-economic development and environmental priorities and norms. Economic sustainability is thus not part of a check-list that has to be ticked off as a separate item in the sustainable development enquiry. Rather, it is an element that takes on significance to the extent that it implicates the environment. When economic development potentially threatens the environment it becomes relevant to NEMA. Only then does it become a material ingredient to be put in the scales of a NEMA evaluation.<sup>128</sup>

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126 *Fuel Retailers* (supra) at paras 44-45, 58-59, 61, 72, 74, 76 and 79-80.

127 See also Ferris (supra) at 252.

128 *Fuel Retailers* (supra) at para 113.

Similarly, Judge Claassen held in *BP Southern Africa* that sustainable development is

[t]he fundamental building block around which environmental legal norms have been fashioned, both internationally and 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 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.<sup>129</sup>

According to Sachs J and Claassen J decision-makers (and courts) cannot ignore or undervalue the adjective 'ecologically'. They must ensure a result that allocates ecological benefits their proper weight.

Sustainable development — or 'triple bottom line analysis' — usually lies at the heart of environmental impact assessments ('EIAs'). During this process, decision-makers must strike a delicate balance between the three pillars of sustainable development. The diagram below illustrates how these three concepts must be understood holistically and not hierarchically.

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Of course, it may not always be possible to satisfy the differing demands of this tripartite alliance. Given the inherent tension between economic development and environmental protection, decision-makers may often be forced to choose one dimension of sustainable development over another. That 'hard choice' does

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not necessarily mean that environmental protection must yield to economic development. As *Save the Vaal*<sup>130</sup> suggests, decision-makers who take FC s 24 seriously might find that environmental protection trumps economic development in a given set of circumstances. In short, FC s 24 provides a constitutional basis to refuse an application for a proposed development that will negatively impact on the environment.<sup>131</sup>

This approach to sustainable development applies both to government and private industry. Over the last two decades, South African businesses have been experiencing growing pressure from stakeholders to maintain acceptable standards of internal corporate governance.<sup>132</sup> The third instalment of the King Report ('King III'), released in 2009, makes sustainable development an integral part of good

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129 *BP Southern Africa* (supra) at 144. This approach was confirmed by the Supreme Court of Appeal in *MEC for Agriculture, Conservation, Environment and Land Affairs v Sasol Oil (Pty) Ltd & Another* 2006 (5) SA 483 (SCA) at para 15.

130 *The Director, Mineral Development, Gauteng Region & Sasol Mining (Pty) Ltd v Save the Vaal Environment & Others* 1999 (2) SA 709 (SCA), 1999 (8) BCLR 845 (SCA).

131 The legal definition of sustainable development in NEMA s 2 is contrary to FC s 24(b) and thus unconstitutional, because it omits the adjective 'ecologically'. NEMA s 2 creates the impression that economic, developmental and environmental interests are of equal value in the Final Constitution. That is clearly not the case.

132 See, for example, 'Institute of Directors in Southern Africa' *King Report III on Corporate Governance for South Africa* (2009).

corporate governance. Sustainable development in this context refers to the 3-pillared approach to environmental management and protection.

### **(ee) Meaning of ‘reasonable legislative and other measures’**

FC s 24(b) requires reasonable legislative and other measures to prevent pollution and ecological degradation, promote conservation and to secure ecologically sustainable development and use of natural resources while promoting justifiable economic and social development. This provision means that the existing regulatory regime relating to the environment and natural resources in South Africa should be complimented by a process of: (1) amending or replacing existing environmental legislation; (2) adopting new legislation that gives effect to the objectives of this subsection; and (3) interpreting existing legislation as well as the common law and customary law in a manner that promotes the spirit, purpose and objects of the Bill of Rights, including FC s 24.<sup>133</sup>

### **(w) Reasonable measures**

Section 24(b) of the Final Constitution places an obligation on the state to protect the environment through ‘reasonable’ measures, legislative or otherwise. Reasonableness can, it should be noted, operate as an internal qualification in that it restrict a party’s obligation under FC s 24(b). The Constitutional Court, in *Government of the Republic of South Africa & Others v Grootboom & Others*, defined reasonableness, in the context of FC s 26, in the following manner:

The State is required to take reasonable legislative and other measures. Legislative measures by themselves are not likely to constitute constitutional compliance. Mere legislation is not enough. The State is obliged to act to achieve the intended result and the legislative measures will invariably have to be supported by appropriate, well-directed policies and

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programs implemented by the Executive. These policies and programs must be reasonable both in their conception and their implementation. The formulation of a program is only the first stage in meeting the State’s obligations. The program must also be reasonably implemented. An otherwise reasonable program that is not implemented reasonably will not constitute compliance with the State’s obligations.<sup>134</sup>

*Grootboom* suggests that FC s 24(b) requires flexible but coherent measures to give effect to environmental protection.<sup>135</sup> However, in *BP Southern Africa*, Claassen J noted that while ‘it is the Court’s duty to subject the reasonableness of these [environmental protection] measures to evaluation’, the courts should constantly keep in mind that they are generally ‘ill-suited to adjudicate upon issues where court orders could have multiple social and economic consequences for the community’.<sup>136</sup>

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133 FC s 39(2).

134 2001 (1) SA 46 (CC), 2000 (11) BCLR 1169 (CC), [2000] ZACC 19 at para 42 (Yacoob J).

135 *BP Southern Africa* (supra) at 142.

136 *Ibid* at 143. See also *Minister of Health & Others v Treatment Action Campaign & Others (No 2)* 2002 (5) SA 721 (CC), 2002 (10) BCLR 1033 (CC), [2002] ZACC 15.

In terms of FC s 24(b), measures and legislation adopted by the state must be acceptable, rational and based on equitable standards and criteria. The legal standard for reasonable (or justifiable) administrative conduct of organs of state was succinctly described in *Roman v Williams NO*.<sup>137</sup> Firstly this objective test requires the evaluation of the suitability of the conduct. Secondly, the test asks whether the conduct in question was necessary. Finally, the test subjects the conduct to proportionality analysis.<sup>138</sup> Although this statement of the law originates in the very different context of a review of an administrative decision relating to imprisonment, its principles offer our courts useful guidance when they are asked to address FC s 24(b) challenges.

### (x) Financial constraints

The Constitutional Court's first socio-economic rights case — *Soobramoney v Minister of Health (KwaZulu-Natal)*<sup>139</sup> — has been used to support the contention that where the state fails to prevent pollution or ecological degradation, the lack of financial resources on the part of government can serve as a justification for such non-compliance.<sup>140</sup> In *Soobramoney* the Court held that a state hospital could legitimately refuse to provide expensive treatment to a man with a terminal illness. Some commentators might argue that this line of analysis fails to distinguish between rights that grant an individual entitlement, from rights that cannot be reduced to an individual deliverable object. In point of fact, the Court's approach to reasonableness under FC ss 24, 26 or 27 goes to the government's ability to construct and to execute a plan that delivers, over time and within recognizable constraints, these goods to all the members of our polity. Neither FC s 24, nor

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FC s 26, nor FC s 27 is generally understood to guarantee individual remedies. Reasonableness with regard to the environmental right relies rather heavily on regulation through legislation. The nature of the legal object (*Natur der Sache*) of FC s 24 can only be achieved through a variety of measures — integrated environmental management systems, the appointment of qualified officials, environmental education, and conservation programs such as work for water, clean up campaigns, public-private partnership programmes — for which organs of state are mostly, but not solely, responsible.

In addition, the environmental right and the request for reasonableness contained in FC s 24(b) does not contain the same internal qualifiers — 'within its available resources' and 'to achieve the progressive realisation of each of these rights' — as the rights of access to housing and health. In the (likely) event that financial resources are nonetheless raised by the state as a defence in the practical application of the environmental right, the state would, regardless of the limitation of available resources, have an inescapable minimum core obligation under the

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137 1998 (1) SA 270 (C), 1997 (9) BCLR 1267 (C).

138 Ibid at 1276.

139 1998 (1) SA 765 (CC), 1997 (12) BCLR 1696 (CC), [1997] ZACC 17.

140 L Ferris & D Tladi 'Environmental Rights' in D Brand & C Heyns *Socio-Economics Rights in South Africa* (2004). For more on the meaning of the 'within available resources' qualification in other socio-economic rights, see S Liebenberg 'Interpretation of Socio-Economic Rights' in S Woolman, T Roux & M Bishop *Constitutional Law of South Africa* (2nd Edition, OS, December 2003) §33.5(h).

environmental right to fulfil. Leach J in *Hichange Investments (Pty) Ltd v Cape Produce (Pty) Ltd t/a Pelt Products & Others* rejected an MEC's contention that its failure to take steps against an unregistered tannery that caused severe air pollution was justified on the grounds of a lack of technical expertise (read: lack of finances).<sup>141</sup> Leach J described this argument as 'a groundless plea *ad misericordiam*'. He explained:

To now come to Court and plead that he lacks the necessary expertise to carry out the functions which the legislature has specifically entrusted to him is really no answer. It is not for the applicant to question the advisability of appointing the [MEC] as the functionary entrusted with certain obligations. That decision was taken by the legislature and, like it or not, the [MEC] is called upon to discharge those functions. ... The legislature has entrusted certain obligations upon the [MEC] under s 28, obligations which are not met by 'co-operative governance' [requesting National Government to fulfil the obligations]. What the [MEC] was obliged to do was to carry out the obligations imposed under s 28(4).<sup>142</sup>

### (y) Legislative measures

FC s 24 requires enabling legislation. NEMA is South Africa's primary piece of environmental framework legislation.<sup>143</sup> NEMA's environmental framework<sup>144</sup> has been supplemented by a range of specialised environmental statutes that give practical effect to FC s 24. The table of legislation below captures, alphabetically,

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some of the most important pieces of legislation (as well as their objects) that directly or indirectly give life to the basic aims of FC s 24.

SELECTED NATIONAL LEGISLATION ADOPTED IN ACCORDANCE WITH SECTION 24(b) OF THE CONSTITUTION <sup>145</sup>		
No	Act	Scope
1	Basic Conditions of Employment Act 3 of 1997	Provides for control measures pertaining to employment, particularly ensuring healthy conditions.
4	Cultural Institutions Act 119 of 1998	Provides a supporting system for institutions such as the zoological gardens.
5	Marine Living Resources Act 18 of 1998	Regulates conservation of the marine ecosystem and the long-term sustainable utilisation of marine living resources.
6	Minerals and Petroleum Resources Development Act 28 of 2002	Provides for equitable access to and sustainable development of mineral and petroleum resources.
7	National Development Agency Act 108 of	Promotes public private partnerships.

141 Unreported decision, (EC) Case No. 1050/2001 (copy on file with the authors) 36.

142 Ibid at 36-7.

143 See long title of NEMA.

144 For a detailed discussion of NEMA and the characteristics of framework legislation see J Nel & W Du Plessis 'An Evaluation of NEMA Based on a Generic Framework for Environmental Framework Legislation' (2001) 8 *SAJELP* 1.

145 This table is based on the (now somewhat dated) table of South African Environmental Legislation printed in M van der Linde *Compendium of South African Environmental Legislation* (2004).



	1998	
8	National Environmental Management Act 107 of 1998	Provides for co-operative environmental governance.
10	National Forests Act 84 of 1998	Reforms the law on forests.
11	National Heritage Resources Act 25 of 1999	Provides for the protection of heritage resources.
12	National Nuclear Regulator Act 47 of 1999	Establishes the National Nuclear Regulator.
13	National Water Act 36 of 1998	Regulates all matter relating to water.
14	National Veld and Forest Fire Act 101 of 1998 <sup>146</sup>	Regulates veld and forest fires.
15	Occupational Diseases in Mines and Works Act 78 of 1973	Provides compensation for persons working in mines or works who are injured due to the dangerous nature of their environment.
16	Nuclear Energy Act 46 of 1999	Establishes the South African Nuclear Energy Corporation Limited.
17	Promotion of Administrative Justice Act 3 of 2000	Provides for the promotion of administrative justice, including actions impacting on the environment.
18	Promotion of Access to Information Act 2 of 2000	Promotes access to information, including information pertaining to the environment.
20	Water Services Act 108 of 1997	Regulates the right of access to basic water supply and basic sanitation as well as other related matters.
21	Protected Disclosures Act 26 of 2000	Protects whistleblowers, including those exposing environmental abuse.
22	World Heritage Convention Act 49 of 1999	Incorporates the World Heritage Convention into South African law.

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23	Wreck and Salvage Act 94 of 1996	Regulates the salvage of certain vessels and the application of the International Convention of Salvage (1989) in South Africa.
24	National Environmental Management Act: Protected Areas Act 57 of 2003	Provides for the protection and conservation of ecologically viable areas, representative of the country's biological diversity, its natural landscapes and seascapes.
25	National Environmental Management Act: Biodiversity Act 10 of 2004	Provides for the management and protection of the country's biodiversity within the framework established by NEMA.
26.	National Environmental Management Act: Air Quality Act 39 of 2004.	Provides for an integrated approach to the management and protection of the country's air quality.
27.	National Environmental Management Act: Waste Management Act 59 of 2008	Provides for establishment of a national waste management system, protects health and the environment, prevents pollution and ensures remediation of contaminated land.
28.	National Environmental Management Act: Integrated Coastal Management Act 24 of 2008.	Provides for establishment of a system of integrated coastal and estuarine management.

In the following sections, we discuss a selection of these statutes that most directly affect the implementation of FC s 24.

### **(1) National Environmental Management Act (NEMA)<sup>147</sup>**

<sup>146</sup> See also *Gouda Boedery v Transnet Limited* [2004] ZASCA 85.

<sup>147</sup> Act 107 of 1998.

NEMA creates the basic legal framework for the environmental rights guaranteed in FC s 24.<sup>148</sup> The Act repeals the greater part of the Environmental Conservation Act ('ECA').<sup>149</sup> NEMA's principles for environmental decision making are drawn from international environmental law and the Final Constitution:<sup>150</sup>

- (a) NEMA is a detailed statute. As this chapter focuses on the constitutional environmental right, it is not the appropriate forum to provide a detailed analysis of its contents. However, to give some idea of its scope, we provide a list of its core features.
- (b) It promotes ecological sustainable development.
- (c) It reconfirms the State's trusteeship of the environment on behalf of the country's inhabitants.<sup>151</sup>

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- (d) It introduces co-operative governance of environmental matters by establishing the necessary governmental institutions to ensure proper enforcement of environmental protection laws.<sup>152</sup>
- (e) It makes provision for fair environmental decision-making and for conciliation and arbitration of conflicts.<sup>153</sup>
- (f) As part of the process of integrated environmental governance, NEMA introduces a new framework for environmental impact assessments.
- (g) Based on the doctrine of strict liability, NEMA introduces a far-reaching general duty of care to prevent, control and rehabilitate the effect of significant pollution and environmental degradation.<sup>154</sup>
- (h) Similarly, it dictates the duty of care to address emergency incidents of pollution.<sup>155</sup>
- (i) It permits criminal prosecution of individuals. But more interestingly, it holds managers and directors of companies accountable for 'environmental crimes':

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148 *BP Southern Africa (Pty) Limited v MEC for Agriculture, Conservation, Environment & Land Affairs* 2004 (5) SA 124, 145-149 (W).

149 Act 73 of 1989.

150 NEMA s 2.

151 NEMA s 2(4)(o).

152 NEMA Chapters 2 and 3. Environmental crimes are contained in the schedules to the Act.

153 NEMA Chapter 4.

154 NEMA s 28.

155 NEMA s 30.

that is, for environmental damage caused by juristic persons.<sup>156</sup> NEMA's penalties can also require incarceration for managers and directors.

