

# **Public Interest Environmental Litigation: A Comparative Study of Locus Standi Requirements in South Africa and Zambia**

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**Master of Philosophy in Law (General) by Coursework and Dissertation**

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Word Count: 24, 732

**Research dissertation presented for the approval of Senate in fulfilment of part of the requirements for the Master of Philosophy in Law (General) in approved courses and a minor dissertation. The other part of the requirement for this qualification was the completion of a programme of courses.**

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**May 2018**

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## **Acknowledgements**

I owe a debt of gratitude to Prof. Jan Glazewski for his availability and guidance and to my brothers, Kasonde and Nicholas, for their support and encouragement. I cannot forget to thank Eugene Duffy, Brian Nolan and Canon Collins Educational and Legal Trust for making it possible for me to undertake my studies.

## **Abstract**

South Africa integrated environmental rights into its constitutional and legislative framework, and simultaneously expanded its locus standi rules that facilitated public interest environmental litigation a decade and a half earlier than Zambia. The incorporation of environmental rights and the liberalisation of legal standing requirements occurred in South Africa with the enactment of the interim democratic constitution of 1994 which eventually progressed into the final constitution of 1996. Zambia only legislated environmental rights and liberalised the locus standi rules in environmental litigation with the enactment of the Environmental Management Act of 2011. The Zambian constitution has not yet included environmental rights in its Bill of Rights, but it has incorporated many internationally recognised environmental principles which may become building blocks for the further entrenchment and enhancement of environmental rights. The purpose of this paper is to conduct a critical and comparative analysis of the South African and Zambian legal frameworks with regard to locus standi requirements in public interest environmental litigation. The objective is to appreciate the strides that South Africa has made in public interest environmental litigation by critically assessing the constitutional and legislative developments that have taken place in that jurisdiction with a view to drawing lessons for Zambia. Included in the critical analysis is a study of how the South Africa Judiciary has interpreted these legislative developments and implemented them in its judgments particularly with regard to legal standing requirements. The comparison is intended to identify challenges to and opportunities for public interest environmental litigation in Zambia.

<b>Table of Contents</b>	<b>Page</b>
1.0 Chapter 1.....	6
1.1 Introduction.....	6
1.2 Research Methodology.....	10
2.0 Chapter 2.....	12
2.1 Definition of Locus Standi.....	12
2.2 Capacity to Sue.....	11
2.3 Interest.....	14
2.4 Public Interest.....	14
2.5 Class Action.....	15
2.6 The Attorney General.....	16
2.7 Conclusion.....	17
3.0 Chapter 3.....	18
3.1 Locus Standi and Public Interest Litigation in South Africa.....	19
3.1.1 The Pre-Democratic Period.....	19
3.1.2 Common Law Standing Rules.....	19
3.1.3 Capacity to Sue.....	19
3.1.4 Interest.....	22
3.1.5 Exceptions Based on Life, Liberty and Physical Integrity.....	25
3.1.6 Legal Standing and the Role of the Attorney General.....	26
3.1.7 Impact of the Strict Common Law Rules of Standing Requirements on Public Interest Litigation.....	27
3.2 Democratic Period.....	28
3.2.1 Bill of Rights and Legal Standing.....	28
3.2.2 Section 38 of Constitution and Common Law Standing Requirements.....	30
3.2.3 National Environmental Management Act No. 107 of 1998.....	35
3.2.4 Liberalisation of Standing Rules in Section 32 of NEMA.....	36
3.2.5 Duty of Care in Section 28 of NEMA.....	37
3.2.6 Costs and Public Interest Environmental Litigation.....	39
4.0 Chapter 4.....	41
4.1 Locus Standi and Public Interest Environmental Litigation in Zambia.....	41
4.1.1 Common Law Standing Rules.....	41
4.1.2 Capacity to Sue.....	41
4.1.3 Interest.....	42
4.1.4 Legal Standing and Role of the Attorney General.....	42
4.2 Constitutional Developments and Standing.....	44
4.2.1 Preamble and Part IV of the Constitution.....	44
4.2.2 Part XIX of the Constitution.....	47
4.3 Environmental Management Act No. 12 of 2011.....	49
4.3.1 Environmental Management Act and Legal Standing.....	50
4.3.2 Environmental Management Act and Legal Costs.....	51
4.4 Mines and Minerals Act of 1995 and the Environment.....	52
5.0 Chapter 5.....	54
5.1 Comparative Analysis of the Impact of Locus Standi Requirements in Public Interest Environmental Litigation in South Africa and Zambia.....	54
5.2 Principles of Standing.....	54
5.3 Sufficient Interest.....	54

5.4 Private Rights and Public Rights.....	56
5.5 Role of the Attorney General.....	58
5.6 Constitutional Provisions.....	58
5.7 Right to Information.....	59
5.8 Constitutional Framework Supporting Common Law Development.....	60
6.0 Chapter 6.....	61
6.1 Conclusion.....	61
7.0 Bibliography.....	65

## 1.0 Chapter 1

### 1.1 Introduction

In order to promote justice and defend human rights, the courts must be accessible to all people regardless of their economic or social status. All are equal before the law and should have equal opportunities to have recourse to the courts of law. A lack of education and awareness of personal rights, as well as economic factors limit many people's access to the courts. Traditionally and historically, one major legal impediment to people's access to justice has been *locus standi in judicio*, otherwise called judicial legal standing. Being Commonwealth countries, South Africa and Zambia share a common legal heritage as they are both former British colonies. The South Africa legal system has been shaped to a considerable degree by Roman-Dutch law, but like the Zambian legal system, it has also been heavily influenced by English common law<sup>1</sup> particularly in the area of Public Law, including judicial standing.<sup>2</sup> The restrictive common law requirements of legal standing have limited the opportunities that people have of correcting wrongs that have been done in society whether it be by government administrators, agencies or even private corporate entities or individuals. The challenge of bringing law suits into the courts of law has been particularly pressing when it comes to public interest litigation. Common law does not easily accommodate individuals or associations that wish to defend the rights of others. The common law courts are open to those whose rights and interests are under threat or have been violated so that they could seek legal redress, but not to third parties who simply have sympathy for those who have been aggrieved and would want to assist them obtain justice. Environmental concerns such as conservation and pollution often go beyond personal interests and rights and, therefore, have a somewhat public character as the effects of one polluted area can have devastating consequences in another area which may not even be geographically close. The effects of pollution can be diffuse and widespread. The interconnectedness of the world's ecosystems means that every occasion of pollution or environmental degradation becomes a cause for public concern and interest. It has been

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<sup>1</sup> O'Regan, Kate 'The Best of Both Worlds? Some Reflections on the Interaction Between the Common Law and the Bill of Rights in Our New Constitution' p.2

<sup>2</sup> 'In 1823, the Colebrooke-Bigge Commission analysed the situation of the legal system at the Cape and was shocked at its condition. The commission proposed to replace the existing legal system gradually – through legislation – by the English system. Consequently, English criminal and civil law were introduced in 1828 and English law of evidence in 1830, while only qualified lawyers admitted to the bars in England, Scotland or Ireland were allowed to practice as judges or lawyers.' Beat Lenel, The History of South African Law and its Roman-Dutch Roots p.5 ([www.lenel.ch](http://www.lenel.ch))

difficult for civil society organisations, lobby groups, human rights groups and other interest groups to seek remedies from the courts as they have been deemed to lack judicial standing. Poor people living on traditional lands whose possession has been passed from one generation of families to another have had difficulties accessing law courts to complain about pollution generated by investors and developers as they do not have legal titles to their land and as such have been deemed to lack legal standing.<sup>3</sup>

In order to set the context, the second chapter will set the parameters of the exposition by defining *locus standi* with its two constituent elements of capacity to sue and interest. A discussion of South Africa's history of public interest litigation in two periods, the pre-democratic period and the post-democratic period, will then follow in the third chapter. The paper will trace the history of South Africa's legal system with its roots in the Roman-Dutch legal system. The Roman legal system had a provision for the *actio popularis* through which a person could bring before the courts matters affecting the public seeking legal redress on behalf of the public. 'There was a wide range of *actiones populares* in Roman law, but with only one exception these fell into disuse in Roman-Dutch law.'<sup>4</sup> English common law also played a role in moulding South African law once the British colonised the country. Furthermore, the chapter will discuss the common law requirements of sufficient interest, personal interest and direct interest as they apply in South African law. These standing requirements reflect the conception of an adversarial system within the common law. Even though some jurisdictions like the Canadian have mixed substantive law with procedural law in their consideration of *locus standi*, in most common law jurisdictions, *locus standi* addresses matters of procedure rather than the merits or substance of the law. Case law that is representative of the strict application of the common law requirements will be discussed in this chapter together with some notable exceptions to the rules. One feature of the common law is its disinterest in addressing matters of legality without a demonstration of personal injury or loss. However, even before democratic governance became established, some court judgments pointed to what was to come in the democratic dispensation as liberal standing rules were applied.

Thereafter, the chapter will survey the radical changes that were made to the South African legal system through the enactment of the interim constitution in 1994 and the final constitution in 1996. These constitutional changes broadened the standing requirements where there was a

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<sup>3</sup> Martha Muzithe Kangwa and 27 Others v Environmental Council of Zambia and Nasla Cement Company and Another 2008/HP/245

<sup>4</sup> Hoexter, Cora *Administrative Law in South Africa* (2007) Juta, Cape Town. p.435

threat or violation of any of the rights in the Bill of Rights. Public interest litigation and class action became possible with the new liberalised *locus standi* requirements. These changes made it possible for justice movements, human rights groups, environmental groups and other special interest and lobby groups to institute legal proceedings for public causes. Even though the constitution explicitly stated that these liberalised standing rules applied to the bill of rights, there are other provisions which point to the possibility of extending the liberalised standing rules to other parts of the constitution and other branches of law. Section 39(2) of the final constitution exhorted adjudicators to interpret all laws in the spirit, purport and objects of the Bill of Rights. Section 8 also called for the aligning of the common law with the constitution. This duty of the courts to develop all laws in line with the constitution has been affirmed in case law.<sup>5</sup> Even more interesting is section 39(3) which states: ‘...the bill of rights does not deny the existence of any other rights or freedoms that are recognised or conferred by common law or customary law or legislation, to the extent that they are consistent with the Bill’. In other words, the constitution recognises that it has not exhaustively listed all human rights in its Bill and that these unmentioned rights may also confer liberalised standing in line with section 38 of the final constitution.<sup>6</sup> Of particular importance in this paper are the environmental rights that are outlined in section 24 of the Bill of Rights. An analysis of the elements of the environmental rights will be conducted to clarify their meaning and implications, particularly the duties and obligations arising from them for the State as well as for private entities and individuals. The diffuse nature of environmental rights makes them ideal for public litigation. This chapter will explore how the courts of law have interpreted the provisions in the Bill of Rights with regard to legal standing. Some court decisions have been strict in that they have restricted the application of the broad standing rules in section 38 of the constitution to the threat to and infringement of the Bill of Rights.<sup>7</sup> Others have extended the liberal standing rules

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<sup>5</sup> *Carmichele v Minister of Safety and Security* 2001 (4) SA 938 (CC), the court held: ‘It needs to be stressed that the obligation of courts to develop the common law, in the context of the section 39(2) objectives, is not purely discretionary. On the contrary it is implicit in section 39(2) read with section 173 that where the common law as it stands is deficient in promoting the section 39(2) objectives, the courts are under a general obligation to develop it appropriately.’

<sup>6</sup> *Eisenberg and Associates v Minister of Home Affairs* 2003 (5) BCLR 514 (C) also adopted this approach where the court affirmed the provision of section 39(3) that the concept of rights cannot be limited to those that are explicitly mentioned in the Bill of Rights.

<sup>7</sup> *Maluleke v MEC for Health and Welfare* 1999 (4) SA 367 (T)

to all constitutional provisions regardless of whether they are connected to the Bill of Rights or not.<sup>8</sup>

The Chapter will then progress to a discussion of the National Environmental Management Act of 1998 (NEMA) which was enacted to concretise the environmental rights enunciated in section 24 of the Bill of Rights. The unique thing about the NEMA is that it is the only legislation that has been granted the wide standing requirements that are accorded to the Bill of rights together with the other corresponding environmental acts. The wide standing provisions that are applicable to the Bill of Rights are repeated verbatim in section 32 of the NEMA. The liberalised standing rules in the NEMA have made it possible for the *actio popularis* to be effected in environmental litigation. Public interest litigation is probably the best way of seeking environmental justice as environmental issues affect a broad range of people and interests or concerns.

