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**LEGAL ASPECTS OF PUBLIC INTEREST PARTICIPATION IN  
ENVIRONMENTAL MANAGEMENT AND CONSERVATION**

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Cape Town 7 February 1998

  
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J D de Truter

## CONTENTS

Acknowledgements	2
Contents	3
I <u>Public Interest Participation in Environmental Management and Conservation</u>	7
1.1 Introduction	7
1.2 Legal Aspects of Public Interest Participation in Environmental Law	7
II <u>The Environmental Right</u>	10
2.1 Introduction	10
2.2 The Development of the Environmental Right	12
2.3 Human Rights approaches to the environmental problem	14
2.4 The Environmental Right in South African Constitutional Law	18
2.4.1       The Constitution of the Republic of South Africa Act 200 of 1993	18
2.4.2       The Constitution of the Republic of South Africa Act 108 of 1996	18
III <u>Background to environmental norms, rights, duties, relevant legislation, structures and policies.</u>	21
3.1 Introduction to the structure of Environmental Law in South Africa	21
3.2 Environmental legislation	22
3.2.1       National	22
3.2.1.1   Environmental Conservation Act 73 of 1989	22
3.2.1.2   Procedures for direct public participation in terms of the Environmental Conservation Act	23
3.2.1.3   Public participation in terms of section 2 in determination of environmental policy	23
3.2.1.4   Public participation in terms of section 32 relating to notices	26
3.2.1.5   Public participation in environmental impact assessments and reports	27
3.2.1.6   Public participation in Board of Investigation	28
3.2.1.7   The Steyn Commission	28
3.2.1.8   Remedies in terms of the Environmental Conservation Act	30
3.2.1.8.1 Appeals	30
3.2.1.8.2 Criminal Penalties	30
3.2.1.8.3 Interdict	30
3.2.1.9   Regulations for coastal zone management, noise control, waste control, etc.	30
3.2.2       Provincial Legislation	31
3.2.3       Municipal Bylaws	31
3.3 Private law	32
3.4 Criminal law	32
3.5 International law and treaties	32
3.6 Environmental bodies	33
3.6.1       The Council for the Environment	33
3.6.2       Committee for Environmental Co-ordination	34
3.6.3       The Human Rights Commission	34

IV	<u>Administrative law in environmental conservation and management</u>	35
4.1	Relevance of administrative law for public interest groups	35
4.2	Constitutional Right to just administrative action	35
4.3	Impact of administrative justice clause on public interest participation in environmental law	37
V	<u>Standing or <i>Locus Standi</i> in Environmental law</u>	43
5.1	Introduction	43
5.2	<i>Locus standi</i> in common law	43
5.3	<i>Locus standi</i> of public interest groups in environmental matters against the State	44
5.4	<i>Locus standi</i> of public interest groups in environmental matters against private legal personae	46
5.5	<i>Locus standi</i> in international law	47
VI	<u>Right to Information</u>	48
6.1	Introduction	48
6.2	Right to information in common law	49
6.3	Right to information in statutory law	51
6.4	Right to information in constitutional law	51
6.5	The Draft Open Democracy Bill	54
6.6	Environmental information required	55
6.7	Access to environmental information; Guidelines of European Parliament	56
6.8	Environmental impact reports	57
6.9	Information relating to environmentally inspired limitations on land ownership and the use of public databases and registers	61
6.10	Procedure for accessing environmental information	62
6.11	Uses of environmental information	62

VII	<u>Legal processes and various environmental remedies</u>	63
7.1	Introduction to legal processes and environmental remedies available to public interest groups	63
7.2	Public law processes in environmental law	63
7.2.1	Comments and representations	64
7.2.2	Objections	64
7.2.3	Interdicts	65
7.2.3.1	Prohibitory interdict	65
7.2.3.2	Mandatory interdict	67
7.2.3.2.1	<i>Mandamus</i>	67
7.2.3.3	<i>Mandament van Spolie</i>	67
7.2.4	Judicial review	67
7.2.5	Administrative appeals	69
7.2.6	Administrative tribunals	69
7.2.7	Criminal law actions	70
7.3	Public law remedies in environmental law	70
7.3.1	Withdrawal of consent, authority or permit	70
7.3.2	Polluter pays principle	70
7.3.3	Appropriate relief and damages	71
7.3.4	Cleaning up costs	72
7.4	Private law remedies in environmental law	73
7.4.1	Interdicts (future conduct)	73
7.4.2	<i>Actio legis Aquiliae</i>	73
7.5	Public publicity and pressure	73
VIII	<u>Foreign Law</u>	74
8.1	Introduction	74
8.2	The legal system in USA	74
8.3	Environmental legislation	75
8.4	Federal law	75
8.4.1	Court Actions	75
8.4.2	Judicial Review	75
8.5	State law	76
8.6	Standing	76
8.7	Contribution of public interest in environmental law in USA	76
IX	<u>Conclusion</u>	77

X	<u>BIBLIOGRAPHY</u>	79
10.1	Books	79
10.2	Journals/Articles	80
10.3	Statutes	82
10.3.1	RSA	82
10.3.2	USA	82
10.4	Government Gazettes	83
10.5	Provincial Gazettes	83
10.6	Conventions	84
10.7	List of decided cases RSA	85
10.8	List of decided cases UK	86
XI	<u>ANNEXURE 1</u>	87

## I Public Interest Participation in Environmental Management and Conservation

### 1.1 Introduction

The plethora of reporting on environmental issues in newspapers, news broadcasts on radio and television and in many other areas of daily life has created a new awareness of the environment in the general public. The cultivation of this awareness heightens the public's interest in becoming involved in environmental matters. Although individuals often realise that some action is required to address an environmental problem, they are in general ignorant of how environmental law can be applied to the issue. Even amongst informed environmentalists there is no common procedure for approaching environmental issues. Public interest participation in managing and conserving the environment is one avenue open to the public-spirited environmentalist.

### 1.2 Legal Aspects of Public Interest Participation in Environmental Law

Public interest participation in environmental matters is new to South Africa, but has been fairly well established in some other jurisdictions. It involves the activities of a single person, a group or organisation, that does not have a personal or financial interest in an environmental matter, but takes action by participating in environmental policymaking, lobbying, commenting on proposed legislation and draft regulations, objecting to proposed developments in environmentally sensitive areas, undertaking practical environmental projects and research and most important, acts to enforce environmental law. This enforcement can be by means of litigation in court or by administrative action.

Public interest participation in environmental matters has been described as citizen enforcement of environmental law, and in court actions as public interest environmental litigation.

In the United States of America, as will be seen in Chapter VIII, there are certain statutes which make special provision for the creation of procedures for citizen enforcement of environmental norms and standards and this has led to the forming of active environmental citizens organisations.

The European environmentalists, however, take a more political route to influence environmental concerns and are often described as the 'Green' movement. Some of these European groups such as Greenpeace are actively involved in preventing environmentally harmful activities, for example the transportation of nuclear waste, and resort to both legal and illegal means.

In South Africa, public interest participation in environmental matters has been sporadic as, until recently, it has been legally hamstrung, but the Constitution<sup>1</sup> has provided a new basis for active participation in environmental matters by public interest groups.

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1 Act 108 of 1996

The environment is at risk in this country as the State does not have the means in manpower, expertise and finance to manage, protect and conserve the natural resources or to control pollution of soil, air and water.

South Africa fortunately has a number of non-governmental organisations active in the environmental field. These range from the Wildlife Society of Southern Africa, the Botanical Society of South Africa to specialist groups such as Friends of Tokai Forest or the Save the Rhino or Dolphin groups. Most of them are co-operating in the Habitat Council, which was formed in 1974 by voluntary organisations to co-ordinate the actions of private groups and organisations. In 1991 the Habitat Council represented about 1.5 million people, who were members of its affiliates.<sup>2</sup> It was then estimated<sup>3</sup> that there were 89 private groups and organisations active in the environmental arena and today there are many more. These public groups and organisations can assist the State in enforcing environmental norms by monitoring aspects of the environment, providing expertise where necessary and by acting where warranted.

In order to make public interest participation effective, certain conditions must be present in society and in the legal system.<sup>4</sup> In this paper the situation in South Africa will be examined to see if there are any conditions to promote public participation, how these conditions or lack thereof would impact on public participation and what improvements are suggested.

The conditions are:

1. The community's awareness of its responsibility to the environment, a culture of recognising human rights, in particular third generation rights, of which the environmental right is one.
2. Legislation, preferably a constitutionally entrenched environmental right with strong specific environmental legislation to address particular environmental issues.
3. A legal system which affords rights of standing to public interest groups in environmental matters, a system of administrative law by which public interest groups can hold the administration accountable in environmental matters and a legal right of public interest groups to have access to environmental information.
4. An administration, legal system and legal profession that are aware of all aspects of environmental law and are receptive to promoting public interest participation in the

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2 Report of the Three Committees of the Presidents Council on A National Environmental Management System 22 October 1991 para 3.2.1.6 p 110

3 *Op cit* para 3.2.1.5 p 110

4 Robinson D and Dunkley J (Editors) *Public Interest Perspectives in Environmental Law* Wiley Chancery 1995 Chapter 16 by Robinson D titled: Public Interest Environmental Law - Commentary and Analysis p 300

management and conservation of the environment and in the enforcement of environmental law.

5. Environmental groups, organisations, societies and other public organisations willing to promote public interest participation in environmental issues and proper funding for these groups.

The key issues, however, would be the environmental right and environmental laws and procedures applicable, together with access to courts. These determine the basic threshold for public interest participation and when these are in place, the other conditions may be developed.

A new procedure during the planning stage is that of the environmental impact assessment. Public participation in environmental management has been stimulated by this procedure which has evolved to accommodate the realization that developments, and especially developments in certain industries, may have negative impacts on the environment. An environmental impact assessment (EIA) has been described by Fuggle and Rabie<sup>5</sup> as:

*“a procedure designed to ensure that the environmental consequences of a development are understood and adequately considered in the planning process.”*

Part of this EIA process is to do an environmental impact assessment (EIA) during which the environmental effects of a proposed development are assessed and analysed. It is at this stage that the the public can participate and contribute to the process. Since 5 September 1997<sup>6</sup> an EIA has been required for certain developments, this process and the possibilities for public involvement therein are discussed below.

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5 Fuggle R E & Rabie Environmental Management in South Africa Juta & Co 1994 p 749

6 R 1182 and R 1183, Government Gazette 18261 dd 5 September 1997

## II The Environmental Right

### 2.1 Introduction

Environmental law provides for the legal framework and standards in terms of which environmental matters can be assessed. Environmental law is not a separate branch of law, but is a term used to identify the aspects of constitutional law, administrative law, criminal law, civil and criminal procedural law, private law and statutory law relating to or used in environmental matters.<sup>7</sup> It addresses the legal aspects pertaining to the environment, sets standards necessary for assessing environmental matters, and stipulates the relevant legal processes and remedies. The application of an environmental law tends to favour either environmental protection or environmental management.<sup>8</sup> This vast environmental law terrain causes difficulty for those who wish to use legal means to address environmental problems. This paper will strive to set out the content of environmental rights, norms, processes and remedies which determine the parameters of public participation in a logical way, in order to consolidate the necessary environmental legal knowledge required by the public or an individual in the Republic of South Africa. To achieve this, attention is given to legal aspects relevant to the environmental issue in a considered manner: taking an overall view of conservation, sustainable development and pollution control. This requires a knowledge of the relevant laws as well as sufficient and reliable information about the specific environmental issue. The goal is an informed approach to legal aspects of environmental management and conservation. This knowledge could aid the public in promoting accountability in environmental matters, in assessing environmental issues from a legal perspective and in taking the necessary steps to address issues that require specific legal action.

The environmental cause is, to many, an emotive one and when this clouds a balanced approach to environmental issues the term "loony green" is often employed to denigrate those making ill-considered environmental statements and frequently the criticism is well-founded. Environmental law does not, however provide an open season to all those aptly described as "cranks or busybodies who attempt to abuse legal process."<sup>9</sup>

Legal process and costs will quickly eliminate them. The true environmentalist must have a balanced view of the ever present demands of society on the environment and act in a constructive way. There are numerous environmental matters which require attention in South

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7 Cowen D V *Towards distinctive principles of South African environmental law: some jurisprudential perspectives and a role for legislation*, 1989 THRH p 3 at p 4 argued in 1989 that legislation must be used to establish environmental law on a proper footing and this has been achieved in the Constitution of South Africa, Act 108 of 1996, s24.

8 Hughes D *Environmental Law* (2nd Ed.) Butterworths 1992 p 13.

9 *Wildlife Society of Southern Africa and Others v Minister of Environmental Affairs and Tourism of the Republic of South Africa and Others* 1996 (3) 1095 (Tk) p 1106H

Africa. The public, in addressing and drawing attention to them, can provide the impetus required for proper attention by the relevant authority.

Effective environmental action depends not only on traditional legal knowledge and procedures but also on newly created rights and procedures and often on a combination of both. The environmental legal sphere is now very different from what it was prior to the 1993 Constitution. The new State has had a reverberation in environmental law. The constitutional situation has changed from that of a sovereign parliament which had the power to legislate freely, unhindered by any environmental concerns, to a constitutional state, subject to a Bill of Rights containing, *inter alia*, environmental rights. Environmental concerns used to be just another political issue, but became a fundamental legal right in the new political dispensation.

In these changed circumstances, the action-minded environmentalist must be aware that private law has traditionally addressed problems in the fields of contracts, law of persons, succession, delict and property.<sup>10</sup> Environmental matters were side issues, actionable as damages for losses caused to private property or nuisances created by neighbours. Public law regulated the State and legal matters between the State and private persons, but afforded very few opportunities for effective environmental action by the public.

The present industrialized world has complicated matters further, in that environmental issues have become of much greater concern, they affect the public at large, and future generations. The present generation must consider environmental impacts on a world peopled by the next generation. Environmental impacts in turn, may be caused by an individual, a number of legal entities, the State or a combination of all these.

When an individual wishes to act on an environmental issue, he is, in most cases, venturing into uncharted waters. Often he does not know when he should act, how he should act, what he should try to achieve and whom to act against. Mistakes can be expensive in financial terms and can waste crucial time. The most cost and time efficient means must always be used in addressing environmental matters.

The intention of this paper is to present an overview of the environmental rights of the individual; to furnish directions for the obtaining of the relevant environmental information; to suggest remedies and to establish legal standing and the processes for the enforcement of environmental rights. An attempt will also be made to furnish guidelines for identification of parties to be acted against or who could be held responsible for environmental problems.

The paper is presented in nine parts. The first introduces public interest participation, the second discusses the environmental right, the third establishes the framework of environmental norms, constitutional environmental rights, duties, relevant legislation and policies. The fourth describes how administrative law interacts with environmental law, the fifth discusses who can act or has legal standing in environmental matters. The sixth deals with the right to environmental information, the seventh the legal processes and various

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10 Cowen D V *Towards distinctive principles of South African environmental law: some jurisprudential perspectives and a role for legislation*, 1989 THRHR p 3 at p 8.

environmental remedies. The eighth refers to foreign law and the last is a conclusion with recommendations.

## 2.2 The development of the environmental right

Environmental rights are a relatively new concept in law. The legal concept of an environmental right has slowly developed as man has progressed from hunter-gatherer to modern industrialized man with the corresponding changes in the impacts of society on the environment.

Man first regarded all natural resources as limitless. Gradually, threatened extinction of species of fauna and flora raised awareness of the necessity for conservation measures. At the same time man became concerned about the wasteful and inefficient use of soil, water and forests. Soil and water conservation resulted in sustainable agriculture. Sustained-yield forest management resulted in continuous cropping, all to more efficient production. This was the start of the conservation of natural resources, which promoted efficiency in the use and development of these resources, while protecting them. Conservation is a part of the environmental concept, which is based on the relationship between man and the natural environment and determines the quality of life on earth.<sup>11</sup>

Environmental norms to establish, improve and protect this quality of life, have progressed through three stages, namely:

- The proclamation of environmental rights.
- Giving content to the rights or setting standards for the rights.
- The protection of environmental rights.

The protection of environmental rights and interests is dictated by the nature of the rights which encompass two aspects,<sup>12</sup> namely:

- the right to a clean and healthy environment, and
- the right to conservation of natural resources in order to sustain human and other existence.

The protection of environmental rights must limit the negative impacts on these rights and promote the positive.

The main environmental concerns in South Africa can be grouped under three headings, namely:

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11 Lacey J (Editor) *Government and Environmental Politics; Essays on Historical Developments Since World War Two* The Woodrow Wilson Centre Press 1991 p 22

12 Lyster Rosemary *The Protection Of Environmental Rights* (1992) 109 SALJ p 518

- i. Pollution control in air, soil and water with waste management.
- ii. Negative impacts on living natural resources relating to fauna & flora, fisheries and water.
- iii. Negative impacts on nonliving resources relating to use of land, soil, any substance in or on land eg minerals, historical buildings, cultural or historical areas and sites, land ownership, planning or zoning of land and the urban environment.

Looking at these issues as a whole, it is clear that environmental objectives can be achieved only if the environmental norms are enforced. This is usually left to the State to address, but recent developments eg the rezoning of land for the Saldanha Steel steelworks at Saldanha, the proposed extension of Myburg Park Township at Langebaan, plans to develop Oudekraal and Sandy Bay as residential areas would all have proceeded unhindered if the public had not acted in time and objected to the original proposals. As the State is the major stakeholder in the economy of South Africa, transgressions by the State in environmental matters could easily be ignored by other State departments. Administrative actions, impacting on the environment, by the State or provincial or local authorities will require more careful and closer scrutiny, as the authorities have many other demands to cater for other than just the environment. Developments creating employment or stimulating the economy of an area could easily push environmental considerations out of reckoning.

Public action promoting environmental management and conservation by individuals or acting in unison with others or in groups, is and will become more important as the State curtails staffing levels in the civil service, resulting in fewer staff monitoring and enforcing environmental standards. This is already having an effect, for example the abalone sources at Hawston have been plundered by poachers to the extent that they will take years to recover, assuming that there is ever proper control. The public cannot assist in a situation like that, where police action has failed, but can act in many other ways as set out hereinafter. The public is best-placed to act as an environmental watchdog and awareness of its environmental rights and the ability to act in terms of these rights will result in forcing the authorities to take cognisance of the environmental issues in decision making.

When, how and where people can act to protect, conserve and manage the environment depends on how effectively the legal system can be used.

