



LAW
ENVIRONMENT AND
DEVELOPMENT
JOURNAL

LEAD

PROMOTING ENVIRONMENTAL JUSTICE THROUGH CIVIL-BASED INSTRUMENTS IN SOUTH AFRICA

Michelle Toxopeüs and Louis J. Kotzé

ARTICLE



VOLUME
13/1

LEAD Journal (Law, Environment and Development Journal)
is a peer-reviewed academic publication based in New Delhi and London and jointly managed by the
Law, Environment and Development Centre of SOAS University of London
and the International Environmental Law Research Centre (IELRC).
LEAD is published at www.lead-journal.org
info@lead-journal.org
ISSN 1746-5893

ARTICLE

PROMOTING ENVIRONMENTAL JUSTICE THROUGH CIVIL-BASED INSTRUMENTS IN SOUTH AFRICA

Michelle Toxopeüs and Louis J. Kotzé

This document can be cited as
Michelle Toxopeüs and Louis J. Kotzé, 'Promoting Environmental
Justice through Civil-Based Instruments in South Africa',
13/1 *Law, Environment and Development Journal* (2017), p. 47,
available at <http://www.lead-journal.org/content/17047.pdf>

Michelle Toxopeüs, Legal Researcher, Helen Suzman Foundation, South Africa Email: michelle@hsf.org.za

Louis J. Kotzé, Research Professor of Law, Faculty of Law, North-West University, South Africa
Email: Louis.Kotze@nwu.ac.za

Published under a Creative Commons Attribution-NonCommercial-ShareAlike 3.0 Unported License

TABLE OF CONTENTS

1. Introduction	49
2. Environmental Justice	51
3. Environmental Governance and Civil-Based Instruments	54
3.1 Public Participation	56
3.2 Access to Information	57
3.3 Access to Justice	57
4. CBIs and South African Law	57
4.1 Public Participation	58
4.2 Access to Information	63
4.3 Access to Justice	68
5. Conclusion	72

1

INTRODUCTION

South Africa is rich in natural resources and renowned the world over for its unique landscapes, biodiversity and natural resources. Unfortunately, this natural heritage has been marred 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 which promoted its elitist conservation concerns, while disenfranchising millions of people in the process by excluding them from environmental and associated socio-economic benefits and services.¹ This fostered a legacy of environmental injustice in South Africa and created social and environmental challenges that still continue today.

With the birth of democracy in the 1990s, a new era of constitutional environmentalism dawned which, among other aims, seeks to promote environmental justice, particularly as it relates to supporting the core constitutional values of human dignity, equality and freedom.² At a minimum, environmental justice relates to the equitable distribution of environmental benefits and burdens; to the recognition of group identities and differences within society and how these play into peoples' relationship with the environment; to specific environment-related needs of people differently situated on the socio-economic ladder; and to ways through which people can obtain maximum benefits from life-sustaining resources in an equitable way that also promotes justice in its broadest sense.³ To this end, environmental justice is both backward and forward looking: it highlights past and present injustices that arise as a result of environment-related

economic and social oppression and exclusion, while at the same time advocating means by which to address these injustices.⁴

In South Africa, the achievement of environmental justice is squarely based on the prevailing constitutional and statutory framework. The Constitution of the Republic of South Africa, 1996⁵ (Constitution) enshrines an environmental right which states '[e]veryone has the right to an environment that is not harmful to their health or well-being'.⁶ As the foundation of constitutional environmental protection in South Africa and as part of the transformative vision of the Constitution,⁷ this right must address historical injustices and it must enable people to live in an environment that permits health and well-being and promotes sustainable development.⁸ To a significant extent, then, the environmental right is also the constitutional foundation of environmental justice in South Africa, and it provides the foundation for the emerging domestic paradigm of transformative environmental constitutionalism which is a key aspect of the broader environmental justice movement in the country to the extent that it emphasises environmental justice is 'an inherently transformative and redistributive concept'.⁹ The National Environmental Management Act¹⁰ (NEMA) is the framework environmental law that gives effect to the environmental right. To this end the NEMA is a statutory tool used to further realise the environmental right and similarly to promote environmental justice, by explicitly recognising environmental justice and equitable access to environmental resources and benefits as important

1 DA McDonald, 'What is Environmental Justice?' in DA McDonald (ed), *Environmental Justice in South Africa* (University of Cape Town Press 2002) 1.

2 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.

3 D Schlosberg, 'Reconceiving Environmental Justice: Global Movements and Political Theories' (2004) 13 *Environmental Politics* 517, 537.

4 McDonald (n 1) 3.

5 Constitution of the Republic of South Africa 1996.

6 S 24 of the Constitution.

7 eg E Christiansen, 'Transformative Constitutionalism in South Africa: Creative Uses of Constitutional Court Authority to Advance Substantive Justice' (2010) 13 *Journal of Gender, Race and Justice* 575.

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

9 For a comprehensive account, M Murrcott, 'The Role of Environmental Justice in Socio-economic Rights Litigation' (2015) 132 *South African Law Journal* 876.

10 107 of 1998.

principles that must guide environmental governance in the country.¹¹

In this article, we interrogate ways through which to achieve environmental justice in South Africa through the use of civil-based instruments (CBIs) of environmental governance. The central hypothesis is that CBIs are particularly well-suited to contribute to the achievement of environmental justice since they are essentially instruments which empower civil society to become central stakeholders in environmental governance by fostering active participation in the decisions that may impact on the environment and people's health and well-being.¹² Through these instruments all of society, particularly disenfranchised people suffering most from environmental injustice, are afforded a platform to pursue their environment-related interests that may be affected by the decisions taken by government and private actors such as polluting companies. In this sense, the public is recognised as 'co-governors',¹³ a role in the performance of which members of the public should be able to facilitate a move towards greater environmental justice through their active recognition and participation, while asserting and protecting their rights-based interests in this respect.

For the purpose of the discussion we focus specifically on public participation, access to information and access to justice, all of which are generally accepted as CBIs, including in international law, notably through pivotal instruments such as the Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters of 1998. Mirroring the South African constitutional approach to environmental protection, the Aarhus Convention confirms in its preamble that: 'every person has the right to live in an environment adequate

to his or her health and well-being, and the duty, both individually and in association with others, to protect and improve the environment for the benefit of present and future generations'. It further reiterates that 'to be able to assert this right and observe this duty, citizens must have access to information, be entitled to participate in decision-making and have access to justice in environmental matters'.¹⁴ While South Africa is not a signatory to the Aarhus Convention, and while we do not focus on this convention's provisions in the ensuing discussion, its focus on access to information, public participation and access to justice is a representative, encompassing and instructive one which fully embraces the desire to promote environmental justice-based concerns through these three CBIs.¹⁵ The original contribution of this analysis lies in its being the first interrogation in South African context to elaborate the more general theory of environmental governance and CBIs, to link this theory with the concept of environmental justice, and to critically evaluate domestic law provisions within the theoretical framework of environmental governance, CBIs and environmental justice.

The discussion commences in Part 2 below with a brief description of the general and then the specific meaning of environmental justice in South Africa. Part 3 reflects on the generic meaning of environmental governance, CBIs and then specifically on public participation, access to information and access to justice. Part 4 constitutes the bulk of the discussion and offers a detailed account of the applicable South African constitutional and statutory provisions, alongside a discussion of relevant case law that pertains to public participation, access to information and access to justice in the country. We conclude the discussion in Part 5.

11 S 2 of the NEMA. In addition to the NEMA, there are 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 civil-based instruments (CBIs) provided for by the SEMAs.

12 J Nel & W Du Plessis, 'An Evaluation of NEMA Based on a Generic Framework for Environmental Framework Legislation' (2001) 8 SAJELP 1, 31.

13 *ibid* 31.

14 Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters, Aarhus, 25 June 1998, preamble. The connection between the rights-based approach and the achievement of environmental justice is also evident from Principle 1 of the Stockholm Declaration on the Human Environment, 1972. Also see Principle 10 of the Rio Declaration on Environment and Development, 1992.

15 As noted in the introduction, due to limitations of length and because of this focus we do not discuss the issue of the right to administrative justice, which is a CBI and which is comprehensively regulated by s 33 of the Constitution and the Promotion of Administrative Justice Act 3 of 2000.

