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LLM Dissertation

Locus Standi in Environmental Law - A Comparative Analysis of South Africa and the United States

PBL 612 S

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Table of Contents

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I.) Introduction

Due to the growing awareness of the impact of human activity on the ecology, the legislators around the world increasingly deal with the issue of environmental protection. In South Africa, there is already a considerable body of legislation that is concerned with the control of activities affecting the environment. Those statutes may serve as a ground for concerned individuals or groups to approach a court in cases of alleged irregular or illegal acts. Privates may sue other privates for their illegal acts. They may also impugn the performance of public officials that are in charge of controlling polluting activities. A third option was opened up by amendments to the Environment Conservation Act 73 of 1989. Section 3 (2), which obliges the Director-General to ensure compliance of other state officials with the Department's declared policy. Thus, litigants are now able to claim a mandatory order compelling the Director-General to fulfil such duty.
However, before an aggrieved individual or group may approach a court for judicial relief, certain requirements must be met.

A major requirement which applies to all applicants who approach a court, is that they must have the legal standing - *locus standi* - in order to present their case. A feature of almost all legal systems is that an applicant is required to have a sufficient interest in the matter to claim legal standing. The *locus standi* is the threshold question for the justiciability of a case. The *locus standi* requirement must be dealt with before a decision is reached on the merits of the case.
Why, then, is the *locus standi* question a particular issue for environmental lawyers? The *locus standi* requirement is applicable here as in any other field of law. However, the environment is a very general interest. Its degradation affects all who live in it. Yet, it is particularly the field of environmental law where illegal activities affecting the environment do not always have a direct impact on the interests of an individual or organisation. In case of those diffuse interests as protection of the environment, it becomes necessary to open up access to judicial resources to a broader range of potential litigants than under traditional *locus standi* rules.
Moreover, it is especially the field of environmental law, where the implementation of statutes has often been seen unsatisfactory. C. Loots observes that South Africa's environmental legislation, generally speaking, has not been enforced effectively.[1] Administrative officials of the various departments "seem to adopt a conciliatory rather than confrontational approach to polluters, which is evidenced by the fact that, with the exception of the Department of Water Affairs, they have initiated virtually no prosecutions."[2]

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[1] C Loots "Making environmental law effective" (1994) SAJELP, 17 at 17; see also R F Fuggle and MA Rabie *Environmental Management in South Africa* (1992), 120

[2] C Loots, *supra note* 23

The situation is further exacerbated by the fragmentation of environmental legislation and the diffusion of responsibility for the administration and enforcement amongst numerous government departments, provincial administrations and local authorities and the ensuing lack of co-ordination of administration.[3]

Public officials when implementing statutes are faced with the conflict between environmental protection and economical interests. Regulated industries possess strong political powers and they subject state agencies to political pressure. For example, a fashionable argument against environmental concerns is its negative impact on employment. This argument increasingly gains power given the constraints in the employment market all over the world. As a result of continuous exercise of influence by well-organised private groups, statutory enactments may be defeated during implementation. People affected are principally not able to exert the same kind of influence on the implementation process. One might contend that this may not always be true. In fact, the opposite is conceivable as well. "Green" political groups today may also be in the position to exert considerable influence on the political process. It, nonetheless, questions the view that only regulated objects and not beneficiaries should have access to judicial review as is the case under traditional *locus standi* law.

In South Africa, implementation of environmental laws is often handled by departments for which protection of the environment is not a primary concern. In fact, their main concerns often conflict with the interest in environmental protection, as must, for example, be the case with the Department of Trade and Industry, which is charged with the implementation of the Dumping Sea Control Act 73 of 1980. The Department's main concern is obviously the promotion of the economy.
Even if state agencies are willing to enforce environmental law, they may also lack the resources. A public service that is plagued by financial constraints is likely to have simply not enough staff to detect each and every transgression of statutes and permits.
Recent amendments to the Environmental Conservation Act tried to mitigate the adverse effects of diffused responsibilities as mentioned above. Section 2 (1) of the Environment Conservation Act 73 of 1989 empowers the Minister of Environment Affairs and Tourism to declare policy, which he did on the 21 of January 1994. .Significantly increased power to influence the law enforcement of the several Departments and provincial authorities was given to the Department of Environmental Affairs by the section 3 (2) of the Environment Conservation Act 73 of 1989. This provision obliges the Director-General of that department to ensure that the policy is complied with; he may take any steps or make any inquiries he deems fit in order to determine if the policy is being complied with; and if he is of the opinion that the policy is not being complied with, may take such steps as he

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[3] See C Loots, *supra note* 23

deems fit in order to ensure that the policy is complied with by the relevant Minister, Administrator, local authority or government institution.

The Minister of Environment Affairs and Tourism has now been given the watchdog task of ensuring compliance with the policy of the Minister. This is a significant improvement to the Department's hitherto limited powers. Previously, the Department was obliged to obtain the concurrence of the Ministers of other departments before even declaring policy, whereas it has now relatively unfettered discretion to make such policy and the duty that the policy is complied with and the authority to force compliance on the part of other authorities.[4]

The described developments go a long way to an efficient law enforcement and, therefore, have the potential to contribute to improvements of environmental quality and hence the protection of the environmental right in section 24. Other developments worth mentioning in the context of proper law enforcement and protection of the environment are the Human Rights Commission and the Public Protector. The Human Rights Commission (a) promotes respect for human rights and a culture of human rights, (b) promotes the protection, development and attainment of human rights and (c) monitor and assess the observance of human rights.[5] The environmental right in section 24 is such a fundamental right with which the Commission may deal. The Commission redresses violations of or threats to fundamental rights by means of mediation, conciliation or negotiation.[6] It may also bring proceedings in a court in its own name, or on behalf of a person or a group or class of persons.[7]

The Public Protector addresses malfunctions of the public administration. It investigates and may report on improper administration, and may take appropriate remedial action.[8] It can proceed by application or on its own initiative.

The creation of the Human Rights Commission and the Public Protector has the potential to enhance the protection of Human Rights and ensure proper administration, both of which is relevant for the protection of the environment. Given the workload these institutions will foreseeably face, it will, however, be of limited value for aggrieved individuals and organisations who require speedy intervention.

The situation can be improved if individuals and public organisations may, irrespective of whether they are personally affected, take action for the environment by utilising judicial resources.

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[4] See C Loots, *supra note* 25 It is, however, unfortunate that these powers were not extended to authorise the enforcement of standards and norms, the Minister may determine in terms of s. 2 (1A) of the Act.

[5] s. 184 (1) of the Constitution

[6] See s. 8 Human Rights Commission Act 54 of 1994

[7] See s. 7 (e) Human Rights Commission Act 54 of 1994

[8] See s. 182 (1) of the Constitution

In view of the shortcomings of public official's activities in the field of environmental protection, the idea to harness the awareness of private individuals for the enforcement of environmental law becomes attractive. However, before the constitution came into effect, concerned citizens or organisations frustrated by the inaction of public officials were often prevented from bringing the matter to court because they were unable to present a sufficient legal interest under the traditional *locus standi* law.

In South Africa as well as in other judicial systems, courts traditionally did not allow a party to claim relief in the public interest. [9]

This theory of access to courts leaves no room for the generally concerned citizen representing a broad public interest, such as an ecological public concern. In the United States, Congress tried to alleviate the situation when it removed some of the *locus standi* obstacles by means of legislation. This is generally referred to as "citizen suit"-clauses.

The situation in South African *locus standi* law was dramatically changed by section 7 (4) of the interim constitution and section 38 of the final constitution.

This thesis will look at the traditional common law on *locus standi* before the inception of the constitution. It will further discuss how the section 38 of the final constitution impacts on those *locus standi* rules.

The issue of *locus standi* in the field of environmental law has received a great deal of attention in the United States. Therefore, the developments in the American law on *locus standi* will be surveyed and compared with the situation in South African law. On the basis of the American experience with citizen suits, the thesis will highlight several issues arising from the liberalisation of traditional standing rules including the separation of powers, and how possible undesirable effects ensuing from abuse may be prevented. These issues are also relevant for South African standing law after the constitution.

II.) Traditional *locus standi* rules

The above mentioned problem of the *locus standi* rules as a blocking mechanism for environmental litigants was illustrated in *Van Moltke v. Costa Aerosa*[10]. The applicant was a resident of a suburb of Cape Town who frequently visited Sandy Bay, a naturalist resort near Cape Town. He sought an

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[9] *Bagnall v The Colonial Government* (1907) 24 SC 470; *Dalrymple and others v Colonial Treasurer* 1910 TS 372 at 386; *Director of Education, Transvaal b Mc Cagie and others* 1918 AD 616 at 621 and 627; *Roodespoort-Maraisburg Town Council b Eastern Properties (Prop.) Ltd* 1933 AD 87 at 101

[10] 1975 (1) SA 255 CPD; L Baxter (1984) *Administrative Law*, 651

interdict restricting the respondent developer from continuing with development of certain land adjacent to the sea on the ground that the requisite planning permission required by the then applicable planning ordinance had not been obtained. The applicant also claimed that the proposed development would result in environmental degradation and loss of aesthetic amenities. The court did not deal with these questions as it decided that the applicant lacked the legal standing. It held that "the party seeking relief must show that he is suffering or will suffer some injury, prejudice or damage or invasion of right peculiar to himself and over and above that sustained by the members of the public in general."[11]

The latter judgement was partly questioned.[12] What is clear, however, is that a litigant may not seek relief merely on the basis that the defendant is contravening a statute and that it is in the public interest that he should be stopped.

1.) Sufficient interest

In South African law, a plaintiff must demonstrate a "legally enforceable right"[13] or a "valid"[14] or "sufficient"[15] and "personal"[16] interest in the relief claimed.

It is clear from the South African case law that a plaintiff who could establish harm which is quantifiable in financial terms would have no problem establishing standing. The same is true for litigation based on an invasion of any of the traditionally-recognised civil liberties. Financial loss is in those cases not an essential requirement for *locus standi*.[17] As stipulated in *Dell v Town Council of Cape Town*[18], a threat to the plaintiff's health also qualifies as grounds for claiming relief. Before the Interim Constitution, there was no general right to a clean environment that could be presented as a legally recognised right.

2.)Enforcement of statutes

Whith regard to enforcement of statutes, it is conceivable that rights could be created by statutory provisions. However, the problem with this is that obligations do not necessarily create rights. The

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[11] *Van Moltke v. Costa Aerosa* (1975) (1) SA 255 CPD, at 258

[12] L Baxter, *supra* 658

[13] *Patz v Greene & Co.* 1907 TS 427, at 432-3, *Roodepoort-Maraisburg Town Council v. Eastern Properties (Prop) Ltd.* 1933 AD 87 at 101

[14] *Riddelsdell v Hall* (1883) 2 SC 356, 358

[15] *Roodepoort-Maraisburg Town Council v. Eastern Properties (Prop) Ltd.* 1933 AD 87 at 101

[16] Baxter, *supra*, 655

[17] *Director of Education, Transvaal v. McCagie and others* 1918 AD 616 at 629 *Shifidi v. Administrator-General for South West Africa and others* 1989 (4) SA 631 (SWA) at 637 E-F

[18] (1879) 9 Buch 2.

court in *Patz v Greene & Co* dealt with an application that sought to enforce a prohibition of certain trading. Because the authorities had not acted, the applicant who claimed to suffer damages from the illegal trading went to court and sought an interdict to restrain the respondent from carrying on prohibited business. The court subscribed to a rule from English law which determines the circumstances under which enforcement of a statutory provision can be claimed. The rule is as follows:

Where the statute in question is enacted in the public interest, litigants claiming enforcement thereof must establish that they personally have been affected by the breach of the statute; however in cases where the statute was enacted in the interest of a particular group of persons, members of that group automatically have standing."[19] The individual will thus have *locus standi* without the necessity of proving loss or damage. A contravention of a statute designed to protect private interests must be seen as an encroachment on these interests.

Since in the case the statute prohibited the trading in the public interest the applicant had to show that he had suffered loss through the illegal trading.

