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POST-GRADUATE DIPLOMA IN MARINE & ENVIRONMENTAL LAW

TITLE	**EFFECTIVELY PREVENTING ENVIRONMENTAL POLLUTION AND ECOLOGICAL DEGRADATION : THE ROLE OF THE COMMON LAW INTERDICT**
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I hereby declare that I have read and understood the regulations governing the submission of dissertations for the Post-Graduate Diploma in Marine & Environmental Law, including those relating to length and plagiarism, as contained in the rules of this University, and that this dissertation conforms to those regulations.

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EFFECTIVELY PREVENTING POLLUTION AND ECOLOGICAL DEGRADATION : THE ROLE OF THE COMMON LAW INTERDICT

1. INTRODUCTION :

Amongst the fundamental human rights enshrined in South Africa's Constitution[1] is the right that everyone enjoys to an environment that is not harmful to their health or wellbeing.[2] In addition, Section 24(b) places a duty upon the State to enact 'reasonable legislative and other measures' that prevent pollution and ecological degradation.[3]

Cheryl Loots in an article published in 1994, prior to the enactment of the Constitution (and its predecessor, the interim Constitution[4]), stated as follows in its introduction :

> As the threats to our environment increase the need to use law to protect the environment becomes more critical. South Africa has a considerable body of environmental legislation but, generally speaking, it has not been effectively enforced. There are three methods of enforcement : criminal sanction, administrative action and civil litigation. In order to achieve effective enforcement, all three methods should be fully utilised. To date there has been very little enforcement by way of either criminal law or civil action. Insofar as there has been enforcement, it has been almost exclusively by way of administrative action.[5] (emphasis supplied)

Since Loots's article was published, the South African Government has enacted a large number of legislative and other measures in compliance with the duty imposed upon it under Section 24(b) of the Constitution, and many of these laws are aimed at preventing pollution and ecological degradation of the environment. The question is whether these laws have succeeded in effectively preventing pollution and ecological degradation from occurring or whether they merely provide remedies once the pollution and ecological degradation has occurred.

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[1] Constitution of the Republic of South Africa Act 108 of 1996.

[2] Section 24(a).

[3] Section 24(b)(i).

[4] Constitution of the Republic of South Africa Act 200 of 1993.

[5] Cheryl Loots, "Making Environmental Law Effective" (1994) 1 *South African Journal of Environmental Law and Policy (SAJELP)* 17.

In the recently published report on the state of the South African environment[6] the following is stated in the introduction section of the executive summary thereof :

> South Africa has made significant progress in the area of environmental management in the past decade. Despite this, there have been increasing pressures on [South Africa's] resource base and some aspects of the environment have deteriorated.[7]

This report makes the statement that the condition of the South African environment is deteriorating. The deterioration includes air quality which is harming people's health, water quality and land degradation.

While the report indicates that environmental management has improved,[8] the fact that these laws and management measures are not effectively preventing environmental pollution and ecological degradation begs the question as to whether the legislative and other measures enacted by Government are effective in preventing environmental pollution and ecological degradation.

This paper will briefly consider some of the laws and management measures and their effectiveness in preventing environmental pollution and ecological degradation. This consideration has to be brief, as the array of laws and measures and an analysis thereof, could form the subject of a study in its own right. The consideration of these laws and management measures is aimed at contextualising the role of the common law interdict in effectively preventing environmental pollution and ecological degradation.

Thereafter, the role of the common law interdict will be considered by looking at how the courts, both before and after the enactment of Section 24 of the Constitution, have dealt with its elements and how it can, and does, play a role in effectively preventing environmental pollution and ecological

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[6] South Africa Environment Outlook (2006), A Report on the State of the Environment published by the Department of Environmental Affairs and Tourism 2006, available on http://www.deat.gov.za.

[7] Ibid, executive summary, page 2.

[8] Ibid. Reference is made in the executive summary to the improvement of some fish stocks which have recovered due to good management measures – see at pages 2 and 30.

degradation, the contention being that prevention must always be more effective than the cure.[9]

The conclusion reached is that the common law interdict (both final and interim) can be used in appropriate circumstances as an effective tool in preventing environmental pollution and ecological degradation. As Loots describes it, the interdict is 'an extremely effective remedy because it puts a stop to the harmful activity and therefore prevents altogether, or at least limits, damage to the environment'.[10]

2. A CONSIDERATION OF LEGISLATIVE AND OTHER MANAGEMENT MEASURES

In order to protect the environmental right, various administrative and judicial measures have been enacted. The main administrative measures are the issuing of permits and licences for various activities and the issuing of directives for failure to comply therewith or for failing to comply with the provisions of the relevant statutes. The main judicial measures are criminal measures comprising some novel sanctions, the introduction of private prosecutions and cost recovery provisions while the civil measures encompass extended *locus standi* provisions, the codification of judicial review[11] and interdicts. In regard to the civil measures, the issue of *locus standi* and interdicts will be dealt with in the next chapter of this paper.

A brief overview of the administrative and criminal measures referred to above will now be considered.

The main framework legislation which has been enacted is the National Environmental Management Act[12] (NEMA), which provides, according to its long title, *inter alia*, for the enforcement of other environmental management laws. It has amongst its principles[13] that negative impacts on the environment and on people's environmental rights be anticipated and

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[9] See *Minister of Health and Welfare v Woodcarb (Pty) Ltd & Another* 1996 (3) SA 155 (N) at 169 B - C.

[10] Loots (supra, note 5) at 27.

[11] Under the Promotion of Administrative Justice Act No. 3 of 2000.

[12] Act No. 107 of 1998.

[13] NEMA Section 2.

prevented, and where they cannot altogether be prevented, be minimized and remedied.[14]

2.1. Administrative measures :

The potential impacts on the environment of the listed activities under NEMA must be considered, investigated, assessed and reported on to the competent authority who must then grant an environmental authorisation.[15] Every such environmental authorisation must as a minimum ensure that adequate provision is made for the ongoing management and monitoring of the impacts of the activity on the environment throughout the life cycle of the activity.[16]

Similarly, provisions are contained in a number of other laws for the obtaining of permits, rights and licences prior to the use or activity in question being carried out.[17]

The object of this system of issuing permits, licences and rights is to ensure that prior to the granting thereof, the impact of the relevant activities on the environment is considered, investigated and properly assessed prior to the competent authority issuing an environmental authorisation, a license or a right. It is beyond the scope of this paper to enumerate the provisions of the legislation referred to,[18] but suffice to say that the legislation referred to contains extensive provisions to ensure that the impact of the proposed activity on the environment is fully considered and evaluated prior to the authorisation, license or right in question being granted.

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[14] NEMA Section 2(4)(a)(viii).

[15] NEMA Section 24(1).

[16] NEMA Section 24(E).

[17] See, for example, chapter 4 of the National Water Act 36 of 1998 (NWA) which provides for water uses and the regulation thereof and for the issue of general authorisations and water use licences; the provisions of chapter 4 of the Mineral and Petroleum Resources Development Act 28 of 2002 (MPRDA) in regard to the issuing of prospecting and mining rights; chapter 6 of the MPRDA in regard to the issue of exploration and production rights for offshore petroleum and gas; chapter 3 of the Marine Living Resources Act 18 of 1998 in regard to the granting of various categories of fishing rights; the issue of a registration certificate to carry on a scheduled process in terms of the Atmospheric Pollution Prevention Act 45 of 1965 which will be replaced by a system of licensing in terms of the National Environmental Management : Air Quality Act 39 of 2004.

[18] Ibid.

The difficulty with the system of permitting and licensing is that due to a lack of capacity, severe backlogs have been formed. It was recently reported that the National Department of Environmental Affairs and Tourism has a backlog of 1,075 applications awaiting environmental impact assessment (EIA) decisions.[19] According to the Department, it did not know how far the backlogs dated to and attributed the backlogs to a national shortage of EIA officers.[20]

2.2. Directives :

The duty of care set out in Section 28(1) of NEMA is couched in a way that deals with two situations, namely, pollution or degradation of the environment which has been, or is being caused, on the one hand, and pollution or degradation which may be caused (i.e. in the future) on the other. In *Bareki NO & Another v Gencor Ltd & Others*[21] the Court held that the provisions of Section 28(1) were not retrospective in application while Soltau[22] opines that Section 28 applies retrospectively and that this is made clear by the use of the phrase '[e]very person who causes, has caused …'.[23] Hopefully this dichotomy will be resolved when the National Environmental Management : Waste Management Bill[24] becomes law. Part 8 of the Bill which deals with "Contaminated Land" is expressly retrospective inasmuch as Section 41 provides that Part 8 applies to the contamination of land even if the contamination occurred before the commencement of the Act. Contamination is defined in Section 1(1)(f) as meaning 'the presence in or under any land … of a substance or micro-organism above the concentration which is normally present in or under that land which substances directly or indirectly affect or may affect the quality of soil or the environment adversely.'

