

# The promotion of environmental justice through the lens of civil-based environmental governance in South Africa

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## **ABSTRACT**

Civil society has a significant role to play in promoting environmental justice, particularly through the lens of civil-based environmental governance. Civil-based instruments such as public participation, access to information, and access to justice may provide remedies for past inequalities and lead to outcomes that are more just by recognising all members of society and thereby empowering them to participate in environmental governance. Therefore, this dissertation seeks to argue that procedural environmental justice is promoted through the use of these civil-based instruments, as the public is recognised as an important stakeholder within the environmental governance regime while being given the opportunity to participate in environmental decision-making, enforcement and compliance. This will be done by establishing a link between the environmental right enshrined in the Constitution and environmental justice, determining whether or not civil-based instruments have been applied in the context of the environmental right, and establishing the extent to which this application of civil-based instruments has promoted environmental justice.

Keywords: environmental justice, civil-based instruments, public participation, access to information, access to justice, environmental right, civil society

## OPSOMMING

Die samelewing speel 'n belangrike rol in die bevordering van omgewingsgeregtigheid, veral deur 'n lens van burgerlikgebaseerde omgewingsbestuur. Burgerlike instrumente soos openbare deelname, toegang tot inligting, en toegang tot die reg kan 'n rol speel om die ongelykhede van die verlede reg te stel en kan lei tot uitkomstes wat meer regverdig is deurdat daar erkenning aan alle lede van die samelewing is en sodoende hulle bemagtig om deel te neem aan omgewingsbestuur. Daarom, argumenteer hierdie verhandeling dat die prosedurele aspekte van omgewingsgeregtigheid bevorder is deur die gebruik van hierdie burgerlike instrumente, want sodoende word die publiek erken as 'n belanghebbende binne die omgewingsbestuurraamwerk terwyl hulle die geleentheid gegee word om deel te neem aan omgewingsbesluite, handhawing en nakoming. Om dit te doen sal hierdie verhandeling 'n verhouding stig tussen die omgewingsreg in die Grondwet en omgewingsgeregtigheid; dit sal bepaal word of burgerlike instrumente in hierdie konteks van die omgewingsreg toegepas was; en tot watter mate hierdie toepassing van burgerlike instrumente wel omgewingsgeregtigheid bevorder het.

Sleutelwoorde: omgewingsgeregtigheid, burgerlike instrumente, openbare deelname, toegang tot inligting, toegang tot die reg, die omgewingsreg, die samelewing

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## LIST OF ABBREVIATIONS

ACHPR	African Commission on Human and Peoples' Rights
ANC	African National Congress
CBI	Civil-based instruments
CC	Constitutional Court
CER	Centre for Environmental Rights
DEA	Department of Environmental Affairs
ECLAC	Economic Commission for Latin America and the Caribbean
EIA	Environmental Impact Assessment
EJNF	Environmental Justice Networking Forum
GG	Government Gazette
GMO	Genetically Modified Organism
GN	Government notice
I&APs	Interested and Affected Parties
J Land Resources & Env'tl L	Journal of Land Resources and Environmental Law
LEAD	Law, Environment and Development Journal
MBI	Market-based instrument
NDP	National Development Plan
NECER	National Environmental Compliance and Enforcement Report

NEMA	National Environmental Management Act
NEM:AQA	National Environmental Management: Air Quality Act
NEM:WA	National Environmental Management: Waste Act
NGO	Non-governmental Organisation
NWA	National Water Act
OECD	Organisation for Economic Co-operation and Development
PAIA	Promotion of Access to Information Act
PELJ	Potchefstroom Electronic Law Journal
RECIEL	Review of European Comparative & International Environmental Law
RFF	Resources for the Future
SAHRC	South African Human Rights Commission
SAJELP	South African Journal on Environmental Law & Policy
SAJHR	South African Journal on Human Rights
SALJ	South African Law Journal
SAPOA	South African Property Owners Association
SCA	Supreme Court of Appeal
SEMA	Specific Environmental Management Act
SERAC	Social and Economic Rights Action Centre and the Centre for Economic and Social Rights
SGHC	South Gauteng High Court

SLAPP	Strategic Litigation Against Public Participation
STA	Sectional Titles Act
Stan J Int'l L	Stanford Journal of International Law
Stell LR	Stellenbosch Law Review
The Geo Wash Int'l Rev	The George Washington International Law Review
UN	United Nations
UNEP	United Nations Environmental Programme
USA	United States of America
USEPA	United States Environmental Protection Agency
VEJA	Vaal Environmental Justice Alliance
WESSA	Wildlife and Environmental Society of Southern Africa

# Chapter 1 Introduction

## 1 Introduction

South Africa boasts a rich natural heritage. Nevertheless, this heritage has largely been masked by racial oppression, which has seen the majority of the people in South Africa excluded from enjoying it. In particular, colonial and apartheid governance regimes favoured a small white minority and placed great importance on the need to safeguard and conserve the environment, and in the process displaced communities from their ancestral lands and homesteads without compensation.<sup>1</sup> This, amongst other such examples of manipulation, fostered a legacy of environmental injustice in South Africa and created social and environmental obstacles that still need to be overcome today.

With the birth of democracy in South Africa, a new era of constitutionalism and environmentalism dawned, with importance placed on environmental justice as it relates to the constitutional value of equality.<sup>2</sup> While there is no universally accepted definition of environmental justice, it relates fundamentally to the equitable distribution of environmental benefits and burdens; as well as to the recognition of identity and group differences within society, which allows for greater participation within environmental decision-making.<sup>3</sup> It is an approach that links social issues with the environment and places people at the centre of such interaction.<sup>4</sup> In essence, environmental justice highlights the injustices that arise as a result of environmentally-related economic and social issues and thereby advocates for means by which to rectify such injustice.<sup>5</sup>

Enshrined in the *Constitution of the Republic of South Africa, 1996*<sup>6</sup> (the Constitution) is the environmental right which states that “[e]veryone has the right to an environment that is not harmful to their health or well-being”.<sup>7</sup> As the foundation of the constitutional protection of the environment in South Africa, this right must, *inter alia*, address the

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<sup>1</sup> McDonald “What is Environmental Justice?” 1.

<sup>2</sup> S 1(a) of the Constitution states that South African is founded on the values of human dignity, equality and freedom. Similarly, s 7(1) of the Constitution states that the Bill of Rights affirms these values.

<sup>3</sup> Schlosberg 2007 *Environmental Politics* 537.

<sup>4</sup> MacDonal “What is Environmental Justice?” 3.

<sup>5</sup> MacDonal “What is Environmental Justice?” 3.

<sup>6</sup> Constitution of the Republic of South Africa, 1996.

<sup>7</sup> S 24 of the Constitution.

historical injustices and enable people to live in an environment that permits health and well-being and promotes sustainable development,<sup>8</sup> as core objectives of the environmental right. Therefore the constitutional environmental right has a strong transformative element to it. If the environmental right enshrined in the Bill of Rights is not used effectively, then it denies people the right to its inherent social dimension – its ability to protect people’s right to live a life of human dignity where their health and well-being is not adversely affected.

The *National Environmental Management Act*<sup>9</sup> (NEMA) is the framework environmental act in South Africa that gives effect to the environmental right enshrined in the Constitution. NEMA is a statutory tool used to further realise the environmental right and similarly to promote environmental justice in South Africa. NEMA recognises environmental justice and equitable access to environmental resources and benefits as important principles that guide environmental governance.<sup>10</sup>

In addition to NEMA, and often based on these laws, civil-based instruments (CBIs) have been established and applied in environmental governance. These are structures and instruments which empower society to become involved in environmental enforcement and the protection of the environment, and which therefore foster the active participation of civil society within environmental governance.<sup>11</sup> Civil instruments include, *inter alia*, public participation, access to information and access to justice through broad *locus standi* provisions.

Through these instruments, society is given a greater platform to highlight disparities within the environmental governance regime and address them through active involvement in decision-making. In this sense, the public is recognised as co-governors or managers,<sup>12</sup> and members of the public are able to facilitate a move toward greater

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<sup>8</sup> S 24(b) states that everyone has the right to have the environment protected for the benefit of present and future generations.

<sup>9</sup> 107 of 1998.

<sup>10</sup> S 2 of NEMA. In addition to NEMA, there are several specific environmental management acts (SEMAs) that regulate sector-specific environmental management. Although they are vitally important in the environmental regulatory regime, the scope of this discussion does not allow for an analysis of environmental justice through CBIs provided for by the SEMAs. Therefore, the analysis will primarily focus on CBIs provided for by NEMA as the environmental framework legislation.

<sup>11</sup> Nel and du Plessis 2001 *SAJELP* 31.

<sup>12</sup> Nel and du Plessis 2001 *SAJELP* 31.

environmental justice through their recognition and participation, while asserting and protecting their own rights in this respect. Most generally, civil-based environmental governance instruments are used to assert, enforce and protect substantive entitlements derived from the panoply of environmental provisions in South Africa, including the environmental right.

This dissertation examines the extent to which civil-based environmental governance instruments have been applied in the context of the environmental right and its objectives to promote environmental justice in South Africa since 1996. This enquiry is threefold and primarily consists of three questions. Firstly, is there a link between enforcing and protecting the environmental right and environmental justice? Secondly, how have CBIs been applied in the context of the environmental right and its objectives? Thirdly, to what extent does this application of CBIs promote environmental justice?

This enquiry is unique as it seeks to directly situate the debate about public participation, access to information and access to justice within the domain of CBIs specifically – a debate which has been largely fragmented in the past. By doing this, it also focuses the discussion of CBIs in the context of environmental justice and the role that CBIs play in promoting environmental justice. While there is ample literature on environmental justice,<sup>13</sup> it has not specifically dealt with the role of CBIs as procedural markers of environmental justice. Lastly, this dissertation is also one of the first studies to look at recent case law.

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<sup>13</sup> Ako RT *Environmental Justice in Developing Countries: Perspectives from Africa and Asia Pacific* (Routledge New York 2013); Hill BE *Environmental Justice: Legal Theory and Practice* 2nd ed (Environmental Law Institute Washington 2009); McDonald DA *Environmental Justice in South Africa* (University of Cape Town Press Cape Town 2002); Rechtschaffen C and Gauna E *Environmental Justice: Law, Policy and Regulation* (Carolina Academic Press North Carolina 2002); Low N and Gleeson B *Justice, society and nature: an exploration of political ecology* (Routledge London 1998); Patel Z “Environmental justice in South Africa: tools and trade-offs” 2009 *Social Dynamics* 94-110; Schlosberg D “Reconceiving Environmental Justice: Global Movements and Political Theories” 2007 *Environmental Politics* 517-540; Hillman M “Environmental justice: a crucial link between environmentalism and community development” 2002 *Community Development Journal* 349-360; Clayton S “Models of Justice in the Environmental Debate” 2000 *Journal of Social Issues* 459-474; Roberts RG “Environmental Justice and Community Empowerment: Learning from the Civil Rights Movement” 1998 *American University Law Review* 229-269.

To frame an accurate and holistic understanding of environmental justice, chapter 2 details the theoretical foundations of environmental justice. It seeks specifically to determine the origins, nature, scope and extent of environmental justice as a theoretical concept and how this concept relates in practice to environmental justice movements observed internationally and more particularly in South Africa. The chapter includes a discussion on the foundations of justice in general, and environmental justice in particular, and a brief overview of the environmental justice movement internationally. The discussion further includes an in-depth analysis of environmental justice in South Africa, with the influence of historical injustices as a background to the environmental justices that are prevalent in the new constitutional dispensation.

Chapter 3 looks at the foundation of CBIs as regulatory instruments in environmental governance. It seeks firstly to determine the role of CBIs within the broader regulatory framework and secondly, how CBIs relate to environmental justice. Therefore, to determine the role of CBIs within the environmental governance regime chapter 3 will start with a brief explanation of CBIs within governance itself and an analysis of the need for CBIs in environmental governance in relation to other regulatory instruments. To establish a clear picture of the importance of CBIs requires a brief explanation of the nature and scope of the other regulatory instruments including command and control, market-based and voluntary instruments. This analysis highlights the importance of CBIs, their use in environmental governance and the need thereof in South Africa. Chapter 3 concludes with an overview of the nature, scope and extent of the CBIs that will be analysed in chapter 4, including public participation, access to information and access to justice.

Following on from the foundational/conceptual analysis set out in chapters 2 and 3, chapter 4 will include an analysis of the use of CBIs within the context of the environmental right by examining the Constitution, the South African environmental framework legislation and various court cases. While provisions in specific environmental management acts may be relevant to this discussion, in the interests of space this study will focus only on the relevant provisions in the Constitution and NEMA and case law.<sup>14</sup> Chapter 5 will seek to determine the extent to which this use and

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<sup>14</sup> And PAIA, under the discussion of access to information.

application of CBIs has promoted environmental justice. The analysis in chapter 5 will conclude with some broad recommendations and a few general notes on the possible future research agenda regarding the role of CBIs in environmental justice.

## Chapter 2 Environmental justice

### 2 Environmental justice

Environmental justice means different things to different people based on various political, social and economic factors and contexts.<sup>15</sup> As a result, various models of environmental justice have been proposed. The concept was first formally noted in the United States of America (USA), but the pursuit thereof has not been limited to the borders of the USA. The quest for environmental justice is also relevant to South Africa, which has a particularly stark history of oppression and injustice. The dawn of a new democratic era through the adoption of the Constitution brought with it a renewed hope for attaining human dignity, equality and freedom for all people in South Africa, especially the indigent. This renewed hope is based on the premise that the Constitution is viewed as being transformative in nature. As stated in *S v Makwanyane*:<sup>16</sup> “[W]hat the Constitution expressly aspires to do is to provide a transition from these grossly unacceptable features of the past to a conspicuously contrasting... future.”<sup>17</sup>

In this sense, the notion of transformation plays an important role in interpreting the Constitution,<sup>18</sup> as it provides a platform to remedy the injustices and inequalities of the past. This is also alluded to in the Preamble of the Constitution where it is stated: “the Constitution is adopted as the supreme law... to heal the divisions of the past and establish a society based on democratic values, social justice and fundamental human rights.”<sup>19</sup> The hypothesis of this chapter is that transformation, in the light of the Constitution, provides the means to cultivate greater justice in South Africa, including environmental justice. To do this, this chapter seeks to determine the origins, nature, scope and extent of environmental justice as a theoretical concept and how this relates

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<sup>15</sup> Ako *Environmental Justice in Developing Countries* 1.

<sup>16</sup> 1995 (3) SA 391 (CC).

<sup>17</sup> Para 262.

<sup>18</sup> Langa 2006 *Stell LR* 351.

<sup>19</sup> Preamble of the Constitution.

in practice to environmental justice movements observed internationally and more particularly in South Africa.

Therefore environmental justice will be discussed in this chapter within this transformative context provided for by the Constitution. In order to frame an accurate and holistic understanding of environmental justice, the theoretical foundations of justice in general will be discussed as a basis of environmental justice. This includes a discussion of the most pertinent qualities of justice found in literature, such as the distribution of benefits and burdens established through Rawls' hypothetical "veil of ignorance",<sup>20</sup> and the recognition of identities and group differences within society proposed by Young,<sup>21</sup> amongst others. Once the theoretical foundations of justice have been set, the means by which these qualities of justice translates to environmental justice will be discussed, including the equitable distribution of environmental benefits and burdens and the subsequent recognition of identity and participation in environmental decision-making.

To foster a clearer understanding of the origins and development of environmental justice and to set the tone for establishing a definition of environmental justice in South Africa, a brief discussion of the history of the environmental justice movement will be provided, with specific focus on its origins in the USA. Because the notion of environmental justice is not confined to the USA, a brief overview of the development of environmental justice in international and regional instruments will be given. While this is by no means intended to be a comprehensive comparative review, this will set the scene as it were, and build the epistemological platform from which the notional development of environmental justice in South Africa will be discussed.

Within the South African context, the discriminatory regimes and policies of the past had an impact on environmental justice. The extent of this impact and the influence of democracy on the further development of the environmental justice movement in South Africa will be discussed with reference to some challenges experienced by the movement. Finally, it will be argued that environmental justice is recognised by the

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<sup>20</sup> Rawls *A Theory of Justice* 12.

<sup>21</sup> Young *Justice and the Politics of Difference* 1.

Constitution through the constitutionally enshrined environmental right's promotion of sustainable development.

## **2.1 Theoretical foundations of justice**

Defining justice in absolute terms has proven to be relatively difficult, as noted by the collection of discourse surrounding the notion of justice. This dates back to the time of Plato and Aristotle, who defined justice within the context of virtues, of which justice was the “chief of virtues... [the] perfect virtue”.<sup>22</sup> Kelsen<sup>23</sup> notes that justice arises from a conflict of interests and cannot be absolute by human reasoning, as it entails subjective value judgements that will differ depending on the context in which justice is sought. Thus, he defines justice to be “a social order under whose protection the search for truth can prosper.”<sup>24</sup> Black’s Law Dictionary<sup>25</sup> defines justice as “the fair and proper administration of law.”

Needless to say, ample literature exists on the concept of justice, and while models of justice may vary, equality as a central notion is usually fundamental to the discourse on justice,<sup>26</sup> including environmental justice.<sup>27</sup> To understand the precepts found within environmental justice, many scholars start with a discussion of Rawls’ theory of justice.<sup>28</sup> Although taken within a context where principles are established that seek to govern a just society as a whole,<sup>29</sup> it may also set a foundation for theories of justice focused on the environment, as the environment forms an integral part of modern society.

Rawls<sup>30</sup> maintains that principles of justice should be established under a hypothetical “veil of ignorance” where nobody is aware of their social stance. This “original position” of equality would lead to a fair distribution of social and economic benefits and harms. While this is, admittedly, a very idealistic view, Rawls’ theory embraces the notion that

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<sup>22</sup> Aristotle *The Nicomachean Ethics* 1129b as cited in Kelsen *What is Justice?* 18.

<sup>23</sup> Kelsen *What is Justice?* 7.

<sup>24</sup> Kelsen *What is Justice?* 24.

<sup>25</sup> Garner *Black’s Law Dictionary* 942.

<sup>26</sup> Rawls *A Theory of Justice* 440.

<sup>27</sup> Clayton 2000 *Journal of Social Justice* 461.

<sup>28</sup> Rawls *A Theory of Justice*.

<sup>29</sup> Kukathas and Pettit *Rawls: A Theory of Justice and its Critics* 36.

<sup>30</sup> Rawls *A Theory of Justice* 12.

fairness is central to justice and that the distribution of wealth and resources within society is fundamental to defining and shaping justice.<sup>31</sup>

While Young<sup>32</sup> acknowledges that the distribution of benefits and burdens as a physical act is central to the notion of social justice, she argues that it is not solely reliant thereon, since factors that reflect the social, cultural and institutional conditions fundamental to such distribution should also be taken into account. Accordingly, injustice does not merely arise where the distribution of benefits and burdens is found to be inequitable, but also in cases where identity<sup>33</sup> and group differences are not acknowledged or recognised.<sup>34</sup> This is particularly relevant in the South African context, as non-whites were historically marginalised and their group differences not recognised.

Similarly, Fraser<sup>35</sup> avers that justice requires elements of both distribution and recognition, and identifies a link between the lack of identity or recognition and reduced participation in the social and political spheres. Thus, while Rawls explores the ideals within the process of justice, Young and Fraser deal with the weaknesses of these idealistic processes by considering the reasons behind inequity, and subsequently focus on ways in which such weaknesses can be addressed.<sup>36</sup>

The inclusion of recognition within the justice paradigm allows for all members of society to participate within the decision-making process. Therefore, the framework of justice should include political procedures that address distribution and recognition respectively.<sup>37</sup> In this sense, procedures which facilitate participatory decision-making are seen as an element of justice as well as a prerequisite thereof.<sup>38</sup> Therefore, justice can be understood in a procedural sense through processes that facilitate greater recognition and participation, as well as in a substantive sense through the equitable

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<sup>31</sup> *Ako Environmental Justice in Developing Countries* 5.

<sup>32</sup> *Young Justice and the Politics of Difference* 1.

<sup>33</sup> Schlosberg notes that identity does not refer to the identity itself, but rather to the relationship between identity and different forms of oppression and injustice. See Schlosberg 2007 *Environmental Politics* 538.

<sup>34</sup> *Young Justice and the Politics of Difference* 1.

<sup>35</sup> Fraser "Social Justice in an Age of Identity Politics" 9.

<sup>36</sup> Schlosberg 2007 *Environmental Politics* 519.

<sup>37</sup> Schlosberg 2007 *Environmental Politics* 519.