### 2.3 Human Rights approaches to the environmental problem

The environmental right is one of the human rights contained in the Bill of Rights which forms part of the new constitution.<sup>13</sup>

In the interpretation of this Bill of Rights, S39<sup>14</sup> directs that a court, tribunal or forum:

- a. *must promote the values that underlie an open and democratic society based on human dignity, equality and freedom*
- b. *must consider international law; and*
- c. *may consider foreign law*

This clause is of importance to the environmentalist in a number of ways.

Firstly, it refers to a court, which includes both the magistrates' and the High Courts. A person involved in an environmental matter before such court may accordingly refer to international law, which authority the court must consider. Foreign law will be of persuasive value only. The same applies to any matter before a tribunal. A tribunal is usually a board appointed to adjudicate on an administrative law matter, and most environmental matters fall within the field of administrative law. The forum is a new concept in South African law, and is used in the Labour Relations Act to describe a meeting place for discussion.<sup>15</sup> The Division of Sea Fisheries is conducting forums with stakeholders in the fishing industry to explain the new fishing quota system.

Wherever an environmental issue needs to be argued in South Africa and the interpretation of a clause is in dispute, international law cases and authority must be considered by the court and foreign law would have a persuasive influence.

International developments in human rights have led to the inclusion of the environmental right as a human right. An awareness of the international history of the environmental right will assist the environmentalist to give content to the right.

International law gave legal substance and impetus to human rights in December 1948 when the General Assembly of the United Nations adopted a resolution, the Universal Declaration of Human Rights (UDHR),<sup>16</sup> listing a number of rights comprising both first-generation rights (civil and political) and second-generation rights (economic, social and cultural rights). The UDHR is not a treaty but a recommendatory resolution of the General Assembly, and is not legally binding on the states.<sup>17</sup> This Declaration was the foundation upon which the

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13 Chapter II Act 108 of 1996.

14 Act 108 of 1996 s 39(a), s 39(b) and s 39(c)

15 See S 78 Act 66 of 1995, The Labour Relations Act

16 General Assembly resolution 217 (III) Article 17 dd 10 December 1948.

17 Dugard J: *International Law, a South African Perspective*, Juta & Co 1994 p 204.

international community could build a whole culture of human rights, and was the first part of an International Bill of Rights to be followed by a multilateral treaty, which became two Covenants, namely: *The International Covenant on Civil and Political Rights and the Optional Protocol (ICCPR)* and *The International Covenant on Economic, Social and Cultural Rights (ICESCR)*, both were adopted in 1966 and came into force in 1976. States that have ratified these Covenants must ensure that their legal systems give effect and protection to the rights contained in the Covenants.

First generation rights do not require any action by the State in order that a person may exercise his rights, eg the right to personal liberty: they have a negative character.<sup>18</sup> Second generation rights have a positive element, here some action is required by the State eg health care and social welfare.

The third generation of rights has a lesser international standing, and is termed people's or collective rights.<sup>19</sup> This includes the right to self-determination (not recognised by a number of States), the right to development (a right vague in content) and the right to a healthy environment (not popular in non western industrial states). These rights also require action by the State eg to regulate negative impacts on the environment such as pollution control.

Under the auspices of the United Nations a conference on the human environment was held in Stockholm in 1972, attended by 113 UN member states. This conference adopted a declaration, which became known as the *Stockholm Declaration on the Human Environment 1972*, in which 26 principles relating to the environment were listed.

Principle 1 reads as follows:

*"Man has the fundamental right to freedom, equality and adequate conditions of life, in an environment where quality permits a life of dignity and well-being."*<sup>20</sup>

and adds to this an obligation on man to care for the environment, and refers to the rights of future generations stating:

*(That) " man" (also) "bears a solemn responsibility to protect and improve the environment for future generations."*<sup>21</sup>

This Stockholm Declaration, and further the World Charter for Nature (1982) and the Rio Declaration on Environment and Development, contain recommendatory principles on the

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18 Fuggle R F & Rabie M A *Environmental Management in South Africa* Juta & Co 1994 p 142

19 Dugard J *op cit* p 216

20 United Nations, document A/Conf. 48/14/rev chapter 1, New York, 1972

21 Idem

environment, but no general obligation on all States to protect the environment as contained in Article 192 of the Convention on the Law of the Sea.<sup>22</sup>

Although most of the international human rights charters do not refer to the environment there are exceptions such as the *African Charter of Human and Peoples Rights* (the Banjul Charter) of 1981, which, in Article 24 states:

*"All peoples shall have the right to a generally satisfactory environment favourable to their development."*

In terms of some constitutions eg that of India, the State is not only obliged to protect and improve the environment, but it is also the duty of each citizen to do so.<sup>23</sup> Here the recommendation to protect the environment has now achieved legal force and become a legal obligation. More than fifty-four States had incorporated an environmental clause into their constitutions by 1995.<sup>24</sup>

The European Community amended the Treaty of Rome of 1958, which established the EEC, by the incorporation of Article 100A, which reads:

*"3. The Commission, in its proposals envisaged in paragraph 1 concerning health, safety, environmental protection and consumer protection, will take as a base a high level of protection,"*<sup>25</sup>

which amendment came into effect in 1987, to provide for environmental concerns. The EC has raised the level of environmental awareness between its member states and this in turn has resulted in a European public that has an active interest in environmental matters. Certain concepts such as environmental impact assessments and pollution control have been receiving more attention in Europe since the inception of the premise that when it comes to environmental problems, prevention is better than cure.

Today it is generally accepted amongst environmentalists and international lawyers that a fundamental human right in respect of the environment is evolving internationally.

The situation in South Africa was that prior to the 1994 constitution the environmental right did not enjoy recognition as a human right and the international covenants and most international treaties did not receive recognition or support. The international situation did have an impact on national legislation.

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22 IUCN *Draft International Covenant on the Environment and Development* 1995 p xi

23 Articles 48A and 51A as referred to in SA Law Commission working paper 13 p 556

24 Winstanley T *Entrenching Environmental Protection in the New Constitution* SAJELP 1995 (1) p 85 at p 94

25 Article 100A, as quoted in Burnett-Hall R *Environmental Law* Sweet & Maxwell 1995 p 40

Originally, the first three drafts of the Environment Conservation Bill allowed for the principle that every inhabitant of the RSA is entitled to live, work and relax in a safe, productive, healthy and aesthetically and culturally acceptable environment.

The South African Law Commission proposed a Bill of Rights in South Africa. It produced working paper 25 as project 58 in 1989. The right to a decent and healthy environment was not recognised in the Commission's draft Bill of Rights as a fundamental right.

Rabie<sup>26</sup> pleaded for the recognition of the environmental right, as a human right as the courts would then have greater power to control legislation and administrative acts which affect the environment. He submitted that South African public law did not have a tradition of environmental legislation, and that such right would not flood the court with environmental disputes, but that it would provide opportunities for the judicial control of legislation and administrative action in the environmental field. This plea was answered in the 1996 Constitution,<sup>27</sup> which expanded on the 1993 Interim Constitution.<sup>28</sup>

Finally, with reference to the rapid development in this field, it must be noted that the responsibility of the present generation to care for the environment in its own interest and that of future generations is reflected in the term "inter generational right" - with particular reference to the environment.

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26 Rabie M A *A new deal for environmental conservation: aspects of the Environmental Conservation Act 73 of 1989* THRHR vol 53 no. 1 February 1990, p 21

27 Act 108 of 1996

28 Act 200 of 1993

## 2.4 The Environmental Right in South African Constitutional Law

A right to the environment was first created in the interim constitution and was amplified and extended in the final constitution.

### 2.4.1 The Constitution of the Republic of South Africa Act 200 of 1993

This Interim Constitution (now repealed) listed various fundamental or human rights in Chapter 3, one of which is the Environmental Right which stated:

*"Every person shall have the right to an environment which is not detrimental to his health or well-being."*<sup>29</sup>

This was one of the third generation rights, and placed an obligation on the State to provide a healthy environment.

The drafting of this environmental right was criticized as being too focussed on people's health while ignoring resource utilization, conservation, pollution control, planning law and rights of future generations.<sup>30</sup>

Most important, however, was the incorporation of the environmental right into the sphere of public law and into the benefits of the fundamental rights of standing<sup>31</sup>, administrative justice<sup>32</sup>, and access to information.<sup>33</sup>

### 2.4.2 The Constitution of the Republic of South Africa Act 108 of 1996

This Constitution came into operation on 4 February 1997 in terms of Proclamation R6 1997, subject to the terms of the proclamation which excluded certain provisions of the Constitution, which will only come into operation at a later date.

The drafters of the final constitution heeded the criticism levelled at the earlier environmental clause and redrafted it to read:

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29 S 29

30 Glazewski Jan *The Environment and the Interim Constitution*, Consultus April 1994 p 22 at p 23.

31 S 7.

32 S 24.

33 S 23.

Environment<sup>34</sup>24. *Everyone has the right-*

- (a) *to an environment that is not harmful to their health or well-being; and*
- (b) *to have the environment protected, for the benefit of present and future generations, through reasonable legislative and other measures that-*
  - (i) *prevent pollution and ecological degradation;*
  - (ii) *promote conservation; and*
  - (iii) *secure ecologically sustainable development and use of natural resources while promoting justifiable economic and social development.*

This right is subject to limitation by S36 and by the declaration of a state of emergency (S37).

The content of the new environmental legal norm now encompasses the prevention of pollution, the promotion of conservation and the securing of sustainable development. The measures used are reasonable legislative and other measures. By reference all environmental legislation has been incorporated in the environmental right.

This right has two aspects. In part (a) a substantive environmental right is granted which ensures that a person will live in an environment which is not harmful to his health and well-being. This does not protect the environment, but the health of people in any environment. The State has an obligation to regulate the environment, but only to the extent that it does not affect the health of the population. No standard is set for any environment, and a healthy environment may be completely unprotected. An example would be a sea stripped of all commercial resources. This would not affect the population's health. The right would affect current or new legislation which has or may have potentially harmful environmental consequences that may impact on peoples' health. Such legislation could be repealed or amended as it conflicts with the Bill of Rights.<sup>35</sup>

No right directly related to the environment is created in the second part, only an indirect environmental right. This part directs the State to promulgate legislation to prevent pollution and ecological degradation, to promote conservation, and to secure ecologically sustainable development and use of natural resources while promoting justifiable economic and social development. It remains a problem in constitutional law as to whether a subject can force a government to adhere to these directions.

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34 Constitution of the Republic of South Africa, Act 108 of 1996.

35 White Paper on the Conservation and Sustainable Use of South Africa's Biological Diversity Government Gazette 8163 dd 28 July 1997 p 92.

Section 36<sup>36</sup> enacts that this right may only be limited in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society and subject to the other factors mentioned therein.

Other sections of the Constitution<sup>37</sup> which have a direct or indirect relevance to the environmental right, or to the environment are sections 7, 8, 25, 32, 33, 34, 36, 38, 39, 146, 184, Schedule 4, and section 23 of Schedule 6.

The impact of the application of this environmental right will be the promoting of public participation in environmental management and conservation. For the first time there is an environmental norm enacted in legislation which affords the public the right to an environment which is not harmful to one's health or well-being. The areas involved are pollution of air, soil and water plus waste management. It grants the public an enforceable right to clean air, clean water and unpolluted soil. The public can demand and force the State to take action against anyone polluting air, water or soil. The other fundamental rights mentioned in the Constitution grant extensive access to the courts for the enforcement of these rights. The law reports include cases where the public has made use of this right. In one case the Wildlife Society of Southern Africa<sup>38</sup> used the extended *locus standi* provision to compel the Minister of Environmental Affairs and Tourism to comply with its obligations in terms of Decree 9 promulgated by the former Government of Transkei. In another case neighbours of a factory causing air pollution lodged complaints and the minister of Health and Welfare<sup>39</sup> obtained an interdict to stop the pollution. In other areas people living near or even on asbestos dumps are forcing the state to take action to contain the pollution. Where mining activities polluted water in streams, farmers downstream forced the state to act.

These reported cases are but the tip of the real activity taking place. The newspapers are constantly reporting on public actions and activities relating to environmental matters.

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36 Act 108 of 1996

37 *Idem*

38 *Wildlife Society of Southern Africa and Others v Minister of Environmental Affairs and Tourism of the Republic of South Africa and Others* 1996 (3) 1095 (Tk)

39 *The Minister of Health and Welfare v Woodcarb (Pty) Ltd and Another* 1996 (3) 155  
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### III Background to environmental norms, rights, duties, relevant legislation, structures and policies.

#### 3.1 Introduction to the structure of Environmental Law in South Africa.

Environmental law norms exist in private, public and international law.

In private law environmental issues are addressed mainly by the *actio legis Aquiliae* which provides for the remedies of an interdict and damages. A number of environmental issues, for instance problems with falling leaves, smoke, view, lateral support, light, stormwater and other environmental legal issues which arise between neighbours in private law can be grouped as neighbour law. Most of these environmental issues relate to the ownership, use or occupation of fixed property and are also part of or closely linked to the law of things.

In public law the Constitution of the Republic of South Africa creates an environmental right and refers to "*reasonable legislative and other measures*"<sup>40</sup> for the implementation of the right.

Public international environmental law has developed through treaties which contain the international environmental standards.<sup>41</sup> Customary environmental international law consists in doctrines of self-defence and good neighbourliness.<sup>42</sup>

South Africa's main environmental act is the Environmental Conservation Act 73 of 1989. Also influential are various other acts, regulations, policies, municipal bylaws and provincial acts or ordinances. The enforcement of this legislation is the responsibility of the national government, provincial government or local government, respectively.

The Constitution<sup>43</sup> lists, in terms of S104, in Schedule 4 the functional areas of concurrent national and provincial legislative competence. Part A of this schedule lists the environment as one of the issues on which both the national and provincial parliaments can legislate.

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40 S 24 1996 Constitution

41 Fuggle R E & Rabie M A *Environmental Management in South Africa* Juta & Co 1994 p 158

42 Fugle & Rabie *op cit* p 160-161

43 Act 108 of 1996

## 3.2 Environmental legislation

### 3.2.1 National

There is no codification of environmental law. Up to now, environmental issues have been addressed on an *ad hoc* basis in legislation. As a result legislation which regulates the environment ranges from laws specific to the environment to those in which the environment is a peripheral matter. Annexure A is a list of the main national legislation which is applicable to environmental matters nationally. This list indicates the wide ambit of possible environmental issues.

The most important national environmental legislation is the Environmental Conservation Act<sup>44</sup>.

#### 3.2.1.1 Environmental Conservation Act 73 of 1989

This Act, and the one it has replaced,<sup>45</sup> was not a codification of the South African environmental laws, as very little common law existed. It created a new environmental approach through environmental policy and it regulates a number of issues which were not previously controlled by the State. The aim of the Act is to provide for the effective protection and controlled utilization of the environment and for matters incidental thereto.<sup>46</sup> The words "effective protection" and "controlled utilization" denote conservation.

The administration of the Act was assigned to the Provinces by Proclamation R. 43 of 1996.<sup>47</sup>

The Act<sup>48</sup> defines the environment as:

*"The aggregate of surrounding objects, conditions and influences that influence the life and habits of man or any other organism or collection of organisms."*

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44 Act 73 of 1989

45 Environment Conservation Act 100 of 1982

46 *Op cit* Heading

47 Government Gazette 5745 8 August 1996

48 Act 73 of 1989 S1

Rabie<sup>49</sup> extracts an environmental law norm from this. This norm relates to the environment and specifically to environmental conservation. The legal right to enforce this environmental norm exists mainly in legislation.

The Act further provides for the Minister to identify certain activities which will probably have a detrimental effect on the environment.<sup>50</sup> A new aspect is also the limited development areas declared in terms of the Act.<sup>51</sup>

This Act is unique in that it allows for public participation in its application in a number of ways.

### 3.2.1.2 Procedures for direct public participation in terms of the Environmental Conservation Act

### 3.2.1.3 Public participation in terms of section 2 in determination of environmental policy

A completely new direction in South African legislation is the enactment of environmental policy, according it statutory status. One of the main problems of environmental control, whether it is conservation, pollution control or planning, is that there must be some co-ordination between the relevant authorities. Co-ordination must not only take place between the various bodies concerned when considering an issue, in addition there must be a common environmental approach. This approach is regulated by environmental policy. Normally a governmental policy is set out in a white paper which does not have the force of law. Environmental policy, once proclaimed, is a fixed directive to be followed in any administrative action by each Minister, competent authority, local authority and government institution that has any power or duty in relation to the environment.

This Act stipulates how the Minister is to determine general environmental policy after consultation as set out in the Act.<sup>52</sup> Once the policy has been determined and finalised it is published in the Government Gazette whereafter it becomes part of the Act. On 21 January 1994 the General Environmental Policy was published as Notice 51 of 1994.<sup>53</sup> It determined policy relating to environmental education, land use, nature conservation, cultural heritage, the urban environment, pollution control, conservation of natural resources, economic measures, research and international co-operation. The Minister may, in determining environmental policy, determine norms and standards which will further the objectives set out

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49 Rabie M A *Environmental Conservation in The Laws of South Africa* (First Reissue) Vol 9 p 87 at p 91 par 116.

50 S21 Act 73 of 1989.

51 S 23 Act 73 of 1989

52 S2(2) Act 73 of 1989.

53 Government Gazette 15428 21 January 1994

in ss (2)(1)(a),(b),(c),(d),(e),(f) and (g) of the Act. This policy, with the norms and standards, establishes standards against which all governmental action relating to the environment can be judged.

The Act provides that the Minister and various other authorities, in terms of powers assigned to them by the Act, must exercise such powers and perform such duties in accordance with the abovementioned policy. This policy will also be binding on the State.<sup>54</sup>

In implementing the policy, two aspects must be noted. The first is the obligation on any competent authority to comply with the policy in considering any issue. Secondly the public has a standard whereby it may access the administrative actions of a competent authority in environmental matters to judge if it acted in accordance with the general environmental policy. If the competent authority fails to take the policy into consideration, it would be failing in its administrative duty to act lawfully, reasonably and procedurally fairly.

This determination of the policy is perhaps one of the weaknesses of the Act. In comparison the United States with its National Environmental Policy Act of 1970, follows the principle that the national legislature enacts policy as law. There the executive is bound by the law which includes policy. In South Africa, however, the policy must be determined by the administration in terms of the Act and this can and did take time. Furthermore, the administration and not parliament is the final determinant of the policy.