Not only legal rights constitute a sufficient interests for legal standing. If a litigant cannot present a legal interest, then as in many other legal systems, a factual interest is also regarded as sufficient.[20] Since *Sierra Club v. Morton*[21] the American judiciary treats aesthetic amenities and well-being as cognizable interests. In South Africa, the qualifiable interests have not been extended that far. The court in *Van Moltke v. Costa Aerosa* were not prepared to acknowledge the interest in an aesthetic and tranquil surroundings as grounds for legal standing. It was held that these interests are not peculiar to him, but are shared with the public at large. The result in *Van Moltke v. Aerosa* might have been different if he had been able to show the risk of health damage. In a similar case[22] the court allowed the application for an interdict against a public nuisance. In *Dell v Town Council of Cape Town*[23], an individual sought an interdict to restrain the town council from dumping refuse on the beach of Table Bay. Although the court found that this was a public nuisance and the applicant acted only as a member of the public at large, it held that the applicant had legal standing, which seems to contradict *Van Moltke v. Costa Aerosa*. However, Mr.Dell unlike Mr. Van Moltke, was

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[19] 1907 TS 427, at 433; also *Roodepoort-Maraisburg Town Council v. Eastern Properties (Prop) Ltd.* 1933 AD 87 at 102

[20] W Bray "Locus standi in environmental law" (1989) CILSA, 33, at 35; Baxter, *supra* 652, for example, American jurisprudence employs an "injury in fact" test

[21] 405 U.S. 727, 31 L.Ed.2d 636 (1972)

[22] *Dell v Town Council of Cape Town* (1879) 9 Buch 2

[23] (1879) 9 Buch 2.

able to establish some potential personal injury to his health. The court in *Dell v Town Council of Cape Town*, however, did not go as far as the American jurisprudence to regard the mere interest in an aesthetic environment as a sufficient interest.

In a more recent case of *Verstappen v Port Edward Town Board & Others* [24], an applicant sought to interdict a local authority from unlawfully operating a disposal site. Since the law pertaining to the operation of disposal sites (Environmental Conservation Act 73 of 1989) was intended to operate in the interest of the public at large, the applicant had to prove that she suffered or will suffer special damage as a result of the impugned activity. The applicant claimed that her property value was depreciated and the disposal site threatened her health. The court dismissed the applicant's claim that the disposal site lead to health risks and depreciation in the value of her property since the applicant failed to prove these claims. The applicant also claimed that she is a ratepayer and therefore entitled to interdict the local authority. In several cases, ratepayers were afforded the right to interdict local authorities from dealing contrary to law with their funds or property.[25] The court also dismissed this claim as a basis for *locus standi*, since the applicant did not attack the operation of the disposal site on the grounds that it was too expensive. Thus, the court denied the applicant *locus standi*.

In South Africa, since *Patz v Greene & Co.* an applicant has to establish some sort of loss or damage if the statute he seeks to enforce was enacted in the public interest. In the environmental context, damage in form of health risks will often be relevant As the *Verstappen* case illustrates, loss of property value due to developments on adjoining land can be claimed as a basis for *locus standi*. However, the argument that an applicant is a ratepayer and is therefore entitled to an interdict only has force if the applicant claims that the impugned activity of a local authority is too expensive.

3.) Standing in suits on behalf of others

With regard to suits of litigants on behalf of others as, for example, in the case of organisations suing for their members, South African courts have been particular restrictive. This is particularly unfortunate given the social patterns of South African society. Poverty, a lack of sophistication and education often renders individuals unable to bring environmental concerns to court. The detection of irregularities, however, needs expertise and litigation is expensive and time consuming.

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[24] 1994 (3) SA 569 (d), at 574 A-575A

[25] *Dormer v Town Council of Cape Town* (1886) 4 SC 240; *Cairncross v Oudtshoorn Town Council* (1897) 14 SC 272; *Maberley v Woodstock Municipality* (1901) 18 SC 443 (10 CTR 749)

This has been acknowledged by Indian courts, which allowed public interest actions by individuals on behalf of poor and disadvantaged persons.[26]

In the recent past, a large number of organisations formed for the purpose of promoting environmental interests. Such organisations are usually in a much better position to take action for the protection of the environment. They often have the expertise and funds at their disposal to undertake environmental litigation. Yet on a number of occasions, it has been held that organisations may not litigate as the representative of their members.[27] In *South African Optometric Association v Frames Distributors (Pty) Ltd*, the court concluded that the Act the association sought to enforce was conceived in the public interest and that the applicant had not established that it suffered any damage. A loss would only be suffered by members and not by the organisation itself. On these grounds, the organisation lacked the *locus standi* necessary to bring the application. In contrast, American courts grant organisations *locus standi* if the organisation establishes that members have an interest in the relief claimed, see below.

An exception to the general rule of *Patz v Greene & Co* are organisations that are statutorily acknowledged and granted the right to take action to enforce its provisions. They are not required to demonstrate a special damage in order to have legal standing. This has been relevant in the field of animal protection. An example for this is the decision in *Society for the Prevention of Cruelty to Animals (SPCA), Standerton v Nel and Others*[28]. In this case, the SPCA applied for an interdict to prevent the holding of a rodeo with a live bullriding competition..

Officers of that society were holders of certificates in terms of section 8 of that Act. The section confers wide powers on the holder of such a certificate, such as the right to enter premises for the purposes of examining conditions under which any animal is kept, the arrest without warrant of any person who is suspected of having committed an offence under the Act, and the right to seize any animal in the possession or custody of that person.

The court, unlike an earlier similar case, where it was decided that the SPCA without proving any personal or individualised damage did not have standing, allowed the application. It came to this conclusion with reference to the fact that the SPCA received statutory recognition in the Act and

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[26] See J Cassels "Judicial activism and public interest litigation in India: attempting the impossible" (1989) 37 American Journal of Comparative Law 495

[27] *South African Optometric Association v Frames Distributors (Pty) Ltd* 1985 (3) SA 100 (O), at 103F-105C; *Electrical Contractors' Association (South Africa) and another v Building Industries Federation (South Africa)* (2) 1980 (2) SA 516 (t), at 520E; *Natal Fresh Produce Growers Association and others v Agroserve (Pty) Ltd and others* 1990 (4) SA 749 (N), at 758 G-759 D

[28] 1988 4 SA 42 (W)

that it has over time become well established and recognised as the authoritative voice in the protection of animals.

A more previous unreported decision, came to this conclusion by way of implication.[29] The court held that , since the Animal Protection Act gives the society the authority to take action in the event of an offence being committed in terms of the Act, the legislature must have intended that the society should also have a civil right of action to claim an interdict to prevent an offence from being committed or continued. The court, thus, granted *locus standi* on the basis that the society is impliedly authorised by statute to take action for the protection of animals.

However, with the exception of statutorily acknowledged organisations, the courts tend to be restrictive with regard to *locus standi* of organisations.

Class Action

In a very enlightened decision, a South African court allowed an individual to litigate in the interest of others, who were not themselves able to approach the court and thus followed the approach of Indian courts. In *Wood v Ondangwa Tribal Authority*[30] the South African Appellate Division acknowledged the possibility of a class action. It allowed church leaders to claim an interdict in the interest of a large, vaguely defined group or persons who feared that they would be illegally arrested, tried and subjected to summary punishment on account of their political affiliations. The court based the standing of the church leaders on the impracticality to expect the people under threat, many of whom were tribesmen living about 800 km from the seat of the court, to come to court themselves. This decision could have laid the foundation for a wider recognised class action. Courts, instead, declined to use it as a precedent to justify the relaxation of the traditional standing rules in other areas of law and limited its application to matters involving violations of life, liberty or physical integrity.[31]

It must be said, without a legally recognised interest in environmental preservation and aesthetic surroundings and a generally restrictive approach to litigation of organisations on behalf of their members, traditional South African jurisprudence on legal standing leaves not much room for

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[29] *Society for the Prevention of Cruelty to Animals v The University of the Witwatersrand*, unreported decision of the Witwatersrand Local Division delivered on 7 December 1987 under case number 23288/87

[30] (1975) (2) SA 294 (A)

[31] *Christian League of Southern Africa v Rall* 1981 (2) SA 821 (O) at 826-7; *Ahmadiyya Anjuman Ihaati-Islam Lahore (South Africa) v Muslim Judicial Council (Cape)* 1983 (4) SA 855 (C) at 864 E-F: *National Education Crisis Committee v State President of the Republic of South Africa* WLD (September 1986 Case No 16736/86, unreported

altruistic environmental claims by concerned individuals and environmental groups. Under common law, the constraints of traditional standing rules pertaining to organisations could, however, be surmounted if the legislation expressly acknowledged and authorised an organisation's activities to protect the environment. On the basis of in *Society for the Prevention of Cruelty to Animals (SPCA), Standerton v Nel and Others*, such an organisation would be dispensed to present a sufficient interest as ordinarily required

III.) United States

American jurisdiction has developed the most liberal interpretation of *locus standi* in matters related to the enforcement of environmental law. It has a generous common law approach to what qualifies as sufficient interests for *locus standi*. The infringement of legal rights is not required but rather an "injury in fact". Many statutes provide for enforcement actions in the public interest, the so called "citizen suit".

1.) Injury in fact

If there is no specific statute that provides for the invocation of the judicial process, applicants can seek judicial review of administrative decisions pursuant to § 10a of the Administrative Procedure Act (APA)[32], which stipulates:

"A person suffering legal wrong because of agency action, or is adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof."

Not only a legal wrong qualifies as a sufficient interests. The applicant is also entitled to judicial review if he is affected or aggrieved by the impugned action. Traditionally, American case law interpreted this as requiring an "injury in fact", a requirement which was originally derived from the case or controversy requirements of Article III of the American Constitution.[33] To be "adversely affected or aggrieved . . . . within the meaning" of a statute, the plaintiff must establish the injured interest falls within the zone of interests sought to be protected by the statutory provision whose violation forms the legal basis for the application.[34] For example, a company that has the contract to record and transcribe the agency's proceedings cannot invoke a statutory provision requiring hearings to be recorded. The company may be adversely affected by the agency's failure to record hearings; the provision, however, was clearly enacted to protect the interests of the parties to the proceedings and not those of the reporters.

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[32] 5 USCS § 702

[33] M S Greve "The private enforcement of environmental law" (1990) Tulane Law Review, 339, at 342 -43

[34] *Clarke v Securities Industry Assn*, 479 US 388, 396-397, 93 L Ed 2d 757, 107 S Ct 750 (1987)

The Supreme Court dealt with the problem of *locus standi* in its widespread and controversial case of *Sierra Club vs. Morton*[35]. Here a prominent environmental group took the initiative to protect the Mineral King Valley from degradation through the construction of a ski resort. It sought judicial review pursuant to §10(a) APA, claiming that various aspects of the proposed development contravene federal laws concerned with the preservation of national parks, forests and game refugees. It also sought preliminary and permanent injunctions restraining the federal officials involved from granting their approval.

The claimants were unsuccessful on the grounds that they did not meet the requirements for *locus standi*.

The court pointed out that the group itself or its members must have suffered an injury in fact.

The problem with Sierra Club's allegation was that it represented only the interests of the general public. It failed to show any particularised injuries of its or its members' interests. It did not allege that any of its members "would be affected in any of their activities or pastimes by the . . . development."[36]

The court did not agree with some previous decisions that held the interest of an organisation in the problem of environmental protection to be a sufficient interest.[37]. In *Hudson Valley v Volpe*, the court granted an environmental group standing because the group was in the best position to serve and protect the public interest: it had the money and time to proceed with the action. If the court had refused the group its standing, it would be difficult to understand who could be in the ideal position to act against unlawful administrative conduct. Thus, *Sierra Club v Morton* reverted back to the traditional line by stressing the "injury in fact" requirement.

2.) Sufficient interest

It has long been recognised that, for example, economic injuries are sufficient to lay the basis for standing.[38] Someone who can show that his economic position is adversely affected can assert an "injury in fact".