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[19] Article entitled "State grapples with EIA backlog" available on http://www.busrep.co.za/general published on 23.08.07 [Accessed on 27.08.07].

[20] Ibid.

[21] [2006] 2 All SA 392 (T).

[22] Friedrich Soltau, "The National Environmental Management Act and Liability for Environmental Damage" (1999) 6 *SAJELP* 33 at 43.

[23] Ibid.

[24] Government Notice 1832 of 2007, published in Government Gazette No. 29487 dated 12 January 2007.

In terms of Section 28(1) of NEMA, the person who may cause pollution or degradation of the environment is obliged to take reasonable measures to prevent such pollution or degradation from occurring and, even when the harm to the environment is authorised by law or cannot reasonably be avoided, the person concerned is obliged to minimize the pollution or degradation. In this latter respect, the provisions of Section 28(1) are clearly aimed at preventing environmental pollution and degradation and the duty falls on the owner of land or premises, the person in control of land or premises, or the person who has the right to use the land or premises in which the activity which is likely to cause significant pollution or degradation of the environment will occur.[25]

The duty to monitor compliance with the duty of care falls on the Director General of the Department of Environmental Affairs and Tourism (DEAT) and the Provincial Heads of Department of Environmental Affairs and Tourism.[26] While Loots opines that most of the environmental enforcement (at the time of her writing) had been by way of administrative action,[27] since the enactment of the duty of care provisions of NEMA which came into effect on 29 January 1999, it is questionable whether the enforcement of this duty of care administratively has been effective.

One of the key outcomes on the report of the state of the environment[28] is that enforcement of environmental management legislation has shown some improvement in areas such as the recovery of South Africa's pelagic fish stocks due to proper enforcement of management actions[29] but there needs to be a willingness and a capacity on the part of the authorities to act against

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[25] NEMA Section 28(2).

[26] NEMA Section 28(4).

[27] Supra, note 5.

[28] Supra, note 6, executive summary, introduction at page 2.

[29] Ibid at page 15.

perpetrators of environmental pollution and ecological degradation in order for these measures to be effective.

Monitoring and enforcement has received some impetus since June 2005 with the designation of the first 858 environmental management inspectors (EMIs) who are also known as the 'Green Scorpions' and whose mandate it is to act both locally and at provincial and national levels to enforce the new environmental laws and regulations.[30] Since then a number of significant instances of environmental pollution and ecological degradation have been addressed including developers who have developed in wetlands without environmental authorisations,[31] the illegal exportation of rhino horns, ivory and abalone,[32] and the contravention by a prominent steel manufacturer of a number of environmental laws including conducting activities without the required environmental authorisations, the dumping of hazardous waste on an unpermitted site and particulate emissions to the air that have caused serious air pollution.[33]

In order for Section 28(1) to be of application, it has to be shown that the pollution or degradation of the environment is significant. In *Hichange Investments (Pty) Limited v Cape Produce Company (Pty) Limited t/a Pelts Products & Others*[34] the Court held that 'the assessment of what is significant involves, …, a considerable measure of subjective import … [and] … that the threshold level of significance will not be particularly high'.[35]

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[30] According to enquiries made of Melissa Fourie, Director : Enforcement, Environmental Quality & Protection Branch, DEAT, per e-mail on 13.08.2007, approximately another 120 EMIs are currently undergoing EMI Basic Training. In addition 50 EMIs were presented with a 3-day course entitled "Forensics Awareness for EMIs" in October 2006.

[31] Article entitled 'Green Scorpions crack whip on developers who flout the rules' available on http://www.thestar.co.za/general published on 09.07.07 [Accessed on 23.07.07].

[32] Article entitled 'Rhino horns : two arrested at airport' available on http://www.dailynews.co.za published on 11.07.07 [Accessed on 23.07.07].

[33] Media statement dated 19.07.07 available at http://www.deat.gov.za [Accessed on 20.07.07].

[34] 2004 (2) SA 393 (E).

[35] At page 414 I to 415 A. See also Jan Glazewski, Environmental Law in South Africa 2ed (2005) 150 and Tracy-Lynn Field, "Realising the National Environmental Management Act's potential to bring polluters to book" (2004) 121 *South African Law Journal* 772 at 784.

Section 28(4) of NEMA provides that the Director General of DEAT or a Provincial Head of Department may direct any person who fails to take the measures required, to do so and Section 28(7) provides that should a person fail to comply, or inadequately comply, with such a directive, the Director General or a Provincial Head of Department may take reasonable measures to remedy the situation and to recover all costs incurred from either the person responsible for the pollution, the owner of the land, the person in control of the land or a person who negligently failed to prevent the pollution or ecological degradation from taking place.

The *Hichange* case[36] is important for the reason that the relief ultimately granted by the Court was obtained under the provisions of Section 28(12) of NEMA. Section 28(12) is an important section which is not mirrored in any of the other environmental laws referred to[37] other than in the context of invasive species under the Biodiversity Act.[38] Section 28(12) of NEMA provides that any person may, after giving the Director General of DEAT or a Provincial Head of Department thirty days' notice, apply to a competent Court for an order directing the Director General or any Provincial Head of Department to take any of the steps listed in Section 28(4) (namely to issue an appropriate directive), if the Director General or Provincial Head of Department fails to inform such person in writing that he or she has issued a directive. As Glazewski states, this essentially creates a statutory mandamus giving any person the right to request a Court order compelling the listed officials to take action under the sub-section. The person entitled to approach the Court is very broad in accordance with the broader locus standi provisions both of the Constitution and NEMA and gives any concerned individual or non-governmental organisation the right to approach a Court.[39]

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[36] Supra, note 34.

[37] Supra note 17.

[38] National Environmental Management : Biodiversity Act 10 of 2004, Section 74(3).

[39] Glazewski op cit note 21 at 152; Section 38 of Act 108 of 1996 and Section 32 of Act 107 of 1998.

Similar administrative actions are available under a number of other environmental laws.[40] Essentially where any person or entity either performs or fails to perform an activity as a result of which the environment is either seriously damaged, polluted or degraded, the relevant authority is given the power to issue a directive on certain terms and conditions to force the person or entity in question to take reasonable measures to eliminate, reduce or prevent the damage or pollution, and, in the event of the directive not being carried out, the authority in question may implement the necessary steps and recover all the costs incurred from the person or entity involved.

Finally, under the Marine Living Resources Act,[41] extensive provisions are set out for the declaration of marine protected areas to protect fauna and flora or a particular species thereof and the physical features on which they depend, and to facilitate fishery management by protecting spawning stock, allowing stock recovery, enhancing stock abundance in adjacent areas and providing pristine communities for research. Provisions are made for activities in marine protected areas under permits. The Act contains provisions prohibiting certain fishing methods, fishing gear, bans on driftnet fishing and law enforcement including provisions for observers, fishery control officers, procedures for taking a seized vessel to port, etc.[42]

The duty to enforce these directives falls squarely on the State authorities. The enforcement of environmental law by Government departments is seen as a huge problem in South Africa as Government officials are incapacitated by a lack of human resources and skills.[43] The fact that only 858 EMIs have been designated for the

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[40] See, for example, Section 31(A) of the Environment Conservation Act 73 of 1989; Section 19 of the National Water Act No. 36 of 1998; Sections 69 and 73 of the National Environmental Management : Biodiversity Act 10 of 2004; Sections 45 and 46 of the MPRDA and Section 45 of the National Heritage Resources Act 25 of 1999 (NHRA).

[41] Act No. 18 of 1998.

[42] See generally Sections 43 to 60.

[43] Willemien du Plessis, *Hichange* – A new direction in environmental matters? – *Hichange Investments (Pty) Limited v Cape Produce Company (Pty) Limited t/a Pelts Products & Others* 2004 (11) *SAJELP* 135.

entire country and that only 50 of them have completed a forensics training course, only exacerbates matters.