2 ENVIRONMENTAL JUSTICE

Historically, environmental justice evolved as a social movement focused on advocating equality in the distribution and sharing of environmental benefits and burdens. The movement started in the United States of America (USA) and gained momentum in the 1980s when those at the centre of experiencing environmental injustice were poor minority communities agitating for political and socio-economic empowerment.¹⁶ While there are numerous other approaches, Wenz¹⁷ takes a pluralistic conceptual approach to environmental justice, noting that it may be understood in different ways depending on the context, where different notions of environmental justice will address different issues, as priorities change according to context.¹⁸ Such an approach facilitates a multi-faceted view enabling the consideration of various procedural and substantive issues relating to environmental justice.¹⁹ Substantive environmental justice fundamentally seeks the equitable distribution of environmental benefits and burdens, where the crux of substantive environmental justice is based on equity. Procedural environmental justice, on the other hand, advocates for informed and active participation in environmental decision-making and governance,²⁰ while simultaneously providing the means to achieve the equitable distribution of environmental benefits and burdens. The realisation of the substantive aspects of environmental justice is therefore entirely contingent on the procedural aspects. In essence, then, the challenge attached to attempting to achieve environmental justice is ensuring that substantive equality with respect to the environment is achieved through procedural

measures that allow for all members of society to fully participate in ensuring that their environment-related concerns and interests are considered in environmental governance, particularly those members who themselves do not have the political and socio-economic means to do so.²¹

Environmental justice in South Africa must be understood in the country's historical context, which was marked by environmental and other forms of racial exclusion and discrimination.²² Although similar to the idea of environmental justice elsewhere in the world, there are also differences, including the degree to which oppressed people were affected, as millions of South Africans experienced widespread and pernicious inequality and discrimination under the reign of apartheid.²³

Environmental injustice in South Africa is rooted in colonial conservation, where environmental protection practices predominantly favoured the white, affluent and middle-class minority, and disregarded the interests of the indigenous majority.²⁴ This laid the foundation for protecting the natural environment, notably through the proclamation of nature reserves such as the Kruger National Park, where such conservation practices were often accompanied by the forcible removal of people from their traditional homesteads and lands to accommodate elitist 'white' conservation concerns.²⁵ This process was exacerbated throughout the twentieth century with the introduction of segregation laws and, later, the implementation of apartheid as an official policy. To a significant extent, the socio-economic structures of apartheid's oppressive policies have deeply affected the relationship between people and their environment.²⁶ Social justice

16 These minorities were mostly black people. Many scholars agree that the decision to situate a hazardous waste site in Warren County resulted in opposition and a movement that became the environmental justice movement.

17 PS Wenz, *Environmental Justice* (New York Press 1988) as cited in Schlosberg (n 3) 533.

18 Schlosberg (n 3) 533.

19 Schlosberg (n 3) 534.

20 M Hillman, 'Environmental Justice: A Crucial Link between Environmentalism and Community Development' (2002) 37 *Community Development Journal* 349, 351.

21 RT Ako, *Environmental Justice in Developing Countries: Perspectives from Africa and Asia Pacific* (Routledge 2013) 7.

22 For an in-depth analysis of the historical background of environmental injustice in South Africa see F Khan, 'The Roots of Environmental Racism and the Rise of Environmental Justice in the 1990s' in DA McDonald (ed), *Environmental Justice in South Africa* (University of Cape Town Press 2002).

23 M Kidd, *Environmental Law* (Juta, 2nd ed 2011) 301.

24 Khan (n 22) 17.

25 *ibid* 18.

26 Kidd (n 23) 301; P Steyn, 'The Lingering Environmental Impact of Repressive Governance: The Environmental Legacy of the Apartheid Era for the New South Africa' (2005) 2 *Globalizations* 392, 392.

within the political sphere was distorted; a distortion that was also reflected in the laws governing (or failing to govern) environmental issues in relation to access to housing, potable water and sanitation.²⁷ The environment was seen as an instrument to be used by a politically powerful minority to further oppress people based on race,²⁸ as the apartheid government showed little empathy for the environmental sufferings experienced daily by non-whites all across the country.²⁹ As Brand reminds us:

Perhaps the most debilitating and tragic legacy of the 300 years of oppression, exclusion and discrimination along racial lines in South Africa that culminated in 43 years of apartheid rule in the 20th century is the devastating impoverishment and social and economic inequality left in its wake.³⁰

As South Africa transitioned into a new democratic era in 1994, political and legal transformation percolated into the environmental domain as well, finally allowing oppressed South Africans the opportunity to formally address their environmental justice concerns. The political focus had subsequently shifted from liberation to the broader realisation of fundamental human rights, including the right to a healthy environment.³¹ The Environmental Justice Networking Forum (EJNF) was established, which sought to coordinate the activities of organisations relating to issues of environmental justice in South Africa.³² Reflecting the particular meaning of environmental justice in the country, the EJNF understood environmental justice at the time to embrace:

... 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.³³

While reflecting the particular, virtually all-encompassing dimensions of environmental justice in the South African context, this definition also points to the critical need for people suffering from environmental injustice to challenge the decisions and actions of powerful (mostly public power wielding) entities that impact on environmental quality and their health and well-being. The important footwork initially done by the EJNF has since been carried forward and significantly amplified by the Centre for Environmental Rights, which has been, and continues to be, remarkably successful in advancing environmental justice by employing the CBIs we discuss in this article.³⁴

The idea (and ideals) of environmental justice are most accurately captured by the country's Bill of Rights; particularly the rights to equality, human dignity, and life, as well as the constitutional environmental right. In terms of the right to equality: '[E]veryone is equal before the law and has the right to equal protection and benefit of the law ... [T]o promote the achievement of equality, legislative and other measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination may be taken'.³⁵ Section 10 provides '[E]veryone has inherent dignity and the right to have their dignity respected and protected', while section 11 succinctly states '[E]veryone has the right to life'. Clearly these provisions are geared towards achieving, among other objects, substantive equality and social justice. This

27 For an in-depth look at the effects of the apartheid regime see Steyn (n 26) 392-97.

28 McDonald (n 1) 1.

29 Steyn (n 26) 394. Although initiatives were later implemented in townships to address the environmental suffering, Steyn argues that such efforts should not be seen as genuine attempts to improve living conditions, but rather as attempts to pacify the increase in opposition as a result thereof.

30 Danie Brand, 'The South African Constitutional Court and Livelihood Rights' in Oscar Vilhena, Upendra Baxi and Frans Viljoen (eds), *Transformative Constitutionalism: Comparing the Apex Courts of Brazil, India and South Africa* (Pretoria University Law Press 2013) 414.

31 Khan (n 22) 27.

32 McDonald (n 1) 2.

33 EJOLT, 'Environmental (In)Justice' (date unknown) <<http://www.ejolt.org/2013/02/environmental-injustice/>>.

34 See the official website at <<https://cer.org.za/>>.

35 S 9 of the Constitution.

could be done through 'legislative and other measures' which, as we argue below, include CBIs. Narrowing down the broader focus of social justice that these three rights seek to achieve more closely to the environmental domain, the Constitution's environmental right provides:

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.³⁶

When these rights are read together it becomes clear that environmental justice, being part of the larger social justice paradigm, must seek the equitable distribution of environmental benefits and burdens: in accordance with the rights-based approach, environmental justice should ideally transform the lives of people and lead to better health and well-being for everyone. This is supported by the transformative character of the Constitution, which is peculiar to South Africa and other post-colonial countries that have emerged from oppressive regimes and/or situations leading to deeply entrenched inequalities and social injustices.³⁷ The terms 'transformative constitutionalism' and 'transformative environmental

constitutionalism' have subsequently emerged to denote a constitutional order that seeks to achieve broad social, economic, environmental, political and legal transformation through constitutional and other provisions.³⁸ Considering the transformative vision of the Constitution, there is an argument to be made out in support of specifically focusing on and benefitting those marginalised sectors of society that suffer the most from environmental injustices.

Returning to the environmental right and its connection with environmental justice, the judiciary has generously interpreted the concept of 'well-being' in *HTF Developers (Pty) Ltd v The Minister of Environmental Affairs and Tourism and Others*³⁹ as an 'open-ended [concept] ... manifestly ... incapable of definition'.⁴⁰ 'Everyone' furthermore has the right to an environment that is not harmful to their health or well-being, which emphasises the need to recognise all members of society and which supports the notion of environmental justice as pertaining to all members of society regardless of race, level of income, education and gender. Although South African courts have not extensively detailed the substantive meaning of the environmental right,⁴¹ it is clear that the nature of the right is anthropocentric or socially oriented:⁴² it functions as a 'basic condition for human existence',⁴³ and it explicitly makes provision for sustainable development that is an imperative for the human condition.⁴⁴

In the South African context sustainable development 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'.⁴⁵ Scholars have

³⁶ S 24 of the Constitution.

³⁷ Notably Brazil and India. For a detailed discussion see Oscar Vilhena, Upendra Baxi and Frans Viljoen (eds), *Transformative Constitutionalism: Comparing the Apex Courts of Brazil, India and South Africa* (Pretoria University Law Press 2013).

³⁸ Among the many publications on transformative constitutionalism see Christiansen (n 7).