<sup>38</sup> *Young Justice and the Politics of Difference* 23.

distribution of benefits and burdens; an interpretative approach that is usefully accommodative of this study's central theme.

## **2.2 Justice in the environmental context**

Although these theories of justice focus on the social aspect of justice, similar models of justice within the environmental context have been proposed, particularly relating to the distribution of environmental benefits and burdens, with some references to recognition and participation in decision-making. Low and Gleeson<sup>39</sup> place the emphasis on the distribution of environmental quality as the crux of environmental justice. They maintain that environmental quality consists of both harmful and beneficial elements which are distributed among individuals and communities, usually according to social indicators relating to race and class.<sup>40</sup>

While Low and Gleeson recognise that justice is a “universal moral relationship” shared by people that “has to be interpreted through culturally specific institutions which will vary”,<sup>41</sup> they do not link these variations to the recognition of group differences or identity as a component of environmental justice. This may result in the procedural aspects of environmental justice which, *inter alia*, facilitate society's participation in decision-making and governance, being overlooked because people are not recognised and therefore cannot participate in decisions that affect them.

Similarly, Achterberg<sup>42</sup> argues for a liberal-egalitarian concept of environmental justice. His point of departure is Dworkin's presumption that “the interests of members of the community matter, and matter equally”. Fundamentally, Achterberg's concept of environmental justice seeks the equitable distribution of resources and environmental interests among and between generations. Equity as part of environmental justice is therefore fundamental when determining the distribution of environmental benefits and burdens. In this regards, Shelton<sup>43</sup> notes that equity “can allow for exceptions to an otherwise uniformly applied law, in order to provide individualized justice.” In other

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<sup>39</sup> Low and Gleeson *Justice, society and nature* 133.

<sup>40</sup> Low and Gleeson *Justice, society and nature* 103.

<sup>41</sup> Low and Gleeson *Justice, society and nature* 67.

<sup>42</sup> Achterberg “Environmental Justice and Global Democracy” 184.

<sup>43</sup> Shelton “Using law and equity for the poor and the environment” 17.

words, factual situations relating to the law will be treated differently in order to achieve a just result.

Although these are arguably comprehensive concepts of environmental justice, Schlosberg<sup>44</sup> notes that the global environmental justice movement takes into account many demands including “[d]emands for the recognition of cultural identity... which cannot be separated from distributional issues.” He argues that environmental justice, in practice, is complex and diverse as organisations cater for various needs and notions of environmental justice while providing for the integration of such notions.<sup>45</sup> In this sense, recognition is fundamental to environmental justice in a democratic society, as it could foster the equitable distribution of environmental resources and interests and facilitate greater participation.

Schlosberg does not completely denounce notions of distributional environmental justice, but instead emphasises the possibility of collaboration and interaction amongst various notions of environmental justice. Similarly, Wenz<sup>46</sup> takes a pluralistic approach to environmental justice, noting that it may be understood in different ways depending on the context, where differing notions of environmental justice will address various issues, as “priorities change according to context”.<sup>47</sup> Although this does not create uniformity in recognising a single, uniformed definition of environmental justice, it does facilitate a unified, multidimensional stance on different issues relating to environmental justice.<sup>48</sup>

This allows for a broader interpretation of environmental injustice and facilitates in assisting more people that suffer from injustices relating to the environment. However, fragmentation and the eventual weakening of the energies required to engage in social struggle may also occur as a result of trying to maintain the multitude of interests. For example, the Environmental Justice Networking Forum (EJNF), a network committed to social transformation through a broad definition of environmental justice in South Africa,

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<sup>44</sup> Schlosberg 2007 *Environmental Politics* 537.

<sup>45</sup> Schlosberg 2007 *Environmental Politics* 533.

<sup>46</sup> Wenz PS *Environmental Justice* (New York Press New York 1988) as cited in Schlosberg 2007 *Environmental Politics* 533.

<sup>47</sup> Schlosberg 2007 *Environmental Politics* 533.

<sup>48</sup> Schlosberg 2007 *Environmental Politics* 534.

disintegrated in 2005 as a result of difficulties arising from the diverse interests that were accommodated by the EJNFs expanded definition of environmental justice.<sup>49</sup>

In practice, the distribution of environmental benefits and burdens, recognition and participation are provided for through substantive and procedural environmental justice. Substantive environmental justice fundamentally seeks the equitable distribution of environmental benefits and burdens. Therefore, the crux of substantive environmental justice is founded on equity. Procedural environmental justice, on the other hand, advocates for the recognition of group differences and subsequently, the active involvement and participation in decision-making and governance,<sup>50</sup> while providing the means to achieve equitable distribution of environmental benefits and burdens. The substantive aspect of environmental justice is therefore entirely contingent on the procedural aspects of environmental justice, notably to the extent that the substantive aspects can be achieved only by means of procedural aspects.

Thus, Ako<sup>51</sup> argues that the objective of substantive environmental justice is achieved through procedural measures which ensure equitable distribution, recognition and participation. In essence, the challenge surrounding environmental justice is ensuring that substantive and procedural measures allow for all members of society to participate in ensuring that environmental justice is attained, particularly for those members who do not have the political and economic means to do so.<sup>52</sup>

## **2.3 The environmental justice movement**

### *2.3.1 Origins of environmental justice: USA*

The environmental justice movement found its roots in the USA in the 1980s, where ethnic minorities alleged that environmental risks such as waste sites were predominantly placed within communities of colour – constituting “environmental racism”.<sup>53</sup> The movement was said to be an extension of the Civil Rights Movement that

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<sup>49</sup> Dugard and Alcaro 2013 *SAJHR* 19.

<sup>50</sup> Hillman 2002 *Community Development Journal* 351.

<sup>51</sup> Ako *Environmental Justice in Developing Countries* 7.

<sup>52</sup> Ako *Environmental Justice in Developing Countries* 7.

<sup>53</sup> Rechtschaffen and Gauna *Environmental Justice* 3; Ako *Environmental Justice in Developing Countries* 1.

occurred in the 1960s in the country, which focused mainly on social injustice and institutional discrimination and therefore went beyond the scope of mere environmental issues.<sup>54</sup> As a result, its scope later broadened to include a multi-issue movement of disproportionalities concerning both race and economic factors.<sup>55</sup>

The concept of environmental justice in the USA has further developed over the years to place human health concerns at its core, regardless of race or economic status.<sup>56</sup> Therefore the United States Environmental Protection Agency (USEPA) defines environmental justice as:

...the fair treatment and meaningful involvement of all people regardless of race, color, national origin, or income with respect to the development, implementation, and enforcement of environmental laws, regulations and policies.<sup>57</sup>

It goes on further to define key concepts such as “fair treatment” and “meaningful involvement”, which address both substantive and procedural elements of environmental justice. While “fair treatment” substantively denotes that environmental resources and risks should not be allocated disproportionately, “meaningful involvement” seeks to include the affected communities within the decision-making process.<sup>58</sup> Therefore this definition moves beyond the concept of environmental justice as merely a racial issue and into a framework where anyone who is deprived of his or her environmental rights in the manner explained within the definition above, may be subject to an environmental justice issue. There are advantages and disadvantages to this broader notion of environmental justice. While a broader scope of environmental justice is able to assist more people who suffer injustices relating to the environment, the multitude of interests that are catered for within the broad definition of environmental justice may lead to all environmental struggles being captured by the environmental justice narrative, which could weaken this movement to sufficiently address injustices.

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<sup>54</sup> Roberts 1998 *American University Law Review* 232.

<sup>55</sup> Rechtschaffen and Gauna *Environmental Justice* 3.

<sup>56</sup> Hill *Environmental Justice* 3.

<sup>57</sup> USEPA 2004 <http://www.epa.gov>.

<sup>58</sup> Ako *Environmental Justice in Developing Countries* 2.

### 2.3.2 Environmental justice: international and regional instruments

International and regional instruments have also contributed to the development of environmental justice in conceptual and normative terms. *The Declaration of the United Nations Conference on the Human Environment (Stockholm Declaration)*<sup>59</sup> recognises substantive environmental justice:

Man has the fundamental right to freedom, equality and adequate conditions of life, in an environment of a quality that permits a life of dignity and well-being, and he bears a solemn responsibility to protect and improve the environment for present and future generations. *In this respect, policies promoting or perpetuating apartheid, racial segregation, discrimination, colonial and other forms of oppression and foreign domination stand condemned and must be eliminated.*<sup>60</sup>

This principle significantly links fundamental human rights to environmental quality and calls for the elimination of several forms of oppression. Similarly, the *Rio Declaration on the Environment and Development (Rio Declaration)*<sup>61</sup> acknowledges the importance of indigenous communities and urges states to recognise such communities and enable them to participate in decision-making.<sup>62</sup> The Rio Declaration further provides for procedural environmental justice in recognising that:

Environmental issues are best handled with participation of all concerned citizens, at the relevant level. At the national level, each individual shall have appropriate access to information concerning the environment that is held by public authorities, including information on hazardous materials and activities in their communities, and the opportunity to participate in decision-making processes. States shall facilitate and encourage public awareness and participation by making information widely available. Effective access to judicial and administrative proceedings, including redress and remedy, shall be provided.<sup>63</sup>

By advocating for public participation, access to environmental information and access to justice, the Rio Declaration very explicitly supports procedural environmental justice. This should encourage states to establish structural frameworks that promote these three instruments, and thereby facilitate greater realisation of environmental justice.

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<sup>59</sup> *The Declaration of the United Nations Conference on the Human Environment*, 1972.

<sup>60</sup> Principle 1 of the Stockholm Declaration. Own emphasis.

<sup>61</sup> *Rio Declaration on the Environment and Development*, 1992.

<sup>62</sup> Principle 22 of the Rio Declaration.

<sup>63</sup> Principle 10 of the Rio Declaration.

The *Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters* (Aarhus Convention)<sup>64</sup> is a leading example of the three instruments in Principle 10 of the Rio Declaration embedded in a single convention. The convention is open to all countries for ratification, it provides legally binding obligations on states to enforce the three instruments,<sup>65</sup> and it recognises the role of non-governmental organisations (NGOs) in environmental decision making,<sup>66</sup> which facilitates the procedural environmental justice at a regional level.

The North-American human rights system includes the *American Convention of Human Rights* (American Convention),<sup>67</sup> which originally included only political and civil rights but was later complemented by the *Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights* (San Salvador Protocol).<sup>68</sup> This Protocol provides for the right to a healthy environment,<sup>69</sup> and while there is no right to development included in the San Salvador Protocol, the Inter-American Commission on Human Rights (the Commission) has recognised the existence of such a right.<sup>70</sup> In this regard, the Commission has noted that:

... development activities must be accompanied by appropriate and effective measures to ensure that they do not proceed at the expense of the fundamental rights of persons who may be particularly and negatively affected, including indigenous communities and the environment upon which they depend for their physical, cultural and spiritual well-being.<sup>71</sup>

By recognising the rights of indigenous communities, the Commission supports environmental justice through recognising the group differences and identity.

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<sup>64</sup> *Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters*, 1998.

<sup>65</sup> Morgera 2005 *RECIEL* 138.

<sup>66</sup> Toth 2010 *J Land Resources & Envtl L* 295.

<sup>67</sup> *American Convention of Human Rights*, 1978.

<sup>68</sup> *Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights*, 1988.

<sup>69</sup> A 11 of the San Salvador Protocol.

<sup>70</sup> Shelton 2009 *The Geo Wash Int'l Rev* 755.

<sup>71</sup> *Maya Indigenous Communities of the Toledo District v Belize/Inter-American Commission Report No. 40/04*, 85 (2004).

On the African front, the *African Charter on Human and People's Rights* (the African Charter)<sup>72</sup> provides for a substantive right to a healthy environment. It states that “[a]ll people shall have the right to a general satisfactory environment favourable to their development.”<sup>73</sup> The *African Commission on Human and Peoples' Rights* (ACHPR) first considered the content of the environmental right in *SERAC & Another v Nigeria*.<sup>74</sup> The ACHPR established that the right requires states to:

... take reasonable measures to prevent pollution and ecological degradation; promote conservation and ensure ecological sustainable development and the use of natural resources; permit independent scientific monitoring of threatened environments; undertake environmental and social impact assessments prior to industrial development; provide access to information communities involved; and grant those affected an opportunity to be heard and participate in the development process.<sup>75</sup>

Therefore, the ACHPR identified various procedural aspects that are included in the environmental right to ensure the achievement of substantive rights.<sup>76</sup> These include the right to access to information for communities that are involved in proposed development activities, the right of affected community members to participate in the development process, and the right of those members to be heard, all of which are integral aspects in securing procedural environmental justice.

## **2.4 Defining environmental justice in South Africa**

The nature of environmental justice in South Africa must be understood within the country's historical context, which was marked primarily by environmental and other forms of injustice.<sup>77</sup> Although similar to environmental injustice in the USA there are also vast differences, including the degree to which oppressed people were affected, as South Africa experienced widespread inequality under the auspices of apartheid.<sup>78</sup> The

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<sup>72</sup> *African Charter on Human and People's Rights*, 1987.

<sup>73</sup> A24 of the African Charter.

<sup>74</sup> *Communication 155/96 Social and Economic Rights Action Centre and the Centre for Economic and Social Rights v Nigeria* October 2001. It was alleged that the Nigerian government had violated various rights within the African Charter, including the environmental right, through their direct involvement in oil production within the Niger Delta, and which subsequently led to environmental degradation and health problems among the Ogoni People.

<sup>75</sup> SERAC communication paras 52 and 53.

<sup>76</sup> *Ako Environmental Justice in Developing Countries* 18.

<sup>77</sup> For an in-depth analysis of the historical background of environmental injustice in South Africa see Khan “The Roots of Environmental Racism”.

<sup>78</sup> Kidd *Environmental Law* 301.

socio-economic structures of such oppressive policies have subsequently affected the relationship between people and their environment – further aggravating the problem of environmental injustice in South Africa.<sup>79</sup> For example, the overpopulation of non-white townships led to vast soil erosion and, coupled with a lack of infrastructure for electricity, water and sanitation, led to the overexploitation of wood resources as a fuel resource, and to water pollution within the areas.<sup>80</sup>

#### 2.4.1 *Environmental justice in South Africa: A historical perspective*

Environmental injustice finds its roots in South Africa in colonial conservation, where environmental protection practices predominantly favoured the white, affluent and middle-class minority, and disregarded the interests of the indigenous majority.<sup>81</sup> This laid the foundation for protecting the natural environment, but was accompanied by the forcible removal of non-white residents from their traditional homesteads and lands.<sup>82</sup> This process was exacerbated through the twentieth century with the introduction of segregation laws and, later, the implementation of apartheid as an official policy.

Thus, social justice within the political sphere was distorted, which distortion was reflected in the laws governing environmental protection in relation, among other things to people living without adequate shelter and clean water.<sup>83</sup> Similarly, the environment was not seen as relevant to the anti-apartheid struggle but rather as an instrument to be used by an elitist minority to further oppress people based on their race,<sup>84</sup> as the government showed little empathy towards the environmental sufferings experienced daily by non-whites in homelands and townships alike.<sup>85</sup> The apartheid government also promoted environmental conservation, which was enjoyed primarily by the white minority at the expense of the majority. The establishment of the Kruger National Park and restriction of access to the park to whites is an example.

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<sup>79</sup> Kidd *Environmental Law* 301; Steyn 2005 *Globalizations* 392.

<sup>80</sup> Steyn 2005 *Globalizations* 392.

<sup>81</sup> Khan “The Roots of Environmental Racism” 17.

<sup>82</sup> Khan “The Roots of Environmental Racism” 18.

<sup>83</sup> For an in-depth look at the effects of the apartheid regime see Steyn 2005 *Globalizations* 392-397.

<sup>84</sup> McDonald “What is Environmental Justice” 1.

<sup>85</sup> Steyn 2005 *Globalizations* 394. Although initiatives were later implemented in townships to address the environmental sufferings, Steyn argues that such efforts should not be seen as genuine attempts to improve the living conditions, but rather as attempts to pacify the increase in opposition as a result thereof.

As South Africa transitioned into a new democratic era in 1994, transformation percolated into environmental policy, which change allowed non-white South Africans the opportunity to formally challenge environmental issues, as the focus had shifted from political liberation to the realisation of fundamental human rights, including the right to a healthy environment.<sup>86</sup> Earlier, though, there had been a growing dialogue surrounding environmental justice in South Africa, which culminated in a conference in 1992 entitled “What Does it Mean to Be Green in the New South Africa”.<sup>87</sup> The conference, which occurred well before South Africa’s modern panoply of environmental laws were adopted, focused on outlining action that would need to be taken to attain environmental justice, and resulted in the establishment of the EJNF, which sought to coordinate the activities of organisations relating to issues of environmental justice in South Africa.<sup>88</sup> The EJNF defined environmental justice as relating to:

... social transformation directed towards meeting basic human needs and enhancing our quality of life – economic quality, health care, housing, human rights, environmental protection, and democracy. In linking environmental and social issues the environmental justice approach seeks to challenge the abuse of power which results in poor people having to suffer the effects of environmental damage caused by the greed of others .... In recognizing that environmental damage has the greatest impact upon poor people, EJNF seeks to ensure the right of the most affected to participate at all levels of environmental decision making.

This definition expanded the general definition of environmental justice, as the founders of the network believed that the environment includes “our workplace, home, hostel, town, village and city” alongside the natural environment.<sup>89</sup> With this, the environment was no longer defined as a sphere set aside for the minority, but rather as a place which included the interests of those oppressed by inequitable and fundamentally racist policies.

Various other environmental NGOs subsequently emerged, with the objective of promoting democratic values relating to the environment, particularly focussing on the

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<sup>86</sup> Khan “The Roots of Environmental Racism” 27.

<sup>87</sup> As cited in McDonald “What is Environmental Justice” 2.

<sup>88</sup> McDonald “What is Environmental Justice” 2.

<sup>89</sup> Dugard and Alcaro 2013 *SAJHR* 18.

redress of past injustices.<sup>90</sup> The objective of addressing poverty and environmental degradation was also rooted in the newly elected African National Congress' (ANC) mandate to address environmental injustices relating to the social, economic and political spheres.<sup>91</sup> At grassroots level, communities began participating in campaigns directed at environmental injustices such as the protests against the possible development of nuclear power stations and toxic waste recycling plants.<sup>92</sup> Trade unions within the labour sector also began to recognise the role that environmental issues played in occupational health and safety, which, in turn, prompted greater awareness amongst labourers of environmental health and safety issues in the workplace.<sup>93</sup>

#### *2.4.2 Environmental justice in South Africa: A pragmatic critique*

Since the development of a new democratic order in South Africa, some aspects of the environmental justice movement that developed during the transitional period of democracy have proven less effective, evidenced largely through the poor implementation of policies.<sup>94</sup> This is attributed to various reasons which will be briefly discussed. Firstly, South Africa's diverse demographic and geographic indicators allow for a variety of environmental movements that cater for such diversity. This leads to fragmentation, as the movements, because of their different aims and objectives, are unable to formally and coherently harmonise to create a unified alliance.<sup>95</sup> Although this allows for the South African environmental justice movement to cover a broad range of environmental issues, it creates a complex political relationship between race, class and gender.<sup>96</sup> This may delay development within the environmental justice movement and effectively reduce its application to achieve greater distributional equity, recognition and public participation within the environmental context.

Secondly, Khan<sup>97</sup> notes that diversity in the sphere of environmental action groups does not necessarily mean that it represents the concerns of South Africa's indigenous

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<sup>90</sup> For an in-depth discussion on the types of environmental NGOs formed see Cock and Fig 2001 *African Sociological Review* 17-19.

<sup>91</sup> McDonald "What is Environmental Justice" 2.

<sup>92</sup> Khan "The Roots of Environmental Racism" 28.

<sup>93</sup> Khan "The Roots of Environmental Racism" 29.

<sup>94</sup> Cock and Fig 2001 *African Sociological Review* 15.

<sup>95</sup> Cock and Fig 2001 *African Sociological Review* 15.

<sup>96</sup> Cock and Fig 2001 *African Sociological Review* 20.

<sup>97</sup> Khan "The Roots of Environmental Racism" 37.

population. However, the dynamic within environmental NGOs seems to be changing to include greater representation of South Africa's population. Thirdly, environmental justice issues are rarely framed as environmental issues because they are mostly placed in the context of health or economic issues.<sup>98</sup> This results in a clear focus being directed towards social and economic matters and a concomitant neglect of environmental considerations, which may sometimes be the root cause of the social or economic issues. There is accordingly no integrated approach to environmental justice, as it were. Fourthly, to avoid civil war and stabilise South Africa's economy, political compromises were made in the transitional period of democracy, which compromises emphasised economic growth and to a large extent eroded the government's robust promotion of environmental policies.<sup>99</sup> This, together with the increased emphasis on globalisation, has hampered the development and proficiency of environmental movements in South Africa.