In *Sierra Club v. Morton*[39] , the Supreme Court went further and regarded environmental aesthetics and environmental well-being as cognisable interests. This expansion of cognisable interests has

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[35] 405 US 727, 31 L Ed 2d 636 (1972)

[36] Id. at 734

[37] *Environmental Defence Fund, Inc. v Hardin* 428 F. 2d 1093, 1097; *Scenic Hudson Preservation Conference v Federal Power Commission*, 354 F 2d 608 (1965); *Hudson Valley v Volpe*, 425 F 2d (1970)

[38] See *Data Processing Service v. Camp*, 397 U.S. 150, 25 L Ed 2d 184 (1970); *Barlow v. Collins*, 397 U.S. 159, 25 L.Ed. 2d 192 (1970)

been confirmed by several judgements.[40] In *Research Improves the Environment Inc. v. Costle*[41], the court found that the members of Research Improves the Environment Inc. would be adversely affected by the pollution of the water and the contamination of the marine life. Their "injury in fact" thus related to the fact that they were no longer be able to swim or fish in the waters degraded through chemical contamination. The applicant is not required as in traditional South African law, to show an infringement of economical interests or that his health is at risk. It is sufficient if the applicant shows that the recreational value of an area is diminished. The Sierra Club lacked standing because it failed "to allege that it or its members would be affected in any of their activities or pastimes. . .."[42] However, not any impairments to pastimes qualify as a sufficient interest. Applicants have to establish that they use the area in question in a way that would be "*significantly*[43] affected by the proposed actions. . . "

It can be concluded that there has been a trend of the courts to a generous reading of "injury in fact". The applicant does not have to prove health damage or depreciation in property value by activities that result in degradation of the environment. The applicant can also claim the infringement of recreational, aesthetic and environmental interests. The situation for the applicant thus becomes easier in a lot of cases - most certainly in cases where the applicant can claim the impairment to activities that cannot be relocated to other areas. This would include watching of rare animals or surveying of rare plants. Here, the applicant would be surely affected. This has been acknowledged in *Lujan v Defenders of Wildlife*[44]. Here, the applicants claimed that they intended travelling to Egypt and Sri Lanka in order to observe endangered animals whose continued existence they claimed to be jeopardised by a government decision. The court emphasised the proposition that the interest in observing animals is indeed a sufficient interest. It referred to the *Japan Whaling* case[45] where the court held that an environmental organisation could complain of excessive whale harvesting when the "whale watching and studying of their members would be adversely affected by continued whale harvesting"[46]. The reason why the court in *Lujan v Defenders of Wildlife*

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[39] 405 U.S. 727, 31 L Ed 2d 636 (1972)

[40] *Research Improves the Environment Inc. v. Costle*, 650 F.2d 1312 (5th Cir. 1981); *Sierra Club v. Aluminium Co. of America*, D.C.N.Y. 1984, 585 F. Supp. 842

[41] *supra*

[42] 405 U.S. 727, 31 L.Ed.2d 636 (1972), at 643

[43] emphasis added

[44] 504 US, 119 L Ed 2d 351 (1992)

[45] *Japan Whaling Association v American Cetacean Society*, 478 US 221, 92 L Ed 2d 166 (1986)

[46] 504 US, 119 L Ed 2d 351 (1992), at 372, n. 8

eventually denied the applicants standing was because they failed to demonstrate specific travel plans to the areas in question.

An applicant who merely claims to use certain sites within a vast tract of open countryside for recreational activities will have more difficulties in establishing standing. In *Lujan v National Wildlife Federation*[47], two members of the plaintiff organisation which challenged the opening of certain federal lands to mining and mineral leasing, averred personal use of certain federal lands in the vicinity of the former lands, and alleged injury to their recreational and aesthetic enjoyment of the countryside. The court recognised recreational use and aesthetic enjoyment as cognisable interests[48]. The problem was, however, that the land opened up to mining covered only 4500 acres in a vast natural area of two million acres. The members did not state that their recreational use extends to the particular 4500 acres covered by the impugned decision. The Supreme Court thus decided that their allegation was ambiguous and insufficient to show that their interests were actually affected by the action of the agency.

The question arises whether standing would have had to be granted if the applicants had showed that they use this particular piece of land. The court could conceivably have assumed the standpoint that the applicants are not sufficiently aggrieved as the applicants could have easily moved their activities to other lands within the vast area of open countryside; thus referring to the ruling of *Sierra Club v. Morton* that the applicant must be *significantly* affected.

It must nevertheless be said that under American standing law, which recognises the interest in environmental aesthetics, the possible range of applicants is much broader than in South Africa. Had the judges in *Van Moltke v. Costa Aerosa* relied on *Sierra Club v. Morton* instead of insisting that the right in question be peculiar to the applicant and not be shared by others, the applicant would have had *locus standi*.

3.) Standing of Organisations

It has been noted that organisations can have standing even if an interest of the organisation itself is not threatened but when it alleges that its members are suffering immediate or threatened injury as a result of the challenged action of which it complains.[49] An organisation can act as a representative of its members without being expressly authorised by the members. Unlike traditional South African standing law, the United States law allows an association to act on behalf of its members without individual authorisation as long as the association represents members who are themselves somehow adversely affected by the impugned measure.

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[47] 497 US 871, 111 L Ed 2d 695 (1990)

[48] *supra note*, at 715

[49] *Sierra Club v. Morton,* 405 U.S. 727, 31 L.Ed.2d 636 (1972)

The Supreme Court in *Hunt v. Washington State Apple Advertising Commission*[50] set out the prerequisites to proper associational standing as follows:

a.) The members of the association must, in theory, have standing to sue in their own right. This prerequisite requires the association to show that some or all members suffer an *injury in fact*.

b.) The interest, the association seeks to protect are germane to the organisation's purpose.

c.)Neither the claim asserted, nor the relief requested, requires the participation of individual members. The participation of the respective members is not necessary, for example, if the relief is injunctive or declaratory.

The question then arises as to the relationship required between the organisation and the injured persons in order to justify the proposition of *Sierra Club v. Morton* that the organisation can act as representatives of these injured persons.

This proposition requires a certain relation between the organisation and its subjects. An organisation can only sue on behalf of members as opposed to anonym contributors or supporters, as litigation on behalf of contributors or supporters more resembles a suit in the public interest. The organisation has, instead, to allege identifiable injuries of the organisation's members that have a certain degree of control over the organisation.[51] It is the measure of control, members exercise over the organisation that makes up the representativeness of an organisation. It is of no significance whether membership of a given association is voluntary or obligatory as long as the members are able to influence the politics and of an organisation[52], by, for example, electing the governing body.[53] Hence, a bar association or a union for which membership is required may well suit on behalf of its members. It is the fact that members retain control over the direction an organisation chooses to pursue, which distinguishes it from those organisations that consists of supporters or contributors who only give more or less money to the organisation or express opinions in letters.

4.) Summary

Summarising the American rules on standing, to meet the federal and similar state standards, the "injury in fact" allegations, backed by affidavits and oral testimony must specify:

that individual plaintiffs use, benefit from, and enjoy the area or resource involved; that any organisational plaintiff has identified members who use, benefit from, and enjoy the area or resource; and that some project or work or other activity will harm or damage the area or resource

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[50] 432 U.S. 333, 97 S.Ct. 2434, 53 L.Ed.2d 383 (1977)

[51] *Sierra Club v. Aluminium Co. of America*, D.C.N.Y. 1984, 585 F. Supp. 842, at 850

[52] U.S. Supreme Court in *Hunt in Washington Apple Advertising Community*, 432 U.S. 333, 97 S.Ct. 2434, 53 L.Ed.2d 383 (1977)

[53] *Sierra Club v. Aluminium Co. of America*, D.C.N.Y. 1984, 585 F. Supp. 842, at 851

or otherwise diminish the use, benefit, and enjoyment for the plaintiffs, or threaten the public health, safety, or welfare.

To back the "zone of protection" allegation, the complaint should show the relation of the statute it seeks to enforce to the protection of the area or resource and its intent to protect against the type of harm to a plaintiff which results from the challenged project, work, or other activity.

5.) Liberalisation of locus standi in environmental statutes / "citizen suit"

In the recent past growing environmental awareness has led to a comprehensive set of environmental statutes that creates various duties of state agencies to engage in the protection of the environment. The problem with these duties is that they are not open to judicial review for private citizens, since these duties are owed to the general public. Under traditional standards, a law that creates a duty to the general public as opposed to an individual citizen does not give rise to privately enforceable rights.[54]

The failure of the courts to develop a public interest action has driven the American legislatures to include "citizen suit" enforcement provisions in environmental statutes over the course of the past three decades.[55] These provisions allow private actors, frequently environmental interest groups, to bring suits against polluters for violations of environmental laws and against government officials for failure to perform nondiscretionary duties. Citizens are granted the ability to act as private attorneys general to sue on behalf on the community. They dispense the party seeking judicial review from coming up with farfetched allegations of invasions of personal interests. The development of citizen suit provisions occurred in response to a perceived governmental failure to enforce statutes.

The earliest example is the inception of the citizen suit provision in the Clean Air Act in 1970[56], which stipulates:

Except as provided in subsection (b) of this section, any person may commence a civil action on his own behalf-

(1) against any person (including (I) the United States, and (ii) any other governmental instrumentality or agency to the extent permitted by the Eleventh Amendment to the Constitution)

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[54] See e.g. *Cort v. Ash*, 422 U.S. 66, 45 L Ed 2d 26 (1975),

[55] See e.g. Toxic Substances Control Act, 15 U.S.C. §2619 (1988); Surface Mining Control and Reclamation Act of 1977, 30 U.S.C. § 1270 (1988); Clean Water Act of 1976, 33 U.S.C. § 1365 (1988); Marine Protection, Research and Sanctuaries Act of 1972, 33 U.S.C. § 1415 (g)(1) (1988); Safe Drinking Water Act, 42 U.S.C. § 300 j-8 (1988); Noise Control Act of 1972, 42 U.S.C. § 4911 (1988)

Almost every major environmental statute authorises a citizen suit

[56] Act of 1970 codified as amended at 42 U.S.C. § 7604

who is alleged to be in violation of (A) an emission standard or limitation under this chapter or (B) an order issued by the Administrator or a State with respect to such a standard or limitation,
(2) against the Administrator where there is alleged a failure of the Administrator to perform any act or duty under this chapter which is not discretionary with the Administrator, or
(3) against any person who proposes to construct or constructs any new or modified major emitting facility without a permit required under part C of subchapter I of this chapter (relating to significant deterioration of air quality) or part D of subchapter I of this chapter (relating to nonattainment) or who is alleged to be in violation of any condition of such a permit.

Once established in the Clean Air Act, the Congress endowed nearly every major environmental statute with a citizen suit. The institutionalisation of the citizen suit[57] is illustrated by the similarities of the provisions in different statutes.
To give the Administrator and other officials a chance to rectify inaction, all citizen suit provisions require individuals to give notice to the officials and wait 60 days before beginning proceedings.[58] When the State already initiated a court case, the individual cannot lodge a citizen suit but rather intervene in the pending court procedures.[59]

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[57] R B June "The structure of standing requirements for citizen suits and the scope of congressional power" (1994) Environmental Law 761 - 799

[58] See e.g. FWPCA § 505 (b); 33 U.S.C. § 1365 (b); SWDA § 7002 (b) (1) (a), 42 U.S.C. § 6972 (b) (1) (a)(1988); ESA § 11 (g) (2) (c), 16 U.S.C. § 1540 (g) (2) (c)

[59] See for example Clean Water Act of 1976, 33 U.S.C. § 1365 (b) (1988):
No action may be commenced-
(1) under subsection (a) (1) of this section (suit against other individuals)-
(A) prior to sixty days after the plaintiff has given notice of the alleged violation (I) to the Administrator, (ii) to the State in which the alleged violation occurs, and (iii) to any alleged violator of the standard, limitation, or order, or
(B) if the Administrator or State has commenced and is diligently prosecuting a civil or criminal action in a court of the United States, or a State to require compliance with the standard, limitation, or order, but in any such action in a court of the United States any citizen may intervene as a matter of right.

(2) under subsection (a) (2) of this section (suit against Administrator) prior to sixty days after the plaintiff has given notice of such action to the Administrator,. . .

The scope of possible litigants is very broad. The citizen suit provisions invariably stipulate that "any person may commence a civil action on his own behalf."[60] The meaning of person is further defined.

The citizen suit regulations provide remedies of injunctive relief (and civil penalties in some cases).[61] The civil penalties are paid to the Federal Treasury. However, the Courts have consistently held that plaintiffs cannot recover damages under the citizen suit provisions.[62]

Disputed is, however, the range of potential defendants. All of the citizen-provisions require that an action be commenced against a person who is alleged to "be in violation" of the act whose compliance the enforcer is seeking. There are courts that interpret this language narrowly, so as to require that the alleged violator still be violating the act at the time the citizen files the suit.[63] Some courts, on the other side, construe these provisions more broadly, so that the citizen may file suit even after the alleged violation has ceased.[64] The courts infer the restricted reading of the provision from the view that citizen suits play only a supplementary role beside public enforcement and the perceived need to keep the federal courts from being overburdened by litigation.[65] Yet, this standpoint faces the contention that violations of statutes often become noticeable with delay.[66] Adherence to the narrow approach would have the implausible consequence that the violator could comply with the regulatory requirements during that sixty-day period and avoid paying a penalty for past violations.[67] Thus, a narrow reading of the provision appears questionable.