³⁹ *HTF Developers (Pty) Ltd v The Minister of Environmental Affairs and Tourism and Others* 2006 (5) SA 512 (T).

⁴⁰ *ibid* para 18.

⁴¹ A Du Plessis, 'South Africa's Constitutional Environmental Right (Generously) Interpreted: What is in it for Poverty?' (2011) 27 SAJHR 279, 289.

⁴² L Feris, 'Constitutional Environmental Rights: An Under-utilised Resource' (2008) 24 SAJHR 29, 33.

⁴³ *ibid* 33.

⁴⁴ An in-depth discussion of sustainable development is beyond the scope of this article.

⁴⁵ S 1 of NEMA.

noted that this necessitates a balance between, and an integration of, economic, social and environmental considerations.⁴⁶ Arguably, although sustainable development requires integration, the achievement of equity remains one of the core objectives of sustainable development.⁴⁷ This includes the need for equity within existing generations (intra-generational equity), equity between generations (inter-generational equity) and equity in terms of the inevitable trade-offs that will result from integrating social, economic and environmental concerns. Clearly then, environmental justice is deeply intertwined with sustainable development to the extent that both have equity at their core and both have a social justice dimension; as Du Plessis⁴⁸ notes: ‘sustainable development is impossible in the absence of environmental justice’. We would suggest that the inverse is equally true.

In sum it could be said that the idea of environmental justice in South Africa is wrought from two central ideas.⁴⁹ First, environmental justice is a social, civil movement as it places people at the centre of its concerns while aiming at the equitable distribution of environmental resources as well as adverse environmental impacts.⁵⁰ This substantive objective of environmental justice can be achieved only by those agitating against environmental injustice, if they have the procedural juridical means to do so.⁵¹ In the next part we reflect on the procedural civil-based governance instruments through which people are potentially enabled to ensure environmental justice for themselves and for others.

3 ENVIRONMENTAL GOVERNANCE AND CIVIL-BASED INSTRUMENTS

Environmental governance can broadly be defined as:

... a normative institutional regulatory intervention and social construct that is predominantly based on law and that aims to influence how people interact with the environment. It entails a pluralistic, dynamic, multi-level, multi-actor response and process of change which pragmatically aims to change human behaviour vis-à-vis the environment, and idealistically to optimize environmental benefits and use, while at the same time seeking to protect and preserve sufficient environmental capital for present and future generations.⁵²

In order to actualise environmental governance, or to make it happen as it were, a wide variety of different governance instruments are available. The predominant and most popular instruments that are used in environmental governance are traditional command and control instruments, although alternative instruments have developed over the years which are used in tandem with, or as alternatives to, traditional instruments.⁵³ Command and control instruments, such as penalties and statutory directives, are regulatory tools which include strong top-down, state-driven measures that aim to ensure strict adherence to regulations that have been set and are enforced by powerful public authorities.⁵⁴ Market-based

46 See Kidd (n 23) 17.

47 TL Field, ‘Sustainable Development versus Environmentalism: Competing Paradigms for the South African EIA Regime’ (2006) 123 SALJ 409, 415.

48 Du Plessis (n 41) 290.

49 Z Patel, ‘Environmental Justice in South Africa: Tools and Trade-offs’ (2009) 35 Social Dynamics 94, 97.

50 D Hallows and M Butler, ‘Power, Poverty and Marginalized Environments’ in DA McDonald (ed), *Environmental Justice in South Africa* (University of Cape Town Press 2002) 52.

51 Patel (n 49) 97.

52 LJ Kotzé, *Global Environmental Governance: Law and Regulation for the 21st Century* (Edward Elgar 2012) 200.

53 J Nel and JA Wessels, ‘How to Use Voluntary, Self-Regulatory and Alternative Environmental Compliance Tools: Some Lessons Learnt’ (2010) 13 PELJ 48, 48.

54 AB Killmer, ‘Designing Mandatory Disclosure to Promote Synergies between Public and Private Enforcement’ in D Zaelke, D Kaniaru and E Kruzikova (eds), *Making Law Work: Environmental Compliance and Sustainable Development*, vol 2 (Cameron May 2005) 50.

instruments (MBIs) such as environmental taxes include 'fiscal and other economic incentives and disincentives to incorporate environmental costs and benefits into the budgets of households and enterprises'.⁵⁵ Thus, instead of using inflexible regulatory directives embedded in 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.⁵⁶ Voluntary instruments, such as the ISO 14001 environmental management system, are initiatives that (mostly) industries choose to undertake to advance their environmental performance, and they are therefore not mandatory under law.⁵⁷ In other words, no sanction can be imposed on those industry actors who choose not to comply, or who comply inadequately, with the measures. These instruments are largely supplementary in nature and are often used to complement other environmental governance mechanisms.⁵⁸

What emerges from the definition of environmental governance above and from the brief discussion of the various types of governance instruments is that environmental governance functions within the public and private sectors and it has distinct public and private characteristics. Its private character is evident from the non-state involvement in voluntary instruments, and even more starkly from the fourth category of environmental governance instruments, i.e., CBIs. The use of CBIs allows the public to be involved in the governance of actions and decisions that impact on the environment, health and well-being. Importantly for present purposes, the empowerment of civil society in governing environment-related activities through the use of CBIs could potentially lead to greater recognition and representation of environmental justice concerns in the broader environmental governance effort. CBIs 'include all measures to

empower, inform, educate and co-opt civil society to be involved in the enforcement process'.⁵⁹ CBIs empower civil society to participate in the governance of environmental matters as 'outsiders', which means that environmental governance is driven by individuals or representatives who do not wield public power and who hail from 'outside' the traditional nucleus of public power. 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 and potentially to influence these to the extent that civil society is recognised as having an important stake in, and influence on, decision-making outcomes. In this way, CBIs may promote environmental justice interests because procedural means (such as public participation, access to information and access to justice) could influence the equitable distribution of environmental benefits and burdens that impact interests related to dignity, life, equality, health and well-being (substantive environmental justice).

CBIs are provided for in the Constitution, in environmental and other legislation, or as conditions attached to environmental authorisations. For example, when applying for an environmental authorisation for a listed activity in terms of the NEMA that would require an environmental impact assessment (EIA), the applicant must ensure that the applicable public information and participation procedures are followed.⁶⁰ 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'.⁶¹ On the contrary, combining command and control instruments and CBIs establishes a 'unique informal relationship between insiders and outsiders'.⁶²

The primary advantage of CBIs lies in the fact that they provide means for people to have a say in environmental governance, and consequently the power to influence those decisions that could affect

55 OECD, 'Welcome' (2007) <<https://stats.oecd.org>>.

56 UNEP, 'UNEP Programmes and Secretariats in Geneva' (2004) <<http://www.unep.ch>>.

57 F Craigie, P Snijman and M Fourie, 'Dissecting Environmental Compliance and Enforcement' in A Paterson and IJ Kotzé (eds), *Environmental Compliance and Enforcement in South Africa* (Juta 2009) 60.

58 K Lehmann, 'Voluntary Compliance Measures' in A Paterson and IJ Kotzé (eds), *Environmental Compliance and Enforcement in South Africa* (Juta 2009) 269.

59 Nel and Wessels (n 53) 50.

60 S 24(4)(v) of the NEMA.

61 Nel and Wessels (n 53) 52.

62 Nel and Du Plessis (n 11) 18.

their health and well-being in the context of environmental justice. This is particularly relevant for a country such as South Africa because of its tumultuous and largely exclusionary past that sought to suppress activism by civil society. CBIs could therefore provide remedies to address environmental injustice by recognising all members of society and thereby empowering them to participate in environmental governance. While there are others, the following section focuses on three types of CBIs that relate to environmental governance: public participation, access to information, and access to justice.

3.1 Public Participation

Public participation is central to any democratic governance order as it allows the public to have a say in decision-making that affects them. Public participation in environmental matters 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'.⁶³ 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 recognising equally all members of society – an important concern of environmental justice as well.