Since 1995 consultations and drafting have been taking place on a new National Environmental Policy. The *White Paper on Environmental Management Policy For South Africa*<sup>55</sup> contained the government's environmental management policy and set out how the policy was developed through a comprehensive participatory process, known as the Consultative National Environmental Policy Process (CONNEPP). CONNEPP gave everyone in South Africa an opportunity to contribute to the development of the new environmental policy.<sup>56</sup> This White Paper reads that the process involved millions of people and through the Connepp I and II Conferences, distribution of 60,000 discussion documents, the receipt of written comments and the publication of a Green Paper. At CONNEPP II, the second national conference, where the Green Paper, of which 40.000 copies were distributed, was discussed, 265 sectoral representatives met. A number of references are made therein to public participation in environmental management and it serves as a very accurate statement of the present status thereof together with a summary of how public participation will be encouraged in future by government.

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54 S3 Act 73 of 1989.

55 Notice 1096 of 1997 in Government Gazette 18164 dd 28 July 1997

56 *Op cit* p 14

One of the principles set out for environmental management is that of public participation. The White Paper states that :

“The Government must encourage the inclusion of all interested parties and affected parties in environmental governance with the aim of achieving equitable and effective participation.”<sup>57</sup>

In addition in Chapter 5 on Governance the White Paper states:

“Accountability and participation

Section 195 (1) (e-g) [of the Constitution] states that the public administration must be accountable, transparent through the provision of timely, accessible and accurate information, must respond to people’s needs and must encourage public participation in environmental governance.”<sup>58</sup>

The present status of environmental management is described in the White Paper as:

“Participation

In the past many interested and affected parties have been excluded from decision making and information processes relevant to the environment and there has been little if any public participation in environmental governance.”<sup>59</sup>

The White Paper regards the influence of the democratic process and the growing public awareness of environmental issues as important reasons to give higher priority to environmental concerns at all levels of decision making and states that:

“Government must become more transparent and provide adequate opportunity for participation in environmental governance. Promoting environmental understanding will increase the capacity of people to participate effectively in environmental decision-making.”<sup>60</sup>

There is a bright future for public participation in environmental management and conservation if all of these proposals regarding public participation in environmental management as contained in the White Paper, are implemented.

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57 *Op cit* p 23

58 *Op cit* p 40

59 *Op cit* p 71

60 *Op cit* p 78

Other policies are in the process of formulation. A White Paper was published for comment by the public on the *Conservation and Sustainable Use of South Africa's Biological Diversity*.<sup>61</sup> These are all opportunities for public interest participation. Other policies declared were a policy on the control of vehicles in the coastal zone<sup>62</sup> and a policy on the classification of terrestrial and marine protected areas.<sup>63</sup>

#### 3.2.1.4 Public participation in terms of section 32 relating to notices

As the environment and all matters pertaining to the environment concerns the public at large, this Act provides for the Minister of Environmental Affairs, the Minister of Water Affairs, an Administrator (now the Provincial Premier) or any local authority intending to issue a notice in terms of this Act by publishing a draft notice in the Government Gazette or the Provincial Gazette.<sup>64</sup> This is to give notice to the public that certain actions in terms of the Act are envisaged and public comment is invited. The relevant actions or matters are listed as:

- i *the issuing of a regulation or a direction in terms of the Act;*
- ii *before making a declaration declaring an area to be a protected natural environment or a special nature reserve;*
- iii *or before identifying activities which will probably have a detrimental effect on the environment;*
- iv *or before declaring an area a limited development area;*

which draft notices in the *Government or Official Gazette* must include:

- i *The text of the proposed regulation, direction, declaration, identification or determination of policy;*
- ii *A request that interested parties submit comments within a certain period;*
- iii *the address to which such comments must be submitted.*<sup>65</sup>

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61 Notice 1095 of 1997, in Government Gazette 18163 dd 28 July 1997

62 GN 858 dd 29 April 1994 Government Gazette 15655

63 GN 449 9 May 1994 Government Gazette 15726

64 Section 32(1)(a)+(b)+(c)

65 S32(2)(a)+(b)+(c) Act 73 of 1989

Thereafter the relevant authority must take these representations from the public into consideration when coming to a decision. The Act does not require this explicitly, but in terms of the administrative justice clause in the Constitution,<sup>66</sup> if consideration has not been given, then it can be argued that the Act was not adhered to as the process in reaching the decision was not correct. This is an important aspect of the Act in that it brings public participation into environmental management and conservation in terms of legislation.

### 3.2.1.5 Public participation in environmental impact assessments and reports

Public participation must be called for by anyone carrying out an environmental impact assessment (EIA) before an environmental impact report (EIR) can be drawn up in terms of the Act.

S26<sup>67</sup> authorises the minister to make regulations with regard to any activity identified in terms of S21(1) relating to the content of environmental impact reports. In proclamation 1752<sup>68</sup> the Minister of Environmental Affairs and Tourism published proposed regulations for public comment. Thereafter notice R1182<sup>69</sup> was published identifying the activities that may have a detrimental effect on the environment, which activities in terms of s21(1) of the Environmental Conservation Act,<sup>70</sup> now require an environmental impact report. These include construction of electricity generation and supply facilities, nuclear reactors, roads, railways dams, sewage plants and other construction works. In addition, any changes of land use must also be covered by an EIA in terms of s21, for example a change of land use from residential to industrial or commercial use, from agricultural to any other land use are all such activities. Notice R1183<sup>71</sup> proclaims regulations which stipulate the procedure and contents of an environmental impact assessment and an environmental impact report. Where an environmental impact assessment (EIA) has been done, whether as a legal requirement or voluntarily, the process culminates in an environmental impact report which provides documentation on the project containing information and estimates of impacts. The content of the report may differ from one investigation to another, but should contain the information as discussed below in Chapter VI paragraph 6. Public participation in this process is addressed directly in the Notice 1183 as follows:

Public participation is a responsibility of the applicant as section 3(1)(f) stipulates:

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66 S33 Act 108 of 1996

67 Environmental Conservation Act 73 of 1989

68 Government Gazette 17517 dd 1 November 1996

69 Government Gazette 18261 dd 5 September 1997

70 Act 73 of 1989

71 Government Gazette 18261 dd 5 September 1997

“An applicant is responsible for the public participation process to ensure that all interested parties, including government departments that may have jurisdiction over any aspect of the activity, are given the opportunity to participate in all the relevant procedures contemplated in these regulations”

An **interested party** is defined as:

“any person or group of persons concerned with or affected by an activity”

As an appendix to the EIR there must be a description of the public participation process followed, including a list of interested parties and their comments.<sup>72</sup>

Section 3(2) stipulates that if any provision of subsection (1), which includes public participation, is not complied with by the applicant, and not immediately attended to, after having been made aware of it by the relevant authority, the application is regarded as having been withdrawn.

Clearly public participation is an important part of the EIA process.

#### 3.2.1.6 Public participation in Board of Investigation

In terms of s15(1) of the Environmental Conservation Act 73 of 1989 the minister may appoint a board of investigation to assist him in the evaluation of any matter or any appeal in terms of the provisions of the act. Public participation is not directly provided for but as a board is appointed on a *ad hoc* basis, each board can regulate its own procedure. Often public participation in the session of the board is requested and encouraged as in the instance of the Steyn Commission.

#### 3.2.1.8 The Steyn Commission

The proposed steel plant at Saldanha resulted in an application to court<sup>73</sup> for an order requiring the Minister of Environmental Affairs and Tourism to appoint a board of enquiry in terms of section 15(1) of the Act. Before the matter was heard the Minister of Environmental Affairs appointed a Board of Investigation in Government Gazette No. 16519 of 1995 in terms of the provisions of Section 15 of the Environmental Conservation Act 73 of 1989.

The question to be investigated was the proposed steel plant planned by Iscor between Langebaan and Vredenburg on the shores of Saldanha Bay, which may have possible negative influences on the environment on account of the proximity of the Langebaan lagoon. This

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72 Section 8(c)(iii) of Notice 1183

73 *Van Huysteen NO and Others v Minister of Environmental Affairs and Tourism And Others* 1995 (9) BCLR 1191

lagoon is part of the West Coast National Park and is registered as a wetland of international importance in accordance with the Ramsar<sup>74</sup> convention. Some of the issues on which the board had to advise the Minister concerned the placement of the site, the objections raised against the proposed industrial development and which powers the respective authorities have in terms of Section 31(a) of the Environmental Conservation Act.

Various hearings were held where the public was invited to and did participate, made submissions and filed documents. In Chapter VIII in the Summary and Conclusions the report refers<sup>75</sup> to public participation:

“The proceedings were conducted with considerable opportunity for participation by interested and affected parties and by the general public.”

Full opportunity was given for public participation and this will stand as a precedent of how these investigations should be conducted.

At the end of the day, the board recommended that the location of the proposed steel mill on the Yzervarkensrug site is not desirable and should be moved further inland. This would have reduced the risk to the environmentally sensitive areas in the area of the development. Iscor then decided to withdraw from the site and the board filed an addendum. One of the issues discussed, was the issue of litigation and control and certain recommendations were made. One of the main recommendations<sup>76</sup> was that the Minister should identify such activities which will in his view have a substantial detrimental effect on the environment and gave notice of those activities in the Gazette in accordance with provisions of Section 21.1 and 22.2 of the Act. This has now been done as set out above. Any similar application shall in future be dealt with in terms of the EIR procedure promulgated.

The value of this investigation was that it gave considerable opportunity for participation by the public by means of written evidence received and by personal appearances. The public had the opportunity to state their concerns, have them investigated and answered by ISCOR. This led to an open debate and many issues which would otherwise have been ignored, were raised and discussed.

In the end the recommendations of the Steyn Commission as to the siting of the Steel plant were not followed by the minister, and the plant was constructed closer than recommended to the shore of the lagoon.

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74 The Convention on Wetlands of International Importance Especially as Wildfowl Habitat was adopted in 1971 at Ramsar. South Africa is a party thereto.

75 Report of the Board of Investigation into the Saldanha Steel Project under Justice J H Steyn, 4 October 1995 p 191

76 Report of the Board of Investigation into the Saldanha Steel Project under Justice J H Steyn, 4 October 1995

### 3.2.1.8 Remedies in terms of the Environmental Conservation Act

#### 3.2.1.8.1 Appeals

The Act provides for appeals to the Minister of Environmental Affairs, the Minister of Water Affairs and various provincial Premiers. These appeals form part of the internal control and only have limited use for public participation.

#### 3.2.1.8.2 Criminal Penalties

The Act provides for criminal sanctions to ensure compliance and the maximum penalty is a fine of R100 000, 00 or ten years imprisonment or in certain cases a maximum fine of three times the commercial value of anything in respect of which the offence was committed.<sup>77</sup> In addition there is a provision for forfeiture of the means used to commit the offence.<sup>78</sup> Where a person is convicted of an offence in terms of the Act, of any act which caused damage to the environment, the court may order that the offender repair such damage.<sup>79</sup>

#### 3.2.1.8.3. Interdict

In some cases an interdict can be applied for by the administration or the person concerned.

### 3.2.1.9 Regulations for coastal zone management, noise control, waste control, etc

One of the features of the Act is to regulate the treatment of certain areas of environmental control by the issue of ministerial regulations. Effectively this means administrative legislation and although this provides flexibility, it does not have the sanction of parliament. A number of regulations have been promulgated relating to coastal zone management, noise control, waste control and other matters.

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77 Section 29 Act 73 of 1989

78 Section 30 Act 73 of 1989

79 Section 29(7) Act 73 of 1989

### 3.2.2 Provincial Legislation

The President may assign, in terms of section 235(8) of the 1993 Constitution, to the provinces the administration of Acts. He assigned the Environmental Conservation Act 73 of 1989 to the provinces by proclamations R 29<sup>80</sup> of 1995 and R 43<sup>81</sup> of 1996 excluding those provisions (if any) which fall outside the functional areas specified in Schedule 6 to the Constitution or which relate to paragraph (a) to (e) of section 126(3) of the Constitution.

Each of the provinces retained the various provincial ordinances in existence prior to the 1993 Constitution. These can now be amended or repealed by the Provincial legislature.

In the Province Western Cape, Ordinance 19 of 1974, the Nature and Environmental Conservation Ordinance, regulates nature reserves, protection of Wild animals, flora, certain endangered plants and animals and fish in inland waters.

The public can assist nature conservation officers by informing them of any infringement of the ordinance.

The proposed Western Cape Planning and Development Bill, 1997<sup>82</sup> lists, in the title, one of its aims as:

*"to provide for principles and lay down guidelines and parameters for planning and development where provincial regional interests require, including environmental protection"*

When this bill becomes law, it will bind the State and a municipality. S 53 refers to general planning and development principles which are enumerated in Schedule IV. Principle 7 thereof set out environmental guidelines to development. The Bill allows for public comment, objections and participation at most relevant stages of any application, rezoning, subdivision etc.

### 3.2.3 Municipal

Certain specific environmental problems are addressed at municipal level eg noise control. Most municipalities have used the powers granted in Provincial Ordinances to provide for by-laws regulating noise within a municipality.

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80 Government Gazette 16346 7 April 1995.

81 Government Gazette 17354 8 August 1996.

82 Provincial Gazette Extraordinary 5183 3 October 1997

### 3.3 Private Law

The common law of South Africa does not have specific environmental norms. The law of delict provides a basis for action where a negligent environmental occurrence causes damage eg a veld fire or diverted stormwater.

### 3.4 Criminal Law

Most acts containing environmental norms include a criminal sanction eg no mining without a permit.

### 3.5 International law and treaties

Certain environmental norms exist in international law which is binding on South Africa.<sup>83</sup> As international law governs relationships between states, only the State can act in trans-boundary environmental matters. Individuals can do little more than publicise any breach of international environmental law by a State other than its own. Where the international environmental obligation has become part of municipal law by treaty or convention, action can be taken in public law to enforce the relevant environmental norm. South Africa is a party to a number of international environmental conventions<sup>84</sup>, and is becoming a party to many other conventions.<sup>85</sup>

International Customary Law recognises the principles of self-defence and that of good neighbourliness and these are applied in environmental matters.

International Customary Law principles in the environmental field originated in the Trail Smelter Arbitration case (US v Canada 1938 and 1941)<sup>86</sup>, which dealt with offensive fumes emanating from lead and zinc smelting in Canada, causing pollution damage to crops, trees and livestock in the United States of America. The dispute went to arbitration where it was

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83 Devine J & Erasmus M G *International Environmental Law in Fuggle R F & Rabie M A Environmental Management in South Africa* Juta & Co 1994 p 155 at p 158.

84 *Op cit* p 180 list some of these conventions.

85 See the Antarctic Treaties Act No 60 of 1996 and regulations R 980 in Government Gazette 18150 dd 18 July 1997 prohibiting catching of Antarctic marine living resources without a permit.

86 Discussed in Fuggle R F & Rabie M A *Environmental Management in South Africa* Juta & Co 1994 p 161

ruled that Canada was liable for past losses and had to abate future losses. A monetary award was made against Canada on the international law principle that a State may not allow its territory to be used in such a manner that it may cause injury in another State.

International principles of self-defence to protect the environment were used by the United Kingdom government in 1967 when it bombed the Liberian oil tanker *Torry Canyon* which had run aground on a reef in their waters, to stop oil pollution.

The public at large cannot act directly in these matters, but can do so indirectly by demanding prompt and proper action from their government, and by publicising the possibility of environmental damage or prospective damage. Furthermore, it can insist on proper compliance by the relevant State department with any legislation eg by preventing the British ship *Pacific Teal* carrying plutonium waste from France to Japan from entering South African waters without the proper authorization, and by ensuring by public demand and publicity, even administrative action where applicable, that permits are not issued. In this particular matter public pressure resulted in the SA government's taking a stand opposing the shipment of any nuclear waste.<sup>87</sup>

### 3.6 Environmental Bodies

#### 3.6.1 The Council for the Environment

The Council for the Environment is a statutory body established in terms of s 4 of the Environmental Conservation Act.<sup>88</sup> This council consists of not more than 22 members, appointed by the Minister and nominated by provinces.<sup>89</sup> This body advises the Minister on matters of policy and any matter which the Minister refers to the council.<sup>90</sup> In addition, the council may hear representations by any person relating to such matters affecting the environment after the submission of a memorandum, and if the council is of opinion that such representation will be in the interest of the conservation of the environment.<sup>91</sup> Public interest groups can use this right to submit memorandums, and if not invited to make representations, may use administrative law procedures to press for representation.

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87 Sunday Times Metro 2 February 1997 p 1

88 Act 73 of 1989

89 *Op cit* s 6

90 *Op cit*, s 5(1)(a) and (b)

91 *Op cit* s 5(2)

### 3.6.2 Committee for Environmental Co-ordination

The Committee for Environmental Co-ordination was established in terms of s 12.<sup>92</sup> This committee has the function of co-ordinating departmental actions which may impact on the environment. No provision was made for any public participation in the workings of this committee. In practice, the activities of each department must be monitored to ascertain if that department is acting within the scope of its powers, or fulfilling its obligations as provided for in legislation.

### 3.6.3 Human Rights Commission

The Human Rights Commission was established in terms of s 184 of the Constitution.<sup>93</sup> Its functions are *inter alia* to promote the protection, development and attainment of human rights, to monitor and assess the observance of human rights and to carry out investigations in this regard.<sup>94</sup> Public interest groups have access to this Commission to address environmental rights. P Glavovic<sup>95</sup> suggested an environmental policy for this Commission, and if this policy, or a similar one is adopted, a wide range of environmental matters will be addressed by the Commission. This Commission, to be consistent with the constitutional provisions of standing and administrative justice, would allow public interest group participation in its work.

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92 Act 73 of 1989

93 Act 108 of 1996

94 *Op cit* ss 1 and 2

95 Glavovic P a Suggested Environmental Policy For The Human Rights Commission in *The Human Rights Constitutional Law Journal Of Southern Africa* Vol 1 no 3 p 32-34

## IV Administrative law in environmental conservation and management

### 4.1 Relevance of administrative law for public interest groups

Administrative law is the area of law which governs the legal relations between two public bodies or between a public body and an individual. Most environmental matters fall under administrative law, as environment related laws prescribe either environmental obligations or prohibitions. The application of these laws falls under the jurisdiction of some State, provincial or local government department and certain statutory bodies. The exercise and utilization of legal powers granted to these bodies are regulated by administrative law norms. The powers conferred cannot be exceeded or ignored. Effective environmental administration relies on having the correct environmental norms in place, and the proper application of these norms. Accordingly, the success of environmental management and conservation relies almost entirely upon the effective and satisfactory enforcement of legislation *et cetera* by these government departments and administrative bodies. The public can play a major and decisive role in ensuring that these bodies do what is required by various legislative enactments and regulations. Until the implementation of the Constitution, the public lacked effective administrative law means and remedies to ensure that decisions taken by these bodies and the exercise of their administrative discretion uphold and further environmental conservation and management. The constitutional entrenchment of administrative law provides that environmental controls can be developed and expanded by the inputs of the public. These inputs can ensure the effective application of environmental norms in environmental management and conservation.