In the fourth chapter, the paper will trace the legal history of Zambia's standing rules from Independence in 1964 through the 1973 constitutional amendments<sup>9</sup> that established Zambia as a one-party state to the introduction of multi-party politics in 1991. Zambia inherited English jurisprudence and legal structures from its colonial past including the common law rules of standing. The paper will highlight and critique the application of the common law requirements of standing in Zambian case law. Zambian case law frequently makes use of precedents in other commonwealth countries including South Africa. As will happen in the sections on South Africa, the analysis concerning Zambian case law will begin with an assessment of some of the cases that have employed strict common law rules and then an assessment of some exceptions to the rules. The English common law rules of standing that Zambia has adopted are not amenable or friendly to public interest litigation. Historically, in the English and Commonwealth legal systems which include South Africa and Zambia, the void in public interest litigation was filled by the Attorney General whose duty was to institute legal proceedings to protect the interests and rights of the public. The paper will compare and contrast the roles that have been played by Attorneys-General in South Africa and Zambia in public litigation with the roles evolving differently in the two countries. Thereafter, the chapter will draw attention to a turning point in Zambia's economic, political and legal history which

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<sup>8</sup> In the Van Rooyen case, the judge said there are practically no standing limitations regarding constitutional matters.

<sup>9</sup> The Constitution of Zambia Act 1973

was the introduction of political pluralism with the enactment of the 1991 constitution.<sup>10</sup> The country abandoned socialist policies and embraced neo-liberal capitalist policies that saw free-market economics and multi-party politics taking root. 1996 saw the enactment of another constitution that was meant to consolidate the changes that were effected in 1991.<sup>11</sup> The embracing of capitalist policies led to the privatisation of government parastatals, particularly the mines, and it was a period that saw terrible environmental degradation and pollution. The chapter will make reference to the secret development agreements that gave immunity to multinational corporations from environmental litigation for causing pollution. Thereafter, the paper will move to highlight the advances that were achieved in terms of environmental legislation particularly with the enactment of the Environmental Management Act No. 12 (EMA) in 2011 which liberalised standing rules in section 110 of the act and enshrined environmental rights. The 2016 Zambian constitution in section 43 and part XIX also incorporated some internationally recognised environmental principles, outlined environmental duties and introduced the office of the Public Protector<sup>12</sup> which was supposed to supplement the work of the Attorney General in ensuring that those whose rights had been violated by administrative action or the actions of private individuals or corporate institutions and organisations received justice.

The fifth chapter will be dedicated to conducting a critical and comparative analysis of the environmental regimes of the two jurisdictions regarding *locus standi* requirements in public interest litigation. The Zambian environmental legal regime has already imported important legal ideas and measures from South Africa and there are still more lessons to be learned. The chapter will attempt to draw lessons from South Africa and to identify areas of possible development, as well as identify obstacles and opportunities in this endeavour.

## 1.2 Research Methodology

The methodology employed is a comparative analysis of the legal frameworks in South Africa and Zambia. The paper will compare and contrast the constitutional and legislative developments that have occurred in both jurisdictions regarding public interest litigation in the environmental sphere with particular reference to the *locus standi* requirements. The

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<sup>10</sup> Constitution of Zambia Act 1991

<sup>11</sup> Constitution of Zambia Act No. 18 of 1996

<sup>12</sup> The Constitution of Zambia Act No. 1 of 2016 section 243

paper will also assess how the courts have addressed this important aspect with the aim of discovering the best way of improving access to justice as standing requirements have often been viewed as obstacles to justice. The research will involve reviewing relevant legal literature including case law, statutes and academic journals.

In the next chapter, the paper will proceed to define and explore the concept of *locus standi*, as well as the related concept of public interest litigation with the aim of establishing the importance of the latter concept in facilitating access to justice.

## 2.0 Chapter 2

### 2.1 Definition of Locus Standi

Whenever venturing into any discussion of a topic, it is important to establish “what” one is talking about before discussing related questions such as the ‘who?’, ‘how?’, ‘when?’, and ‘why?’. What is *locus standi*? Etymologically, the term comes from Latin and simply means ‘a place to stand’. In terms of usage, it is used synonymously with words and expressions such as ‘standing’, ‘status’, ‘title to sue’ and ‘qualification to bring a suit’.<sup>13</sup> S M Thio defines it thus: ‘The term locus standi denotes legal capacity to institute proceedings and is used interchangeably with terms like “standing” or “title to sue”’.<sup>14</sup> Cheryl Loots’s definition goes: ‘The concept of standing is concerned with whether a person who approaches the court is a proper party to present the matter in issue to the court for adjudication’.<sup>15</sup> Cora Hoexter says, ‘Standing encompasses both capacity to sue...and a sufficient interest in the case’.<sup>16</sup> The definitions above make it clear that *locus standi* has to do with the right or entitlement of a person to institute legal proceedings with the aim of seeking relief from a court of law. The ‘what’ question, which is a question of definition, has led us to discover that locus standi deals with the question of ‘who’ can bring a case before the courts of law, or better, ‘who’ can be admitted by a court to bring a matter for adjudication. *Locus standi* is a procedural matter that addresses the legal status of the litigant before the court delves into the merits of a case. In short, *locus standi* is about ‘who’ brings a case rather than ‘what’ case they bring. ‘The issue of standing is divorced from the substance of the case. It is therefore a question to be decided in *limine*, before the merits are considered.’<sup>17</sup>

### 2.2 Capacity to Sue

As can be noted from Cora Hoexter’s definition above, *locus standi* has two constituent elements; capacity to sue, which is sometimes referred to as legal capacity, and sufficient interest. Before determining whether a person has legal standing, a court of law will assess whether the applicant possesses both aspects. When either of those elements is missing, the court will decline to grant the applicant legal standing. ‘Capacity has been defined as the power

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<sup>13</sup> Cromwell, Thomas A. *Locus Standi: A Commentary on the Law of Standing in Canada* (1986) Carswell Co. Ltd, Toronto. p. 1

<sup>14</sup> *Ibid* at p.2

<sup>15</sup> Loots Cheryl ‘Standing, Ripeness and Mootness’ in Woolman, Stuart et al *Constitutional Law of South Africa* 2<sup>nd</sup> ed. p. 7-1

<sup>16</sup> Hoexter, Cora *Administrative Law in South Africa* (2007) Juta, Cape Town. p. 434

<sup>17</sup> *Ibid* at 435

to acquire and exercise legal rights.’<sup>18</sup> Issues surrounding legal capacity or capacity to sue deal with the matter of legal personality. In the process of ascertaining whether a litigant has legal capacity, courts ask the question whether the litigant is a legal person. Capacity can be achieved on the basis of being a natural person or juristic person. A legal person has rights and owes duties in law. If it is a natural person, legal capacity would consider personal characteristics such as the age and mental capacity of the applicant. In the case of a group or class of persons, association or institution, legal capacity would consider whether the individual members have capacity to sue or whether the collective is recognised in law by possessing requirements such as a constitution or certificate of incorporation. Some organisations or groups may not be recognised as legal entities and, therefore, would not qualify as juristic persons. ‘The rules relating to whether infants, mental incompetents<sup>19</sup> and unincorporated associations may sue all relate to the question of capacity, that is, whether these entities have the power to exercise legal rights.’<sup>20</sup>

Historically speaking, legal capacity has sometimes proved to be a formidable challenge in environmental public interest litigation. Groups and classes of people that have been affected by pollution or environmental degradation, and movements or associations of environmental activists interested in environmental conservation have sometimes lacked the capacity to sue and have, therefore, been denied standing. Capacity deals with the identity of the person and interest is connected to the nature of the proceedings. A person may have capacity to sue because their identity as a legal person is recognised by the law, but they may be denied standing if they do not have the right relationship to the nature of the proceedings, that is, their human rights such as the right to free speech or the right to property may not be threatened or injured. A person who is denied standing in one case may be granted standing in another case depending on the nature of the case. ‘This interrelationship between the identity of the plaintiff, the nature of the proceedings and the issue of standing means that the choice of remedy may

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<sup>18</sup> Cromwell, Thomas A. *Locus Standi* p. 3

<sup>19</sup> The matter of the legal capacity of persons with mental and other disabilities has become a human rights issue based on the contention that persons with disabilities have equal dignity and, therefore, should not be discriminated against and must be accorded the same rights as everybody else. Zambia’s Disabilities Act 6 of 2012 in section 8(1) reads: ‘A person with disability shall enjoy legal capacity on an equal basis with others in all aspects of life’.

<sup>20</sup> *Ibid* at 3

be of the utmost importance.’<sup>21</sup> One may not have standing at common law and yet have standing regarding a particular statute.

### 2.3 Interest

The second constituent element is interest: “Interest”... is used in a variety of expressions such as direct, substantial, personal, or special interest; legal rights or interests prejudicially affected.’<sup>22</sup> Common law legal standing rules are strict in that they require an individual to demonstrate that they have been personally and directly aggrieved or have an interest which may be proprietary or financial in a matter.<sup>23</sup> Where an action has affected the general public, a plaintiff has to demonstrate that they have suffered special damage that is beyond and above what others have suffered.<sup>24</sup> According to the common law, one who has no interest or has not suffered any injury cannot stand up to defend the rights of another person. Even if a person has evidence that an illegality has been committed by the State or by a private person or private body, they will not be granted legal standing.<sup>25</sup> The presumption of the standing rules is that the courts exist to settle disputes, to provide remedies or grant relief, and to declare the rights of those who require these rights to be declared. At common law, courts do not declare rights or declare the invalidity or unconstitutionality of pieces of legislation in a vacuum, that is, without the material threat to or violation of rights and interests in a factual situation. The intention of the courts is to deal with real disputes and not to deal with hypothetical or academic issues.<sup>26</sup> Environmental groups bring cases to the courts not because they have suffered harm but to safeguard the rights of the public, to hold public authorities accountable for their actions and because it is the right and ethical thing to do.

### 2.4 Public Interest Litigation

What is Public Interest Litigation? Public interest litigation occurs when a person, natural or juristic, undertakes litigation in the interest of the general public. Public interest litigation may also be instituted by a group that may not qualify as a juristic person. Public interest litigation

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<sup>21</sup> Preston, Brian J ‘Standing to Sue at Common Law in Australia’ A Paper Presented to the Joint Seminar on Legality of Administrative Behaviours and Types of Adjudication at Xian, People’s Republic of China, April 2006. p. 2

<sup>22</sup> Bray, W ‘Locus Standi in Environmental Law’ (1989) 22 The Comparative and International Law Journal of South Africa CILSA 33, 35

<sup>23</sup> Dalrymple v Colonial Treasurer (1910) TS 372 at 379

<sup>24</sup> Dell v Town Council of Cape Town (1879) 9 Buch 2 and Von Moltke v Costa Areoso (Pty) Ltd (1975) 1 SA 255 (C) 258

<sup>25</sup> Hoexter, Cora *Administrative Law in South Africa* (2007) Juta, Cape Town p.434

<sup>26</sup> Loots, Cheryl ‘Standing, Ripeness and Mootness’ in Woolman, Stu et al *Constitutional Law of South Africa* 2n ed. p.7-1

is of particular interest in environmental litigation because it does not require the litigant to have a personal and direct interest in the relief or remedy being sought. The litigant's sole purpose may be to protect a public right. Environmental issues sometimes do not have an immediate and direct bearing on a person or group of people, but they involve safeguarding the general integrity and wellbeing of the earth and its species, natural habitats and ecosystems. There are health, cultural, scientific, historical, economic, religious and ethical concerns that are connected to the environment and which may not necessarily have a direct impact on the litigant who may institute proceedings for the benefit of the general public.

Public interest litigation aims to ensure justice even for the vulnerable members of society such as those affected by poverty, ignorance, powerlessness and social factors such as disability to seek justice. A person that is unaware that they possess a right cannot claim that right even if it is being violated. Public interest litigation allows those that have the knowledge, goodwill and the financial means to institute legal proceedings to do so on behalf of the marginalised and weaker members of society. When a public right is affirmed or promulgated on behalf of one person in society by a court, the benefit of that publicly acknowledged right automatically extends to all members of society. In a country like Zambia where there is a lawyer for every 20, 000 people, public interest litigation becomes an affordable and quicker way to access justice.<sup>27</sup>

## **2.5 Class Action**

It is also important to distinguish public interest litigation from class action. 'A class action is a device whereby a single plaintiff may pursue an action on behalf of a group of persons with a common interest in the subject matter of the suit.'<sup>28</sup> Public interest litigation and class action are similar in that they involve standing up to represent the interests of a collective, but they differ in the sense that in the former the plaintiff stands up to represent the interests of the general public whereas in the latter the litigant represents the interests of a particular group or class of people and not the general public. In other words, public interest litigation promotes and protects public interests and rights whereas class action promotes and protects private rights and interests. Public interest litigation also tends to have a focus on challenging government illegality with a view to establishing and entrenching the rule of law whereas class action tends to focus on developing the idea of representative standing. An important feature

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<sup>27</sup> ([www.laz.org.zm/about-laz/](http://www.laz.org.zm/about-laz/)) accessed on 21<sup>st</sup> September, 2017.