2.3. Criminal measures :

All the statutes referred to above make it an offence for a person or entity to engage in an activity without the necessary permit, right or licence. In earlier years, the prescribed penalties were inadequate to constitute an effective deterrent. For example, the maximum penalty for a first-time offence under the Atmospheric Pollution Prevention Act[44] is a fine not exceeding R500.00 or imprisonment not exceeding six months and in the case of a second or subsequent conviction, to a fine not exceeding R2,000.00 or imprisonment for a period not exceeding one year.[45] The effect of such an ineffective penalty is to render the incurrence thereof to be simply an expense incurred in the conduct of the business.[46]

Even statutes with more substantial penalties have not proved to be effective deterrents. For example, Michael Kidd refers to the fact that under the Environment Conservation Act there is a provision for a maximum penalty of R100,000.00 fine and/or ten years imprisonment for certain offences under that Act, but nobody as at the time of his article, had as yet been prosecuted in terms of those provisions.[47] In the more recent laws, more substantial penalties have been provided for.[48]

The use of criminal law, as Kidd notes, is not without its disadvantages.[49] The ever present weaknesses are the cost and time involved in criminal prosecutions, the fact that it is reactive rather than

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[44] Act No. 35 of 1965.

[45] Section 46.

[46] Richard J Lazarus, "Assimilating environmental protection into legal rules and the problem with environmental crime: (1994) 27 *Loyola LA LR* 867 at 880 quoted in Michael Kidd, "Environmental Crime – Time for a rethink in South Africa?" (1998) 5 *SAJELP* 186.

[47] Kidd, op cit at footnote 13.

[48] For certain offences under the MPRDA fines of up to R500,000.00 or imprisonment not exceeding ten years or both are provided for, while under the Marine Living Resources Act fines ranging from R2 to R5 Million for various types of offences may be imposed.

[49] Op cit at 188 *et seq.*

preventative in nature, the problems of proof and the obstacles presented by "due process" safeguards. The situation in South Africa, he observes,[50] are inadequate policing, a lack of public awareness, difficulties of investigation and a lack of expertise on the part of the court officials. As he observes, criminal prosecutions involve significant cost to the State and there is a considerable time delay between the commission of the offence and the conclusion of the trial. Because of the need to use expert evidence in certain types of pollution trials, costs are higher than in trials dealing with the more frequently encountered common-law crimes. Witnesses are inconvenienced by numerous delays and postponements and this raises serious questions as to whether it is worthwhile to use the criminal process when the best possible outcome from the State's perspective is a trivial fine. Furthermore, the criminal measures are designed to react to offences which have already been committed which might often be too late to prevent damage to the environment. As such, criminal sanctions are not effective in preventing environmental pollution and ecological degradation. Because of this, Kidd suggests that criminal prosecution should be reserved for more egregious contraventions of the law.[51]

Notwithstanding the reservations expressed above, some novel sanctions and other criminal measures have been enacted in NEMA. Firstly, provision is made in Section 33 for any person acting in the public interest, or in the interest of protecting the environment, to institute and conduct a private prosecution of any breach or threatened breach of any duty, other than a public duty resting on an organ of State, where that duty is concerned with the protection of the environment and the breach of that duty is an offence. Provision is also made for the court to order the convicted person to pay the costs of the private prosecution.[52]

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[50] Ibid.

[51] Op cit at 181.

[52] NEMA Section 33(3).

Secondly, various novel criminal sanctions are set out in Section 34 of NEMA. Provision is made for the Court, at the written request of the Minister or other organ of State in the presence of the convicted person, to enquire summarily and without pleadings into the amount of loss or damage which has been caused to the organ of State or other person, including the costs incurred or likely to be incurred by an organ of State or other person in rehabilitating the environment or preventing damage to the environment and for the court to then give judgment therefor in favour of the organ of State or other person concerned against the convicted person. Such judgment has the same force and effect and is executable as if it had been given in a civil action duly instituted before a competent court.[53] Furthermore, the court may summarily enquire into and assess the monetary value of any advantage gained or likely to be gained by such person in consequence of the offence committed and, in addition to any other punishment imposed in respect of that offence, the court may order an award of damages or compensation or a fine equal to the amount so assessed.[54]

A further novel provision is that the court convicting a person who has committed a Schedule 3 offence, may upon the application of the prosecutor or other organ of State, order such person to pay the reasonable cost incurred by the Public Prosecutor and the organ of State concerned in the investigation and prosecution of the offence.

There are furthermore provisions contained in Section 34 for an employer to be guilty of an offence committed by a manager, agent or employee under certain circumstances[55] and for the manager, agent or employee to be convicted as if he or she were the employer under certain circumstances.[56] Furthermore, a director of a firm at the time

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[53] NEMA Sections 34(1) and (2). It is to be noted that this will only be in the context of an offence listed in Schedule 3 to NEMA.

[54] NEMA Section 34(3). Here too the provision relates only to an offence listed in Schedule 3 to the Act.

[55] NEMA Section 34(5).

[56] NEMA Section 34(6).

> of the commission by the firm of a Schedule 3 offence, shall himself or herself be guilty of the offence and liable on conviction to the penalties stipulated in the relevant law including the orders referred to above relating to the cost of rehabilitating the environment, a fine equal to any economic gain and the costs of the prosecution itself. As Paterson observes, despite being in existence for a number of years, these novel penalty provisions remain vastly underutilized.[57]

The legislative and management measures set out above are all state driven.[58] Reference has been made to the limited resources which DEAT has in effectively monitoring compliance with the various environmental laws and to the backlogs which currently exist in obtaining environmental authorisations. In addition, the courts have also placed limitations on the issuing of directives under section 31A.[59] In *Evans and Others v Llandudno/Hout Bay Transitional Metropolitan Substructure and Another*,[60] the court held that before being issued with a section 31A directive, the applicants were entitled to be given notice of the respondent council's intention to issue a directive under section 31A and be given an opportunity of being heard and to make representations thereon to the respondent council.[61]

Then, in the recent decision of the SCA in *HTF Developers (Pty) Ltd v The Minister of Environmental Affairs and Tourism and Others*,[62] the court held that before a direction under section 31A could be issued, the issuing authority had to comply with the provisions of section 32 which provides, *inter alia*, that before a directive is issued, the authority concerned must first publish in the Government or Provincial Gazette a draft notice. The draft

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[57] Alexander Paterson, "Novel financial sanctions for environmental offenders" (2005) December *News & Views for Magistrates* 1.

[58] Other than the ability of a private person or entity to apply under Section 28(12) of NEMA and Section 74(3) of the Biodiversity Act for an order directing the relevant state authority to issue a directive under those Acts.

[59] Of the Environment Conservation Act 73 of 1989.

[60] 2001 (2) SA 342 (C).

[61] At 355 D – E.

[62] SCA Case number 337/06, 28 March 2007, unreported.

notice is to include the text of the proposed directive and make provision for comment thereon.[63]

While the requirement in *Evans* of giving the affected person or entity an opportunity to be heard seems to be reflected in the wording of section 28(4) of NEMA,[64] the wording of section 19(3) of the NWA, sections 69(2) and 73(3) of the Biodiversity Act, section 45(1) of the MPRDA and section 45(1) of the NHRA, similarly to section 31A, do not reflect this requirement. The courts could potentially require the competent authority in terms of these Acts to afford the affected person or entity an opportunity to be heard, before it can issue a directive especially if one takes into account that section 28(4) of NEMA has an over-arching effect on these other provisions. On the other hand, it could be argued that by the Legislature deliberately excluding such a requirement from these other provisions, it was clearly intended that it should not apply. Whichever way the courts decide this issue, the effectiveness of this environmental protection tool, in the light of the limitations described above, is questionable.

Accordingly, it is argued that the legislative and management measures referred to in this chapter are not effective in preventing environmental pollution and ecological degradation even though their aim is directed towards this objective. The question, therefore, is whether there is any other means to effectively prevent environmental pollution and ecological degradation from occurring rather then to rely on measures which by their very nature are *ex post facto* and are designed to remedy environmental pollution and ecological degradation after it has occurred.

3. **THE COMMON LAW INTERDICT AS A TOOL FOR EFFECTIVE ENVIRONMENTAL PROTECTION** :

3.1. Introduction

If, as postulated above, the legislative and management measures contained in South Africa's various environmental laws are ineffective

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[63] At para [13].