Despite these challenges and increasingly as a result of them, there is a serious need for the environmental justice movement to gain strength in South Africa today. Because of the environmental racism experienced in the past, the injustices that still prevail need to be addressed. This is particularly evident in the level of poverty that still plagues South Africa. In a report analysing poverty trends in South Africa,<sup>100</sup> it has been shown that in 2011, 45.5 percent of the population was considered to be poor,<sup>101</sup> while 20.2 percent of the population lived in extreme poverty.<sup>102</sup> Unless the issue of poverty is addressed, also in terms of the environment, the poor will continue to live in deplorable socio-economic and ecological conditions, which would further aggravate environmental injustices.<sup>103</sup>

In this sense, Patel<sup>104</sup> maintains that the environmental justice approach taken by South Africa is wrought from two central ideas. Firstly, environmental justice is anthropocentric

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<sup>98</sup> Cock 2004 <http://www.populareducation.co.za>.

<sup>99</sup> Cock and Fig 2001 *African Sociological Review* 23.

<sup>100</sup> Released by Statistics South Africa in 2014 entitled "Poverty Trends in South Africa: An examination of absolute poverty between 2006 and 2011".

<sup>101</sup> Applying the upper-bound poverty line.

<sup>102</sup> Statistics SA 2014 <http://beta2.statssa.gov.za> 12. Therefore, more than 50 percent of those people living in "poverty" actually live in extreme poverty, according to the report.

<sup>103</sup> Khan "The Roots of Environmental Racism" 42.

<sup>104</sup> Patel 2009 *Social Dynamics* 97.

in nature as it places people at the centre of its concerns. The emphasis is placed on the environmental impacts that arise from the interrelationship between social, economic and political considerations and the way in which injustices that arise as a result of these considerations could be remedied.<sup>105</sup> In this sense it includes the equitable distribution of both environmental resources as well as adverse environmental effects.<sup>106</sup>

Secondly, and importantly for the purposes of the present study, environmental justice also implies procedural justice, where participation in decision-making is facilitated.<sup>107</sup> In this sense, the public and the people most affected by any environment-related decision should be acknowledged and recognised as an important part of the decision-making process. The discussion below is based on the foundation of these two central ideas: the equitable distribution of environmental benefits and burdens (or substantive environmental justice), and the recognition and participation of the public in the decision-making and governance (or the procedural aspects of environmental justice).

## **2.5 Environmental justice and the Constitution**

Included in the preamble of the Constitution is the declaration that the Constitution is adopted as the supreme law of South Africa “to heal the divisions of the past and establish a society based on democratic values, social justice and fundamental human rights.”<sup>108</sup> This statement establishes the constitutional foundation by which to interpret environmental justice within South Africa as a nation that seeks to transform its society to ensure greater (environmental) justice for all its people.

As noted earlier,<sup>109</sup> environmental justice cannot be established or understood independently of equality. Therefore, as a point of departure, the right to equality enshrined in the Constitution<sup>110</sup> is vitally important in the pursuit of environmental justice because it promotes the equal treatment of all persons. More importantly, enshrined in the Constitution is the environmental right which provides that:

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<sup>105</sup> Patel 2009 *Social Dynamics* 97.

<sup>106</sup> Hallows and Butler “Power, Poverty and Marginalized Environments” 52.

<sup>107</sup> Patel 2009 *Social Dynamics* 97.

<sup>108</sup> Preamble of the Constitution.

<sup>109</sup> See section 2.2 from page 9.

<sup>110</sup> S 9 of the Constitution.

Everyone has the right –

- (a) to an environment that is not harmful to their health or well-being;
- (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 the use of natural resources while promoting justifiable economic and social development[.]<sup>111</sup>

As environmental justice seeks the equitable distribution of environmental benefits, it should subsequently lead to greater health and well-being for people who in the past have not been privy to such entitlements. Where the equitable distribution of environmental benefits as a physical act promotes health and well-being, it can also be argued that environmental justice is constitutionally recognised as a means to promote greater health and well-being, as provided for in the environmental right. This is particularly true when the terms “environmental justice” is construed against the judiciary’s interpretation of “well-being” in *HTF Developers (Pty) Ltd v The Minister of Environmental Affairs and Tourism and Others*<sup>112</sup> as an “open-ended [concept] ... manifestly ... incapable of definition”.<sup>113</sup> To this end, the concept of environmental justice in South Africa is embedded in the narrative of equality, health and well-being.

Although the Constitutional Court has not extensively detailed the substantive interpretation of the environmental right,<sup>114</sup> it is clear that the right is anthropocentric in nature:<sup>115</sup> it functions as a “basic condition for human existence”,<sup>116</sup> and it explicitly makes provision for sustainable development. While an in-depth analysis of the discourse surrounding sustainable development is beyond the scope of this discussion, in the South African context it fundamentally concerns “the integration of social, economic and environmental factors into planning, implementation and decision-making so as to ensure that development serves present and future generations”.<sup>117</sup>

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<sup>111</sup> S24 of the Constitution.

<sup>112</sup> *HTF Developers (Pty) Ltd v The Minister of Environmental Affairs and Tourism and Others* 2006 (5) SA 512 (T).

<sup>113</sup> Para 18.

<sup>114</sup> Du Plessis 2011 *SAJHR* 289.

<sup>115</sup> Feris 2008 *SAJHR* 33.

<sup>116</sup> Feris 2008 *SAJHR* 33.

<sup>117</sup> S 1 of NEMA.

Various scholars have noted that this necessitates a balance between and an integration of economic, social and environmental considerations, and that this relationship is fundamental to attaining sustainable development.<sup>118</sup> Field<sup>119</sup> maintains that although sustainable development emphasises this integration, equity remains the core objective of sustainable development within the context of integration. Therefore, equity explains the reason why and the means in which integration is necessary to achieve sustainable development.<sup>120</sup> This includes the need for equity within existing generations (intra-generational equity)<sup>121</sup> and equity between generations (inter-generational equity).<sup>122</sup> Also, because the sustainable development model may sometimes “lack specificity, particularly with respect to ... implementation”,<sup>123</sup> advancing equity in terms of environmental justice allows for a means to effectively implement sustainable development in a practical and normative sense.

As the recognition of all members of society is central to environmental justice, the Rio Declaration supports the link between sustainable development and environmental justice in this sense by noting the importance of recognising and supporting indigenous and local communities through their “effective participation in the *achievement of sustainable development*”<sup>124</sup> (own emphasis). Therefore, it is argued that environmental justice is a means to achieve sustainable development; as Du Plessis<sup>125</sup> notes “sustainable development is impossible in the absence of environmental justice”.

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<sup>118</sup> See Kidd *Environmental Law* 17.

<sup>119</sup> Field 2006 *SALJ* 415.

<sup>120</sup> Field 2006 *SALJ* 426.

<sup>121</sup> The importance of intra-generational equity is found in its capacity to take the distributional demands of social justice within a generation into account, particularly when based on the belief that distributional inequalities (of benefits and burdens) account for a great deal of environmental degradation (see Feris 2008 *SAJHR* 41). When environmental justice is promoted through the equitable distribution of environmental benefits and burdens, it operates as a functional means to fulfil the intra-generational element of sustainable development.

<sup>122</sup> Kidd *Environmental Law* 17. Inter-generational equity emphasises the need for future generations to enjoy an equal claim to the Earth’s natural resources. One of the duties placed on present generations through inter-generational equity is to maintain the quality of the environment to such an extent that it is not passed on to future generations in a worse condition than that in which it was received (see Collins 2007 *RECIEL* 322-323). When distributional equality is promoted through environmental justice in the present generation, that lays a foundation for such equity to be emulated by future generations, instead of future generations having to work towards a model of equity from a legacy founded on inequity.

<sup>123</sup> Collins 2007 *RECIEL* 322.

<sup>124</sup> Principle 22 of the Rio Declaration: “Indigenous people and their communities and other local communities have a vital role in environmental management and development because of their knowledge and traditional practices. States should recognize and duly support their identity, culture and interests and enable their effective participation in the achievement of sustainable development.”

<sup>125</sup> Du Plessis 2011 *SAJHR* 290.

Consequently, it is argued that environmental justice is constitutionally recognised in the environmental right as a precondition for achieving sustainable development.

The Constitution further provides that “everyone” has the right to an environment that is not harmful to their health or well-being. This realises the need to recognise all members of society, which further supports the notion of environmental justice, as such recognition forms part of environmental justice.

Furthermore, the Bill of Rights affirms the values of human dignity, equality and freedom<sup>126</sup> and thus, the environmental right must uphold these values while the state has an obligation to respect, protect, promote and fulfil the rights enshrined in the Bill of Rights.<sup>127</sup> Upon this backdrop, and if read with the right to equality, inasmuch as it provides for the full and equal enjoyment of all rights and freedoms,<sup>128</sup> the environmental right places a positive duty on the state to take responsibility for environmental justice issues.<sup>129</sup> This is based on the premise that, notwithstanding the link between environmental justice and sustainable development provided for by the Constitution, environmental justice also inherently promotes human dignity, equality and freedom.

Clearly, environmental justice is constitutionally recognised in the environmental right as a means to promote greater health and well-being where the equitable distribution of environmental benefits and burdens promotes health and well-being. It has been argued further that environmental justice is also constitutionally recognised through the provision that supports sustainable development, as environmental justice may be seen as a means to achieve sustainable development; or, put differently, sustainable development is possible only if issues of environmental justice are adequately addressed. CBIs such as public participation, access to information and access to justice are used as procedural structures to achieve the substantive ideals of the environmental right. Thus, CBIs are linked to the procedural aspects of environmental justice with a view to achieving the substantive ideals of environmental justice.

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<sup>126</sup> S7(1) of the Constitution.

<sup>127</sup> S7(2) of the Constitution.

<sup>128</sup> S9(2) of the Constitution.

<sup>129</sup> Glazewski “The Rule of Law” 178. It also places a negative duty on the state to ensure that environmental justice is not affected. In other words, the state is prohibited from negatively impacting on the environment-related interests and rights of people through the inequitable distribution of environmental benefits and burdens, non-recognition and non-participation.

## Chapter 3 Civil-based instruments within the environmental governance regime

### 3 Civil-based instruments within the environmental governance regime

Governance has been defined differently in several disciplines, which has resulted in the formulation of numerous different descriptions of governance. Even within a single discipline, such as law, there are different definitions for governance. This makes the concept rather imprecise, but it also usefully allows for various interpretations of governance to be applied to the complex regulatory setting of the globalised world. The Governance Groups of the World Bank Institute defines governance as:

... the traditions and institutions by which authority in a country are exercised. This includes the process by which governments are selected, monitored and replaced; the capacity of the government to effectively formulate and implement sound policies; and the respect of citizens and the state for the institutions that govern economic and social interaction among them.<sup>130</sup>

In accordance with this understanding, governments are considered the primary actors within governance. This implies the acceptance of a narrow definition of governance, found within the public sphere, where governance is performed largely by the state through a top-down approach. There are also other institutions, such as the UN Commission on Global Governance, that express governance in broader terms to include “the sum of the many ways individuals and institutions, public and private, manage their common affairs”.<sup>131</sup> Following on this, Kotzé<sup>132</sup> proposes a definition for environmental governance. He explains that environmental governance is:

[a] management process executed by institutions and individuals in the public and private sector to holistically regulate human activities and the effects of human activities on the total environment (including all environmental media, and biological, chemical, aesthetic and socio-economic processes and conditions) at international, regional, national and local levels; by means of formal and informal institutions, processes and mechanisms embedded in and mandated by law, so as to promote the common present and future interests human beings hold in the environment.<sup>133</sup>

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<sup>130</sup> World Bank 2014 <http://info.worldbank.org>.

<sup>131</sup> UN Commission on Global Governance 1995 <http://www.gdrc.org>.

<sup>132</sup> Kotze “Environmental Governance” 107.

<sup>133</sup> Kotze “Environmental Governance” 107.

Therefore environmental governance, in this sense, functions within the public and private sector, and non-state institutions are seen as playing a crucial role in the entire environmental governance effort. The use of CBIs within the environmental governance regime allows the public to be involved in the governance of human actions that impact the environment, as these instruments “empower, inform, educate and co-opt civil society to be involved in the enforcement process.”<sup>134</sup> The empowerment of the public to be involved in governing environment-related activities through the use of CBIs facilitates a more holistic regulation of human activities and their impact on the environment and could thereby promote more effective environmental governance.

In this chapter the theoretical foundations of CBIs will be discussed. The discussion firstly seeks to determine the role of CBIs within the broader regulatory framework and secondly how CBIs relate to environmental justice. The purpose of this chapter is not to give an exposition of the South African law relating to CBIs.<sup>135</sup> Rather, the purpose is to lay a theoretical foundation describing CBIs as policy instruments and to discuss the theoretical foundation of public participation, access to information and access to justice as the three core elements of CBIs. While other CBIs, such as administrative justice, form an integral part of the regulatory system and may contribute to environmental justice, the scope of this study is limited to public participation, access to information and access to justice. In addition to space constraints, this is primarily because international law focuses largely on these three instruments as procedural instruments within environmental law, which is a good indication of the relevance of these instruments in a domestic jurisdiction as well.<sup>136</sup>

### **3.1 *Environmental governance instruments***

In the past, the predominant instruments used in environmental governance have been the traditional command and control instruments. However, alternative instruments have developed over the years, which are used in tandem with the command and control instruments or as alternatives to the traditional tools.<sup>137</sup> One of the biggest challenges facing environmental governance is choosing the right governance instrument to

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<sup>134</sup> Nel and Wessels 2010 *PERJ* 50.

<sup>135</sup> This will be done in chapter 4. See pg 36 below.

<sup>136</sup> Particularly the Aarhus Convention, which is the most comprehensive legal document concerning CBIs within the international community.

<sup>137</sup> Nel and Wessels 2010 *PERJ* 48.

achieve the most effective result,<sup>138</sup> particularly because each instrument has inherent strengths and weaknesses.<sup>139</sup> Therefore, using a combination of instruments<sup>140</sup> will be the most effective means to ensure successful environmental governance.<sup>141</sup> This conclusion is based on the argument that where two or more instruments are used to achieve a similar outcome, the possibility of both instruments failing at the same time concerning the same aspect of enforcement is considerably reduced.<sup>142</sup> It further allows for a broad adoption of instruments to suit the needs of the enforcement regime.<sup>143</sup>

The next sections briefly discuss the various instruments of environmental governance in South Africa with a view to broadly explaining their occurrence, functions, failures and successes. While such a brief discussion cannot do justice to the burgeoning debate around this issue, it does seek to situate CBIs within this regulatory framework and to contrast CBIs with other environmental governance instruments.

### *3.1.1 Command and control instruments*

Kidd<sup>144</sup> defines command and control instruments as “a system where there is strict monitoring by the authorities as to whether the law is being followed and where offenders are prosecuted, using criminal law.” However, these regulatory tools also include other formidable measures that ensure strict adherence to regulations that have been set, which are not confined only to criminal measures.<sup>145</sup> These measures include:

... the entire legal enforcement loop, ranging from policy to legislation, pollution or environmental degradation standards, and the full range of command and control instruments, as well as the political will and institutional capacity to drive enforcement and prosecution.<sup>146</sup>

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<sup>138</sup> Nel and Kotzé “Environmental Management: An Introduction” 16.

<sup>139</sup> See Nel and Wessels 2010 *PERJ* 52-53 for a general list of strengths and weaknesses.

<sup>140</sup> The variety of instruments may include planning, doing, checking and acting characteristics.

<sup>141</sup> Nel and Kotzé “Environmental Management: An Introduction” 16; Nel and Du Plessis 2001 *SAJELP* 17.

<sup>142</sup> Nel and Wessels 2010 *PERJ* 54.

<sup>143</sup> Nel and Wessels 2010 *PERJ* 54.

<sup>144</sup> Kidd *Environmental Law* 269.

<sup>145</sup> Killmer “Designing Mandatory Disclosure” 50.

<sup>146</sup> Nel and Wessels 2010 *PERJ* 50.

Command and control instruments usually prescribe the goal that is to be achieved through regulation as well as the means by which the prescribed goal must be met.<sup>147</sup> This is achieved through technology-based standards, which specify the means and sometimes the equipment that must be used to comply with the regulation; or performance-based standards, which stipulate the target that polluters must meet while providing some flexibility in terms of how that target should be met.<sup>148</sup>

While traditional forms of regulation such as command and control instruments may provide a degree of certainty because the regulatory requirements are set out clearly and the sanction for non-compliance is usually quite clear, regulatory authorities rarely have the financial means and administrative resources to monitor and enforce these regulations.<sup>149</sup> Moreover, the legislative penalties, particularly regarding environmental sanctions, are minimal when compared to the profits of large corporations. Therefore, there are numerous obstacles in the monitoring and enforcement of inflexible command and control instruments, which limits their effectiveness.

### 3.1.2 *Market-based instruments*

The Organisation for Economic Cooperation and Development (OECD) defines market-based instruments (MBIs) as “fiscal and other economic incentives and disincentives to incorporate environmental costs and benefits into the budgets of households and enterprises.”<sup>150</sup> Thus, instead of using regulatory directives that are distinctive of command and control instruments, MBIs allow for greater flexibility, as individuals and companies are provided with financial incentives and disincentives which encourage them to function in an environmentally responsible manner.<sup>151</sup>

The purpose of MBIs “is to cure market failure caused by the externalities which occur when environmental costs are incurred without payment.”<sup>152</sup> In other words, the cost that pollution and degradation has on the environment is shouldered by the increased financial cost that the individuals and companies incur to emit pollutants or use the

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<sup>147</sup> Jordan, Wruzel and Zito 2003 *Environmental Politics* 9.

<sup>148</sup> Stavins “Market-based Environmental Policies” 32. An example of performance-based standards in South Africa is the minimum emissions standards (GN 893 in GG 37054 of 22 November 2013) prescribed in terms of the *National Environmental Management: Air Quality Act* 39 of 2004.

<sup>149</sup> Killmer “Designing Mandatory Disclosure” 50.

<sup>150</sup> OECD 2007 <https://stats.oecd.org>.

<sup>151</sup> UNEP 2004 <http://www.unep.ch>.

<sup>152</sup> Kidd *Environmental Law* 281.

specified resource.<sup>153</sup> MBIs include, among others, pollution taxes, tradable permits, deposit-refund systems and performance bonds.<sup>154</sup>

There are various advantages to using MBIs. Firstly, they provide greater incentive for individuals and companies to reduce pollution and adopt environmentally controlled technology than traditional command and control instruments are able to provide.<sup>155</sup> This, in turn, allows for greater innovation in the development of environmentally controlled technological advancements that are able to reduce or control pollution more effectively.<sup>156</sup> Secondly, they are an expression of the polluter pays principle in practice as the cost of pollution is placed on the polluters.<sup>157</sup> In this way, MBIs are theoretically more effective in shifting the costs of pollution onto the polluter than are command and control instruments.<sup>158</sup> Thirdly, MBIs entail less public sector management and monitoring than command and control instruments.<sup>159</sup>

### 3.1.3 *Voluntary instruments*

Voluntary instruments are measures that (mostly) industries choose to undertake to advance their environmental performance, and they are therefore not mandatory under law.<sup>160</sup> In other words, no sanction can be imposed on those industry actors who choose not to comply with the measures. These instruments are largely supplementary in nature and therefore should not be used as a means to an end in themselves, but rather as a means to complement other environmental governance mechanisms.<sup>161</sup>

There are four main categories of voluntary instruments, as listed by the OECD.<sup>162</sup> Firstly, unilateral commitments are self-regulatory in nature and include environmental measures that are undertaken by industry actors internally.<sup>163</sup> Secondly, private agreements are contracts that are entered into between industry actors and the people

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<sup>153</sup> UNEP 2004 <http://www.unep.ch>.

<sup>154</sup> For a detailed discussion on the types of MBIs see Stavins "Market-based Environmental Policies" 33-41.

<sup>155</sup> Stavins "Market-based Environmental Policies" 33.

<sup>156</sup> UNEP 2004 <http://www.unep.ch>.

<sup>157</sup> UNEP 2004 <http://www.unep.ch>.

<sup>158</sup> Stavins "Market-based Environmental Policies" 33.

<sup>159</sup> UNEP 2004 <http://www.unep.ch>.