<sup>28</sup> Burns, Yvonne Administrative Law 4<sup>th</sup> ed. (2013) LexisNexis, Cape Town p. 529

of class action is that the decision of the court becomes binding on all members. That is why in most jurisdictions, it is a requirement to notify members of the class being represented as the outcome would affect them. '...[C]lass actions proceed on the theory...that all persons affected by the litigation are before the court, either in person or by representation.'<sup>29</sup> Matters that are handled in class action become *res judicata* for members of the class and as such they cannot raise them again in another court. On the other hand, in public interest litigation the decisions of the court do not constitute *res judicata*, but rather *stare decisis*.<sup>30</sup> In terms of *locus standi*, class action has often been heavily impacted by the constitutive element of capacity to sue since the identity of the collective, its legal status or personality, has often been the subject of scrutiny in the courts. In contrast, public interest litigation has often been impacted by the second constitutive element of *locus standi* which is interest. Public interest litigation has been difficult without having to demonstrate a sufficient, personal and direct interest in a case.

## 2.6 The Attorney-General

In common law jurisdictions such as the United Kingdom, United States, Canada and Australia, litigating in the public interest was seen as the preserve of the attorney-general.<sup>31</sup> South Africa and Zambia have incorporated the office of the attorney-general in their constitutions<sup>32</sup>, and as indicated earlier, the role has undergone an evolutionary process particularly in the case of the former. The attorney-general has, traditionally, been referred to as the 'guardian of public interest'.<sup>33</sup> Legally speaking, the Crown or the State was seen as the guardian of the public interest and the attorney-general as the chief legal advisor and representative of the Crown or State was said to embody this responsibility.<sup>34</sup> The attorney-general had legal standing in all court cases that involved public interest and public rights and could intervene in any court case where public matters or the constitutionality of legislation was disputed. 'Private individuals, in the absence of special circumstances, do not have standing to commence proceedings in the public interest to protect the public at large from a wrongful invasion of its rights. Traditionally, this is for the attorney-general, as guardian of the public interest, to discharge this function.'<sup>35</sup>

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<sup>29</sup> Law Reform Commission of British Columbia Report on Civil Litigation in the Public Interest LRC 46 (1980) p.5 (hereafter LRC 46)

<sup>30</sup> Ibid at 6

<sup>31</sup> DeSmith, Woolf and Jowell *Judicial Review of Administrative Action* 5<sup>th</sup> ed. (1995) Sweet and Maxwell, London. pp. 146-150

<sup>32</sup> Article 54 of the Constitution of Zambia Act No: 18 of 1996 and Article 177 of the Constitution of Zambia Act No. 2 of 2016.

<sup>33</sup> Mantziaris, Christos 'The Attorney-General and the Public Interest' (2004) 25 *Adelaide Law Review* 211

<sup>34</sup> LRC 46 p.5

<sup>35</sup> LRC 46 p.5

The attorney-general's role as guardian of the public interest does not just involve protecting the rights of the citizenry but it also includes checking or regulating the exercise of public power by public bodies and agencies. It is within the mandate of the attorney-general 'to institute proceedings where a public body exceeds, or threatens to exceed, its statutory powers'<sup>36</sup>. The attorney-general institutes legal proceedings in the interest of the public in two ways: firstly, in his individual capacity as *ex officio*; secondly, in a relator relationship with a private individual who requests the attorney-general to join the case in the interest of the public.<sup>37</sup> For the second type of legal proceedings to commence, the consent of the attorney called his *fiat* is required. The attorney-general has absolute discretion to either join or not and his decision is not subject to review.<sup>38</sup> It is also significant to mention that it is very rare for the attorney-general to commence legal proceeding on his own volition. 'In view of the attorney-general's absolute discretion, situations may arise in which public rights are not vindicated in the courts because he has refused his *fiat*.'<sup>39</sup> The attorney-general is not bound by law to commence legal proceedings in each instance of a violation of public rights and this becomes an important justice issues because every aggrieved person must have the right to have his case heard by a court. The reasons advanced for the privilege of discretion accorded to the attorney-general are similar to the reasons that are advanced in defence of the strict common law requirements such as the prevention of "vexatious" and "frivolous" litigation.<sup>40</sup>

## 2.7 Conclusion

It is evident that the office of the attorney-general cannot meet the demands of justice in highly unequal societies such as South Africa and Zambia where there is poverty, ignorance about basic human rights and even illiteracy among the majority. According to statistics there are 5 million people who are illiterate in South Africa. Litigation is expensive in both countries and public interest litigation can go some way in enabling people to have access to justice. The role of the attorney-general as arbiter of public interest has its limits which will be discussed in depth in the sections below on South Africa and Zambia. These limitations of the office of the attorney-general demand that people be given the right to institute legal proceedings in the interest of the public without the restrictions of the common law *locus standi* requirements.

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<sup>36</sup> Tokar, Janice J 'Administrative Law: Locus Standi in Review Proceedings' (1984) 14 Manitoba Law Journal 209

<sup>37</sup> Ibid at 210

<sup>38</sup> Australian Conservation Foundation Inc v Commonwealth (1980) 146 CLR 493 at 527

<sup>39</sup> LRC 46 p.5

<sup>40</sup> Inland Revenue Commissioners v National Federation of Self-Employed and Small Businesses Ltd (1981) 2 All ER p.113

The paper will now proceed to discuss the development of public interest environmental litigation beginning with the common law *locus standi* restrictions that made it difficult for individuals and groups to litigate in the public interest.

### 3.0 Chapter 3

#### 3.1 Locus Standi and Public Interest Environmental Litigation in South Africa

##### 3.1.1 The Pre-Democratic Period

##### 3.1.2 Common Law Standing Rules

The common law rules of standing have as their focus the settling of disputes between two parties. To have access to the courts or to have legal standing, one has to demonstrate that they are aggrieved or have an interest to protect. One cannot have legal standing unless they show that the relief that they are seeking from the court has a direct bearing on them. Only people that had suffered loss or injury or whose interests were threatened or were violated could have recourse to a court and seek a remedy from that court. In Roman-Dutch law, the concept of the *'actio popularis'*<sup>41</sup> or 'citizen's action'<sup>42</sup> which had existed in Roman law and allowed individuals or groups of people to bring matters to the courts in the interest of the public became obsolete because it was rarely used. It was possible to institute legal proceedings in the public interest in Roman law concerning matters such as the desecration of tombs, *'res sacrae'*<sup>43</sup>, violations of public roads, *'res publicae'*<sup>44</sup>, and the falsification of official documents, *'alibi corruptio'*<sup>45</sup>. The South African common law which is inherited from both English and Roman-Dutch law, therefore, did not have a legal provision for the *actio popularis*. The Supreme Court of the Netherlands had even declared that the *actio popularis* of the Roman-Dutch law had ceased to operate in 1578.<sup>46</sup> In the case of *Bagnall v the Colonial Government*<sup>47</sup>, the court held that the *actio popularis* had never been part of South African law. The obsolescence of the *actio popularis* in Roman-Dutch law was confirmed in the case of *Dalrymple v Colonial Treasurer*<sup>48</sup>:

*'The general rule of our law is that no man can sue in respect of a wrongful act, unless it constitutes the breach of a duty to him by the wrong doer, or unless it causes him some damage*

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<sup>41</sup> Cora Hoexter *Administrative Law in South Africa* 2<sup>nd</sup> ed. (2012) Juta, Cape Town p.488

<sup>42</sup> Jan Glazewski and Louise du Toit (eds) *Environmental Law in South Africa* (2013) LexisNexis, Cape Town p.7-34

<sup>43</sup> GE Devenish 'Locus Standi Re-visited: Its historical Evolution and Present Status in terms of Section 38 of the South African Constitution' (2005) 38 De Jure 28 at 29

<sup>44</sup> Ibid 29

<sup>45</sup> Ibid 29

<sup>46</sup> Ibid 29

<sup>47</sup> *Bagnall v The Colonial Government* (1907) 24 SC 470

<sup>48</sup> *Dalrymple v Colonial Treasurer* 1910 TS 372 at 379

*in law...And the rule applies to wrongful acts which affect the public as well as to torts committed against private individuals.*<sup>49</sup>

In other words, at common law one cannot stand up to defend the rights and interests of others. The common law rules of standing, shaped as they were to settle private disputes, did not lend themselves to challenging the lawfulness of administrative decisions, unless the decision impacted on the applicant's rights and interests. The fact that an applicant had a legitimate concern and may have had indisputable evidence of government illegality did not imply that they could be accorded legal standing. At common law, issues regarding legal standing were procedural issues rather than issues of substance or merits. Having a good case did not necessarily imply that one would be entitled to legal standing. Legality was only discussed within the context of the rights and interests of an aggrieved party. Having sufficient interest in an application was a primary criterion if one was to obtain legal standing. It has often been said that the interest required for one to achieve standing should be more than moral, intellectual, and sentimental or emotional. The interest required can be subjective, but it also has to be objective in the sense of having tangible interests. It was sometimes understood that if someone were to be granted standing, they would need to have something to gain or something to lose personally from a court case. Jan Glazewski has observed that, initially, there seemed to be no need for legal standing in South African law<sup>50</sup> as evidenced by the *Dell v The Town Council of Cape Town* case.<sup>51</sup> Dell was a railway traffic manager who challenged the Cape Town Council for dumping refuse on a beach in the interest of the public. Dell succeeded in obtaining a temporary interdict against the council as the court agreed with him that the dumping of waste on Woodstock beach constituted a public nuisance and, most significantly, declared that he had a right to apply to the court to 'restrain the nuisance in any public place in the town'<sup>52</sup>. Subsequent court decisions, however, changed the landscape of South African legal requirements for one to access the courts.

*'...[I]n a triumvirate of cases decided at the turn of the century, Patz v Green & Co, Bagnall v Colonial Government, and Dalrymple v Colonial Treasurer, the tide turned, and the general requirement that an individual required a special interest peculiar to himself before being given a hearing was imported into our law from English law. This severely curtailed the ability*

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<sup>49</sup> Ibid at 379

<sup>50</sup> Glazewski *Environmental Law in South Africa* p.7-34

<sup>51</sup> *Dell v The Town Council of Cape Town* (1879) 9 Buch 2

<sup>52</sup> Glazewski *Environmental Law in South Africa* p.7-35

*of individuals and or groups to litigate in the public interest and the ramifications were evident throughout the field of public interest law.*<sup>53</sup>

### 3.1.3 Capacity to Sue

As stated in chapter 2, capacity to sue which is also called legal capacity refers to ‘the power to acquire and exercise legal rights’<sup>54</sup>. Only natural persons and juristic persons can claim rights and owe legal duties. Without legal capacity, one cannot have access to the courts. Rights empower one to make legal claims which includes asserting one’s rights in the face of threats or violations, and legal duties make one susceptible to be sued in case of a failure to fulfil the duties owed to other persons or the State. With regard to natural persons, capacity to sue is determined by factors such as age and mental capacity whereas with juristic persons or associations the main factor is legal recognition or incorporation. ‘In English law, unincorporated associations generally lack legal capacity to sue or be sued in their own name.’<sup>55</sup> At common law in South Africa, the situation was the same as in English law. Movements and loose associations of environmentalists and nature conservationists were deemed to lack the capacity to sue and as such were denied legal standing. In an environmental case which concerned the pollution of the atmosphere by a company that was manufacturing wooden poles that were treated with creosote, Tergniet and Toekoms Action Group and Others v Outeniqua Kreosootpale (Pty) Ltd and Others<sup>56</sup>, the matter of the capacity to sue was raised. The residents of Tergniet and Toekoms who had been affected by the pollution emanating from the industry formed a voluntary association to represent their interests and applied for an interdict to stop Outeniqua Kreosootpale (Pty) Ltd from continuing with its creosote pole production. They had also applied that the operation be declared illegal as the operators did not have the necessary permit as required by the APPA<sup>57</sup>. The respondent contended that the voluntary association did not possess the capacity to sue as it was a fluid organisation without a constitution. The respondent submitted that the association did not possess ‘the primary attributes that endow a *universitas personarum* with locus standi – in the sense of the capacity

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<sup>53</sup> Ibid p.121

<sup>54</sup> Thomas A Cromwell Locus Standi: A Commentary on the Law of Standing in Canada (1986) Carswell, Toronto p.3

<sup>55</sup> Harry Woolf, Jeffrey Jowell and Andrew Le Sueur *De Smith’s Judicial Review* 6<sup>th</sup> ed. (2007) Sweet & Maxwell, London p.75

<sup>56</sup> Tergniet and Toekoms Action Group, Thirty-Four and Others v Outeniqua Kreosootpale (Pty) Ltd, Chief Air Pollution Control Officer, Minister of Environmental Affairs and Others Case 10083/2008 (Unreported)

<sup>57</sup> Atmospheric Pollution Prevention Act No. 54 of 1965 (APPA)

to sue...'<sup>58</sup>. The attributes of juristic personality that were mentioned are 'perpetual succession, the capacity of acquiring rights and incurring obligations independently of members and own[ing] property'<sup>59</sup>.