While public participation is driven by the public, the processes and means that facilitate it must also to a significant extent be provided for by the state. One way to ensure that it actually happens is to include public participation measures in laws and policies. There are generally two forms of public participation that are found in legislation and policies: normative and functional participation.⁶⁴ The former focusses strategically on the broader democratic values that public participation must promote, while the latter facilitates the practical and actual realisation of public participation. For example, the NEMA provides for a

normative principle that the participation of all interested and affected parties (I&APs) must be promoted in environmental governance.⁶⁵ But the NEMA also functionally provides that an application for an environmental authorisation must include participation procedures for all I&APs.⁶⁶ This provision is reinforced and implemented in practice through public participation provisions in the EIA regulations.⁶⁷

In practice, it is important to provide for normative participation in legislation, as it affords the public a juridically legitimate platform to be involved in decision-making. However, it would be useless if the provision were not functional in the sense that participation could be efficiently implemented and used. Therefore, the results arising from public participation must have 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. To this end, functional public participation increases the legitimacy of decisions as it allows the public to actively participate in decision-making while reinforcing the democratic values of transparency and accountability.⁶⁸

Another important aspect of public participation is that it potentially could improve the quality of the decisions that are made, as people (who may be more familiar with specific circumstances and even have more expert knowledge than public authorities) are given the opportunity to represent specific interests that may contribute to more appropriate decisions in the end.⁶⁹ The inclusion of public participation may also create greater awareness of the myriad of environmental issues that people face, and encourage behavioural changes regarding how people interact with their environment.⁷⁰

63 DK Anton and DL Shelton, *Environmental Protection and Human Rights* (Cambridge University Press 2011) 357.

64 F Coenen, 'Public Participation: Introduction' in FHJM Coenen (ed), *Public Participation and Better Environmental Decisions* (Springer 2009) 2.

65 S 2(4)(f) of the NEMA.

66 S 24(4)(a)(v) of the NEMA.

67 GN 982 of 4 December 2014 in GG 38282.

68 Coenen (n 64) 2; also see Anton and Shelton (n 61) 381.

69 Coenen (n 64) 2; S Casey-Lefkowitz *et al.*, 'The Evolving Role of Citizens in Environmental Enforcement' in D Zaelke, D Kaniar and E Kruzikova (eds), *Making Law Work: Environmental Compliance and Sustainable Development*, vol 1 (Cameron May 2005) 559.

70 Coenen (n 64) 2.

3.2 Access to Information

Access to information is vitally important for environmental governance, because it allows for informed decisions to be taken by all stakeholders, especially by members of the public when they seek to represent their interests in environmental decision-making. A right to access to information can be understood both in a narrow sense and more broadly.⁷¹ 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 could have the right to receive environment-related 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.⁷² A second form of the right to access to information is also emerging – the right to access information that is held by private entities.⁷³ While the state is usually able to access information from private bodies through licensing and environmental impact requirements,⁷⁴ through the latter right non-governmental organisations (NGOs) and members of the public are able to access the records of businesses and industries in order to examine their environmental profiles and footprints to encourage improved environmental performance.⁷⁵

Access to information as a CBI is regularly used to secure greater transparency and accountability for both government and industry where their actions might impact on the environment, serving at the same time also as a means by which the public is informed about

environmental issues.⁷⁶ Access to environmental information has also been heralded as the cornerstone of,⁷⁷ and a prerequisite for,⁷⁸ public participation in environmental governance, as it informs people about pertinent environmental issues and allows them to meaningfully participate in environmental governance. After all, there must be an awareness and understanding of the issues at hand if the public are to make a meaningful intervention in their environmental justice concerns and protect their interests.

3.3 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 remedies available for judicial recourse. In other words, people who have had their rights infringed upon or have experienced injustice need to be able to seek redress within legal structures to achieve a just outcome. 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 [disputes] expeditiously'.⁷⁹ Access to justice is often situated in and closely related to the *locus standi* paradigm. Access to justice entails access to an independent court or forum which is able to review and remedy injustices, and wide *locus standi* provisions, which deal 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 are important in exercising and protecting rights-based environmental justice claims, as we show further below.

4

CBIs AND SOUTH AFRICAN LAW

The discussion in this part includes an analysis of the use of the three CBIs analysed above within the

71 Anton and Shelton (n 63) 357.

72 Art 19 of the Universal Declaration of Human Rights, 1948; art 19 of the International Covenant on Civil and Political Rights, 1966; art 10(1) of the European Convention on Human Rights, 1950; and art 13 of the American Convention on Human Rights, 1969.

73 D Zaelke, D Kaniaru and E Kruzikova, 'Information Regulation' in D Zaelke, D Kaniaru and E Kruzikova (eds), *Making Law Work: Environmental Compliance and Sustainable Development*, vol 2 (Cameron May 2005) 13.

74 Anton and Shelton (n 63) 357.

75 Zaelke, Kaniaru and Kruzikova (n 73) 14.

76 *ibid* 13.

77 M Kidd, 'The National Environmental Management Act and Public Participation' (1999) 6 SAJELP 21, 26.

78 Anton and Shelton (n 63) 357.

79 ECLAC, 'Economic Commission for Latin America and the Caribbean' (2013) <<http://www.cepal.org>>.

environmental governance regime by examining the constitutional environmental framework and other relevant statutory provisions, including court cases that have dealt with these CBIs. The analysis seeks to indicate, throughout, the potential of these CBIs in promoting environmental justice.

4.1 Public Participation

The Constitution does not provide an explicit right to public participation and no single statute in South Africa comprehensively regulates the facilitation of public participation in a generic sense. This does not mean, however, that public participation is not critically important in South Africa. In *Doctors for Life International v Speaker of the National Assembly and Others*⁸⁰ (*Doctors for Life*) the Constitutional Court stressed the importance of public participation in South Africa's constitutional democracy by stating that:

... 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.⁸¹

Public participation, thus conceived, is realised through a panoply of legal provisions. While the Constitution does not specifically provide for a right to public participation, it does provide for other rights which may facilitate public participation. For example, the

⁸⁰ 2006 (6) SA 416 (CC).

⁸¹ Para 115.

Constitution states that one of the objects of local government is to encourage community involvement in the matters of local government.⁸² In *Borbet South Africa (Pty) Ltd and Others v Nelson Mandela Bay Municipality*⁸³ (*Borbet*), the High Court noted the influence that the Constitution has had on the role of public participation in local governance (arguably including by extension the broader governance regime):

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 ... required to extend the reach of local participatory democratic processes by actively incorporating effective public participation in their decision-making.⁸⁴

This could place a particularly important obligation on local governments, as the sphere of government closest to the mass of people, to facilitate public participation within their executive functions.⁸⁵ To be sure, this obligation is 'extensive and far-reaching'⁸⁶ to the extent that thoroughgoing public participation is required. Therefore, local government is required to do more than ensure that public meetings are held and that information is easily accessible. It must also put structures in place that ensure capacity building within the community, which will allow members of the community to participate effectively.⁸⁷

The Constitution further requires the public administration more generally to be governed by

⁸² S 152(1)(e) of the Constitution.

⁸³ 2014 (5) SA 256 (ECP).

⁸⁴ Para 1.

⁸⁵ *Democratic Alliance v Ethekwini Municipality* 2012 (2) SA 151 (SCA) para 23. 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.

⁸⁶ *Borbet* para 72.

⁸⁷ Para 80. For example, local government 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.

democratic values and principles, including public participation in policy-making.⁸⁸ Being generic, these 'basic values and principles governing public administration' also apply to environmental governance, promoting as they would seek to do the involvement of the public in decision-making processes and allowing stakeholders to effectively advocate environmental issues.⁸⁹ Some of these values and principles related to public participation include: that a high standard of professional ethics must be promoted and maintained; that public administration must be development-oriented; that services must be provided impartially, fairly, equitably and without bias; that people's needs must be responded to, and the public must be encouraged to participate in policy-making; that public administration must be accountable; and that transparency must be fostered by providing the public with timely, accessible and accurate information.

The judiciary has confirmed that in facilitating public participation in decision-making, public bodies 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'.⁹⁰ In other words, the 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 participation in a law-making process, the Constitutional Court noted in *Doctors for Life*:

... [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.⁹¹

When these aspects of public involvement are translated by a public body to facilitate public participation in the decision-making process, a public body must not only provide stakeholders with an opportunity to meaningfully participate, but must also establish measures that ensure that stakeholders have the ability to utilise the opportunities to participate in decision-making. Although public participation guidelines exist that specifically focus on the EIA process (see the discussion below), it may be necessary for environmental authorities in future to consider drafting a standard generic guideline on the facilitation of public participation in all environmental matters. Such a guideline must at a minimum be based on and seek to realise the basic values and principles governing the public administration discussed above. Without such a guideline, public 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 all interested and affected parties. If such a guideline is implemented, it may also lead to a more meaningful participation process which in turn could promote environmental justice. In the guideline government could create situation-based assessments to understand the needs and conditions of the proposed development and the community. Therefore, not all the public participation processes will be identical in their execution and implementation. This may guide the use of 'reasonable' public participation and also lead to decisions that are more environmentally just in the procedural sense, as the public would be able to meaningfully participate rather than to be participants in a tick-box exercise.

88 S 195 of the Constitution.

89 LA Feris, 'The Role of Good Environmental Governance in the Sustainable Development of South Africa' (2010) 13 PELJ 73, 76.