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[60] See e.g. SWDA § 7002 (a), 42 U.S.C. § 6972 (a) (1988); ESA § 11 (g) (1), 16 U.S.C. § 1540 (g) (1)

[61] See e.g. FWPCA § 505 (a); 33 U.S.C. § 1365 (a); SWDA § 7002 (a), 42 U.S.C. § 6972 (a) (1988); ESA § 11 (g) (1), 16 U.S.C. § 1540 (g) (1) (no civil penalties in citizen suit)

[62] In *Middlesex County Sewerage Authority v. National Sea Clammers Association* 453 U.S. 1, 69 L Ed 2d 435, at 497 (1981), the Supreme Court ruled that the Clean Water Act gives private plaintiffs no right to damages

[63] *Hamker v. Diamond Shamrock Chemical Co.*, 756 F. 2d 392 (5th Cir. 1985)

[64] *Menzel v. County Utils. Corp.*, 712 F. 2d 91 (4th Cir. 1983); *Illinois v. Outboard Marine, Inc.*, 680 F. 2d 473 (7th Cir. 1982); *Evansville v. Dentucky Liquid Recycling, Inc.*, 604 F. 2d 1008 (7th Cir. 1979)

[65] *Hamker v. Diamond Shamrock Chemical Co.*, 756 F. 2d 392 (5th Cir. 1985), at 396

[66] J L Austin "The rise of citizen suit enforcement in environmental law: reconciling private and public attorneys general" (1986-87) Northwestern University Law Review, 220, at 244

[67] *Chesapeake Bay Foundation v. Gwaltney of Smithfield, Ltd.*, 611 F. Supp. 1542 (E.D. Va. 1985), at 1550

On the other side, permitting citizen suits over wholly past violations would bring about a risk of directing the plaintiffs' enforcement effort away from the statutory purpose of abatement, and toward violations that may long have been corrected at the time a complaint was filed.
The Supreme Court found a compromise by ruling, that the citizen cannot lodge suits for wholly past violations , but that jurisdiction exists if plaintiffs make a good faith allegation of "continuous or intermittent violation".[68]

A citizen wishing to lodge a suit is not confined to the provisions of a citizen suit. An appellant can always assert standing in accordance with the common law "injury in fact" requirement. This, for example, becomes important when a claimant cannot rely upon a citizen suit provision due to his failure to comply with its requirements, as happened for instance in *National Sea Clammers Association v, New York*[69]. Here, an association of fishermen sued federal state, and local officials to refrain from the discharge of toxic sewerage which contaminated the shellfish and marinelife in the waters where plaintiffs fished. Here the district court denied standing since the claimants failed to give notice as required by the citizen suit provision. The court of appeals, however, reversed and granted them standing. The court emphasised that the plaintiffs were not barred by the notice requirement because that provision only applies when "a non injured member of the public sues to enforce the Act."[70] The plaintiffs in this case, however, are injured in fact and thus can rely on the *injury in fact* - requirement, as stipulated in *Sierra Club v. Morton.*

6.) Closing the Courthouse Door

After a period of liberalisation of standing requirements in citizen suits, a tendency of the Federal Supreme Court to restrict environmental standing has become noticeable. The view of lower courts had been that a legislative grant of standing was constitutional even without showing of injury in fact.[71]
In the important case of *Lujan v Defenders of Wildlife*[72], however, the Supreme Court pointed out that the citizen suit runs counter the constitutional minimum of standing as required by Art. III of the Federal Constitution. Congress cannot confer standing as it deems fit under environmental citizen suit provisions. Plaintiffs must now establish a "case or controversy" under Article III.

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[68] *Chesapeake Bay Foundation v. Gwaltney of Smithfield, Ltd.*, 484 U.S. 49, 98 L Ed 2d 306 (1987), at 321

[69] 616 F.2d 1222 (3d Cir.), *cert. granted,* (449) U.S. (917, 101 S. Ct. 314, 66 L.Ed.2d 145 (1980)

[70] Id. at 1227

[71] See e.g. *Evans v. Lynn*, 537 F. 2d 571 (2d Cir. 1976); *Friends of the Earth v. Carey*, 535 F. 2d 165 (2d Cir. 1976)

[72] 504 US 555, 119 L Ed 2d 351 (1992)

The Court elaborated on the requirements as follows:

1.) The plaintiff must have suffered an **injury in fact** - that is, an invasion of a legally protected interest which is

(a) **concrete and particularised**, which means that the claimant must personally and individually affected and

(b) **actual or imminent**, not conjectural or hypothetical.

2.) There must be a **causal connection between the injury and the conduct** complained of.

3.) It must be likely, as opposed to merely speculative, that the **injury will be redressed by a favourable decision.**

To establish a "case or controversy", a citizen must allege and prove an imminent and substantial injury in fact.

A generalised interest in environmental protection does not qualify as an injury in fact.

Lujan arose under the Endangered Species Act of 1973. This Act provides that "Each Federal agency shall, in consultation with and with the assistance of the Secretary (of the Interior), insure that any action authorised, funded, or carried out by such agency . . . is not likely to jeopardise the continued existence of any endangered species.[73] An issue pertaining to this provision has been whether these obligations apply to actions of the U.S. government that are taken in foreign countries. After it had been the position of the Interior Department that it did indeed apply outside the United States, the Department changed his view in 1983 with a new regulation. Henceforth, the Act would no longer apply in foreign countries with the important consequence that American agencies funding foreign projects were no longer required to consult with the Secretary of the Interior if their projects would jeopardise the existence of endangered species.

Defenders of Wildlife claimed that the new regulation violated the statute. To establish standing under traditional nonstatutory standing law, a member of the environmental group claimed to have travelled to Egypt in 1986 to watch the habitat of the endangered Nile crocodile and to wish to do so again. A second member claimed that she had travelled to Sri Lanka to observe the habitat of the endangered Asian elephant and the leopard and that she intended to return to Sri Lanka to see members of these species.

The Court held that watching and studying certain animals qualifies as a sufficient interest. It refused, however, to grant standing to the applicants since they were unable to show injuries to their interests.

The claimants did not assert any specific plans. As they gave no time when they intended to travel to the mentioned habitats, they had shown no "actual or imminent" injury.[74]

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[73] 16 U.S.C. § 1536 (a)(2) (1988)

[74] 504 US 555, 119 L Ed 2d 351 (1992), at 367

The court stated, a general interest in studying or seeing endangered species, because of a professional commitment or otherwise does not qualify as a congnizable interest. There must be a "factual showing of perceptible harm."[75] Therefore, the Court could not find any injury in fact.
The Court next rejected the plaintiff's claim of standing based upon a statutory provision entitling "any person (to) commence a civil suit on his own behalf . . . to enjoin any person, including the United States and any other governmental instrumentality or agency . . . who is alleged to be in violation of any provision of this chapter."[76]
The Court drew the conclusion that the citizen suit provision of the Endangered Species Act as applied by the court of appeal runs counter the "case" or "controversy" requirement of Art. III of the Constitution. Art. III requires something more than "a generally available grievance about government"[77]. This finding rests on the Courts fear that the courts could usurp functions of the executive, namely the duty of the president to "take care that the laws be faithfully executed".[78]
Under Art. III, the courts are not allowed "to vindicate the public's nonconcrete interest in the proper administration of the laws"[79]. The claimant must show "that the action injures him in a concrete and personal way"[80]. Thus, this ruling fills citizen suits that are designed to give concerned citizens the opportunity to go to court to enforce environmental statutes with additional requirements. The plaintiff, now must point to a concrete injury, not merely to a congressional grant of standing.
This requirement, however, won't be a major stumbling block to successful lawsuits. Environmental groups are in most cases able to find a member who has the requisite injury. It is, however, more complicated to lodge a suit in the aftermath of *Lujan*. As an advantage can be seen that national environmental groups are now forced to co-operate with people in localities that are affected by pollution and whose interests might otherwise not receive enough attention by the national environmental groups' enforcement action policy.
The decision still leaves a number of cases untouched. The claimants' argument that their interest in observing certain animal's habitats was threatened was rejected. But only because their plans to travel there were not particularised. That a clean environment is a cognisable interest was itself not questioned by the Court. Claimants, to rely on this interest must establish that they use the area affected by the challenged activity if they want to claim environmental damage.[81] It follows, that if

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[75] 504 US 555, 119 L Ed 2d 351 (1992), at 368

[76] 16 U.S.C. § 1540 (g) (1) (1988)

[77] 504 US 555, 119 L Ed 2d 351 (1992), at 372

[78] 504 US 555, 119 L Ed 2d 351 (1992), at 374

[79] 504 US 555, 119 L Ed 2d 351 (1992), at 377 (Kennedy, J., concurring)

[80] 504 US 555, 119 L Ed 2d 351 (1992), at 377 (Kennedy, J., concurring)

[81] 504 US 555, 119 L Ed 2d 351 (1992), at 367

the claimants had particularised their travel plans, they would have had standing. The Court also endorsed the *Japan Whaling* case[82] to show that an environmental organisation could complain of excessive whale harvesting when the "whale watching and studying of their members would be adversely affected by continued whale harvesting".[83]

IV.) The significance of a widened access to justice regarding environmental law in the South African society

It's been said several times that the rigid approach of South African courts lags behind the needs of a modern society and that the *locus standi* rules should be considerably relaxed or altogether removed.[84] The requirement that only individuals who can claim an own interest at stake may have standing ignores the dynamics in a "mass orientated society"[85] Giving all concerned citizens access to judicial remedies is in keeping with the policy of empowerment of the individual, an aspect that has been emphasised by the White Paper on Environmental Management Policy.[86] Yet, granting *locus standi* to individuals with an interest in the environment is not very likely to lead to a massive surge of individuals initiating lawsuits. Litigation is, above all, very expensive. Many potential litigants would be deterred from suing by the prospect of having to pay the legal costs. This is particularly relevant for South Africa with its large third world population component. Even if the obstacle of litigation costs could be removed, as contemplated below, individuals might still lack the sophistication to deal with complex law. The American citizen suit which was originally expected to be a tool for individual citizens is mainly used by environmental organisations.[87] Organisations, unlike individual citizens, had sufficient expertise and resources to detect permit violations and to take legal action if they deem necessary. Thus, it's been emphasised that the significance of a relaxed *locus standi* law is in enabling litigants, mostly organisations to take actions in the interests of those citizen who are unable to approach a court for relief themselves.[88]

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[82] *Japan Whaling Association v. American Cetacean Society*, 478 U.S. 221, 92 L Ed 2d 166 (1986)

[83] 504 US 555, 119 L Ed 2d 351 (1992), at 372, n. 8

[84] see J Glazewski "Human rights approaches to environmental protection" in *Environmental rights and the new South African constitution*, ed A E Boyle, M R Anderson, p. 190; C Loots "Making environmental law effective" (1994) 1 SAJELP 17, at 31-32; W L R De Vos "Reflections on the introduction of a class action in South Africa" (1996 TSAR 639, at 656

[85] De Vos, supra, 640

[86] White Paper on Environmental Management Policy, p. 27

[87] M S Greve "The private enforcement of environmental law" (1990) Tulane Law Review, 339, at 351

[88] C Loots "Standing to enforce fundamental rights" (1994) SAJHR, 49 at 49

Very often, it is precisely those citizens that are not in the position to take legal action that have to live in a degraded environment. The reality in South Africa as in other contemporary societies is that the poor social classes live and work in environmentally unsound and harmful conditions.[89] In those cases where large numbers of people are affected, there is great benefit in one litigant being able to approach the court in the interests of all whose rights are infringed.[90] It is here, where the litigation of organisations on behalf of aggrieved individuals that are not in the position themselves to take actions becomes most significant. However, unlike American law that took a lead in the development of modern *locus standi* law, South African law remained exceptionally restrictive. It did not allow organisations to litigate on behalf of their members, let alone individuals outside the organisation. Affluent communities have the means to take action against polluting activities in their neighbourhood, such as the erection of a waste treatment plant, whereas this is not the case in poor communities. Apart from lacking the funds for litigation, environmental considerations are regarded with indifference by those black South Africans, whose lives and aspirations are dictated by the struggle for survival. Even if there was awareness of environmental issues, poor communities, are more likely to give in to economical pressures, such as the promise of developers to create much needed jobs, than wealthier communities would. All this gives rise to a scenario where poor communities bear the brunt of pollution by industrialisation due to the tendency to locate polluting activities in areas where the least resistance is expected. Since wealth in South Africa is distributed along race lines, this also becomes a racial issue. Opening access to judicial remedies thus must be seen in the context of redressing racial imbalances. The expertise and money of organisations committed to environmental protection should be harnessed for litigation on behalf of those disadvantaged groups.

The response to the aforesaid issues would be the relaxation of *locus standi* rules.
The interim constitution of 1993[91] and the final constitution[92] made this step and provided judicial relief to a wide range of claimants, notable a class action and a public interest action. These procedures are available only if the infringement of or any threat to a right entrenched in the Bill of Rights is alleged. However, the law commission proposed an extension of these procedures by means of legislation to other areas such as consumer protection and environmental issues.[93]

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[89] S B O Gutto "Environmental rights litigation, human rights and the role of non-governmental-and peoples' organisations in Africa" (1995) SAJELP, 1,at 12

[90] C. Loots *supra note* at 49

[91] Constitution of the Republic of South Africa 200 of 1993 s 7

[92] Constitution of the Republic of South Africa of 1996 s 38

[93] "The recognition of a class action in South African law" Working paper 57, project 88/1995 5, 13

The following chapter will to look at how section 38 impacts on the traditional law of standing. When an infringement of or a threat to any right in the Bill of Rights is alleged, any person entitled to approach a court may apply to a competent court for appropriate relief. Appropriate relief comprises the ordinary judicial remedies, namely 1) an order compelling the performance of an act; 2) an order interdicting the performance of an act; and section 38 expressly includes 3) a declaration of rights. It is uncertain whether the court may order the payment of damages for the infringement of rights in chapter 2.[94]

"Any person" entitled to the rights in chapter 2 includes juristic persons such as companies, clubs, societies, universities and welfare organisations. Although being no bearers of individual human rights, these bodies will have standing to challenge the constitutionality of laws and administrative actions.[95]

Section 38 changes the traditional rules of *locus standi* dramatically. In terms of section 38 (e), an association may act in the interest of its members. Organisations may therefore now, unlike at traditional common law, as stipulated, e.g. in *South African Optometric Association v Frames Distributors (Pty) Ltd* institute representative actions on behalf of their members.