<sup>160</sup> Craigie, Snijman and Fourie "Dissecting Environmental Compliance and Enforcement" 60.

<sup>161</sup> Lehmann "Voluntary Compliance Measures" 269.

<sup>162</sup> OECD 2000 <http://www.oecd-ilibrary.org>.

<sup>163</sup> An example in South Africa is the ISO 14001 environmental management system.

who are harmed by its actions or their representatives (usually actors within civil society). Thirdly, negotiated agreements are those agreements that are undertaken between industry actors and public authorities and are therefore a form of co-regulation.<sup>164</sup> Fourthly, public voluntary programmes include standards that have been developed by environmental agencies under which no obligation exists to comply but where incentives are provided for participation.

Voluntary instruments allow for industry to freely commit to achieving sustainable and environmentally responsible practices without submitting to a sanction for non-compliance or non-participation. In this sense, industry is seen as a key role player in developing measures to regulate environmental performance.<sup>165</sup> This allows for environmental practices that go beyond the minimum requirements posed by command and control instruments, which generally provide for a core minimum for environmental degradation but do not necessarily secure environmental sustainability.<sup>166</sup> However, the value of voluntary instruments has also been called into question as a result of non-compliance.<sup>167</sup> Because voluntary instruments do not have strict enforcement and monitoring mechanisms, they carry standards that need to be fully trusted by environmental authorities and when they are compromised the authorities may return to the certainty inherent in command and control instruments.<sup>168</sup>

### 3.1.4 *Civil-based instruments*

CBIs, the primary focus of this study, “include all measures to empower, inform, educate and co-opt civil society to be involved in the enforcement process.”<sup>169</sup> They empower civil society to participate in the management of environmental practices as “outsiders”, which means that the management may be powered by individuals or representatives within civil society.

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<sup>164</sup> An example of this in South Africa is found in s 35 of NEMA, which provides for environmental management co-operation agreements.

<sup>165</sup> Lehmann “Voluntary Compliance Measures” 273.

<sup>166</sup> Lehmann “Voluntary Compliance Measures” 272.

<sup>167</sup> For example, the ISO 14001 certification scheme was rocked by revelations that certain high-profile firms that had been certified in terms of the scheme were non-compliant to a serious extent. See Craigie, Snijman and Fourie “Dissecting Environmental Compliance and Enforcement” 60.

<sup>168</sup> Craigie, Snijman and Fourie “Dissecting Environmental Compliance and Enforcement” 60.

<sup>169</sup> Nel and Wessels 2010 *PERJ* 50.

The need for CBIs within the context of environmental justice lies in their ability to empower civil society to participate in environmental decision-making and governance. Civil society is therefore also recognised as having an influence on the decision-making outcomes and is consequently given an opportunity to participate in environmental governance. In this sense, procedural environmental justice is promoted, as the public is recognised as an important stakeholder within the environmental governance regime while being given the opportunity to participate in environmental decision-making, enforcement and compliance. This promotes environmental justice as a whole because procedural structures (such as public participation and access to information and justice respectively) may influence the equitable distribution of environmental benefits and burdens (substantive environmental justice) by providing a means to participate in the decisions and compliance regulations that deal with such distribution.

CBIs are central to environmental governance since they are provided for in legislation or may even be included as conditions to environmental authorisations. For example, when applying for an environmental authorisation for a listed activity in terms of NEMA, the applicant must ensure that public information and participation procedures are followed.<sup>170</sup> This inclusion of civil-based procedures in an environmental authorisation, however, does not change the nature of such CBIs. In other words, the fact that the CBI is included as a prerequisite for granting a command and control type instrument does not make the instrument "less 'civil' based".<sup>171</sup> On the contrary, combining command and control instruments and CBIs establishes a "unique informal relationship between insiders and outsiders."<sup>172</sup>

The advantages of CBIs are evident: while insiders (members holding an office in a private or public institution) have knowledge about environmental issues, they often lack the authorisation or incentive to oppose "bureaucratic behaviour patterns",<sup>173</sup> because they are not formal bearers of official governance authority. On the other hand, outsiders (members of civil society) may have the ability to challenge decisions but may not necessarily have information on which to base that challenge or access to and

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<sup>170</sup> S24(4)(v) of NEMA.

<sup>171</sup> Nel and Wessels 2010 *PERJ* 52.

<sup>172</sup> Nel and Du Plessis 2001 *SAJELP* 18.

<sup>173</sup> Nel and Du Plessis 2001 *SAJELP* 18.

remedies to fight decisions in a judicial forum. When outsiders are given the ability to access the information needed through CBIs, they are empowered to effectively challenge decisions.

While other instruments within the environmental governance regime are vitally important to the regulation of human activities and the effects that accompany those activities, the importance of CBIs within a democratic dispensation should not be underestimated. These instruments are essential for promoting environmental protection and progressing towards sustainable development, as they highlight the role of participation, access, legitimacy, accountability and transparency in environmental governance. Therefore, increasing the role of civil society within environmental management and governance is generally encouraged for two reasons.<sup>174</sup> Firstly, it provides a platform for people with valuable knowledge and information to participate in environmental governance, which increases the efficiency and quality of decision-making. Secondly, it provides greater legitimacy in decision-making as the democratic value of participation is set into action.

The advantages of CBIs are particularly relevant for a country such as South Africa because of South Africa's tumultuous and largely exclusionary past that sought to marginalise activism by civil society. Because the Constitution provides that everyone has the right to "have the environment protected ... through reasonable legislative and other measures"<sup>175</sup> it may be argued that a duty is placed on the state to adopt and use alternative environmental instruments as provided for by the Constitution through "other measures",<sup>176</sup> including CBIs. Therefore CBIs in the context of the environmental right may provide remedies for past inequalities by recognising all members of society and thereby empowering them to participate in environmental governance. While several measures may be civil-based in nature,<sup>177</sup> the following section will focus on three types

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<sup>174</sup> Bernauer and Betzold 2012 *The Journal of Environment & Development* 63.

<sup>175</sup> S 24(b) of the Constitution.

<sup>176</sup> Du Plessis and Nel "Driving Compliance" 259.

<sup>177</sup> For a discussion on common law remedial instruments see Summers R "Common Law remedies for environmental protection" in Patterson A and Kotzé LJ (eds) *Environmental Compliance and Enforcement in South Africa: Legal Perspectives* (Juta Cape Town 2009). For a discussion on administrative justice see Hoexter C *Administrative Law in South Africa* 2nd ed (Juta Cape Town 2012).

of CBIs that relate to environmental governance: public participation, access to information, and access to justice.

### **3.2 Public participation**

Participation is central to a democratic dispensation as it allows the public to participate in decision-making that affects them. The World Bank Learning Group on Participation defines participation as a “process through which stakeholders influence and share control over development initiatives and the decisions and resources which affect them.”<sup>178</sup> In environmental law, public participation is “based on the right of those that may be affected, including foreign citizens and residents ... [to] have a say in the determination of their environmental future.”<sup>179</sup> By including foreign citizens and residents, this definition aptly acknowledges a broad spectrum of interested parties that may be involved in participation, particularly within the environmental sphere which, in turn, speaks to the value of public participation as a means of recognising all members of society – an important issue within environmental justice.

With this definition in mind, it is important for the state to involve all stakeholders in decision-making and governance. One way to ensure that such participation is provided for is to include public participation requirements in laws and policies. There are generally two forms of public participation that are found in legislative and policy documents, namely normative and functional participation.<sup>180</sup> The former focuses on the democratic values that public participation promotes, while the latter places emphasis on the practical application of public participation. For example, NEMA provides for a normative principle that the participation of all interested and affected parties (I&APs) must be promoted in environmental governance.<sup>181</sup> However, NEMA also functionally provides that an application for an environmental authorisation must include participation procedures for all I&APs.<sup>182</sup> This provision is reinforced and implemented in

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<sup>178</sup> As cited in Gaventa and Valderrama “Participation, Citizenship and Local Governance” 2.

<sup>179</sup> Anton and Shelton *Environmental Protection and Human Rights* 357. Public participation in this regard may include elections, grassroots action, lobbying, public speaking, hearings and other systems of governance.

<sup>180</sup> Coenen “Public Participation: Introduction” 2.

<sup>181</sup> S 2(4)(f) of NEMA.

<sup>182</sup> S 24(4)(a)(v) of NEMA.

practice through public participation provisions in the Environmental Impact Assessment (EIA) regulations.<sup>183</sup>

In practice, it is important to provide for normative participation through legislation, as it affords the public a platform to be involved in decision-making. However, it would be useless if the provision were not functional in the sense that the participation could be efficiently implemented and used. Therefore, the results arising from public participation have must been substantially considered in the decision-making process for it to have had a real impact on the outcome of the decisions that were made.

Functional public participation increases the legitimacy of decisions in this way as it allows the public to actively participate in decision-making and reinforces the democratic values of transparency and accountability.<sup>184</sup> Casey-Letkowitz *et al*<sup>185</sup> explain that in this sense, participation and government authority are two sides of the same coin. A government that provides for greater public participation in the development and implementation of its policies may have greater success in mobilising support, because its processes, and thus its authority, is popularly seen by the public as being legitimate.

Another important aspect of public participation is that it improves the quality of the decisions that are made, as people (who may know the area more intimately than the government) are given the opportunity to provide for and require necessary information that may contribute to the quality of the decisions that are made.<sup>186</sup> This is particularly true for participation within environmental decision-making, as locals interact with their environment on a daily basis. In this sense, Kidd<sup>187</sup> also observes the proactive nature of public participation as a means to forestall any administrative and other actions that may be detrimental to the environment.<sup>188</sup> The inclusion of public participation may also

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<sup>183</sup> GN 982 in GG 38282 of 4 December 2014.

<sup>184</sup> Coenen "Public Participation: Introduction" 2; also see Anton & Shelton *Environmental Protection and Human Rights* 381.

<sup>185</sup> Casey-Lefkowitz *et al* "The Evolving Role of Citizens in Environmental Enforcement" 560.

<sup>186</sup> Coenen "Public Participation: Introduction" 2; Casey-Lefkowitz *et al* "The Evolving Role of Citizens in Environmental Enforcement" 559.

<sup>187</sup> Kidd 1999 *SAJELP* 22.

<sup>188</sup> For example, public participation may bring to light an aspect of the proposed development that may be detrimental to the environment but which may have been overlooked by the administrative officials.

create greater awareness of the environmental issues that people face, and encourage behavioural changes regarding how people interact with their environment.<sup>189</sup>

### **3.3 Access to information**

Access to necessary information is vitally important in environmental law, because it informs the public of matters that affect their environmental rights. A right to access to information can be understood both in a narrow sense and more broadly.<sup>190</sup> In the narrow sense, the public has the freedom to seek information and the state is obliged to refrain from interfering with the public's pursuit of such information. More broadly, the public may have the right to access or receive information and the state is obliged to obtain and publish relevant information pertaining to the environment.

In terms of the broader understanding, access to information can be further divided into two forms. Firstly, the public has a right to information held by the state, which is widely recognised by the international community as a human right.<sup>191</sup> A second form of the right to access information is also emerging – the right to access information that is held by private entities.<sup>192</sup> While the state is able to access information from private bodies through licensing and environmental impact requirements,<sup>193</sup> the right to access information held by private bodies further allows NGOs and members of the public to access the records of businesses and industries in order to examine their environmental profile and thereby encourage improved environmental performance.<sup>194</sup>

Access to information as a civil-based instrument is regularly used as a tool to secure greater transparency and accountability for both government and industry in their interactions with the environment, and is a means by which the public is informed about environmental issues.<sup>195</sup> Some authors go so far as to herald access to environmental information as the “cornerstone”<sup>196</sup> of and a “prerequisite”<sup>197</sup> for public participation in

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<sup>189</sup> Coenen “Public Participation: Introduction” 2.

<sup>190</sup> Anton and Shelton *Environmental Protection and Human Rights* 357.

<sup>191</sup> A19 of the Universal Declaration of Human Rights; A 19 of the International Covenant on Civil and Political Rights; A 10(1) of the European Convention; and A 13 of the American Convention.

<sup>192</sup> Zaelke, Kaniaru and Kruzikova “Information Regulation” 13.

<sup>193</sup> Anton and Shelton *Environmental Protection and Human Rights* 357.

<sup>194</sup> Zaelke, Kaniaru and Kruzikova “Information Regulation” 14.

<sup>195</sup> Zaelke, Kaniaru and Kruzikova “Information Regulation” 13.

<sup>196</sup> Kidd 1999 *SAJELP* 26.

environmental governance, as it informs the people about pertinent environmental issues and allows them to meaningfully participate in environmental governance. After all, there needs to be an awareness and understanding of the issues, if the public is to make a meaningful contribution to effectively alleviating environmental problems.

However, the right of access to information is not absolute. As will be seen in chapter 4 there are various provisions where access to information may be limited; for example, where it is confidential or contains information that may have a significant impact on commercial interests if it were to be released.

### **3.4 Access to justice**

While recognising that justice as a principle of law is vitally important, it may be of no use to people in a functional sense if they are not able to access such justice. In other words, people who have had their rights infringed upon or have experienced harm of some sort need to be able to seek redress within legal structures, and having the means to access justice becomes vitally important.

Access to justice within the environmental context can be defined as “the public’s ability to turn to impartial, independent arbitrators to protect environmental rights or repair environmental damage to resolve expeditiously disputes.”<sup>198</sup> It has been argued that legal standing developed under the common law in South Africa for three main reasons.<sup>199</sup> Firstly, to ensure that the courts fulfil their function subject to the separation of powers where the courts adjudicate disputes according to the law and do not create the law. Secondly, the doctrine of legal standing was created to prevent disputes being brought before the court where the subjects do not have an interest in the case. In other words, legal standing served a “gate-keeping function”.<sup>200</sup> Thirdly, the doctrine of legal standing focused primarily on the protection of private interests and rights, which also served a gate-keeping function in that it limited the availability of litigation as an option for public interests, although public interest matters were permitted where necessary.<sup>201</sup>

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<sup>197</sup> Anton and Shelton *Environmental Protection and Human Rights* 357.

<sup>198</sup> ECLAC 2013 <http://www.cepal.org>.

<sup>199</sup> Murombo 2010 *LEAD* 167.

<sup>200</sup> Murombo 2010 *LEAD* 168.

<sup>201</sup> Particularly regarding violations of life, liberty or physical integrity. Murombo 2010 *LEAD* 169.

Today, access to justice fundamentally entails access to an independent court or forum which is able to review and remedy injustices, and *locus standi*, which deals with whether a person's legal interest in a matter sufficiently allows for him or her to bring a matter before a court. Both of these aspects of justice are important in exercising and protecting environmental rights, and enforcing duties.

It is clear that public participation, access to information and access to justice empowers civil society to participate in environmental decision-making and governance. In this sense, procedural environmental justice is promoted, as the public is recognised as an important stakeholder within the environmental governance regime and is given the opportunity to participate in environmental decision-making, enforcement and compliance.

## **Chapter 4 CBIs within the South African legal framework**

### **4 CBIs within the South African legal framework**

The South African environmental legislative framework provides for an array of CBIs including private prosecution, the protection of whistle-blowers, and public awareness. This chapter seeks to focus on public participation, access to information and access to justice. The chapter includes an analysis of the use of these CBIs within the environmental governance regime by examining the Constitution, environmental framework legislation (NEMA)<sup>202</sup> and various court cases. More specifically, the discussion will seek to determine the role of these three CBIs in promoting environmental justice through the environmental right.

#### **4.1 Public participation**

The courts have on multiple occasions stressed the importance of public participation in South Africa's constitutional democracy. In *Doctors for Life International v Speaker of the National Assembly and Others*<sup>203</sup> (Doctors for Life) the Constitutional Court stated that:

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<sup>202</sup> And PAIA in the discussion of access to information.

<sup>203</sup> 2006 (6) SA 416 (CC).

[t]he participation by the public on a continuous basis provides vitality to the functioning of representative democracy. It encourages citizens of the country to be actively involved in public affairs, identify themselves with the institutions of government and become familiar with the laws as they are made. It enhances the civic dignity of those who participate by enabling their voices to be heard and taken account of. It promotes a spirit of democratic and pluralistic accommodation calculated to produce laws that are likely to be widely accepted and effective in practice. It strengthens the legitimacy of legislation in the eyes of the people. Finally, because of its open and public character it acts as a counterweight to secret lobbying and influence peddling. Participatory democracy is of special importance to those who are relatively disempowered in a country like ours where great disparities of wealth and influence exist.<sup>204</sup>

In *Matatiele Municipality and Others v President of the RSA and Others*<sup>205</sup> (Matatiele) the Court also drew a link between public participation and human dignity. Quoting the Court of Appeals of Quebec,<sup>206</sup> the Constitutional Court noted that:

... a commitment to a right to ... public participation in governmental decision-making is derived not only from the belief that we improve the accuracy of decisions when we allow people to present their side of the story, but also from our sense that participation is necessary to preserve human dignity and self-respect.<sup>207</sup>

This suggests that public participation recognises the persons inherent worth and dignity as a member of society who has something to contribute to the decision-making process. Furthermore, the importance of public participation is given effect through various constitutional and legislative provisions, which will be discussed below.

#### 4.1.1 Constitutional outline of public participation

The Constitution does not specifically provide for a right to public participation, but it does provide for other rights which may facilitate public participation.<sup>208</sup> The Constitution also states that one of the objects of local government is to encourage community involvement in the matters of local government.<sup>209</sup> In *Borbet South Africa (Pty) Ltd and Others v Nelson Mandela Bay Municipality*<sup>210</sup> (Borbet), the court observed the influence that the Constitution has had on the role of public participation in local governance:

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<sup>204</sup> Para 115.

<sup>205</sup> 2007 (6) SA 477 (CC).

<sup>206</sup> In *Caron v R* 20 QAC 45 ([1988] RJQ 2333) para 14.

<sup>207</sup> Matatiele para 66.

<sup>208</sup> Including the environmental right (s 24), the right of access to information (s 32) and the right to a broad *locus standi* (s 38).

<sup>209</sup> S 152(1)(e) of the Constitution.

<sup>210</sup> 2014 (5) SA 256 (ECP).

The Constitution has fundamentally transformed the landscape of public participation in local governance. Organs of local governance are not only required to conduct themselves lawfully and in accordance with the principles of legality, they are also, as will be seen, required to extend the reach of local participatory democratic processes by actively incorporating effective public participation in their decision-making.<sup>211</sup>

This places a particularly important obligation on local governments, as the sphere of government closest to the community, to facilitate public participation within their executive functions.<sup>212</sup> This obligation placed on local government is “more extensive and far-reaching” because the scope for public participation is greatest.<sup>213</sup> Due to the close proximity of the local government and the community, the interests of the community can be addressed and promoted with greater ease and precision. Therefore local governments are required to do more than ensure that public meetings are held and that information is easily accessible through publication. They are required to put structures in place that ensure capacity building within the community, which will allow members of the community to participate effectively.<sup>214</sup>

The Constitution also requires public administration to be governed by democratic values and principles, including equitable service distribution, public participation in policy-making, accountability and transparency.<sup>215</sup> These principles are an essential component of environmental governance, because they involve the public in decision-making processes and allow I&APs to effectively advocate for environmental issues.<sup>216</sup>

In facilitating public participation in decision-making, a public body may have a “broad discretion to determine how best to fulfil their constitutional obligation to facilitate public involvement in a given case, so long as they act reasonably.”<sup>217</sup> In other words, the

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<sup>211</sup> Para 1.

<sup>212</sup> Para 23 *Democratic Alliance v Ethekwini Municipality* 2012 (2) SA 151 (SCA). Also see ss 5(1)(a)-(g), 29(b)(i) and ch 4 of the *Local Government: Municipal Systems Act* 32 of 2000, which extensively provides for public participation in local government.

<sup>213</sup> *Borbet* para 72.

<sup>214</sup> Para 80. For example, local governments may be required to allocate resources to the task of public participation in matters relating to the environment and to ensure that structures are established by the legislation that meet the objectives of effective participation.

<sup>215</sup> S195 of the Constitution.

<sup>216</sup> Feris 2010 *PELJ* 76.