- (j) NEMA permits employees to refuse to perform environmentally hazardous work and protects whistle-blowers.<sup>157</sup>
- (k) Finally, NEMA reconfirms the wide standing rules that the Constitution provides in FC s 38<sup>158</sup> and ensures broad access to environmental information.<sup>159</sup>

## **(2) National Forest Act (NFA)<sup>160</sup>**

The NFA reforms and codifies the laws on forests. It repeals previous laws relating to forests and forestry such as the Management of State Forests Act<sup>161</sup> and provides principles to guide decisions affecting forests,<sup>162</sup> the promotion and enforcement of sustainable forest management<sup>163</sup> and the development and implementation of policy pertaining to forests and forestry.<sup>164</sup>

## **(3) National Water Act (NWA)<sup>165</sup>**

The Water Services Act<sup>166</sup> was enacted in 1997 to deal with the rights of access to basic water supply, basic sanitation, and the setting of national standards and norms for tariffs. NWA is, however, the primary legislation pertaining to the

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regulation and conservation of water within South Africa.<sup>167</sup> In sum, the purposes of NWA are to: ensure the management of water resources;<sup>168</sup> protect water resources;<sup>169</sup> regulate water usage;<sup>170</sup> create catchment management agencies;<sup>171</sup>

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156 NEMA s 34.

157 Chapter 7 of NEMA.

158 For more on standing, see C Loots 'Standing, Ripeness and Mootness' in S Woolman, T Roux & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, February 2005) §7.2.

159 NEMA s 31.

160 Act 84 of 1998.

161 Act of 128 of 1992.

162 NFA s 3.

163 NFA s 4.

164 NFA s 46.

165 Act 36 of 1998.

166 Act 108 of 1997.

and regulate access to, and rights over, land.<sup>172</sup> Section 19 of NWA places a duty of care on polluters, landowners and land users to prevent pollution of water sources similar to that found in s 28 of NEMA.

In *Harmony Gold Mining Co Ltd v Regional Director: Free State Department of Water Affairs and Forestry* the Supreme Court of Appeal held that Harmony — a gold-mining company — had a legal duty to prevent the pristine aquifers in its mining area from being contaminated by heavy metals through acid drainage from old mines.<sup>173</sup> Section 19 of NWA, the SCA found, imposed an obligation on Harmony to ensure not only that its own operations did not pollute clean water, but also to take expensive measures to prevent polluted water upstream from more shallow and now defunct mines from contaminating its own deeper clean ground water sources. To arrive at this conclusion, Howie P read the common-law duty of landowners in light of the provisions of s 19 of NWA. *Harmony* establishes the principle that owners or users of property must take reasonable steps to prevent pollution from other sources from polluting the water on their own property.

#### **(4) Marine Living Resources Act (MLRA)<sup>174</sup>**

The Marine Living Resources Act regulates the conservation of the marine ecosystem, the long-term sustainable utilisation of marine living resources and the exploitation, utilisation and protection of certain marine living resources.<sup>175</sup> It demands that the control over marine living resources be exercised in a fair and equitable manner to the benefit of all citizens.<sup>176</sup>

#### **(5) Mineral and Petroleum Resources Development Act (MPRDA)<sup>177</sup>**

167 For a comprehensive discussion of the NWA, see H Thompson *Water Law: A Practical Approach to Resource Management and the Provision of Services* (2006); and HA Strydom & ND King *Fuggle and Rabie's Environmental Management in South Africa* (2nd Edition, 2009) 425-454.

168 NWA Chapter 2.

169 NWA Chapter 3.

170 NWA Chapter 4.

171 NWA Chapter 7.

172 NWA Chapter 13.

173 [2006] ZASCA 66 (SCA).

174 Act 18 of 1998.

175 With respect to the protection of the South Africa marine environment, see generally, Strydom & King (supra) at 455-512.

176 Long title of the MLRA.

177 Act 28 of 2002.

In 1998 the government released a white paper: 'A Minerals and Mining Policy for South Africa.'<sup>178</sup> This position paper reaffirmed the government's commitment to sustainable development in the mining sector. The most important step towards the sustainable development of mineral and mining resources was the promulgation

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of MPRDA.<sup>179</sup> It guarantees equitable access to and sustainable development of the nation's mineral and petroleum resources in order to eradicate all forms of discriminatory practices in the mineral and petroleum industries. The Act further emphasises the need to create an internationally competitive and efficient administrative and regulatory regime. MPRDA was recently subjected to comprehensive amendment when the environmental provisions relating to prospecting and mining activities (ie, environmental management programs, environmental assessment authorisation, environmental management, rehabilitation and mine closure, financial provision for mine closure) were repealed from the Act and incorporated into NEMA.<sup>180</sup> The amendment also alters the lines of decision-making and review authority.<sup>181</sup>

## **(6) National Environmental Management: Protected Areas Act (NEM: PAA)<sup>182</sup>**

The Protected Areas Act provides for the protection and conservation of ecologically viable areas representative of the country's biological diversity, its natural landscapes and its seascapes. It further provides for the establishment of a national register of protected areas,<sup>183</sup> the management of these areas,<sup>184</sup> cooperative governance, public participation<sup>185</sup> and matters related to protected areas.

## **(7) National Environmental Management: Biodiversity Act (NEM: BA)<sup>186</sup>**

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178 Department for Minerals and Energy *A Minerals and Mining Policy for South Africa* (1998) available at [http://www.dme.gov.za/minerals/min\\_whitepaper.stm](http://www.dme.gov.za/minerals/min_whitepaper.stm) (accessed on 17 October 2009).

179 For a background discussion of the management of the environmental impacts of mining activities see Strydom & King (*supra*) at 513-576.

180 National Environmental Management Amendment Act 62 of 2008 and Mineral and Petroleum Resources Development Amendment Act 49 of 2008.

181 Environmental management on mines will for a period of 18 months fall within the exclusive jurisdiction of the Minister of Minerals (except for deciding appeals which falls within the authority of the Minister of Water and Environmental Affairs). Thereafter authority will revert to national or provincial environmental agencies.

182 Act 57 of 2003.

183 NEM: PAA Chapter 2.

184 NEM: PAA Chapter 4.

185 NEM: PAA Chapter 3.

The Biodiversity Act provides for the management and protection of the country's biodiversity within the framework established by NEMA.<sup>187</sup> It covers the protection of species and ecosystems,<sup>188</sup> sustainable use of indigenous biological resources, equity in bio-prospecting,<sup>189</sup> and the establishment of a regulatory body on biodiversity — the South African Biodiversity Institute.<sup>190</sup>

## **(8) National Environmental Management: Air Quality Act (the Air Quality Act)<sup>191</sup>**

The Air Quality Act, as the name suggests, regulates air quality in order to protect the environment. The Air Quality Act, once fully in force, will repeal<sup>192</sup> the

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RS2, 10-10, ch50-p34

Atmospheric Pollution Prevention Act ('APPA').<sup>193</sup> However, for the time being, APPA applies simultaneously with parts of the Air Quality Act.<sup>194</sup> The Air Quality Act creates reasonable measures for the prevention of air pollution whilst having due regard to the concept of sustainable development. The Act introduces a new dimension to improving air quality in South Africa: regulation of ambient air quality.<sup>195</sup> The Act envisages national norms and national, provincial and local standards to regulate ambient air quality and emission standards<sup>196</sup> and establishes specific air quality measures and objectives.<sup>197</sup> Until the national, provincial and local ambient air quality standards have been established, s 63 of the Act makes provision for

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186 Act 10 of 2004. Regarding the protection of biological diversity in South Africa, see generally, Strydom & King (supra) at 97-125, 382-393, 394-424.

187 NEM: BA Chapter 2.

188 NEM: BA Chapter 4.

189 NEM: BA Chapter 6.

190 NEM: BA Chapter 2.

191 Act 39 of 2004. See generally Strydom & King (supra) at 579-629.

192 Air Quality Act s 60.

193 Act 45 of 1965.

194 The Air Quality Act partially commenced on 11 September 2005 except for ss 21, 23, 36, 49, 51(1) (e) & (f) & (3), 60 and 61. However, it runs concurrently with APPA and secondary legislation published in terms thereof.

195 Air Quality Act s 2(b).

196 Air Quality Act ss 9, 10 and 11.

197 Air Quality Act s 12.

temporary ambient air quality standards that cover the most common pollutants.<sup>198</sup> Furthermore, s 18(1) empowers the Minister or MEC to declare an area a 'priority area' if ambient air quality standards are being exceeded or if a significant negative impact on the air quality occurs and specific air management action is required to rectify the situation.<sup>199</sup> The Act requires national and provincial executives to specify what activities result in atmospheric emissions so they can be properly regulated.<sup>200</sup>

For the time being, negative point source emissions are regulated by s 9(1) of APPA. This section prohibits an operator from performing any of the scheduled processes unless it holds a current registration certificate from the Chief Air Pollution Control Officer ('CAPCO'). The courts have had a number of opportunities to consider the consequences — especially the effects of illegal air pollution on third parties — of operating outside the certification system. In *Minister of Health*

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& *Welfare v Woodcarb (Pty) Ltd* the High Court prohibited the further operation of a scheduled process by a sawmill in the absence of a Registration Certificate.<sup>201</sup> The Court held that the resultant air pollution from the illegal burning of sawdust, chips and wood infringed the neighbours' constitutionally protected environmental rights.

Similarly, in *Hichange Investments (Pty) Ltd v Cape Produce (Pty) Ltd t/a Pelt Products & Others* the first respondent illegally operated a tannery by failing to comply with CAPCO's technical requirements. The tannery generated a severe stench, and seriously corroded metal structures and equipment on the applicant's neighbouring premises.<sup>202</sup> To prevent further violations, Leach J ordered the provincial environmental authority to ensure proper compliance with the conditions of the Registration Certificate.

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198 See Air Quality Act schedule 2. See also SANS 69:2004 and SANS 1929:2004 published in GG 27179 (28 January 2005)(the latter adds Benzene (C6H6) as a common ambient pollutant that should be regulated.)

199 For example, the Vaal Triangle Air-shed Priority Area was declared in GG 28732 (21 April 2006) amended by GG 30164 (17 August 2007) and the HighVeld Priority Area in GG 30518 (23 November 2007).

200 Air Quality Act s 21 requires the Minister, and authorizes the MEC, to publish lists of activities which result in atmospheric emissions that may be significantly detrimental to the environment. These lists must establish the minimum emission standards resulting from a listed activity (including permissible amount, volume, emission rate or concentration etc.). The Act also introduces a new licensing system where the emitter of a listed activity must obtain an Atmospheric Emissions License from the Licensing Authority in the area where is or will be carried out. Air Quality Act ss 22 and 37. The Minister has undertaken an extensive public consultative process and is presently finalizing the national list. Air Quality Act s 21(4)(a). Until the promulgation of the new lists, the 72 noxious and offensive emission processes contained in the Second Schedule to APPA become Listed Emissions in terms of the Air Quality Act. Air Quality Act s 62. Air Quality Act s 23 makes provision for the Minister or MEC to declare any appliance or activity that may result in atmospheric emissions which may be detrimental to health or the environment as a Controlled Emitter. Similarly the Minister or MEC may, in terms of s 26, declare as Controlled Fuels any substance or mixture thereof which when used as fuel in a combustion process, result in atmospheric emissions that are a threat to the environment or health. The Minister or MEC may in terms of Part 6 of Chapter 4 of the Act adopt measures to control pollution by dust, noise and offensive odours that create public nuisance.

201 1996 (3) SA 155 (N).

202 2004 (2) SA 393 (EC).

Recently, in *Tergniet*,<sup>203</sup> the High Court found that the first respondent, a manufacturer of creosole-treated wooden poles, operated a tar process without a valid Registration Certificate. In addition, it found that the tar process caused significant atmospheric vapour pollution through the uncontrolled release of volatile organic compounds. The Court concluded that, despite holding a Registration Certificate for another (wrongly) scheduled process of wood burning and wood drying and having already submitted an internal appeal against CAPCO's refusal to operate a tar process, the creosote business was operating illegally. To protect the applicant's constitutional environmental rights, the Court issued an interdict that barred the first respondent from continuing with its unlawful operations.<sup>204</sup>

As these decisions illustrate, the Air Quality Act will often be invoked to address particularly noxious forms of pollution that cause conflict between neighbours, or between communities and polluters.

## **(9) National Environmental Management: Waste Act (Waste Act)<sup>205</sup>**

The Waste Act consolidated more than 36 laws as well as various policies, guidelines and other reference materials currently used in relation to waste management in the country. In addition, it introduces the more integrated 'cradle-to-grave'<sup>206</sup> approach and secure life cycle management of products, to replace the outdated 'end-of-the-pipe'<sup>207</sup> approach to waste management. Some of the other important topics covered by the Waste Act include: a reduction in natural resource consumption; waste generation; recycling; waste disposal; prevention of pollution; promotion of waste services; remedying land degradation; and achieving integrated waste-management reporting and planning.

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RS2, 10-10, ch50-p36

## **(10) National Environmental Management: Integrated Coastal Management Act (ICMA)<sup>208</sup>**

ICMA provides for the establishment of a system of integrated coastal and estuarine management in order to promote conservation of the coastal environment, and to maintain the natural attributes of coastal landscapes and seascapes. The Act also regulates the development and use of coastal areas, and ensures that it is economically and socially justifiable as well as ecologically sustainable. Lastly, ICMA

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203 *Tergniet and Toekoms Action Group & Thirty Four Others v Outeniqua Kreosootpale (Pty) Ltd & Others* [2009] ZAWCHC 6.

204 *Ibid* at par 50.

205 Act 59 of 2008.

206 According to Wikipedia, 'cradle to grave' means 'the full Life Cycle Assessment from manufacture ("cradle") to use phase and disposal phase ("grave").' Available at [http://en.wikipedia.org/wiki/Cradle-to-grave\\_analysis](http://en.wikipedia.org/wiki/Cradle-to-grave_analysis) (accessed on 13 September 2010).

207 This approach simply tries to solve the problem at the end of the process. The best example is literally putting something on the end of a waste-emitting pipe to limit its polluting effects.

208 Act 24 of 2008.



prohibits incineration and dumping at sea, and pollution or inappropriate development of the coastal zone.<sup>209</sup>

## **(z) Other measures: integrated environmental management systems and environmental impact assessments<sup>210</sup>**

In *BP Southern Africa*, the Court found that the integrated environmental management system ('IEMS') that was administered by the provincial environmental authority — in terms of Chapter 5 of NEMA<sup>211</sup> read with the appropriate environmental impact assessments ('EIAs') provided for in ECA<sup>212</sup> — is an example of the 'other measures' provided for by FC s 24(b).<sup>213</sup> No all-embracing definition of Integrated Environmental Management ('IEM') currently exists. However, s 23(2) of NEMA describes the purpose of IEM as the integration of the fundamental principles of environmental management in s 2 of NEMA into all decisions that may deleteriously effect the environment.<sup>214</sup> IEM systems or activities must, therefore, identify and evaluate the actual and the potential effects of pollutants on the environment, socio-economic development and the preservation of communities and their cultural heritage. They must assess risks, consequences and alternatives in order to mitigate any negative impacts and to maximise potential benefits.<sup>215</sup> IEMs also create structures designed to facilitate meaningful public participation in the environmental decision making process.<sup>216</sup>

As part of the process of integrated environmental governance, NEMA introduces a new framework for EIAs.<sup>217</sup> Those entities that seek to conduct listed activities must consider, investigate and assess the potential impact that their activities will have on the environment and then report their findings to EIA Administrators.<sup>218</sup> The Minister or MEC are empowered to make regulations identifying activities and geographical areas, setting procedures for applying for EIAs, or any other matter, necessary to ensure the effectiveness of the environmental

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209 ICMA long title.

210 See generally Strydom & King (supra) at 971-1045.

211 NEMA ss 23 and 24.

212 ECA ss 21 and 22.

213 *BP Southern Africa (Pty) Limited v MEC for Agriculture, Conservation, Environment & Land Affairs* 2004 (5) SA 124, 145-149 (W) ('*BP Southern Africa*').