Prior to the interim Constitution, few statutory rights to administrative justice existed, but certain common law provisions were in place. This was an unsatisfactory state of affairs as the common law requirements and procedures resulted in restricting the use of administrative action to promote or protect environmental norms.

The important aspects of administrative law are the administrative procedures and remedies both in common and in statutory law. While private law remedies are well developed in South African law to grant relief, public law remedies are not as well developed or used. The reason is that South Africa did not have a culture of utilizing public law processes. This situation should change rapidly under the influence of the Constitution, and the law reports are starting to reflect this change. These old and new administrative law remedies and processes are discussed in Chapter VI below.

### 4.2 Constitutional Right to just administrative action

The Constitution entrenched the right to just administrative action. For the first time in South African legal development, the public acquired a statutory right to ensure that any administrative action which is applicable to them may be legally questioned. Other rights in the Constitution extend the right of the public to just administrative action even to matters where they act for another person or for the public at large. This development will have a

major impact on the role that the public can play in ensuring the proper application of environmental norms at any level of government or to statutory bodies.

This right to just administrative action was first enacted in the Interim Constitution.<sup>96</sup> The Constitution rewrote the administrative justice clause and S33 of the Constitution<sup>97</sup> now provides for just administrative action. S33 reads:

- (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."*
- (3) *National legislation must be enacted to give effect to these rights, and must-*
  - (a) *provide for the review of administrative action by a court or, where appropriate, an independent and impartial tribunal;*
  - (b) *impose a duty on the state to give effect to the rights in subsection (1) and (2); and*
  - (c) *promote an efficient administration.*

This right will have a major impact on environmental actions by the authorities as it adds substantially to the common law as will be set out herein.

This right is, however, subject to the provisions of s 23 of Schedule 6 of Act 108 of 1996 which suspend s 33(1) and 33(2) until national legislation is enacted as provided for in s 23 (1). Until then s 33 (1) and (2) must be regarded to read as follows:

*"Every person shall have the right to-*

- (a) *lawful administrative action where any of his or her rights or interests is affected or threatened.*
- (b) *procedurally fair administrative action where any of his rights or legitimate expectations is threatened or affected.*
- (c) *be furnished with reasons in writing for administrative action which affects any of his or her rights or interests unless the reasons for that action have been made public*
- (d) *administrative action which is justifiable in relation to the reasons given for it where any of their rights is affected or threatened."*

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96 S 24 of Act 200 of 1993

97 Act 108 of 1996

This provision will lapse after three years if the envisaged legislation is not enacted within the specified three years or if the Constitution is not amended to make another provision.

This section is almost exactly the same as s 24 of the interim Constitution.

#### 4.3 Impact of administrative justice clause on public interest participation in environmental law.

The first impression in reading section 23 of Schedule 6 is of the underlying concept of procedural fairness and the obligation to furnish and justify reasons for taking administrative actions. This lack of procedural fairness and failure to furnish reasons for a decision was seen by Baxter L as one of the main failings of the South African administrative law which did not

*"expand and develop the common law principles of procedural fairness in accordance with the demands of modern society"*<sup>98</sup>

One of the demands of modern society is for the public to have a say as to the type of environment in which it wants to live, and the environmental right gave legal substance to this demand.

How does this new right to just administrative action affect the public in its effort to care for the environment? The four subsections of s23 of Schedule 6 each provide for a different administrative law right and in consequence change the common law which up to now was the only basis for general administrative law rights.

3.1 S23(2) reads:

"Every person has the right to-

- (a) *lawful administrative action where any of their rights or interests is affected or threatened.*"

This provides for the right to lawful administrative action if a person's;

- i right is affected; or
- ii interest is affected; or
- iii right is threatened; or
- iv interests are threatened.

It is submitted that "rights" means an existing legal right, determined in terms of the common law or statute, where applicable.

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98 Baxter L *Fairness and Natural Justice in English and South African Law* 1979 SALJ p 608.

Here the application of the common law principles of natural justice is extended from the statement in Traub's<sup>99</sup> case when Corbett C J held:

*"the classic formulation of the (audi) principle refers to decisions prejudicial affecting an individual in his liberty, property or existing rights,"*

which covers affected rights (i above) and s23(a) extends natural justice to ii, iii and iv above. The word "interest" connotes some concern in legal terms which is less substantial than a right, but more inclusive. Some balanced interpretation needs to be placed on "interest," in the environmental sense, if too wide it will hamper good administration, if too narrow, "right" alone could have sufficed. Administrative action which affects environmental rights or interests could be positive or negative of a rezoning from single residential use to commercial use of a property against the interest of the community against the lack of action when allowing environmental pollution of river water from industrial sources. This is where the "lawful" aspect is important. Regardless of whether the decision is positive or negative to a person's rights or interests, the decision must be one which advances good (lawful) administration.

A decision which threatens a right or interest can only be detrimental to the person concerned. This type of action would normally be an advance notice of a next step, which would be an action negatively affecting a right or interest. It gives the advance notice required in the rule of natural justice as held in *South African Roads Board case*<sup>100</sup> by Milne JA

*"For the audi principle applies where the authority exercising the power is obliged to consider the particular circumstance of the individual affected. It satisfies the individual's desire to be heard before he is adversely affected: and it provides an opportunity for the repository of the power to acquire information which may be pertinent to the just and proper exercise of the power."*

Here s23 codifies the common law.

"Lawful" has further implications. Mureinik<sup>101</sup> states that the purpose of s23(a)[old s24(a)] is to annul ouster clauses. These ouster clauses were provisions in legislation which ousted the review jurisdiction of a court to review an administrative decision on grounds which it would have had, were it not for such bar. This means that environmental administrative actions cannot be excluded from the scrutiny of the courts. This in effect forces any administration to act environmentally as if a judge is continuously peering over its shoulder, as any action can be taken on review by the public.

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99 *Administrator, Transvaal, & others v Traub & others* 1989(4) SA 731 (A) at p 753  
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100 *South African Roads Board v Johannesburg City Council* 1991 (4) SA 1(A) at 12 F-G

101 Mureinik E A *Bridge to where?: Introducing the New Constitution* 1994 SALJ p 38

3.2 Section 23(b) guarantees the right to procedurally fair administrative action and reads:

"23. Every person has the right to-

(b) *procedurally fair administrative action where any of their rights or legitimate expectations is affected or threatened"*

The first aspect to note is that it limits this right to that group of persons whose rights or legitimate expectations are threatened or affected and so identifies the ones to whom the right must be afforded.

The common law in *Traub's*<sup>102</sup> case did away with the rigid classification process to determine the instances where the twin principles of natural justice apply and extended the extent of the *audi alteram partem* rule with qualifications. S23(b) takes the concept even further in that it also applies to the administrative actions which threaten a person's environmental rights or legitimate expectations. To threaten is a negative action prior to an action which affects. Here again a right to an early warning is not afforded by the common law but is now constitutionally enacted.

What is meant by "legitimate expectations" is not stated in the definitions to the Constitution. Du Plessis & Corder<sup>103</sup> view legitimate expectations as

*"falling between a 'right' and an 'interest' as a legal concept."*

My view is that weight must be given to both "legitimate" and to "expectations". Certain expectations are not legitimate in the sense they are not based in law while legitimate expectations are not a legal right, but are a concept based on a legal extension of the *audi alteram partem* rule to provide a person a say in a matter where the law does not provide for such right, but the concept of natural justice does. The legal development of this concept, coupled to fair procedures, could become very useful to environmentalists, who can now demand that an open and accountable government has a legal duty and obligation to consult widely on all environmental matters prior to taking action or decisions.

Mureinik<sup>104</sup> states that this section protects a person who in common law was not afforded the right to be heard prior to any administrative decision being taken. This affects or threatens a person's environmental rights or legitimate expectations where fair procedure, in addition to the right to be heard, requires that the matter be properly disclosed in advance and an opportunity given for reply when the matter is debated.

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102 *Administrator, Transvaal, & others v Traub & others* 1989(4) SA 731 (A)

103 Du Plessis L & Corder H *Understanding South Africa's Transitional Bill of Rights* Juta & Co 1994 p 167

104 Mureinik E A *Bridge to where?: Introducing the New Constitution* 1994 SALJ 38 at p 39

### 3.3 Section 23(c) reads:

*"Every person has the right to-*

- (c) *be furnished with reasons in writing for administrative action which affects any of their rights or interests unless the reasons for that action have been made public"*

Here the division between the common law review on procedure and appeal on facts starts to overlap.

This right of furnishing reasons in writing for administrative action is a new one, as there was no such right prior to the Interim Constitution, unless an act specifically required that such reasons must be given. Here, as in the other ss of s 23, a right is guaranteed, which is the strongest possible benefit that can be granted in law. Certain acts and regulations made in terms of certain acts did specify, in some cases, that reasons must be given by the decision making authority if the decision was taken on appeal. See for instance s 36(1) of the Environmental Conservation Act 73 of 1989 which gives a person whose interests are affected by a decision the right to request the decision-making body to furnish reasons for the decision within 30 days. This, however was the exception rather than the rule.

This right comes into operation when administrative action affects the environmental rights or interest of a person. Again the words "rights" and "interest" are used and the test here would be a valid recognisable legal right or legal interest which is determined by fact. The Courts will have a basis for the interpretation of the word "right" as a "right" is also considered in the granting of an interdict. That aspect of the law is well stated. Complications can arise in the application of the qualifier in that if reasons for such environmental action were made public, the right to request reasons falls away. If so, it will be a factual matter what "public" requires. Whether reasons must be made public in a general way or in a specific way will be for the courts to decide, as certain environmental administrative actions affect the rights of certain people only and different guidelines may be set for valid application for those administrative actions, in contrast to publication for administrative action which affects the right of every person in the country. Publication in the local newspaper or even by letters directed to specific persons might be sufficient in the first case, whilst in the latter case publication in the Government Gazette may be required.

An aspect which will receive careful consideration in court, is what the nature of 'reasons' would be. Reasons should firstly refer to the environmental administrative action itself, should substantiate the action and should cover relevant facts on which the reasons are based. Reasons should enable a person whose environmental rights or interest has been affected, to reach an informed decision as to whether he or she wishes to proceed with this matter. This section does not set out who should give the reasons but it is logical that the reasons should be given by the person who brought about the administrative action, or somebody involved in such action, so that he is aware of the facts and circumstances and reasoning that led to the administrative action. It may be that s 23(c) alone will not be adequate as reasons supplied can only be judged in relation to the facts of the matter. In this regard the access to information clause is important as discussed in VI below.

### 3.4 Section 23(d):

"Every person has the right to-

- (d) *administrative action which is justifiable in relation to the reasons given for it where any of their rights is affected or threatened.*"

The meaning of the word "justifiable" as used here is open to debate. Mureinik<sup>105</sup> states that it

*"empowers the court to inquire into the justification of administrative action."*

He equates "justifiable" with "reasonable"<sup>106</sup> and says in the note that the latter was used to allay the fears of the executive that the courts might usurp their policy-making prerogatives if reviewing powers are granted on grounds of unreasonableness. This impact on the common law as unreasonableness in itself was never a reviewable defect, but inferred the existence of some other defect, and even so the unreasonableness must be of a serious nature ie "gross"<sup>107</sup>.

Breitenbach<sup>108</sup> holds the view that

*"it is impossible to identify a neutral principle or standard of which the reasonableness or unreasonableness of a decision can be evaluated," op cit p 11.*

In my view "justifiable" as used in s 23(d) is used in a narrower sense than "reasonable" as it refers to the reasons given for the administrative decision, which reasons, it is submitted, are different from those in s 23(c) as it refers there to a different right. The environmental administrative action may be justifiable in that it can be justified or defended in relation to the reasons given. Reasonable administrative action in relation to reasons given would be action within reason, not greatly less or more that might be expected but it may not be justified by the given reasons. Reasonable and justifiable are also used in s36(1) in Chapter 2 as separate standards and both words being used, indicate that they are not synonyms. Justifiable has a legal base ie *iustum* =just, equitable or that which is right, whilst reasonable

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105 *Op cit* p 39

106 *Op cit* p 40 n 34

107 *Op cit* p 39-40

108 Breitenbach A Jurisdiction: *Mistakes of Law, Review for Unreasonableness (unpublished class notes July 1994)* p 11

"The actual assessment of the (un)reasonableness of the impugned decision, it is suggested, comprises,.....,an appraisal of the logical soundness (the "rationality" or, perhaps, "justifiability") of the repositry's process of reasoning (where reasons for the decision have been given) and an evaluation of the congruence of the decision arrived at with (usually inarticulate) considerations of constitutional propriety and political morality."

has a logical base ie *ratio* = the reasoning faculty.

Mureinik<sup>109</sup> equates justifiability with proportionality and differentiates it from unreasonableness, which supports the idea that those words must not be read as meaning the same.

In conclusion, when the courts interpret s 23 as promoting values which underlie an open and democratic society, a new jurisprudence will develop to evolve new standards for environmental administrative justice and this in turn will impact on the common law as provided in s 39 of Chapter 2. For example, the division between review and appeal or merit and procedure, will narrow as the court will examine the factual basis of reasons in s 23 and in doing so, move away from procedural fairness (*Traub's case*) to substantial environmental protection. The Constitutional Court in terms of s167(7) could further grant substantial relief for unconstitutional administrative acts or conduct which impacts on the environment.

The public use of administrative law to promote environmental management and conservation depends mainly on the requirement of standing which is discussed below. If standing is not an issue, the provisions of administrative law will have a major impact on the ability of the public to hold the State accountable in environmental matters and will force the State to take decisions affecting the environment only after due deliberation and under the scrutiny of the public.

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109 Mureinik *op cit* p 41 n 36 recognise this problem when he states that

" the idea of justifiability (does not) entitle a court to strike down a decision merely on the grounds of its 'unwisdom' because, I submit, it is not unjust or out of proportion to the reasons given. However it could still be unreasonable as the reasons in itself may be for an improper purpose and this gives scope to the common law grounds of review to be applied if not included in 'lawful' above."

## V Standing or Locus Standi in Environmental law

### 5.1 Introduction

When the man in the street decides to enforce environmental law in the public interest, one of the main procedural problems he faces is that of the procedural requirement of standing. This requirement hampers a person or any public interest group from acting in environmental matters unless he or the group has a direct interest at stake.

*Locus standi* has both a primary and a secondary meaning. The primary meaning refers to the legal capacity of a person to litigate: a minor for example lacks the capacity to institute legal action without assistance. The secondary meaning refers to the capacity of a legal *persona* to sue in a specific matter. Normally the requirement is that a party to any action or application must have a direct and substantial interest in the matter.<sup>110</sup> In addition, the onus is on the party who claims to have *locus standi* in a matter to prove his standing.

At present the requirements for *locus standi* of public interest groups in environmental matters differ according to whether the other party is the State or a private *persona*.

### 5.2 Locus standi in common law.

In South African law there is no *actio popularis* in terms of which an individual who suffers no personal injury or has no direct interest in a matter, can institute an action on behalf of the public at large.<sup>111</sup> In Bamford's case<sup>112</sup> the court held but did not make a finding whether Bamford as member of Parliament had *locus standi* to represent his constituency, but found that the members of the public had the right of access to the Groote Schuur Estate and lawful interference with that right can be acted upon by any member of the public without proof of special damage.<sup>113</sup>

Baxter<sup>114</sup> states that standing can be established by the claim of a person that some legal right or recognised interest of his is at stake, in which he has a personal direct right or

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110 *The Law of South Africa*, First Reissue 3 Part 1 Civil Procedure Butterworth Publishers 1997 par 40 p 28

111 Baxter *op cit* p 651, Fuggle & Rabie *op cit* p 133

112 *Bamford v Minister of Economic Development and State Auxiliary Services* 1981 (3) SA 1054 (CPD) at p 1059

113 *Op cit* p 1060A

114 *Op cit* p 652

interest. In the case of Roberts,<sup>115</sup> who objected against a bus fare increase at the Local Road Transportation Board, Roberts was held to have *locus standi* although he was found to have been only one of the hundred million passengers carried by the bus company each year. He had, however, a direct personal interest.

In environmental law the state of the environment is a concern of all mankind. Yet in actions between private individuals the law still requires a person to show some personal interest. Rabie<sup>116</sup> submits that a person should have *locus standi* if he can establish interference with a right which he enjoys, even though other members of the public may be in the same position as he. This relates to a situation where air pollution or smoke from a factory affects all the residents in a nearby residential area and action is required against the owner. More difficult is the situation with a tanker leaking oil in False Bay, that causes sea pollution but does not interfere with the use and enjoyment of the public of the nearby beaches. Would the rights, if any, of a False Bay resident differ from the rights of a resident in another province as to the *locus standi* which they may have against the ship owner?

As the law stands at present, a person must show a personal interest in the environmental matter before he will be able to institute a private law action against another individual. This requirement effectively precludes public interest action in environmental matters against private individuals in terms of the common law.

In developing the common law, as mandated in S 39(2) of the Constitution and in applying Sections 8(3)(a) and (b) of the Constitution<sup>117</sup>, which encourage the court to develop the common law to the extent that legislation does not give effect to that right, the extension of the *locus standi* of public interest groups in environmental matters could be developed. To resuscitate the old *actio popularis* and develop an environmental common law public action is one option. It could become the basis of all common law public interest environmental actions to conserve and manage the environment.

### 5.3 Locus standi of public interest groups in environmental matters against the State.

Prior to enactment of the Constitution an environmental group or an individual was unable to take legal steps against the government to prevent environmental degradation, unless it could prove that it had a direct interest in the matter.

The *locus standi* of the public in environmental matters is now regulated by the Constitution in the Bill of Rights. Section 38 of the Constitution creates an *actio popularis* which grants public interest groups wide standing to institute legal proceedings in the public interest. This right comes into existence when a person's environmental right has been infringed or is threatened. The question is if this relaxation of the *locus standi* requirement is only applicable

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115 *Roberts v Chairman of the Local Road Transportation Board* 1980 (2) SA 472,

116 Fuggle & Rabie *op cit* p 133 par. 8.4.1.2

117 Act 108 of 1996

to rights in Chapter II of the Constitution, of which the environmental right is one, or if it extends to rights granted or acquired in terms of other legislation.