90 *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 arguably also 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 executive and legislative affairs. See *Democratic Alliance v Ethekwini Municipality* para 24 and *Borbet* para 60.

91 *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.

The need for public bodies to facilitate effective public participation was emphasised in *South African Property Owners Association v Johannesburg Metropolitan Municipality and Others*⁹² (*SAPOA*), 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 to ensure public participation in decision-making regarding the budget.⁹³ The Supreme Court of Appeal (SCA) found that the City had not followed the procedures required to ensure adequate public participation and that the time given for stakeholders to respond to the amended proposals to the budget had been unreasonably short.⁹⁴ Therefore, although the City had provided measures for public participation, the limited timeframe which stakeholders were given did not enable them to effectively utilise 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 often a significant challenge.⁹⁵

Governance, as we have seen above, involves a process of decision-making, which essentially comes down to administrative decisions taken by public authorities.⁹⁶ In this context, the question before the SCA in *The Director: Mineral Development, Gauteng Region and Another v Save the Vaal Environment and Others*,⁹⁷ (*Save the Vaal*) was whether interested parties who wished to oppose an application by the holder of mineral rights for a mining licence were entitled to raise environmental objections and to be heard by the Director of Mineral Development (the Director). This case dealt *inter alia*

with public participation in an administrative action (embedded as this case was in the broader paradigm of administrative justice)⁹⁸ and focused on whether the *audi alteram partem* rule, 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 concerns related to the development. The *audi*-principle that is 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. In other words, the *audi*-principle may be used effectively as a means to participate in decision-making relating to the environment. To this end, the public can also rely on the extensive provisions of the Promotion of Administrative Justice Act (PAJA);⁹⁹ specifically its provisions governing procedurally fair administrative action (public hearings, notice and comment procedures), the right to written reasons, and judicial administrative review on procedural grounds.¹⁰⁰ The Act is firmly based on and gives effect to the constitutional right to administrative justice which provides, among others:

92 2013 (1) SA 420 (SCA).

93 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.

94 2013 (1) SA 420 (SCA), paras 40-41.

95 LC Paddock, 'The Role of Public Engagement in Achieving Environmental Justice' in Le Bouthillier Y *et al* (eds), *Poverty Alleviation and Environmental Law* (Edward Elgar 2012) 129.

96 Feris (n 89) 75.

97 1999 (2) SA 709 (SCA).

98 Administrative justice aims to, *inter alia*, ensure good governance and administration, ensure fair dealing in administrative context, enhance protection of the individual against abuse of state power, promote public participation in decision-making, and strengthen the notion that public officials are answerable and accountable to the public they are meant to serve. GE Devenish, K Govender and D Hulme, *Administrative Law and Justice in South Africa* (Butterworths 2001) 14-16.

99 Act 3 of 2000.

100 Although the scope of this discussion does not allow for a detailed analysis of administrative justice, it is important to note the close relationship between public participation, administrative justice and decision-making. See for a more comprehensive account, LJ Kotzé, 'The Application of Just Administrative Action in the South African Environmental Governance Sphere: An Analysis of Some Contemporary Thoughts and Recent Jurisprudence' (2004) 7 PELJ 58; A Paterson and LJ Kotzé (eds), *Environmental Compliance and Enforcement in South Africa: Legal Perspectives* (Juta 2009); Cora Hoexter, *Administrative Law in South Africa* (2nd ed, Juta 2012).

(1) Everyone has the right to administrative action that is lawful, reasonable and procedurally fair.

(2) Everyone whose rights have been adversely affected by administrative action has the right to be given written reasons.¹⁰¹

In terms of this right, environmental governance decisions that have been taken by authorities must comply with the minimum requirements of legality (i.e., they must be lawful). Procedural fairness, for its part, relates to the principles of natural justice that include, *inter alia*, the principles of *audi alteram partem* and *nemo iudex suo causa*.¹⁰² While procedural fairness relates to the procedural aspect of natural justice, reasonableness relates to the substantive element of natural justice, by which a court is afforded the opportunity to investigate the justification of administrative actions.¹⁰³ Especially with respect to the last point, and relating to the overall role of the judiciary in promoting the public participation aspects of administrative justice, PAJA provides that “[A]ny person may institute proceedings in a court or a tribunal for the judicial review of an administrative action.”¹⁰⁴

In addition to these general provisions, the NEMA specifically recognises the importance of and provides for extensive public participation in environmental governance.¹⁰⁵ To this end:

[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.¹⁰⁶

While this principle is not enforceable *per se* because it is a principle, it must at the very least guide decision-making and could be relied on by parties who contend that proper public participation has not taken place. In environmental governance, it is arguably important to provide the public with a platform to participate in environmental governance,¹⁰⁷ but it is also important to ensure that such participation is aligned with an informed and clear understanding of the issues at hand and a capacity to participate effectively. Therefore, 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 case by case, on the basis of whether or not members of the public were sufficiently informed, and fully understood their rights and duties with respect to a governance decision.

The NEMA also recognises the important role that traditionally marginalised groups such as women and the youth play in environmental governance, and emphasises that their participation in environmental governance should be promoted.¹⁰⁸ This is further supported by the principle that public participation should allow for and promote traditional knowledge.¹⁰⁹ By recognising all forms of knowledge, the NEMA essentially elevates the importance of all members of society participating in and contributing to the decision-making process.

Furthermore, the NEMA makes provision for public participation in the process of submitting an application for an environmental authorisation through its integrated environmental management provisions (otherwise referred to as its EIA

101 S 33 of the Constitution.

102 S 3 of PAJA; Devenish, Govender and Hulme (n 98) 129.

103 Devenish, Govender and Hulme (n 98) 130-131.

104 S 6(1) of PAJA.

105 Primarily through ss 2 and 24 of the NEMA.

106 S 2(4)(f) of the NEMA.

107 One concrete possibility to achieve greater civil society participation in compliance and enforcement (which is traditionally reserved for public authorities), is through the Department of Environmental Affairs’ multi-stakeholder Environmental Monitoring Committees. See, for a detailed discussion, L Chamberlain, ‘Beyond Litigation: The Need for Creativity in Working to Realise Environmental Rights’ (2017) 13/1 Law, Environment and Development Journal 1.

108 S 2(4)(q) of the NEMA.

109 S 2(4)(g) of the NEMA.

provisions),¹¹⁰ which must be read with the 2014 EIA Regulations (EIA regulations).¹¹¹ The EIA regulations comprehensively provide for public participation related to its listed activities,¹¹² while guidelines have also been published dealing with public participation in the EIA process.¹¹³ In general, chapter 5 of the NEMA dealing with EIAs, as read with chapter 6 of the EIA regulations, provides for public participation processes in the granting and rejection of an environmental authorisation for a listed activity.¹¹⁴ The EIA regulations do not require that the application itself be subject to public participation.¹¹⁵ Only once the application has been submitted to the competent authority and the basic assessment or scoping report has commenced are stakeholders notified of the proposed development¹¹⁶ through public notices.¹¹⁷ 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'.¹¹⁸ Once the decision has been made to grant the environmental authorisation, the only remedy for stakeholders is to appeal the decision in terms of the National Appeals Regulations.¹¹⁹

While the public participation procedures provided for in the process of applications for an environmental authorisation are commendable, they relate only to

certain listed activities which require an EIA and not to the broader environmental governance effort. The NEMA also does not provide for robust opportunities to participate in the monitoring and enforcement of environmental compliance other than through private prosecution provisions.¹²⁰ This is a concern to the extent that civil society is able to meaningfully participate in the initial preparation and decision-making phases of a development, but then given little opportunity to participate in the monitoring and enforcement of environmental compliance after the fact, which in many cases are crucial. Not providing the public with procedural opportunities 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) potentially could restrict the continued endeavour to achieve the goal of environmental justice, especially to the extent that many environmental impacts arise only once a project has started. There is accordingly a need for the legislature to revisit the NEMA in this respect and to consider including within this framework environmental law comprehensive provisions that could properly facilitate continued *ex post facto* public participation.

While it did not deal with formal public participation processes *per se*, the potential positive impact of effective public participation and its ability to direct public opinion and to mobilise people to actively participate in environmental governance can be seen in *Petro Propps (Pty) Ltd v Barlow and Another*,¹²¹ (*Petro Propps*). In this case, 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 environmental authority in an ecologically sensitive area. As part of the public campaign, Ms Barlow, an environmental activist and the respondent in the present case, sought to mobilise public opinion against the development and to challenge the approval process, including through the use of media, public meetings, submissions directed to various governmental levels and representations to the owners of the filling station. The Court found in

110 Ch 5 of the 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'.

111 GN 982 of 4 December 2014 in GG 38282.

112 Ch 6, EIA regulations.

113 GN 807 of 10 October 2012 in GG 35769. Although these guidelines are not legally binding, they provide important information that clarifies certain issues and guides the process of participation.