214 NEMA s 2 gives further effect to FC s24.

215 NEMA s 23(2)(b).

216 NEMA s 23(2)(d) & (f).

217 NEMA s 24(A)-(I).

218 NEMA s 24(1) as amended by National Environmental Management Amendment Act 62 of 2008 s 2.

authorisation process.<sup>219</sup> The Minister or an MEC may also, in terms of s 24(2)(a) of NEMA, identify prescribed activities that may not commence without their prior authorisation.<sup>220</sup> It is a criminal offence to proceed without authorisation.<sup>221</sup>

Notwithstanding these limitations, authorities are often confronted with cases where prescribed activities commenced or were finalised without prior authorization.<sup>222</sup> In *Silvermine Valley Coalition v Sybrand Van der Spuy Boerdery & Others*, the court made clear that s 24(1) of NEMA (and s 21 of the ECA) does not make provision for retrospective authorisation: Parties who continue without prior permission not only act unlawfully but also illegally.<sup>223</sup> *Hichange Investments (Pty) Ltd v Cape Produce (Pty) Ltd t/a Pelt Products & Others* establishes that South African environmental law makes provision for EIAs in two instances.<sup>224</sup> First, as in *Silvermine Valley Coalition*, s 24 of NEMA, read with s 21 of ECA, requires an EIA for identified activities to be conducted as part of the authorisation process prior to the

219 NEMA s 24 (2), (3), (5) and (6).

220 The Minister subsequently published, in terms of NEMA s 24(5) and 44, the EIA Regulations. GN R385, R386 and R387 published in *Government Gazette* No 28753 (21 April 2006). They came into effect on 3 July 2006. Regulation 385 sets out the detailed requirements and procedures that applicants should follow to obtain approval of listed activities prior to their commencement. The first critical step is to determine whether a basic assessment or scoping ('full assessment') is to be applied to the application. A basic assessment must be applied if the authorisation for the planned activity falls into any of the following categories: (a) the planned activity is listed in EIA Regulation 386; or (b) the planned activity is listed in a notice issued by the Minister or the MEC in terms of NEMA s 24D of the Act pertaining to those listed matters referred to in NEMA s 24(2) (e.g. in specific geographical areas that may or may not require an EA). EIA Regulation 385 regs 21(1)(a) and (b). EIA Regulation 385 regs 21(2)(a)(i) and (ii) require that scoping and EIA must be applied to an application if:

(a) the planned activity is listed in EIA Regulation 387;

(b) the planned activity is listed in a notice issued by the Minister or the MEC in terms of NEMA s 24D pertaining to those listed matters referred to in NEMA s 24(2) of (e.g. in specific geographical areas that may or may not require an EA);

(c) the Administrator accepts an application by the applicant that the EAP recommends that scoping instead of a basic assessment should be done due to the nature of information that the Administrator would require to make a decision (EIA Regulation 385 reg 21(2)(b)); and

(d) if there are several activities under the same development, but only one of them qualifies for scoping as set out above, scoping should be applied to all the activities (EIA Regulation 385 reg 21(2)(c)).

221 NEMA s 24F(1)(a). It is also criminal not to comply with an applicable norm or standard or contravene conditions in an EA. NEMA s 24F(2) as amended by National Environmental Management Amendment Act 62 of 2008 s 5. All these crimes are punishable with a fine of up to R5 million or 10 years' imprisonment or both. NEMA s 24F(4).

222 These cases were decided prior to the Amendment introducing s 24F into NEMA. Sections 24(A)-24(I) were incorporated into NEMA in terms of the National Environment Amendment Act 8 of 2004. This act, including the amendments, became operational on 7 January 2005.

223 2002 (1) SA 478, 448-489 (C) ('*Silvermine Valley Coalition*').

224 *Hichange Investments (Pty) Ltd v Cape Produce (Pty) Ltd t/a Pelt Products & Others* unreported decision (EC) Case No 1050/2001 (copy on file with the authors) 30-31, 33 and 39.

commencement of the activity in question. Second, s 28(4)(a) of NEMA requires an EIA to be conducted in the event of significant pollution where the responsible party's duty of care requires it to take reasonable steps to address the pollution. However, conducting such an *ex post facto* EIA in terms of s 28(4)(a) of NEMA does *not* constitute retrospective authorization of the identified activities.

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RS2, 10-10, ch50-p38

However, in *Eagles Landing Body Corporate v Molewa NO & Others*, Kroon J reached a seemingly opposite conclusion to *Silvermine Valley Coalition and Hichange Investments*.<sup>225</sup> The court permitted retrospective authorisation because it concluded that the legislature could not have intended such a partially constructed structure to be demolished, authorised and then rebuilt.<sup>226</sup> To remedy these divergent interpretations — and in light of the hefty volume of EIA applications before administrators — the legislature passed an amending Act. The new s 24G permits parties to rectify the unlawful commencement or continuation of activities — subject to the payment of a substantial penalty.<sup>227</sup>

Despite allowing for rectification of unauthorised activities, this provision has proven controversial. Applicants and decision-makers alike have been frustrated by its scope, its application and operation. The primary problems relate to transitional provisions, time periods, the entitlement to retrospective authorisation, and general difficulties relating to interpretation. For example, some administrators have taken the position that the administrative fine should be interpreted as an 'administrative fee' that still allows for potential prosecution. This interpretation clearly contradicts the terms of s 24G(2) read together with s 24(3) which indicate that the legislature intended to supplant prosecution with an administrative fine. This payment should effectively halt the operation of s 24F of NEMA.

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225 2003 (1) SA 412 (T).

226 *Ibid* at paras 101-2.

227 As amended by s 6 of the National Environmental Management Amendment Act 62 of 2008. NEMA s 24G(1) states that any person who has committed an offence in terms of section 24F(2)(a), which includes commencing with a listed or specified activity without prior authorisation, can apply for environmental authorisation from the Minister, the Minister of Mining or MEC. Those authorities may require the applicant to compile a report and submit the following information for his/her consideration:

1. an assessment of the nature, extent, duration and significance of the environmental consequences or impacts, including the cumulative effects, of such illegal activities;
2. a description of mitigation measures that have been or will be undertaken in regard to the environmental consequences or impacts;
3. a description of the public participation process that was followed, including all comments that were received and an explanation how these issues have been addressed;
4. an Environmental Management Program (EMPr); and
5. any other information that may be required. NEMA s 24G(2) requires the Minister or MEC to consider any reports or information submitted by the applicant and may then either issue a Directive that orders the activity to cease, wholly or in part, and to rehabilitate the affected environment. Otherwise the Minister or MEC may issue an EA subject to specific conditions. NEMA s 24G(2A), however, requires the applicant first to pay an administration fine of up to R1 million before the Minister or MEC may act as above. NEMA s 24G(3) makes it an offence not to comply with the Directive of the Minister or MEC or to contravene any condition of the authorization and such a person is liable on conviction of a penalty as contemplated in s 24F.

In addition to the difficulties with applying and interpreting the rectification procedure, s 24(G) of NEMA may be unconstitutional on several grounds. First, the principle of the rule of law (in FC s 1<sup>228</sup>), read with the principle of administrative

legality found in FC s 33,<sup>229</sup> makes it impossible for a lawful activity to follow from unlawful administrative conduct. The wording of s 24(2) of NEMA — the empowering provision — requires authorisation prior to the commencement of an identified activity. No exception can undo the unlawfulness of a breach. Permitting rectification would not only appear to be inconsistent with the principles of administrative justice, but also with the Supreme Court of Appeal's holding in *Oudekraal Estates (Pty) v the City of Cape Town* relating to validity of successive administrative decisions.<sup>230</sup>

Secondly, prior authorisation and conducting an EIA before the commencement of activities that may negatively affect the environment form the very essence of the EIA process in s 24 of NEMA and the IEM in s 23 of NEMA. Section 24G of NEMA undermines the very purpose of environmental assessment, integrated environmental management, sustainable development and, ultimately, the fundamental right to environmental protection. Davis J's words in *Silvermine Valley Coalition v Sybrand Van der Spuy Boerdery & Others* support this proposition with respect to the ECA: '[t]he ECA and the regulations do not envisage that an EIA can be wrenched from its particular purpose as conceived in the legislative structure and be employed as an independent remedy'.<sup>231</sup> A belated EIA would have no effect on the continuation of the existing but illegal identified activity; it might be of a moral value but 'would hold no legal significance in terms of the legislative structure in which the EIA is located.'<sup>232</sup>

Thirdly, it is contrary to South Africa's obligations under international law to conduct an EIA after the fact. Section 2(4)(b) and (i) of NEMA codified the international soft law principle of integrated management and environmental assessment as underlying principles for the interpretation of environmental law in South African law. An environmental assessment prior to the commencement of an activity that may detrimentally affect the environment is an established legal element of the principle of sustainable development. Given that FC s 24(b) read with s 2(4)(a) of NEMA makes sustainable development the foundation of South African environmental law, prior authorisation and conducting an EIA must form an essential part of the right to environmental protection. Any illegal conduct that undermines the very essence of the fundamental right to environmental protection violates FC s 24.

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228 For more on the rule of law, see F Michelman 'Rule of Law, Legality and the Supremacy of the Constitution' in S Woolman, T Roux & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, February 2005) Chapter 11. For more on founding provisions of the Final Constitution generally, see C Roederer 'Founding Provisions' in S Woolman, T Roux & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, December 2005) Chapter 13.

229 For more on FC s 33, see J Klaaren & G Penfold 'Just Administrative Action' in S Woolman, T Roux & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, June 2008) Chapter 63.

230 2004 (6) SA 222 (SCA).

231 *Silvermine Valley Coalition* (supra) at 488.

232 *Ibid.*

Fourthly, the provision would appear to conflict with well-established criminal law principles. One, while the legislature intended the administrative fine to have a penal character, the applicant can still be criminally prosecuted for the same offence in terms of s 24F(2)(a) of NEMA. This outcome conflicts with FC s 35(3)(m). FC s 35(3)(m) prohibits anybody from being convicted twice for

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RS2, 10-10, ch50-p40

the same crime.<sup>233</sup> Two, it may be contrary to the presumption of innocence<sup>234</sup> and the right against self incrimination.<sup>235</sup> Section 24F(1) states that a person who 'has committed an offence' may apply for a rectification authorisation. By implication, through the mere process of submitting an application, the applicant is presumed by law to have contravened s 24(2)(b) of NEMA. Indeed, officials often use this 'presumption' to justify the imposition of severe administrative fines. Lastly, while the applicant may have a valid defence against a criminal conviction in terms of s 24F(2)(a) of NEMA, the applicant cannot raise that same defence against an administrative fine. The Minister or MEC does not have discretionary powers to waive the fine. For example, an applicant may have acted on the wrong instruction from an official and not have applied for prior authorisation for the listed activity. The applicant could successfully raise the defence of putative authorisation — excluding the required *mens rea* — to avoid criminal conviction. Yet, on the same facts, the applicant would still be strictly liable to pay the administrative fine.

Fifthly, although s 24G(2A) of NEMA requires the Minister or MEC to be paid an administrative fine before consideration of the application, the mathematical formula according to which the fine is calculated may not have been promulgated by regulation. It may merely be captured in an internal departmental directive. An internal departmental directive is not a 'rule of law'. As a result, any fines imposed would violate any number of provisions in FC s 35 and could not be justified in terms of FC s 36. In any event, punishment without prior publication of the criminal offence would seem to be the quintessential example of a violation of the rule of law to which the Constitution is committed.<sup>236</sup>

In the IEM process, both applicants and administrators/decision-makers must take full cognisance of FC s 24 as well as various important provisions of NEMA<sup>237</sup> in evaluating their impact or proposed impact on the environment. *Fuel Retailers*

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233 FC s 35(3)(m) reads: 'Every accused person has a right to a fair trial, which includes the right not to be tried for an offence in respect of an act or omission for which that person has previously been either acquitted or convicted'. For more on FC s 35(3)(m), see F Snyckers & J Le Roux 'Criminal Procedure: The Rights of Detained, Arrested & Accused Persons' in S Woolman, T Roux & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, July 2006) §51.5(m).

234 FC s 35(3)(h). For more on the presumption of innocence, see Snyckers & Le Roux (supra) at §51.5(i).

235 FC s 35(3)(j). For more on the right against self incrimination, see Snyckers & Le Roux (supra) at §51.5(j)(i).

236 FC s 35(3)(l) read with FC s 35(3)(n). FC s 35(3)(l) reads: 'Every accused person has a right to a fair trial, which includes the right- not to be convicted for an act or omission that was not an offence under either national or international law at the time it was committed or omitted'. FC s 35(3)(n) reads: 'Every accused person has a right to a fair trial, which includes the right- to the benefit of the least severe of the prescribed punishments if the prescribed punishment for the offence has been changed between the time that the offence was committed and the time of sentencing'. For more on both rights, see Snyckers and Le Roux (supra) at § 51.5(l) and (n).

*Association* specifically considered these provisions in relation to the evaluation process.<sup>238</sup> The *Fuel Retailers* Court wrote:

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RS2, 10-10, ch50-p41

[T]he applicant [correctly] contended that the environmental authorities themselves were obliged to consider the socio-economic impact of constructing the proposed filling station. The applicant also [correctly] submitted that this obligation is wider than the requirement to assess the need and desirability of the proposed filling station under the Ordinance. This obligation requires the environmental authorities to assess, among other things, the cumulative impact on the environment brought about by the proposed filling station and all existing filling stations that are in close proximity to the proposed one. This [obligation] in turn required the environmental authorities to assess the demand or necessity and desirability, not feasibility, of the proposed filling station with a view to fulfilling the needs of the targeted community, and its impact on the sustainability of existing filling stations. The applicant relied upon the provisions of section 24(b)(iii) of the Constitution, as well as sections 2(4)(a), 2(3), 2(4)(g), 2(4)(i), 23 of NEMA.<sup>239</sup>

Administrators consider policies, guidelines and specialist reports during the evaluation process in order to ascertain whether the requirements of NEMA and FC s 24 have been met. In *MEC for Agriculture, Conservation, Environment & Land Affairs v Sasol Oil Pty Ltd & Bright Suns Development CC*, the Supreme Court of Appeal reiterated the value to be attached to such policies:

The adoption of policy guidelines by state organs to assist decision-makers in the exercise of their discretionary powers has long been accepted as legally permissible and eminently sensible. This is particularly so where the decision is a complex one requiring the balancing of a range of competing interests or considerations, as well as specific expertise on the part of a decision-maker. As explained in *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs*,<sup>240</sup> a Court should in these circumstances give due weight to the policy decisions and findings of fact of such a decision-maker. Once it is established that the policy is compatible with the enabling legislation, as here, the only limitation to its application in a particular case is that it must not be applied rigidly and inflexibly, and that those affected by it should be aware of it. An affected party would then have to demonstrate that there is something exceptional in his or her case that warrants a departure from the policy.<sup>241</sup>

Ultimately, administrators (and applicants) must be satisfied that an 'environmentally responsible' decision has been made.

It must be stressed that once a decision has been approved, an applicant is still under an obligation to obtain additional related environmental authorisations which may fall outside the ambit of Chapter 5 of NEMA. In *Earthlife Africa (Cape Town) v Director-General: Environmental Affairs and Tourism & Eskom Holdings Limited* the

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237 See NEMA ss 2, 23, 24 (in particular 24(4)) and 28.

238 *Fuel Retailers Association of Southern Africa v Director-General: Environmental Management, Department of Agriculture, Conservation and Environment, Mpumalanga Province & Others* 2007 (6) SA 4 (CC), 2007 (10) BCLR 1059 (CC), [2007] ZACC 13 ('*Fuel Retailers*').

239 *Fuel Retailers* (supra) at para 30.

240 2004 (4) SA 490 (CC), 2004 (7) BCLR 687 (CC), [2004] ZACC 15; at para 48.

241 [2005] ZASCA 76 at para 19.

Court reaffirmed this point. It held that Eskom could not commence construction of its new Pebble Bed Modular Reactor 'unless and until it obtains the necessary authorisations in terms of the [National Nuclear Regulator] Act and [the Nuclear Energy] Act.'<sup>242</sup>

## (ii) Related Rights and Constitutional provisions

This section briefly considers rights other than FC s 24 that regularly feature in environmental disputes.