<sup>217</sup> *Doctors for Life* para 145. While this was applied in the context of Parliament’s obligation to facilitate public participation in the legislative process, it is contended that it is relevant to government’s duty to facilitate public participation regarding decision-making in governance as both forms of public participation seek to promote the principles of participatory democracy. This obligation also applies to local governments in facilitating public participation in their executive and legislative affairs. Also

question is whether the public body has taken reasonable measures to ensure public participation. In determining whether or not the National Assembly had adequately facilitated public involvement in the law-making process, the Constitutional Court noted in *Doctors for Life* that:

...[w]hat is ultimately important is that the Legislature has taken steps to afford the public a reasonable opportunity to participate effectively in the law-making process. Thus construed, there are at least two aspects of the duty to facilitate public involvement. The first is the duty to provide meaningful opportunities for public participation in the law-making process. The second is the duty to take measures to ensure that people have the ability to take advantage of the opportunities provided...As pointed out, that right not only guarantees the positive right to participate in public affairs, but it simultaneously imposes a duty on the State to facilitate public participation in the conduct of public affairs by ensuring that this right can be realised.<sup>218</sup>

When these aspects of public involvement in the law-making process are translated by a public body to facilitate public participation in the decision-making process, a public body must not only provide I&APs with an opportunity to meaningfully participate, but must also establish measures that ensure that the I&APs have the ability to utilize the opportunities to participate in decision-making.

The need for public bodies to facilitate effective public participation was illustrated in *South African Property Owners Association v Johannesburg Metropolitan Municipality and Others*<sup>219</sup> (SAPOA case), where the appellant claimed that a decision made by the Johannesburg Metropolitan Municipality (the City) regarding an increase in business property rates was invalid because it had *inter alia* failed to adequately fulfil its statutory obligations for public participation in decision-making regarding the budget.<sup>220</sup> The Supreme Court of Appeal (SCA) found that the City had not followed the procedures required to ensure adequate public participation and further, that the time given for I&APs to respond to the amended proposals to the budget had been unreasonably

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see *Democratic Alliance v Ethekwini Municipality* para 24 and *Borbet South Africa (Pty) Ltd and Others v Nelson Mandela Bay Municipality* 2014 (5) SA 256 (ECP) para 60.

<sup>218</sup> *Doctors for Life* para 129. Also see *Merafong Demarcation Forum and Others v President of the Republic of South Africa and Other* 2008 (5) SA 171 (CC), which again confirmed and applied the standard of reasonableness.

<sup>219</sup> 2013 (1) SA 420 (SCA).

<sup>220</sup> The City initially tabled and published a budget for public comment. However, during this process additional facts came to the City's attention which necessitated a further increase to the business property rates. SAPOA and other I&APs had limited time to respond to the new proposals.

short.<sup>221</sup> Therefore, although the City had provided measures for public participation, the limited timeframe which I&APs were given did not enable them to effectively utilize that opportunity to participate.

The SAPOA case illustrates the importance of establishing a suitable timeframe for effectively facilitating public participation, which is also true in environmental law where delayed public participation in decision-making is a significant challenge.<sup>222</sup> Therefore, the impact that public participation has on the final decision is softened considerably, because there is not enough time to establish effective public participation measures.

Furthermore, governance “essentially involves a process of decision-making”.<sup>223</sup> In this context, the question before the SCA in *The Director: Mineral Development, Gauteng Region and Another v Save the Vaal Environment and Others*,<sup>224</sup> (Save the Vaal) was whether interested parties who wish to oppose an application by the holder of mineral rights for a mining licence are entitled to raise environmental objections and to be heard by the Director of Mineral Development (the Director). This question fundamentally dealt *inter alia* with public participation in an administrative action and asked if the *audi-alteram partem* principle, which promotes the right to be heard in cases where interests have been affected, could be applied. Both the court *a quo* and the SCA found that the *audi*-principle did apply and that therefore a right existed in the case of this administrative action for the interested parties to object to the concerns of the development. The *audi*-principle found in administrative law can be used in this way to:

... facilitate effective public participation by relying on this principle to raise objections to administrative government decisions which may affect environmental rights and interests, certainly in those instances where concerned citizens have *not* been given the opportunity to raise objections to administrative decisions.<sup>225</sup>

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<sup>221</sup> Paras 40-41.

<sup>222</sup> Paddock “The role of public engagement” 129.

<sup>223</sup> Feris 2010 *PELJ* 75.

<sup>224</sup> 1999 (2) SA 709 (SCA).

<sup>225</sup> Kotzé “Promoting Public Participation” 3.4 – 4. Although the scope of this discussion does not allow for a detailed analysis of administrative justice, it is important to note the role of public participation in administrative justice and decision-making. Therefore, this discussion touches on aspects of just administrative action only insofar as they involve public participation as an aspect of administrative action.

In other words, the *audi*-principle may be used as a means to participate in decision-making relating to the environment.

#### 4.1.2 Public participation in NEMA

NEMA provides for extensive public participation in environmental governance, particularly within the principles provided for in the Act and the procedures regulating participation when applying for an environmental authorisation.<sup>226</sup> One such principle provided for in NEMA states that:

[t]he participation of all interested and affected parties in environmental governance must be promoted, and all people must have the opportunity to develop the understanding, skills and capacity necessary for achieving equitable and effective participation, and participation by vulnerable and disadvantaged persons must be ensured.<sup>227</sup>

While this principle applies only to the state and is not enforceable *per se*, it should guide decision-making. Therefore, while it is important to give the public a platform to participate in environmental governance, it is also important to ensure that such participation is aligned with a holistic and clear understanding of the situation and a capacity to participate effectively. This means that, at least in theory, the mere fact that participation is provided for within environmental governance and decision-making structures should not amount to a rigid acceptance that the purpose of effective participation has been accomplished. Rather, participation should be evaluated on whether or not the members of the public have been sufficiently informed and fully understand their rights and duties concerning the matter for which participation was provided, and the extent to which the public had a say in the decisions affecting them.

NEMA also promotes procedural environmental justice through participation by recognising the important role that traditionally marginalised groups, such as women and the youth, play in environmental management, and emphasises that their participation in environmental governance should be promoted.<sup>228</sup> This is further supported through the principle that public participation should allow for and promote

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<sup>226</sup> Primarily through ss 2 and 24 of NEMA.

<sup>227</sup> S 2(4)(f) of NEMA.

<sup>228</sup> S 2(4)(q) of NEMA.

ordinary and traditional knowledge.<sup>229</sup> By recognising all forms of knowledge, NEMA fundamentally recognises the importance of all members of society participating in and contributing to the decision-making process. These principles highlight the importance of public participation as a tool to guide the actions of public bodies in environmental decisions.

Furthermore, NEMA makes provision for public participation in the process of submitting an application for an environmental authorisation through its integrated environmental management provisions,<sup>230</sup> read with the EIA Regulations, 2014 (EIA regulations).<sup>231</sup> The EIA regulations comprehensively provide for public participation, dedicating a whole chapter to it,<sup>232</sup> while guidelines have also been published dealing with public participation in the EIA process.<sup>233</sup> In general, chapter 5 of NEMA dealing with integrated environmental management, read with chapter 6 of the EIA regulations provides for public participation processes in the granting and rejecting of an environmental authorisation.<sup>234</sup>

The EIA regulations which deal with the general application requirements do not require that the application itself needs to be subject to public participation.<sup>235</sup> Only once the application is handed in at the competent authority and the basic assessment or scoping report is commenced with are I&APs notified of the proposed development.<sup>236</sup> Essentially, I&APs are notified of the application for an environmental authorisation

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<sup>229</sup> S 2(4)(g) of NEMA.

<sup>230</sup> Chapter 5 of NEMA. According to s 23(2)(d) one of the general objectives of integrated environmental management is to “ensure adequate and appropriate opportunity for public participation in decisions that may affect the environment”.

<sup>231</sup> GN 982 in GG 38282 of 4 December 2014. Public participation in the environmental authorisation process is defined by NEMA as “a process by which potential interested and affected parties are given the opportunity to comment on, or raise issues relevant to, the application”.

<sup>232</sup> Chapter 6, EIA regulations.

<sup>233</sup> GN 807 in GG 35769 of 10 October 2012. Although these guidelines are not legally binding, they provide important information that clarifies certain issues and guides the process of participation. Regulation 41(2) further states that “the person conducting a public participation process must take into account any relevant guidelines applicable...”. This means that the guidelines must be taken into account.

<sup>234</sup> Which consist of either a basic assessment or a scoping and environmental impact report, and where applicable, a closure plan.

<sup>235</sup> R 16 – 18 of the EIA regulations, which deal with the general application requirements, do not require that the application itself needs to be subject to public participation. This application includes a description of the location of the activity and a location plan.

<sup>236</sup> In terms of regulations 19 and 21 of the EIA regulations.

through public notices.<sup>237</sup> However, reasonable alternative measures should be taken to notify people of the invitation to participate “in those instances where a person is desirous of but is unable to participate in the process due to illiteracy”.<sup>238</sup> Once the decision has been made to grant the environmental authorisation, the only remedy for I&APs is to appeal the decision in terms of the National Appeals Regulations.<sup>239</sup>

While the public participation procedures provided for in the process of applications for an environmental authorisation are commendable, NEMA does not provide for many opportunities to participate in the monitoring and enforcement of environmental compliance other than through private prosecution provisions, for example.<sup>240</sup> This creates fragmentation in the application of public participation processes, as civil society is able to meaningfully participate in the preparation and decision-making phases of a development but given little opportunity to participate in the monitoring and enforcement of environmental compliance.

#### *4.1.3 Effect of public participation in practice*

Public participation mobilises the community to actively participate in environmental governance and leads to greater transparency and accountability in the decision-making of the state.<sup>241</sup> This was seen in *Petro Props (Pty) Ltd v Barlow and Another*,<sup>242</sup> (Petro Props) where an application for an interdict was brought before the court to prevent the respondent from continuing with a public campaign that had been raised against the construction of a fuel station which had been approved by the state in an ecologically sensitive area. The Court found in favour of the respondent,<sup>243</sup> recognising that its interest in mobilising the public campaign was selfless and geared towards the protection of the environment.<sup>244</sup>

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<sup>237</sup> This includes erecting a notice board on the boundary of the proposed development; giving written notice to various parties; and placing an advertisement in a local newspaper and the *Government Gazette* or provincial or national newspaper (R 41(2) of the EIA regulations).

<sup>238</sup> R 41 (2)(e) of the EIA regulations.

<sup>239</sup> GN 993 in GG 38303 of 8 December 2014 as amended by GN 205 of 12 March 2015 in GG 38559.

<sup>240</sup> S 33 of NEMA.

<sup>241</sup> Coenen “Public Participation: Introduction” 2.

<sup>242</sup> 2006 (5) SA 160 (W).

<sup>243</sup> The court was essentially required to weigh up the competing interests of the applicant’s property right against the respondent’s right to freedom of expression.

<sup>244</sup> Para 55.

Participation of the public in environmental governance, as displayed in *Petro Props*, does not usurp the state's role to enforce regulatory provisions but rather "constitutes a vital collaboration between the State and private entities in order to ensure achievement of constitutional objectives."<sup>245</sup> While this may be true, a significant threat to public participation, particularly relating to public interest litigation, is the trend of strategic litigation against public participation (SLAPP suits). This is defined as:

... a meritless case mounted to discourage a party from pursuing or vindicating their rights, often with the intention not necessarily to win the case, but simply to waste the resources and time of the other party until they bow out.<sup>246</sup>

In other words, litigation may be brought against a party who has been active in pursuing matters of public environmental concern or has questioned the environmental legitimacy and integrity of a development. While this seems to be a trend which was first begun in the USA,<sup>247</sup> the South African courts have been rather astute in recognising it. For instance, SLAPP litigation was seen in *Wraypex (Pty) Ltd v Barnes and Others*<sup>248</sup> (*Wraypex*), where the court granted a special order for costs against the plaintiff for pursuing vexatious litigation,<sup>249</sup> because it was "purposeless from an economic point of view, and ... the defendants were unnecessarily involved in heavy expenditure in defending the cases brought against them."<sup>250</sup> Nevertheless, it remains a threat to public interest litigation particularly in environmental law, where most cases involve under-resourced NGOs or public interest firms that go against large, wealthy corporations.

## **4.2 Access to information**

### *4.2.1 Constitutional outline of access to information*

While public participation is not explicitly provided for as a constitutional right in South Africa, the right to access to information is constitutionally enshrined:

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<sup>245</sup> Para 18 in *Vaal Environmental Justice Alliance v Company Secretary of ArcelorMittal South Africa Limited and Another Case 39646/12 (SGHC) 1 September 2013* (unreported).

<sup>246</sup> *Murombo and Valentine 2011 SAJHR 84.*

<sup>247</sup> *Murombo and Valentine 2011 SAJHR 92.*

<sup>248</sup> 2011 (3) SA 205.

<sup>249</sup> In this case, the defendants had exercised their right to participate in environmental decision-making by applying to appeal against a decision made by the Gauteng Environment Authorities to approve the establishment of a township by the plaintiff.

<sup>250</sup> Para 16.

- (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.<sup>251</sup>

This provision makes it clear that access to information may be requested from a state or private body. The importance of this right in a constitutional and democratic society cannot be overemphasised as it is central to the promotion and enforcement of other rights.<sup>252</sup> The Constitutional Court noted this when it stated that:

[t]he importance of [the right to access to information] in a country which is founded on values of accountability, responsiveness and openness, cannot be gainsaid. To give effect to these founding values, the public must have access to information held by the State. Indeed one of the basic values and principles governing public administration is transparency. And the Constitution demands that transparency “must be fostered by providing the public with timely, accessible and accurate information”. Apart from this, access to information is fundamental to the realisation of the rights guaranteed in the Bill of Rights.<sup>253</sup>

Therefore, access to information is important for transparency and accountability and for the realisation of other human rights, including the environmental right.<sup>254</sup> It also allows for informed participation in environmental decision-making.

#### 4.2.2 Access to information in NEMA

Firstly, NEMA provides for access to information by stating that “[d]ecisions must be taken in an open and transparent manner, and access to information must be provided in accordance with the law.”<sup>255</sup> While this generally applies to the actions of the state in their decisions that may affect the environment, the SCA noted in *Company Secretary of Arcelormittal South Africa v Vaal Environmental Justice Alliance*<sup>256</sup> (VEJA case) that:

... in principle, [it must also] apply to corporate decisions and activities that [have an] impact on the environment and thus implicate the public interest, particularly when their activities require regulatory approval.

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<sup>251</sup> S 32 of the Constitution.

<sup>252</sup> Peekhaus 2011 *Government Information Quarterly* 543.

<sup>253</sup> *Brümmer v Minister for Social Development and Others* 2009 (6) SA 323 (CC) paras 62 and 63.

<sup>254</sup> For example access to environmental information such as the levels of emissions may be required to enforce and protect the right to an environment that is not harmful to the health and well-being of those people who live in the area.

<sup>255</sup> S 2(4)(k) of NEMA.

<sup>256</sup> 2015 (1) SA 515 (SCA).

This inclusion of private bodies in the principle of access to information and transparency is particularly relevant when considering the significant role that these bodies play as actors in environmental governance – both from a commercial and environmental perspective. NEMA further provides in its definition of “commercially sensitive information” that “details of emission levels and waste products must not be considered to be commercially confidential”.<sup>257</sup> This may have significant interpretative relevance in the future as public and private bodies often refuse to provide environmental information on the grounds of confidentiality.<sup>258</sup>

As noted, NEMA comprehensively provides for public participation within its integrated environmental management provisions read with the EIA regulations, which includes access to information during the process of granting environmental applications.<sup>259</sup> NEMA also initially included an expressed provision for access to environmental information,<sup>260</sup> which was later repealed after PAIA had been enacted. Therefore, it is fitting to provide a detailed account of access to environmental information through the *Promotion of Information Act*<sup>261</sup> (PAIA), as this now forms the primary basis for information requests in general and also those requests relating to the environment.

#### 4.2.3 PAIA

PAIA was enacted to give effect to the constitutional right to access to information<sup>262</sup> and is the primary means of asserting the right to access to information,<sup>263</sup> including environmental information. It further acknowledges the role of access to information in the protection and promotion of other rights, as it explicitly sets out in its preamble that it seeks to “actively promote a society in which the people of South Africa have effective access to information to enable them to more fully exercise and protect all of their

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<sup>257</sup> S 1 of NEMA.

<sup>258</sup> CER 2014 <http://cer.org.za> 5. For example this definition can be used to help gain access to certain information that the public or private body refuses to release on the grounds of confidentiality, particularly if the information relates to emission levels and waste products.

<sup>259</sup> Particularly see R 4(2)(a); 5(3); 26(h); 34(6) and 40(2) of the EIA regulations.

<sup>260</sup> S 31 of NEMA.

<sup>261</sup> 2 of 2000.

<sup>262</sup> S 9(a) of PAIA.

<sup>263</sup> *Institute for Democracy in South African and Others v African National Congress and Others* 2005 (5) SA 39 (C) para 17.

rights”,<sup>264</sup> and reiterates the Constitution’s provision that the requester has a right to gain access to information that is held by both public<sup>265</sup> and private<sup>266</sup> bodies respectively.<sup>267</sup>

#### 4.2.3.1 *Information that is voluntarily disclosed*

Information for both public and private bodies may either be disclosed voluntarily – where information is freely accessible within the public domain or disclosed upon request. While public bodies are statutorily obliged to annually release categories of records to the public, which will be published in the *Government Gazette*,<sup>268</sup> private bodies may voluntarily release such information but are not statutorily obliged to do so.<sup>269</sup> Therefore access in this regard should in theory be readily available within the public domain, and when dealing with public bodies should largely include “the general state of the environment, the state’s compliance with international and domestic obligations, environmental planning, impending legislative and administrative action, applications for environmental authorisations, and the terms and conditions of current environmental authorisations.”<sup>270</sup>

Although not statutorily obliged to do so, public bodies such as the Department of Environmental Affairs (DEA) do publish reports relating to the state of the environment and the strategic plan relating to the environment.<sup>271</sup> The DEA also provides for an annual National Environmental Compliance and Enforcement Report (NECER), which

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<sup>264</sup> Preamble of PAIA.

<sup>265</sup> PAIA defines a “public body” in S 1 as:

- (a) any department of state or administration in the national or provincial sphere of government or any municipality in the local sphere of government; or
- (b) any other functionary or institution when –
  - (i) exercising a power or performing a duty in terms of the Constitution or a provincial constitution; or
  - (ii) exercising a public power or performing a public function in terms of any legislation.

<sup>266</sup> PAIA defines a “private body” in S 1 as:

- (a) a natural person who carries or has carried on any trade, business or profession, but only in such capacity;
  - (b) a partnership which carries or has carried on any trade, business or profession; or
  - (c) any former or existing juristic person,
- but excludes a public body. See Peekhaus 2014 *Journal of Information Policy* 575-581 for an in-depth discussion on the nuances of defining public and private entities and the subsequent jurisprudence on this distinction.

<sup>267</sup> Part 2 and 3 of PAIA respectively.

<sup>268</sup> S 15 of PAIA.

<sup>269</sup> S 52 of PAIA.

<sup>270</sup> Du Plessis “Access to Information” 199.

<sup>271</sup> Including the State of the Environmental Reports.

seeks to provide an overview of environmental compliance and enforcement activities that have been embarked on by various public and private bodies.

While private bodies are not statutorily obliged to disclose any information voluntarily, some private bodies do publish annual reports relating to the environment, permits and authorisations. However, there is very little concrete information relating to these aspects of environmental compliance in those reports.<sup>272</sup> In 2011 the Centre for Environmental Rights (CER), a non-profit organisation and law clinic dealing with environmental matters in South Africa formally requested (not in terms of PAIA) various private bodies in the mining industry to publish their environmental licences<sup>273</sup> on their websites. While some companies did not respond to the request, others refused the request on the grounds of confidentiality, among other things.<sup>274</sup>

#### 4.2.3.2 *Requesting information from public bodies*

Information that is not freely available within the public domain must be requested. Requests that are made to public bodies must follow the procedural requirements for filing the request for information,<sup>275</sup> but the requestor is not required to provide reasons for the request.<sup>276</sup> The right to access information is not absolute and there are several grounds for refusal of the request, as listed in PAIA.<sup>277</sup> One of the reasons most regularly cited by public bodies for refusing a request for environmental information is the protection of the commercial information of third parties.<sup>278</sup> This may be attributed to

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<sup>272</sup> CER 2013 <http://cer.org.za> 24.

<sup>273</sup> While the scope of this dissertation does not include a discussion on mining licences and permits, this report is used as a general example to illustrate the grounds on which private bodies refuse to voluntarily release information.

<sup>274</sup> CER 2012 <http://cer.org.za> 13. Other grounds included the administrative and financial burden on the company to upload the documents; the potential harm to the company's commercial interests; the claim that information is released to various parties in a "controlled fashion" to limit misunderstanding relating to the information; and that the information should be obtained from the public bodies who authorised the licences.