114 Which consists of either a basic assessment or a scoping and environmental impact report, and where applicable, a closure plan.

115 Regs 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.

116 In terms of regs 19 and 21 of the EIA regulations.

117 Reg 41(2) of the EIA regulations.

118 Reg 41(2)(e) of the EIA regulations.

119 GN 993 of 8 December 2014 in GG 38303 as amended by GN 205 of 12 March 2015 in GG 38559.

120 S 33 of the NEMA.

121 2006 (5) SA 160 (W).

favour of the respondent,¹²² recognising that her interest in mobilising the public campaign was selfless and geared towards the protection of the environment.¹²³ Cases such as *Petro Props* show how mobilising a community to enforce environmental rights through participating in dialogue can have positive effects. 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, including related aspects of environmental justice.¹²⁴ To this end Du Plessis¹²⁵ 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 ultimately amount to taking several steps forward in promoting environmental justice through public participation.

4.2 Access to Information

While public participation is not enshrined as a constitutional right, the right to access to information is:

- (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.¹²⁶

The importance of this right in a constitutional democracy, and more particularly in the context of

(environmental) governance and CBIs, cannot be overemphasised.¹²⁷ 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 is easily available and accessible. Participation that is promoted through access to information could lead to more environmentally just decisions, as civil society is placed in an informed position to effectively and meaningfully participate in the decisions that impact their health and well-being. The Constitutional Court confirmed this position, albeit in a broader sense, when it stated:

[t]he importance of this 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.¹²⁸

The general constitutional right to access to information seems to be fully supported by the NEMA, which situates this right and its significance in the environmental domain. The NEMA provides for access to environmental information as a matter of principle 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”.¹²⁹ While this generally applies to the actions of the state in governmental decisions that may affect the

¹²² 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. ¹²³ Para 55.

¹²⁴ A Du Plessis, ‘Public Participation, Good Environmental Governance and Fulfilment of Environmental Rights’ (2008) 11 PELJ 1, 22.

¹²⁵ *ibid.*

¹²⁶ S 32 of the Constitution.

¹²⁷ W Peekhaus, ‘Biowatch South Africa and the Challenges in Enforcing its Constitutional Right to Access to Information’ (2011) 28 Government Information Quarterly 542, 543.

¹²⁸ *Brümmer v Minister for Social Development and Others* 2009 (6) SA 323 (CC) paras 62, 63.

¹²⁹ S 2(4)(k) of the NEMA.

environment, the SCA noted in *Company Secretary of Arcelormittal South Africa v Vaal Environmental Justice Alliance*¹³⁰ (VEJA) that it could also apply, in principle, to the decisions and activities of corporate bodies that may have an impact on the environment.¹³¹ This position is reiterated by the constitutional provision on access to information, which makes it clear that access to information may be requested from the state or a private body. The inclusion of private bodies under the remit of the principle of access to information is particularly relevant when considering the significant potential and real impact private actors have on the environment, on the health and well-being of people, and on their related environmental justice concerns. While commercial confidential information is usually excluded from the reach of a right to access to information, the NEMA provides in its definition of 'commercially sensitive information' that 'details of emission levels and waste products must not be considered to be commercially confidential'.¹³² This is important because public and private bodies often refuse to provide environmental information on the grounds of confidentiality.¹³³

The NEMA's EIA regulations also provide for access to information measures during the process of considering environmental authorisations.¹³⁴ While the NEMA initially included an express provision on access to environmental information,¹³⁵ it was later repealed after the Promotion of Information Act¹³⁶ (PAIA) had been enacted. Therefore, it is fitting to provide a detailed account of access to environmental information through the PAIA, as this now forms the primary basis for information requests in general, including per implication those requests relating to the environment.¹³⁷

The PAIA was enacted to give effect to the constitutional right to access to information,¹³⁸ and is the primary statutory means to assert the right to access to information,¹³⁹ including also environmental information. It reiterates the role of access to information in the protection and promotion of other rights, as it explicitly acknowledges 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 rights'.¹⁴⁰ The PAIA also confirms the Constitution's provision that the requester has a right to gain access to information that is held by both public and private bodies.¹⁴¹

Requests that are made to public bodies must follow the procedural requirements for filing requests for information,¹⁴² but the requestor is not required to provide reasons for the request.¹⁴³ Like all other rights in the Bill of Rights, the right to access to information is not absolute,¹⁴⁴ and there are several grounds for refusal of the request, as listed in the PAIA.¹⁴⁵ 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.¹⁴⁶ Where someone fails to give a decision on whether to grant access to the requested information

130 2015 (1) SA 515 (SCA).

131 Para 66.

132 S 1 of the NEMA.

133 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.

134 Particularly see Regs 4(2)(a), 5(3), 26(h), 34(6) and 40(2) of the EIA regulations.

135 S 31 of the NEMA.

136 2 of 2000.

137 While the PAIA provides for the voluntary disclosure of information by public bodies, the discussion below focusses only on requests for information regulated by the PAIA.

138 S 9(a) of the PAIA.

139 *Institute for Democracy in South African and Others v African National Congress and Others* 2005 (5) SA 39 (C) para 17.

140 Preamble of the PAIA.

141 Parts 2 and 3 of the PAIA respectively.

142 S 18 of the PAIA.

143 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 at para 9 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'.

144 All rights in the Bill of Rights can be limited in terms of s 36 of the Constitution, but only once very strict conditions have been met.

145 Ch 4 of Parts 2 and 3 of the PAIA respectively.

146 In terms of s 36 of the PAIA. Other relevant grounds for refusal include the mandatory protection of the privacy of a third party who is a natural person (s 35); manifestly frivolous 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).

within 30 days after the request has been received, the request is deemed to have been refused.¹⁴⁷ Although the PAIA provides requesters with an internal appeal mechanism against decisions made by public bodies,¹⁴⁸ once the internal appeal process has yielded no different outcome, the requester's only other option is to approach the courts to enforce his or her right to access to information. Encouragingly though, 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.¹⁴⁹

Particularly relevant to the discussion of obtaining access to information from public bodies in the environmental context is the case of *Trustees, Biowatch Trust v Registrar: Genetic Resources and Others*,¹⁵⁰ where the applicant was the Biowatch Trust (Biowatch), an environmental NGO which sought to obtain information from public bodies¹⁵¹ 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. 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. Biowatch's application in the High Court prompted intervention from three producers of GMOs including Monsanto, which was granted leave to intervene in order to prevent Biowatch from gaining access to confidential information which Monsanto had provided to the Registrar. While the PAIA had already been promulgated, it had not yet commenced by the time that Biowatch filed its initial request for information to the Department. The Court subsequently rejected the respondent's argument that the PAIA applied retrospectively.¹⁵² 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.¹⁵³ The Court subsequently found in favour of Biowatch and held that eight of the eleven requests for information should be granted.

While the judgment was favourable to Biowatch and its efforts to pursue environmental justice, the very fact that it had to resort to judicial measures to enforce its right to access to information highlights the need for the establishment of an independent institution to promote, protect and enforce the right to information in terms of the Constitution and the PAIA.¹⁵⁴ Not only are court proceedings costly, but they are also time-consuming. In the *Biowatch* case 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 perspective¹⁵⁵ 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.¹⁵⁶

This is particularly true regarding environmental information. Where information relating to the environmental impacts of a development is requested and subsequently rejected, the development may be completed before the information is eventually

147 Ss 27 and 58 of the PAIA respectively.

148 Ch 1 of part 4 of the PAIA.

149 S 81(3) of the PAIA.

150 2005 (4) SA 111 (T).

151 Including the Ministry of Agriculture, particularly the Directorate of Genetic Resources.

152 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.

153 Peekhaus (n 127) 547.

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

155 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.

156 Peekhaus (n 127) 550-551.

received through court proceedings. As a result, the information could have lost its significance.¹⁵⁷ Environmental degradation may also threaten the realisation of other rights, including the right to life and the right to access to sufficient food and water.¹⁵⁸ Therefore, where the requested information relates to environmental degradation or pollution, a delay in accessing such environmental information may lead to a delayed response to its adverse impacts on other rights.