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RS2, 10-10, ch50-p42

### (aa) Substantive Rights

#### (u) Equality<sup>243</sup>

FC s 9 can affect environmental protection in a variety of ways. A local municipality may employ different waste management, environmental management, service delivery, or water use strategies and policies for diverse stakeholders — residential zones; heavy and medium industrial zones; and light commercial zones. Whatever the benefits of this differential treatment might be, it could lead to the perpetuation of existing social inequities.<sup>244</sup>

In a case where the right to equality was specifically engaged in an environmental context — *Paola v Jeeva NO & Others* — the applicant challenged a decision permitting his neighbour to build a two-storey house that would obscure his view.<sup>245</sup> In dismissing the application, the Court inelegantly applied FC s 9. The applicant argued that any building that detracted from the view of an adjoining property should be prohibited by the relevant local authority. Kondile J held that this approach would endorse 'unequal treatment of neighbouring property owners with regard to the development of their properties, on the basis of the order of the occurrence of

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242 2005 (3) SA 156 (C).

243 FC s 9 reads:

(1) Everyone is equal before the law and has the right to equal protection and benefit of the law.

(2) Equality includes the full and equal enjoyment of all rights and freedoms. To promote the achievement of equality, legislative and other measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination may be taken.

(3) The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth.

(4) No person may unfairly discriminate directly or indirectly against anyone on one or more grounds in terms of subsection (3). National legislation must be enacted to prevent or prohibit unfair discrimination.

(5) Discrimination on one or more of the grounds listed in subsection (3) is unfair unless it is established that the discrimination is fair.

For more on FC s 9, see C Albertyn & B Goldblatt 'Equality' in S Woolman, T Roux & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, March 2007) Chapter 35.

244 For an indication of how a court might approach such a case, see *City Council of Pretoria v Walker* 1998 (2) SA 363 (CC), 1998 (3) BCLR 257 (CC), [1998] ZACC 1 (the City Council applied different rules for the provision of electricity in black townships and white suburbs).

the developments. That is arbitrary and clearly inconsistent with the Constitution, which demands the promotion of equality and rationality.<sup>246</sup> The court would have accomplished its task with greater elan had it employed FC s 33 read with FC s 24.

However, when FC s 9 is properly raised in relation to FC s 24, the dispute must be settled within the terms of the 'equality enquiry' laid down in *Harksen v Lane NO*<sup>247</sup> and the applicable provisions of the Promotion of Equality and Prevention

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of Unfair Discrimination Act ('Equality Act').<sup>248</sup> Indeed, ordinarily litigants must rely first on the Equality Act, if it is applicable, before reverting to FC s 9.<sup>249</sup> FC s 9 will, generally, only apply when the court is asked to consider the constitutionality of the legislation governing the conflict between the parties.

### (v) The right to life

The Final Constitution grants the right to life to every individual.<sup>250</sup> The right is directly related to the right to a healthy environment where, for example, a person uses contaminated water, or breathes polluted air. Short and long-term health risks due to environmental degradation could be interpreted as an infringement of a person's right to life. The right to life has, rather interestingly, been deployed in other jurisdictions to protect environmental interests in the absence of an enforceable environmental right.<sup>251</sup> In *Gabcikovo — Nagymaros Project (Hungary v Slovakia)*, Weeramantry J held: '[t]he protection of the environment is likewise a vital part of contemporary human rights doctrine for it is a *sine qua non* for numerous human rights such as the right to health and the right to life itself.'<sup>252</sup>

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245 2002 (2) SA 406 (D) ('Paola'). See also §50.3(c)(i)(bb)(y) 'Well-being' above, for a more detailed discussion of this case. See also, *Ex parte Mercer & Another* 2003 (1) SA 203 (CC), [2002] ZACC 23 (the applicants, convicted in the Magistrates' Court for harbouring wild animals without the required permit, challenged the constitutionality of the law in terms a number of constitutional issues including FC ss 9 and 24. The Court avoided deciding the issue, as the parties were still awaiting the outcome of the High Court.)

246 *Paola* (supra) at 404H.

247 1998 (1) SA 300 (CC), 1997 (11) BCLR 1489 (CC), [1997] ZACC 12.

248 Act 4 of 2000.

249 *MEC for Education: Kwazulu-Natal and Others v Pillay* 2008 (1) SA 474 (CC), 2008 (2) BCLR 99 (CC), [2007] ZACC 21 at para 40.

250 Section 11 of the Final Constitution. For a detailed discussion on s 11, see M Pieterse 'Life' in S Woolman, T Roux & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, July 2006) Chapter 39.

251 For a detailed discussion, see M Anderson 'Individual Rights to Environmental Protection in India' in A Boyle & M Anderson *Human Rights Approaches to Environmental Protection* (1996).

252 ICJ (September 1997) General list no.92 Reprinted in UNEP *Compendium of Judicial Decisions on Matters Related to Environment: International Decisions* (Vol. 1, 1998) 255, 298



The Constitutional Court has endorsed the connection between the right to a healthy environment and the right to life. The *Fuel Retailers* Court emphasised the importance of effective protection of the environmental rights in the Constitution as a pre-requisite for the enjoyment of the other rights in the Bill of Rights:

The importance of the protection of the environment cannot be gainsaid. Its protection is vital to the enjoyment of the other rights contained in the Bill of Rights; indeed it is vital to *life* itself. It must therefore be protected for the benefit of the present and future generations. The present generation holds the earth in trust for the next generation. This trusteeship position carries with it the responsibility to look after the environment.<sup>253</sup>

### **(w) Human dignity<sup>254</sup>**

The right to dignity can dovetail with the right to a healthy environment in two discrete ways: (1) the infringement of the right as a result of environmental degradation; or (2) environmental protection at the cost of human dignity. The first

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category of denial of dignity would occur, for example, where industries pollute a river that a community uses for water, washing, recreation or worship. The second could occur where there is opposition to providing emergency housing to a desperate community because of the potential impact on an ecologically sensitive area. The courts have yet to consider, interpret and apply the right to dignity in relation to the environmental right in an environmental dispute. When they do, they should recall the Constitutional Court's dictum in *Dawood & Another v Minister of Home Affairs & Others*:

[Dignity] is a value that informs the interpretation of many, possibly all, other rights. This Court has already acknowledged the importance of the constitutional value of dignity in interpreting rights such as the right to equality, the right not to be punished in a cruel, inhuman or degrading way, and the right to life. Human dignity is also a constitutional value that is of central significance in the limitations analysis. Section 10, however, makes it plain that dignity is not only a *value* fundamental to our Constitution, it is a justiciable and enforceable *right* that must be respected and protected. In many cases, however, where the value of human dignity is offended, the primary constitutional breach occasioned may be of a more specific right such as the right to bodily integrity, the right to equality or the right not to be subjected to slavery, servitude or forced labour.<sup>255</sup>

### **(x) Access to housing**

The Final Constitution grants every person the right of access to adequate housing and requires the state to take reasonable legislative and other measures within its available resources to attain the progressive realisation of this right.<sup>256</sup> The right to adequate housing or access thereto can come into conflict with FC s 24 where

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253 *Fuel Retailers* (supra) at para 102 (emphasis added).

254 FC s 10 reads: 'Everyone has inherent dignity and the right to have their dignity respected and protected.' For a detailed discussion of s 10, see S Woolman 'Dignity' in S Woolman, T Roux & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, December 2005) Chapter 36.

255 2000 (3) SA 936 (CC), 2000 (8) BCLR 837 (CC), [2000] ZACC 8 at para 35.

256 FC s 26 reads:

residents of a community have been rendered homeless through a natural disaster such as flooding. Government, under such circumstances, is under a constitutional obligation to provide adequate housing to flood victims. A relocation or housing project that gives effect to constitutional obligations under FC s 26 can have adverse effects on the natural environment.<sup>257</sup>

## (y) Access to food and water

Section 27 of the Final Constitution provides rights of access to healthcare

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services,<sup>258</sup> sufficient food and water,<sup>259</sup> and social security.<sup>260</sup> Two rights contained in FC s 27 stand in some tension with the environmental rights in FC s 24: the rights to food and water. Subsistence fishing and hunting often have a negative impact on the conservation of sensitive ecosystems. Agricultural practices — say the use of natural aquifers to increase production — may have an adverse effect on sound environmental management. Moreover, the state's dual obligations to manage the natural environment and to provide the conditions for adequate production of food products can come into conflict.<sup>261</sup> At the same time, the right to access to water may work, hand in glove, with the right to a healthy environment. Access to water

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(1) Everyone has the right to have access to adequate housing.

(2) The state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of this right.

(3) No one may be evicted from their home, or have their home demolished, without an order of court made after considering all the relevant circumstances. No legislation may permit arbitrary evictions.

For a detailed discussion of s 26, see K McLean 'Housing' in S Woolman, T Roux & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, July 2006) Chapter 55.

257 See *Minister of Public Works & Others v Kyalami Ridge Environmental Association* 2001 (3) SA 1151 (CC), 2001 (7) BCLR 652 (CC), [2001] ZACC 19.

258 FC s 27(1)(a) reads: 'Everyone has the right to have access to health care services, including reproductive health care'. For a detailed discussion on the right to healthcare, see D Bilchitz 'Health' in S Woolman, T Roux & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, December 2005) Chapter 56A.

259 FC s 27(1)(b) reads: 'Everyone has the right to have access to sufficient food and water'. For a discussion on the right to food, see D Brand 'Food' in S Woolman, T Roux & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, February 2005) Chapter 56C. For a discussion on the right to water, see A Kok & M Langford 'Water' in S Woolman, T Roux & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, June 2004) Chapter 56B. For the most recent authority on the right to water, see *Mazibuko & Others v City of Johannesburg & Others* (CCT 39/09) [2009] ZACC 28 (Constitutional Court rejected Soweto residents' objections to the City's water policy).

260 FC s 27(1)(c) reads: 'Everyone has the right to have access to social security, including, if they are unable to support themselves and their dependents, appropriate social assistance.' For a discussion on the right to social security, see M Swart 'Social Security' in S Woolman, T Roux & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, July 2006) Chapter 56D.

261 For further discussion of the rights to food and nutrition, see G Bekker 'Introduction to the Rights to Food and Nutrition' in Centre for Human Rights *Economic and Social Rights Series — A Compilation of Essential Documents on the Rights to Food and Nutrition* (Volume 3, 2000) 1.

implies drinking water free from toxic contaminants, which will require keeping watercourses and the surrounding environment free of pollution.<sup>262</sup>

### **(z) Property clause**

The Final Constitution grants individuals a limited right to property.<sup>263</sup> If the government wants to restrict the use of a person's property for conservational purposes, then it may, in terms of FC s 25(2), only do so in terms of a law of general application and provided that such a deprivation is not done 'arbitrarily'.<sup>264</sup> However, the term 'arbitrary' in FC s 25(1) has been interpreted by the Constitutional Court to describe a decision-making process that falls somewhere between

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actual arbitrariness and proportionality.<sup>265</sup> If the state wishes to expropriate property, it must do so for a public purpose or in the public interest and must provide the owner with fair compensation. It is yet to be determined when protecting the environment is a sufficient purpose to expropriate property.

### **(bb) Procedural rights**

The procedural rights — the rights to access to information and administrative justice — contained in the Bill of Rights are often indispensable in the application, implementation and enforcement of FC s 24. Procedural rights provide a mechanism for gathering information that might affect those concerned with a potential environmental dispute and in adopting reaction strategies to check the reasonableness of government decisions. As Oliver JA wrote in *Director: Mineral Development, Gauteng Region, & Another v Save the Vaal Environment & Others*: 'Our Constitution, by including environmental rights as fundamental human rights, by necessary implication requires that environmental considerations be accorded appropriate recognition and respect [in terms of the] administrative process in our country.'<sup>266</sup>

### **(x) Access to information<sup>267</sup>**

262 See United Nations Committee on Economic, Social and Cultural Rights' General Comment No. 15 on the Right to Water. E/C.12/2002/11 (12 Nov. 2002) (The comment states that everyone is entitled to safe and acceptable water for personal and domestic use.)

263 FC s 25. For more on the right to property, see T Roux 'Property' in S Woolman, T Roux & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, December 2003) Chapter 46.

264 See AJ van der Walt 'Property Rights, Land Rights, and Environmental Rights' in D van Wyk, B De Villiers, J Dugard & D Davis *Rights and Constitutionalism: The New South African Legal Order* (1994) 496.

265 *First National Bank of SA Limited t/a Wesbank v Commissioner for the South African Revenue Services and Another; First National Bank of SA Limited t/a Wesbank v Minister of Finance* 2002 (4) SA 768 (CC), 2002 (7) BCLR 702 (CC), [2002] ZACC 5. For further discussion, see T Roux 'The "Arbitrary Deprivation" Vortex: Constitutional Property Law after FNB' in S Woolman & M Bishop (eds) *Constitutional Conversations* (2008) 265 and F Michelman 'Against Regulatory Taking: In Defence of the Two-stage Inquiry' in Woolman & Bishop (supra) at 283.

266 1999 (2) SA 709, 719 (SCA).

267 FC s 32 reads:

The right of access to information provides the public with a mechanism to obtain relevant information on existing or potential threats to the environment.<sup>268</sup> For example, in *Van Huysteen v Minister of Environmental Affairs and Tourism*, the Cape High Court held that the applicants should have access to state-held documents regarding the development of a proposed steel mill and its potential adverse environmental impact.<sup>269</sup>

The constitutional right to access information has — as required by FC s 32(b) — been given effect by the Promotion of Access to Information Act ('PAIA').<sup>270</sup> In addition to the general procedure for accessing information, PAIA places a mandatory obligation on both public<sup>271</sup> and private<sup>272</sup> bodies to disclose information if the record would reveal evidence of 'imminent and serious public safety or environmental risk.' In *Trustees for the Time Being of the Biowatch Trust v the Registrar: Genetic Resources & Others*,<sup>273</sup> the High Court dealt with an application for access to information about genetically modified organisms. The application relied on both FC s 32 and PAIA (because the application was lodged between promulgation and entry into force of PAIA.) The respondents were of the view that the request was premature. Internal remedies, in their view, had not yet been exhausted in terms of s 78 of PAIA. Dunn AJ concluded, however, that s 78 was not applicable because the section did not apply to the bodies from which Biowatch was seeking information. One of the complex array of issues raised in *Biowatch* was whether the state could refuse to disclose information on the grounds of s 18 of the

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(1) Everyone has the right of access to-

(a) any information held by the state; and

(b) any information that is held by another person and that is required for the exercise or protection of any rights.

(2) National legislation must be enacted to give effect to this right, and may provide for reasonable measures to alleviate the administrative and financial burden on the state.

For a discussion of FC s 32, see J Klaaren & G Penfold 'Access to Information' in S Woolman, T Roux & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, 2002) Chapter 62. For a discussion of the right's application to environmental law, see W Du Plessis 'Access to Information' in A Paterson & LJ Kotze *Environmental Compliance and Enforcement in South Africa* (2009) 197-221.

268 See C Bruch, W Coker & C van Arsdale 'Breathing Life into Fundamental Principles: Implementing Constitutional Environmental Protections in Africa' (2000) 7 *SAJELP* 21,66.

269 1996 (1) SA 283 (C), 1995 (9) BCLR 1191 (C). See also *Aquafund (Pty) Ltd v Premier of the Western Cape* 1997 (7) BCLR 907 (C); *Goodman Bros (Pty) Ltd v Transnet Ltd* 1998 (4) SA 989 (W), 1998 (8) BCLR 1024 (W); *Van Niekerk v City Council of Pretoria* 1997 (3) SA 839 (T); and *Le Roux v Direkteur-Generaal van Handel en Nywerheid* 1997 (4) SA 174 (T), 1997(8) BCLR 1048 (T).

270 Act 2 of 2000.

271 PAIA s 46(a)(ii).

272 PAIA s 70(a)(ii).

273 2005 (4) SA 111 (T) ('*Biowatch (HC)*').