The court decided in favour of the applicants affirming that they all had legal standing. The rationale for the decision has, however, been criticised by some commentators. In his analysis of the case, Michael Kidd observed that the court had confused the two constitutive aspects of locus standi which are capacity to sue and sufficiency of interest.<sup>60</sup> He argued that the court did not address the matter of the association's capacity to sue, but simply considered the interests of the residents of Tergniet and Toekoms who had sufficient interest because they resided in the vicinity of the pole production plant and had been exposed to the atmospheric pollution. He ruminated that if the action group had been the only applicant, it is unclear what the court's decision would have been because the association 'appeared to have been carried along on the backs of its members'<sup>61</sup> who individually had the capacity to sue. He contended that '[t]his decision could have been made before 1996' and that the judgment made no reference to the provisions of section 38 of the Constitution and section 32 of NEMA. He feared that since the court had used the pre-1996 reasons of the common law, it is highly likely that if it had been a non-governmental organisation litigating the case, it could have been denied standing.<sup>62</sup>

### 3.1.4 Interest

At common law, a person has to have sufficient interest before they can attain legal standing. As is the case with English common law, what the term "sufficient interest" means is not clearly defined. What constitutes sufficient interest depends on the circumstances of each particular case.<sup>63</sup>

*'Section 31 (3) SCA 1981 does not contain any express guidance as to the factors to be taken into account in determining whether a claimant has sufficient interest. The court will assess the claimant's interest against all the factual and legal circumstances of the case. It is a "mixed question of fact and degree".'*<sup>64</sup>

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<sup>58</sup> Tergniet and Toekoms v Outeniqua (Pty) Ltd at para. 17

<sup>59</sup> Ibid para 17

<sup>60</sup> Michael Kidd 'Public Interest Environmental Litigation: Recent Cases Raise Possible Obstacles' (2010) 13 PER/PELJ 27 at 31

<sup>61</sup> Ibid at 31

<sup>62</sup> Ibid at 31

<sup>63</sup> Tergniet and Toekoms v Outeniqua at para 21

<sup>64</sup> Harry Woolf et al *De Smith's Judicial Review* p.81

A person is normally deemed to have sufficient interest in a case if their private or public rights or financial and proprietary interests are at stake. At common law in South Africa, for one to possess sufficient interest, their interest has to be personal and it has to be direct. As indicated in the *Dalrymple v Colonial Treasurer* case cited above, a person can only sue if someone has violated a contractual or public duty owed to them or they have suffered some injury that is recognised by the law. In *Roodepoort-Maraisburg Town Council v Eastern Properties Ltd*<sup>65</sup>, the court affirmed the decision in *Dalrymple v Colonial Treasurer* by asserting that a person cannot be granted legal standing if their interest does not go beyond and above that of the general public. One has to demonstrate special interest or special damage to be accorded the right to institute legal proceedings.

*‘However, if a right which he can exercise personally is affected, his locus standi will not be denied merely because the same right also accrues to other members of the public. In short, the mere fact that a person shares with others the right or interest on which he relies to acquire locus standi, does not in itself indicate whether he has locus standi or not, because the answer ultimately depends on the circumstances of each case.’*<sup>66</sup>

The court in the *Roodeport-Maraisburg* case showed a nuanced understanding of special interest or special damage. If it is possible to exercise a general right individually or claim a general interest personally, then a person might be granted standing depending on the circumstances. The direct interest that individuals can possess while sharing similar interests with the general public was also on display in *Jacobs v Waks*<sup>67</sup>, where the Carltonville City Council had made a decision to exclude non-whites from accessing a park in a white area. Black people decided to boycott the businesses in the area in protest. Three individuals, a white person, a black person and an Indian person appealed to the court against the decision. The white person was affected because he was the director of a hardware store which suffered a loss of business due to the boycott. The black person regularly used the park although he was not a resident of the town. The Indian person was also not a resident of Carltonville but had a business which also suffered the effects of the boycott. The Appellate Division granted locus standi to all three stating that the white person had interests as a rate payer and business man, while the Indian and the black person had a direct interest because their dignity had been impaired by their exclusion. Counsel for the Council argued that the black person had no

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<sup>65</sup> *Roodepoort-Maraisburg Town Council v Eastern Properties Ltd* 1933 AD 87

<sup>66</sup> Elmene Bray ‘*Jacobs v Waks* from an Environmental Angle’ (1992) 7 SA Public Law 329 at 331

<sup>67</sup> *Jacobs v Waks* 1992 (1) SA 521 (A)

interest because he was not a resident of Carltonville but the court held that parks were meant for the benefit of the general public and not just for residents of a particular area.

The common law's concentration on sufficient, direct, personal interest reflects its interest in dispute resolution rather than the discussion of legality. In the case of *Davies v Bekker*<sup>68</sup>, where two applicants for a government post appealed against an unlawful appointment, the applicants were deemed to lack legal standing because they could not prove that they had been disadvantaged by the appointment and, as such, lacked sufficient interest. In an environmental case, *Verstappen v Port Edward Town Board*<sup>69</sup>, even though the municipality had clearly flouted the law by dumping waste next to the land belonging to the applicant without a permit as required by the Environment Conservation Act No. 73 of 1989<sup>70</sup>, the applicant who had applied for an interdict to halt the dumping was denied standing. The illegality was clear, but the applicant was thought to lack sufficient interest. The court held that the legislation in question was passed in the interest of the general public and the applicant failed to demonstrate that she had suffered unique or special damage as a result of the illegal dumping.

Cora Hoexter says '[t]he determination not to recognise injury of a public kind led the courts to evolve a common law requirement that the interest be "personal" to the applicant'.<sup>71</sup> She notes that there were two interpretations of the personal requirement in the jurisprudence of the country, one which was broad and another which was restrictive or narrow. The restrictive interpretation is the one that required an applicant to demonstrate special interest or special damage which was above and beyond that of the public. The broad interpretation acknowledged that damage or interest could be shared by an applicant with other members of the public, but as long as it was personal to the applicant, locus standi could be conferred. The *Jacobs v Waks* case cited above is evidently representative of the broad interpretation. The *Patz v Green* case<sup>72</sup> is representative of the restrictive interpretation and it also led to the development of the alternative principle that stated that if legislation was enacted in the interest of a particular class or group of people to which an applicant belonged, then the applicant could be granted legal standing regardless of whether they had suffered special injury or not.<sup>73</sup>

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<sup>68</sup> *Davies v Bekker* NO and Smit 1934 TPD 384

<sup>69</sup> *Verstappen v Port Edward Town Board* 1994 (3) SA 569 (D)

<sup>70</sup> Section 20(1)

<sup>71</sup> Hoexter *Administrative Law in South Africa* p.496

<sup>72</sup> *Patz v Green & Co* 1907 TS 427

<sup>73</sup> Tobias P van Reenen 'Locus Standi in South African Environmental Law: A Reappraisal in International and Comparative Perspective' (1995) 2 SAJELP 121 at 124

### 3.1.5 Exceptions Based on Life, Liberty and Physical Integrity

In South Africa, the case that is unique in that the court did not apply the strict common law locus standi requirements is *Wood and Others v Ondangwa Tribal Authority and Another*<sup>74</sup>. Religious leaders that included an Anglican bishop applied for an interdict to stop the unlawful arrests of and the subsequent infliction of corporal punishment upon individuals who were suspected of supporting certain political parties. These were held in detention without trial. At common law it was established that a person could not sue with the aim of defending another person's rights or interests without having a direct and personal interest or being adversely affected by the alleged illegality.<sup>75</sup> The religious leaders themselves were under no threat but they were granted locus standi as it was believed that the victims were not in a position to represent themselves as they were far from any established courts and were dispersed throughout South West Africa. This decision recognised the paramount importance of the rights to life and liberty and allowed the defence of these rights in the public interest. Reflecting on this decision, Cheryl Loots writes: 'This decision could have been used by the courts as precedent to justify the relaxation of the traditional rule against representative standing. Instead, the Appellate Division limited its application to matters involving violations of life, liberty or physical integrity.'<sup>76</sup> Another case which is of interest to environmentalists as it concerns the protection of green spaces is *Bamford v Minister of Community Development*<sup>77</sup>. The applicant who was a member of parliament for the Groote Schuur constituency applied for a permanent interdict to prevent the Minister of Community Development from building houses in a park in his constituency which was intended for public use. The applicant had never used the park, nor did he have any special interest in it, but he instituted legal proceedings in the public interest and was granted legal standing.

### 3.1.6 Legal Standing and Role of the Attorney General

The primary role of the attorney general in South Africa has been that of conducting prosecutions. The enabling acts for the functions of the attorney general were the South Africa Act<sup>78</sup> and the Criminal Procedure and Evidence Act of 1917<sup>79</sup>. Section 7(2) of the Evidence

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<sup>74</sup> *Wood and Others v Ondangwa Tribal Authority and Another* 1975 (2) SA 294 (A)

<sup>75</sup> Cheryl Loots 'Standing, Ripeness and Mootness' in Stuart Woolman et al *Constitutional Law of South Africa* 2<sup>nd</sup> ed. (2013) Juta, Cape Town p. 7-2

<sup>76</sup> *Ibid* p.7-3

<sup>77</sup> *Bamford v Minister of Community Development and State Auxiliary Services* 1981 (3) SA 1054 (C)

<sup>78</sup> Section 139 of the South Africa Act of 1909

<sup>79</sup> Section 17 of the Criminal Procedure and Evidence Act No. 31 of 1917

Act read: ‘This right and duty of prosecution vested in and entrusted to such Attorneys-General or Solicitor-General (as the case may be) is absolutely under his management and control’<sup>80</sup>. The office of the attorney general was independent until 1926 when the powers of prosecution were transferred to the Minister of Justice who would then delegate his powers to the attorney general.<sup>81</sup> The reason that was given for the change was that the attorney general wielded a lot of power and yet was not responsible to anybody, not even parliament.<sup>82</sup> In 1935, the authority of prosecution was returned to the attorney general who did not require a delegation from the Minister of Justice, but the latter still retained the power to veto or reverse a decision of the former to either prosecute or not prosecute.<sup>83</sup> This status was maintained even in the 1977 Criminal Procedure Act where the Minister of Justice could also exercise the functions of the attorney general himself.<sup>84</sup> The Act stated:

*‘An attorney general shall exercise his authority and perform his functions under this Act or under any other law subject to the control and direction of the Minister of Justice who may reverse any decision arrived at by an attorney general and may himself in general or in any specific matter exercise any part of such authority and perform any of such functions.’<sup>85</sup>*

According to the 1977 Criminal Procedure Act, the attorney general was under no obligation to disclose reasons for a decision to prosecute or not prosecute and his decision could not be appealed. The amendments of 1935 and 1977 clearly married politics to law making the office of the attorney general politically sensitive and one could say legally compromised because of the political influence that became exerted on the office. Nico Horn attributes the legislative amendments that the John Vorster government undertook in 1977 to the student revolts that happened in 1976 and he views the Criminal Procedure Act as just one of the oppressive measures implemented in an effort to quell dissent.<sup>86</sup> In the 1996 democratic Constitution, the prosecutorial functions of the attorney general were assumed by the National Director of Public Prosecutions<sup>87</sup> with the National Prosecuting Authority Act 32 of 1998 being the empowering

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<sup>80</sup> Nico Horn ‘The Independence of the Prosecutorial Authority of South Africa and Namibia: A Comparative Study’ in Nico Horn and Anton Bosl eds. *The Independence of the Judiciary in Namibia* (2008) MacMillan Education Namibia, Windhoek p.115

<sup>81</sup> Criminal and Magistrates’ Court Procedure Amendment Act No. 39 of 1926

<sup>82</sup> GE Devenish ‘Equality before the Law: The Constitutional and Legal Background of the Office of the Attorney General’ (1979) April Issue 139 *De Rebus* 189 at 189

<sup>83</sup> General Law Amendment Act No. 46 of 1935

<sup>84</sup> GE Devenish ‘Equality before the Law’ p.189

<sup>85</sup> Section 3(5) of the Criminal Procedure Act No. 51 of 1977

<sup>86</sup> Horn ‘The Independence of the Prosecutorial Authority’ p.118

<sup>87</sup> Section 179 of the 1996 Constitution of South Africa

legislation. Currently, there are plans to create the position of the solicitor general who will be the chief government legal advisor and will take charge of all civil litigation involving the government. To facilitate this process, the State Attorney Amendment Act 13 of 2014 is in the process of being drafted.