Even further go s. 38 (c) and (d) whereby one can act "as a member of, or in the interest of, a group or class of persons" or "in the public interest".

V.) class action

Section 38 introduces into South African law the concept of the class action. A class action, according to the American model, where it has been best developed, is a procedural device that enables a large group of people, whose rights have been similarly infringed to sue the defendant as a collective entity without having to form an organisational unit. A representative party initiates the action "in the interest"[96] of a group or class of persons. In America, this tool has been particularly used in the field of consumer protection.

The problem of adequate representation and autonomy of the absent members arises when the acts of the representative bind all members. Can the interests of the class members be determined objectively or is consent of the represented members required for the actions of the representative? According to the American conception of class action, the court orders bind all absent members. As far as the participation of absent members is concerned, the American Federal Rule of Civil Procedure stipulates two concepts. In Fed. R. Civ. P. 23 (b) (1) and (2), on one hand it allows the

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[94] See C Loots "The impact of the constitution on environmental law" (1997) SAJELP, 57, at 63

[95] See A Cachalia et al, *fundamental rights in the new constitution-an overview of the new constitution and a commentary on chapter 3 on fundamental rights* (1994), 19

[96] s. 38 (c)

procedure to go ahead once the court has found that the interests of the representative class are congruent. Rule 23 (c) (2), on the other hand, requires that "notice must be given to the members of the class advising them that if they wish to be excluded from the action they must request exclusion by a certain date and that the judgement, whether favourable or not, will bind all those who do not request exclusion." A contentious issue became the form of notice[97] because individual notice to all members identifiable through reasonable effort, as required by the Supreme Court in *Eisen v Carlisle & Jaquilin*[98] may effectively kill the class action due to prohibitive costs if a vast number of members can be reasonably identified.

The South African constitution gives no clear indication as to how it conceives the class action in section 38. However, looking at the paragraph (c) in its context with the entire section 38, one notices that section 38 (c) states that anyone may act as a member or in the interest of a group. It does not use "on behalf" as in (b). Section 38 (b) allows litigation on behalf of persons thus with binding effect for them. Here, the applicant has to demonstrate that the persons he is representing cannot act in their own name. Whereas the omission of "on behalf" in section 38 (c) indicates that this paragraph refers to a broader concept of class actions that is not confined to those class actions with binding effect for the absent members and all its ensuing problems as discussed above. The class action was understood in this way by the judge in *Minister of Health & Welfare v Woodcarb (Pty) Ltd & Another*[99]. Here, the court allowed the Minister of Health and Welfare to seek an interdict restraining the respondent from discharging fumes on the basis that the Minister initiates a class action under the Interim Constitution.[100] Since the generation of smoke constituted an infringement of the neighbours' right to an "environment which is not detrimental to their health and well being"[101], the state authorities could claim *locus standi* on the grounds that they act in the interest of those neighbours. Here, no binding effect on the neighbours was considered by the court. For class actions with binding effect, provision must be made relating to the participation of the absent members. Some form of notice to the members of the class is required and they should also have the opportunity to exclude themselves from the action. Besides the form of notice, another issue is how members of a class can exclude themselves from the action. In terms of the American rules of federal procedure[102] members of the class must request exclusion from the action. It would also be conceivable to require people to indicate whether they wish to be inlcuded as members of the class. The law commission proposes a flexible approach. The judges may decide which form of

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[97] See De Vos, supra, 646-47

[98] 417 US 156, 40 L Ed 2d 732 (1974)

[99] 1996 (3) SA 155 (N) at 164 E-G

[100] s. 7 (4) (b) (iv)

[101] Interim Constitution Act 200 of 1993 s. 29

[102] Rule 23 (c) (2)

notice, whether individual notice or notice via media, and which form of exclusion is appropriate in the circumstances of a particular case.[103]

The Constitution extends the class action whose application South African courts hitherto limited only to violations of life, liberty or physical integrity[104] to all cases involving constitutional rights. The applicant in a class action has to demonstrate that a right in the Bill of Rights has been infringed or threatened. In the environmental context the applicant will mostly rely on section 24, therefore he has to establish that the health or well-being of an individual or group is being threatened or harmed.

Another significant difference to the American model is that the representative need not be a member of the group represented. This corresponds to the socio-economic patterns of South African society. Since a large section of the South African society is unsophisticated and poorly educated, it will be often unlikely that a member of such a community will initiate a class action. This problem became apparent in post-independence India.[105] After independence in India, the newly established Supreme Court had only been used by the wealthy and affluent. The traditional *locus standi* rule that only a person whose rights had been infringed could bring an action for judicial regress effectively deprived the poor and disadvantaged of judicial access. This changed only after the Supreme Court allowed persons to act on behalf of those who are unable to approach the court personally because of poverty, helplessness, disability, or a socially economically disadvantaged position.[106]
It is here where organisations with the interests of those communities at heart are of great benefit and need to be utilised and enabled to sue on behalf of them.

It is also important to note that the class action in conjunction with section 24 may also be used by state authorities to enforce environmental law by way of civil action. This was done in *Minister of Health & Welfare v Woodcarb (Pty) Ltd & Another.*
If the Constitution gives the class action such a broad meaning, the question arises as to how it relates to the public interest action.

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[103] "The recognition of a class action in South African law" Working paper 57, project 88/1995 5, p. 38

[104] see above

[105] See C Loots "Standing to enforce fundamental rights" (1994) SAJHR, 49 at 50

[106] *SP Gupta v Union of India* (1982) 2 SCR 365 at 520, AIR 1982 SC 149 at 189

VI.) public interest action

Cases qualifying as a public interest action that do not already fall under the category of class actions, can be those where the applicant cannot identify specific persons who are adversely affected by the wrong complained of. It has been argued that the public interest action as well necessitates the demonstration that the constitutional rights of an individual are harmed or threatened.[107] This, however, would create an overlap with the class action. Justice O'Regan points out that it flows from the character of the public interest that it is sufficient to show that the rule or conduct complained of is infringing a constitutional right without pointing to an individual case of infringement. The public has an interest in the infringement of rights generally, not particularly.[108] The occurrence of rights infringements may then be assumed, unless it can be ruled out that there are people being adversely affected by the act or statute complained of. It must be generally possible that human beings are affected by the impugned act or legislation.

Loots cites as an example for a case of public interest, the interdict seeking to prevent the emission of CFCs on the basis that damage to the ozone layer potentially affects all persons.[109]

As another example can be mentioned the review of legislation that is alleged to be unconstitutional.[110]

1.) public interest

If it comes to enforcement of statutes it can be safely said that the upholding of the rule of law is in the public interest. This is equally true for the review of constitutionality of statutes. And in the environmental context, it must be said that the promotion and protection of an intact ecology is clearly a public interest. This has been acknowledged, for example, in the Rhodesian case of *King v. Dykes*[111] when the court formulated its land use ethics. It held "that an owner must not use his land in a way which may prejudice his neighbours or the community in which he lives and that he holds the land in trust for future generations." Here, the court articulated that the public at large have an environmental interest in privately owned land that prevents the owner to use the land as he pleases. Justice O'Regan said "Factors relevant to determining whether a person is genuinely acting in the public interest will include considerations such as: whether there is another reasonable and effective manner in which the challenge can be brought; the nature of the relief sought; and the extent to

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[107] T Winstanley "Entrenching environmental protection in the new constitution" (1995) SAJELP, 85

[108] *Ferreira v Levin No and others*, 1996 (1) SA 984 (CC), at para 235

[109] "The impact of the constitution on environmental law" (1997) SAJELP, 57, at 65

[110] See C Loots supra, at 65; also Justice O'Regan in *Ferreira v Levin No and others*, 1996 (1) SA 984 (CC) at para 234-37

[111] (1971) 3 SA 540 RA, at 545

which it is of general and prospective application; and the range of persons or groups who may be directly affected by any order made by the Court. . ."[112]

2.) Dynamics of private litigation activities

An issue that needs to be addressed here is the dynamics of private litigation activities that a generous *locus standi* law brings about. Public interest litigants are supposed to represent the interests of the public at large. Similarly the representative in a class action should have the interest of the class at heart. However, as the case of the American citizen suit shows, private litigation might not always correlate with the optimal public benefit.

The American example of the Clean Water Act illustrates that the environmental groups are driven by economic calculations rather than public benefits in their motives to take enforcement actions.[113] First of all, organisations tend to direct their efforts not at the most serious violations but at those that involve the least efforts and expenses. However, if the litigant is driven by considerations other than the interests he ostensibly represents, then it poses the question whether the litigation may still be seen as in the public interest in the case of a public interest action; or as far as class actions are concerned whether the representative truly acts in the interests of the class.

Environmental groups in America tend to act in easy and non complicated cases when costs of detection and enforcement are low rather than in cases in which enforcement is most beneficial in terms of social and environmental gains. That is why most of the private actions was taken under the Clean Water Act where organisations can resort to publicised discharge records. A permit required under the Clean Water Act for discharge of regulated pollutants[114], besides limiting the amount of pollutants discharged with a facility's effluent, requires its holder to periodically file discharge-monitoring reports.[115] The reports are generally available to the public.[116] Therefore, it is relatively easy to check and compare the facility permits with the discharge reports, if one suspects a violation of pollution limits. The reports save organisations own detection efforts.

While it was relatively easy to detect transgressions of standards and limits under the Clean Water Act, it turned out to be particular difficult to establish transgressions within the Clean Air Act enforcement. Here the emission standards or limitations are not easily to be determined by measurement. Instead, other requirements relating to operation or maintenance, design and

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[112] *Ferreira v Levin No and others*, 1996 (1) SA 984 (CC) at para 234

[113] See M S Greve "The private enforcement of environmental law" (1990) Tulane Law Review, 339

[114] See Id. §§ 1311 (a), 1342 (a)

[115] Id. § 1342 (a)(2)

[116] Id. § 1318

equipment, work practices and operational standards are to be considered as well.[117] In addition, in the field of air pollution, detection of the source of pollution is difficult where there are multiple emitting facilities in a small area. There is no uniform system of record keeping of compliance data. A cumbersome system of exceptions to standard compliance necessitates a comprehensive assembling, correlating and interpreting of data.. Hence, an environmental group wishing to enforce Clean Air Act requirements takes a substantial risk that after an expensive investigation, the court would find no violations.[118] These difficulties operate as a considerable disincentive for enforcement actions. These dynamics that are at work here, however, frustrate the idea of citizen suit provisions. Citzen suit provisions were thought to facilitate a process in which private entities operate as a detector of those illegal activities that remain unnoticed by public enforcement activities. Instead, often NGO's focus their activities on transgressions that are in fact already publicly recorded. As a result, rather than supplementing each other, public and private enforcement activities are targeted at the same objects.

South African environmental groups will act similarly to their American counterparts. A concentration of private efforts on those cases that bring about the greatest social benefit must, however, be preferred. Yet, to insist on realisation of this goal seems to be idealistic. Environmental groups, as any other prospective private litigant, are constrained by budgetary considerations. This, however, does not change the public interest character of a public interest action. Neither does it necessarily question the representativeness of a class action litigant.

The possible inhibiting effect of complicated cases may to some extent be counteracted by the operation of fact-finding commissions.[119] The assistance of fact-finding commission is considered by the law commission's working paper on class actions.[120]

Furthermore, the motivation of public interest and class action litigants may be manipulated by the prospect of financial gain.

Often, the citizen-suit actions are influenced by the prospect of gaining some financial benefit as is illustrated by the settlements under the Clean water Act.