Genetically Modified Organisms Act.<sup>274</sup> Section 18 prohibited the Registrar from disclosing information gained in his duties, except if ordered to do so by a court or 'insofar as it is necessary for the proper application of the provisions of [the GMO] Act'. Dunn AJ held that the second exception applied:

the right of access to information is intended to serve a wider purpose, namely to ensure that there is open and accountable administration at all levels of government - a vital ingredient in our new constitutional culture and in an open and democratic society. The disclosure of information, or the granting of access to information, should therefore, in my view, be necessary for the proper application of the provisions of the GMO Act. In other words, the Registrar is not prohibited from disclosing any information acquired by him through the exercise of his powers or the performance of his duties under the GMO Act, if such disclosure is aimed at giving effect to the right to access of information enshrined in s 32(1)(a) of the Constitution.<sup>275</sup>

Dunn AJ, therefore, correctly concluded that Biowatch was entitled to most of the information it had sought under FC s 32(1).

A number of pieces of environmental legislation complement FC s 33 and PAIA.<sup>276</sup> For example, the national environmental management principles of NEMA provide that 'decisions must be taken in an open and transparent manner, and access to information must be provided for in accordance with the law.'<sup>277</sup> NEMA further provides for access to environmental information and the protection of whistle-blowers.<sup>278</sup>

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The right to access information is closely supported by the rights to freedom of expression<sup>279</sup> and freedom of assembly.<sup>280</sup> The freedom to express what may be controversial or unpopular views is particularly relevant when environmental action (or inaction) elicits vociferous protests from environmental activists — often in ways that impinge on private property. The question is, then, how to harmonize, if possible, the rights to property and economic activity of developers and the rights of the public to obtain information about the negative environmental impacts of the planned activity and to voice their displeasure with the development through

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274 Act 15 of 1997.

275 *Biowatch (HC)* (supra) at para 37.

276 See National Water Act 36 of 1998 ss 110, 140 -142; National Environmental Management: Biodiversity Act 10 of 2004 ss 7, 61, 82, 89, 99 and 100; Protected Areas Act 57 of 2003 ss 5, 10 and Part 5; and Mineral and Petroleum Resources Development Act 28 of 2002 ss 30, 61 and 88.

277 NEMA s 2(4)(k).

278 NEMA s 31.

279 For a detailed discussion of the expression protection found in FC s 16(1), see D Milo, G Penfold & A Stein 'Freedom of Expression' in S Woolman, T Roux & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, June 2008) Chapter 42.

280 For a detailed discussion of the assembly protection found in FC s 17, see S Woolman 'Freedom of Assembly' in S Woolman, T Roux & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, February 2005) Chapter 43.

protests, assemblies or demonstrations on the property at issue. The Court in *Petro Props (Pty) Ltd v Barlow and the Libradene Wetland Association* faced this very question.<sup>281</sup> A persistent public campaign organised by a community association had halted the development of a Sasol petrol filling station that encroached on a wetland. The campaign was so effective that Sasol withdrew from the development and construction stopped. The developer failed in its application to interdict the respondents from harassing and interfering with its property rights to develop the property into a filling station. Tip AJ rejected the argument that the right to development of the property outranks the right to freedom of expression. Referring to various leading judgments on the importance of freedom of speech in an open and democratic society, he held that as the protest was ‘not vexatious, *contra bonos mores* or actionable’, there was no justification in prohibiting a successful public campaign.<sup>282</sup> South African courts ‘have on many occasions warned of the perils of curtailing free speech and free association’.<sup>283</sup> This was such a case: Permitting an interdict in these circumstances ‘would have a chilling effect on the readiness of persons ... and associations ... to step forward as active citizens.’<sup>284</sup>

### **(y) Administrative justice<sup>285</sup>**

FC s 33 and the subsequent promulgation of the Promotion of Administrative Justice Act (‘PAJA’)<sup>286</sup> provide powerful rights to just administrative action. Administrative justice plays a central role in most environmental disputes: the subject of a challenge almost always turns on the legitimacy of the administrative decision

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procedures (an EIA, for example) for issuing a licence or permit.<sup>287</sup> PAJA and FC s 33 offer the following three-fold protection: all administrative action must be ‘lawful, reasonable and procedurally fair.’<sup>288</sup>

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281 2006 (5) SA 160 (W)(‘*Petros Props*’).

282 *Petro Props* (supra) at para 65.

283 *Ibid* at para 60.

284 *Ibid*.

285 For a detailed discussion of administrative justice, FC s 33, see J Klaaren & G Penfold ‘Kust Administrative Action’ in S Woolman, T Roux & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, June 2008) Chapter 63. For a discussion of FC s 33’s application to environmental law, see Y Burns & M Kidd ‘Administrative Law & Implementation of Environmental Law’ in HA Strydom & ND King *Fuggie and Rabie’s Environmental Management in South Africa* (2nd Edition, 2009) 222-268; and E Bray ‘Administrative Justice’ in A Paterson & LJ Kotze *Environmental Compliance and Enforcement in South Africa* (2009) 152-196.

286 Act 3 of 2000.

287 See also LJ Kotze & AJ Van der Walt ‘Just Administrative Action and the Issue of Unreasonable Delay in Environmental Impact Process: A South African Perspective’ (2003) 10 *SAJELP* 39.

288 FC s 33(1).

First: reasonableness. The assurance of reasonable administrative action allows courts to consider, within certain parameters, the issue of substantive fairness in the administrative decision-making process. In *South African Shore Angling Association & Another v Minister of Environmental Affairs*, the parties challenged the validity and constitutionality of regulations that impose a general prohibition on recreational use of vehicles in the coastal zone as unreasonable.<sup>289</sup> Erasmus J rejected the challenge. As the regulations did not constitute an absolute ban — they allowed for exemptions and permitting — they were reasonable. In *BP Southern Africa (Pty) Limited v MEC for Agriculture, Conservation, Environment & Land Affairs*, the applicant challenged a decision not to grant permission to build a new filling station. It argued that the MEC had relied on socio-economic concerns, not environmental ones and had exceeded his mandate by relying on sources outside the ECA. The court rejected both arguments. The *BP Southern Africa* court held that the constitutional and statutory framework — which expanded beyond ECA to include NEMA and other relevant legislation — made it ‘abundantly clear that the department’s mandate includes the consideration of socio-economic factors as an integral part of its environmental responsibility.’<sup>290</sup> Claassen J emphasised that the discretionary powers exercised by the MEC during the EIA were reasonable because they enabled the MEC to fulfil her constitutional obligation under FC s 24.<sup>291</sup> In addition, the MEC’s discretionary powers were not exhausted by strict adherence to EIA guidelines. Ample room exists for deviation from the guidelines -- provided the applicant has proffered comprehensive supporting evidence. In the instant case it failed to provide such evidence.

The most important decision on reasonableness in the context of environmental decision-making is the Constitutional Court’s discussion on the allocation of fishing quotas in *Bato Star Fishing (Pty) Ltd v the Minister of Environmental Affairs and Tourism*.<sup>292</sup> In essence, O’Regan J held that the reasonableness of administrative action depends on the facts of the case. The Court extracted the following (somewhat unhelpful) test from s 6 of PAJA: a decision will be unreasonable if a reasonable decision-maker could not have reached it. The Court reiterated that reasonableness in any particular instance will depend on factors such as the nature of the decision; the identity of the decision-maker; the range of factors relevant to the decision; the nature of the competing interests involved; and the impact of the decision on the lives and well-being of those affected. The Court further ‘warned’ that judges may not take over the task of the executive branch

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of government by arrogating ‘to [themselves] superior wisdom’. Rather, the sole task of the courts is to establish if a decision was reasonable in terms of the Constitution.<sup>293</sup>

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289 2002 (5) SA 511 (SE).

290 Ibid at 151D-E.

291 2004 (5) SA 124 (W).

292 2004 (4) SA 490 (CC), 2004 (7) BCLR 687 (CC), [2004] ZACC 15. See also *Compass Waste Services (Pty) Ltd v The Head of Department, Department Agriculture and Environmental Affairs of the Province Kwa-Zulu Natal & Others* unreported case (N) Case No: 2280/2003 (on file with authors).

293 Ibid at 44-46.

Second: Procedural fairness. Procedural fairness in the decision-making process of environmental matters embraces the *audi alteram partem* ('hear the other side') rule. In *Director, Mineral Development, Gauteng Region and Sasol Mining (Pty) Ltd v Save the Vaal Environment & Others*,<sup>294</sup> the Supreme Court of Appeal rejected the government's refusal to apply the *audi alteram partem* rule in a mining licence application. The SCA described the government's position as an overly legalistic interpretation of the relevant legislation and as 'emasculat[ing] the principles of natural justice'.<sup>295</sup> The state's formalistic approach to statutory interpretation was clearly in conflict with the constitutional duty on all bearers of state authority (and even, in some instances, private parties)<sup>296</sup> to concretise FC s 33 and FC s 24. Through contextual-teleological-value based interpretation, the Court found that the issuance of a mining licence in terms of s 9 of the Minerals Act<sup>297</sup> set into motion a series of events that might have serious consequences for the environment because it enabled the licence holder to take preparatory steps to commence actual mining upon the later approval of the environmental management program ('EMPR').<sup>298</sup> Furthermore, the Court found that s 39 of the Minerals Act enabled a license holder to be exempted from the responsibility to conduct an EMPR, or to obtain temporary permission to commence mining pending the approval of the EMPR.<sup>299</sup> If the demand to 'hear the other side' was postponed until the end of the EMPR process, then environmental concerns might never be heard. By applying the *audi* rule at the s 9 stage, the extensive damage that mining operations might cause to the environment and ecology can be identified and, if necessary, prevented. This approach will ensure that sustainable development will take place in a fashion that ensures intergenerational equity.

The issue of procedural fairness was again considered in *Earthlife Africa (Cape Town) v Director General: Department of Environmental Affairs and Tourism & Eskom Holdings*.<sup>300</sup> Earthlife argued that the procedure that led to the grant of an Environmental Authorisation ('EA') to construct a pebble bed modular reactor ('PBMR') was unfair. Earthlife had only been permitted to comment on the draft environmental impact report. Moreover Earthlife could only engage the Director-General's consultants: they were barred from approaching the DG himself. The Court took time to stress the great importance of procedural aspects and that EA administrators must give proper consideration to interested and affected parties'

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294 1999 (2) SA 709 (SCA) ('*Save the Vaal*').

295 *Ibid* at 717.

296 See FC ss 8(1) and (2).

297 Act 50 of 1951.

298 *Save the Vaal* (*supra*) at 718.

299 *Ibid* at 718 F-H.

300 2005 (3) SA 156 (C) ('*Earthlife*'). See also *Evans & Other v Llandudo/Houtbay Transitional Metropolitan Substructure & Another* 2001 (2) SA 342 (C) (the Court dealt with the issue of procedural fairness in the decision-making process where the respondent issued an ECA s 31A directive in order to protect the environment).



participation in the authorisation process. After reviewing the evidence, Griesel J accepted both of Earthlife's arguments: (1) the DG made his decision 'without having heard [Earthlife]' and (2) 'without making himself aware of the nature and substance of [its] submissions.'<sup>301</sup> He set aside the decision and ordered the DG to reconsider the matter after hearing Earthlife's submissions.

Two last, minor points are worth making. One, a license applicant is entitled to written reasons from an environmental authority for the refusal of the license.<sup>302</sup> Two, PAJA provides not only for judicial review of administrative action, but specifies the remedies that can be granted if the decision is deficient. These remedies include: prohibition, setting aside the administrative action, a declaration of rights, granting an interdict, and, in extreme cases, damages.<sup>303</sup>

### (iii) Other constitutional provisions relevant to the environment

Several central structural mechanisms of the Final Constitution that determine the respective competences of the national legislature and provincial legislatures have an important bearing on environmental matters.<sup>304</sup> In short, certain subject areas are assigned exclusively to the provincial legislatures,<sup>305</sup> while others are areas of concurrent competence for both national and provincial lawmakers.<sup>306</sup> A detailed regime exists for resolving conflicts between the two spheres of legislative authority. Environmental issues fall into both the exclusive and shared categories. The Final Constitution grants concurrent control over the most important environmental subjects, including 'Environment', 'Nature conservation ... and marine resources', 'Pollution control' and 'Soil conservation'.<sup>307</sup> Only a few subjects, with limited environmental relevance, are assigned solely to the provinces.<sup>308</sup> Finally, some

301 *Earthlife* (supra) at para 78.

302 PAJA s 5.

303 PAJA ss 6 and 8.

304 For a full discussion of the separation between national and provincial governments, see V Bronstein 'Legislative Competence' in S Woolman, T Roux & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, June 2004) Chapter 15 and V Bronstein 'Conflicts' in S Woolman, T Roux & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, July 2006) Chapter 16.

305 These powers are listed in Schedule 5.

306 These powers are listed in Schedule 4.

307 Other potentially relevant areas included in Schedule 4 are: (1) Administration on indigenous forest; (2) Agriculture; (3) Animal control and diseases; (4) Cultural matters; (5) Disaster management; (6) Health services; (7) Industrial promotion; (8) Public transport; (9) Regional planning and development; (10) Tourism; (11) Trade; and (12) Urban and rural development.

308 Potentially relevant areas included in Schedule 5 are: (1) Abattoirs; (2) Museums other than national museums; (3) Provincial planning; (4) Provincial cultural matters; and (5) Provincial roads.

environmental issues — including ‘Air pollution’, ‘Municipal parks’, ‘Noise pollution’ and ‘Refuse removal and waste disposal’<sup>309</sup> — are reserved for local government.<sup>310</sup>

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If one sphere of government, intentionally or not, intrudes into the realm of another sphere, its actions will be invalid.<sup>311</sup>

Chapter 9 of the Final Constitution establishes several organizations designed to support constitutional democracy. The South African Human Rights Commission (‘SAHRC’),<sup>312</sup> the Public Protector and other bodies ensure that relatively impartial institutions monitor, promote, protect and fulfil the rights contained in Chapter 2.<sup>313</sup> For example, the SAHRC must request from relevant organs of state information on measures undertaken by these organs in the realisation of the rights contained in chapter 2, including the right to a healthy environment.<sup>314</sup>

## 50.4 Application of the right to a healthy environment: practical considerations

Although the right to a healthy environment is entrenched in our Bill of Rights, the case-law remains under-developed. What follows are some practical considerations to be taken into account when applying FC s 24 in environmental dispute settlement procedures.

### (a) Considering the appropriate forum for environmental dispute settlement

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309 Other potentially relevant areas included in Schedule 4(b) and 5(b) are: (1) Beaches; (2) Cleansing; (3) Control of public nuisances; (4) Electricity and gas reticulation; (5) Fences and Fencing; (6) Fire fighting services; (7) Municipal abattoirs; (8) Municipal planning; (9) Municipal health services; (10) Municipal public transport; (11) Stormwater management systems; and (12) Water and sanitation services.

310 FC ss 155(6)(a) and 155(7) read with Schedules 4(b) and 5(b).

311 See *City of Johannesburg Metropolitan Municipality v Gauteng Development Tribunal & Others* [2010] ZACC 11 (a national law that interfered with the provincial power to determine municipal planning was declared invalid).

312 For more on the Chapter 9 institutions, see M Bishop & S Woolman ‘Public Protector’ in S Woolman, T Roux & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, December 2005) Chapter 24A; S Woolman & Y Schutte ‘Auditor General’ in S Woolman, T Roux & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, December 2005) Chapter 24B; J Klaaren ‘SA Human Rights Commission’ in S Woolman, T Roux & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, December 2005) Chapter 24C; C Albertyn ‘Commission for Gender Equality’ in S Woolman, T Roux & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, December 2003) Chapter 24D, J White ‘Independent Communication Authority of South Africa (ICASA)’ in S Woolman, T Roux & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, February 2005) Chapter 24E, S Woolman & J Soweto-Aullo ‘Commission for the Promotion & the Protection of the Rights of Cultural, Religious and Linguistic Communities’ in S Woolman, T Roux & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, February 2005) Chapter 24F.