While requests that are made to a private body need to comply with certain procedures,¹⁵⁹ the requestor is also required to prove that the 'requested record is required for the exercise or protection of any right'.¹⁶⁰ 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'.¹⁶¹ While the requestor must show how the information would assist the exercise or protection of the rights,¹⁶² 'mere compliance with the threshold requirement of "assistance" will not be enough'.¹⁶³ 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.¹⁶⁴

While the parameters set down by the SCA are substantially broad, it may still be difficult for the requester to prove there is a substantial link between the requested record and the right that it affects, because requesters do not necessarily know the exact contents of the record, making it difficult to establish such a link.¹⁶⁵ In recognising this difficulty, the courts have stated:

... 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.¹⁶⁶

The willingness of the courts to apply this broad interpretation of the threshold requirement in the environmental context was illustrated by the SCA in *Company Secretary of Arcelormittal South Africa v Vaal Environmental Justice Alliance*¹⁶⁷ (*Arcelormittal*), which primarily dealt with the interpretation of section 50 of the PAIA dealing with the right to access to the records of private parties. Before instituting court proceedings in the court *a quo*, the Vaal Environmental Justice Alliance (VEJA), an environmental NGO, sent Arcelormittal (a multinational steel company) notices on two separate occasions requesting certain information that VEJA asserted was 'necessary for the protection of the section 24 constitutional rights and [which was] in the public interest'.¹⁶⁸ The VEJA went on to state that it required this information to ensure that Arcelormittal carried out its obligations under the NEMA and various other environmental law provisions.¹⁶⁹ Arcelormittal eventually rejected the

157 This, of course, will not be the case if the requestor applies for and is granted an interdict prohibiting further progress to the development before the conclusion of the primary matter of access to information. However, it does emphasise the importance of information served timeously and of alternative avenues to gain speedy access to relevant information.

158 D Shelton, 'Human Rights, Environmental Rights, and the Right to Environment' (1991) 28 *Stan J Int'l L* 103, 112.

159 S 53 of the PAIA.

160 S 50(1)(a) of the 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.

161 *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).

162 *Cape Metropolitan Council v Metro Inspection Services (Western Cape) CC and Others* 2001 (3) SA 1013 (SCA) para 28.

163 *Unitas Hospital v Van Wyk and Another* 2006 (4) SA 436 (SCA) para 17.

164 *ibid* para 18.

165 W Peekhaus, 'South Africa's Promotion of Access to Information Act: An Analysis of Relevant Jurisprudence' (2014) 4 *Journal of Information Policy* 570, 580.

166 *M & G Media Ltd and Others v 2010 FIEA World Cup Organising Committee South Africa Ltd, and Another* 2011 (5) SA 163 (GSJ) para 354.

167 2015 (1) SA 515 (SCA).

168 Para 8 (SCA).

169 Para 8 (SCA).

VEJA's requests on the grounds that the VEJA had failed to base its requests on a right that they sought to protect or exercise, as required by section 50 of the PAIA. The VEJA subsequently instituted proceedings in the High Court to declare the refusal invalid, and further to order Arcelormittal to supply the VEJA with the requested information. The High Court considered the meaning of the word "required" in section 50(1)(a) of the PAIA¹⁷⁰ 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.¹⁷¹ It considered the VEJA's requests in relation to the environmental right which it sought to protect and exercise and held that refusing the VEJA's application would hinder its ability to preserve and protect the environment, notably as an active advocate for environmental justice.¹⁷² A further instructive observation by the SCA that illustrates the judiciary's appreciation of CBIs in the broader environmental justice context of South Africa was the Court's acknowledgement at the outset of the judgment that:

... the world, for obvious reasons, is becoming increasingly ecologically sensitive ... citizens in democracies around the world are growing alert to the dangers of a culture of secrecy and unresponsiveness, both in respect of governments and in relation to corporations. In South Africa, because of our past, the latter aspect has increased significance.¹⁷³

Underscoring the importance of allowing concerned people access to environmental information in order to pursue environmental justice concerns, the SCA made it patently clear that '[C]orporations operating within our borders, whether local or international, must be left in no doubt that in relation to the environment in circumstances such as those under

discussion, there is no room for secrecy and that constitutional values will be enforced'.¹⁷⁴

Accessing information from a private body through the PAIA may provide some difficulties, as we have seen in *Arcelormittal*. For example, 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 in rather broad terms, 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 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, an aggrieved requester's only option is often 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 would be 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. 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.

Finally, despite numerous encouraging signs from the judiciary on promoting the right of access to information in favour of the public, the implementation of access to information provisions has been lacklustre in many instances. Government has acknowledged this of its own accord in the National Development Plan¹⁷⁵ (NDP), which sets out the national development strategy until 2030:¹⁷⁶

170 S 50(1)(a) reads '(1) A requester must be given access to any record of a private body if- (a) that record is required for the exercise or protection of any rights'.

171 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).

172 Para 14 (SGHC).

173 Para 1 (SCA).

174 Para 82 (SCA).

175 National Planning Commission of South Africa, 'National Development Plan 2030' (2012) <<http://www.poa.gov.za/news/Documents/NPC%20National%20Development%20Plan%20Vision%202030%20lo-res.pdf>>.

176 *ibid* 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.¹⁷⁷

Similarly, the South African Human Rights Commission (SAHRC)¹⁷⁸ has noted the PAIA's 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'.¹⁷⁹ Therefore, while provisions for access to environmental information are adequately made, and seemingly used to their fullest extent by the courts, which are rather open to their liberal interpretation and application, poor day-to-day implementation of these provisions threatens to weaken the impact that access to information has as a CBI to promote environmental justice on the back of the environmental right.

These and other concerns related to obtaining access to information could very well be addressed soon with the establishment of the Information Regulator; an

independent statutory body created in terms of the Protection of Personal Information Act (POPI).¹⁸⁰ The Regulator is empowered in relation to POPI and PAJA: to educate; to monitor and enforce compliance with respect to public and private bodies; to consult with interested parties; to handle complaints; to conduct research and report to Parliament; to create codes of conduct; and to facilitate cross-border cooperation in matters related to information.¹⁸¹ At the time of writing, the Regulator's official website had already been launched and its main staff component has been appointed. With an expectation that it could soon commence with its activities, the creation of the Regulator could go a long way in improving access to environmental information, thereby simultaneously strengthening environmental justice claims.

4.3 Access to Justice

The Constitution generously provides for access to justice measures by including a right to have disputes resolved through a fair public hearing before a court, tribunal or other forum.¹⁸² Another right enshrined in the Constitution that has allowed for improved access to justice is its provision of generous legal standing. While including an environmental right in the Bill of Rights has bolstered potential environmental claims, its enforcement potential has arguably likewise been bolstered through the broad *locus standi* provision. The Constitution provides in this respect:

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;

¹⁷⁷ *ibid* 452.

¹⁷⁸ The SAHRC is mandated in terms of ss 32 and 83-85 of the PAIA to monitor compliance with the PAIA and the implementation thereof.

¹⁷⁹ SAHRC, 'Annual Report' (2014) 22 <https://www.sahrc.org.za/home/21/files/2013_14%20SAHRC%20ANNUAL%20REPORT%20AS%20AT%2031%20MARCH%202014.pdf>. See, for a detailed discussion of practical issues related to obtaining access to environmental information, the range of transparency reports produced by the Centre for Environmental Rights <<https://cer.org.za/programmes/transparency/publications-by-the-cer>>.

¹⁸⁰ 4 of 2013. See, Chapter 5 of the Act.

¹⁸¹ S 40 of POPI.

¹⁸² 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.'

(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.¹⁸³

Locus standi, as provided for by the Constitution, is starkly contrasted with legal standing as per the common law position in the pre-constitutional dispensation. According to the common law a person had legal standing, and was therefore able to approach a court, only if he or she could prove either personal harm or damage;¹⁸⁴ or could prove that his or her rights had been affected.¹⁸⁵ While the narrow common law position could potentially exclude a significant number of potential claimants that had suffered environmental injustices, it also worked particularly adversely in that it prevented people (such as those working in an environmental NGO) from acting on behalf of others.

By providing for a broader scope for the enforcement of rights before a court, the Constitution now affords *locus standi* to a much broader category of persons to approach a court in matters where a right in the Bill of Rights has been affected. However, 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.¹⁸⁶ Feris¹⁸⁷

183 S 38 of the Constitution.

184 See *Patz v Greene and Co* 1907 TS 427.

185 See *Dalrymple v Colonial Treasurer* 1910 TS 372.

186 L Feris, 'Environmental Rights and Locus Standi' in A Paterson and LJ Kotzé (eds), *Environmental Compliance and Enforcement in South Africa* (Juta 2009) 149; Y Burns and M Kidd, 'Administrative Law and Implementation of Environmental Law' in HA Strydom and ND King (eds), *Fuggle and Rabie's Environmental Management in South Africa* (Juta 2009) 263.

187 Feris (n 186) 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) 1105A-B.

notes in this respect the need to develop the common law provisions for *locus standi* in environmental matters in order to bring them in line with the broader provisions for *locus standi* provided for by the Constitution. This should ensure that a body with the objective of protecting the environment will also have *locus standi* at common law, where rights-based claims are not at issue.