Since, today, the basic legal questions have been adjudicated, most of the organisations' legal actions under the Clean Water Act lead to settlements and consent decrees.[121]

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[117] 42 U.S.C. § 7602 (k)(Supp. V 1993)

[118] E Gauna "Federal environmental citizen provisions: obstacles and incentives on the road to environmental justice" (1995) Ecology Law Quarterly , 1 at 56

[119] see Indian example as discussed by S Meer "Litigating fundamental rights: rights litigation and social action litigation in India- a lesson for South Africa" (1993) SAJHR, 358, at 363

[120] "The recognition of a class action in South African law" Working paper 57, Project 88 (1995), 14

The settlements usually comprise amongst others, provisions for achieving compliance with permit limits and provisions for the payment of attorney's fees and litigation costs to the plaintiff group and so-called "mitigation" or "credit" programmes, to be instituted or paid for in addition to fines. The credit programmes involve payments to environmental organisations for costs they incur in course of their work, yet normally not to the organisation taking the enforcement action. The inclusion of these transfer payments in the settlements agreements is to be explained by the particularities of the Clean Water Act. Unlike other environmental statutes, this Act provides for the payment of fines. To ensure strictly altruistic citizen enforcement these fines are payable to the United States Treasury. Nonetheless it generates these rather self-serving transfer payments. Since both the offender and the enforcing environmental group are better off if they negotiated a private transfer payment that is less than the statutory fine and often even tax deductible[122] the parties are induced to agree on these payments.

The prospects of financial gain is understandably a potential determinant for private litigants. When payments to litigants are permitted there is a danger of abuse. Private enforcers could come on the market who operate for the sheer profit. This certainly would not be in the public interest as required by s. 38 (d). Similarly, the motivation for litigants determined by financial gains is inconsistent with the idea of a class action. The litigant in a class action is supposed to represent the interests of a class or group of people, which may be frustrated if the acts of the representative party are motivated by the prospects of monetary benefits.

Procedural regulations should be aimed at preventing private litigation that is misguided by considerations hostile to underlying purposes of class actions and public interest actions. The law commission proposes a two-stage approach to class action proceedings.[123] At the first stage, the litigant brings an application before the court for leave to institute a class action. Only after certification by the court, the applicant may go ahead with the proceedings. This works as a mechanism to ward off undesirable suits. A similar approach may be chosen for the public interest action, which gives the court the chance to check whether the proceedings are consistent with the public interest requirement. This effectively prevents, e.g., the operation of groups acting for the mere profit.

Moreover, settlements should be subject to court approval. Before approving, the court scrutinises the terms of the settlement and underlying motives. Transfer payments to organisations other than a party of the settlement are not necessarily unacceptable. In fact, it is a source of funds for

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[121] M S Greve "The private enforcement of environmental law"(1990) Tulane Law Review, 339, at 355

[122] M S Greve *supra* at 358

[123] "The recognition of a class action in South African law" Working paper 57, Project 88 (1995), 58-59

organisations that enables them to operate efficiently and provide support to individuals that are not in the position to approach a court themselves. Furthermore, in the United States, environmental mitigation projects have successfully been launched with funds raised with Clean Water Act citizen suit settlements.[124] Thus, payments to environmental groups or mitigation projects as in the American example may well be included in settlements. Individual cases of abuses may be dealt with in the process of court approval.

VII.) Infringement of a right or threat to any right in the Bill of Rights

As an applicant is required to allege the infringement of a right entrenched in chapter 2 the relaxed standing rules of section 38 are of no use if the applicant merely claims the violation of a statute. An environmental group or concerned individual wishing to oppose the establishment of a waste disposal site (as happened in *Van Moltke v Costa Aerosa*) in the public interest on the ground that environmental or planning statutes are infringed cannot do so under section 38. Those applicants seeking enforcement of environmental statutes would however have *locus standi* if they could show that the opposed proposal would at the same time infringe section 24.

A concerned individual or organisation wishing to litigate an environmental case as a class action or public interest action will in most cases have to do so by claiming an infringement of section 24. Section 24 recognises the right to an environment that is not harmful to health and well-being. The right to a healthy environment ensures certain ecological minimum standards. It becomes relevant, for example, in cases where communities are exposed to health hazards caused by adjoining industries or waste disposal sites polluting the air or/and (ground)-water.

The term well-being is rather broad. Glazewski interprets it as including the aesthetic and spiritual dimension of the natural environment. This would extend to the interest in the maintenance of wild places.[125] The question may arise of whether the claimant has to demonstrate that he lives in or is going to visit the area in question as required by American jurisprudence[126]. It is submitted that it would go too far to include in the term well-being the comfort that one might derive from the sheer knowledge of the abscence of harm to a certain wilderness area which the claimant does not frequent. Someone living in Johannesburg cannot claim that his well-being is affected because of a waste disposal site that has been set up near Cape Town, unless he is going to travel there. It is

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[124] Ecology Law Quarterly 95, 48

[125] J Glazewski "Environmental rights and the new South African constitution" in *human rights approaches to environmental protection* ed. A Boyle & M R Anderson, Clarendon Press Oxford 1996, 177 at 187

[126] See *Lujan v Defenders of Wildlife* 504 US 555, 119 L Ed 2d 351 (1992

submitted that section 24 (a) refers to the immediate environment that can only affect physically present humans. This question is, however, mostly irrelevant as the claimant may initiate a class action or public interest action. Here, the claimant merely has to find someone who is affected by the act complained of; or if he cannot specify an individual, he may initiate a public interest action. Then, the court simply has to assume that there is someone who is or will be affected unless it can be ruled out that a human can enter the area in question. It becomes clear that the *locus standi* rules in section 38 go further than American law. According to *Lujan v Defenders of Wildlife*, applicants have to specify travel plans to the area in question whereas this is not necessary under section 38.

1.) Enforcement of Statutes

The right to an environment that is not harmful to health or well-being in section 24 (a) can be invoked for the enforcement of statutes. The non-compliance of an authority with non-discretionary duties created by law may result in the violation of section 24 (a). Thus, on the basis of section 24 (a) an applicant may interdict a public authority that, for example, is about to permit the establishment of a waste disposal site under the violation of certain standards set by law.
Section 24 (a) may also be invoked with regard to discretionary duties. The right to an environment that is not harmful to health or well-being does not anticipate certain outcomes of a decision-making process. It, however, imposes the duty to take due regard of factors relevant to someone's health or well-being. This applies to both administrative decisionmaking and legislative decisionmaking. Failure to conduct an impact assessment or failure to take account of adverse impacts disclosed in an environmental impact assessment report may be impugned on the basis of section 24 (a).[127]Alternatively, the right to just administrative action in section 33 can be invoked, since making a decision without having carried out the required procedures is not procedurally fair.[128]
The same result could be achieved by relying on section 24 (b). Section 24 (b) guarantees the right to have the environment protected through reasonable legislative and other measures. This paragraph creates the entitlement to compel state authorities to take appropriate steps to protect the environment. In the context of enforcement of statutes, it requires officials to comply with their statutory duties, whether discretionary or nondiscretionary.[129]

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[127] C Loots "Impact of the constitution on environmental law" (1997) SAJELP, 57 at 58

[128] See *Van Huysteen & Others NNO v Minister of Environmental Affairs and Tourism & Others* 1996 (1) SA 283 (C)

[129] C Loots "Impact of the constitution on environmental law" (1997) SAJELP, 57 at 61-62

2.) Review of legislation

On a similar basis, the constitutionality of legislation may be reviewed, for example, if the applicant claims that the legislature failed to consider the cancerous potential of a substance whose emission it allowed through an enactment. This failure results in an infringement of the right to an environment not harmful to health or well-being in section 24 (a). Even more obvious here, section 24 (b) is applicable, which expressly extends the duty to protect the environment to the legislature[130]. Read together with section 38 (d) (public interest action), it provides a useful basis for reviews of legislation. It removes obstacles of *locus standi* and ripeness that litigants seeking review of legislation were hitherto faced with. In *Cabinet of the Transitional Government for the Territory of South West Africa v* Eins[131] the plaintiff applied for an order declaring legislation invalid in terms of the South West Africa Constitution Act 39 of 1968. The legislation in question empowered the Transitional Cabinet to evict people from the territory. The applicant alleged being one of thousands of people who could be prohibited from being within the territory of South West Africa. He claimed that the legislation deprived him and others of the fundamental right to reside in South West Africa, which was guaranteed by the Constitution. The Appellate Division refused to grant standing to the applicant because there was no evidence that any action had been taken against him, or that the Cabinet intended to take any action against him. The result of this approach is that a person does not have standing until he is actually adversely affected by the legislation or action complained of. The applicant in *Cabinet of the Transitional Government for the Territory of South West Africa v Eins* did not assert to be representing the thousands of people whom he alleged were in the same position as him. The issue here, therefore, was really more the ripeness of the case rather than the *locus standi* of the applicant.

Section 38 (d) changes the legal situation of those seeking review of statutes. Under section 38, applicants seeking review of statutes do not have to wait until they are actually adversely affected by the statute. In *Ferreira v Levin No and others*[132], the court held that litigants impugning legislation on the ground that it violates principles of fair trial need not wait until they themselves are being prosecuted, since they may also act in the public interest under section 38 (d).

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[130] S. 24 (b) reads: Everyone has the right to have the environment protected . . . through reasonable legislative and other measures . . .

[131] 1988 (3) SA 369 (A)

[132] 1996 (1) SA 984 (CC), at para 231- 237

3.) Section 24 (b)

Section 24 (b) widens the range of possible claims to those that seek the enactment of legislation (section 24 (b)) and also to those that relate to conservation (section 24 (b) (ii)); both could not have been brought under the Interim Constitution.

Section 24 (b) (ii) creates the entitlement to have conservation of the environment promoted, for the benefit of present and future generations, through reasonable legislative and other measures. The right in section 24 (b) takes account of the interest of future generations which might extend to an area for whose conservation current generations see no need. Thus, the range of protection of section 24 (b) (ii) even extends to areas that are currently uninhabited.

Hence, whereas in the context of a public interest action, it is ordinarily required that it be generally possible that human beings are adversely affected[133], this is not so if a claimant relies on section 24 (b) (ii). A public interest litigant, claiming promotion of conservation, thus, has standing regarding wilderness areas where there are currently no humans that could be affected. Section 24 (b) (ii) thus introduces an almost ecocentric approach as opposed to the usually anthropocentric character of chapter 2 rights.

4.) Horizontality of section 24

Often, an applicant may wish to litigate against another private directly, as happened in *Van Moltke v. Costa Aerosa*.

The applicant in those cases can invoke section 38 in conjunction with section 24 only if section 24 apply to the relationship between private individuals. This is called horizontal application. The Constitutional Court in *Du Plessis v De Klerk*[134] held that the interim constitution had only vertical application. This will not necessarily apply to the final constitution since section 8 (2) provides that "A provision of the Bill of Rights binds a natural or juristic person if, an to the extent that, it is applicable taking into account the nature of the right and the nature of any duty imposed by the right."

This suggests that the chapter 2 rights will apply horizontally when it is appropriate that they should do so. It seems appropriate that the right to an environment not harmful to health and well-being applies horizontally.[135]

Having said that, the applicant in *Van Moltke v Costa Aerosa* should have no difficulties to base his *locus standi* on the constitution.

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[133] See VI.)

[134] 1996 (3) SA 850 (CC)

[135] C Loots "Impact of the constitution on environmental law" (1997) SAJELP, 57 at 59

He could act in his own interest (section 38 (a)) and claim that his well-being is threatened by a waste disposal site that does not comply with planning statutes.

5.) Conclusion

Section 38 in conjunction with section 24 gives the opportunity for litigation for a wide range of litigants. The South African law on standing is in effect more generous than American law. The American Supreme Court in *Lujan* made clear that it insists on the establishment of a sufficient interest even within the ambit of citizen suit provision. Under American environmental law, a litigant has to establish that he himself or in case of an organisation the members are adversely affected, even if it is only in their pastimes.[136] If the claim concerns an area remote from the litigant, he has to demonstrate specific travel plans to the area in question. A South African litigant wouldn't even have to do this. Virtually everyone can approach a court seeking environmental protection, irrespective of whether the litigant is adversely affected by the alleged infringement of rights. Litigants will almost always find someone whose health or at least well-being is threatened or infringed by the impugned act. It is not necessary for the litigant to point to specific individuals for the initiation of a public interest action.

The public interest action also dispenses the litigant from the burden to descend into arguments about the causal relationships between the activity of a specific polluter and the harm suffered by an individual. This becomes relevant in the case of water and particularly air pollution. Detection of the source of pollution is difficult where there are multiple emitting facilities in a small area. Under traditional standing law, the applicant would have to prove that the harm suffered by him stems from the activities of the respondent. Section 38 in effect achieves the same result as American law achieved with citizen suit provisions. To establish standing, citizen-suit plaintiffs merely need to allege that their actual use of an environmental resource is "adversely affected" by its polluted condition; they do not need to show that their injuries were caused specifically by the alleged violator.[137]

And in case a litigant in an action against a public authority is entirely unable to establish that humans could be possibly affected, then he can still resort to section 24 (b) (ii). The private litigant effectively functions as a private attorney general in the field of environmental protection.