313 FC s 184.

314 FC s 184(3).

Litigation is but one dispute resolution mechanism; there are many other — sometimes more appropriate — dispute resolution processes. If we think of the possibilities as falling on a continuum with litigation on one end, other options towards the less formal end would encompass negotiation, mediation, conciliation, arbitration, mini-trial, mediation-arbitration, fact-finding and enquiry. Non-litigation procedures are referred to collectively as Alternative Dispute Resolution ('ADR'). Whatever the procedure parties use, the application and the interpretation of FC s 24 remain an integral part of resolving an environmental dispute.

ADR will generally be more appropriate if the maintenance of the relationship between the parties is important.<sup>315</sup> The primary advantages of ADR are: more cost effective; less time consuming; the parties generally have the power to determine the outcome of the dispute; the parties can design the procedures involved; and the parties choose an independent mediator or arbitrator with appropriate and expert knowledge. Litigation, on the other hand, will be more appropriate if one wishes to rely on existing precedent or if media coverage is important to the parties. Unfortunately, choosing the appropriate dispute resolution process — especially in environmental disputes — may not fall within the discretion of the adversely affected parties. Quite often the appropriate forum will be decided by statute, by regulation<sup>316</sup> or, in the case of many corporate institutions, by contractual obligations.<sup>317</sup>

NEMA and the National Water Act,<sup>318</sup> however, both require ADR.<sup>319</sup> The National Water Act established a Water Tribunal to hear appeals against decisions taken by institutions operating under the authority of the Act.<sup>320</sup> The Act also provides for environmental dispute resolution through the processes of mediation and negotiation.<sup>321</sup> NEMA further broadens the scope of environmental dispute resolution. Any Minister, MEC or Municipal Council may, in decisions where the environment is concerned, refer the matter for conciliation.<sup>322</sup> Where this procedure proves

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315 For a discussion on approaches to environmental dispute resolution in South Africa, see Johan van den Berg 'Environmental Dispute Resolution in South Africa — Towards Sustainable Development' (1998) 5 *SAJELP* 71.

316 Regulations may require an independent third party to investigate the matter.

317 A contractual provision may provide that an environmental dispute be referred to an arbitrator for arbitration.

318 Act 36 of 1998.

319 Water Act s 150. See *Naude & Andere v Heatlie & Andere; Naude & Andere v Worcester-Oos Hoofbesproeiingsraad & Andere* 2001 (2) SA 815 (SCA)(on competency of the Water Court). See *Jansen van Vuuren & Andere v Van der Merwe & Andere* 1992 (1) SA 124 (A)(discussion of the jurisdiction and power of the Water Court established under the previous Water Act 54 of 1956). See also *Kruger v Le Roux* 1987 (1) SA 866 (A); *Mathee en Ander v Lerm* 1980 (3) SA 742 (C).

320 Water Act Chapter 16.

321 Water Act s 150.

322 NEMA ss 17-18.

inappropriate, the matter can be referred to facilitation.<sup>323</sup> NEMA also provides for arbitration<sup>324</sup> and investigation.<sup>325</sup>

Another important consideration in deciding on the appropriate forum in environmental disputes is the relief sought. Given that environmental infringements are often caused by multi-national corporations, it might be more appropriate to file in another country against the mother company than to litigate in South Africa. In *Englebert Ngcobo & Others v Thor Chemical Holdings (Pty) Ltd*,<sup>326</sup> for example, the applicants filed in the United Kingdom and not in South Africa. The applicants were all temporary workers at the Thor Chemical Holdings plant at Cato Ridge, KwaZulu Natal. They had been exposed at the plant to hazardous and

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unsafe quantities of mercury, mercury vapour and mercury compounds. Legislation on occupational compensation prevented the applicants from suing in South Africa.<sup>327</sup>

### **(b) The issue of standing<sup>328</sup>**

Standing in environmental litigation is substantially easier to secure as a result of FC s 24. Prior to its inclusion, unless standing was expressly granted under legislation,<sup>329</sup> applicants had to show a direct personal interest in the environmental dispute.<sup>330</sup> This cramped position on standing made environmental public interest litigation virtually impossible. FC s 38 dramatically expands traditional standing rules and permits people to sue in the public interest, on behalf of a class of people, on behalf of others who cannot represent themselves and associations whose members have an interest in a matter.<sup>331</sup> Section 32(1)(e) of NEMA provides even broader standing by allowing any person or group of persons to seek appropriate relief in respect of any breach of NEMA, its s 2 principles, or any provision of any statutory provision

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323 Ibid.

324 NEMA s 19.

325 NEMA s 20.

326 No 1994 N 1212 (UK) reprinted in *UNEP Compendium of Judicial Decisions on Matters related to Environment: National Decisions* (Volume 1, 1998) 237.

327 Workmen's Compensation Act 31 of 1941 s 7 prohibited actions by employees against employers for injuries sustained at work. Irrespective of fault a claim must be lodge against the Workman's Compensation Commissioner. Section 8 of the Act, however, permits a workman to sue a third-party tortfeasor. The third-party tortfeasor in this instance was a UK-based company.

328 For a detailed discussion of standing in Bill of Rights litigation, see C Loots 'Standing, Ripeness & Mootness' in S Woolman, T Roux & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, February 2005) Chapter 7.

329 See *Society for the Prevention of Cruelty to Animals, Standerton v Nel & Others* 1988 (4) SA 42 (W).

330 For a detailed discussion of this issue, see M Kidd *Environmental Law — A South African Guide* (1997) 26.

pertaining to environmental protection. The only limitation is that the person acts in the 'interest of protecting the environment'.<sup>332</sup>

Pickering J provided powerful early support for wide standing in environmental litigation in *Wildlife Society of South Africa v Minister of Environmental Affairs and Tourism*:

One of the principal objections often raised against the adoption of a more flexible approach to the problem of *locus standi* is that the floodgates will thereby be opened, giving rise to an uncontrollable torrent of litigation. It is well, however, to bear in mind ... that it may sometimes be necessary to open the floodgates in order to irrigate the arid ground below them. I am not persuaded by the argument that to afford *locus standi* to a body such as first applicant in circumstances such as these would be to open the floodgates to a torrent of frivolous or vexatious litigation against the State by cranks or busybodies. Neither am I persuaded, given the exorbitant costs of Supreme Court litigation, that should the law be so adapted cranks and busybodies would indeed flood the courts with vexatious or frivolous

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applications against the State. Should they be tempted to do so, I have no doubt that an appropriate order of costs would soon inhibit their litigious ardour.

In any event, whilst cranks and busybodies who attempt to abuse legal process do no doubt exist, I am of the view that lawyers are sometimes unduly apprehensive and pessimistic about the strength of their numbers. The meddlesome crank and busybody with no legal interest in a matter whatsoever, mischievously intent on gaining access to the court in order to satisfy some personal caprice or obsession, is, in my view, as has been remarked elsewhere, more often a spectral figure than a reality.<sup>333</sup>

However, notwithstanding the clear and unequivocal broadening of standing under FC s 38 and NEMA, it is often a preliminary issue addressed in environmental litigation. For example, in *All the Best Trading CC t/a Parkville Motors v S N Nyagar Property Development and Construction CC* the court held that applicant lacked standing because the suit did not turn on the advancement of environmental rights. The suit was crafted solely around the firm's pecuniary interests.<sup>334</sup> However, in two further filling station cases — *Capital Motors CC v Shell SA Marketing (Pty) Ltd*<sup>335</sup> and

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331 FC s 38 reads:

Anyone listed in this section has the right to approach a competent court, alleging that a right in the Bill of Rights has been infringed or threatened, and the court may grant appropriate relief, including a declaration of rights. The persons who may approach a court are-

- (a) anyone acting in their own interest;
- (b) anyone acting on behalf of another person who cannot act in their own name;
- (c) anyone acting as a member of, or in the interest of, a group or class of persons;
- (d) anyone acting in the public interest; and
- (e) an association acting in the interest of its members.

332 NEMA s 32(1)(e).

333 1996 (3) SA 1095 (Tks).

334 2005 (3) SA 396 (T).

*Fuel Retailers*<sup>336</sup> — applications for protection of business interests as part of the right to economic and social development were successfully based on FC s 24. In *Tergniet and Toekoms Action Group & Thirty Four Others v Outeniqua Kreosootpale (Pty) Ltd & Others*<sup>337</sup> the court accepted the wider basis for standing provided by FC s 38 and s 32 of NEMA when it allowed an application by an informal residential grouping without a founding constitution or fixed membership and 34 inhabitants or property owners of the affected area. Their complaint, ultimately successful, was against the illegal manufacturing of creosote-treated wooden poles and accompanying unlawful release of offensive and noxious vapours.

### (c) Scope of application

FC s 8(1) states that all the substantive provisions in the Bill of Rights apply to all law and bind the legislature, the executive, the judiciary and all organs of state.<sup>338</sup> FC s 8(2) provides that a right 'binds a natural or juristic person if, and to the extent that, it is applicable, taking into account the nature of the right and the nature of the duty imposed by the right.' The extension of the environmental right's application to non-state actors means that the parties most likely to impair the enjoyment of the right — the mining sector, industries and corporate institutions —

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can be held directly accountable. FC s 24 can apply to a natural person or a juristic person in two ways. It can apply directly to a legal dispute that engages the constitutionality of an express rule of law as a point of possible infringement. It can apply indirectly to an environmental dispute in which the court is asked to interpret legislation or develop the common law in light of the general spirit, purport and objects of the Bill of Rights.<sup>339</sup>

In *The Director, Mineral Development, Gauteng Region & Sasol Mining (Pty) Ltd v Save the Vaal Environment & Others*, the principle of intergenerational equity

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335 Unreported decision (T), Case No. 3016/05 (18 March 2005)(on file with authors).

336 *Fuel Retailers Association of Southern Africa v Director-General: Environmental Management, Department of Agriculture, Conservation and Environment, Mpumalanga Province & Others* 2007 (6) SA 4 (CC), 2007 (10) BCLR 1059 (CC), [2007] ZACC 13 ('*Fuel Retailers*') at para 109 (Sachs J, dissenting)(*'It is ironic that the first appeal in this Court to invoke the majestic protection provided for the environment in the Bill of Rights comes not from concerned ecologists but from an organised section of an industry frequently lambasted both for establishing worldwide reliance on non-renewable energy sources and for spawning pollution. So be it. The doors of the Court are open to all, and there is nothing illegitimate or inappropriate in the Fuel Retailers Association of Southern Africa seeking to rely on legal provisions that may promote its interests.'*)

337 [2009] ZAWCHC 6 (23 January 2009).

338 FC s 8(1).

339 FC ss 8(3) and 39. For detailed discussions of the application of the Bill of Rights, see S Woolman 'Application' in S Woolman, T Roux & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, February 2005) Chapter 31; S Woolman 'The Amazing, Vanishings Bill of Rights' (2007) 124 *SALJ* 762; C Sprigman & M Osborne '*Du Plessis* is not Dead: South Africa's 1996 Constitution and the Application of the Bill of Rights in Private Disputes' (1999) 15 *SAJHR* 25; Jan Glazewski *Environmental Law in South Africa* (2000) 88; I Currie & J de Waal *The Bill of Rights Handbook* (2005); Alfred Cockrell 'Private law and the Bill of Rights: A Threshold of Horizontality' (1997) *Bill of Rights Compendium* 3A1-17. See also *Du Plessis v De Klerk* 1996 (3) SA 850 (CC), 1996 (5) BCLR 658 (CC), [1996] ZACC 10.

applied directly to the conduct of an organ of state.<sup>340</sup> But, had there been no express rule of law governing the dispute, FC s 8(2) could have been used to extend the legal force of FC s 24(a) directly to the conduct of mining rights holder. Where no express rule of law exists to govern conduct, FC s 8(2) creates the space to apply evolving principles of international environmental soft law to disputes between private parties. For example, courts could create legal duties — in addition to those responsibilities already imposed by legislation — for companies to conduct their construction, manufacturing or mining activities in an ecologically sustainable manner, to manage their waste streams effectively in terms of the ‘polluter pays’ and ‘cradle-to-grave’ principles, or to take adequate steps in terms of the precautionary principle to prevent greenhouse gas emissions and contributions to global warming.

#### **(d) Limitation of the environmental right**

FC s 36(1) permits a law of general application to limit the environmental rights in FC s 24 to the extent that the limitation is ‘reasonable and justifiable in an open and democratic society based on human dignity, equality, and freedom’.<sup>341</sup> In addition to the general limitation clause, parts of FC s 24 can be viewed as ‘internal limitations’. Particularly, the qualifications ‘reasonable’ and ‘ecological’ in FC s 24(b) could be seen as internal modifiers of an otherwise absolute right. A practical application of the general limitation clause in relation to the environmental right is yet to be considered by the courts.

#### **(e) Interpretational guidelines**

In addition to existing rules of statutory interpretation, the Bill of Rights mandates courts to promote the spirit, purport and objects of the Bill of Rights

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in the interpretation of legislation.<sup>342</sup> In the environmental context, courts have effectively employed this mandate in order to give effect to both the objective of FC s 24 as well as the Environmental Principles, the Duty of Care and the concept of Integrated Environmental Management envisaged in NEMA.<sup>343</sup> In *Sasol*, the Supreme Court of Appeal had to decide whether a regulation permitted the government to

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340 1999 (2) SA 709, 719 (SCA).

341 For a detailed discussion of the limitation of the rights contained in the Bill of Rights, and internal limitations found within the rights themselves, see S Woolman & H Botha ‘Limitation’ in S Woolman, T Roux & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, July 2006) Chapter 34.

342 FC s 39(2).

343 See *MEC for Agriculture, Conservation, Environment & Land Affairs v Sasol Oil Pty Ltd & Bright Suns Development CC* [2005] ZASCA 76 (*‘Sasol’*) at para 13; *HTF Developers (Pty) Ltd v the Minister of Environmental Affairs (1)* 2006 (5) SA 512 (T) (this decision was over turned on appeal on different grounds in *HTF Developers (Pty) Ltd v the Minister of Environmental Affairs* 2007 (5) SA 438 (SCA)(A majority of the SCA held that the MEC had failed to follow the procedural requirements in ECA s 32. Jafta JA dissented, concluding that s 31A was for urgent situations and therefore s 32 was not applicable.) which was in turn reversed by the Constitutional Court *MEC: Department of Agriculture, Conservation and Environment and Another v HTF Developers (Pty) Limited* 2008 (2) SA 319 (CC), 2008 (4) BCLR 417 (CC), [2007] ZACC 25 (The Court supported Jafta JA’s judgment) These decisions are discussed in detail below.)

regulate filling stations generally, or only the storage and use of hazardous substances at filling stations. In rejecting the High Court's conclusion that the regulation only had limited application, Cachalia AJA explicitly relied on FC s 24, particularly its endorsement of sustainable development. He reasoned: 'To attempt to separate the commercial aspects of a filling station from its essential features is not only impractical but makes little sense from an environmental perspective. It also flies in the face of the principle of sustainable development.'<sup>344</sup>

But the clearest example of interpreting legislation in line with FC s 24 — and FC s 33 — is *MEC: Department of Agriculture, Conservation and Environment & Another v HTF Developers (Pty) Limited*. In *HTF Developers*, the question before the High Court was whether the applicant required environmental authorization before it could subdivide its property. The state contended that the land constituted 'virgin ground' and the applicant therefore required authorization. Murphy J avoided deciding the precise meaning of 'virgin ground'. Instead Murphy J interpreted s 31A of the ECA — which permits the state to intervene in emergency situations to prevent damage to the environment — in light of the constitutional imperative of promoting conservation and securing ecologically sustainable development. By so doing, the court granted the MEC the power to intervene in *any* activity if it was necessary to protect the environment.