[64] Which provides for the Director-General or Provincial head of department "after having given adequate opportunity to affected persons to inform … of their relevant interests" to issue a directive.

in preventing environmental pollution and ecological degradation from occurring, the question is whether there is any other means to effectively prevent this. An examination of the case law reveals that at times, both before and since the advent of South Africa's environmental laws and indeed the enactment of the Constitution, interdicts (both final and interim) have been granted and have effectively stopped environmental pollution and ecological degradation from occurring and continuing. Kidd opines that :

> An interdict is potentially a very useful enforcement tool because it can be used to put a stop to harmful activity and often at an early stage, allowing proactive intervention. An interdict can be sought by anybody, given the wide locus standi provisions in NEMA.[65] (emphasis supplied)

An interdict is an order of court which enjoins a respondent to refrain from doing something (a prohibitory interdict) or orders a respondent to do something (a mandatory interdict).[66] Accordingly, it is not a remedy for past conduct, but for present and future conduct.[67]

3.2. Locus standi

Prior to the wide locus standi provisions in NEMA, and the Constitution, the issue of locus standi to interdict environmental pollution and ecological degradation was fraught with difficulties in that the applicant had to allege and prove special damage in order to establish the necessary standing to claim the relief sought.[68] Now, both under the Constitution[69] and NEMA,[70] any person acting in their own or in a group or class of persons' interests, in the interest of, or on behalf of, a person who is unable to act themselves, in the public interest and in the interest of protecting the environment, may bring interdict proceedings. Therefore, because of the Constitutional right

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[65] Michael Kidd, "Alternatives to the Criminal Sanction in the Enforcement of Environmental Law" (2002) 9 *SAJELP* 42.

[66] The Law of South Africa [LAWSA], First Reissue, Vol. 11 at para 303.

[67] Ibid.

[68] See *Verstappen v Port Edward Town Board & Others* 1994 (3) SA 569 (D); C B Prest, *The Law and Practice of Interdicts*, 1996 at 305.

[69] Act 108 of 1996 Section 38.

[70] Act 107 of 1998 Section 32.

which everybody enjoys to have an environment that is not harmful to their health or wellbeing,[71] it is not difficult to imagine that the classes of persons now endowed with locus standi, both Constitutionally and under NEMA, will effectively get past the previous hurdles in this regard.

3.3. Requirements

In order to obtain a final interdict, an applicant has to show a clear right, an infringement thereof that has actually occurred or is reasonably apprehended, and that there is no other adequate alternative remedy.[72] The requirements for an interim interdict are that the applicant must show a prima facie right even though open to some doubt, the apprehension of harm which may be irreparable if the interdict is not granted, that the balance of convenience favours the granting of the interdict and that the applicant has no other satisfactory or adequate remedy in the circumstances.[73] Each of these requirements will now be assessed in the context of environmental protection.

3.4. Clear/prima facie right

In regard to the first element of an interdict (both final and interim), Prest indicates that interdicts are based upon rights and include rights based on statute.[74] As Claassen J states, '[t]he Constitution reigns supreme'.[75] He also states that by virtue of Section 24 of the Constitution, environmental considerations, often ignored in the past, have now been given rightful prominence by their inclusion in the fundamental bill of rights section of the Constitution[76] and that 'by

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[71] Act 108 of 1996 Section 24.

[72] LAWSA, First Reissue, Vol. 11 at para 309; LAWSA Second Edition Vol. 19 at para 201; Johan Meyer, *Interdicts and Related Orders*, 1993, at 59; Prest, op cit at 42.

[73] LAWSA, First Reissue, Vol. 11 at para 316; LAWSA Second Edition, Vol. 19 at para 200; Meyer op cit at 59; and Prest op cit at 50.

[74] Op cit at 52 and the authorities cited there in footnote 15.

[75] *BP Southern Africa (Pty) Limited v MEC for Agriculture, Conservation, Environment and Land Affairs* 2004 (5) SA 124 (W) at 140 G.

[76] At 142 C.

elevating the environment to a fundamental justiciable human right, South Africa has irreversibly embarked on a road, which will lead to the goal of obtaining a protected environment …'.[77] Accordingly, any concerned citizen, association or non-governmental organisation will be able to establish both a clear and prima facie right to satisfy the first requisites of final and interim interdicts.

In the past and before the enactment of the Constitution and NEMA, reliance was placed, as will be seen below, on the law of nuisance and on neighbour law in order to enforce one's property rights.

In the environmental context, pollution and ecological degradation usually cause harm to neighbouring land owners and thus amount to a nuisance to them. Where the right of one owner to use his property conflicts with the right of another owner to the free enjoyment of his property, the rights are limited by the imposition of mutual obligations. An owner's rights of ownership then extend only so far as there rests an obligation on his neighbour to endure the exercise of that right. That involves an obligation on the one owner so as to exercise his right that he does not exceed that limit. If it is exceeded, he no longer acts according to the right which his right of ownership accords to him and he infringes the right of his neighbour. That is unlawful conduct which the law does not tolerate and which can form the basis of an interdict.[78] On the other hand, reasonable exercise of a right, i.e. the reasonable normal use of the property, is lawful.[79]

Thus, in *Gien's* case,[80] the respondent had erected a scaring apparatus on his farm to chase away baboons and other wild animals from his vegetable garden and a building that was used as a store. The apparatus made loud explosive noises at regular intervals and the apparatus was set so as to work night and day. The applicant's farm joined that of the respondent and the farms were situated in a quiet,

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[77] At 144 D.

[78] *Gien v Gien* 1979 (2) SA 1113 (T) at 1121 B-D.

[79] Ibid at 1121 H.

[80] Ibid.

rural and well wooded area where cattle farming was mainly carried on. People in the applicant's house during the daytime as well as the night found the explosive noises disturbing and it interrupted their sleep. Applicant's cattle became restless and the noise affected one of the applicant's horses, which was normally tame, to the extent that it threw its rider and could only be calmed down with difficulty. It eventually had to be removed from the farm so that it could be made controllable. The restless cattle caused problems when they had to be dipped. It was technically possible for the respondent to muffle the sound of the apparatus by adjusting it without frustrating the purpose for which it was erected. It was also not necessary for the apparatus to work at night. The applicant applied for an interdict against the use of the apparatus in a way that it caused a nuisance on the applicant's property and the Court granted an interdict in the applicant's favour. This decision in 1979 long before the advent of many of South Africa's environmental laws, indicates that an interdict for noise pollution of the disturbing nature described, based on the law of nuisance, was effective.

In the nuisance section of LAWSA Vol. 19,[81] various nuisances are listed including odours, noise, smoke, the keeping of animals in circumstances where they can cause a material interference with the physical comfort of the occupant of neighbouring land, and water pollution. These have all been held to constitute nuisances which can be effectively stopped by the obtaining of an interdict. In paragraph 211 of the same work, the principles concerning public nuisances are set out. A public nuisance denotes a nuisance of which the harmful effect is so extensive as to affect the general public at large or at least a distinct class of persons within its field of operation.

In *Dell v The Town Council of Cape Town*,[82] the traffic manager of the Railway applied for an interdict to restrain the defendants from

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[81] Supra, notes 72 and 73.

[82] (1879) 9 Buch 2.

throwing rubbish and other refuse of the Cape Town streets upon the beach of Table Bay in the immediate neighbourhood of the city. De Villiers C J stated that '[t]here can be no doubt … that the deposit of this rubbish is a nuisance to the persons in whose neighbourhood it is thrown'.[83] In response to the argument by the defendants that the applicant did not expressly state that his health was likely to suffer from the rubbish being deposited in the neighbourhood of the railway station, the judge indicated that the applicant had stated that he was employed by the Government as a traffic manager and that accordingly the Court could draw the conclusion that his duties would compel him to go to both the passenger and goods stations and that going to the latter his health would be liable to be affected by the stench on the beach. The judge found that it would be absurd to say that the applicant was to wait until his health was affected by the nuisance before approaching the Court.[84]

The learned judge stated further that –

> If [the applicant] shows to the Court that the probable effect of this nuisance would be to injure his health, and if his duties compel him to be in the neighbourhood of the nuisance, then I think he has made out a case to justify the Court in granting an interdict to restrain the respondents from throwing rubbish in his immediate neighbourhood. Moreover, if this is a nuisance, it is a nuisance to the public of Cape Town at large, and Mr Dell, as one of the public, according to the authority quoted from *Voet*, is entitled to make this application to restrain the nuisance in any public place in the town, and upon any part of this beach in the neighbourhood of the town. …[I]t does not follow …, that a private party would not be justified in coming to the Court for an interdict to restrain the nuisance.[85]

The Court accordingly granted an interdict albeit of a limited duration akin to an interim interdict allowing the parties to re-approach the Court after a period of time for what the Court termed a 'perpetual interdict'. The law report is annotated to the effect that the nuisance complained of was abated by the Town Council and therefore no further proceedings were taken. This is clearly a very early example of an interdict abating pollution and ecological degradation long before

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[83] Op cit at 5.