<sup>275</sup> S 18 of PAIA.

<sup>276</sup> This interpretation was confirmed in *Transnet Ltd and Another v SA Metal Machinery Co (Pty) Ltd* 2012 (2) SA 50 CC, where the court stated that "...once a requester has complied with the procedural requirements for access and overcome the refusal grounds in chapter 4, he or she must be given access. [Section] 11 makes that clear. Not only that, [section] 11(3) makes it equally plain that the requester's reasons are not relevant" para 9.

<sup>277</sup> Ch 4 of Part 2 and 3 of PAIA respectively.

<sup>278</sup> In terms of s 36 of PAIA. This was observed from the requests sent out to public bodies by CER between 2010-2014. CER 2014 <http://cer.org.za> 5. Other relevant grounds for refusal include the mandatory protection of the privacy of a third party who is a natural person (s35); manifestly frivolous

the fact that public bodies do not have the knowledge and training required to determine if the information that has been requested falls within the purview of section 36 of PAIA.<sup>279</sup> This indicates a need for greater understanding of PAIA and its provisions amongst public officials that deal with information requests.

Where the body fails to give a decision on whether to grant access to the requested information within 30 days after the request has been received, the request is deemed to have been refused.<sup>280</sup> Although PAIA provides requesters with an internal appeal mechanism against decisions made by public bodies,<sup>281</sup> once the internal appeal process has yielded no different outcome, the requester's only other option is to approach the courts to enforce its right of access to information. If a case is presented in court, the party who seeks to limit the right to access information by refusing to grant access has the onus to prove that such a limitation is justified.<sup>282</sup>

Particularly relevant to the discussion of access to information from public bodies is the case of *Trustees, Biowatch Trust v Registrar: Genetic Resources and Others*,<sup>283</sup> where the applicant was the Biowatch Trust (Biowatch), an environmental NGO which sought to obtain information from public bodies<sup>284</sup> regarding genetically modified organisms (GMOs). Biowatch submitted four requests to the Department of Agriculture (the Department) over a period of eight months for information regarding the manner in which decisions permitting GMO crops had been made.<sup>285</sup> The Department partially released some information while it ignored other requests, upon which Biowatch instituted proceedings in the High Court, seeking access to information from the Registrar of Genetic Resources (the Registrar).

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or vexatious requests; substantial and unreasonable division of resources (s 45); and that the report which contains the requested information cannot be found or does not exist (s 23).

<sup>279</sup> CER 2014 <http://cer.org.za> 5.

<sup>280</sup> Ss 27 and 58 of PAIA respectively.

<sup>281</sup> Chapter 1 of part 4 of PAIA.

<sup>282</sup> S 81(3) of PAIA.

<sup>283</sup> 2005 (4) SA 111 (T).

<sup>284</sup> Including the Ministry of Agriculture, particularly the Directorate of Genetic Resources.

<sup>285</sup> PAIA had not yet come into effect when Biowatch launched its applications in the court and therefore, the requests were made in terms of s 32 of the Constitution.

Biowatch's application in the High Court prompted intervention from three producers of GMOs,<sup>286</sup> including Monsanto, who was granted leave to intervene in order to prevent Biowatch from gaining access to confidential information which Monsanto had provided to the Registrar. While PAIA had already been promulgated, it had not yet commenced by the time that Biowatch had filed their initial request for information to the Department. Therefore, the Court rejected the respondent's argument that PAIA applied retrospectively.<sup>287</sup> Monsanto's application for leave to intervene in court proceedings was based on the fact that the requested information was confidential, yet it failed to provide substantial evidence to convince the Court that the information that Biowatch had requested was in fact commercially sensitive and therefore confidential.<sup>288</sup> The Court subsequently found in favour of Biowatch and held that eight of the eleven requests for information should be granted to Biowatch.

#### 4.2.3.3 *Requesting information from private bodies*

While requests that are made to a private body also need to comply with certain procedures,<sup>289</sup> the requestor is also required to prove that the "requested record is required for the exercise or protection of any right".<sup>290</sup> This threshold requirement has been interpreted by the SCA to mean "reasonably required... provided that it is understood to connote a substantial advantage or an element of need".<sup>291</sup> While the requestor must show how the information would "assist" the exercise or protection of the rights,<sup>292</sup> "mere compliance with the threshold requirement of 'assistance' will not be enough."<sup>293</sup> Therefore, it is accepted that whether information is required for the exercise or protection of rights will be determined within the parameters set out in jurisprudence and with due regard to the facts of each case.<sup>294</sup>

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<sup>286</sup> The other two producers who were granted leave to intervene included Stoneville Pedigree Seed Company and D & PL SA South Africa Inc.

<sup>287</sup> Although the Court held that it would not be unfair to allow for PAIA grounds for refusing access to information, because the right to information is not absolute. However, the Registrar failed to cite any PAIA grounds for the refusal of Biowatch's request.

<sup>288</sup> Peekhaus 2011 *Government Information Quarterly* 547.

<sup>289</sup> S 53 of PAIA.

<sup>290</sup> S 50(1)(a) of PAIA. The full provision states: (1) A requester must be given access to a record of a private body if – (a) that record is required for the exercise or protection of any rights.

<sup>291</sup> *Clutchco (Pty) Ltd v Davies* 2005 (3) SA 486 (SCA) para 13. This interpretation was further confirmed in *Unitas Hospital v Van Wyk and Another* 2006 (4) SA 436 (SCA).

<sup>292</sup> *Cape Metropolitan Council v Metro Inspection Services (Western Cape) CC and Others* 2001 (3) SA 1013 (SCA) para 28.

<sup>293</sup> *Unitas Hospital v Van Wyk and Another* 2006 (4) SA 436 (SCA) para 17.

<sup>294</sup> *Unitas Hospital v Van Wyk and Another* 2006 (4) SA 436 (SCA) para 18.

While the SCA has noted that the parameters set down by its judgment are substantially broad, it may still be difficult for the requester to prove that there is a substantial link between the requested record and the right that it affects. This is because in environmental matters, as is the case with most other requests for information, the requesters do not necessarily know the exact contents of the record, making it difficult to establish such a link.<sup>295</sup> However, the courts have recognised this difficulty by noting that PAIA:

...requires requesters to demonstrate a need to know the information – a connection between the information requested and the protection and enforcement of rights. But the degree of connection [between the information requested and the protection or enforcement of a right] should not be set too high or the principal purpose of PAIA will be frustrated. These words “required for the protection and exercise of rights” must therefore be interpreted so as to enable access to such information as will *enhance and promote* the exercise and protection of rights.<sup>296</sup>

The willingness of the courts to apply this broad interpretation of the threshold requirement for private bodies in the environmental sense was further illustrated by the SCA in *Company Secretary of Arcelormittal South Africa v Vaal Environmental Justice Alliance*<sup>297</sup> (Arcelormittal case), which primarily dealt with questions of application surrounding the use of the word “required” in section 50(1)(a) of PAIA.<sup>298</sup> Before instituting court proceedings in the court *a quo*, the Vaal Environmental Justice Alliance (VEJA) sent Arcelormittal notices on two separate occasions requesting certain information that VEJA asserted was “necessary for the protection of the section 24 constitutional rights and [was] in the public interest.”<sup>299</sup> VEJA went on to state that it required this information to ensure that Arcelormittal carried out its obligations under NEMA and various other environmental legislative provisions.<sup>300</sup> Arcelormittal eventually rejected VEJA’s requests on the grounds that VEJA had failed to base its requests on a right that they wanted to protect or exercise, as required by section 50(1)(a) of PAIA.

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<sup>295</sup> Peekhaus 2014 *Journal of Information Policy* 580.

<sup>296</sup> Para 354 *M & G Media Ltd and Others v 2010 FIFA World Cup Organising Committee South Africa Ltd, and Another* 2011 (5) SA 163 (GSJ).

<sup>297</sup> 2015 (1) SA 515 (SCA).

<sup>298</sup> The applicant in the court *a quo*, VEJA, was a non-profit voluntary association which defined itself as an advocate for environmental justice. The respondent was Arcelormittal South Africa Limited, a steel manufacturer in the Vaal area.

<sup>299</sup> Para 8 (SCA).

<sup>300</sup> Para 8 (SCA).

VEJA subsequently instituted proceedings in the High Court to declare the refusal invalid, and further to order Arcelormittal to supply VEJA with the requested information.

The High Court considered the meaning of the word “required” and stated that “the use of the word ‘required’ rather than, for example, the use of the word ‘necessary’, in Section 50(1)(a) creates a far lower ‘threshold’ than that contended for” by Arcelormittal.<sup>301</sup> It considered VEJA’s requests in relation to the environmental right which it sought to protect and exercise and held that refusing VEJA’s application would hinder its ability to preserve and protect the environment, notably as an advocate for environmental justice.<sup>302</sup>

Arcelormittal applied for and was granted leave to appeal in the SCA, which again considered the question of PAIA’s threshold requirement. The Court scrutinised the documents adduced by each of the parties to determine whether the applicant had laid a proper foundation to prove that the information requested was “reasonably required” for the exercise or protection of VEJA’s rights.<sup>303</sup> It found that Arcelormittal’s activities had significant environmental impacts and were therefore “matters of public importance and interest.”<sup>304</sup> The Court also found that VEJA had relied not only on the environmental right enshrined in the Constitution but also on the relevant legislation.<sup>305</sup>

#### 4.2.4 Effect of PAIA in practice

While PAIA gives effect to the constitutionally enshrined right to access to information, the implementation of its provisions has been largely lacklustre. The state has acknowledged this of its own accord in the National Development Plan<sup>306</sup> (NDP), which sets out the national strategy to eliminate poverty and reduce inequality by 2030.<sup>307</sup> Realising the crippling effect of corruption on development, the NDP clearly states that:

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<sup>301</sup> Para 8 of *Vaal Environmental Justice Alliance v Company Secretary of ArcelorMittal South Africa Limited and Another* Case 39646/2012 (SGHC) 1 September 2013 (unreported).

<sup>302</sup> Para 14 (SGHC).

<sup>303</sup> Para 50 (SCA).

<sup>304</sup> Para 52 (SCA).

<sup>305</sup> Including NEMA, the *National Environmental Management: Waste Act* 59 of 2008 (NEM:WA) and the *National Water Act* 36 of 1998 (NWA).

<sup>306</sup> National Planning Commission of South Africa 2012 <http://www.poa.gov.za>.

<sup>307</sup> National Planning Commission of South Africa 2012 <http://www.poa.gov.za> 24.

Ineffective implementation of the Promotion of Access to Information Act is due to wilful neglect, lack of appreciation of the importance of the right, an institutional culture of risk aversion and/or secrecy and a lack of training. The absence of a useable enforcement mechanism is one of the primary obstacles. Unlike most modern access to information laws, the act does not create a specialist adjudicatory body, such as an information commissioner or commission. Such a body should be established to dispense quick, accessible and inexpensive access to justice for those appealing to withhold information, or so-called deemed refusals where no answer comes in response to a request.<sup>308</sup>

Similarly, the South African Human Rights Commission (SAHRC)<sup>309</sup> has noted PAIAs ineffective implementation by stating in its 2014 annual report that “public bodies do not comply substantively with PAIA and instead adopt a tick box approach.”<sup>310</sup> Therefore, while provisions for access to environmental information are adequately provided for, particularly by PAIA, the implementation of these provisions threatens to weaken the impact that access to information has as a tool to promote environmental justice.

### **4.3 Access to justice**

#### *4.3.1 Constitutional outline of access to justice*

##### *4.3.1.1 Access to courts*

The Constitution provides for far-ranging access to justice by including a right to have disputes resolved through a fair public hearing before a court, tribunal or other forum.<sup>311</sup> Unfortunately, many people in South Africa do not have the financial means to actively pursue costly court proceedings. Therefore public interest litigation<sup>312</sup> has become increasingly important in advancing justice in South Africa, as it provides litigation opportunities and relief to a broad spectrum of people, including the marginalised sectors of society.<sup>313</sup> Public interest litigation has further benefits within the

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<sup>308</sup> National Planning Commission of South Africa 2012 <http://www.poa.gov.za> 452.

<sup>309</sup> The SAHRC is mandated in terms of ss 32 and 83-85 of PAIA to monitor compliance with PAIA and the implementation thereof.

<sup>310</sup> SAHRC 2014 <http://www.sahrc.org.za> 22.

<sup>311</sup> S 34 of the Constitution reads: “Everyone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum”.

<sup>312</sup> Public interest litigation is broadly defined as “litigation in the interest and for the protection of... the public in general” Schall 2008 *Journal of Environmental Law* 419. For a detailed discussion on public interest in South Africa see Cote and Van Garderen 2011 *SAJHR* 178-182.

<sup>313</sup> Kotzé and Feris 2009 *RECIEL* 339.

environmental context as, *inter alia*, it promotes environmental justice in cases where “marginalised communities bear the brunt of environmental degradation.”<sup>314</sup>

One of the primary challenges to public interest litigation and accessing justice through the courts is the financial implications or costs of litigation.<sup>315</sup> Also, public interest firms have the financial and administrative capabilities to take on only a limited amount of cases. While litigation costs may pose an obstacle to access to justice, it has long been established, and noted by the Constitutional Court in *Ferreira v Levin and Others*,<sup>316</sup> that a flexible approach to costs is necessary; which stems from two basic principles:

the first being that the award of costs, unless expressly otherwise enacted, is in the discretion of the presiding judicial officer, and the second that the successful party should, as a general rule, have his or her costs... The second principle is subject to a large number of exceptions where the successful party is deprived of his or her costs... [T]he principles which have been developed in relation to the award of costs are by their nature sufficiently flexible and adaptable to meet new needs which may arise in regard to constitutional litigation. They offer a useful point of departure. If the need arises the rules may have to be substantially adapted; this should however be done on a case by case basis.<sup>317</sup>

Therefore, although there are two general principles surrounding cost orders in litigation, they are flexible and subject to adaptation on a case-by-case basis. Following this, the question arose in *Biowatch Trust v Registrar Genetic Resources and Others*<sup>318</sup> as to “whether the general principles developed by the courts with regard to cost awards need to be modified to meet the exigencies of constitutional litigation.”<sup>319</sup> Despite Biowatch’s being largely successful in its application, the High Court found that some of Biowatch’s requests for information, as well as its notice of motion, were formulated in an inept manner, prompting the High Court to disregard the general rule that the costs should follow the result.<sup>320</sup> Consequently, the state was not ordered to pay the costs in Biowatch’s favour. The High Court further ordered Biowatch to pay Monsanto’s costs,

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<sup>314</sup> Kotzé and Feris 2009 *RECIEL* 339.

<sup>315</sup> Humby 2010 *Journal of Environmental Law* 125.

<sup>316</sup> *Ferreira v Levin No and Others; Vryenhoek and Others v Powell No and Others* 1996 (2) SA 621 (CC). This judgement on costs was given separately from the judgment given on the merits of the case.

<sup>317</sup> Para 3.

<sup>318</sup> 2009 (6) SA 232 (CC).

<sup>319</sup> Para 12.

<sup>320</sup> Para 68.

Monsanto being a private body that had been granted leave to interfere in the court proceedings.

Biowatch appealed to and was eventually granted leave to appeal in the Constitutional Court. Although the High Court decision revolved on the right to access to information, the Constitutional Court case centred on “the proper judicial approach to determining costs awards in constitutional litigation.”<sup>321</sup> This consisted of four main issues. Firstly, the Court dealt with whether the status of the parties or the issue itself should be the determining factor concerning cost awards in constitutional litigation. Relying on the fact that everyone has equal protection under the law, the Court found that the cost award should not be dependent on the characterisation of the parties. In other words, whether the parties are acting in their own interests or in the public interest should not be the determining factor. Rather, the “primary consideration in constitutional litigation must be the way in which a cost order would hinder or promote the advancement of constitutional justice”,<sup>322</sup> which involves determining “whether it has been undertaken to assert constitutional rights and whether there has been impropriety in the manner in which the litigation has been undertaken.”<sup>323</sup>

In this sense, Kotzé and Feris<sup>324</sup> argue that the character of the parties and the nature of the issue in constitutional litigation will often be directly linked, because public interest litigants would most likely be the ones bringing public interest matters before the court. Therefore it would be an “almost impossible” task to expect a court to consider the character of the parties “as an issue wholly separate” from the nature of the issue.<sup>325</sup> While the authors agree that asserting constitutional rights as emphasised by the Court should be an important factor in the consideration of costs, they argue that it should not be the overriding consideration, as there are many factors that need to be taken into account when dealing with cost orders in public interest litigation.

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<sup>321</sup> *Biowatch* (CC) para 1.

<sup>322</sup> Para 16.

<sup>323</sup> Para 20.

<sup>324</sup> Kotzé and Feris 2009 *RECIEL* 344.

<sup>325</sup> Kotzé and Feris 2009 *RECIEL* 344.

On the other hand, Humby<sup>326</sup> argues that the Court's finding not to consider the character of the parties should be seen in a positive light, as it avoids the possible challenges of identifying whether a party is actually acting in the public interest or not, or the extent to which the character of the parties should be taken into account when determining costs. Both critiques raise valuable arguments. When viewed from the context of environmental justice it is clear that justice takes equity into account. That being said, equity "can allow for exceptions to an otherwise uniformly applied law, in order to provide individualised justice."<sup>327</sup> However, the Court approached this matter on the basis that all litigants have equal status when asserting their rights in a court of law, as prescribed by the equality clause in the Constitution.<sup>328</sup> Thus, "equal status before a court" implies that no distinction is made between the parties, whereas "equity" would generally advocate for a differentiation between parties if it would generate a just result.

The second issue in the *Biowatch* case dealt with the general rule followed in matters which involve litigation between private parties and the state. The Court followed the general rule established in *Affordable Medicines Trust and Others v Minister of Health and Another*,<sup>329</sup> that an unsuccessful party in constitutional litigation against the state ought not to be ordered to pay costs.<sup>330</sup> In other words, if the state is successful, each party will bear its own costs, but where the state is unsuccessful it should be ordered to pay the other party's costs. This general rule may be departed from where the application is frivolous, vexatious, or is in any other way manifestly inappropriate.<sup>331</sup>

Thirdly, the Court dealt with the general approach in matters where constitutional litigation arises between private parties. The Court noted that this will usually occur where the state has failed effectively to regulate the competing interests of the parties. Therefore, "these matters involve litigation between a private party and the state, with radiating impact on other private parties."<sup>332</sup> Before considering this issue it is worth noting the fourth issue where the Court considered the role of appellant courts in

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<sup>326</sup> Humby 2010 *Journal of Environmental Law* 133.

<sup>327</sup> Shelton "Using law and equity for the poor and the environment" 17.

<sup>328</sup> S 9(1) of the Constitution, which reads: "Everyone is equal before the law and has the right to equal protection and benefit of the law".

<sup>329</sup> 2006 (3) SA 247 (CC).

<sup>330</sup> Para 21.

<sup>331</sup> Para 24.

<sup>332</sup> *Biowatch* (CC) para 28.

appeals against cost orders. The Court found that it would interfere with an order for costs only if the court *a quo* had carried out a “demonstrable blunder” or reached an “unjustifiable conclusion” in exercising its discretion to award costs.<sup>333</sup>

The judgment dealt with the cost order against Biowatch relating to the state and Monsanto (the private party) separately. Firstly, the court *a quo* did not order that the state bear the costs, despite the fact that the matter dealt with constitutional issues.<sup>334</sup>

The Court found that the lack of precision in the court documents submitted by Biowatch had not prevented the High Court from handing down a “thorough and well-substantiated judgement on the merits.”<sup>335</sup> As a result, the state was ordered to pay Biowatch’s costs in the High Court as well as the Constitutional Court<sup>336</sup> because it had continuously failed to supply information that they were duty bound to provide.<sup>337</sup>

Secondly, the Court dealt with the cost order of the court *a quo* against Biowatch for Monsanto’s costs. Although the litigation involved competing interests (Biowatch’s right to access information versus Monsanto’s right to privacy), the question revolved around whether the state had fulfilled its constitutional obligation to “separate the confidential wheat from the non-confidential chaff.”<sup>338</sup> Monsanto, the Court noted, had no choice but to interfere with the proceedings. Therefore the state was ordered to bear the costs of the successful litigant and no cost order was made against any of the private parties.<sup>339</sup>

The order against Biowatch to pay Monsanto’s costs was subsequently set aside.<sup>340</sup>

#### 4.3.1.2 *Locus standi*

Another right enshrined in the Constitution that has allowed for greater access to justice is its provision for generous legal standing. While including an environmental right in the Bill of Rights has significantly broadened access to courts in environmental matters, the

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<sup>333</sup> Para 31.