Section 38 of the Constitution extends the *locus standi* of the public to all Chapter II rights and binds the legislature, the executive, the judiciary and all organs of state.<sup>118</sup>

This section reads:

*Enforcement of rights*

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

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

Juristic persons are entitled to the rights in the Bill of Rights to the extent required by the nature of the rights and of the juristic persons.<sup>119</sup>

Section 38 effectively extends *locus standi* to anyone acting in the public interest to approach a competent court, where a right in the Bill of Rights has been infringed, eg the environmental right.

The subsequent question is: “ would public interest groups have *locus standi* where the right infringed is not a Chapter 2 right?” Most environmental protection is contained in other legislation and s 38 does not refer to infringements of such legislation.

In the Wildlife case<sup>120</sup> Pickering J held, after it was so conceded by the respondent, that the Wildlife Society of Southern Africa had *locus standi* to apply for an order compelling the Minister and other respondents to enforce the provision of degree 9 (Environmental Conservation) promulgated by the former government of Transkei and places this action within the provisions of s 7(4)(b) read with s 29 of the (Interim) Constitution of the Republic of South Africa.<sup>121</sup> He further expresses the opinion that there was much to be said for the

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118 S 8(2).

119 S 8(4).

120 *Wildlife Society of Southern Africa v Minister of Environmental Affairs and Tourism of the RSA* (1996) 3 SA 1095 Tk at p 1104 E-J

121 Act 200 of 1993

view that where s 7 of the (Interim) Constitution is not applicable to granting *locus standi*, that is where no infringement of a right entrenched in Chapter 3 is alleged, and where a statute imposes an obligation upon the state to take certain measures in order to protect the environment in the interest of the public, then interested groups such as the Wildlife Society of Southern Africa should have a *locus standi* in common law to apply for an order compelling the State to comply with its obligations in terms of such statute.<sup>122</sup>

This judgement did not specify how the rights contained in s 29 had been infringed and grounds the applicant had to claim *locus standi* in terms of s 7(4). One view is that the situation complained of was not detrimental to anyone's health or wellbeing and applicants in fact had no *locus standi*.

It can however be argued that the present position is different in law, as s 24(b) of the Constitution created the right to have the environment protected through reasonable legislative and other measures which prevent pollution, promote conservation and secure ecologically sustainable development. These rights did not exist before in such terms. Where for example, environmental protection exists in legislation, and the State allows a situation to develop which impacts negatively on the environment, s 38 will afford *locus standi* to public interest groups to enforce the legislation. Where no such protection exists, public interest groups will still have *locus standi* in terms of s 38 as the right to have the environment protected is being infringed.

The drafting of s 24 has the effect that public interest participation in environmental matters is possibly much more extensive than envisaged by a reading of s 38 only.

#### 5.4 *Locus standi* of public interest groups in environmental matters against private legal personae

As shown, private law environmental matters require a direct and substantial interest in a matter before a party has the *locus standi* to sue. A much debated legal aspect of the Constitution was whether the fundamental rights contained in the Bill of Rights apply not only vertically, that is between the State and its subjects, but also horizontally, between two private legal *personae*. If, for instance, the environmental right can be made applicable horizontally, then s 38 of the Constitution can be used to by public interest groups to act against private legal *personae*.

In *Du Plessis and another v De Klerk and another*<sup>123</sup> Kentridge AJ held that the provisions of Chapter 3 of the interim Constitution are not generally capable of application to any relationship other than that between persons and legislative or executive organs of State at all levels of government. This means that the Constitution is only applicable vertically and not horizontally, which excludes private individuals from using the provisions of the Constitution for private law matters. In addition, the court held that the Constitution allows for the

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122 *Op cit* p 1105 A-B

123 (1996) 3 SA 850 CC at p 881 E-G

development of the common law by the Supreme Court in accordance with the objectives of Chapter 3 as provided in Section 35(3)<sup>124</sup>.

The interim Constitution contained s 29, similar to the new s 24(a), and no section similar to the new s 24(b). But there is a vast difference between s 24(a) and s 24(b). In reading s 24(b) it is clear that such rights can only be applied vertically, that is between a person and the State. S 24(a) is a negative right and the cause of an environment which is harmful or detrimental to a person's health or well-being could be the State or another person. What has changed the situation is the impact of s 8(2) and s 8(3) on this question of horizontal or vertical application of the Bill of Rights.

S 8(1) stipulates that the Bill of Rights applies to all laws and binds the legislature, the executive, the judiciary and all organs of state, but does not refer to private individuals.

S 8(2) stipulates that:

*"A provision of the Bill of Rights binds natural and juristic persons if, and to the extent that it is applicable, taking into account the nature of the right and any duty imposed by the right."*

S 8(3) stipulates how a court shall apply the provision of the Bill of Rights to natural and juristic persons.

C Loots submits that the Bill of Rights will have an horizontal application where appropriate.<sup>125</sup> In environmental law, pollution of air, water and soil are considered detrimental to one's health, but bad town planning decisions are not. Here s 38 may provide *locus standi* to public interest groups to fight pollution, but no other environmental issues. This partial granting of *locus standi* might encourage the courts to develop the common law as suggested above.

### 5.5 Locus standi in international law

In international law only the state has *locus standi* to persue international environmental problems. Public interest groups can petition the government to act, and can publicise the matter, but are legally debarred from acting directly against a foreign state. Organisations such as Greenpeace International publicise international environmental issues and aim to gather local support which will pressurize national governments to act internationally. The smoke pollution in Indonesia, caused by bush and timber clearing, is a good example of how negligible the effect of public opinion in other countries is on a defaulting government.<sup>126</sup>

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124 *Op cit* p 885 E

125 Loots C *The Impact Of The Constitution On Environmental Law* (1997) 4 SAJELP p 59

126 Time October 6 1997 p 38 *Dark Cloud of Death*

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## VI Right to information

### 6.1 Introduction

Accountability to the public is an essential feature of an open democracy. Although certain governmental activities require limited or total secrecy, this does not extend to information concerning the environment. Reliable and pertinent information is the foundation of enforcing adherence to environmental norms. Environmental knowledge gained through environmental education, forms part of the right to information.

Traditionally, the enforcement of environmental standards and norms was a matter between the regulator and the regulated - the State and the State department, industry or any legal person. Neither the State, or a particular industry had any reason to disclose information regarding the environmental norms applied in to industry relating to standards set, the tests applied, the adherence to the standards by the industry and how standards were enforced by the State. The public had to trust the State to exercise proper controls and those regulated kept very quiet about their activities. Often, secrecy was enforced by legislation such as that relating to petroleum products<sup>127</sup> and nuclear fuels.<sup>128</sup> Departments created their own policies of secrecy, even when not required to do so by legislation. The lack of proper and attainable environmental information hampered the effective functioning of environmental groups in protecting and conserving the environment. Often, the first information furnished would be the announcement of final approval and the inception of a project.

This problem is not unique to the RSA. The US Freedom of Information Act of 1982 set the standard in assisting groups to obtain information and evidence required to institute environmental actions.<sup>129</sup> In the UK the Royal Commission on Environmental Pollution recommended in 1984 that there should be a:

*"presumption in favour of unrestricted access for the public to information which pollution control authorities obtain or receive by virtue of their statutory powers."*<sup>130</sup>

This finding and the European Commission Directive 90/313 on the *Freedom of Access to Information on the Environment* resulted in the UK's implementing the Environmental Information Regulations of 1992.<sup>131</sup> These regulations apply to any information which relates

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127 Petroleum Products Act 120 of 1977

128 Nuclear Energy Act 92 of 1982

129 Burnett-Hall R *Environmental Law* Sweet & Maxwell 1995 p 913-914.

130 Burnett-Hall R *Environmental Law* Sweet & Maxwell 1995 p 914.

131. Burnett-Hall R *Environmental Law* Sweet & Maxwell 1995 p 914-915.

to the environment. Internationally there is a precedent for open access to environmental information by any person who requests it, and it is not limited to those whose right or interest is affected.

Environmental information may be required for general or specific purposes. An example of the latter would be to have knowledge of a particular environmental aspect such as levels of industrial or agricultural pollution in a river. This is the type of information required to evaluate the infringement of a right.

Specific environmental information can be used by public interest groups in many ways when:

- a) objecting to the application for a licence, a permit or some consent;
- b) substantiating a complaint;
- c) laying a criminal charge or instituting civil proceedings, if possible;
- d) ensuring compliance by the State, provincial or local authority to a law or regulations;
- e) Drawing attention to a project which will impact negatively on the environment, an environmental problem or threat to the environment.

## 6.2 Right to information in common law

Baxter<sup>132</sup> states that the general principle in common law is that the State is not obliged to disclose documents in judicial proceedings when it claims public interest privilege, if the disclosure will be prejudicial to public interests. The court may examine the claim and uphold it if satisfied that the claim is justified.

Where information is required, for example if raw sewage is being pumped into Table Bay, no right exists in common law to such information. One of the few places where information can be acquired, is question time in Parliament. Here members may put questions to the minister. There is, however, no legal obligation on the minister to answer.

An interesting development in the financial world is that good management and the auditing profession requires public companies to report on environmental matters. The relationship between the company and the environment in which it operates can have major financial consequences. If a mine pollutes the water sources in its vicinity, it can result in expensive water treatment costs, even closure. The shareholders in such company require sufficient environmental information to assess the risk and the financial implications thereof. The shareholder has the right to know, and public companies are obliged to disclose.

A number of accounting bodies<sup>133</sup> worldwide investigated the standards to be set for the minimum information that should be included in the financial statements of a company and laid down certain guidelines. These guidelines are useful in that when applied they provide the necessary information about a company to enable one to assess its environmental policy and the success or lack of success thereof. Public interest groups can contribute by encouraging shareholders in companies to ask the following type of question to obtain information:

- a) *a description of the most important environmental risks which could affect the company;*
- b) *the environmental policy of the company;*
- c) *the environmental aims of the company in terms of measurable standards, for example, indicating air emissions targets and the cost thereof;*
- d) *the accounting policy of the company regarding reserves for environmental claims such as cleaning-up costs;*
- e) *the environmental costs of the company relating to energy usage, waste management and waste disposal, treatment of polluted water, substances, soil and air; compliance with environmental legal requirements, fines, reclamation and rehabilitation;*
- f) *the cost of existing or projected environmental liabilities of the company;*
- g) *the amount of subsidies relating to environmental activities received from the State by the company and the use thereof;*
- h) *the impact of the company's environmental policy on future capital costs, operating costs and profitability;*
- i) *the environmental impact of any investments made or financial assistance given by the company;*
- j) *the existence of an independent third party assessment of environmental audit.*<sup>134</sup>

These questions are relevant to any business or commercial activity. If this type of information about the environmental activities of companies becomes available or if environmental accountancy guidelines are adhered to, public interest groups will have better information available to monitor commercial environmental impacts.

Once it is known that a company has this information, and were it to infringe environmental rights, by, for example, polluting water in an area, this information could be requested and used by a public interest group.

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133 Canadian Institute of Chartered Accountants, the Institute of Chartered Accountants in England and Wales and others. See *Finansies en Tegniek*, 30 April 1996 p 40

134 *Finansies en Tegniek*, 30 April 1996 p 40

### 6.3 Right to information in statutory law

South African legislation, apart from the 1996 Constitution, contains no general provision<sup>135</sup> regulating rights to information. There is, however, specific legislation which entitles an individual to ask for certain information. The Road Transportation Act<sup>136</sup> obliges the Local Board to make available, against payment, a copy of any application to an "interested person." These provisions tend to limit the information to those with a specific interest in the matter.

Until recently, the rule applied in government has been that information should be kept by the State and be prevented from reaching the public. The Protection of Information Act<sup>137</sup> is the best example of denying access to information and ensured that officials kept information under wraps. The Nuclear Energy Act<sup>138</sup> restricts access by the public to information in s69 regarding nuclear sites and installations.<sup>139</sup> Baxter<sup>140</sup> states that this secrecy led to maladministration and corruption as evidenced by the Information Scandal and abuses in prisons. Problems at Thor Chemicals and the pollution at Grootvlei gold mine are examples of the environmental devastation that can be caused if correct and adequate environmental information is not available to the public.

This problem was addressed in the new Constitution, as the aim of the new government is open and accountable administration furnishing relevant information, as set out in s195(1)(g).

### 6.4 Right to information in constitutional law

In the Interim Constitution<sup>141</sup> s 23 reads:

*"Every person shall have the right of access to all information held by the state or any of its organs at any level of government in so far as such information is required for the exercise or protection of any of his or her rights."*

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135 Baxter L *Administrative Law* Juta & Co 1984 p 235.

136 Act 74 of 1977

137 Act 84 of 1982.

138 Act 131 of 1993.

139 See also s 41 of the Atmospheric Pollution Prevention Act 45 of 1965 and which prohibits disclosing information in regard to any manufacturing process; s 17 of the Hazardous Substances Act 15 of 1973 prevents disclosure of information arising from the analysis of a sample in terms of the act.

140 Baxter L *Administrative Law* Juta & Co 1984 p 234.

141 Act 200 of 1993

This right contained two limitations; the first that it could be invoked only against the State and the second that it was limited to that information required to exercise or protect a person's rights.<sup>142</sup> These were not only rights contained in Chapter 3, but all rights recognised in private and statutory law.<sup>143</sup>

The final Constitution<sup>144</sup> heeded all the criticism levelled against s23 and a new s32 reads:

*"Access to information*

- 32 (1) *Everyone has the right of access to-*
- (a) *any information held by the state; and*
  - (b) *any information that is held by another person and that is required for the exercise or protection of any rights.*
- (2) *National legislation must be enacted to give effect to this right, and may provide for reasonable measures to alleviate the administrative and financial burden on the state.*

This section did not come into force on 4 February 1997 with the rest of the Constitution as s 23 (1) of Schedule 6 provides for the enactment of national legislation envisaged in s 32 (2) above within three years of the date on which the new Constitution took effect. This resulted in the suspension s 32 (1) and the replacement thereof with:

*"(1) Every person has the right of access to all information held by the state or any of its organs in any sphere of government in so far as that information is required for the exercise or protection of any of their rights."*<sup>145</sup>

This provision is nearly identical to s 23 of the Interim Constitution<sup>146</sup> and effectively access to information will be regulated by the Interim Constitution until 4 February 2000. If no national legislation is enacted within the prescribe three-year period, the constitution must be amended, or the right to information will lapse. An Open Democracy Bill has been published for comment and should move ahead in the 1998 parliamentary session.

Once s32(1) becomes operative, the important change between the interim and final Constitution regarding access to information is that in the final constitution there is no

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142 Du Plessis L & Corder H *Understanding South Africa's Transitional Bill of Rights* Juta & Co 1994 p 164.

143 Du Plessis L & Corder H *Understanding South Africa's Transitional Bill of Rights* Juta & Co 1994 p 164.

144 Act 108 of 1996.

145 S 23 (2)(a) of Schedule 6 of Act No 108 of 1996.

146 Act 200 of 1993.

requirement that information held by the State must be required for the exercise of a right. This has the effect that once the legislation referred to has been promulgated, and subject to standard limitations such as state security, all information will become available. Horizontally the provision will apply to information necessary in the exercise of a persons' rights.

At present Van Dijkhorst J ruled in *Directory Advertising Cost Cutters v The Minister for Posts, Telecommunications, and Broadcasting and others*,<sup>147</sup> that the rights envisaged in s 23 of Act 200 of 1993 were those fundamental rights set out in Chapter 3 thereof and "nothing more, nothing less."<sup>148</sup>

Cameron J however differed from this in *Van Niekerk v City Council of Pretoria*<sup>149</sup> In this matter the ambit of Section 23 of the Constitution of the Republic of South Africa Act 200 of 1993 was discussed.

Van Niekerk had lodged a claim against Pretoria City Council for damages which he allegedly sustained on account of a power surge after storm damage to his power supply which power was supplied by the Pretoria City Council. Van Niekerk thought that a defective transformer, operated by the Pretoria City Council had led to the power surge which was denied by the council. A copy of the report which the electricity division of the Pretoria City Council prepared was requested, on the basis of Section 23 of the Constitution of the Republic of South Africa.<sup>150</sup> The Pretoria City Council refused to supply the requested information.

The first issue which the court had to decide was whether Section 23 was applicable to a civil claim for damages, as damages was not a "right" protected by chapter 3 of the Constitution. The court held that the case of the *Directory Advertising Cost Cutters v Minister for Posts, Telecommunications and Broadcasting and Others*<sup>151</sup> which held that the rights contemplated in Section 23, were limited to the rights set out in Chapter 3 of the Constitution, was wrong.

The judge ruled that the wording of s 23 was wide and unlimited and the required approach to the interim Constitution was a:

"broader approach to the principles which underlay the inclusion of s 23 and that the approach taken by Van Dijkhorst J was in consequence unwarrantably narrow."<sup>152</sup>

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147 1996 (3) SA 800 T

148 *Idem* at 813A.

149 1997 1 All SA 305 T

150 Act 200 of 1993

151 1996 (3) SA 800 (T)

152 *Idem* at 309H-L.

He further referred to the rules of interpretation and to the principle applied in *Minister of the Interior v Machadadorp Investments (Pty) Ltd and another*<sup>153</sup> and held that all rights could be protected or enforced in terms of s 23 including delictual or contractual rights.<sup>154</sup> The court accordingly ordered the City Council to make available to Van Niekerk a copy of the report of its electricity department relating to the damage to his electrical appliances.

This paves the way to request environmental information in relation to the enforcement or protection of rights over and above the fundamental rights enumerated in the Constitution.

One expects that the State will charge a fee for the information and that there will be a limit set on the access to certain information. For instance, copies of all permits or other applications requiring consent should be readily available. On the other hand the furnishing of information about water pollution would depend on whether the water were being tested or not. This right will be subject to the content of other fundamental rights, the general limitation clause,<sup>155</sup> and to a state of emergency.<sup>156</sup> As an example, the right to privacy would bar the State from giving information about substantive privacy rights (family relationships, marriage etc.) and informational privacy rights (privacy of communication).<sup>157</sup>

The right to information has now been extended to include information held by another person other than the State. This was particularly necessary so as to provide for information held by parastatal organizations, town councils, public authorities and legal persons. Baxter<sup>158</sup> notes that in the absence of specific legislation, these bodies had no obligation to furnish any information. Legislation must now be enacted to give effect to this right.

## 6.5 The Draft Open Democracy Bill

In October 1997 the Draft Open Democracy Bill was published for information and comment. The principal object of the draft Bill is to give effect to the right to information referred to in section 32(1)(a) of the Constitution. The Bill provides for *inter alia* public access to information held by governmental bodies subject to certain exemptions, to make information in respect of the functions and operation of governmental bodies available to the public and for other related matters.