[84] Op cit at 6.

[85] Ibid.

the environmental laws that the country now has, were even contemplated. In addition, the relief sought was effective in stopping and preventing further pollution from occurring.

What is also apparent from the decision in *Dell*, is that it is not necessary to show actual harm to one's health and wellbeing and the conduct complained of can be interdicted if the potential to affect one's health and wellbeing is demonstrated.

In *Rainbow Chicken Farm (Pty) Limited v Mediterranean Woollen Mills (Pty) Limited*[86] the Court was dealing with a situation where factory effluent had been discharged into a stream causing pollution. The Court held that where the producer of effluent discharges it from his factory into a public stream, and the effluent thus discharged into the stream pollutes it both in the sense that it does not conform to the standards laid down in terms of the governing statute (in this instance, the 1956 Water Act) and in the sense that it amounts to pollution at common law, an injured third party may elect whether to proceed against the producer for breach of the statutory duties laid upon him or under the common law.[87] The Court also found that even if the statutory provisions were applicable the victim may still proceed against the producer of the effluent under the common law and that it would be far-fetched to suggest that a Court could not interdict the producer of the effluent from poisoning the public stream.[88] The Court was dealing on the return day of a rule nisi the effect of which was an interim interdict but by the time the parties were back in Court, the pollution which had caused the initial application had ceased to exist and the Court was only dealing with the issue of costs. Here too the Court long before the advent of South Africa's environmental laws indicated unequivocally that at common law, pollution of a public stream could effectively be stopped by interdicting the producer of the effluent from discharging the effluent into the public stream.

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[86] 1963 (1) SA 201 (N).

[87] At 205 B.

[88] At 205 D.

It can thus be seen that in regard to the requirement for both the final and interim interdict, whether a person's right to enjoy his property was, or was threatened to be, negatively affected by pollution or some other act of ecological degradation, is a factual enquiry much dependant on the facts of any given situation. The cases analysed thus far certainly show that on the facts presented therein, the Courts unhesitatingly recognized the effectiveness of an interdict in either preventing or stopping environmental pollution and ecological degradation.

With the enactment of the environmental right in the Constitution, an infringement of that right in a way that constitutes pollution or an act of ecological degradation will, even more so than before, be a justification for the granting of interdictory relief by the courts.

3.5. Infringement of the right, or reasonable apprehension thereof

In the case of both a final and an interim interdict, this requirement constitutes a factual enquiry, and the applicant for an interdict will have to set out the facts which either constitutes the infringement or set out the basis upon which there is a reasonable apprehension that the right will be infringed. The cases discussed below in regard to the remaining requirements of the interdict, give a clear indication of how the courts have dealt with this requirement.

3.6. Alternative remedy

One element of the interdict which is the same whether interim or final is the element that there is no suitable alternative remedy. In *Bristow v Coleman*[89] the Court was dealing with an application for an interdict by the owner of a ranch to prevent the respondent, a professional hunter and safari operator, who had leased the hunting rights on the farm from the owner, from issuing hunting rights during the closed season. The Court having found that the applicant had established a clear right and that the right was being infringed by the admitted

[89] 1976 (2) SA 252 (R).

hunting during the closed season, considered whether there was any alternative relief available to the applicant other than an interdict. It was suggested by the respondent that there were three alternative remedies available to the applicant. The first of these was to apply to the relevant Government Minister in terms of the (then Rhodesian) Parks and Wildlife Act 1975, secondly a claim for damages, and thirdly a criminal prosecution in terms of the legislation. The Court held that the applicant '… is entitled to immediate relief. There is no knowing whether he would be successful in moving the Minister to act or how long it would take or whether, if the Minister did act, the notice would provide the protection which the [applicant] seeks.'.[90]

The Court went on to hold that to sue for damages on each occasion when the respondent and his clients killed game was not as suitable a remedy as an interdict prohibiting the respondent from infringing the applicant's rights in the future.[91] The Court also mentioned the fact that the applicant had attempted unsuccessfully to institute prosecutions and came to the conclusion that the same reasoning would apply in the case of damages.[92]

> An interdict is a more suitable remedy because otherwise the [applicant] will have to wait until his rights have been infringed and he has probably suffered loss before, in each case, attempting to institute a prosecution. Furthermore, the relief sought is more embracing than the mere prevention of criminal offences.[93]

Accordingly, the Court found that the requirement of proving no suitable alternative remedy had been established by the applicant and granted a final interdict.

In *Wright & Another v Cockin & Others*,[94] where the respondents had stocked their conservancy, which was adjacent to the applicants' cattle farm, with blue wildebeest (which was not endemic to the Eastern

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[90] At 258 D-E.

[91] At 258 G.

[92] Ibid.

[93] At 258 H.

[94] 2004 (4) SA 207 (E).

Cape), the applicants applied for an interdict prohibiting the respondents from allowing any of the wildebeest to come within 1000 metres of the applicants' property because the wildebeest had transmitted, and would continue to transmit, a fatal virus, known colloquially as 'snotsiekte'. The respondents had argued that an adequate alternative remedy available to the applicants was an action for damages. The Court rejected this argument, pointing out that the applicants were faced with a continuous and ongoing situation. As long as the respondents' wildebeest were allowed to run near to the boundary separating their respective properties, it was inevitable that the applicants' cattle would be infected from time to time. The harm was accordingly an ongoing one and there was no way of knowing what the scale of the applicants' losses might be if the mischief was not removed.[95] The Court therefore concluded that the applicants had satisfied all the requirements for a final interdict.[96]

In *Capital Park Motors CC and Another v Shell South Africa Marketing (Pty) Limited and Others*[97] the first respondent, Shell South Africa and one of its franchisees, had erected a filling station without an environmental authorisation, as contemplated under the Environmental Conservation Act, having been obtained. The respondent subsequently applied for an authorisation which had been refused and they thereafter lodged an appeal which was still pending at the time the Court was called upon to consider the applicants' interdict. The filling station had been completed in December 2001 but trading only commenced in January 2005, some four years later. The applicants' first called for undertakings from the respondents that they would desist from operating the filling station but when these were not forthcoming, an urgent interdict application was launched.

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[95] At 218 F – I.

[96] The Court also found that the applicants had satisfied the elements of a clear right and a reasonable apprehension that the virus would be transmitted to their cattle.

[97] 2006 JDR 0105 (T).

The Court was satisfied that the requirements for an interim interdict were satisfied and therefore granted the relief sought. In considering the element of a suitable alternative remedy, the Court held as follows :

> It is so that the first applicant might have a claim in delict for damages suffered due to respondents' illegal trading. That however, is small consolation when it is almost impossible to quantify damages sufficiently for the loss which may have been sustained over a lengthy period. There are also many other factors that need to be taken into account in quantifying damages like for instance, general economic conditions and other local conditions. All these have to be brought into the equation. In my mind I am satisfied that there is no other adequate remedy to the applicants' assistance.[98]

As set out above, in the environmental context, pollution and ecological degradation usually cause harm to neighbouring landowners and thus constitute a nuisance to them. In *Three Rivers Ratepayers Association and Others v Northern Metropolitan*,[99] the applicants applied for an interdict directing the first respondent to remove a group of squatters from a piece of land belonging to the first respondent. The Court, referring to the decision in *Regal v African Superslate (Pty) Limited*,[100] stated that when a nuisance is created by third parties such as the group of squatters, an interdict is only competent if the respondent has knowledge of the nuisance and has failed to take reasonably practical measures to prevent the harm. The Court found that the consideration by the first respondent municipality of other available land for the second respondent group of squatters was a display of reasonableness vis-à-vis the second respondent, whereas the law required the measures to be reasonably practical vis - à-vis the applicants in an attempt to avert the interference with their rights.

The Court also found that the first respondent municipality was in control of the land on which the second respondent group of squatters were squatting unlawfully and as such creating a public nuisance

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[98] Op cit page 26 at paragraph 22.

[99] 2000(4) SA 377 (W).

[100] 1963 (1) SA 102 (A).

which infringed on the rights of the applicants. The Court accordingly found that the first respondent had failed to take reasonably practical measures to avert the infringement of the applicant's rights and granted a mandatory interdict directing the first respondent municipality to, within forty-eight hours from the grant of the order, evict and remove the second respondent group of squatters from its property.

This is yet another example of the effectiveness of the interdict remedy as the pollution and environmental degradation which the group of squatters were causing on the land in question was effectively stopped notwithstanding the fact that the municipal authorities were cognisant of the pollution and environmental degradation which was occurring and had not done anything effective to stop it from continuing.