<sup>334</sup> The right to access to information in terms of s 32 of the Constitution, and the environmental right in terms of s 24 of the Constitution.

<sup>335</sup> Para 44.

<sup>336</sup> Para 52.

<sup>337</sup> Para 49.

<sup>338</sup> Para 53 and 54.

<sup>339</sup> Para 56

<sup>340</sup> In *Tebeila Institute of Leadership, Education, Governance, and Training v Limpopo College of Nursing and Another* [2015] ZACC 4, the Constitutional Court had to deal with an appeal against a cost order handed down by the High Court which ordered each party to pay its own costs, despite the applicant’s (a private party’s) successful application involving constitutional matters against the state. Therefore, the Constitutional Court rectified the High Court’s “inadvertent transposition of logic” (para 10) by ordering the state to pay the costs (para 18).

scope is widened even further when considering the wide *locus standi* that the Constitution provides for matters which relate to rights enshrined in the Bill of Rights. The Constitution provides that:

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.<sup>341</sup>

Therefore, *locus standi*, as provided for by the Constitution, is starkly contrasted with the doctrine of legal standing that had been developed by the common law in the pre-constitutional dispensation. According to the common law doctrine, a person has legal standing, and is therefore able to approach the court, only if he or she can prove either personal harm or damage,<sup>342</sup> or that his or her rights have been affected.<sup>343</sup>

By providing for a broader scope for the enforcement of rights before a court, the Constitution now affords *locus standi* to a broader list of people who are able to approach a court in matters where a right in the Bill of Rights has been affected. In this sense, the common law provisions for *locus standi* should not be disregarded completely as they still apply to matters that do not involve a right enshrined in the Bill of Rights.<sup>344</sup> Feris<sup>345</sup> notes the need to develop the common law provisions for *locus standi* in environmental matters in order to bring it in line with the broader provisions for *locus standi* provided for by the Constitution. This will ensure that a body with the objects of protecting the environment will also have *locus standi* at common law.

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<sup>341</sup> S 38 of the Constitution.

<sup>342</sup> See *Patz v Greene and Co* 1907 TS 427.

<sup>343</sup> See *Dalrympie v Colonial Treasurer* 1910 TS 372.

<sup>344</sup> Feris “Environmental Rights and Locus Standi” 149; Burns and Kidd “Administrative Law and Implementation of Environmental Law” 263.

<sup>345</sup> Feris “Environmental Rights and Locus Standi” 149 as emphasised in an obiter dictum by Pickering J in *Wildlife Society of Southern Africa and Others v Minister of Environmental Affairs and Tourism of the Republic of South Africa and Others* 1996 (3) SA 1095 (Tk) at 1105A-B.

## 4.3.2 Access to justice in NEMA

### 4.3.2.1 Access to courts

While NEMA does not specifically refer to the right of access to courts in environmental disputes it does dedicate a chapter to fair decision-making and conflict management, largely dealing with conciliation and arbitration,<sup>346</sup> and makes provision for judicial matters.<sup>347</sup> According to NEMA, a court may decide not to award costs against an unsuccessful litigant if it is of the opinion that the litigant acted out of concern for the public or environmental interest and has made an effort to use other means that are reasonably available to obtain the relief sought.<sup>348</sup> Therefore, while public interest or environmental litigants are given leeway to bring matters to court in the interest of the environment, they must take care not to institute frivolous or vexatious proceedings.

This was the case in *Wildlife and Environmental Society of South Africa v MEC for Economic Affairs, Environment and Tourism, Eastern Cape and Others*,<sup>349</sup> where the court held that while the applicant had acted out of a genuine concern for the environment and in the public interest, the court was obliged to make a cost order against the applicants (WESSA, an environmental NGO) because the application was unreasonable and unnecessary.<sup>350</sup> The overall character of the judgement may imply that the court would not have ordered costs against WESSA had their application been reasonable, because despite its unreasonableness the application had been made out of a true concern for the environment.

NEMA also provides for civil enforcement through private prosecution, which allows any person acting in the public interest or in the interest of the environment to institute criminal proceedings in matters where a breach (or threatened breach) of duty has

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<sup>346</sup> Ch 4 of NEMA.

<sup>347</sup> Ss 32-35 of NEMA.

<sup>348</sup> S 32(2) of NEMA.

<sup>349</sup> 2005 (6) SA 123 (ECD).

<sup>350</sup> At 143J - 144 C. This reflects the need to raise substantive issues in court applications and the court's discretion in such matters. Similarly in *Silvermine Valley Coalition v Sybrand van der Spuy Boerderye and Others* 2002 (1) SA 478 (CPD) at 493C-E an environmental NGO was not ordered to pay all the costs of the unsuccessful application, but was ordered to pay costs that were wasted because it had brought the application on an urgent basis without justification.

taken place.<sup>351</sup> This duty must be provided for by law and be concerned with the protection of the environment, and where the breach of such a duty is an offence. Private prosecution provides the public with a further platform to participate in environmental governance through criminal procedures. This participation promotes environmental justice through recognising civil society as actors in environmental criminal matters, and providing the means for them to access justice in these situations.

#### 4.3.2.2 *Locus standi*

Notwithstanding the broad *locus standi* provided for in the Constitution and the need to develop the common law, NEMA further broadens *locus standi* in environmental matters that do not necessarily involve the constitutional environmental right, but nevertheless involve aspects of the environment. Section 32(1) of NEMA provides:

- (1) Any person or group of persons may seek appropriate relief in respect of any breach or threatened breach of any provision of this Act, including a principle contained in Chapter 1, or of any provision of a specific environmental management Act, or of any other statutory provision concerned with the protection of the environment or the use of natural resources-
- (a) in that person's or group of person's own interest;
  - (b) in the interest of, or on behalf of, a person who is, for practical reasons, unable to institute such proceedings;
  - (c) in the interest of or on behalf of a group or class of persons whose interests are affected;
  - (d) in the public interest; and
  - (e) in the interest of protecting the environment.<sup>352</sup>

In this sense, anyone is able to approach the court where the matter involves the environment, even if the matter does not specifically pertain to the environmental right enshrined in the Constitution.

The broad *locus standi* provided for by NEMA was reiterated in *Eagles Landing Body Corporate v Molewa No and Others*,<sup>353</sup> which dealt with the *locus standi* of bodies corporates provided for by the *Sectional Titles Act 95 of 1986*<sup>354</sup> (STA). The applicant in this case was the body corporate of a sectional title scheme that neighboured a portion

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<sup>351</sup> S 33(1) of NEMA.

<sup>352</sup> S 32(1) of NEMA.

<sup>353</sup> *Eagles Landing Body Corporate v Molewa No and Others* 2003 (1) SA 412 (T).

<sup>354</sup> In terms of s 36(6) of the *Sectional Titles Act 95 of 1986*.

of land which the respondent, a developer, was in the process of developing.<sup>355</sup> The respondent argued that because the applicant was a creature of statute, its court application fell outside the scope of the body corporate's functions and powers as regulated by the STA.<sup>356</sup> In other words, the respondent argued that the applicant's *locus standi* was limited to matters provided for in the STA.<sup>357</sup>

However, the Court held that the STA does not expressly limit the scope of *locus standi* to those conditions provided for in the STA itself,<sup>358</sup> and further, that the applicant was sufficiently acting in the interests of the environment, regardless of any personal interest that its members would gain in the process.<sup>359</sup> Therefore, the Court found that *locus standi* provided for by section 32 of NEMA is broad enough to embrace within it an interpretation which includes body corporates.

However, some courts have not been as swift in making use of the extended *locus standi* in environmental matters provided for by the Constitution and NEMA. In some instances, the courts have reverted to the common law position of *locus standi* despite having section 32 of NEMA at their disposal. In *Tergniet and Toekoms Action Group and Others v Outeniqua Kreosootpale (Pty) Ltd*<sup>360</sup> (Tergniet), the respondents sought to rely on the test for *locus standi* that was established in *Patz v Greene and Co*<sup>361</sup> read with *Roodepoort-Maraisburg Town Council v Eastern Properties (Prop) Ltd*,<sup>362</sup> which required the applicants to prove that they had suffered actual harm or damage.

The applicants, on the other hand, noted that section 38 of the Constitution "should be amplified with a view to bestowing standing on groups," particularly in matters where these groups seek to enforce legislation which gives effect to the constitutionally enshrined environmental right. The applicants also argued that section 32 of NEMA

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<sup>355</sup> The first and second respondents were the Member of the Executive Council for the Department of Agriculture, Conservation and Environment and the head of the Department respectively.

<sup>356</sup> S 36(6) of the STA accords the body corporate legal personality and *locus standi in iudicio*.

<sup>357</sup> Particularly, s 36(6) of the STA.

<sup>358</sup> Para 47.

<sup>359</sup> Paras 51-53.

<sup>360</sup> *Tergniet and Toekoms Action Group and Others v Outeniqua Kreosootpale (Pty) Ltd* Case 10083/2008 (C) 23 January 2009 (unreported).

<sup>361</sup> *Patz v Greene and Co* 1907 TS 427.

<sup>362</sup> *Roodepoort-Maraisburg Town Council v Eastern Properties (Prop) Ltd* 1933 AD 87.

further expanded *locus standi* for environmental matters and that the applicants were acting in the interest of protecting the environment as indicated in NEMA.<sup>363</sup>

Despite the applicants having raised these constitutional and legislative measures advocating for a broader *locus standi* in their arguments, the court followed the narrower line of reasoning used by the respondent to formulate its judgement. In terms thereof, the Court found that APPA was not promulgated in the public interest but rather “in the interest of persons and communities living in close proximity”<sup>364</sup> to activities which release noxious and offensive gases. The Court subsequently concluded that “*locus standi* concerns the sufficiency of interest and directness of interest in litigation ... [which] depends on the particular facts of each individual case”,<sup>365</sup> and therefore the Court found that all the applicants did have *locus standi*.

Upon analysing the judgement, Kidd<sup>366</sup> rightly points out that while the court correctly concluded that the applicants did have *locus standi*, the same judgement could have been made before 1996. In other words, the Court failed to recognise section 38 of the Constitution and section 32 of NEMA in its reasoning, which sends a message that these provisions are irrelevant.<sup>367</sup> By doing this, the Court fails to recognise key procedural provisions, strengthened by the fact that these provisions are constitutionally enshrined and legislatively provided for, that promote environmental justice by providing anyone with an interest to access such justice.

While both the Constitution and NEMA provide for a broad scope for *locus standi* which does not necessarily require the litigant to have a personal interest in the case, there must at least be an environmental interest in order to be able to rely on section 38 of the Constitution (where the constitutional environmental right is concerned) and section 32 of NEMA. This was reiterated in *All the Best Trading CC t/a Parkville Motors and Others*

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<sup>363</sup> *Tergniet* para 19.

<sup>364</sup> Para 20. This reasoning by the Court does not seem to appreciate that generally all environmental matters are essentially in the broader public interest, especially given the broad definition of environment in s 1 of NEMA.

<sup>365</sup> Para 20.

<sup>366</sup> Kidd 2010 *PELJ* 30.

<sup>367</sup> Kidd 2010 *PELJ* 33.

*v SN Nayagar Property Development and Construction CC and Others*.<sup>368</sup> The applicants, who were owners of various petrol stations, sought to prevent the respondent from developing another petrol station in the same area. However, the applicants based their application on the fact that the proposed development would have a significant impact on their commercial interests. Therefore the Court found that while the applicants relied on section 38 of the Constitution, they failed to show that they had an environmental interest.

## **Chapter 5 Analysis, conclusion and recommendations**

### **5 Analysis, conclusion and recommendations**

#### **5.1 Public participation**

The Constitution provides general objects and principles for local government and public administration, which include public participation. As participation in environmental governance plays an integral part in providing for procedural environmental justice, it is clear that promoting public participation in environmental decision-making is crucial to promoting environmental justice, including its substantive ideals as set out in the environmental right. However, in order to participate, members of the public must first be recognised as stakeholders in environmental governance.

Recognising and engaging the community concerning environmental matters results in greater participation, as the community will believe that its views are important and taken into account in the decision-making process – which also speaks to the worth and dignity of the people in the community. This may also broaden the scope of the I&APs that are participants in the decision-making process. What is meant by this is that oftentimes the I&APs are NGOs and organisations or associations that have been formed with the specific purpose of advocating for the environment. While this is positive for environmental advocacy and governance, members of the community may be overlooked as important stakeholders in the decision-making process.<sup>369</sup> Therefore

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<sup>368</sup> *All the Best Trading CC t/a Parkville Motors and Others v SN Nayagar Property Development and Construction CC and Others* 2005 (3) SA 396 (T).

<sup>369</sup> This does not mean that members of the community are excluded from NGOs and other organisations. However, oftentimes NGOs and other organisations are regarded as the primary

recognising each member of the community as a stakeholder in and participant in environmental governance regardless of whether the person is affiliated to an organisation or not is an important point for advancing the recognition aspect in environmental justice.

Notifying I&APs of the development and the subsequent public participation procedures also recognises the need to allow those interested and affected by the decision to participate in and subsequently enhance environmentally just decision making. While the EIA regulations offer multiple ways in which I&APs may be notified of the application for an environmental authorisation, the publication of notices in various newspapers and along the boundary of the development may pose some problems.

Firstly, I&APs are notified of the application for an environmental authorisation only once it has been received by the competent authority and the applicant proceeds with the submission of the basic assessment or scoping and environmental impact report. In other words, I&APs are invited to participate only once a decision regarding the location of the development has already been made by the developers. In order to accomplish environmental outcomes that are more just, the public should be involved as early as possible in the authorisation process.<sup>370</sup>

Secondly, because of the high illiteracy rate in many areas of South Africa, the publication of notices and the subsequent invitation for public participation in newspapers is not always an effective means of informing I&APs. The indirect exclusion from the participation process of those community members who are unable to read may effectively result in their non-recognition and subsequently foster unjust outcomes, as not all interested community members will have the opportunity to participate.

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public stakeholders. In other words, when an NGO or organisation is involved in the public participation process, the public and private bodies involved may be quick to regard the public participation requirement as being fulfilled. However, this approach fails to recognise those members of society whose views are not advocated by an NGO or other organisation. Promoting the participation of those members of the public who do not form part of those organisations will effectively promote procedural environmental justice, as it will recognise and create a platform for those members to participate in decision-making.

<sup>370</sup> Paddock "The role of public engagement" 141.

The EIA regulations do provide that reasonable alternative measures should be taken to notify people of the invitation to participate “in those instances where a person is desirous of but is unable to participate in the process due to illiteracy”.<sup>371</sup> However, this provision is inutile in a practical sense because a person cannot desire to participate in proceedings which he does not know are available to him in the first place. In this regard, local government can play an important role to ensure that capacity building measures are created in the community, which allow the community to participate more effectively. This includes developing education and training systems which educate members of the community about the environment, their rights *vis-à-vis* the environment, and the means of participation in environmental decision-making.

Only once the public is recognised as a stakeholder in environmental governance are members of the public able to participate in environmental decision-making. *Save the Vaal* illustrates the importance of public participation as a CBI in decision-making to enforce the public’s constitutional environmental right. In other words, the public should be given the opportunity to raise objections to decision-making that may have an effect on its environmental rights. Similarly, *Save the Vaal* demonstrates the need to consider environmental issues in decision-making, particularly in decisions relating to mining which is a powerful economic element in South Africa.

Moreover, *Save the Vaal* underscores the need to train public officials in all departments of government on the importance of public participation and the means by which it may be facilitated. If public officials were trained in the practicalities of public participation, this might lead to decisions that are more environmentally just, as members of the community would be given the opportunity to raise issues of justice that affect them, while officials would be able to genuinely take the issues raised into account. This is particularly true in matters that include sustainable development, because the socio-economic conditions of the community might urge public officials (who were trying to improve the way of life in the area) to favour the economic element of the development to the detriment of the environment and of the community members who are adversely affected thereby.

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<sup>371</sup> R 41 (2)(e) of the EIA regulations.

*Doctors for Life* illustrates that the question of whether a public body has adequately facilitated public participation or not will be reviewed upon a standard of reasonableness. The approach is twofold: the public body must not only provide opportunities to effectively participate in decision-making, but it must also equip the public to effectively realise this right to participate. This standard of reasonableness allows for a wide discretion for public officials to decide on the scope of public participation, which can be subject to abuse, as seen in the *SAPOA* case.

This wide discretion also makes way for contextually-specific tools and techniques for public participation.<sup>372</sup> However, “reasonable” public participation would require procedural guidelines, because without such guidelines participation might be construed by public officials as a bare minimum to be achieved rather than an authentic process that genuinely seeks the input of I&APs. Taking a bare-minimum approach to participation might further reinforce the tick-box approach to the application of public participation and reinforce the misconception that the public does not have anything valuable to add to the decision-making process.

Where public participation is not authentic in that it fails to actually consider the public’s views, this may lead to environmentally unjust decisions, because it fails to recognise the public as stakeholders in the decision-making process. However, if procedural guidelines which guide effective public participation are implemented, this may lead to a more meaningful participation process, which in turn would promote environmental justice, as the views of the public would be recognised as legitimate and applied to the decision-making process. While guidelines have been provided for in the EIA process, the state could go further by publishing policy documents that establish values for public participation that need to be upheld in the participation process, and by creating situation-based assessments to understand the needs and conditions of the proposed

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<sup>372</sup> What is meant by contextually-specific tools is adapting the tools and techniques that are used to the general context of the community culture. For example, in an urban community that is generally fast-paced, tools and techniques directed towards public meetings may not be effective, as they require the community members to schedule time out of their already busy schedules to attend public meetings. To effectively engage with this community culture would require the use of technology, for example, social media pages which allow the community to participate electronically. On the other hand, rural communities that are largely illiterate would require engagement tools that do not involve reading or writing. Instead, personally interactive techniques such as public meetings would be more effective. Public officials would need to explain the use and purpose of the meeting to the members of the community in a language that they would understand, and allow for questions and comments.

development and the community. Therefore, not all the public participation processes will be identical in their execution and implementation. This may not only guide the use of “reasonable” public participation, but may also lead to decisions that are more environmentally just in the procedural sense as the public would be able to participate in a meaningful way rather than as participants in a tick-box exercise.

While NEMA comprehensively provides for public participation, the actual implementation of public participation may be limited. In this sense, although the EIA regulations are an important tool to guide the implementation of public participation in the process of environmental authorisations,<sup>373</sup> innovative tools that are contextually relevant need to be developed that will ensure effective participation by all I&APs. Also, measures need to be put in place that will ensure that all I&APs are aware of the development, understand the effects of the proposed development, and comprehend the impact that their participation may have on the outcome of the decision. Not only could these measures lead to decisions that will promote transparency and greater legitimacy in environmental governance, but they could also lead to more just decisions.

Furthermore, the fact that little provision is made for public participation after the environmental authorisation has been approved illustrates that NEMA provides for public participation only in the planning phase of a development and provides for little public involvement in any of the other phases of a project lifecycle. The discovery of any deviation or non-compliance, *inter alia*, with the conditions set out in the environmental authorisation would require giving the public access to such information in order to enable members of the public to participate in the monitoring of the compliance of the development or activity. However, requesting access to information from public and private bodies comes with its own set of challenges, as will be discussed below.<sup>374</sup>

Not providing the public with procedural structures to participate in the monitoring and enforcement of environmental authorisations throughout the lifecycle of a development (other than through access to information and judicial mechanisms) severely restricts the continued application of procedural environmental justice. Not only does this impact

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<sup>373</sup> This discussion relates to EIA authorisations in terms of NEMA only, and not in terms of other environmental authorisations such as those included in the NWA, NEM:AQA and NEM:WA.

<sup>374</sup> See paragraph 5.2 from page 68 below.

negatively on the credibility of the public participation processes that have already been completed, but it also adversely affects substantive environmental justice (the equitable distribution of environmental benefits and burdens), the realisation of which is preceded by the procedural aspects of recognition and participation. Similarly, some environmental impacts become apparent only once the project has been implemented. In such cases, no legislative provisions are available to the public to monitor compliance with the environmental authorisation.<sup>375</sup>

Nevertheless, mobilising a community to enforce environmental rights through participating in dialogue can have positive effects, as was seen in *Petro Props*. Public participation facilitates dialogue between stakeholders, and when construed within the environmental decision-making paradigm, it provides a means for the public to exercise their environmental rights.<sup>376</sup> Du Plessis<sup>377</sup> suggests that public participation should go beyond information feedback and consultation towards a more constructive form of participation which facilitates open planning, public monitoring and assistance in environmental inspections. This could require a broad revision of national environmental policy and legislation that is applicable to all spheres of government, to create uniformity in the structure and purpose of public participation in environmental governance, and would amount to taking several steps forward in promoting environmental justice through public participation.