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153 1957 (2) SA 395 (A) at p 405 reads: "*A construction which would promote the more effective attainment of the clear object of an enactment should, I think, be preferred to an interpretation which would hamper its realization.*"

154 *Idem* at 312b.

155 S 36 Act 108 of 1996

156 S 37 Act 108 of 1996

157 Van Wyk D, Dugard J, de Villiers B, Davies D *Rights and Constitutionalism* Juta & Co 1994 p 243

158 Baxter L *Administrative Law* Juta & Co 1984 p 235.

The Bill provides for the right of access to any person who so requests, to any record of a governmental body, but subject to the terms of the Act. The request must be on a prescribed form and if it is directed at the wrong government body, the request must be transferred. Records may not be destroyed if requested and provision is made for payment of a request fee and/or deposit. The government is entitled to refuse requests in certain circumstances, especially where privilege is concerned.<sup>159</sup>

Section 45 of the Bill regulates mandatory disclosure in public interest and this will have a marked impact on public participation and environmental management. This section provides that subject to certain qualifications a governmental body must grant the request for access to a record if -

*“(a) disclosure of the record would reveal evidence of substantial -*

*(iii) danger to the environment or the health or safety of an individual or the public.”*

This language used in the draft Bill is similar to that used in the section on the environmental right in the Constitution. Any information which would reveal evidence of a substantial danger to the environment, for example a spill of a toxic substance into water must, subject to certain qualifications, be disclosed. This provision is mandatory, as a danger is a serious threat. The same provisions apply where a person's health or safety is endangered.

This bill does not make provision for access to environmental information held by private people.

The bill has been redrafted several times and should be enacted in 1998. If the act includes the quoted provisions, it will assist the public greatly in obtaining environmental information which in turn would aid public participation in environmental management.

#### 6.6 Environmental information required.

The environmental information required by the public would be the information relevant to an environment which provides for minimum standards for health, a spiritual and aesthetic dimension<sup>160</sup> and a protection as provided for in s 24(b).

The type of information required is not limited to the state of the environment, but also to activities and measures which are harmful or have the potential to be harmful or damaging to the environment. Conversely, information concerning all measures taken to protect the

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159 See sections 10, 14 and 15 of the Bill

160 Glazewski Jan *The Environment and the Interim Constitution* Consultus April 1994 p 23.

environment must be kept.<sup>161</sup> This must further extend to information which is not held by the body concerned, but to which such body has access or is entitled to have access.

The s 32(2) limitation that no undue financial or administrative burden must be placed on the State, should not be used by the State to avoid furnishing relevant environmental information. If information requested is refused, action can be taken in terms of the right to just administrative action,<sup>162</sup> outlined herein and in terms of s38,<sup>163</sup> the Enforcement of Rights. Good and proper administration in government should ensure that information kept is relevant, correct, up-to-date and accessible. The limitation applies only to the State and not to legal *personae*, non-state bodies, organizations etc.

#### 6.7 Access to environmental information; Guidelines of European Parliament

1987 to 1988 was the European Environmental Year. In preparation for this event the European Commission resolved in March 1986 to institute a program to disseminate environmental information relating to the EC policy on the environment, environmental measures taken by the EC and to make people aware of environmental concerns.<sup>164</sup> The Chernobyl disaster in April 1986 resulted in radioactive fallout over a large part of the European continent and Britain and highlighted environmental issues in particular. European countries were unable to organise effective countermeasures when they attempted to diminish the effect of the resultant nuclear pollution, on account of lacking proper information.<sup>165</sup> This gave added impetus to the movement to free access to environmental information, which resulted in Council Directive 90/313, and this came into effect on 31 December 1992.<sup>166</sup>

It was decided to limit the directive to environmental information held by administrative authorities, as this need was generally acknowledged and not to extend it to all information, as this would result in opposition from Member States.<sup>167</sup>

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161 Burnett-Hall R *Environmental Law* Sweet & Maxwell 1995 p 916.

162 S 33 Act 108 of 1996

163 Act 108 of 1996

164 Krämer L *Focus on European Environmental Law* Sweet & Maxwell 1992 p 291

165 Krämer L *Focus on European Environmental Law* Sweet & Maxwell 1992 p 291

166 *Article 1 states: "The object of this Directive is to ensure freedom of access to, and dissemination of, information on the environment held by public authorities and sets out the basic terms and conditions on which such information should be made available."* Quoted from: McLoughlin J & Bellinger E G *Environmental Pollution Control* Graham & Trotman/Martinus Nijhoff 1993 p 229.

167 Krämer L *Focus on European Environmental Law* Sweet & Maxwell 1992 p 295

The effect of this directive has been that public authorities must make available to the public information relating to the environment and may only refuse to do so in certain defined circumstances, which refusal is subject to judicial or administrative review.<sup>168</sup> The directive established a right to information and ensured freedom of access without proving an interest. It is limited to information held by an authority, which has no legal obligation to find or collect the requested information.

The general philosophy of the Directive is important:

*"The protection of the environment is an objective of general interest. The environment is not the property of public authorities or those who damage it, and it is in everyone's interest-- also in that of future generations-- to be informed of the state it is in."*<sup>169</sup>

As mentioned above, our courts would be influenced by what is the norm for access to information in other jurisdictions, of which the European Community is one.

#### 6.8 Environmental impact reports

Very useful information can be derived from the environmental impact report (EIR). In terms of S 26<sup>170</sup> the minister may make regulations with regard to any activity identified in terms of S 21(1) concerning the content of environmental impact reports. In proclamation R 1182 and R 1183<sup>171</sup> the Minister of Environmental Affairs and Tourism published regulations listing certain activities in terms of s 21(1) of the Environmental Conservation Act<sup>172</sup> that will now require an environmental impact report. These regulations stipulate that an application must be followed by a study for scoping, a scoping report, a plan of study for environmental impact assessment and the environmental impact report. Where an environmental impact assessment (EIA) has been done, whether as a legal requirement or voluntarily, the process culminates in an environmental impact report which provides documentation on the project containing information and estimates of impacts. The content of the report may differ

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168 Krämer L *Focus on European Environmental Law* Sweet & Maxwell 1992 p 298

169 Krämer L *Focus on European Environmental Law* Sweet & Maxwell 1992 p 309

170 Environmental Conservation Act 73 of 1989

171 R 1182 and R 1183 Government Gazette 18261 dd 5 September 1997.

172 Act 73 of 1989

from one investigation to another, but should contain all the information necessary to evaluate the application holistically.<sup>173</sup>

This record can be used to appeal against the decision in terms of S 35 of the Act, or for review purposes if the Act is not being complied with.

All these provisions will assist environmental public interest groups in accessing the relevant information.

The content of the report may differ from one investigation to another, but the environmental impact report (EIR) should contain the following information;<sup>174</sup>

Part one: Applicant and application

1. Name and address of applicant.
2. Section and Act number in terms of which application is made.
3. Name and address of authority to which application is made.

Part two: Methods and key issues

1. Methods of report.

As the EIR is a non-technical summary of the issues involved, this presents the basic information eg background information on the applicant, who carried out the EIA and its limitations, and who wrote the EIR, the parties consulted, the methods used, problems encountered in carrying out the EIA and the relevant legislation applicable.

2. Summary of key issues.

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173 Glasson J, Therivel R, Chadwick A, *Introduction to Environmental Impact Assessment* UCL Press 1994 p 6 as amplified with my own observations. See further GG17517 dd 1 November 1996 for the initial Proclamation 1751 listing the proposed list of activities which have the potential to detrimentally affect the environment on a National or a Provincial level and proclamation 1752 giving notice of requiring an initial environmental impact report on the activities listed in P 1751 and the content of such report. See note 174 below for the final notice.

174 Government Gazette 18261 of 5 September 1997 contain Notice R 1183 setting out the legal requirements, procedure and content of the report.

This provides information on the key issues involved and encourages users of the EIR to concentrate on the aspects which are really relevant.

### 3 Monitoring program.

The monitoring program should check the study on a continuous basis and how new information could influence or alter existing information.

#### Part three: Background to the proposed development

1. Preliminary studies, needs, planning, alternatives, site selection.  
Here issues relate to the need for the development, plans and planning options, possible planning alternatives and site selection and alternative sites.
2. Site description and baseline conditions.  
The proposed site would be described here with the zoning, planning requirements and plans. Plans should include contours and sides, back and front elevations.
3. Description of proposed development.  
The development should be described as comprehensively as possible. Any projected phased development should be specified in detail as developments tend to grow once clearance has been granted for a portion. S25 Of the Sectional Titles Act<sup>175</sup> sets a guideline of how phased development can be controlled.
4. Construction activities and program.  
Often the real damage is not caused by the development, but by the preceding construction. An upgrading of the Table Mountain cableway could ignore the damage done by cement spilling from buckets as it is being flown by helicopters to the top of the mountain.  
The timing can also be crucial. Blasting in the sea for a new sewer pipe at Hermanus in the whale calving season could scare all the whales away for seasons to come.

#### Part four: Environmental impact assessment - topic areas

1. Current and future land use of the site, landscape and visual quality, the physical and landscape characteristics of the site as well as its surroundings, the existing infrastructure or services. The proposed land use must be stated.
2. Geology, topography and soil.
3. Hydrology and water quality.
4. Air quality and climate.
5. Ecological characteristics of the site, its surroundings and climate.
6. Noise.

7. Transport.
8. Socio-economic characteristics of the site as well as its surroundings and its cultural resources.
9. The risks and hazards, health and safety of the public.

Part five The Consultative process

1. A record of the consultation process with the public and interested parties
2. Interrelationships between effects.
3. A discussion of the alternatives which were considered with regard to sites, projects, processes, designs, materials and methods.

The process of each EIA will differ as will the content of the EIR. Properly used, this will be a valuable source of information, not only in the application process but in monitoring the project thereafter.

Part Six Record of decision

In terms of the regulations,<sup>176</sup> once the application has been considered, and a decision made, the relevant authority shall on request of any interested person, issue to such person a record of decision which shall include or should include:<sup>177</sup>

- (a) the reference number;
- (b) a description and details of the proposed activity, the extent including quantities and the surface areas involved, the infrastructure requirements and the implementation programme in terms of which the permit is issued;
- (c) the specific location of the activity;
- (d) the name of the applicant, address and telephone number;
- (e) the name, address and telephone number of any consultant involved;
- (f) the date of, and persons present, at a site visit, if any;
- (g) any media coverage or contact with, and the views of interested persons or organisations;
- (h) the decision of the relevant authority;
- (i) the conditions of approval (including mitigation, control and rehabilitation measures to be taken during and after the proposed activity to minimise the potential influences and impacts) if any;
- (j) the key factors in determining the decision, including the views of the other authorities approached, if any;
- (k) the date of expiry or the duration of approval;
- (l) the manner of the appeal (if applicable);

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176 Section 10 Notice R 1183 Government Gazette 18261 5 September 1997

177 This list is more comprehensive than is required by regulation.

- (m) the signature of the duly authorized person; and
- (n) the date.

This record can be used to appeal against the decision in terms of S35 of the Act, or for review purposes if the Act was not being complied with.

All these provisions will assist the environmentalist greatly in accessing the relevant information, as information is vital for assessing an environmental matter.

#### 6.9 Information relating to environmentally inspired limitations on land ownership and the use of public databases and registers

In private and public law in South Africa there are environmentally inspired limitations on land ownership which address major environmental concerns. These limitations function as a tool for environmental management. Environmental management has been *ad hoc* and objective-specific but may become more integrated as the General Policy for Environmental Conservation takes effect. The effectiveness of public law limitations on land ownership are limited to specific areas of concern because the main environmental act, the Environmental Conservation Act (Act No 73 of 1989) is not fully implemented, as the Minister has yet to list limited development areas. A number of other different acts make effective control of land use by the imposition of limitations difficult, as different administrative bodies are involved.

Due to this multiplicity of acts it is very difficult for environmentalists to establish what environmentally inspired limitations are imposed or exist on land, or the environmentally related duties and obligations of the land owner. The general result is that environmentally inspired limitations on land ownership are as effective as the relevant authority is in imposing and supervising the limitation or, in exceptional cases, as effective as the concerned public is in overseeing adherence to the limitation by the land owner.

Various State departments keep electronic data such as the deeds registries in all the different regions, which hold data on all fixed property in the area, except some unsurveyed fixed property belonging to the State. The data is not environmentally specific, but property-specific. If registered land contains a restriction on use imposed in a will or by notarial deed that, for instance, the land should be kept as a park, the title of the land will contain the restriction, or be so endorsed. This information is available to the public and can be used to stop any action in contravention of such restriction.<sup>178</sup> There is no general list for land subject to environmental restraints, each deed must be studied individually for conditions

In South Africa there is as yet no requirement for authorities to keep public registers about specific environmental matters. It is foreseen that the demands of good governance would

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178 *Bamford v Minister of Community Development and State Auxiliary Services* 1981 (3) SA 1054 C relied on the terms of the will of Cecil John Rhodes restricting the use of Groote Schuur Estate.

require such public registers where necessary and this would assist environmentalists in accessing environmental information.

#### 6.10 Procedure for accessing environmental information

To obtain the required information one must ensure that the correct legal procedure is used if prescribed in any law, regulation or directive.

To facilitate access to environmental information, the State should list what information is available and the source or the contact person. The accepted administrative standard would be to keep relevant registers listing applications made and consents granted in terms of each act or subordinate legislation.

#### 6.11 Use of environmental information

The information so obtained must first be used by public interest groups to evaluate the relevant environmental matter as a whole. The three aspects conservation, pollution control and sustained development must be used to assess the project. The project as a whole or only some part thereof may fail the environmental norms requirements. An objection can then be drafted using a EIR report as basis, if available. Comprehensive and correct information is the crux of a well prepared objection. Normally such information is difficult to obtain, and may frequently be obtained only at great expense. Here the information furnished by the applicant can be used. Any information should be considered and cross-checked, as two "experts" could come to opposing conclusions using the same basic information.

## VII Legal processes and various environmental remedies

### 7.1 Introduction to legal processes and environmental remedies available to public interest groups

Individual and public interest groups may act to promote environmental conservation and management in a variety of ways. There are, at present a number of organisations and individuals active in promoting environmental education, highlighting environmental concerns, lobbying and making submissions and representations.

The formal route by which to address environmental concerns is to use the legal process, in either its private or public law form.

The private law remedies in environmental law are the interdict (for existing and future conduct), and the *Actio legis Aquiliae*. These remedies are well developed in law to protect private rights, but the procedural requirement of *locus standi in judicio* is strict and hampers its use in environmental matters.

In contrast environmental remedies in public law are underdeveloped as these remedies were restricted by procedural requirements in the past and in particular the requirement of *locus standi*. This has been partially rectified in the Constitution as shown and the added provisions for just administrative action, access to information and enforcement of rights are assisting in bringing environmental matters to court or before other forums. Public law processes and remedies range from formal objections to judicial review, *mandamus*, criminal law charges and constitutional remedies.

### 7.2 Public law processes in environmental law

In most environmental law matters, the State will be one of the parties, therefore public law procedures and remedies apply. Public law remedies are based on the common law and on statutory law. Often an action is a common law procedure: for example an interdict to enforce the right to clean air, which is a statutory right. One procedure, for instance that of lodging an objection, can lead to an appeal or review. Cost implications in any matter are important in deciding an approach. Any court application will have cost implications, which is not the case in administrative procedures. Timing and the tactics are other important aspects. A timely and proper objection, for example, prior to construction or other works, will receive a better hearing than any action instituted once the necessary approval has been given by the relevant authority. In most cases, there will be more than one way of raising any environmental issue and two-pronged strategies could be more effective than a one-sided approach. Financial interests often mean that any environmental objection is strenuously opposed. This places the average concerned citizen or public interest group at a disadvantage as normally his or their resources of time, knowledge and finance for presenting the complete case are limited. Networking of skills and resources between public interest groups can assist in surmounting many of these problems.

Selecting the correct forum for any action is of vital importance. In administrative matters, the relevant act will prescribe the forum, which is usually an appointed Board or administrative Tribunal. In court actions, the Magistrates' Court or High Court may have jurisdiction. Jurisdiction means both the physical court (a court in a certain place) where the action must be instituted and the power of a Magistrates or High Court to hear the specific matter. The latter jurisdiction of a Magistrates' Court is defined by statute, but the High Court has inherent jurisdiction to hear all matters, except certain constitutional matters which must be referred to the Constitutional Court.

### 7.2.1 Comments and Representations

In terms of various acts the Minister may publish certain proposed regulations and invite comments from the public. In terms of s 2 of the Environment Conservation Act<sup>179</sup> the Minister may determine and publish the general policy. Various environmental policies are under review or are being drawn up, and public participation has been a major element thereof. The drafting of the *Green Paper on the Conservation and Sustainable Use of South Africa's Biological Diversity*,<sup>180</sup> was one and the result of a process which invited public participation and comments. Public interest groups can assist in monitoring all such processes and utilize such opportunities to steer government actions and policies in an environmentally sound direction.

In addition, public interest groups are always entitled to make representations to the State or to private individuals or to legal entities. These representations may assist in determining the correct course of action in environmental matters under consideration or in determining which matters should be considered. If such representations are ignored and subsequent events indicate that those representations should have been considered and acted upon, the decision makers will be seen to have failed in their duty.

### 7.2.2 Objections

Most administrative procedures which grant rights, permits, concessions or authorisations that allow certain actions to be taken by an applicant, have built-in process which enable the public to object. As seen, just administrative action requires an affected person to be notified and given an opportunity to lodge an objection. In all administrative law matters and in certain other matters public interest groups will have *locus standi* to object.

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179 Act No 73 of 1989

180 Department of Environmental Affairs and Tourism-October 1996

### 7.2.3 Interdict

An interdict is summary remedy with which a person can obtain the protection of a court against a deprivation of his environmental right or the threat of such deprivation. It has the same features as a *mandamus* but where a *mandamus* is used to order a public official to carry out or abstain from carrying out a certain action, an interdict lies against non public *personae*. Potentially, an interdict is a very valuable remedy in environmental law as it regulates future action, which could be imminent or in process.

There are various types of interdicts viz.:

#### 7.2.3.1 Prohibitory interdict

This type of interdict is one whereby an order is granted in terms of which a person is required to abstain from committing an infringement of an environmental right, or from continuing to commit an existing infringement.

In *The Minister of Health and Welfare v Woodcarb (Pty) Ltd and Another*<sup>181</sup> Hurt J heard an application for an interdict to order the respondent to stop carrying out a process scheduled under the Atmospheric Pollution Prevention Act<sup>182</sup> because the relevant registration certificate issued to respondent had expired. In terms of s 9(1)(a) of the Act no person within a controlled area shall carry on a scheduled process in or on any premises unless he is the holder of a current registration certificate authorising him to carry on that process in or on those premises. In 1968 the whole of the Republic of South Africa was declared a controlled area.