An interesting decision dealing with not only the element of demonstrating no other suitable remedy but also the ineffectiveness of administrative action is the case of *Minister of Health v Drums and Pails Reconditioning CC t/a Village Drums and Pails*.[101] In this case, the applicant applied for an interdict prohibiting the respondent from carrying on with a chemical waste incineration process in contravention of the Atmospheric Pollution Prevention Act (APPA).[102] The respondent had erected an incinerator on its premises prior to making an application for a provisional registration certificate for the incinerator as was required in terms of APPA. Even though the respondent was not issued with the requisite registration certificate, it used the incinerator on occasions. The drums which were incinerated contained various substances such as residues of paint and chemicals which, when subjected to the incineration process, caused chemical oxidation resulting in the emission of noxious and offensive gasses as defined in Schedule 2 to APPA.

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[101] 1997 (3) SA 857 (N).

[102] No. 45 of 1965.

On the question of alternative remedies, the respondent argued that the applicant had available the penal provisions of APPA and further an alternative remedy was available in terms of the National Building Regulations and Building Standards Act[103] in terms of which an application could be made to the Magistrate's Court for an order to demolish any illegally erected structure.[104] The Court was not persuaded by both these arguments indicating that the fact that APPA makes provision by way of a criminal sanction for the respondent's alleged contravention of APPA, was no bar to the granting of the interdict.[105] The Court also found that the alternative remedy argued on behalf of the respondent in terms of Section 21 of the National Building Regulations and Building Standards Act did not avail itself to the applicant as the Minister referred to in the relevant section under that Act was the Minister of Economic Affairs and Technology and not the applicant. The Court rejected the argument on the basis that it was 'ill-founded'.[106] The Court accordingly granted a final interdict restraining the respondent from carrying on with any chemical waste incineration in contravention of the provisions of APPA.

3.7. Balance of Convenience

In the context of interim interdicts, there is the further requirement that the applicant has to satisfy and that is that the balance of convenience favours the granting of the interim interdict. It is in regard to this particular element that difficulties in the environmental context can arise.

The balance of convenience is described by Prest[107] as follows :

> In exercising its discretion the Court weighs, *inter alia*, the prejudice to the applicant if the interdict is withheld, against the prejudice to the respondent if it is granted. If there is greater possible prejudice to the respondent, an

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[103] No. 103 of 1977.

[104] Section 21 thereof.

[105] At 877 G.

[106] At 877 I.

[107] Prest op cit, at 69.

> interim interdict will be refused whereas if the prejudice to the respondent will be less than that of the applicant, the interdict will be granted.[108]

The essence of the balance of convenience is to try and assess which of the parties will be least seriously inconvenienced by being compelled to endure what may prove to be a temporary injustice until the just answer can be found at the end of a trial.[109]

In the *Capital Park Motors* case[110] the Court found that the balance of convenience favoured the applicant. The respondent had not operated the facility for almost four years, and '[a]lthough it is a costly exercise, the Respondents are the architects of their own misfortune.'.[111] The Court also found that the first respondent (Shell South Africa) –

> … being a big national corporation and part of an international group of companies, should be able to hold out for a while longer. On the other hand, First Applicant is a small entity and would in all likelihood find it extremely difficult to survive, should Respondents be allowed to operate.[112]

In the environmental context, where one is dealing with the situation of pollution or ecological degradation usually on the part of one landowner towards another, for example, the emission of noxious fumes from an activity or the polluting of a water course,[113] in the weighing up of the balance of convenience it is likely that a Court will find in favour of an applicant where the temporary cessation of the cause of the pollution until proper permitting or adequate safeguards to prevent the pollution are put in place, can effectively be achieved.

There are, however, problems when an individual attempts to stop a public entity from environmental pollution or ecological degradation. In these instances, it would appear that based on the traditional principles which have evolved in our law, the balance of convenience will always turn in favour of the public entity.

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[108] Op cit, at 72.

[109] Op cit, at 72-73 and the authorities cited in footnote 148.

[110] Supra, note 97.

[111] Op cit at 25 para 21.

[112] Ibid.

[113] *Woodcarb* (note 9, supra), *Drums and Pails* (note 101, supra), and *Rainbow Chicken Farms* (note 86, supra).

In *Verstappen's* case,[114] the Court had to consider the balance of convenience between a private citizen and a public entity. The facts, briefly, were as follows : the applicant was the co-owner of certain immovable property which abutted a worked-out quarry which the first respondent (the Port Edward Town Board) had commenced using as a waste disposal site. It had done so without obtaining the requisite permit under the Environment Conservation Act.[115] The Court found that this conduct on the part of the first respondent was unlawful. The Court, *inter alia*, was called upon to determine whether the first respondent should be interdicted from continuing to operate the waste disposal site pending the hearing by oral evidence of the nuisance created by the waste disposal site. In weighing up the question of the balance of convenience, the Court referred to the decision in *Olympic Passenger Service (Pty) Ltd v Ramlagan*[116] where it was held that 'a Court will not grant an interdict if the effects of the order upon the respondent or the general public welfare would be to cause greater harm or inconvenience from that which the applicant complains of.'[117]

The Court in *Verstappen* then went on to hold that :

> Where, as in this case, the wider general public is affected, the convenience of the public must take into account any assessment of the balance of convenience. … In my opinion, if the interests of the other rate payers living in the (first) respondents local authority area are taken into account, the balance of convenience in this matter is overwhelmingly against the grant of any interim relief to the applicant …[118]

The question is whether this finding, which was made prior to the enactment of the Constitution and on the principles of nuisance and neighbour law, would be any different now that one's right to an environment which is not harmful to one's health and wellbeing is enshrined as a fundamental right in the Constitution?

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[114] Supra, note 68.

[115] Supra, note 40.

[116] 1957 (2) SA 382 (D).

[117] At 383 F; see also LAWSA, First Reissue, Vol. 19 at para 200; and the authority cited in footnote 10.

[118] At 576 H - 577 A.

In *Hoffman v City of Cape Town & Another*,[119] on the return date of an earlier rule nisi and interim interdict, the Court by agreement between the parties, declared that the first respondent (the City of Cape Town) was not operating its solid waste disposal facility at Vissershok (the City's largest and most important solid waste disposal facility) in compliance with the requirements of the permit issued to it in terms of Section 20 of the Environment Conservation Act and that its conduct was unlawful. The Court also ordered the first respondent to bring its operation of the facility into substantial compliance with the permit by 1 September 2006. In fact, in earlier litigation concerning the first respondent's operation of the facility, it transpired during December 2004 that the land on which the facility was being operated had not been zoned for the purpose of operating a solid waste disposal facility.[120]

Notwithstanding the unlawful operation of the solid waste disposal facility at Vissershok, both applicants chose not to seek interim interdictory relief pending the obtaining of the necessary rezoning, probably in the light of the decision in Verstappen, but rather chose to enforce the permit conditions. It would be most unlikely that a Court would have interdicted the City of Cape Town from continuing to operate its Vissershok facility, even though it was unlawful, as the interests of the wider community would have taken precedence over that of the applicants and therefore the balance of convenience would have been overwhelmingly against the granting of such relief to the applicants.[121]

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[119] CPD Case No. 12726/2005, 13 March 2006, unreported.

[120] *Minnitt NO and Others v Minister of Water Affairs and Forestry and Another*, CPD Case No. 6418/2003. This matter also involved forcing the City of Cape Town to comply with its permit conditions and the matter was confidentially settled between the parties.

[121] The rezoning application of the Vissershok site has still not been completed. An advertisement in the Cape Times dated 25 July 2007 called for public participation in regard to a draft environmental impact report. This is some two and a half years since the incorrect zoning had been brought to light in December 2004.