The South African attorney general was always more aligned to the judiciary than the executive in the sense that the focus of the office was criminal prosecution. The office was placed under the supervision and control of the Minister of Justice, as is the case with the current NDPP, but it was never really considered to be part of the executive in the manner in which the attorney general in England or Zambia is considered to be an ex officio member of cabinet. The office was not engaged in executive functions such as the preparation or scrutiny of government contracts and international agreements. The South African attorney general was not active in civil matters and, consequently, his role as guardian of the public interest was extremely limited. Furthermore, South African law did not provide for relator relations where consent could be sought by members of the public to institute legal proceedings in the public interest in the name of the attorney general.<sup>88</sup> The legal standing of the attorney general was limited to criminal matters.

### **3.1.7 Impact of the Strict Common Law Standing Requirements on Public Interest Litigation**

The aim of public interest litigation is to affirm, promote and enforce a public right that is guaranteed by the Constitution, legislation and even the common law. Public interest litigation, when successful, not only enforces the public right, but it also raises awareness about the value of the right in question. One can argue that even in defeat, there is an aspect of victory because a fight for rights forces a society to engage in introspection regarding how it is respecting the dignity of its citizens. The narrow common law requirements, needless to say, had a negative impact generally in public law and, specifically, in public interest environmental litigation which by its very nature goes beyond personal interests and even goes beyond national interests. Environmental concerns are global issues because what happens in one part of the world has possible ramifications in other parts of the world because of how interconnected the world's ecosystems are. The common law's reluctance to venture into issues of legality without evidence or a demonstration of personal injury or loss made public interest litigation extremely difficult. Individuals and organisations that were only interested in promoting the rule of law

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<sup>88</sup> GE Devenish 'Locus Standi Revisited' p.30

and protecting the environment could not be granted legal standing and, therefore, had no access to the courts to seek relief. In *Verstappen v Port Edward Town Board*, the court summarised the obstacle posed by the common law locus standi requirements when seeking to challenge an illegality:

*'In order to determine whether a member of the public has locus standi to prevent the commission of an act prohibited by statute, the first enquiry is whether the Legislature prohibited the doing of the act in the interests of any particular person or class of persons or whether it was merely prohibited in the general public interest. If the former, any person who belongs to the class of persons in whose interests the doing of the act was prohibited may interdict the act without proof of any special damage. If not, the applicant must prove that he has suffered or will suffer such special damage as result of the doing of the act. These principles are clearly set forth, inter alia, in *Patz v Greene & Co; Roodepoort-Maraisburg Town Council v Eastern Properties (Pty) Ltd 1933 AD 87* and the *Jacobs case*.'*<sup>89</sup>

## **3.2 The Democratic Period**

### **3.2.1 Bill of Rights and Legal Standing**

The interim constitution of 1994 and the final constitution of 1994 ushered in a new era in public interest litigation in South Africa, especially in the environmental sphere. The new bill of rights did not just have the traditional political and civil rights that are present in the constitutions of most traditional democracies, but it included socio-economic rights, as well as environmental rights. These rights were justiciable and because they were regarded as pivotal to the functioning of the new democratic society that was based on justice and equality, the legal standing requirements were liberalised to ensure access to justice for the purpose of safeguarding and promoting these rights. The constitution states:

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

- a. Anyone acting in their own interest;*
- b. Anyone acting on behalf of another person who cannot act in their own name;*
- c. Anyone acting as a member of, or in the interest of, a group or class of persons;*
- d. Anyone acting in the public interest; and*

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<sup>89</sup> *Verstappen v Port Edward Town Board 1994 (3) SA 569 (D)*

e. *An association acting in the interest of its members.*<sup>90</sup>

The liberalised standing rules outlined in section 38 of the constitution apply to situations where the rights in the Bill of Rights are threatened or violated. The section also applies to rights which are not mentioned in the Bill of Rights, but which are recognised at common law and in other pieces of legislation as long as they conform to the values underpinning the constitution.<sup>91</sup> The Bill of Rights is so important that the Constitution says that all legislation, including the common law, must be enacted and interpreted in the light of the Bill of Rights.<sup>92</sup> The Bill of Rights is binding not just on the State, but it is also binding on individuals and juristic persons to ensure maximum protection of rights.<sup>93</sup> Any legislation that conflicts with the rights guaranteed in the Bill is invalid. In public interest environmental litigation, the most significant right is the right ‘to an environment that is not harmful to health and well-being’.<sup>94</sup> It is, however, a right that is intrinsically linked to other rights such as the rights to water<sup>95</sup>, housing<sup>96</sup> and healthcare<sup>97</sup>. In *Ferreira v Levin*<sup>98</sup>, the Constitutional Court went as far as to declare that the broad standing rules of section 38 did not just apply to matters involving threats to and violations of rights in the Bill of Rights, but to all constitutional matters. Chaskalson P stated:

*‘I can see no good reason for adopting a narrow approach to the question of standing in constitutional cases. On the contrary, it is my view that we should rather adopt a broad approach to standing. This would be consistent with the mandate given to this court to uphold the Constitution and would serve to ensure that constitutional rights enjoy the full measure of the protection to which they are entitled.’*<sup>99</sup>

Southwood J was even more bold in *Van Rooyen v The State*<sup>100</sup> when he enthused that section 38 grants practically unlimited *locus standi* to persons who seek relief from the courts.<sup>101</sup> His bold assertion, however, has not yet been confirmed by the Constitutional Court which

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<sup>90</sup> Section 38 of the 1996 Constitution of the Republic of South Africa

<sup>91</sup> Section 39(3) of the Constitution

<sup>92</sup> Section 39(2) of the Constitution

<sup>93</sup> Section 8 of the Constitution

<sup>94</sup> Section 24 of the Constitution

<sup>95</sup> Section 27(1)(b) of the Constitution

<sup>96</sup> Section 26(1) of the Constitution

<sup>97</sup> Section 27(1)(a) of the Constitution

<sup>98</sup> *Ferreira v Levin* NO; *Vryenhoek v Powell* NO 1996 (1) BCLR 1 (CC); 1996 (1) SA 984 (CC)

<sup>99</sup> Yvonne Burns *Administrative Law* p.521

<sup>100</sup> *Van Rooyen and Others v The State and Others* 2001 (4) SA 396 (T) 232G-I

<sup>101</sup> Loots ‘Standing, Ripeness and Mootness’ p.7-4

acknowledged in *Electoral Commission v Langeberg Municipality*<sup>102</sup> that the ‘outer reaches of s 38(a)-(e)’ are not yet clear.<sup>103</sup> One would also think that legislation whose drafting and enactment is demanded by the Constitution for the practical expression of particular rights such as the right to just administrative action (PAJA)<sup>104</sup>, right to a clean environment (NEMA)<sup>105</sup> and right to equal treatment (PEPUDA)<sup>106</sup> would also be accorded broad standing. In *Concerts CC v Rinaldo Investments*, the Constitutional Court agreed that section 38 applies to PAJA: ‘The wide standing provisions of section 38 were not expressly enacted as part of PAJA. Hoexter suggests that nothing much turns on this because “it seems clear that the provisions of section 38 ought to be read in the statute”. This is correct.’<sup>107</sup>

### 3.2.2 Section 38 of Constitution and Common Law Standing Requirements

The relationship between section 38 and the common law standing provisions is still being worked out by the courts. Currently, the courts appear to be at liberty to apply the liberal provisions as they see fit<sup>108</sup>; some courts apply the broad provisions only when there is a threat to or an infringement of rights in the bill of rights<sup>109</sup>, others apply them to all constitutional matters<sup>110</sup>, and others still even to non-constitutional matters<sup>111</sup>. The constitution does, however, give guidance as it says that ‘when interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights’.<sup>112</sup> The Constitution also states that the Bill of Rights applies to all laws and calls for the development of the common law to bring it in line with the values, principles and goals of the Constitution.<sup>113</sup>

Section 38 has embraced some features of the common law legal standing requirements, but also developed them making it possible for public interest litigation to be undertaken.

#### 38 (a) Anyone acting in their own interest

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<sup>102</sup> *Electoral Commission v Langeberg Municipality* 2001 (3) SA 925 (CC) para 15

<sup>103</sup> Max du Plessis, Glen Penfold and Jason Brickhill *Constitutional Litigation* (2013) Juta, Cape Town p.44

<sup>104</sup> Section 33(3) of the Constitution

<sup>105</sup> Section 24(b) of the Constitution

<sup>106</sup> Section 9(2) of the Constitution

<sup>107</sup> *Concerts CC v Rinaldo Investments (Pty) Ltd and Others* 2013 (3) BCLR 251 (CC) para 29

<sup>108</sup> Hoexter *Administrative Law in South Africa* p.492

<sup>109</sup> *Raubenheimer v Johannes Bredenkamp Trust* 2006 (1) SA 124 (C) paras 45-51

<sup>110</sup> *Ferreira v Levin* para 165

<sup>111</sup> *Van Rooyen v The State and Others*

<sup>112</sup> Section 39(2) of the Constitution

<sup>113</sup> Section 8(3)(a) of the Constitution

This requirement has been adopted from the common law which requires a person to have sufficient direct and personal interest in a matter before one can sue. With section 38, one does not have to have a personal interest or be adversely affected as long as one has an interest in a matter. Therefore, suing in one's own interest does not imply that one has personally suffered loss or damage, but one can actually sue even when it is another who has suffered damage so long as one has an interest in the issue at hand and is genuine in seeking relief from the court. In *Ferreira v Levin*, 'Chaskalson P found that although the person must act in his or her own interest, that person did not need to be the person whose constitutional right had been infringed'.<sup>114</sup>

In *Concerts CC v Rinaldo Investments*, the Constitutional Court expounded a number of important principles regarding own-interest legal standing and litigation. Firstly, the court explained that 'own interest' legal standing is not obtained by the invalidity or illegality of the administrative decision or law being challenged because locus standi is divorced from the merits or substance of a case. What confers standing is the 'effect it will have on his or her interests or potential interests'.<sup>115</sup> The litigant has to demonstrate an interest that will be affected by the impugned decision or law, be it valid or invalid. Secondly, if the litigant lacks interest even an illegal administrative decision may be allowed to stay. However, if the matter is in the public interest, the court may exercise its discretion allowing the case to proceed even if, technically speaking, the litigant may have failed the test of legal standing.<sup>116</sup> The court emphasised that 'where a litigant acts solely in his or her own interest, there is no broad or unqualified capacity to litigate against illegalities'.<sup>117</sup> There must be an interest that is affected. Thirdly, challenging the legality of a law or decision must not just be academic or hypothetical but based on a real situation that affects the interests of the litigant.<sup>118</sup> Fourthly, the court conceded that legal standing is not an easy concept to define and that the facts of each case determine whether the applicant is denied or granted standing.<sup>119</sup> Finally, while conceding that own-interest standing in section 38 was wider than common law own-interest standing, the court asserted that it was not limitless; direct interest was required to avoid engaging in academic and hypothetical exercises.<sup>120</sup>

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<sup>114</sup> Loots 'Standing, Ripeness and Mootness' p.7-4

<sup>115</sup> *Concerts CC v Rinaldo Investments* para 33

<sup>116</sup> *Ibid* para 34

<sup>117</sup> *Ibid* para 35

<sup>118</sup> *Ibid* para 41

<sup>119</sup> *Ibid* para 41

<sup>120</sup> *Ibid* para 50

### **38 (b) Anyone Acting on Behalf of Another Person Who Cannot Act in their Own Name**

At common law, this standing provision was limited to situations involving threats to life and freedom as was the case in the *Wood v Ondangwa Tribal Authority* court case where supporters of the South West African People's Organisation (SWAPO) were being illegally detained without trial, brutally flogged and threatened with death. All the rights enshrined in the Bill of Rights are now applicable and not just life and liberty.<sup>121</sup> This provision is important whenever there is a fear of victimisation or social stigma.<sup>122</sup> It is one that could potentially be used by whistle-blowers on environmental matters. However, section 38 does not do away with the need to justify why the person cannot act in their own name. In *Ngxuza v Permanent Secretary*<sup>123</sup>, the court accorded standing to four applicants who challenged the cancellation of their disability grants payments based on this provision. People who share affiliations in churches, political parties, societies and professional associations can act on behalf of their fellow members. 'Froneman J held that people in a similar position to the applicant could not act on their own because they were poor, did not have access to lawyers and would have difficulty obtaining legal aid.'<sup>124</sup>