HTF Developers appealed to the SCA.<sup>345</sup> By this stage the 'virgin ground' regulation had been repealed. However, the question at the heart of the dispute still required statutory interpretation. HTF argued that the MEC was obliged to follow the procedural requirements in s 32 before acting in terms of s 31A. Section 32 required the government to publish a notice in the Government Gazette and to allow 30 days for comments if it made a 'direction'. Section 31A also used the word 'direction' to describe interventions to prevent individuals causing harm to the environment. The majority agreed with HTF that as the word 'direction' was used in both sections, the procedure in s 32 had to apply to s 31A. Jafta JA was the lone voice of dissent. He argued that the two sections served different purposes: s 32 was meant to 'promote the right to administrative justice, particularly the

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right to procedural fairness' while s 31A's purposes was to ensure a healthy environment as envisaged by FC s 24.<sup>346</sup> Requiring the government to follow the s 32 procedure, which included a 30-day notice and comment procedure, would defeat the purpose of s 31A.<sup>347</sup> The s 31A power would, however, still have to comply with the procedural strictures of PAJA.

The government appealed the SCA's decision. The Constitutional Court preferred Jafta JA's dissenting view.<sup>348</sup> Skweyiya J noted that while words that appeared more than once in a statute should ordinarily be given the same meaning, this rule could

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344 *Sasol* (supra) at para 16 quoting *BP Southern Africa (Pty) Ltd v MEC for Agriculture, Conservation, Environment and Land Affairs* 2004 (5) SA 124, 160A-E (W).

345 *HTF Developers (Pty) Ltd v Minister of Environmental Affairs* 2007 (5) SA 438 (SCA).

346 *HTF Developers (Pty) Ltd v Minister of Environmental Affairs* (supra) at paras 19-21.

347 *Ibid* at paras 22-27.



and *should* be abandoned if it would lead to absurd results.<sup>349</sup> That would be the case if s 32 applied to cases where the government had to act promptly to prevent harm to the environment. The Court distinguished between two uses of 'direction': it is employed to refer to decisions that affect the public generally, and to decisions that only engage the interests of individuals. Only in the first case was the 30-day procedure necessary or appropriate.<sup>350</sup> PAJA offered a much better procedural check for the s 31A power as its requirements were flexible, depending on the circumstances of the case.<sup>351</sup> Justice Ngcobo wrote a concurring judgment emphasizing that

the Constitution and the environmental legislation require authorities to adopt an integrated approach to the environment; an approach that protects the environment while promoting socio-economic growth. To this end, the authorities are enjoined to adopt a risk averse and cautious approach and to prevent and remedy negative impacts on the environment.<sup>352</sup>

### **(f) The role of international law in environmental disputes**

Three constitutional provisions create a role for international law in South Africa. One: FC s 39(1) requires any court, tribunal or forum to consider international law when interpreting the Constitution. Two: Customary international law is, FC s 232 tells us, South African law, provided that it is not in conflict with the Final Constitution or an Act of Parliament. Three: FC s 233 reads: 'Every court must prefer any reasonable interpretation of the legislation that is consistent with international law over any alternative interpretation that is inconsistent with international law'.<sup>353</sup> During the application of FC s 24, international environmental law becomes integral to the decision making process for two reasons. First, international law obviously informs the interpretation of the section. Second, the absence of a sound South African environmental jurisprudence that takes contemporary developments in the field of environmental law into account makes international law particularly important in addressing novel problems. The need to consider international law in environmental dispute settlement applies not only

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to the courts, but to the Water Tribunal and the environmental arbitrators required by NEMA.

While international environmental law provides a rich source of jurisprudence, two decisions are worthy of special mention. *Gabcikovo-Nagymaros Project (Hungary v Slovakia)* provides a useful account of sustainable development and may therefore

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348 *MEC: Department of Agriculture, Conservation and Environment and Another v HTF Developers (Pty) Limited* 2008 (2) SA 319 (CC), 2008 (4) BCLR 417 (CC), [2007] ZACC 25.

349 *Ibid* at para 33.

350 *Ibid* at paras 34-36.

351 *Ibid* at paras 43 and 46.

352 *Ibid* at para 65.

353 FC ss 232 and 233.

assist courts and counsel in determining the ambit of FC s 24(b).<sup>354</sup> This hermeneutical approach was followed by the Constitutional Court in *Fuel Retailers*: the Court broadly canvassed the meaning of the concept of sustainable development in international law.<sup>355</sup>

Second, *Social and Economic Rights Action Centre and the Centre for Economic and Social Rights v Nigeria (SERAC)* — discussed earlier<sup>356</sup> — offers a lucid explanation of the meaning of a right to a satisfactory environment.<sup>357</sup> The decision of the African Commission in *SERAC* notes the wide range of government obligations in the environmental arena. These duties run from the obvious — to prevent pollution and ecological degradation — to duties with a longer-term view — to promote conservation and ensure ecological sustainable development and the use of natural resources — to the procedural — to permit independent scientific monitoring of threatened environments, to undertake environmental and social impact assessments prior to industrial development, to provide access to information to communities involved, and to grant those affected an opportunity to be heard and to participate in the development process. The Commission’s discussion provides an invaluable touchstone for future engagement of these complex issues.

In addition, and as noted earlier,<sup>358</sup> international environmental law principles can find — and have found<sup>359</sup> — direct application through the constitutional provisions on international law. These principles include: the polluter must pay, biodiversity, intergenerational equity, and Environmental Impact Assessments.

### **(g) The role of foreign law in environmental disputes**

FC s 39(1)(c) provides that a tribunal may use foreign law to assist in interpreting a right. The decision of the Rhodesian Appeal Court in *King v Dykes* is, for example, often cited in the scholarly literature and in domestic litigation to explain the concept of intergenerational equity.<sup>360</sup> Claasens J, in *BP Southern Africa*, cites *King* for the following proposition:

[t]he idea which prevailed in the past that ownership of land conferred the right on the owner to use his land as he pleases is rapidly giving way in the modern world to the more

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354 See *UNEP Compendium of Judicial Decisions — International Decisions* (Volume I, 1998) 255.

355 *Fuel Retailers Association of Southern Africa v Director-General: Environmental Management, Department of Agriculture, Conservation and Environment, Mpumalanga Province & Others* 2007 (6) SA 4 (CC), 2007 (10) BCLR 1059 (CC), [2007] ZACC 13 at paras 46-56.

356 §50.2(c) above.

357 *The Social and Economic Rights Action Centre and the Centre for Economic and Social Rights v Nigeria*, Communication 155/96 2001.

358 §50.3(c)(i)(dd)(x)(1) above.

359 §50.3(c)(i)(dd)(x)(2) above.

360 1971 (3) SA 540 (RA).

responsible conception that an owner must not use his land in a way which may prejudice his neighbours or the community in which he lives, and that he holds the land in trust for future generations.<sup>361</sup>

South African courts, particularly the Constitutional Court, have regularly engaged with, drawn on and distinguished foreign law when reasoning their way to a conclusion. They have, however, been careful to note dual constraints that obtain when our courts undertake comparative constitutional analysis. First, foreign jurisdictions possess dissimilar legal frameworks that may work in such a way that facially similar texts produce alternative outcomes. Second, foreign laws and judgments are either tools in getting to grips with similar disputes or rhetorical devices that serve to justify a particular outcome. They never bind a South African court.

## **(h) Remedies in environmental disputes**

### **(i) Choosing a remedy**

Before discussing some specific remedial options, we set out some basic principles that should inform the choice of remedy. In environmental dispute resolution, judges, arbitrators and other decision makers must resolve the particular disputes before them and craft a remedy that fits the parties before them and the dispute.<sup>362</sup> That said, judicial, administrative or contractual remedies should take note of the conflicting imperatives of economic growth, social progress and environmental protection and attempt to place the particular outcome on the path towards sustainability.

When crafting a remedy, a court, tribunal or other forum should keep in mind the 'polluter pays' principle. The 'polluter pays' principle requires the offending party to create or to restore that habitat which is necessary for biological diversity.<sup>363</sup> They should, in addition, undertake their work in terms of the following assumptions:

- (i) That legal and factual means are present in order to establish liability,
- (ii) That they have a statutory/ inherent power to mould the appropriate judgment,
- (iii) That courts have the power to enforce decisions through sanctions, and
- (iv) Judges (decision-makers) are independent from outside influence.<sup>364</sup>

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361 J Glazewski *Environmental Law in South Africa* (2000) 87.

362 For a detailed discussion of how courts choose a remedy in constitutional cases, see M Bishop 'Remedies' in S Woolman, T Roux & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, June 2008) §9.2.

363 These considerations are largely based on a PowerPoint presentation of Judge Scott Fulton, Environmental Appeals Board, US Environmental Protection Agency, delivered at the Southern African Judges Needs Assessment Seminar on Environmental Law held in Johannesburg (December 2003.)

364 *Ibid.*

Remedies in environmental disputes are often complex. Adjudicators should draw on expert testimony in a variety of forms: government reports, court-appointed experts, or independent EIA studies.<sup>365</sup>

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Fulton offers a useful 'remedial hierarchy' for courts to follow when constructing environmental remedies. Firstly, remedies must *eliminate violations and present dangers*. To eliminate violations, orders may require a halt to activities, emergency clean-ups or renewal.<sup>366</sup> Secondly, remedies should *address long-term environmental damage*. This desideratum presents adjudicators with the challenge of moving past immediate concerns to focus on mechanisms that reverse the long-term effects of pollution. Such remedies normally entail detailed studies and technical assistance that lay bare the nature of the environmental dilemma and the costs of a range of solutions. Typical remedies at this stage are soil, water and sediment remediation or the treatment of contaminated ground water.<sup>367</sup> Thirdly, remedies should provide *adequate compensation*. Compensation for damages can be classified into non-restorable natural resource damages and private party damages (i.e. property or health).<sup>368</sup> Lastly, remedies must *punish violators and deter future violations*. These ends can be met through a combination of criminal sanctions, monetary fines and civil penalties.<sup>369</sup>

## (ii) Specific remedies in environmental disputes

The primary remedies in environmental cases are: (1) review of state action; (2) injunctions (pre-emptive or directive); (3) damages; (4) punitive sanctions; and (5) permit revocation and asset forfeiture.

### (aa) Judicial review of state action

Judicial review of state action allows a litigant to invalidate unlawful government decisions. It can, for example, be used to set aside the granting of mining permits or zoning decisions that might negatively impact on the environment. Although litigants ordinarily seek to have a decision set aside, it is also possible to force government to take a decision, or for the court to replace the state's decision with its own.<sup>370</sup>

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RS2, 10-10, ch50-p62

### (bb) Interdicts

Interdicts are powerful instruments in seeking environmental relief. Environmental disputes feature three kinds of interdicts: (1) prohibitory interdict; (2) mandatory interdict; or (3) structural interdict.

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365 Ibid. See also *National Fresh Produce Growers Association v Agroserve (Pty) Ltd* 1990 (4) SA 749 (N)(polluter pays principle).

366 Fulton (supra).

367 Ibid.

368 Ibid.

369 Ibid.

## (x) Prohibitory interdict

Where an activity or its continuation constitutes a threat to the environment, an injured party may approach the court for relief in the form of a prohibitory interdict. In *The Minister of Health and Welfare v Woodcarb (Pty) Ltd & Another*, the Minister applied for an interdict to prevent the respondent from operating a sawmill in contravention of the prohibition of carrying out scheduled processes in a controlled area.<sup>371</sup> The court held that the without the registration certificate required by the Atmospheric Pollution Act,<sup>372</sup> the generation of smoke was unlawful and violated the Interim Constitution's environmental rights. The prohibitory interdict was granted.

## (y) Mandamus (mandatory interdict)

A mandatory interdict in environmental disputes can be utilised in two ways. First, it can be employed to compel government to commence environmental clean-up or some other remedial action. Second, it can compel environmental authorities to grant a permit or issue a licence. That was the situation in *Myburg Park Langebaan (Pty) Ltd v Langebaan Municipality & Others*, where the High Court granted a mandatory interdict to compel the respondent to issue a permit giving the applicant the necessary permission to develop his property.<sup>373</sup>

In addition to the normal interdict available when the necessary requirements are met, s 28(12) of NEMA introduces a statutory mandamus to South African environmental law. It allows a person to apply to court for an order directing the Director-General ('DG') of the Department of Environmental Affairs and Tourism or the head of the provincial environmental department ('HOD') to take steps specified in s 28(4) of NEMA to ensure a polluter addresses significant pollution or environmental degradation. However, the interdict is only available if he or she informed the DG or HOD of the problem and the DG or HOD failed to provide written confirmation that the responsible party was instructed to take remedial action. Considering the wording of s 28(4), these interdicts are likely to function more like structural interdicts.

## (z) Structural interdict

370 *UNEP Compendium of Judicial Decisions on Matters Related to Environment — National decisions* (Volume 3, 2001) 3. See *Pharmaceutical Manufacturers Association of SA & Another: In Re Ex Parte President of the Republic of South Africa & Others* 2000 (2) SA 674 (CC), 2000 (3) BCLR 241 (CC), [2000] ZACC 1 (extent of powers of judicial review of state action). In the South African Environmental Authorisation context cases dealing with review applications include: *Compass Waste Services (Pty) Ltd v The Head of Department, Department Agriculture and Environmental Affairs of the Province Kwa-Zulu Natal and Others* unreported decision (N), Case No: 2280/2003 (on file with the authors); *Earthlife Africa (Cape Town) v Director General: Department of Environmental Affairs and Tourism & Eskom Holdings* 2005 (3) SA 156 (C); *Evans & Other v Llandudo/Houtbay Transitional Metropolitan Substructure & Another* 2001 (2) SA 342(C); *MEC for Agriculture, Conservation, Environment & Land Affairs v Sasol Oil Pty Ltd & Bright Suns Development CC* [2005] ZASCA 76; *South Durban Community Environmental Alliance v Head of Department: Department of Agricultural and Environmental Affairs, Kwazulu-Natal, & Others* 2003 (6) SA 631 (D); and *SLC Property Group (Pty) Ltd & Longlands Holdings (Pty) Ltd v Minister of Environmental Affairs and Economic Development (Western Cape) & Municipality of Stellenbosch* unreported decision (C) Case No. 5542/2007 (on file with the authors).

371 1996 (3) SA 155 (N).

372 Act 45 of 1965 s 9.

373 2001 (4) SA 1144 (C).

A structural interdict recognises that damage to the environment cannot always be remedied by a 'once and for all' order. Remedial action may require judicial oversight of programs over a relatively long period of time to resolve the problem

that gave rise to the dispute. The basic model of a structural interdict requires respondents to present a remedial plan to the court and report at regular intervals on the implementation of the plan.<sup>374</sup> In crafting a structural interdict, one of the important considerations is the period of corrective measures imposed in relation to the restoration of a habitat necessary to preserve biological diversity. Structural interdicts in environmental disputes can aid in fulfilling multiple requirements of Fulton's 'remedial hierarchy': A structural interdict can move past the immediate concern and focus on mechanisms to address the long-term effects of pollution such as clean-up operations and addressing damage to natural resources.

Structural interdicts can involve multiple stages that employ various different techniques: studies, technical assistance, analysis of the environmental dilemma and costing. Although structural interdicts are normally employed to compel government to comply with its constitutional obligations, they may be equally appropriate in private disputes that engage the commercial sector. Pure structural interdicts have not, yet, been employed in the environmental context, although our courts — including the Constitutional Court<sup>375</sup> — have made use of structural interdicts in a variety of other contexts.<sup>376</sup>

However, the environmental statutory interdict procedure introduced in s 28(12) of NEMA was applied in *Hichange Investments (Pty) Ltd v Cape Produce (Pty) Ltd t/a Pelt Products & Others*.<sup>377</sup> The environmental authorities failed for some time to prevent effectively the illegal environmental impact of the tannery on the applicant's

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374 S Liebenberg 'Judicial and Civil Society Initiatives in the Development of Economic and Social Rights in the Commonwealth' (2001) 19 (unpublished, on file with authors). See also Wim Trengrove 'Judicial Remedies for Violations of Socio-Economic Rights' (1999) 1(4) *ESR Review: Economic and Social Rights in South Africa* 8.