In, *Fose v Minister of Safety and Security*,[122] Ackermann J stated as follows :

> I have no doubt that this Court has a particular duty to ensure that, within the bounds of the Constitution, effective relief be granted for the infringement of any of the rights entrenched in it. In our context, an appropriate remedy must mean an effective remedy, for without effective remedies for breach, the values underlying and the rights entrenched in the Constitution cannot properly be upheld or enhanced. Particularly in a country where so few have the means to enforce their rights through the Courts, it is essential that on those occasions when the legal process does establish that an infringement of an entrenched right has occurred, it be effectively vindicated. The Courts have a particular responsibility in this regard and are obliged to 'forge new tools' and shape innovative remedies, if needs be, to achieve this goal.[123] (emphasis supplied)

The Court in *Verstappen* applied what can be termed a traditional approach to the determination of the balance of convenience test. The traditional approach would determine that the interest of the wider community would outweigh those of an individual even though the individual's Constitutional right to an environment which is not harmful to the individual's health and wellbeing was being negatively infringed, and the interdict would be refused. Surely the Courts are, in the words of Ackermann J in *Fose*, enjoined to forge new tools and shape innovative remedies and develop the balance of convenience element of an interim interdict differently when it involves environmental issues in the private vs. public arena? Not to do so would effectively exclude the common law interim interdict as an effective remedy, as suggested by Ackermann J was needed when granting relief for an infringement of an entrenched Constitutional right.[124]

As indicated above, pollution in various forms on the part of a landowner can cause a nuisance to his neighbour's ability to use and enjoy his property. Prest[125] indicates that it is not easy to determine the extent of the influence of English law on the South African law in regard to the balance of convenience as a factor to be considered in

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[122] 1997 (3) SA 786 (CC).

[123] At 826 para [69].

[124] Ibid.

[125] Op cit at 69.

the grant or refusal of an interim interdict. Section 39(1) of the Constitution enjoins a Court in developing the common law to have regard, inter alia, to international law. Inasmuch as the English law of nuisance has had some influence on the South African law of nuisance, it is appropriate to have regard to recent developments in English law in regard to the balance of convenience test.

In *Miller & Another v Jackson & Another*,[126] the Court of appeal considered the granting of an interdict in a matter involving the common law of nuisance and was called upon to balance the interest of the public with those of a private individual.

The facts of this case were as follows : from 1905 onwards, cricket was played by a village cricket club on a small ground in the village thereby becoming an important centre of village life during the summer months. In 1972 a housing estate was built on a field adjoining the cricket ground. The plaintiffs bought one of the houses on the edge of the ground and their garden was only 102 feet from the centre of the pitch. While there was a six foot high concrete wall dividing the ground from the garden, cricket balls still landed in the garden and some even hit the plaintiffs' house, damaging brickwork and tiles. Complaints to the cricket club led to them erecting a galvanised chain-link fence on top of the wall making the entire wall and fence 14 feet 9 inches high. The club also told the batsmen to try and drive the cricket balls low for four runs and not to hit them up in the air for sixes. Despite these measures, five balls landed in the plaintiffs' garden, one of which just missed breaking a window of a room in which their young son was sitting. The club offered to supply and fit a safety net over the plaintiffs' garden when cricket was in progress, to remedy any damage and to pay any expenses, and to fit unbreakable glass in the windows and provide shutters and safeguards for them. The plaintiffs' rejected all these offers and instead brought an action against the club claiming

[126] [1977] 3 All ER 338.

damages for negligence and nuisance, as well as an injunction[127] to restrain the club from playing cricket on the ground without first taking adequate steps to prevent balls being struck out of ground onto the plaintiffs' property. At the trial, the club conceded that, as long as cricket was played on the ground, there was no way in which it could stop balls going onto the plaintiffs' premises occasionally. The club denied that its use of the cricket ground involved an unreasonable interference with the plaintiffs' enjoyment of their own property and contended that it had taken, or offered to take, all reasonable steps to protect the plaintiffs and their property from harm. They were granted an injunction and the club appealed. The appeal was upheld.

The three Law Lords who heard the appeal had to balance the right of the club to continue playing cricket on their cricket ground against the right of the adjoining property owner not to have his right to his peaceful enjoyment of his property interfered with. Lord Denning MR found that -

> On taking the balance, I would give priority to the right of the cricket club to continue playing cricket on the ground, as they have done for the last 70 years. It takes precedence over the right of the newcomer to sit in his garden undisturbed.[128]

He also said the following –

> This case is new. It should be approached on principles applicable to modern conditions. There is a contest here between the interest of the public at large and the interest of a private individual. The *public* interest lies in protecting the environment by preserving our playing fields in the face of mounting development, and by enabling our youth to enjoy all the benefits of outdoor games, such as cricket and football. The *private* interest lies in securing the privacy of his home and garden without intrusion or interference by anyone. In deciding between these two conflicting interests, it must be remembered that it is not a question of damages. … As between their conflicting interests, I am of the opinion that the public interest should prevail over the private interest. The cricket club should not be driven out. In my opinion, the right exercise of discretion is to refuse an injunction; and, of course, to refuse damages in lieu of an injunction.[129]

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[127] cf an interdict in the South African context.

[128] At 344 h-j.

[129] At 345 b-d.

On the other hand, Geoffrey Lane LJ held a different opinion when balancing the interests of the public with that of an individual and stated that –

> A balance has to be maintained between on the one hand the rights of the individual to enjoy his house and garden without the threat of damage and on the other hand the rights of the public in general or a neighbour to engage in lawful pastimes. Difficult questions may sometimes arise when the defendants' activities are offensive to the senses, for example by way of noise. Where, as here, the damage or potential damage is physical the answer is more simple. There is, subject to what appears hereafter, no excuse I can see which exonerates the defendants from liability in nuisance for what they have done or from what they threaten to do.[130]

On the issue of granting an injunction, he said the following :

> There is no doubt that if cricket is played damage will be done to the plaintiffs' tiles or windows or both. There is a not inconsiderable danger that if they or their son or their guests spend anytime in the garden during the weekend afternoons in the summer they may be hit by a cricket ball. So long as this situation exists it seems to me that damages cannot be said to provide an adequate form of relief. … I would accordingly uphold the grant of the injunction to restrain the defendants from committing nuisance. However, I would postpone the operation of the injunction for 12 months to enable the defendants to look elsewhere for an alternative pitch.[131]

A few years later, the Court of Appeal was called upon, once again, to balance the interests of the public with those of a private individual in *Kennaway v Thompson & Another*.[132] The facts of this case were as follows :

The plaintiff owned land near a lake on which a club had organised motorboat races and waterskiing since the early 1960s. Although aware of the club's racing activities, the plaintiff began building on her land in 1969, considering that the club's activities would not interfere with her comfort and enjoyment of the new house. However, by the time the house was completed in 1972, the club was holding considerably more race meetings and the competing boats had become more powerful and noisy. By 1977 the club had become a centre for motorboat racing at club, national and international level, and the number of days on which racing and practicing took place on

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[130] At 348 e-f.

[131] At 349 e-g.

[132] [1980] 3 All ER 329.

the lake had increased. The plaintiff sought an injunction restraining the club from causing or permitting excessive noise to come onto her land and restricting motorboat racing on the lake to certain specified times. The trial judge found that a nuisance had been caused by the club's activities on the lake but refused to grant an injunction on the ground that to do so would be oppressive, having regard to the enjoyment of the large numbers of the public who attended the club's races. Instead the Court awarded the plaintiff damages. The plaintiff appealed the judge's refusal to grant the injunction, contending that once she had proved that the club had caused a nuisance (which was conceded by the club) which interfered in a substantial and intolerable way with the use and enjoyment of her property, she was entitled to an injunction to stop the nuisance. The Court of Appeal held that while the plaintiff was not entitled to an injunction restraining all of the club's activities, she was entitled to an injunction restraining the club from carrying on those activities which caused a nuisance to her in the enjoyment and use of her property, despite the public interest in those activities.

Lawton LJ, referred to the decision of the Court of Appeal in the old case of *Shelfer v City of London Electric Lighting Co.*[133] and referred to the following passage which he described as 'much-quoted' –

> … [T]he Court of Chancery has repudiated the notion that the Legislature intended to turn that Court into a tribunal for legalising wrongful acts; or in other words, the Court has always protested against the notion that it ought to allow a wrong to continue simply because the wrongdoer is able and willing to pay for the injury he may inflict. Neither has the circumstance that the wrongdoer is in some sense a public benefactor (e.g., a gas or water company or a sewer authority) ever been considered a sufficient reason for refusing to protect by injunction an individual whose rights are being persistently infringed.[134]

He then remarked that :

> The injury to the plaintiff's legal rights is not small; it is not capable of being estimated in terms of money save in the way that the Judge tried to make an estimate, namely, by affixing a figure for the diminution of the value of the

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[133] [1895] 1 Ch. 287, [1891-4] All ER Rep 838.

[134] At 332 f-g.