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[136] See *Sierra Club v Morton*

[137] J L Austin "The rise of citizen suit enforcement in environmental law: reconciling private and public attorneys general" (1986-87) Northwestern University Law Review 220 at 227; Under the Clean Water Act, any "citizen may bring suit, 33 U.S.C. § 1365 (a) (1982), with citizen defined as "a person or persons having an interest which is or may be adversely affected", id. § 1365 (g); this formulation corresponds to the test set forth in *Sierra Club v Morton* 405 U.S. 727 (1972)

VIII.) Separation of powers

A generous *locus standi* law raises the issue of the separation of powers. At first glance, it looks very appealing to relax standing requirements so as to give citizens the opportunity to take action for the protection of the environment. In particular, will it enable them to have statutory environmental law enforced by means of court decisions. The individual would become the initiator of judicial scrutiny of other citizens' and administrative compliance with environmental statutes. This might be an economically efficient way to achieve an optimal degree of protection of the environment as it is an incentive for individuals to notice and bring actions to protect biotopes or to attack antiecological acts by the state or other individuals.[138]

However, this sort of enthusiasm must not eclipse that such a liberalisation of standing requirements becomes an issue of separation of powers as was pointed out by Solicitor-General in the Appendix to opinion of Justice Douglas in *Sierra Club vs. Morton* and Scalia A in his essay "The Doctrine of standing as an essential element of the separation of powers"[139] It is feared that the judiciary invades the dominion of the government.

The notion that certain tasks are better left to branches of government was the premise *Lujan v Defenders of Wildlifers* was based on. Justice Scalia's basic objection to the citizen-suit provision was that it enables the courts to ensure the executive officer's compliance with environmental laws. This, however, entails a risk of serious interference with executive powers since the duty to "take care that the laws be faithfully executed" is assigned to the President.[140]

Traditionally the judiciary is confined to the judicial resolution of concrete conflicts. Section 38 in conjunction with section 24 has the potential to give rise to a wave of altruistic lawsuits related to the protection of the environment by organisations and individuals. The dealing with public threats like the protection of the environment is, however, largely a political matter that may not be interfered with by the judiciary. Similarly, as the thrust of environmentally relevant activities are regulated, the applicants will often seek the enforcement of statutes. The law enforcement with its inherent policymaking is vested in the President as the head of the Government.[141] All policymaking and enforcement authority vested in administrative agencies must be discharged subject to supervision by the Government who, through the power of appointment and removal in particular, determines his subordinate's exercise of such responsibilities.[142] Giving private individuals the

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[138] E Brandl & H Bungert , "Constitutional entrenchment of environmental protection" (1992) The Harvard Environmental Law Review Vol. 16, 1 (88)

[139] (1983) 17 Suffolk University Law Review 881

[140] 504 US, 119 L Ed 2d 351 (1992) at 360

[141] s. 85 (2) (a)

[142] H J Krent & E G Shenkman "Of citizen suits and citizen Sunstein" (1993) Michigan Law Review, 1793 at 1799

opportunity for altruistic lawsuits means transferring law enforcement to the courts without the justification of resolving conflicts involving private interests. The courts are, however, to a lesser extent politically accountable than the executive. Even worse, private entities that are the initiators of court procedures and thus may determine the pace of law enforcement are not accountable at all. This, however, is contrary to democratic principles that demand that decisions about how best to redress injuries to the general should be left to actors who are politically accountable.

The increased opportunity for individual entities to file suits may cause the administrative to lose control over its law enforcement policy. Executives' control over law enforcement allows for the exercise of discretion to enforce or not to enforce and permits flexibility in enforcement efforts as conditions change.[143] Environmental organisations, however, might follow policies different from those of the executive when enforcing law. Private groups might sue for their own pecuniary gain irrespective of the public importance of the matter. Such suits may impair the ability of authorities to develop long-standing, co-operative relationships with regulated firms. These relationships, when used in conjunction with vigorous enforcement are conducive to the attainment of environmental enforcement objectives.[144]

In the U.S. environmental organisations today, often enforce statutes outside the courtroom. The basic legal questions under the Clean Water Act have largely been adjudicated so that in most of the cases the violators of environmental statutes are prepared to strike settlements with environmental organisations.[145]

These agreements potentially might not be in the public interest and they might often interfere with the authorities' discretion to enforce or not to enforce. The decision if and to what extent to enforce a provision is ultimately a political one. The executive can be held accountable for these decision whereas private entities cannot.

This raises the question as to how the executive can retain control to uphold a unified law enforcement.

When dealing with the issue of separation of powers, one has to acknowledge that a widened *locus standi* does not necessarily constitutes an invasion into governmental or legislative spheres. The grant of *locus standi* does not automatically precipitate the success of the lawsuit. The merits of a case are decided separately. The lawsuit of an individual is successful only if the impugned act clearly violates standards or norms by which the act is measured. If there are no norms or standards

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[143] H J Krent & E G Shenkman *supra,* at 1803

[144] J L Austin "The rise of citizen suit enforcement in environmental law: reconciling private and public attorneys general" (1986-87) Northwestern University Law Review 220 at 223

[145] M S Greve "The private enforcement of environmental law" (1990) Tulane Law Review, 339, at 355

the court has to exercise deference to the executive and legislative. The standards and norms in a suit based on section 38 is the constitution, in the environmental context in particular section 24. Due to its vagueness of section 24, a concrete content is hard to determine. In addition, as any other right, the environmental right in section 24 is limitable. The vague limitation clause in section 36 allowing the limitation of rights, providing that such limitation is reasonable, justifiable in an open and democratic society adds to the vagueness of section 24.[146] The environmental right in the constitution can hardly be said to provide clear legal standards against which the impingement on the right are to be measured and balanced against other rights.[147] Courts can only say what the law is. If the law, here the constitution, does not say anything the courts lack judicially cognisable standards and thus have to defer to other state authorities. The measure of environmental protection will therefore to a large extent determined by policy decisions of the government and of the legislature. Thus, the generous *locus standi* rules of section 38 must not eclipse that section 24 grants little power to the courts to enjoin authorities to perform in a certain way. Courts should exercise self-restraint when dealing with section 24 rather than give it a content that interferes with policy matters that are down to the government and legislature.

The discretion of those state authorities ends, however, in extreme cases, such as where living conditions of people are so unacceptable that they are clearly out of proportion to the benefits of the limitation of the right. Furthermore, the court may enjoin authorities to take account of certain health risks of substances when they failed to do so.

It is a little easier for a litigant when the legislature gives content to section 24 by means of environmental legislation providing legal standards against which the infringement on the right can be measured. In so far as standards and norms are provided, the court may order compliance. Again, if a statute provides for discretion of the executive, the courts have to exercise deference.

Ultimately, the threat of courts encroaching upon the dominion of other spheres of government becomes less serious if courts exercise reasonable deference. Section 24 at least provides no grounds for the fear that the judiciary might infer from it concrete duties that interfere with policy questions of the government. Under these circumstances the argument that the private individual interferes with executive's responsibilities when he sues to enforce law can be doubted.

An interdict compelling an official to comply with a mandatory duty merely redresses unlawful performance of state authorities. Thus, suits in the public interest cannot generally be said to run counter democratic principles. In fact, it is not democratic if authorities do not enforce duties made mandatory to them.

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[146] s. 36

[147] T P van Reenen "Locus standi in south African environmental law: a reappraisal in international and comparative perspective" (1995) SAJELP 121 at 143

On the other side, if the statute confers discretion upon the authorities, courts have no judicable standards to enforce.

IX.) The issue of governmental participation

It is submitted that the legislature enacts legislation regulating class action and public interest action. This is necessary to respond to the specific problems arising out of the broadening of standing rules. In the following chapter, those problems will be discussed with particular reference to the American experience with citizen suits.

Many of these problems revolve around the issue of the already discussed relationship between courts and government branches. In America as in South Africa the power to enforce law is vested in the president as the head of government.[148] The interest in unified law enforcement is thus constitutionally sanctioned. It is constitutionally critical if private suits impinge on adminstrative's prerogative to structure law enforcement. It can, thus be held that the constitution requires some executive control over private public interest enforcement actions.[149] Besides being a constitutional issue, it has been said above that the government as the ultimate enforcer is to be favoured also for its practical advantages.

It was pointed out that the authorities' control over enforcement policy will be diminished by a rise of public interest lawsuits concerned with the implementation of statutes.

One of the issues that arise in this context is whether governmental action is precluded by prior private suits seeking the enforcement of statutes. Occasionally, the government might have an interest in taking further measures, which would be barred if one took the view that preceding private action precluded any subsequent enforcement action on the same matter.

The issue arose particularly in the context of citizen suits.[150] One could argue in favour of a preclusion by stating that in case of subsequent government enforcement action the defendant has the burden of defending the same charges twice.[151] Furthermore, it was stressed that the possibility of subsequent governmental action renders private action less effective. If the Environmental Protection Agency (EPA), which is in charge of enforcing federal environmental statutes and issuing permits can easily override prior decisions or settlements, the defendant is discouraged to settle a citizen suit, and a court might view the citizen suit much less seriously.[152]

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[148] U.S. constitution art. II § 3; SA constitution s. 85

[149] e.g. H J Krent & E G Shenkman *supra,* at 1794

[150] See J L Austin, *supra*, at 250-56

[151] *United States* v. *StaufferChem. Co.*, 464 U.S. 165, 78 L Ed 2d 388 (1984)

[152] J L Austin, *supra*, at 250-51

The same issues arise under the South African *locus standi* rules. The authority dealing with the enforcement of statutes and permit conditions would be increasingly barred from taking actions if one presumed preclusion by private suits whose number will rise under the new *locus standi* rules. This would lead to shrinking control of the authorities over the implementation of statutes. Therefore, the general rule in American law that allows governmental enforcement action subsequent to private action[153] is to be favoured. The administrative must be able to take further steps where it deems necessary.

The problem of government authorities loosing control over statute implementation could be further mitigated if the administrative got involved prior to private suits.

American citizen-suit provisions contain several procedural barriers for the citizen designed to enable the governmental authority to intervene in private procedures.

First, before filing suit, the citizen-suit plaintiff must issue a written "notice of intent to sue" to both the alleged violator and to the governmental authority.[154] Generally, the applicant may not file suit until 60 days after giving such notice.[155] This is to give the governmental authority and the polluting source a chance to rectify the violations.[156] Most statutes provide that applicants may not file suit if governmental authorities are "diligently prosecuting" the violator in a "court"[157] The Clean Water Act requires the citizen-suit plaintiffs to serve a copy of any action filed in court on the Attorney General and the Administrator of the EPA.[158] The same Act also provides that consent decrees to which the United States is not a party are not final until forty-five days after both the Attorney General and the Administrator have received a copy of the decree.[159]

It should be considered by the legislature to include provisions similar to those mentioned above. Giving notice to the relevant authorities prior to filing suit takes account of the governments prerogative over statute implementation and is thus in keeping with section 85 of the constitution. Moreover, it serves the interest of the applicant. The authority given notice is prompted to consider its failure to perform in accordance with laws. This might result in authority action that comes closer to the applicants demands than a court decision. This is particularly true in cases of administrative discretion, where the court has to exercise self-restraint. The involvement of the administrative prior to filing suit, thus effectively provides the applicants with an additional stage of appeal.

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[153] J L Austin, *supra*, at 250

[154] for example Clean Water Act § 505 (b) (1) (A) 33 U.S.C. § 1365 (b) (1) (A) (1982)

[155] see for example supra note 122

[156] J L Austin, *supra*, at 228

[157] for example Clean Water Act § 505 (b) (1) (B) 33 U.S.C. § 1365 (b) (1) (B) (1982)

[158] 33 U.S.C. § 1365 (c) (3) (1982)

[159] *Id.*

X.) The issue of litigation fees

A very important factor for the efficiency of the empowerment of private parties in the enforcement of environmental law is the question of litigation costs. In South Africa, legal costs follow, as a rule, the outcome of the suit. [160] This means, the unsuccessful party would normally be ordered to pay the costs, including legal fees, of the successful party. The prospect of having to pay not only his own lawyer's fees but also those of the defendant has a chilling effect on potential litigants and might often render the broadened standing rules worthless, since even NGO's have only limited funds to spend on court proceedings.

According to the general rule in the United States each party is liable for the payment of his own lawyer's fees, irrespective of the outcome of the action. This rule would also discourage prospective litigants of class actions or public interest actions.