375 See, for example, *Sibiya & Others v Director of Public Prosecutions* 2006 (2) BCLR 293 (CC); [2006] ZACC 22; *Sibiya & Others v Director of Public Prosecutions: Johannesburg High Court and Others* 2006 (2) BCLR 293 (CC); [2005] ZACC 16; *Sibiya & Others v Director of Public Prosecutions: Johannesburg High Court & Others* [2005] ZACC 6, 2005 (5) SA 315 (CC), 2006 (1) SACR 220 (CC), 2005 (8) BCLR 812 (CC)(Court granted a supervisory order to monitor the replacement of death sentences); *Head of Department: Mpumalanga Department of Education and Another v Hoërskool Ermelo & Another* [2009] ZACC 32 (supervisory order to monitor language policy in schools).

376 See, for example, *EN & Others v Government of RSA & Others* 2007 (1) BCLR 84 (D); *Strydom v Minister of Correctional Services* 1999 (3) BCLR 342 (W)(The Court found that certain prisoners had a right to electrical plug points in their cells and ordered the Minister to make them available. Schwartzman J required the Minister to submit a report indicating the timeline for completion of the project.); *Kiliko & Others v Minister of Home Affairs & Others* 2007 (4) BCLR 416 (C). For a fuller discussion of structural interdicts, see M Bishop 'Remedies' in S Woolman, T Roux & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, June 2008) §9.4(c).

377 2004 (2) SA 393 (EC). See also *Lone Creek River Lodge and Others v Global Forest Products & Others* Unreported decision (T), Case No. 1994/2005 (6 November 2007)(on file with the authors) (The Court interdicted the DG of DEAT in terms of s 28(12) of NEMA to ensure a comprehensive investigation is undertaken with other organs of state in terms of s 28(4) of NEMA that investigates, evaluates and assesses the negative environmental impacts of the operations of the Respondent against its environmental obligations contained in various statutes and regulations (specified in the interdict).)

neighbouring premises. The Court ordered the HOD of the provincial environmental department to instruct the owner of the tannery to investigate, evaluate and assess the impact of gasses emitted from its tannery. The HOD then had to take the necessary steps to ensure that the polluter complied with the tannery's registration certificate and its environmental obligations under NEMA.

### (cc) Criminal sanctions

NEMA, like most legislation dealing with the environment,<sup>378</sup> provides a list of environmental crimes. (They appear in Schedule 3.) Section 34(1) of NEMA permits the organ of state or private party that has incurred costs to rehabilitate the environment from damage caused by an environmental crime to reclaim the costs from the convicted criminal in the criminal trial. The successful party need not lodge a separate civil claim.<sup>379</sup> In addition, the criminal court may assess the financial advantage, if any, that the offender gained as a result of the environmental crime and order the offender to pay back the fruits of the crime as damages, compensation or a fine.<sup>380</sup> The offender may even be required to pay the costs of the prosecution of the crime.<sup>381</sup>

One of the most important innovations of s 34 of NEMA is the introduction of strict criminal liability for environmental crimes. It holds employers and directors of companies criminally liable for the environmental crimes committed by their employees or companies if they failed to take all reasonable steps that were necessary under the circumstances to prevent the commission of the offence.<sup>382</sup> All directors of companies, whether executive or non-executive, can be found criminally liable — and fined or imprisoned — if they do not act reasonably in their executive capacity and ensure that the company meets its duty of care to prevent environmental degradation. Liability is not, however, limited to the employer. A manager, an agent or an employee may also be found guilty of the environmental crime and treated as if they were the employer.<sup>383</sup>

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378 An exception to this is that a failure to exercise your duty of care to prevent pollution under NEMA s 28 is not listed as an environmental crime in Schedule 3.

379 NEMA s 34(2).

380 In terms of NEMA s 34(3).

381 NEMA s 34(4).

382 NEMA s (9) reads:

In subsection (7) and (8) —

(a) 'firm' shall mean a body incorporated by or in terms of any law as well as a partnership; and

(b) 'director' shall mean a member of the board, executive committee, or other managing body of a corporate body and, in the case of a close corporation, a member of that close corporation or in the case of a partnership, a member of that partnership.

383 NEMA s 34(6).

Poor enforcement of environmental law by state authorities has been a serious problem for South African environmental law. In an attempt to remedy the problem, s 34 of NEMA was amended to grant Environmental Management Inspectors ('EMIs') extremely broad powers of search, seizure and arrest.<sup>384</sup> The EMIs, also known as the 'Green Scorpions', have already undertaken investigations that have led to the successful prosecution of several environmental crimes.

### **(dd) Declaration of rights<sup>385</sup>**

In a declaratory order, the court makes a declaration in respect of the rights and duties of the parties in a dispute. The declaration, unlike an interdict, does not direct the parties to take specific action. It merely requires that the parties not act in contravention of the legal position set out by the court's order. In *Myburg Park Langebaan (Pty) Ltd v Langebaan Municipality & Others*, the applicant sought a declaration of rights that the requirements of s 22(1) of the Environmental Conservation Act relating to written authorisation were not applicable in relation to a proposed development scheme.<sup>386</sup> Selikowitz J used his power under 19(1)(a)(iii) of the Supreme Court Act<sup>387</sup> to grant the declaration. He reiterated the two-stage process for granting a declarator: First, the applicant must be a person 'interested' in an 'existing, future or contingent right or obligation'. Secondly, if the applicant is such an interested person the court must decide whether the case is a proper one in which to exercise its discretion to grant a declarator.<sup>388</sup> In *Myburg*, only the court could 'clear the decks' to allow the applicant to proceed with its development.<sup>389</sup>

### **(ee) Contractual obligations**

The entities most likely to violate FC s 24 are corporations in the mining, steel, forestry, construction, engineering and manufacturing sectors. Remedies in environmental dispute settlement will often, therefore, include contractual remedies. Contractual remedies traditionally include: (1) specific performance; (2) interdict; (3) declaration of rights; (4) cancellation; and (5) damages.

Here is but one example of how contractual claims can arise in an environmental context. In *Grand Mines (Pty) Ltd v Giddey NO*, the respondent, liquidator of Bercon, sued Grand Mines in terms of a contract.<sup>390</sup> The contract required Bercon to mine coal from a site owned by Grand Mines and then deliver it to Grand Mines. Bercon

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384 See NEMA ss 34A-34G, inserted by National Environmental Management Amendment Act 46 of 2003 s 7, as amended by the National Environmental Laws Amendment Act 44 of 2008. See generally F Craigie, P Snijman & M Fourie 'Environmental Compliance and Enforcement Institutions' in A Paterson & LJ Kotze *Environmental Compliance and Enforcement in South Africa* (2009) 88-96.

385 For more on declarations of rights in constitutional cases, see Bishop (supra) at §9.5(b).

386 2001 (4) SA 1144 (C) ('*Myburg Park*').

387 Act 59 of 1959.

388 *Myburg Park* (supra) at 1153A quoting *Reinecke v Incorporated General Insurance Ltd* 1974 (2) SA 84, 93A-C (A).

389 *Ibid* at 1154C.



was, in turn, paid for the coal delivered. Bercon sued Grand Mines for not paying for all the delivered coal. Bercon was, however, under a contractual obligation to rehabilitate the site during the mining process. Bercon fell behind with the rehabilitation and did not fulfil its contractual obligations. Grand Mine's defence to the respondent's suit relied on the *exceptio non adimpleti contractus*. It maintained that Bercon's obligation to rehabilitate was reciprocal to its obligation to pay. Smalberger JA rejected the defence:

notwithstanding the bilateral nature of their contract and the degree of interdependence between payment and rehabilitation, the parties could not have intended that they would be

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reciprocal obligations in the strict sense ... [Grand Mines]...could not raise the *exceptio* as the payment and rehabilitation were not reciprocal obligations.<sup>391</sup>

### **(ff) Delictual damages**

Delictual damages are awarded to a party based on the foundational principle that a wronged party should be placed in the position that person would have been in had the wrongful act not occurred. In environmental disputes, damages could take the form of eliminating immediate threats to the environment, emergency clean up or renewal operations, long-term clean up operations and addressing damage to natural resources. For instance, in *Dews & Another v Simon's Town Municipality*, the plaintiff's properties were damaged by 'contained' fires started by the respondent in good faith.<sup>392</sup> The respondent claimed to be exempt from liability in terms s 87 of the Forest Act.<sup>393</sup> The court issued judgment in favour of the plaintiffs.<sup>394</sup>

### **(gg) Constitutional remedies**

As mentioned earlier, under FC s 24 and FC s 38, courts can declare laws, regulations or other measures invalid or unconstitutional. These provisions also empower courts to award damages, order interdicts or administrative remedies or issue a declaration of rights.<sup>395</sup> The relationship between constitutional remedies and their common-law and statutory counterparts is complicated.<sup>396</sup> In short, litigants should always rely first on non-constitutional remedies.<sup>397</sup> Only when those remedies are inadequate to protect the right to a healthy environment should litigants rely on

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390 1999 (1) SA 960 (SCA).

391 Ibid at 967D-G. See also *Government of the Province of the Eastern Cape v Frontier Safaris (Pty) Ltd* and *Government of the Province of the Eastern Cape v Frontier Safaris (Pty) Ltd* 1998 (2) SA 19 (SCA)(The government brought a special plea arguing that a contract that gave a private party control over a game reserve was void *ab initio* because it was contrary to legislation requiring the government to maintain control of the parks. The High Court rejected the argument on the grounds that the legislation was permissive and that the contract made clear that the government retained residual control.).

392 1991 (4) SA 479 (C).

393 Act 122 of 1984.

394 Other South African cases in which damages were awarded for harm to the environment include *HL & H Timber Products (Pty) Ltd v Sappi Manufacturing (Pty) Ltd* 2001(4) SA 814 (SCA); *Johannesburg City Council v Television & Electrical Distributors ((Pty) Ltd* 1997 (1) SA 157 (A); *Louw & Others v Long* 1990 (3) SA 45 (E); and *Viljoen v Smith* 1997 (1) SA 309 (A).

FC s 38 to either expand the reach of the existing remedies or craft a brand new, purely constitutional remedy.

### **(hh) Costs**

Section 32(2) of NEMA encourages the litigation of environmental cases by giving courts a discretion whether to award costs against an unsuccessful applicant. A court can decline to order costs if the applicant acted 'reasonably out of a concern for the public interest or in the interest of protecting the environment

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and had made due efforts to use other means reasonably available for obtaining the relief sought'. This statutory power reflects the general approach to costs in constitutional litigation.<sup>398</sup>

In *Silvermine Valley Coalition v Sybrand Van der Spuy Boerdery & Others*, Davis J decided not to award costs against the applicant non-governmental organisation ('NGO') that had failed to secure an interdict compelling the respondent to conduct an EIA.<sup>399</sup> Davis J wrote:

The fact, however, remains that applicant had acted in the public interest, in terms of a reasonable interpretation of the regulations and, furthermore, after a failure on the part of the authorities to protect the precious environment within the Cape Peninsula. The manner in which this case has come before this Court is unfortunate. Had [the state] performed its environmental stewardship, it would not have been necessary for an NGO to have so acted. Unfortunately the manner in which this dispute has been placed before this Court leaves it with no other alternative than to rule on the basis of the relief sought. However, that does not mean that the Court should not exercise its discretion insofar as costs are concerned. In further support of this particular conclusion it seems to me that NGOs should not have unnecessary obstacles placed in their way when they act in a manner designed to hold the State and indeed the private community accountable to the constitutional commitments of our new society, which includes the protection of the environment.<sup>400</sup>

In contrast, the court in *Eagles Landing Body Corporate v Molewa NO & Others* decided not to waive costs against an unsuccessful applicant.<sup>401</sup> The High Court

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395 For a detailed discussion of constitutional remedies see J de Waal, I Currie & G Erasmus *The Bill of Rights Handbook* (2000) 154; M Bishop 'Remedies' in S Woolman, T Roux & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, June 2008) Chapter 9.

396 See Bishop (supra) at §9.2(f).

397 *Fose v Minister of Safety and Security* 1997 (3) SA 786 (CC), 1997 (7) BCLR 851 (CC), [1997] ZACC 6.

398 For a detailed discussion of costs in constitutional cases, see A Friedman & M Bishop 'Costs' in S Woolman, T Roux & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, RS2, October 2010) Chapter 6.

399 2002 (1) SA 478 (C).

400 Ibid at 493.

401 2003 (1) SA 412, 445 (T).

found that parties had not acted in the public interest in order to protect the environment, but had rather sought to protect their members' individual property interests.

The Constitutional Court — in *Biowatch Trust v Registrar Genetic Resources & Others*<sup>402</sup> — recently summarised the appropriate approach to costs in constitutional disputes and constructed clear principles to govern a court's discretion in such disputes. The High Court<sup>403</sup> had granted two adverse costs awards against Biowatch — an 'environmental watchdog'<sup>404</sup> — that was litigating in the public interest to obtain information about genetically modified organisms ('GMO'). The Registrar, Genetic Resources ('the Registrar'), the government authority responsible for the information, had denied Biowatch's request for information. Biowatch had no option but to sue. A company involved in GMO production, Monsanto, intervened in the litigation to prevent Biowatch from gaining access to confidential information held by the Registrar. Biowatch was largely successful in its application and secured access to eight out of 11 categories of information it sought (including the release of some information that Monsanto had attempted to block). However, because it felt that Biowatch had framed its request for information vaguely and ineptly, the High Court did not grant a costs order against the Registrar and

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other governmental bodies involved. In addition, it ordered Biowatch to pay Monsanto's costs because the vague request for information by Biowatch had forced the company to intervene to protect its interests.

In a unanimous judgment authored by Sachs J, the Constitutional Court reversed *both* costs awards. First, Sachs J firmly rejected a suggestion by Biowatch that it should be treated differently because it was a public interest NGO:

Equal protection under the law requires that costs awards not be dependent on whether the parties are acting in their own interests or in the public interest. Nor should they be determined by whether the parties are financially well-endowed or indigent or, as in the case of many NGOs, reliant on external funding. The primary consideration in constitutional litigation must be the way in which a costs order would hinder or promote the advancement of constitutional justice.<sup>405</sup>

In litigation between a private party and the state, the Constitutional Court re-asserted the general rule initially laid down in *Affordable Medicines Trust v Minister of Health*:<sup>406</sup> if the private party wins, the government must pay its costs, but if the private party loses, each party should bear its own costs.<sup>407</sup> That rule was designed, primarily, so as not to discourage potential litigants from asserting constitutional

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402 [2009] ZACC 14 ('*Biowatch*').

403 2005 (4) SA 111 (T).

404 *Biowatch* (supra) at para 2.

405 *Biowatch* (supra) at para 16.

406 2006 (3) SA 247 (CC), 2005 (6) BCLR 529 (CC), [2005] ZACC 3 at para 138.

407 *Biowatch* (supra) at para 21.

claims. When it came to constitutional disputes between two private parties, Sachs J argued that constitutional disputes between private parties are ‘far more likely to arise’ as a result of the state’s failure to regulate the relationship between private parties than as pure private disputes with no state involvement.<sup>408</sup> In these cases ‘the dispute turns on whether the governmental agencies have failed adequately to fulfil their constitutional and statutory responsibilities.’<sup>409</sup> As the dispute in *Biowatch* suggests, this situation is particularly likely to arise in environmental disputes where government regulation is all but ubiquitous. Justice Sachs summarised the rule in these cases as follows:

[T]he state should bear the costs of litigants who have been successful against it, and ordinarily there should be no costs orders against any private litigants who have become involved. This approach locates the risk for costs at the correct door — at the end of the day, it was the state that had control over its conduct.<sup>410</sup>

On the facts, Sachs J stressed that the dispute had not arisen from the conduct of either *Biowatch* or Monsanto, but from the state’s failure to regulate the dispute.<sup>411</sup> He therefore ordered the state to pay *Biowatch*’s costs and Monsanto to bear its own costs. The *Biowatch* principles ensure that all people or groups with legitimate concerns about harm to the environment can litigate to prevent or remedy without the fear of adverse costs orders.

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408 Ibid at para 28.

409 Ibid.

410 Ibid at para 56.

411 Ibid at para 59.