> plaintiff's house because of the prospect of a continuing nuisance; and the figure could not be described as small.[135]

After considering the refusal of an injunction in *Miller v Jackson* (supra), he stated that –

> The statement of Lord Denning MR that the public interest should prevail over the private interest runs counter to the principles enunciated in *Shelfer's* case and does not accord with the reasoning of Cumming-Bruce LJ for refusing an injunction. We are of the opinion that there is nothing in *Miller v Jackson*, binding on us, which qualifies what was decided in *Shelfer*. … It follows that the plaintiff was entitled to an injunction and that the Judge misdirected himself in law in adjudging that the appropriate remedy for her was an award of damages under Lord Cairn's Act. But she was only entitled to an injunction restraining the club from activities which caused a nuisance, and not all of the activities did.[136]

Accordingly he found that –

> Intervention by injunction is only justified when the irritating noise causes inconvenience beyond what other occupiers in the neighbourhood can be expected to bear. The question is whether the neighbour is using his property reasonably, having regard to the fact that he has a neighbour. The neighbour who is complaining must remember, too, that the other man can use his property in a reasonable way and there must be a measure of 'give and take, live and let live'.[137]

In *Factortame Ltd & Others v Secretary of State for Transport (No 2)*[138] the House of Lords (HL) was confronted with the quandary of not being able to grant an injunction against an organ of State according to UK law. The HL referred to the European Court of Justice which held that when a national court of a member country, in considering a matter concerning the rights of an individual protected by a Community law, considers that the sole obstacle which precludes it from granting interim relief was a rule of the national law like the one in the UK in terms of which a State organ could not be interdicted, then such rule must be set aside. The existing registration of the Appellant's fishing vessels was affected by a new law and this would have a devastating effect on their business which could even result in their bankruptcy. Following the European Court of Justice's ruling, the

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[135] At 332 g-h.

[136] At 333 a-c.

[137] At 333 f-g.

[138] [1991] 1 All ER 70.

HL granted an injunction in favour of the Appellant effectively suspending the application of the statute pending a review thereof.

In weighing up the balance of convenience between the private and public interest, Lord Bridge of Harwich said –

> A decision to grant or withhold interim relief in the protection of disputed rights at a time when the merits of the dispute cannot be finally resolved must always involve an element of risk. If, in the end, the claimant succeeds in a case where interim relief has been refused, he will have suffered an injustice. If, in the end, he fails in a case where interim relief has been granted, injustice will have been done to the other party. … [T]he Court shall choose the course which, in all the circumstances, appears to offer the best prospect that eventual injustice will be avoided or minimised.
>
> If the applicants were to succeed after refusal of interim relief, the irreparable damage they would have suffered would be very great. That is now beyond dispute. On the other hand, if they failed after a grant of interim relief, there would have been a substantial detriment to the public interest resulting from the diversion of a very significant part of the British quota of controlled stocks of fish from those who ought in law to enjoy it to others having no right to it. In either case, if the final decision did not accord with the interim decision, there would have been an undoubted injustice. But the injustices are so different in kind that I find it very difficult to weigh the one against the other.[139]

Lord Goff of Chieveley said –

> Turning then to the balance of convenience, it is necessary in cases in which a party is a public authority performing duties to the public that 'one must look at the balance of convenience more widely, and take into account the interests of the public in general to whom these duties are owed.' … In this context, particular stress should be placed on the importance of upholding the law of the land, in the public interest, bearing in mind the need for stability in our society, and a duty placed on certain authorities to enforce the law in the public interest. This is of itself an important factor to be weighed in the balance when assessing the balance of convenience.[140]
>
> I have, on all the material available to your Lordships, formed the same opinion as that formed by Neill LJ in the Divisional Court on the material then before him, that there was not sufficient to outweigh the obvious and immediate damage which would continue to be caused if no interim relief were granted to the applicants.[141]

From these decisions, one can distil the recognition, in the English context, that the rights of the Davids against the Goliaths of this world will be protected by means of an interdict even in instances where,

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[139] At 108 d-f and g-h.

[140] At 119 g-j.

[141] At 122 c-d.

traditionally, the balance of convenience would have favoured the Goliaths. Recalling the words of Claassen J in the *BP* case,[142] that 'by elevating the environment to a fundamental justiciable human right, South Africa has irreversibly embarked on a road, which will lead to the goal of obtaining a protected environment …', this seems to echo the sentiments expressed by Ntusi Mbodla[143] where he states that the South African Courts are beginning to regard the environment as having intrinsic value and he goes on to quote from the words of Blackmun J of the USA[144] -

> But this is not ordinary, run-of-the-mill litigation. This case poses – if only we choose to acknowledge and reach them – significant aspects of a wide, growing, and disturbing problem, that is, the Nation's and the world's deteriorating environment with its resulting ecological disturbances. Must our law be so rigid and our procedural concepts so inflexible that we render ourselves helpless when the existing methods and traditional concepts do not quite fit and do not prove to be entirely adequate for new issues?

These developments in the traditional law of nuisance, would, arguably, find application in the environmental context and it is argued should be used to develop our common law interdict remedy so that in situations like *Verstappen*, the nuisance created by the local authority in unlawfully using a worked-out quarry as a landfill site could be effectively stopped, albeit on an interim basis, pending a proper environmental impact assessment being carried out prior to obtaining the necessary permit to do so. The conditions of such permit would in all likelihood take into account those factors which constitute a nuisance to the neighbours whose properties abut the worked-out quarry and in this way, rather than a simple refusal of interim relief on a traditional approach, an <u>effective</u> environmental management tool in the form of an interim interdict would be forged.

The balance of convenience in the traditional sense will need to be reconsidered by our Courts (as has occurred in England) and they will have to reshape this particular element of an interim interdict in order

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[142] Supra, note 75.

[143] Ntusi Mbodla, "Legal standing to enforce environmental laws : Has NEMA opened pandora's box?", (2000) 117 *South African Law Journal* 362.

[144] *Sierra Club v Morton* 405 US 727 (1972) 755-6 cited in Mbodla (note 143) at 364.

to make it effective in the private vs. public context. This is particularly more so when weighing up an effective precautionary measure against other relief which by its nature will be *ex post facto*, such as damages. An award of damages does not always bring effective relief as the Court found in *Kennaway v Thomson* (supra) and in appropriate cases an interim interdict preventing continuing harm and environmental degradation may be more effective.

CONCLUSION

In order to prevent environmental pollution and ecological degradation, an array of administrative and criminal measures have been enacted. How effective these measures have been, is questionable, especially if regard is had to what has been reported in the South African Environment Outlook,[145] that despite the enactment of these measures, the South African environment is deteriorating.

In chapter 2, these administrative and criminal measures were briefly considered. It was seen that they are State driven and that as a result of incapacity and being under resourced, substantial backlogs have arisen. Monitoring compliance and enforcement of these measures have, until recently with the designation of the first 858 EMIs in June 2005, been inadequate. In addition, the courts have placed limitations on the issuing of administrative directives particularly under section 31A of the Environment Conservation Act.

In regard to criminal measures, notwithstanding substantial increases in penalties and the introduction of novel sanctions, they remain underutilized. Inadequate policing and investigation, and a lack of expertise on the part of the court officials, are given as reasons for this. Furthermore, criminal prosecutions are reactive rather than preventative in nature and the delays in concluding the criminal prosecution very often means that the damage to the environmental has already occurred. As such, criminal sanctions are not effective in preventing environmental pollution and ecological degradation.

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[145] Supra, note 6.

On the other hand, the analysis in chapter 3 of the cases in which interdicts (both interim and final) were sought and granted in an environmental context, has demonstrated that the common law interdict has been, and can be, used as an effective tool in preventing environmental pollution and ecological degradation and the use of this remedy to effectively prevent pollution and ecological degradation from occurring, is to be encouraged.

However, where the environmental rights of applicants are being infringed or threatened by a public entity, a modified and redeveloped balance of convenience test needs to be forged by the Courts. Not to do so, and to continue to apply the traditional approach to the balance of convenience test in such contexts will lead to the common law interim interdict losing its effectiveness as a tool to prevent environmental pollution and ecological degradation from occurring.

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LIST OF ACRONYMS

APPA	-	Atmospheric Pollution Prevention Act 45 of 1965
DEAT	-	Department of Environmental Affairs and Tourism
EIA	-	Environmental impact assessment
EMI	-	Environmental management inspectors
HL	-	House of Lords
LAWSA	-	The Laws of South Africa, W A Joubert, founding editor
MPRDA	-	Mineral and Petroleum Resources Development Act 28 of 2002
NEMA	-	National Environmental Management Act 107 of 1998
NHRA	-	National Heritage Resources Act 25 of 1999
NWA	-	National Water Act 36 of 1998

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