1.) Contingency fees arangement

Another approach that tries to solve the problem is the recognition of contingency arrangements in the United States. In terms of this theme, the lawyer and the client litigating a class action may agree that the lawyer's fee would only be payable if the action succeeds.[161] Such agreements are particularly useful in cases where monetary compensation is recovered. As a result the client does not incur lawyer's fees if the class action succeeds. In this case, the lawyer's are paid from the class funds created from the award. And if the class loses it is the loss of the lawyer. The inhibiting effect of costs remain in cases where no compensation may be recovered, as the client is left with the liability to pay the lawyer's fees if the action succeeds. However, there is a large number of public interest law firms in the United States that are mainly funded by foundations and that are in the position to pay legal costs. They provide gratuitous legal services to identified clients in fields of consumer protection, civil rights and environmental issues.[162]

The model of the contingency fee arrangement is a workable way to respond to the inhibiting effect of legal costs. In fact, the law commission recommends in its working paper on class actions that provision should be made for a contingency fee arrangement in the context of class actions and

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[160] W L R De Vos "Reflections on the introduction of a class action in South Africa" (1996) TSAR 639 at 651

[161] W L R De Vos *supra* at 650

[162] W L R De Vos *supra* at 651

public interest actions.[163] It later extended this proposal to all actions, save criminal law and family matters.[164]

2.) Creation of a fund

In addition, the law commission proposes the establishment of a fund to provide financial assistance to persons wishing to institute public interest actions and class actions.[165] It contemplates the fund as follows:

> "To make access to justice a reality, new solutions must be found. As public interest actions and class actions are brought in the public interest, it necessarily means that the broader public will have to contribute to the establishment of such fund. For the same reason we consider it fair that members of a class should contribute to the fund in a successful class action suit if they relied on financial assistance of the fund to conduct the class action. The successful members of a class action should therefore share a percentage of the fruits of their gain in order to make it possible for future litigants to rely on financial assistance of the fund."

This proposal follows the examples of the Canadian provinces of Quebec and Ontario[166]. It remains to be seen whether it will receive the necessary support.

3.) Fee shifting

Another way of tackling the problem of legal costs is offered by the fee shifting provisions of American citizen suit regulations.

To encourage private parties to file suits, all of the environmental statures provide for awards of attorney and expert witness fees where "appropriate".[167] These statutes authorise fee awards to "any party" as opposed to parties who prevail on the merits as stipulated by the majority of American

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[163] "The recognition of class action in South African law" working paper 57 project 88 (1995), 50 and 74

[164] "speculative and contingency fees" working paper 63, project 93, 62

[165] "The recognition of class action in South African law" working paper 57 project 88 (1995), 73-74

[166] See "The recognition of class action in South African law" working paper 57 project 88 (1995), 50-51

[167] See e.g. FWPCA § 505 (d); 33 U.S.C. § 1365 (d); SWDA § 7002 (e), 42 U.S.C. § 6972 (e) (1988); ESA § 11 (g) (4), 16 U.S.C. § 1540 (g) (4)

federal statutes.[168] As a result, courts have on several occasions awarded lawyer's fees to public interest groups for unsuccessful suits.[169]

This raises the question how fee awards to parties who lost a suit can be justified. Why should a defendant in a lawsuit who did not initiate the suit be burdened with the legal costs including those of the plaintiff even if the plaintiff lost the suit?

A rationale can be seen in the service provided by the parties in helping to settle the law by educating the court and venting important arguments. For this service the private enforcer must be paid even when the suit itself was unsuccessful. The award serves as a means of restitution.[170]

Traditional notions of restitution justify fee shifting only when the costs of litigation are spread proportionately among beneficiaries and only up to the value of the benefits conferred.[171]

This rationale has, therefore, its limitations. The benefits of a lawsuit, such as the promotion of judicial understanding or resolution of statutory ambiguity, are public benefits; the beneficiary thus is the public at large. If the unsuccessful suit has been brought against the government, the first requirement presents no problems, since the government presumably can act as a fiscal proxy for the public.[172] Fee shifting in suits against private parties will often fail to spread the costs of litigation proportionally to the beneficiaries of the action - usually the public at large.

The second requirement creates problems because the value of the public benefits of law suits are difficult to determine. It is impossible to assign a certain monetary value to the settling of legal arguments or education of the courts.

A second rationale might be seen in the role of fee-awards to unsuccessful parties in encouraging socially desirable litigation. This encouragement of private action is the response to the shortcomings of public enforcement.

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[168] E.g. Clean Water Act § 505 (d), 33 U.S.C. § 1365 (d) (1976)

[169] See e.g. *Northern Plains Resource Council v EPA* 670 F. 2d 42, 55 (D.C. Cir. 1982); *Sierra Club v Gorsuch*, 672 F. 2d 33 (D.C. Cir.) (per curiam), *cert. granted*, 103 S. Ct. 254 (1982) (No. 82-242); *Metropolitan Wash. Coalition for Clean Air v District of Columbia*, 639 F. 2d. 802 (D.C. Cir. 1981) (per curiam)

[170] Awards of attorney's fees to unsuccessful environmental litigants" Note (1983) Harvard Law Review , 677, at 682 - 688

[171] Awards of attorney's fees to unsuccessful environmental litigants" Note (1983) Harvard Law Review, 677, at 683

[172] See, e.g., *La Raza Unida v Volpe*57 F.R.D. 94, 101 (N.D. Cal. 1972)

Government agencies are perceived not to enforce and implement environmental statutes vigorously. Thus private action is regarded as a desirable supplement to these shortcomings. Fee awards must serve as an incentive that encourages suits. [173]

Therefore, a litigant who lost a suit should not be automatically excluded from fees awards. However, the risk of liability to pay legal costs serves as a deterrent to abusive suits. The prospect of having to pay litigation costs make one weigh the viability of his suits more carefully. Thus, awarding fees to unsuccessful parties induce wasteful and harassing lawsuits.

This effect, however, comes at the expense of potential desirable suits. Moreover, granted the difficulty in predicting the outcome of a suit, even awards of costs to prevailing parties will induce some unproductive suits. Encouraging productive suits will necessarily encourage undesirable litigation at the same time. But this should be accepted as the lesser of two evils. And what's more, courts can thwart harassing, unreasonable or baseless suits by dismissing them summarily or by allowing prevailing defendants to collect attorney fees.[174]

It remains, however, the contention that it is *unfair* to burden the prevailing party with the litigation costs of the unsuccessful party. It may seem unjustified to charge the successful defendant with the plaintiff's legal expenses. But the courts could distinguish between suits against private individuals or against the state. While in suits against privates, it may in fact be sometimes unduly harsh to burden them with the litigation costs of the other party, it is not equally unfair to charge state agencies with these costs.[175]

The model of American fee-shifting provisions certainly serves as a workable mechanism to tackle the problem of legal costs as a deterrent for socially productive litigation. They may well be included in South African legislation dealing with class actions and public interest actions. To respond to the particulars of individual cases the approach must be flexible.

The question then remains how it is to be decided as to when an unsuccessful party in fact deserves a fee award. American courts used arguments of both mentioned rationales when they established criteria for the award of lawyers fees to unsuccessful parties.

The courts had the secondly mentioned rationale in mind when they defined fees awards to be appropriate when the party requesting the award had made a "substantial contribution"[176] to the

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[173] "Awards of Attorney's Fees to Unsuccessful Environmental Litigants" Note (1983) Harvard Law Rev., 677, at 685

[174] "Awards of attorney's fees to unsuccessful environmental litigants" Note (1983) Harvard Law Review, 677, at 687

[175] "Awards of attorney's fees to unsuccessful environmental litigants" Note (1983) Harvard Law Review, 677, at 688

[176] *Sierra Club v. Gorsuch* 672 F. 2d 33, 35 (D.C. Cir.), *cert. granted*, 103 S. Ct. 254 (1982)

goals of the authorising statute and when the petitioners had "helped to enforce, refine and clarify the law"[177] . The courts following this line of thought examine whether the suit could contribute to the goals of relevant statutes by educating the court or the public or by aiding judicial interpretation. In *Ruckelshaus v. Sierra Club*[178], the Court even went further and ruled that the award of fees to a citizen-suit plaintiff is "appropriate" only if the claimant achieves some degree of success on the merits.

Courts have occasionally invoked a second standard for appropriateness, a standard that stresses more the prospective desirability of a suit. In *Metropolitan Washington Coalition for Clean Air v. District of Columbia,*[179] the court argued "the legislature, when it called for citizen-suits, considered a fee recovery to be consonant with the public interest whenever the underlying suit was a *prudent and desirable* effort to achieve an unfulfilled objective of the (Clean Air) Act."[180] The court regarded fees awards as appropriate when "there may have been . . . a well founded expectation" that it would further a proper enforcement of the statute.

To summarise, the courts follow two different standards when determining whether or not the lawyer's fees award to unsuccessful parties is appropriate. The first mentioned standard assesses the ultimate effects of a lawsuit whereas the second standard evaluates the suit's prospective desirability. The results of these different analysises may sometimes diverge. The second standard does not consider intervening events that could not have been predicted and that render the suit futile or unnecessary[181] while under the first mentioned standard the fees award would be likely to be denied.[182] Thus, the second standard is less stringent. The substantive contribution standard awarding fees only to parties that actually assist statutory implementation tends to exclude some prudently brought suits. Class actions and public interest actions have the potential to redress disparities of access to justice. Additionally private suits have been seen as a useful tool to supplement public enforcement of environmental statutes. These private actions cannot be optimally encouraged if the courts regard the ultimate outcome of the suit decisive.

This approach must be expected to deter some desirable litigation.

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[177] *Natural Resources Defence Council, Inc. v. EPA*, 484 F. 2d 1331 (1st Cir. 1973)

[178] 463 U.S. 680, 77 L Ed 2d 938 (1983)

[179] 639 F. 2d 802 (D.C. Cir. 1981) (per curiam)

[180] I.d. at 804

[181] See, e.g., *American Constitutional Party v Munro*, 650 F. 2d 184 9th Cir. 1981) here, an amendment of the challenged state statute mooted the suit before trial

[182] "Awards of attorney's fees to unsuccessful environmental litigants" Note (1983) Harvard Law Review, 677, at 690

Therefore, South African courts exercising their discretion should recognise that it is more appropriate to grant fee awards to parties as a reward for their "prudent and desirable efforts" regardless whether the actions ultimately prove productive.

XI.) Conclusion

Effective protection of the environment through the law will be best achieved if all concerned people are allowed to have access to judicial resources to take action for the protection of the environment. In view of the described shortcomings of administrative implementation of environmental statutes, there is no point in leaving enforcement to the State. Awareness of private entities may be utilised to supplement governmental enforcement endeavours and to redress imbalances of access to judicial resources between rich and poor.

The constitution brought about major changes in the law of *locus standi*. Section 38, however, confines the relaxed standing rules to infringements of or threats to chapter 2 rights. This does not present insurmountable difficulties for environmental litigants since the relevant section 24, particularly the right to well-being is open to a broad interpretation. The term should certainly include the interest in environmental aesthetics, which American courts acknowledge to be a sufficient interest for *locus standi* since *Sierra v Morton*. The emphasis on promotion of conservation in section 24 (b) (ii) gives litigants the opportunity to base locus standi even on the injury of nonhuman interests. An environmental NGO, intending to take action against air pollution caused by industrial activities, may base the locus standi on the claim that the emissions result in damage to trees. Due to the reference to the promotion of conservation in section 24 (b) (ii) the NGO can do so even if the trees are of no benefit to (current) human interests. This was the idea C Stone set out in his book "Should Trees Have Standing? Toward Legal Rights For Natural Objects". There he suggests conferring cognisable rights upon nonhuman objects, such as animals, rivers and mountains in order to claim protection or their rights. The dissenting judges in *Sierra v Morton*, most eloquently Mr Justice Douglas[183] also expressed some sympathy for the notion of rights of nonhuman objects. This suggestion flows from critiques of the usual anthropocentric approach of *locus standi*, which leaves the environment out in the cold if no human interests are affected by an illegal act. The plaintiffs then would not need to come up with flimsy allegations of violations of far-fetched human interests. This aspect is usurped by section 38 in conjunction with the broad scope of section 24. In fact, the reference to future generations extends the scope of protection to ecological resources currently irrelevant for human interests and the reference to the promotion of conservation brings in an almost ecocentric approach.

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[183] *Sierra Club v. Morton* 405 U.S. 727, 31 L.Ed.2d 636 (1972), at 647-653

As a result of the broad scope of section 24, section 38 may, unlike its own wording, not only be used to enforce chapter 2 rights but in effect also provide *locus standi* for the enforcement of statutory provisions.

The new *locus standi* law gives environmentalists the means to take action for the environment by way of judicial actions. The new constitution has since brought about an increase in the number of reported cases relating to the protection of the environment. However, the mere opening up of judicial processes doesn't guarantee an improvement in environmental quality. It is still mainly a question of conscience of citizens that matters for the achievement of a healthy and sound environment. But opening up the judicial process to citizens goes a long way to bringing environmental issues on the public agenda because even if cases are lost, the arguments that are aired have the potential to influence the public mindset.