The courts play an important role in promoting public participation in environmental governance. Not only do they provide access to justice in environmental matters (and public participation), but they also safeguard those I&APs against possible SLAPP suits, as seen in the *Wraypex* case.

## **5.2 Access to information**

The importance of access to information for promoting environmental justice lies within its ability to enhance informed participation. The public is able to participate more effectively as co-governors, decision makers, monitors of environmental compliance, watchdogs and whistle-blowers where access to information regarding the environment

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<sup>375</sup> Except through access to information and judicial mechanisms.

<sup>376</sup> Du Plessis 2008 *PELJ* 22.

<sup>377</sup> Du Plessis 2008 *PELJ* 22.

is easily available and accessible. Participation that is promoted through access to information could lead to environmentally just decisions, as civil society is placed in an informed position to effectively and meaningfully participate.

Voluntary disclosure of information by public bodies is essential for creating a system of governance that supports transparency and accountability within a democracy. However, there is no general obligation on public bodies to voluntarily publish environmental authorisations or related information on their website. Although the DEA does publish reports such as the NECER, this contains largely statistical information which does not necessarily assist in the performance of the public's role as co-governors of environmental matters and petitioners for environmental justice.

Although private bodies are not statutorily obliged to disclose any information voluntarily, some private bodies do publish annual reports relating to the environment, permits and authorisations. While some companies do not respond to formal requests to voluntarily disclose information (not in terms of PAIA), some refuse on the grounds of confidentiality. This reluctance from private bodies to publish environmental information may stem from an apprehension that access to such information will allow civil society to monitor compliance (in addition to the monitoring and enforcement already executed by the state) with greater efficiency and effect.

Allowing private bodies the option to choose whether or not to disclose environmental information that, objectively speaking, does not fall within the limitations provided for by PAIA does not enhance the values of transparency, accountability and public participation found within the Constitution, but rather creates a perception that non-disclosure is more important than transparency and participation. Therefore, there is a need for greater engagement between civil society and private bodies regarding transparency and accountability in access to environmental information in order for CBIs to effectively promote environmental justice.

Where requests have been made in terms of PAIA, one of the most regularly cited reasons public bodies give for refusing a request for environmental information is the protection of the commercial information of third parties. This may indicate a lack of

understanding regarding the nature of such claims, and suggest that there is need to train public officials in this regard to avoid misunderstanding and the misuse of section 36 as a ground to refuse information requests. In the *Biowatch* case, for instance, Monsanto's failure to provide evidence relating to the confidentiality of the requested records (as Monsanto maintained), illustrates that while key environmental public bodies use the confidentiality of information pertaining to third parties as reasons to refuse information requests, this ground for refusal may not always hold up in court, because the party who seeks to limit the right to access information by refusing to grant access has the onus to prove that such a limitation is justified.

The fact that Biowatch had to resort to judicial measures to enforce its right to access to information (which was eventually granted by the court) highlights the need for the establishment of an independent institution to promote, protect and enforce the right to information in terms of the Constitution as well as PAIA.<sup>378</sup> Not only are court proceedings costly, but they are also time-consuming. In the *Biowatch* case for example, it took five years to obtain the information that had initially been requested, and another four years to resolve the matter of costs. This may have far-reaching implications from a policy and governance perspective<sup>379</sup> on the eventual usefulness of the information requested, as:

... there is an inverse relationship between [information's] age and usefulness, particularly when exercised as a leverage right in pursuit of other constitutional and legislated rights. [Therefore]... access delayed is often tantamount to access denied.<sup>380</sup>

Furthermore, accessing information from a private body through PAIA may provide some difficulties. The requestor must prove that the information that has been requested is "required" for the exercise and protection of rights. While the courts have interpreted this PAIA threshold broadly, there is no means of assessing whether a private body's decision to reject a request for information based on the PAIA threshold is reasonable outside of court. In other words, there is no internal appeal mechanism for

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<sup>378</sup> Although the SAHRC is mandated to monitor compliance with PAIA and the implementation thereof, the SAHRC cannot enforce compliance. Therefore the SAHRC cannot take corrective measures against bodies who fail to comply with PAIA.

<sup>379</sup> This also has practical implications. Oftentimes NGOs and local communities do not have the financial resources needed to address imminent threats to the environment, health and well-being.

<sup>380</sup> Peekhaus 2011 *Government Information Quarterly* 550-551.

a decision made by a private body to reject a request for information – a problem which is exacerbated in cases where the request has been deemed to be refused.

Therefore a requester's only option is to submit an application to the courts for the decision to be reviewed. While the courts are fully capable of deciding on a matter based on the individual facts of the case, as seen in the *Arcelormittal* case, it is time-consuming and costly for the public to institute an application for every explicit and deemed refusal of access to information by a private body, and applying to the courts is therefore not always a viable option. This poses a significant problem for civil society in general, as a lack of the resources required to finance an application to courts to review a decision results in many private bodies avoiding their obligation to disclose information. Again, this highlights the need for the establishment of an independent body that would provide the public with a timely, cost-effective and independent alternative to the judicial review of decisions. If such a body existed, applicants for information would be able to access timely justice against unjust non-disclosure which prevented their participation in environmentally sensitive matters.

The ineffective implementation of access to information laws can have grave consequences for promoting environmental justice. As already noted, procedural environmental justice seeks to recognise members of society and enable them to participate in the decision-making process. Access to information is essential in providing the knowledge and understanding of environmental matters that is required to effectively participate in decision-making. By thwarting access to necessary information, public and private bodies are essentially impeding procedural environmental justice; and without the application of procedural environmental justice it is impossible to attain substantive environmental justice. Decisions not to disclose information collectively undermine the objects of the environmental right. Therefore it is important to train public officials in the correct implementation of PAIA in order to promote public participation in environmentally sensitive decisions and subsequently, environmental justice.

It is clear that the laws regulating access to information seem to offer civil society the measures necessary to successfully access information. However, the greatest problem

surrounding the laws pertaining to access to information seems to be a lack of understanding of how to effect the implementation of these access provisions.

### **5.3 Access to justice**

One of the challenges to public interest litigation and access to justice through courts is the financial implications of cost orders. Particularly relevant to this discussion of costs is the decision in the *Biowatch* case that the primary consideration for determining costs in constitutional litigation should not be based on the character of the parties, but rather on the status of the issue itself, insofar as the cost order would promote the advancement of constitutional justice. In other words, little regard should be given to the fact that the litigants do not have similar financial means to litigate. This may be seen as perpetuating the problem of access to justice experienced by civil society – particularly in environmental matters, where NGOs usually take on large corporations in the interest of the environment.

However, the matter in *Biowatch* dealt with the subsidiary issue of costs laid down by the court *a quo* and not the substantive merits of the case. This seems to have been what prompted the Court to decide the matter as it did – making no distinction between the character of the parties. The Constitution explicitly states that “[e]veryone is equal before the law and has the right to *equal protection and benefit from the law*”<sup>381</sup> (emphasis added). Therefore, no distinction may be made between the character of the parties. Had this been a case based on merits, the Court could have taken the character of the parties into account, had it been relevant to the facts. Although this may not be ideal for access to justice, particularly in public interest litigation, it would have gone against the provisions of the Constitution had the Court ruled in favour of distinguishing the character of the litigants.

The question remains: what has *Biowatch* meant for access to justice, and in particular, for environmental justice? While there are debates surrounding the Court’s decision not to consider the character of the parties in determining costs in constitutional litigation, the *Biowatch* case has, to a large extent, been an emphatic leap in the right direction for civil society in breaking down the financial obstacles to access to justice. Not only did

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<sup>381</sup> S 9(1) of the Constitution.

the Constitutional Court find that the matter of costs that subsequently required the Court's intervention was in the interest of justice, but it also overturned a decision made by the High Court that would have had grave effects on public interest litigation and further emphasised the role of the state in regulating competing interests between private parties. From an environmental justice perspective, the procedural platform created to access justice through affordable means has been broadened. In other words, more people would in theory be able to approach the court to access justice. However, as a result of the poor economic conditions in which a large number of South Africans find themselves, this possibility is not always reasonable.

Therefore, the more pressing issue relating to costs and access to justice is not whether the Court in *Biowatch* erred in its finding relating to the character of the parties. The more pressing concern should be how to deal with those constitutional, and more specifically, environmental matters that are not heard by any court because those that have been affected do not have the financial means to access justice. Public interest firms have the financial and administrative capabilities to take on only a limited number of cases. It is clear that the state must provide for alternatives to access justice in order to promote greater environmental justice.

Furthermore, the broader *locus standi* provided for by the Constitution as well as NEMA providing for one to litigate in the public environmental interest also allows for more public interest litigation. Therefore access to justice has been advanced further by the wide *locus standi* provided for by section 38 of the Constitution and even more so in environmental law through section 32 of NEMA. With this broad *locus standi* provided for by the Constitution and NEMA in mind, it is strange that the Court in *Tergniet* failed to make use of section 32 of NEMA despite the applicants using it in their arguments. Instead, the Court reverted to using the common law doctrine on *locus standi*. There should be no place for the common law application of *locus standi* where there are constitutional and legislative provisions which supersede it. Therefore courts should be cautious in their application of access to justice including cost orders and *locus standi*, as seen in the *Tebeila* and *Tergniet* cases.

#### **5.4 Conclusion and recommendations**

This research has sought to determine the extent to which civil-based environmental governance instruments have been applied in South Africa since 1996 to promote environmental justice in the context of the environmental right and its objectives. This enquiry primarily consisted of three questions. Firstly, it needed to establish whether there is a link between enforcing and protecting the environmental right and environmental justice. In this regard, it has been established that:

- Environmental justice, as a theoretical concept, consists of a substantive element, which includes the equitable distribution of environmental benefits and burdens, and a procedural element, which includes the recognition of identity and group differences and the subsequent participation of those groups in environmental decision-making. Procedural environmental justice is important as it provides the means to achieve substantive environmental justice. The equitable distribution of environmental benefits and burdens is contingent on the recognition and participation of all interested and affected groups.

Environmental justice is constitutionally recognised in the environmental right as a means to promote greater health and well-being where the equitable distribution of environmental benefits and burdens promotes health and well-being and as a means to achieve sustainable development, as enshrined in section 24 of the Constitution. Therefore, there is a link between the environmental right and environmental justice.

Secondly, the discussion sought to determine how CBIs have been applied in the context of the environmental right and its objectives. One of the means to determine this is to identify the provisions in environmental legislation which promotes the application of CBIs in environmental governance. This also entailed a discussion of the cases involving CBIs and these environment-related provisions. From the above discussion it is clear that:

- CBIs, and specifically those related to public participation, access to information and access to justice promote procedural environmental justice insofar as these

instruments provide civil society with a platform to participate in environmental governance and decision-making and to affect the outcome of decisions.

- Public participation in environmental matters is secured through provisions in NEMA which set out basic principles to direct the actions of public officials (although these principles have in some cases been applied to the actions of private bodies)<sup>382</sup> and the provisions and regulations relating to the EIA process that is required for an environmental authorisation. However, little provision is made to promote civil society's participation beyond the process of granting or rejecting an environmental authorisation. Public participation also facilitates dialogue and information-feedback processes. However, without access to necessary information, it is difficult to meaningfully participate and make informed decisions.
- The Constitution provides for the right to access to information, which is given effect through PAIA. PAIA provides for the voluntary release of information and access to information through requests. The voluntary release of information that is required for exercising and protecting environmental rights significantly enhances public participation because it immediately informs the public of environmental matters affecting them and thereby eliminates the administrative, financial and time-consuming red tape which may arise in PAIA requests. While public bodies are statutorily obliged to voluntarily disclose certain information, private bodies are under no such statutory obligation. This significantly hinders the public's ability to effectively monitor and enforce compliance with the conditions set out in environmental authorisations under NEMA, for example. Public and private bodies are reluctant to voluntarily disclose environmental information.

Access to information by means of PAIA requests has proven to be successful in some cases, but PAIA is largely mired by ineffective implementation. While an internal appeal system exists for public bodies, no such appeal mechanism is in place for private bodies. Therefore the only other appeal option would be to approach the courts to review the decision, which is a costly and time-consuming thing to have to do.

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<sup>382</sup> As is the case in the *VEJA* case.

- Access to justice is primarily provided for by accessing courts and through broad *locus standi* provisions. Both aspects are provided for by the Constitution and given further statutory effect by NEMA. A significant challenge in accessing courts in environmental matters is the costs involved in litigation, particularly because environmental rights are largely litigated in the public interest. While the extent of these challenges has been significantly reduced as a result of the *Biowatch* judgment, the inability of some people to approach the courts for environmental remedies is still a reality which adversely affects the exercise and protection of environmental rights.
- On the other hand, the broad *locus standi* provided for by the Constitution and, to a greater extent, NEMA (through its inclusion of *locus standi* in the interests of the environment) has significantly broadened the scope for accessing justice for environmental rights. Because the courts have sometimes (incorrectly) resorted to using the common law doctrine of *locus standi* despite the clear legislative provisions for *locus standi*, it is clear that the common law must be developed to bring it in line with the constitutional provision for *locus standi*.

Thirdly, this research sought to determine the extent to which this application of CBIs has promoted environmental justice.

- Public participation in environmental governance plays a vitally important role in promoting environmental justice from a procedural perspective as it is closely connected to the recognition and the subsequent participation of all interested and affected identity groups found within environmental justice. Public participation forms the means by which these procedural aspects of environmental justice find practical expression and are transformed from a conceptual notion into a normative manifestation.
- It is clear that for procedural environmental justice to be promoted in environmental governance, the public should be able to participate throughout the planning, monitoring and enforcement of a development project. Although South African law

acknowledges the importance of public participation and has provided for specific public participation procedures in legislation, the bulk of public participation processes in environmental matters is focused on the initial planning and developing phase of the development through the environmental authorisation process. Once the authorisation has been granted or denied, the public's position as a key stakeholder in environmental governance insofar as public participation is concerned seems to be regarded as less important. In other words, there are fewer opportunities provided for the public to meaningfully participate in the monitoring and enforcement of environmental compliance. Therefore, although procedural environmental justice is promoted in the planning and decision-making structures through adequate provisions relating to public participation, the continued pursuit of environmental justice through participation is significantly thwarted by the lack of participation in the monitoring and enforcement of environmental compliance.

- Accessing environmental information places the public in the position to participate in environmental governance by effectively exercising and protecting its environmental rights. In other words, the quality of participation is enhanced by providing for the means to access necessary information that is needed for meaningful participation, thereby strengthening the pursuit of procedural environmental justice. Addressing the ineffective implementation of PAIA in environmental matters may significantly promote procedural environmental justice by eliminating unjust refusals of requested information. Once members of civil society are able to gain access to the information requested, they are able to define more clearly the level of participation they require to effectively exercise and protect their environmental rights.

A significant challenge in accessing information through PAIA is the lack of an independent appeal body to review decisions made by private and public bodies to refuse access to requested information. Once the internal appeals structures (which are not available for requests from a private body) have been exhausted the only other option is to resort to judicial review. This has significant cost and time implications and threatens the usefulness of the information that was requested.

- For environmental justice to find full effect in the law, access to justice through an independent court or other forum is required to review actions or decisions that may have yielded environmentally unjust results. One of the primary challenges when accessing justice is the costs that surround the litigation. This significantly impacts procedural environmental justice as those members of society who are subject to the inequitable distribution of environmental benefits and burdens do not have the financial resources to remedy the injustice. Unless NGOs and/or public interest firms step in on behalf of the interests of the environment and the affected community, those affected by the injustice have to continue living under injustice.

The broad *locus standi* provided for by the Constitution and NEMA has greatly benefited the pursuit of environmental justice as a broader spectrum of people are able to access justice than had been the case with the common law doctrine of *locus standi*. Not only does this broad scope recognise the importance of identity groups, including those that do not have a direct interest in a particular matter but are activist groups acting in the interest of the environment, but it also allows for more people to participate in environmental governance through accessing their means to pursue justice. This ultimately encourages the future development of similar structures in justice – such as establishing an independent body to deal with information requests that have been unjustly refused. The greater access to justice civil society has, the greater impact it will be able to have on promoting environmental justice from a procedural perspective and subsequently, from a substantive perspective.

In the light of the foregoing general critique it is recommended that:

- In order to fully realise the participation aspect of environmental justice it is important that opportunities to participate are developed in a way that equips the public to participate meaningfully. This requires the publication of procedural guidelines for participation that go beyond those that have already been published, to include values underlying public participation, situation-based assessments on the needs and conditions for public participation, and establishing levels of participation (to cater to the needs and conditions of each situation). These contextually-specific

guidelines would help to direct officials to facilitate and implement meaningful participation processes that facilitate environmentally just procedures.

- Training governmental officials to facilitate meaningful participation would also assist in establishing participation procedures that promote environmentally just decisions.
- The fragmented focus of public participation procedures spanning across a development's phases requires a re-evaluation of policies and legislative provisions dealing with public participation on a national scale to extend the public's role beyond mere participants in decision-making, to include the public as monitors and enforcers of environmental compliance. This could promote procedural environmental justice on many levels of environmental governance instead of focusing only solely on environmental decision-making.
- To effectively eliminate the reluctance of public and private bodies to voluntarily disclose information it may be important to provide greater incentives for voluntarily disclosure, where industries are able to enhance their reputation and public trust through releasing this information. This may in turn increase their capital growth.
- While some public and private bodies are reluctant to disclose information relating to environmental authorisations on the grounds of confidentiality, there needs to be greater engagement between the state, industry and civil society to reach a balanced agreement on what information should be subject to voluntary disclosure and what information should be held confidential. Therefore, guidelines should be established to determine the scope of what may be classified as "confidential information". Alternatively, NEMA should be amended to clearly define the scope of "confidential information". For example, the definition of "commercially sensitive information" found in NEMA which states that the details of emission levels and waste products must not be considered to be commercially confidential can be amended to include conditions provided in environmental authorisations.
- Re-defining confidential information may also assist in addressing the over-used (and often misunderstood) PAIA ground for refusing an information request namely,

the confidentiality of information belonging to third parties (section 36 of PAIA). The fact that the purview of section 36 as a legitimate ground for refusing information requests may be misunderstood by some public officials significantly impacts environmental justice, as the unjust non-disclosure of information under the banner of confidentiality thwarts the public's ability to effectively participate in environmental governance. To address this, greater emphasis should be placed on training public officials in the meaning, scope and use of PAIA so that they may fully understand and apply the provisions correctly. The correct implementation of PAIA as a tool to enhance decision-making may promote effective participation in environmental governance and thereby, promote environmental justice.

- The fact that the public's only other appeal mechanism to review information refusals is judicial (once the internal appeal mechanism has been exhausted, in the case of public bodies) points to the need of an independent appeal mechanism which will deal swiftly with reviewing PAIA requests in a cost-effective manner. This may significantly enhance the public's ability to access justice in decisions to refuse information requests that may result in unjust environmental outcomes.
- Obstacles to access to justice, such as high litigation costs, must be addressed in the pursuit of environmental justice. Therefore the state must provide greater access to justice in environmental matters, whether this is achieved through a legislative mechanism that establishes an easily accessible and cost-effective environmental court that focuses on issues of public environmental interest, or through providing funds for the SAHRC to pursue litigation in the public interest.

What this dissertation sought to achieve was to advocate for the increased use of CBIs in the environmental regulatory regime to promote environmental justice. By recognising civil society's role as an active participant in environmental governance, CBIs can significantly promote procedural environmental justice in the context of the environmental right, which is integral to the pursuit of substantive environmental justice. Therefore the exercise and protection of environmental rights and the pursuit of

environmental justice “will not only depend on the diligence of public officials, but on the existence of a lively civil society willing to litigate [and advocate] in the public interest.”<sup>383</sup>

While this dissertation focused on the use of CBIs it did not aim to discredit the use of other environmental instruments, but rather acknowledged the importance of the integrated use of different environmental instruments in environmental governance, Although CBIs are integral in the pursuit of procedural environmental justice, and while there are provisions that substantively contribute to promoting environmental justice in South Africa, the harsh reality is that a large portion of South Africa’s citizenry still lives in deplorable and environmentally unjust conditions. However, the effective implementation of CBIs in the context of the environmental right may go a long way towards rectifying this problem by providing the public with a platform to participate in environmental matters and thereby promote environmental justice.

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<sup>383</sup> *Biowatch* (CC) para 19.

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