### **38 (c) Anyone Acting as a Member of, or in the Interest of, a Group or Class of Persons**

This provision facilitates class action in South African law. The nature of class action and its distinctive features have been explained in chapter 2. In the context of environmental litigation, class action is as important as public interest litigation as it allows ecologists, human rights activists and conservationists to institute legal proceedings on behalf of groups of people that are affected by environmental degradation and pollution. In *Van Huyssteen NO v Minister of Environmental Affairs and Tourism*<sup>125</sup>, trustees of a property who opposed the proposed construction of a steel mill that threatened to pollute and destroy the natural beauty of a lagoon in an adjacent municipality were granted legal standing even though they did not have a direct interest in the matter. In *Minister of Health and Welfare v Woodcarb (Pty) Ltd*<sup>126</sup>, the Minister was granted locus standi based on this provision of the Interim Constitution to apply for an interdict to stop a scheduled process that had the potential to cause air pollution in an area that had been designated as a controlled area. The Minister's interdict was meant to safeguard and

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<sup>121</sup> Yvonne Burns *Administrative Law* p.527

<sup>122</sup> *Ibid* p.528

<sup>123</sup> *Ngxuza v Permanent Secretary, Department of Welfare, Eastern Cape* 2001 (2) SA 609 (E)

<sup>124</sup> Yvonne Burns *Administrative Law* p.528

<sup>125</sup> *Van Huyssteen NO v Minister of Environmental Affairs and Tourism* 1995 (9) BCLR 1191 (C)

<sup>126</sup> *Minister of Health and Welfare v Woodcarb (Pty) Ltd* 1996 (3) SA 155 (N)

promote the right to ‘an environment not detrimental to health or well-being’.<sup>127</sup> The Supreme Court of Appeal in *Mukaddam v Pioneer Foods (Pty) Ltd and Others*<sup>128</sup> held that class actions are not restricted to threats to and infringements of the Bill of Rights.

#### **(d) Anyone Acting in the Public Interest**

This is the provision that introduced the *actio popularis* in South Africa facilitating challenges to unlawfulness which proved to be difficult under the common law without having a sufficient direct and personal interest in a case. Public interest litigation allows specialist organisations such as human rights organisations, consumer protection organisations, professional bodies and environmental organisations to institute legal proceedings in the interest of the public. Such organisations have experience, knowledge, expertise and the resources to mount serious legal challenges to public maladministration, negligence by public institutions, abuse of public power and unjust laws which violate the Constitution. Such organisations often have the ability to look beyond the borders to look at how state institutions in other countries are practicing values such as transparency and accountability. They have the ability to draw on the wisdom of international law and conventions which individuals who are affected by illegalities cannot do. Public interest litigation also makes it possible for foreigners to institute legal proceedings in the interest of the South African public. The courts have established some criteria to determine the authenticity of the interest. In *Ferreira v Levin*, O’Regan J stated:

*‘Factors to determining whether a person is genuinely acting in the public interest will include consideration 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 which it is of general and prospective application; and the range of persons or groups who will be directly or indirectly affected by any order made by the Court and the opportunity that those persons or groups have had to present evidence and argument to the Court.’*<sup>129</sup>

In *Lawyers for Human Rights v Minister of Home Affairs*, Yacoob J added other criteria to judge the authenticity of the litigant’s concern for the interest of the public.<sup>130</sup> Among the criteria included were the extent of people’s vulnerability, the nature of the right threatened

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<sup>127</sup> Loots ‘Standing, Ripeness and Mootness’ p. 7-7

<sup>128</sup> *Mukaddam v Pioneer Foods (Pty) Ltd and Others* (CCT 131/12) [2013] ZACC 23 para 21

<sup>129</sup> Max du Plessis et al *Constitutional Litigation* p.46

<sup>130</sup> *Lawyers for Human Rights and Another v Minister of Home Affairs and Another* 2004 (4) SA 125 (CC) para 18

and possible repercussions of the right's violation.<sup>131</sup> The courts in setting these criteria are concerned about averting the possible abuse of the court process in the name of the public interest. However, the courts need to be careful that they do not make these criteria too stringent as it will defeat the purpose of the broadening of the standing requirements. Loots has observed that how the courts interpret the clause 'in the public interest' will determine how far the process of liberalisation goes.<sup>132</sup> There is always the danger that courts in their work of interpreting the law may move away from the intention of the legislators. Legislators can enact laws with specific intentions, but, ultimately, as Lord Reid asserted, 'the law is what the judge says it is'.<sup>133</sup> The guidelines regarding who may be admitted to bring a case before the courts in the public interest must be in the spirit of the whole of section 38 and the Constitution's goal of promoting and protecting people's rights including the right to a clean and healthy environment.

#### **(e) An association Acting in the Interest of its Members**

At common law, courts did not easily recognise the standing of associations to represent the interests of their members. A sharp distinction was normally drawn between the interests and rights of incorporated associations and the rights and interests of their members individually. However, there were instances where associations were allowed to represent the rights of their members as was the case in *Transvaal Indian Congress v Land Tenure Advisory Board*<sup>134</sup> where the court held that it was better for the body to be given standing to avoid the situation where each of the members would have to institute legal proceedings individually.<sup>135</sup> In *South African Optometric Association v Frames Distribution (Pty) Ltd*<sup>136</sup>, the association did not succeed in its challenge to prevent the respondent from dealing in the illegal sale of spectacle frames as it was a non-profit body and, consequently, was deemed to have no sufficient interest in the matter by the court even though its individual members were, financially, being affected.

As explained above and in chapter two, the requirement of 'capacity to sue' was one that afflicted many groups and voluntary associations and proved to be a formidable impediment in establishing legal standing, but with this provision the situation has now changed. In Rail

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<sup>131</sup> Max du Plessis et al *Constitutional Litigation* p. 46

<sup>132</sup> Loots 'Standing, Ripeness and Mootness' p.7-11

<sup>133</sup> Lord Reid 'The Judge as Law Maker' (1972) 12 *The Journal of Public Teachers of Law* 22 at 22

<sup>134</sup> *Transvaal Indian Congress v Land Tenure Advisory Board* 1955 (1) SA 85 (T)

<sup>135</sup> Yvonne Burns *Administrative Law* p.536

<sup>136</sup> *South African Optometric Association v Frames Distributors (Pty) Ltd t/a Frames Unlimited* 1985 (3) SA 100 (O)

Commuter Action Group v Transnet Ltd t/a Metrorail<sup>137</sup> the court held: ‘Strict adherence to the requirements of a *universitas personarum* is incompatible with the spirit of the Constitution’.<sup>138</sup> The court further went on to say that ‘a voluntary association formed to protect the rights of a vulnerable constituency and with the object of holding a public body accountable to the public should, it seems, not be subjected to unnecessary restrictions before being heard by our Courts’.<sup>139</sup> Where the issue of protecting fundamental human rights is concerned, the courts are now not considering capacity to sue as an impediment to locus standi. This development is especially welcome in the sphere of environmental litigation where non-governmental organisations and conservation groups wish to institute litigation to protect the environment. In *Wildlife Society of Southern Africa and Others v Minister of Environment Affairs and Tourism*<sup>140</sup>, the court held that even at common law, organisations such as the applicant should be accorded standing where they seek enforcement of legislation meant to protect the environment in the face of government failure to fulfil its statutory mandate.

### 3.2.3 National Environmental Management Act 107 of 1998

The National Environmental Management Act (NEMA) is the mother or umbrella environmental legislation that unifies all national legislation relating to environmental issues and as such contains the environmental principles that guide and inform the management of environmental resources. It is the specific legislation that gives practical expression to the environmental right in section 24 of the Constitution. It encompasses matters regarding ‘resource conservation and exploitation; pollution control and waste management; and land use planning and development’.<sup>141</sup> Litigation regarding the environmental right has to go through NEMA in line with the principle of subsidiarity that has been developed by the courts to avoid direct reliance upon the Bill of Rights.<sup>142</sup> In *Mazibuko and Others v City of Johannesburg*, O’Regan J held: ‘This court has repeatedly held that where legislation has been enacted to give effect to a right, a litigant should rely on that legislation in order to give effect to the right or alternatively challenge the legislation as being inconsistent with the constitution’.<sup>143</sup> As the legislation that gives practical expression to the right ‘to an environment that is not harmful to

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<sup>137</sup> Rail Commuter Action Group v Transnet Ltd t/a Metrorail 2003 (5) SA 518 (C)

<sup>138</sup> Hoexter *Administrative Law in South Africa* note 146 p.508

<sup>139</sup> *Ibid* note 146 p.508

<sup>140</sup> *Wildlife Society of Southern Africa and Others v Minister of Environmental Affairs and Tourism and Others* 1996 (3) SA 1095 (TK)

<sup>141</sup> Glazewski *Environmental Law in South Africa* p.7-6

<sup>142</sup> Hoexter *Administrative Law in South Africa* p.119

<sup>143</sup> *Mazibuko and Others v City of Johannesburg and Others* 2010 (4) SA 1 (CC) para 73

health or well-being’, the NEMA has been the recipient of the broadened legal standing accorded to the Bill of Rights in section 38.

### **3.2.4 Liberalisation of Standing Rules in Section 32 of NEMA**

The standing rules in the NEMA are not just a reflection of the standing rules in section 38, but an enhancement or expansion of those rules. Section 32 of NEMA expands section 38 of the Constitution because it not only applies when there are threats to or breaches of rights in the Bill of Rights, but it also extends to violations of the principles contained in chapter one of NEMA, as well as to other violations of environmental legislative provisions. All the other environmental pieces of legislation for which the NEMA provides a general framework are open to the application of the extended standing provisions. Violations of principles such as sustainable development, polluter pays principle, and the pre-cautionary principle accord environmental litigants the expanded grounds of standing.

Persons or Groups aggrieved may seek relief in the following ways:

- (a) in that person’s or group of person’s own interest;*
- (b) in the interest of, or on behalf of, a person who is, for practical reasons, unable to institute such proceedings;*
- (c) in the interest of or on behalf of a group or class of persons whose interests are affected;*
- (d) in the public interest; and*
- (e) in the interest of protecting the environment.*<sup>144</sup>

It is important to note that section 32(1) mentions that the liberal grounds of standing in the NEMA also apply to the extraction and use of natural resources which include mineral resources. The application of the NEMA to the extraction and use of mineral resources was sealed through the enactment of the Mineral and Petroleum Resources Development Amendment Act 49 of 2008 which amended the Mineral and Petroleum Resources Development Act 28 of 2002. The amendment act reflected the concern for integrated environmental management, as well as the concern for sustainable development which aims at

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<sup>144</sup> NEMA Section 32(1)

balancing developmental needs with environmental concerns. The preamble to the amendment act says the purpose of the act was ‘to align the Mineral and Petroleum Resources Development Act with the National and Environmental Management Act, 1998 in order to provide for one environmental management system...’.<sup>145</sup> The dual concern for development and the environment is reflected in provisions such as the requirement to apply simultaneously for the mining right as well as environmental authorisation.<sup>146</sup> The Act also empowers the Minister of Mineral Resources to enforce provisions of the NEMA regarding ‘prospecting, mining, exploration and production’.<sup>147</sup> The issue of sustainable development has been dealt with in cases like *BP Southern Africa (Pty) Ltd v MEC for Agriculture, Conservation and Land Affairs*.<sup>148</sup> The court stated:

*‘The concept of “sustainable development” is the fundamental building block around which environmental legal norms have been fashioned...Pure economic principles will no longer determine, in an unbridled fashion, whether a development is acceptable. Development, which may be regarded as economically and financially sound will, in future, be balanced by its environmental impact...’*<sup>149</sup>

### **3.2.5 Duty of Care in Section 28 of NEMA**

It is the primary duty of the State to protect the public rights of the citizens through its agencies and at the various levels of government at national, provincial and local government. The right to an environment that is not harmful to health and wellbeing can be protected through the enforcement of provisions in the NEMA. Section 28 of the NEMA places an obligation on all persons to ensure that they do not cause pollution or degradation of the environment, but if they do so to take remedial measures and to ensure that future pollution does not occur.<sup>150</sup> Emphasis is, however, placed on the responsibility of those who own land, control land or premises and those who have a right to use land or premises where pollution or environmental degradation may occur to ensure that they exercise the duty of care.<sup>151</sup> Both subsections (1) and (2) of section 28 contain expressions that would require interpretation. Section 28(1) speaks about taking ‘reasonable measures’ to prevent, control or contain the pollution or

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<sup>145</sup> Mineral and Petroleum Resources Development Amendment Act 49 2008

<sup>146</sup> *Ibid* section 18(a)

<sup>147</sup> *Ibid* Preamble

<sup>148</sup> *BP Southern Africa (Pty) Ltd v MEC for Agriculture, Conservation and Land Affairs* 2004 (5) SA 124 (W)

<sup>149</sup> *Ibid*.