On paper at least, South Africa's constitutional provisions on access to justice probably rank among the most progressive in the world. At a more practical level, however, many people in South Africa do not have the financial means to actively pursue costly court proceedings; especially including those who often suffer most from environmental injustices. As a consequence, public interest litigation has become increasingly important in advancing justice in South Africa, as it provides litigation opportunities and relief to a broad spectrum of people, including marginalised sectors of society.¹⁸⁸ Civil society interest groups, such as the Centre for Environmental Rights mentioned earlier, play a critical role in assisting those who are unable to access justice. Public interest litigation has further benefits within the environmental context to the extent that it could, *inter alia*, promote environmental justice in cases where 'marginalised communities bear the brunt of environmental degradation'.¹⁸⁹ While litigation costs may pose an obstacle to access justice, it has long been established by the Constitutional Court in *Ferreira v Levin and Others*¹⁹⁰ 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

188 LJ Kotzé and L Feris, 'Trustees for the Time Being of the Biowatch Trust v Registrar, Genetic Resources and Other: Access to Information, Cost Awards and the Future of Public Interest Environmental Litigation in South Africa' (2009) 18 RECIEL 338, 339.

189 *ibid*.

190 *Ferreira v Levin No and Others; Vryenboek 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.

second principle is subject to a large number of exceptions where the successful party is deprived of his or her costs.¹⁹¹

Following this, the question arose in *Biowatch*, already discussed above, 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’.¹⁹² Despite *Biowatch* being largely successful in its application, the High Court found that some of its 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.¹⁹³ Consequently, the state was not ordered to pay the costs in *Biowatch*’s favour, with the High Court instead ordering *Biowatch* to pay Monsanto’s costs.

Biowatch was eventually granted leave to appeal to the Constitutional Court. Although the High Court decision focussed on the right to access to information, the Constitutional Court case also focussed on ‘the proper judicial approach to determining costs awards in constitutional litigation’.¹⁹⁴ The Constitutional 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’.¹⁹⁵ The state was ordered to pay *Biowatch*’s costs in the High Court as well as the Constitutional Court¹⁹⁶ because it had continuously failed to supply information that it was duty bound to provide.¹⁹⁷ The Constitutional Court also 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 on whether the state had fulfilled its constitutional obligation to ‘separate the confidential wheat from the non-confidential chaff’.¹⁹⁸ 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.¹⁹⁹ The order against *Biowatch* to pay Monsanto’s costs was subsequently set aside.

Collectively seen, such decisions related to the often prohibitive impacts of litigation costs bode well for the promotion of public interest environmental litigation, which often has at the core of its concerns the promotion of environmental justice. More specifically, the *Biowatch* case has to a large extent been an emphatic leap in the right direction for civil society in breaking down the financial barriers to access to justice. Not only did the Constitutional Court find that the matter of costs that subsequently required its 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 environmental litigation. From an environmental justice perspective, the procedural platform created to access justice through affordable means has been broadened and arguably more people will in theory be able to approach courts to have environmental disputes resolved.

Narrowing the focus of access to justice to the environmental domain specifically, the NEMA dedicates a chapter to fair decision-making and conflict management, which largely deals with conciliation and arbitration,²⁰⁰ and which makes provision for judicial matters.²⁰¹ According to the 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.²⁰² However, this does not apply to proceedings that are frivolous or vexatious. In *Wildlife and Environmental Society of South Africa v MEC for Economic Affairs, Environment and Tourism, Eastern Cape and Others*,²⁰³ 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

191 Para 3.

192 Para 12.

193 Para 68.

194 *Biowatch* (CC) para 1.

195 Para 44.

196 Para 52.

197 Para 49.

198 Para 53 and 54.

199 Para 56

200 Ch 4 of the NEMA.

201 Ss 32-35 of the NEMA.

202 S 32(2) of the NEMA.

203 2005 (6) SA 123 (ECD).

order against the applicant because the application was unreasonable and unnecessary.²⁰⁴

In addition to the broad constitutional *locus standi* provisions, the 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 the 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.²⁰⁵

In terms of this very liberal provision, virtually anyone is able to approach a court where the matter involves

204 At 143J-144C. 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) 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.

205 S 32(1) of the NEMA.

the environment, even if the matter does not specifically pertain to the environmental right enshrined in the Constitution.

This was particularly evident in *Lionswatch Action Group v MEC: Local Government, Environmental Affairs and Development Planning and Others*,²⁰⁶ where the applicant's legal standing to review a decision, which granted a residential development company authorisation to proceed with a listed activity in terms of the NEMA, was challenged. The applicant was an umbrella organisation which represented the interests of various neighbourhood-based associations registered as I&APs in the prospective residential development, but was itself not a registered I&AP. The High Court first considered the applicant's standing in terms of the Constitution. It held that the impugned decision did not affect the applicant's rights and interests. Therefore, it did not enjoy own-interest standing. As the associations it represented could litigate in their own name, the applicant also did not enjoy legal standing to act on their behalf; nor did the applicant seek to litigate as a member of a 'group or class of persons' or in the public interest. Therefore, the applicant did not enjoy *locus standi* as provided by the Constitution. However, the Court held that the applicant's grounds for review were broad enough to encompass legal standing in the interest of protecting the environment in terms of the NEMA. This clearly illustrates the value of the NEMA's broader *locus standi* provision in practice; enabling litigants to challenge decisions and actions in the interest of the environment and encouraging environmentally concerned watchdog litigation.

However, not all courts have been as open to making use of the extended *locus standi* in environmental matters provided for by the Constitution and the NEMA, falling back instead on the trite and much narrower common law position of *locus standi*, despite having the NEMA and the Constitution at their disposal. For example, in *Tergniet and Toekoms Action Group and Others v Outeniqua Kreosootpale (Pty) Ltd*²⁰⁷ (*Tergniet*), the respondents sought to rely on the test for *locus standi* that was established in *Patz v Greene and*

206 [2015] ZAWCHC 21.

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

*Co*²⁰⁸ (read with *Roo-depoort-Maraisburg Town Council v Eastern Properties (Prop) Ltd*)²⁰⁹ which required the applicants to prove that they had suffered actual harm or damage. The Court curiously reverted to the common law position of *locus standi* discussed above, despite the applicants emphasising the application of section 38 of the Constitution and section 32 of the NEMA. Kidd²¹⁰ rightly points out that '[A]lthough the court reached the "right" decision with regard to the applicants' *locus standi*, the court's approach is anachronistic and unacceptable. This decision could have been made before 1996.' The Court failed to recognise the constitutional and legislative provisions for *locus standi* in its reasoning, which potentially sends a message that these provisions are somewhat irrelevant, which of course they are not.²¹¹ It is to be hoped that other courts in future will refrain from engaging in such a narrow approach and instead explore to the fullest extent, the liberal constitutional and statutory provisions on access to justice in environmental matters.

5 CONCLUSION

Our analysis above suggests that, on balance, South Africa's constitutional, broader statutory and environmental law framework amply and comprehensively provides for the three main internationally recognised CBIs of public participation, access to information and access to justice in environmental matters. These CBIs could potentially, and often do, play an important role in assisting people to pursue their environmental justice-related concerns. With few exceptions, South African courts have also proven decidedly willing to use these provisions in support of claimants agitating for their environmental justice concerns. This trend is certainly

in line with the Constitution's transformative vision; a vision that must be supported and driven by private and public actors in the broader governance effort. As former Deputy Chief Justice Dikgang Moseneke said: '... transformative constitutionalism is certainly not an event. It is a process that all wielders of public and private power are duty-bound to advance'.²¹²

We also advocated the increased use of CBIs in environmental governance with a view specifically to promoting 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 and other related rights, which is integral to the pursuit of substantive environmental justice. We fully support the view that 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'.²¹³ For civil society to rise to the occasion and to meaningfully participate as environmental co-governors that have the ability to influence environmental justice outcomes, the use of CBIs must be unreservedly encouraged.

208 *Patz v Greene and Co* 1907 TS 427.

209 *Roo-depoort-Maraisburg Town Council v Eastern Properties (Prop) Ltd* 1933 AD 87.

210 M Kidd, 'Public Interest Environmental Litigation: Recent Cases Raise Possible Obstacles' (2010) 13 PELJ 27, 30.

211 *ibid* 33.

212 Dikgang Moseneke 'Transformative Constitutionalism: Its Implications for the Law of Contract' (2009) 20 Stell LR 3, 13.

213 *Bionatch* (CC) para 19.

*LEAD Journal (Law, Environment and Development Journal) is jointly managed by the
Law, Environment and Development Centre, SOAS University of London
soas.ac.uk/ledc
and the International Environmental Law Research Centre (IELRC)
ielrc.org*