The facts were that respondent operated a Rheese burner to burn wood waste, which regularly belched large quantities of smoke over the surrounding countryside. Neighbours complained to the Department of Health that the smoke emitted adversely affected the use and enjoyment of their properties. The Department issued a directive in 1992 that conical burners, of which the Rheese burner is a type, must be phased out over three years. Respondent was given a provisional certificate on the understanding that the Rheese burner would be replaced but it did not do this and the Department thereafter withdrew the provisional certificate and requested the respondent to stop operating the Rheese burner.

The court found that the conduct of the respondent was unlawful. It further found that it infringed the rights of respondent's neighbours who were entitled in terms of s 29 of Act 200 of 1993 to

*" an environment which is not detrimental to their health or well-being"*<sup>183</sup>

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181 1996 (3) SA 155 (N)

182 Act 45 of 1965

183 *Op cit* at 164 E-F

The court then granted the interdict.

Here is a good example of how persons can obtain legal redress indirectly. On the basis of nuisance the neighbours could have acted directly against the respondent but by involving the Department of Health, who had expertise and funds, they succeeded in obtaining the interdict without costs to themselves.

Before an interdict will be granted, the applicant must prove that the defendant's actions are unlawful or that unlawful conduct is imminent, that no alternative adequate remedy is available and that he will consequently suffer irreparable loss if the interdict is not granted. Particularly the requirement that there shall be no other adequate remedy available has been sharply criticised as untenable. In South Africa an interdict may also be obtained against the State. The interdict was also rendered considerably less useful by the narrow interpretation of *locus standi*.

In the matter of *Minister of Health v Drums and Pails Reconditioning CC t/a Village Drums and Pails*<sup>184</sup> the Minister of Health applied for a interdict against Drums and Pails Reconditioning CC to prohibit the company from carrying on with a waste chemical incineration process in contravention of s 9(1)(a)(i) and s (1)(b) of the Atmospheric Pollution Prevention Act<sup>185</sup> (the Act). The fact of the matter was that the company erected an incinerator on its premises before it applied for a provisional registration certificate in terms of the provisions of s 10(1) of the Act. This application was refused, but the company went ahead with installation and operation of the incinerator.

The court found that it was trite law that prior to the issuing of the final interdict the court had to be satisfied on three essential grounds, namely:

1. A clear right on the party asserting it;
2. An injury actually committed or reasonably apprehended;
3. The absence of any other satisfactory remedy that might have been available to the party seeking an interdict

The court held that the Minister had a clear right to enforce the law, that the company did operate the incinerator and that, even though there are certain penal provisions in the Act, it does not bar the court from granting an interdict.

In the matter the company also conceded that the Minister of Health had *locus standi* to prevent particular contraventions of the Act.

In both these cases the complaints of the public caused the Minister to act. These are examples of how public interest groups can act effectively without costs or direct involvement.

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184      1997 (3) SA 867 NPD

185      45 of 1965

### 7.2.3.2 Mandatory Interdict

A Mandatory interdict is an order of court directing a person to perform a positive act or to restore an illegal state of affairs.

#### 7.2.3.2.1 Mandamus

A mandatory interdict against public authorities is known as a *mandamus*.<sup>186</sup>

This remedy is aimed at forcing an administrative organ to carry out a statutory duty. Application is made to the court to order the body to exercise a certain power. However, the court cannot determine how the powers shall be exercised or the duty performed. In *Wildlife Society of Southern Africa and others v Minister of Environmental Affairs and Tourism of the Republic of South Africa and others*<sup>187</sup> the Wildlife Society applied to the court for an order to force the Minister to apply the provisions of Decree 9 (Environment Conservation) which provide that no person may make roads, clear land, erect buildings or conduct any activity which disturbs the natural vegetation in the Transkei coastal conservation area without a valid permit issued by the Department of Environmental Affairs. Pickering J granted the order and held that when a statute imposes an obligation on the State to take certain measures to protect the environment, and the State fails to do that, the court can order (mandate) the State to take the necessary actions. Here the Wildlife Society as a public interest group took successful action to protect the environment.

#### 7.2.3.3 Mandament van Spolie

This type of interdict is a remedy to restore. No one is allowed to take the law into his own hands, and if he does so, the court will order him to restore the situation to the way it was before his action. In environmental matters, a person whose actions have impacted negatively on the environment, could be ordered to restore everything to its previous state. Normally only the affected person or the dispossessed will have the necessary standing to apply to the courts. If it was a State activity in contravention of a fundamental right, the public will have standing, but not so where a private *persona* is involved.

### 7.2.4 Judicial review

The main remedy which an individual has to force the public body to act in terms of a law or regulation is to ask the courts to review the act of such body. The common law of judicial review applicable to public bodies was stated by Innes C. J in the JCI<sup>188</sup> case when he

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186      Baxter L *Op cit* p 687

187      1996 (3) SA 1095 (Tk)

188      *JCI Co v Johannesburg Town Council* 1903 T.S. p 115

remarked that the court may be asked to review the proceedings of "a public body" and set them aside or to correct them whenever such a body "has a duty imposed on it by statute" and does not comply with such duty.

Review addresses the legality of a decision, while an appeal deals with the merits of the decision.<sup>189</sup>

The grounds for review are that the public authority has acted without statutory authority. Normally, there is some statute to which reference could be made and the ruling was based on the compliance or non-compliance with a statute. The common law grounds were later extended to include non-compliance with rules made in terms of the statute but to exclude rules only referred to by statute. The ambit grew wider when in the Dawnlaan case<sup>190</sup> Goldstone J held that the court had review jurisdiction over decisions of JSE office bearers because the JSE was supported by a certain amount of statutory power. New developments in other jurisdictions extend judicial review decisions of those bodies not created by statute but fulfilling a public function or exercising public power which "affects the public rights, obligations or expectations of the victim" per Pannick<sup>191</sup>. It is submitted that this line is a logical extension of the common law and will be followed in South Africa. Furthermore the administrative actions of private non-statutory bodies can be subject to common law review if the court reads into the "voluntary agreement" provisions of "fairness and reasonableness" per Baxter<sup>192</sup> which were not complied with.

Prior to review, all internal remedies must be exhausted and the applicant must have legal standing to bring the application. This requirement of standing is discussed above but is a major problem in any environmental action for review. As will be seen, the constitutional provision of standing has eliminated the problem as far as organs of State are concerned, but the problem remains where a public body is not an organ of state.

The outcome of review proceedings could be to set the decision aside, to refer the matter back to the decision maker and in certain matters, to substitute the decision.<sup>193</sup> The court is not limited to the record of the proceedings, as the legality of a decision can be influenced by other factors, such as bias or procedural aspects.

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189      Baxter *Op cit* p 306

190      *Dawnlaan Beleggings (Edms) Bpk v Johannesburg Stock Exchange* 1983(3) SA 344 (W)

191      Pannick D *New Directions in Judicial Review* p27

192      Baxter L *Administrative Law* p341

193      Baxter L *op cit* p 307

### 7.2.5 Administrative appeals

An appeal differs from a review in that the matter is decided on the existing record of the previous proceedings on merit. The legality of the prior proceedings is not in issue. The question is whether the matter was correctly decided or not. Whereas the High Court has inherent jurisdiction to hear an application for judicial review, no such jurisdiction exists for appeals. This has the result that the right to hear an appeal must be specifically enacted, which is not the case in the relevant environmental statutes.

The Environmental Conservation Act<sup>194</sup> provides for appeals to the Minister of Environmental Affairs and Tourism by any person aggrieved by a decision of an officer or employee exercising any power delegated to him in terms of this Act.

The Act<sup>195</sup> further provides for appeals to the Minister of Water Affairs and Forestry by any person aggrieved by a delegated decision relating to waste management.

In addition the Act<sup>196</sup> provides for appeals to the Premier by any person aggrieved at a decision of an officer or employee enforcing a provision of the Act in respect of a protected natural environment.

Whoever as set out above considers the appeal, may confirm, set aside or vary the decision.

Public interest groups could, where standing exists, in terms of the administrative justice clause in the Constitution<sup>197</sup>, act to institute these appeals.

Other acts, Provincial Ordinances and legislation regulating environmental matters, have similar provisions.

### 7.2.6 Administrative tribunals

A tribunal is an independent body which controls administrative action. Baxter<sup>198</sup> categorises tribunals and describes the independent adjudicative tribunal which acts as arbitrator in disputes between the State and private individuals, or between two individuals. This type of tribunal was established to adjudicate in certain environmental disputes where the legislature has established such a body and granted a right of appeal. The Air Pollution Appeal Board and

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194 S 35(3) of Act 73 of 1989

195 S 35(1) read with s 20 of Act 73 of 1989

196 S 35(2) of Act 73 of 1989

197 S 33 of Act 108 of 1996

198 Baxter L *op cit* p 180-183

regional appeal boards are established in terms of the Atmospheric Pollution Prevention Act,<sup>199</sup> and have the powers to hear appeals in connection with certain specified aspects of the act.

Public participation in terms of this act does not exist, but the public could act in terms of the administrative justice clause in the Constitution.<sup>200</sup>

### 7.2.7 Criminal law actions

In criminal law the State has the sole right to prosecute, and can issue a *nolli prosequi* to a member of the public to prosecute, if the Attorney General refuses to do so. The public can act by laying criminal charges and insisting on prosecution. Unfortunately the environmental knowledge required by prosecutors for successful prosecutions is lacking. This results in very few environmental transgressions ever reaching the criminal courts. The basic environmental law knowledge of magistrates and judges is a further cause for concern. However, the publicity given by public interest groups to various environmental issues is assisting these magistrates and judges to understand the underlying legal aspects.

Another factor is the technical evidence and expertise required in certain cases, for example to prove that water is polluted and where the pollution-causing elements came from. These experts are expensive and in short supply. This is one of the areas where public interest groups can contribute: by assisting in the environmental law education of prosecutors, magistrates and judges and by establishing a data bank with relevant environmental information to assist the courts and enforcement agencies.

## 7.3 Public law remedies in environmental law

### 7.3.1 Withdrawal of consent, authority or permit

In certain cases public interest groups can request the relevant authority to withdraw a consent, authority or permit issued, if the conditions attached thereto were not adhered to. Again, it is a question of knowing what is or is not allowed, and acting if unauthorised activities take place.

### 7.3.2 Polluter pays principle

The polluter pays principle has an economic basis. Historically, certain resources were treated as free, for example water, air and certain land. These "free" resources could be polluted by industry, at no cost to itself. Ultimately it is the State or the local authority that has the duty

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199 S 5(1)(a) and s 5(1)(b) of Act 45 of 1965

200 S 33 of Act 108 of 1996

to clean the water and soil at its own cost. Air pollution is passed on to the community who pay with their health, when suffering the consequences of acid rain. The polluter pays principle requires that the polluter must pay for the cleaning-up costs of the polluted water, air and land. If these costs are costed into its operation, and if it is not viable with these added costs, it should not be carrying out that activity. A proviso here is that the same standards must apply to all similar industries, to prevent unfair competition. This requirement further promotes the use of modern clean industrial technologies, preventing pollution.<sup>201</sup>

Nationally unfair competition can be controlled, but is a problem for industries competing with a similar industry in a neighbouring country. The environmental groups will have to co-operate internationally to strive for similar standards. Internationally this problem is being addressed and recently international organisations drafted the *International Covenant on Environment and Development*<sup>202</sup> which tries to integrate environmental and development issues at national, regional and international levels.

Public interest groups can act as monitors, and raise concerns where air, soil or water pollution occurs. Thereafter they can in addition monitor the activities of the State to ensure that the specified standards for clean air and water are adhered to, and that soil pollution is remedied by forcing the polluter to clean up.

### 7.3.3 Appropriate Relief and Damages

Normally, the State will not claim damages, but may do so in any matter where environmental degradation was caused by a private *persona*. Damages claims are more common where the State is in breach of some duty. In the matter of *Fose v Minister for Safety and Security*<sup>203</sup> Fose sued the Minister for Safety and Security for damages arising out of certain assaults alleged to have been perpetrated by members of the South African Police Services. The action was based on Section 7 (4)(a) of the Interim Constitution which allows the person whose rights have been infringed or threatened in terms of Chapter 3 of the Interim Constitution, to apply to a competent court for the "appropriate relief" which may include a declaration of rights. The Plaintiff asked for "appropriate relief". The court held that the "appropriate relief" in essence be relative to what is required to protect and enforce the Constitution. This relief may be a declaration of rights, an interdict, a *mandamus* or such other relief as might be required to ensure that the rights contained in the Constitution are protected and enforced. If necessary the court can fashion new remedies.

The court made a comparison regarding the position in the United States, Canada, United Kingdom, Trinidad & Tobago, New Zealand, Ireland, India, Sri Lanka, Germany and the European Convention regarding the protection of human rights and found that remedies

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201 Burnett-Hall R *Environmental Law* Sweet & Maxwell 1995 p 41

202 Commission on Environmental Law of IUCN, IUCN Environmental Law Center 1995

203 1997 (3) SA 786 CC

granted in other jurisdictions for the breach of a Constitutional right indicate that these are public law remedies and that the court held that they should be referred to as Constitutional remedies. As South African law differs in a number of aspects from other jurisdictions, the court held that there are no reasons in principle why "appropriate relief" could not include an award of damages. The court discussed punitive damages and found that the Plaintiff will be awarded substantial damages for serious assault and would not be entitled to any punitive Constitutional damages.

It is highly debatable if the courts would extend this Constitutional remedy beyond the line<sup>204</sup> of first generation rights. If it does so, the floodgates could open for all types of claims. In theory, public interest groups could then identify situations where environmental damage was caused, calculate the monetary cost of restoration or other relief, and where *locus standi* exists, institute a claim against the State. It is expected that the limitation clause would become applicable in situations like this.

#### 7.3.4 Cleaning-up costs

Another remedy is to order the polluter to pay for cleaning-up costs. In private law cleaning-up costs would be part of a damages claim, if negligence and a causal link can be established. In public law cleaning-up costs are statutorily imposed for certain activities. Fault need not be established, as ownership of a facility or movable creates liability. The Nuclear Energy Act<sup>205</sup> imposes strict liability on any licensee for any nuclear damage.<sup>206</sup> Public interest groups assist in monitoring activities where strict liability exists.

In terms of the Constitution, a person, or the State in protecting environmental rights, will have the right to ask for cleaning-up costs as appropriate relief.

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204 S 36 of Act 108 of 1996

205 Act 131 of 1993

206 *Op cit* s 61

#### 7.4 Private law remedies in environmental law

##### 7.4.1 Interdicts (future or existing conduct)

In private law the interdict still requires a direct or substantial interest in the environmental problem. Public interest groups accordingly lack the capacity to legislate on behalf of the general public or on behalf of a specific person. This is a major problem for environmental groups, in a vertical application only of environmental rights. The way to effect enforcement would be to demand that the State takes the necessary action.

##### 7.4.2 *Actio legis Aquiliae*

An environmental wrong committed under the *Lex Aquilia* may only be claimed by the person who has actually sustained the damage. Public interest groups cannot act on his behalf.

#### 7.5 Public publicity and pressure

A cost-effective remedy and process for public interest groups is to apply pressure on the State or to a private legal *persona* by means of publicising any environmental problem. Neither politicians nor industrialists like bad publicity and if an issue is highlighted, the chances are that it will receive attention.

## VIII Foreign Law

### 8.1 Introduction

In terms of s39 of the Constitution<sup>207</sup> a court, when interpreting the Bill of Rights, may consider foreign law. S 8(3)(a)<sup>208</sup> states that a court, in order to give effect to a right in the Bill, must apply or if necessary develop the common law to the extent that legislation does not give effect to that right. In environmental law matters a court, where required, will have the opportunity and duty to develop the common law. The development of environmental law and the procedures for raising the efficiency of its application, would benefit substantially by the consideration of foreign law. The reason is that the environment and environmental law has been under intense public scrutiny since the late sixties in most of the major first world countries. This has resulted in the development of environmental laws and in the legal rights of public interest groups to become legally involved in environmental matters.

The leading jurisdictions where public interest participation in environmental law are fairly well established are the USA, the European Community and New Zealand. The situation in the USA is the best example for consideration.

### 8.2 The legal system in USA

The USA has a true federal constitution, with the residue of powers lying with the individual states. There is a strict separation of judicial powers.

Environmental law is enforced by a court structure which is divided into a federal court system and a state court system.<sup>209</sup> The federal court was created by the Constitution and has a constitutional basis to exercise judicial power. State courts have independent internal sovereignty. Conflict between federal and state courts is resolved by the Constitution which has a "Supremacy clause" which provides that states are bound to the Constitution and other laws of the United States. The result is that federal laws pre-empt state laws. Other jurisdictional rules, for example "federal question" jurisdiction allows an action to be heard in a federal court. Goods which cross state boundaries in interstate commerce are treated as a federal matter. Most environmental matters are federal matters, as natural resources cross state boundaries.

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207 Act 108 of 1996

208 *Op cit*

209 Robinson D and Dunkley J (Editors) Public Interest Perspectives in Environmental Law Wiley Chancery 1995 Chapter 1 by Robbins D H titled: *Public Interest Environmental Litigation in the United States* p 6-8

### 8.3 Environmental legislation

There is a codified system of federal law. Many separate environmental acts have been passed by the Congress, by state legislatures, and by local authorities. As the states have jurisdiction over resources within their borders, often both federal and state laws apply to the same subject matter such as clean air.<sup>210</sup>

### 8.4 Federal law

#### 8.4.1 Court Actions

The federal Clean Air Act, 1970 (CAA)<sup>211</sup> is regarded as the model for conferring a right upon citizens and organisations to complement, with federal agencies, the enforcement of the environmental provisions of the act. These provisions allow a citizen to ask a court to order a governmental agency to perform statutory duty, similar to a *mandamus* in South African law. In addition, a citizen can apply to a court to order a polluter, who can be either a private *persona* or a state department, to cease polluting. These actions can be very effective as the penalties for ignoring a court order can be a jail sentence or fines of up to \$25,000 a day.<sup>212</sup>

#### 8.4.2 Judicial Review

The Federal Administrative Procedure Act (APA)<sup>213</sup> regulates judicial review and grants a person suffering a wrong on account of agency action, to apply to a court to review such action. Environmental citizen organisations can use the APA. This act is often used in judicial review of cases under the National Environmental Policy Act. (NEPA)<sup>214</sup> The NEPA does not have a citizen suit clause, but action can be instituted for judicial review in terms of the APA.<sup>215</sup>

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210 Robinson D and Dunkley J (Editors) *Public Interest Perspectives in Environmental Law* Wiley Chancery 1995 Chapter 1 by Robbins D H titled: *Public Interest Environmental Litigation in the United States* p 6

211 42 United States Code (USC) s 7604 (Note: The USC, the official compilations of all US federal statutes are published by West Publishing Company of St. Paul, Minnesota. When enacted, each statute has its own section numbers.)