<sup>150</sup> NEMA Section 28(1)

<sup>151</sup> *Ibid* Section 28(2)

environmental degradation. What needs determination is what constitutes ‘reasonable measures’. Section 28(2) speaks of ‘any land or premises on which or in which any activity or process is or was performed or undertaken which causes, has caused or is likely to cause “significant pollution” or degradation of the environment’.<sup>152</sup> The meaning of the phrase ‘significant pollution’ or rather what it constitutes was interpreted in *Hichange Investments (Pty) Ltd v Cape Produce Company (Pty) Ltd*.<sup>153</sup> The court agreed with Jan Glazewski that ‘significant pollution’, understood within the context of the environmental right as enshrined in the Constitution, did not imply that the level of pollution had to be particularly high.

Section 28(4) empowers the Director General of the Department of Environmental Affairs or Mineral Resources or a Provincial Head of Department to issue a directive to the persons responsible for pollution or environmental degradation to take remedial measures. Section 28(7) applies should the cause of the pollution fail to comply as it obliges the environmental authorities to take remedial measures or to apply to a competent court for relief. The costs incurred under this subsection can be recovered by the authorities from the polluter. ‘Failure to comply with the directive was not a criminal offence prior to the 2009 changes, but now it is, and subject to stiff penalties as well.’<sup>154</sup> Where the aforementioned administrators fail to fulfil their statutory obligations, any person has legal standing to institute legal proceedings to force them to act after giving a 30-day notice.<sup>155</sup> In the *Hichange Investments (Pty) Ltd v Cape Produce (Pty) Ltd* case, the respondent was operating a tannery that processed raw hides. The production process, however, resulted in air pollution and acid rain that damaged vehicles that were parked at the property of the applicant which was next to the tannery. The environmental authorities failed to effect section 28(4) and section 28(7) even after the applicant had informed them of the pollution. The applicant had standing based on section 28(12) and instituted legal proceedings seeking relief. The court ordered the Provincial Department to effect section 28(4) which involved compelling the respondent to ‘investigate, evaluate, and assess the impact of gases emitted from the tannery and report to the Department’.<sup>156</sup> The applicant in this case would have also managed to establish legal standing under the common law as it had sufficient direct interest having suffered special damage through the corrosion of its vehicles and facility,

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<sup>152</sup> Ibid Section 28(2)(b)

<sup>153</sup> *Hichange Investments (Pty) Ltd v Cape Produce Company (Pty) Ltd t/a Pelts Products and Others* 2004 (2) SA 393 (E)

<sup>154</sup> Michael Kidd *Environmental Law* 2<sup>nd</sup> ed. (2011) Juta, Cape Town p.152

<sup>155</sup> NEMA Section 28(12)

<sup>156</sup> LJ Kotze, W du Plessis, L Ferris and M Olivier *South African Environmental Law Through the Cases* (2008) LexisNexis, Durban p.101

but the extended provisions of the NEMA would have accorded any person locus standi in the public interest to institute legal proceedings.

### **3.2.6 Costs and Public Interest Environmental Litigation**

Apart from legal standing requirements, another challenge to public interest environmental litigation has been the high legal costs. The NEMA has addressed this challenge in section 32:

*'A court may decide not to award costs against a person who, or group of persons which, fails to secure the relief sought in respect of any breach or threatened breach of any provision of this Act, including a principle contained in chapter 1, or of any provision of a specific environmental management Act, or of any other statutory provision concerned with the protection of the environment or the use of natural resources, if the court is of the opinion that the person or group of persons acted reasonably out of concern for the public interest or in the interest of protecting the environment and had made due efforts to use other means reasonably available for obtaining the relief sought.'*<sup>157</sup>

It can, however, be observed that the courts still have the discretion whether to grant this waiver or not depending on the conduct, and perceived intentions of the litigants, as well as their efforts in seeking resolution of the problem using other available means. Costs were at issue in the Biowatch case<sup>158</sup> where the High Court decided to punish Biowatch Trust, an NGO involved in the promotion of the environment, for making an inept request for information using the right to information by making a costs order against it even though it succeeded in the claim. The Constitutional Court reversed the decision and instead asked the State to bear the costs.

The next chapter will discuss the Zambian common law standing requirements, as well as the legislative and constitutional developments that have taken place.

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<sup>157</sup> NEMA Section 32(2)

<sup>158</sup> Biowatch Trust v Registrar, Genetic Resources 2009 (6) SA 232 (CC)

## 4.0 Chapter 4

### 4.1 Locus Standi and Public Interest Environmental Litigation in Zambia

#### 4.1.1 Common Law Standing Rules

Zambia is a former British colony having gained independence in 1964 and a member of the Commonwealth. The legal system is based on the English model, although the system of government is presidential with the supremacy of the Constitution rather than the supremacy of Parliament, and the courts still make use of some of the rules and procedures that govern the English courts.<sup>159</sup> The country's standing requirements are based on the English common law standing rules and the courts frequently cite court judgments in England and the other Commonwealth countries. Writing in 1974, WL Church made this observation: 'If there were any doubts that Zambia, as a former part of Britain's colonial empire, is a common law jurisdiction, they would immediately be dispelled by the statutory legacy remaining from the past.'<sup>160</sup> He then proceeded to give examples:

*'There are several specific references to English law in her statutes. By far the most important of these is Chapter 4 of the Laws of Zambia (1970), the English Law (Extent of Application) Act, which provides that "(a) the common law; and (b) the doctrines of equity; and (c) the statutes which were in force in England on the 17<sup>th</sup> August, 1911 ...; and (d) any [later English statutes applied to Zambia] shall be in force in the Republic".'*<sup>161</sup>

The English Law (Extent of Application) Act which regulates the application of English law in Zambia was amended in 2002 with the inclusion of the Supreme Court Practice Rules of England that were in effect in 1999 among the laws applicable in Zambia.<sup>162</sup> The Act was further amended in 2011<sup>163</sup> with the provision regarding the use of the Supreme Court Rules being transferred to the High Court Amendment Act No. 7 of 2011.

#### 4.1.2 Capacity to Sue

As already indicated, *locus standi* is determined by the twin elements of capacity to sue and sufficient interest. The element of capacity to sue has been at the heart of a number of court

<sup>159</sup> High Court Act, Chapter 27 of the Laws of Zambia Sections 9,10,11, and 12; Supreme Court Act, Chapter 25 of the Laws of Zambia Section 8; and Dean Mungomba and Others v Peter Machungwa and Others (2003) ZR 17

<sup>160</sup> WL Church 'The Common Law and Zambia' (1974) 6 Zambia Law Journal 1 at 24

<sup>161</sup> Ibid p.25

<sup>162</sup> English Law (Extent of Application) (Amendment) Act No. 14 of 2002

<sup>163</sup> English Law (Extent of Application) (Amendment) Act No. 6 of 2011

cases such as *Zambia International Hotels Limited v First Alliance Bank (Z) Limited*.<sup>164</sup> The plaintiff had obtained a loan from the defendant to construct a hotel, but upon default the defendant placed the plaintiff under receivership in order to recover its money. The plaintiff obtained a temporary injunction and sued the defendant alleging that the latter had breached the terms of the loan agreement as the loan was only due for repayment after the completion of the construction of the hotel. The defendant argued that the plaintiff had no *locus standi* as it had no capacity to sue in its own name since it had been placed under receivership. In its defence, the plaintiff contended that the appointment and registration of the receiver with the Patents and Company's Registration Agency (PACRA) had been done illegally and, therefore, was null and void. The judge agreed with the defendant holding that the plaintiff had no *locus standi*. In making the judgment, the judge quoted from another court case:<sup>165</sup> 'Quite clearly, a company under receivership has no locus standi independent of its receiver. As long as a company continues to be subject to receivership, it is the receiver alone who can sue or defend in the name of the company.'<sup>166</sup>

#### **4.1.3 Interest**

Court cases in Zambia have generally followed the strict common law principle requiring that a litigant demonstrate a sufficient interest in a matter. In *Wina and Others v Attorney General*,<sup>167</sup> it was argued and accepted that mere dissatisfaction with an administrative decision was not sufficient to establish legal standing. A litigant must have something to lose or gain from a case, a proprietary or financial interest or right.

#### **4.1.4 Legal Standing and Role of the Attorney General**

At common law, it is only the Attorney General who could vindicate a public right. Lord Wilberforce in *Gouriet v Union of Post Office Workers*<sup>168</sup> said:

'It can be properly be said to be a fundamental principle of English law that private rights can be asserted by individuals, but that public rights can only be asserted by the Attorney-General as representing the public...And just as the Attorney-general has in general no power to

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<sup>164</sup> *Zambia International Hotels Limited v First Alliance Bank (Z) Ltd* 2015/HP/0752

<sup>165</sup> *Magnum (Z) Ltd v Basit Quadri (Receiver/Manager) and Grindlays Bank (Z) Ltd* (1981) ZR 141 HC

<sup>166</sup> *Zambia International Hotels Ltd v First Alliance Bank* p. R10

<sup>167</sup> *Arthur Wina and Others v Attorney General* 1990/HP/1878

<sup>168</sup> *Gouriet v Union of Post Office Workers* (1978) AC 435, 477

interfere with the assertion of private rights, so in general no private person has the right of representing the public in the assertion of public rights.’<sup>169</sup>

In Zambian law, the office of the Attorney-General is a constitutional office whose role it is to represent the government in civil proceedings and protect the public interest.<sup>170</sup> The Constitution asserts the independence of the Attorney-General from the control of any person or authority.<sup>171</sup> This provision contrasts with the position of the Attorney-General in South Africa in 1926 who was placed under the authority of the Minister of Justice. The role of the Attorney-General is evident in cases such as *Mumba and Others v Electoral Commission of Zambia (ECZ) and Attorney General and Law Association of Zambia (LAZ)*<sup>172</sup> where the petitioners requested the High Court to extend the tenure of office of the winner of the presidential elections following the death of the incumbent. The petitioners who claimed locus standi by virtue of being voters and as such sharing collectively in the rights of the President were challenged by the respondents that they did not have the locus standi to bring the petition on behalf of the Republican President as this was the role of the Attorney General who was the chief legal advisor and legal representative of the government, as well as guardian of the public interest. The respondents argued that the petitioners did not obtain the consent or *fiat* of the Attorney General to engage in relator relations as required by Order 15 Rule 11(3) of Rules of the Supreme Court 1999 Edition. It is interesting that in this particular case the Attorney General was among the respondents who opposed the petition. The court ruled that the petitioners had no locus standi. The Attorney General is meant to protect the

public interest by ensuring that State organs and agencies do not go beyond their statutory powers and that they perform their functions of protecting and promoting public rights. The office is meant to provide checks and balances by ensuring compliance with statutory obligations. The decision of the Attorney General not to give consent to a relator action is not subject to review<sup>173</sup> and so an illegality can continue unabated when this happens. The 1991 and 1996 Constitutions gave the Attorney General an oversight role over the Director of Public Prosecutions (DPP) regarding sensitive criminal prosecution cases<sup>174</sup>, but that responsibility seems to have been withdrawn in the 2016 Constitution indicating that criminal prosecutions

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<sup>169</sup> Christos Mantziaris ‘The Attorney-General and the Public Interest’ (2004) 25 Adelaide Law Review 213 at 217

<sup>170</sup> Constitution of Zambia Amendment Act No. 2 of 2016 art. 177

<sup>171</sup> Ibid art. 177(4)

<sup>172</sup> *R Mumba and Others v ECZ and Attorney General and LAZ and Another* 2015/HP/0967

<sup>173</sup> Christos Mantziaris ‘The Attorney-General and the Public interest’ p.217

<sup>174</sup> 1996 Constitution of Zambia art. 54(7)

are now the sole responsibility of the DPP. Even though the Constitutions have asserted the independence of the Attorney General in decision-making, in practice this has not always been so because the President has power to remove him at any time.