212 *Op cit* note 178 p 10

213 5 USC s 702

214 42 USC ss 4321-4370

215 *Op cit* note 210 p 10-12

### 8.5 State law

Certain states have general citizen suit statutes. Michigan had the first statute which provides for citizen suites in environmental matters.<sup>216</sup> Massachusetts has a law<sup>217</sup> which grants any 10 or more citizens the right to apply to a court for a permanent or temporary order against a person causing damage in contravention of a statute, ordinance, by-law or regulation whose purpose is to prevent or minimise damage to the environment.

### 8.6 Standing

The question of standing still remains an issue. Standing in citizen suit environmental matters is not open, but must meet certain criteria even where authorised by statute. As standing is not open and available in all matters, both this and funding, remain the main problems of public participation in environmental matters in the United States, at both federal and at state level.<sup>218</sup>

### 8.7 Contribution of public interest in environmental law in USA

Judicial access for environmental citizen organizations (ECO) has contributed significantly to environmental conservation and protection in the United States. This judicial access enables these organizations to become involved in negotiations prior to litigation, often reaching negotiated settlements. At present the Sierra Club is calling for an end to commercial logging on federal public land and for a ban on the practice of clear cutting, which cause mudslides and mud polluted rivers.<sup>219</sup>

In overall context however, the federal and state agencies do most of the work in regulating and managing the environment but the small but focussed contribution of ECO's is making an impact.

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216 Fuggle R F and Rabie M A Environmental Management in South Africa p 135 and note 101

217 Mass. General Laws Chapter 214 s 7A

218 *Op cit* note 210 Chapter 1

219 Sierra May-June 1997 Vol 82 No 3 p 12 and p 22

## IX Conclusions

At the outset two key conditions were identified as crucial in determining the success of public interest participation in the legal aspects of environmental management and conservation. These factors were the nature of the environmental right, including environmental legislation, and open access to the legal system for public interest groups.

The new Constitution provided the legal system with an environmental right. It is complemented by the general and specific environmental policies, national and provincial legislation. This provides a legal framework for the management and control of the environment in South Africa.

All the facets of the constitutional environmental right have yet to be interpreted and applied by the courts. Only then will the full content and extent of the right will be known. The right has been made more effective by creating other new constitutional rights such as the right to just administrative action, the right to information, the right to access to courts and the right to enforce these rights, the last of which broadened the *locus standi* rule to provide for public participation in all matters where a right in the Bill of Rights has been infringed or threatened.

This right of access makes it possible, for the first time in the legal history of South Africa, for public interest groups to have a statutory basis for standing in certain court actions. This standing is not complete nor unlimited. In private law matters, a financial interest or a personal right is still required and must be proved before standing can be assumed to exist. In public law matters, the situation is the same as before, unless a constitutional right is brought to bear. The Constitution directs the courts to interpret legislation and develop the common law to promote the spirit, purport and objects of the Bill of Rights. Accordingly, the courts have a certain discretion in interpreting and addressing the standing requirement for public interest groups, and if developments in certain overseas jurisdictions are followed, it is to be expected that the standing requirement will be interpreted on a basis that where the interest of the environment is at stake, and the public group does not have a separate agenda, for instance a specific financial interest, the court would accommodate such groups in particular matters and afford standing to public interest groups.

At the same time the right to just administrative action, which includes the right to be heard, the right to ask for reasons and the right to be notified before certain decisions are taken, has a positive impact. It has been shown that in the Environmental Conservation Act, the enacted procedure is to consult prior to decision-taking and to bring in public participation to a limited extent. Public groups must lobby to influence other environmental related legislation to provide for public participation where possible.

The right of public interest groups to access relevant environmental information facilitates the monitoring of State actions or proposed State action and the Open Democracy legislation should have a major impact when enacted.

The Constitution has made it possible for the first time for public interest groups to become actively involved in environmental management and control.

The other conditions listed at the outset are requirements in support of the key conditions. An understanding of environmental law, its purpose, procedures and field of application is required knowledge for any lawyer engaged in environmental matters. Some universities are now lecturing environmental law as a separate course. The number of South African environmental law books is steadily increasing, articles are published on environmental law in Law Journals, and a journal for environmental law has appeared. Newspapers are publicising environmental matters, radio talks are presented and television programs on the environment are broadcast frequently. In general a strong awareness of the legal aspects of environmental matters is being created in the legal profession. Knowledge of specific aspects of the law is still lacking, but with the publication of research papers, law reports books and articles, this is changing.

Lawyers are becoming more aware of the specialization possibilities in environmental law, law firms are specifically being created to cater for environmental matters and one can describe environmental law as one of the fastest growing fields of law in South Africa. Certain environmental matters have always been part of the law but have been dealt with under different headings, for instance as a nuisance claim or as a claim for damages or as an administrative law matter or as a town planning matter. All of these are now regarded as environmental law. The basic law has always existed and must now be developed. This new awareness of environmental legal matters among lawyers makes it easier for public interest groups to obtain correct advice on possible actions.

The same factors apply to a lesser extent in the enforcement of environmental laws by government agencies. The officials whose function it is to apply environmental law tend to concentrate on a few specific issues, are understaffed and are finding it difficult to enforce environmental law. Public interest groups can contribute by monitoring areas of environmental management and conservation and can assist the State by reporting thereon.

The environmental organisations in South Africa are active and some are even very well-funded, although funding remains a major problem for most of these organisations. An example of some activity can be judged from contributions made as contained in the White Paper.<sup>220</sup> The newspapers abound in reports on the activities of groups like the Wildlife Society of Southern Africa, the Botanical Society of South Africa, the Mountain Club of South Africa, various special interest groups, "friends" of various areas or *fauna* and others, all of whom are actively involved in the promotion and protection of the environment. These groups can mostly rely on the assistance of dedicated volunteers for cost effective approaches to their activities.

In conclusion, it can be stated that public interest participation in environmental conservation and management in South Africa is increasing and will increase to a greater extent in future. The constitutional right to the environment and the constitutional right of access to courts has resulted in South Africa's being at the forefront of granting public interest participation in the enforcement of the constitutional right to the environment.

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220 White Paper on Environmental Management Policy for South Africa  
Government Gazette 18164 28 July 1997

X            BIBLIOGRAPHY

10.1        Books

Baxter L *Administrative Law* Juta & Co 1984

Burnett-Hall R *Environmental Law* Sweet & Maxwell 1995

Commission on Environmental Law of IUCN, *International Covenant on Environment and Development* IUCN Environmental Law Centre 1995

Dugard J: *International Law, a South African Perspective*, Juta & Co 1994

Du Plessis L & Corder H *Understanding South Africa's Transitional Bill of Rights* Juta & Co 1994

Fuggle R F & Rabie M A *Environmental Management in South Africa* Juta & Co 1994

Glasson J, Therivel R, Chadwick A, *Introduction to Environmental Impact Assessment* UCL Press 1994

Henderson P G W *Environmental Laws of South Africa*, Vol 1 + 2, Juta 1996

Hughes D *Environmental Law* (2nd Ed.) Butterworths 1992

IUCN *Draft International Covenant on the Environment and Development* 1995

Krämer L *Focus on European Environmental Law* Sweet & Maxwell 1992

Lacey J (Editor) *Government and Environmental Politics; Essays on Historical Developments Since World War Two* The Woodrow Wilson Centre Press 1991

McLoughlin J & Bellinger E G *Environmental Pollution Control* Graham & Trotman/Martinus Nijhoff 1993

Pannick D *New Directions in Judicial Review*

Rabie M A *Environmental Conservation in The Laws of South Africa* (First Reissue) Butterworth Publishers (Pty) Ltd 1996

Robinson D and Dunkley J (Editors) *Public Interest Perspectives in Environmental Law* Wiley Chancery 1995

Teurlings P *Guide to Legislation Concerning Natural Environment* Department of Environmental Affairs February 1993

Van Wyk D, Dugard J, de Villiers B, Davies D *Rights and Constitutionalism* Juta & Co 1994

10.2 Journals / Articles

Baxter L *Fairness and Natural Justice in English and South African Law* 1979 SALJ p 608.

Bray: *Locus standi in environmental law* 1989 CILSA 33

Breitenbach A *Jurisdiction: Mistakes of Law, Review for Unreasonableness (unpublished class notes July 1994)*

Cowen D V *Towards distinctive principles of South African environmental law: some jurisprudential perspectives and a role for legislation*, 1989 THRHR

*Finansies en Tegniek*, 30 April 1996

Glavovic P *A Suggested Environmental Policy For The Human Rights Commission The Human Rights Constitutional Law Journal Of Southern Africa* Vol 1 no 3 p 32-34

Glazewski Jan *The Environment and the Interim Constitution*, Consultus April 1994

House of Assembly Debates 1989-05-23 cols 10164-5

Loots Cheryl *Locus standi to Claim Relief in Enforcement of Legislation* (1987) 104 SALJ

Loots C *The Impact Of The Constitution On Environmental Law* (1997) 4 SAJELP

Lyster Rosemary *The Protection Of Environmental Rights* (1992) 109 SALJ

Mureinik E *A Bridge to where?: Introducing the New Constitution* 1994 SALJ

Rabie M A *A new deal for environmental conservation: aspects of the Environmental Conservation Act 73 of 1989* THRHR vol 53 no. 1 February 1990

Rabie M A *Environmental Conservation in The Laws of South Africa (First Reissue)* Vol 9

Rabie M A *A new deal for environmental conservation: aspects of the Environmental Conservation Act 73 of 1989* THRHR vol 53 no. 1 February 1990

Rabie M A *The Environment Conservation Act and its Implementation* SAJELP (1994) 1

Rabie and Echard *Locus standi The Administration's Shield and the Environmentalist Shackle* (1976) 9 CILSA

SA Law Commission Working Paper 13

Sierra May-June 1997 Vol 82 No 3

Sunday Times Metro 2 February 1997

*The Law of South-Africa*, First Reissue 3 Part 1 Civil Procedure Butterworth Publishers 1997

*The Stockholm Declaration on the Human Environment*, 1972

Time October 6 1997 p 38 *Dark Cloud of Death*

Van Niekerk B, *The Ecological Norm in Law or the Jurisprudence of the Fight against Pollution* (1975) 92 SALJ p 78

Van Reenen Tobias *Locus Standi in South African Environmental Legislation: A Reappraisal in International and Comparative Prospective* 1995 (2) SAJELP

Van Wyk, Jeannie (Unisa) *Citizen involvement and the Environment Conservation Act 73 of 1989 SA Public Law 1990 Vol 5 NO 1 & 2 .*

Winstanley T *Entrenching Environmental Protection in the New Constitution* SAJELP 1995 (1) p 85

### 10.3 Statutes

#### 10.3.1 RSA

Act 45 of 1965 Atmospheric Pollution Prevention

Act 15 of 1973 Hazardous Substances Act

Act 74 of 1977 Road Transportation Act

Act 120 of 1977 Petroleum Products

Act 84 of 1982 Protection of Information Act

Act 92 of 1982 Nuclear Energy Act (Repealed)

Act 100 of 1982 Environment Conservation

Act 95 of 1986 Sectional Titles Act

Act 73 of 1989 The Environmental Conservation Act

Act 131 of 1993 Nuclear Energy Act

Act 200 of 1993 Constitution of the Republic Of South Africa

Act 66 of 1995, The Labour Relations Act

Act 108 of 1996 The Constitution of the Republic of South Africa Act

#### 10.3.2 USA

Mass. General Laws Chapter 214

National Environmental Policy Act. (NEPA) 42 USC ss 4321-4370

The Federal Administrative Procedure Act (APA) 5 USC s 702

#### 10.4 Government Gazettes

Government Gazette 15428 21 January 1994

Government Gazette 15655 29 April 1994

Government Gazette 15726 9 May 1994

Government Gazette 16346 7 April 1995

Government Gazette 5745 8 August 1996

Government Gazette 17354 8 August 1996

Government Gazette 17517 1 November 1996

Government Gazette 18150 18 July 1997

Government Gazette 18163 28 July 1997

Government Gazette 18164 28 July 1997

Government Gazette 18261 5 September 1997

#### 10.5 Provincial Gazette

Provincial Gazette Extraordinary 5183 3 October 1997

## 10.6 Conventions and other Documents

Antarctic Treaties Act No 60 of 1996 and regulations R 980 in Government Gazette 18150 dd 18 July 1997

Commission on Environmental Law of IUCN, IUCN Environmental Law Centre 1995

General Assembly resolution 217 (III) Article 17 dd 10 December 1948

*Green Paper on the Conservation and Sustainable Use of South Africa's Biological Diversity*, Department of Environmental Affairs and Tourism-October 1996

*IUCN Draft International Covenant on the Environment and Development* 1995

Report of the Board of Investigation into the Saldanha Steel Project under Justice J H Steyn, 4 October 1995

Report of the Three Committees of the Presidents Council on A National Environmental Management System 22 October 1991

The Convention on Wetlands of International Importance Especially as Wildfowl Habitat. This treaty was adopted in 1971 at Ramsar. South Africa is a party thereto.

White Paper on the Conservation and Sustainable Use of South Africa's Biological Diversity, Government Gazette 18163 28 July 1997

White Paper on Environmental Management Policy for South Africa Government Gazette 18164 28 July 1997

United Nations, document A/Conf. 48/14/rev chapter 1, New York, 1972

10.7 List of decided cases RSA

*Administrator, Transvaal, & others v Traub & others* 1989(4) SA 731 (A)

*Bamford v Minister of Community Development and State Auxiliary Services* 1981 (3) SA 1054 C

*Dawnlaan Beleggings (Edms) Bpk v Johannesburg Stock Exchange* 1983(3) SA 344 (W)

*Directory Advertising Cost Cutters v The Minister for Post, Telecommunications, and Broadcasting and others* 1996 (3) SA 800 T

*Du Plessis and another v De Klerk and another* 1996 ( 3) SA 850 CC

*Fose v Minister of Safety and Security* 1997 (3) SA 786 CC

*JCI Co v Johannesburg Town Council* 1903 T.S. p 115

*Minister of the Interior v Machadadorp Investments (Pty) Ltd* 1957 (2) SA 395 (A)

*Minister of Health and Welfare v Woodcarb (Pty) Ltd and Another* 1996 (3) 155 N

*Minister of Health v Drums and Pails Reconditioning CC t/a Village Drums and Pails* 1997 (3) SA 867 NPD

*Roberts v Chairman of the Local Road Transportation Board* 1980 (2) SA 472,

*South African Roads Board v Johannesburg City Council* 1991 (4) SA 1(A) at 12F-G

*The Minister of Health and Welfare v Woodcarb (Pty) Ltd and Another* 1996 (3) 155 N

*Van Huysteen NO and Others v Minister of Environmental Affairs and Tourism And Others* 1995 (9) BCLR 1191

*Van Huysteen and Others NO v Minister of Environmental Affairs and Tourism and Others* 1996(1) SA 283 (C)

*Van Niekerk v City Council of Pretoria* 1997 (1) All SA 305 T

*Wildlife Society of Southern Africa and Others v Minister of Environmental Affairs and Tourism of the Republic of South Africa and Others* 1996 (3) 1095 (Tk)

10.8 List of decided cases UK

*R v Inland Revenue Commissioners; Ex parte National Federation of Self-Employed and Small Business Ltd.* [1982] AC 617 at 653G-H and at 644C (quoted in Wildlife case above at 1105I (1996(3))

*R v Inspectorate of Pollution and Another, Ex parte Green peace Ltd (No 2)* [1994] 4 All ER 329 (QB) at 350h and 350e-f (quoted in Wildlife case p 1106A-C 1996(3)).

## Annexure 1

### List of Main Environmental Legislation In South Africa

#### 1. General

Constitution of 1996 (section 24)  
 Constitution Act 200 of 1993 (Section 29)  
 Environmental Conservation Act 73 of 1989.

#### 2. Pollution Control

##### 2.1 Air Pollution

Atmospheric Pollution Prevention Act 45 of 1965  
 List of noxious and offensive gasses.  
 Regulations:  
 Inspection of premises in a dust control area.  
 Emissions by diesel-driven vehicles

##### 2.2 Marine Pollution

Dumping at Sea Control Act 73 of 1980  
 General regulations  
 Prevention and Combatting of Pollution of the Sea by Oil Act 6 of 1981  
 General regulations  
 International Convention for the Prevention Of Pollution from Ships Act 2 of 1986  
 Regulations  
 International Convention relating to Intervention on the High Seas, Act 64 of 1987

#### 3. Waste Management

Fertilizers, Farm Feeds, Agricultural Remedies and Stock Remedies Act 36 of 1947  
 Hazardous Substances Act 15 of 1973  
 Regulations  
 Nuclear Energy Act 133 of 1993

#### 4. Land Use, Physical Planning and Development

Physical Planning Act 88 of 1967  
 Physical Planning Act 125 of 1991  
 Development Facilitation Act 67 of 1995

5. Use and Management of Natural Environment

5.1 Land

National Parks Act 57 of 1976  
 Conservation of Agricultural Resources Act 43 of 1983  
 Forest Act 122 of 1984

5.2 Land Animals and Wildlife

Animals Protection Act 71 of 1962  
 Game Theft Act 105 of 1991

5.3 Marine Life and Resources

Sea-shore Act 21 of 1935  
 Territorial Waters Act 87 of 1963  
 Sea Birds and Seals Protection Act 46 of 1973  
 Sea Fishery Act 12 of 1988

5.4 Inland Water

Water Act 54 of 1956  
 Mountain Catchment Areas Act 63 of 1970  
 Lakes Areas Development Act 39 of 1975

5.5 Minerals and Mining

Minerals Act 50 of 1990

5.6 Energy

Electricity Act 41 of 1987

6 Cultural Resources

National Monuments Act 28 of 1969

For further references see:

Fuggle R F & Rabie M A *Environmental Management in South Africa* Juta & Co 1994

Henderson P G W *Environmental Laws of South Africa*, Vol 1 + 2, Juta 1996

Rabie M A *Environmental Conservation in The Laws of South Africa* (First Reissue)

Teurlings P *Guide to Legislation Concerning Natural Environment* Department of Environmental Affairs February 1993