## 4.2 Constitutional Developments and Standing

Zambia has had several Constitutions since independence: the first one was the independence constitution in 1964 that created the Republic of Zambia; the second one was in 1973 which abolished multi-party politics and introduced one-party rule; the third Constitution re-introduced multi-party politics in 1991; a fourth constitution was enacted in 1996 which was meant to entrench democracy; and finally the 2016 Constitution was enacted, the first which had gone through a constitutional conference. ‘The 1964 Constitution contained an extensive Bill of Rights.’<sup>175</sup> It also required a two-thirds majority in parliament and a referendum for amendments to be made to the Bill of Rights. The 1973 Constitution removed this requirement which made it easy for amendments to be made to the Bill of Rights and with the introduction of one-party rule it meant that the rights in the Bill were greatly diluted as so many limitations were imposed. The 1991 Constitution brought back the protections that were accorded to the Bill of Rights by the 1964 Constitution<sup>176</sup> and most importantly, the supremacy of the Constitution was declared.<sup>177</sup> The 1996 Constitution amended the entire constitution with the exception of the Bill of Rights and the Amendment Clause which was contained in Article 79.<sup>178</sup> The 2016 Constitution did not introduce any changes to the Bill of Rights but it saw the creation of the Constitutional Court<sup>179</sup> and the introduction of changes to the electoral system.

### 4.2.1 Bill of Rights and Legal Standing

In the petition case between the Attorney General and the LAZ in the Supreme Court of Zambia (SCZ)<sup>180</sup>, in which the matter of the constitutionality of the provision that provides for the Republican President to set the date for elections was heard, the issue of *locus standi* was raised. The LAZ argued that it was discriminatory for the President, a contestant in the elections, to set the date for the elections as provided for in the Electoral Act<sup>181</sup> and, therefore, in breach of

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<sup>175</sup> Muna Ndulo and Robert B Kent ‘Constitutionalism in Zambia: Past, Present and Future’ (1996) 40 *Journal of African Law* 256 at 263

<sup>176</sup> Constitution of Zambia Act No.1 of 1991 art. 79(3)

<sup>177</sup> *Ibid* art. 1(2)

<sup>178</sup> The Amendment Clause required a two-thirds majority vote and a referendum to effect changes to the Bill of Rights.

<sup>179</sup> Constitution of Zambia Amendment Act of 2016 art. 127

<sup>180</sup> *Attorney General v Law Association of Zambia* (2008) 1 ZR 21

<sup>181</sup> Electoral Act No. 12 of 2006 section 25(1)

article 23 of the Bill of Rights in the Constitution<sup>182</sup> which prohibits discrimination. The LAZ had, therefore, applied for the concerned provision in the Electoral Act to be declared invalid as it was in violation of the Constitution. Article 28 which outlines the standing requirements for the Bill of Rights states:

*‘Subject to clause (5) If any person alleges that any of the provisions of Articles 11 to 26 inclusive has been, is being or is likely to be contravened in relation to him, then, without prejudice to any other action with respect to the same matter which is lawfully available, that person may apply for redress to the High Court which shall –*

- (a) hear and determine any such application;*
- (b) determine any question arising in the case of any person which is referred to it in pursuance of clause (2);*
- (c) and which may, make such order, issue such writs and give such directions as it may consider appropriate for the purpose of enforcing, or securing the enforcement of, any of the provisions of Articles 11 to 26 inclusive.’<sup>183</sup>*

The Attorney General contended that a person had to show that they had been directly affected by the right which they claimed had been, was being or was likely to be contravened.<sup>184</sup> He further argued that the LAZ did not fit the description of ‘any person’ described in Article 28<sup>185</sup> and that they had failed to demonstrate how the alleged discrimination related to them. According to the Attorney General, the proper parties to have raised the matter would have been the political parties that were going to contest the elections as they were going to be directly affected. In this court case, the capacity to sue of the LAZ and its interest in or relation to the alleged infringement were called into question. The status of public interest litigation in Zambian law also came to the fore in the case. In challenging the petition by the LAZ, the Attorney General stated that the petition did not even fall under the category of public interest litigation because there were no socially or financially disadvantaged groups that the association was purporting to represent.<sup>186</sup> In its counter argument, the LAZ stated that Zambian law does not provide for public interest litigation:

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<sup>182</sup> Constitution of Zambia Act No. 18 of 1996

<sup>183</sup> Ibid art. 28(1)

<sup>184</sup> Attorney General v LAZ para 43

<sup>185</sup> Ibid para 42

<sup>186</sup> Ibid para 45

‘...[R]eliance on the case of *The People Union for the Democratic Rights and Another* was misplaced because the *Zambian Constitution* has no clause relating to “public interest litigation”; but...the *Zambian Constitution*, by virtue of Article 28, confers upon the High Court the powers of Judicial Review.’<sup>187</sup>

In its judgment, the Supreme Court held that the LAZ had capacity to sue under Article 28(1) as it had juristic personality that entitled it to fit in the expression ‘any person’ as employed in the aforesaid article.<sup>188</sup> The court also held that Article 28 did not require any person to be directly affected by the contravention of or threat to a right in the Bill of Rights for them to seek redress and, therefore, upheld the locus standi of the LAZ.<sup>189</sup> The court in its judgment showed that what was essential was to demonstrate the threat to or actual violation of a right and not the direct relationship to the possible or actual harm.

In an earlier case, *Harry Nkumbula v Attorney General*<sup>190</sup>, the applicant who was a Member of Parliament and leader of the opposition, appealed against an announcement by the Republican President on 25 February 1972 to establish a one-party state.<sup>191</sup> He argued that the decision would violate his freedom of expression and freedom of association and, therefore, sought a declaration from the Court declaring the move unconstitutional. The Court of Appeal held that Article 28(1) which confers locus standi regarding the Bill of Rights could not be triggered in this case because it concerned proposed legislation which was not yet in force and clause 5<sup>192</sup> to which Article 28(1) was subject clearly stipulated that Article 28(1) could only be invoked regarding legislation in force and not to amendment bills or mere proposals. The applicant was, therefore, adjudged to lack legal standing. The court also emphasised that ‘before the individual has *locus standi* to seek redress there must be an actual or threatened action in relation to him. For instance, if an individual is arrested under provisions of an Act which he alleges is ultra vires the Constitution, he may in addition to any other remedy open to him proceed under section 28(1)’.<sup>193</sup> The applicant was not granted *locus standi*. The interpretation of the Court of Appeal as it was then called was clearly at odds with the interpretation of its successor, the

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<sup>187</sup> Ibid para 50

<sup>188</sup> Ibid para 54

<sup>189</sup> Ibid para 55

<sup>190</sup> *Harry Nkumbula v Attorney General* (1972) ZRL 204

<sup>191</sup> Lawrence Zimba ‘Two Test Cases as to the Constitutionality of the Introduction of a One-Party State Contrasted: The *Zambian One-Party Case of Harry Nkumbula v Attorney General* and the *Sierra Leone One-Party Case of Steele and Others v Attorney General*’ (1981) 13 *Zambia Law Journal* 45 at 46

<sup>192</sup> Ibid p.50

<sup>193</sup> Chandra P. Gupta ‘*Harry Mwaanga Nkumbula and Attorney General for the Republic of Zambia*’ (1973) 5 *Zambia Law Journal* 147 at 153

Supreme Court of Zambia, in the *LAZ v Attorney General* case cited above, where the court held that it was not necessary to be directly related to a contravention of a right in the Bill of Rights before one could seek redress in a court of law. The decision of the Supreme Court was a huge step towards establishing public interest litigation in Zambia as it moved beyond the common law's disinclination to address issues of legality outside of the context of an actual situation where a person's personal rights and interests are threatened.

#### **4.2.2 Liberalisation of Standing Rules by the Courts**

The fact that the Zambian courts frequently make reference to judgments made in other jurisdictions, particularly in England and other Commonwealth countries, means that the jurisprudential developments that occur in these jurisdictions eventually begin to have a bearing on the court decisions in Zambia. The influence of the liberalisation of standing rules in South Africa and India is evident in cases such as *Frank Bwalya v Attorney General and Others*.<sup>194</sup> In this case, the petitioner sued the Investigator General of the Police and the ruling MMD party for violating his constitutional rights to freedom of expression, freedom of assembly and freedom of association. He had started a campaign to discredit the ruling party through an organisation that he had founded, but a senior member of the party had issued threats against him and the police had denied him a permit to hold meetings in the capital. The issue of whether the petitioner had *locus standi* was raised since he had resigned from his organisation in the process of the litigation. Even though the court denied him *locus standi* because of his resignation from the organisation, there was an acknowledgement by Judge P. Matibini that the modern trend in constitutional litigation was to widen the standing requirements. He stated: 'The approach to standing in the Bill of Rights matters contrasts sharply with the common law. Effective enforcement of the Bill of Rights demands a broader approach to standing. This approach was elucidated by Chaskalson P in the South African case of *Ferreira v Levin*'.<sup>195</sup> One could argue that the judge made a bold statement by stating that the modern approach was to liberalise standing rules in order to accord rights maximum protection, but he did not follow through with his bold statement because he denied the petitioner *locus standi*. To justify his bold statement, the least the judge could have done was to accede to the petitioner's request for a declaration that his rights were being threatened.

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<sup>194</sup> *Frank Bwalya v Attorney General and Others* 2010/HP/630

<sup>195</sup> *Ibid*

Nevertheless, he sowed seeds for the future liberalisation of standing rules in constitutional cases, especially those involving the Bill of Rights.

### **4.2.3 2016 Constitution and the Environment**

#### **4.2.4 Preamble and Part IV of the Constitution**

The Zambian Constitution only contains civil and political rights and so does not contain any social and economic rights like environmental rights in its Bill of Rights. The Constitution, however, does make reference to environmental matters. In the preamble there is a reference to the sustainable management of resources in a ‘devolved system of governance’. The environment is then mentioned in Part IV of the Constitution which talks about citizenship. Among the duties of a citizen are, firstly, the maintenance of ‘a clean and healthy environment’<sup>196</sup>; secondly, the protection and conservation of the environment and, thirdly, the utilisation of natural resources in a sustainable manner.<sup>197</sup>

#### **4.2.5 Part XIX of the Constitution**

Part XIX of the Constitution is dedicated to land, natural resources and the environment. Article 253 outlines the principles that should govern land use such as the ‘sustainable use of land’<sup>198</sup> and ‘equitable access to land and associated resources’<sup>199</sup>. The Public trust doctrine<sup>200</sup> is reflected in the fact that certain areas of land like ‘river frontages, islands, lakeshores, and ecologically and culturally sensitive areas’<sup>201</sup> are protected from private ownership in order to ensure that the public have access to those areas. Article 255 outlines the principles that are to govern the management and development of the environment and natural resources such as the polluter pays principle,<sup>202</sup> intra-generational equity principle,<sup>203</sup> precautionary principle<sup>204</sup> and sustainable development<sup>205</sup>. There is mention of the use of renewable energy and the need for local communities to benefit from investments in land,<sup>206</sup> as well as the exploitation of mineral resources. Public participation and consultation by government agencies in the management of

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<sup>196</sup> 2016 Constitution art. 43(d)

<sup>197</sup> Ibid art. 43(c)

<sup>198</sup> Ibid art. 253(d)

<sup>199</sup> Ibid art. 253(a)

<sup>200</sup> Jan Glazewski *Environmental Law in South Africa* p.1-25

<sup>201</sup> 2016 Constitution art. 253(g)

<sup>202</sup> Ibid art. 255(b)

<sup>203</sup> Ibid art. 255(f)

<sup>204</sup> Ibid art. 255(c)

<sup>205</sup> Ibid art. 255(g)

<sup>206</sup> Ibid art. 253(h)

environmental resources is encouraged.<sup>207</sup> One cannot help but be struck by the over-emphasis on the personal responsibility of individual citizens to protect and conserve the environment. There is not a corresponding emphasis on the duty of the State in protecting the environment and where that is done, it is in the context of the need for individual citizens to collaborate with the State.<sup>208</sup> The role of the State in environmental management is recognised but this role appears as if it is second to that of individual citizens.

### **4.3 Environmental Management Act No. 12 of 2011**

The Environmental Management Act No. 12 of 2011 (EMA) provides the general legal framework for the protection and conservation of the environment as well as integrated environmental management. It repealed and replaced the Environmental Protection and Pollution Control Act of 1990 and provided for the establishment of the Zambia Environmental Management Agency (ZEMA) as the body that would undertake environmental management. The legislation incorporates internationally recognised environmental principles with a focus on achieving sustainable development that meets the needs of present and future generations.<sup>209</sup> Perhaps the most remarkable feature of the legislation is the introduction of environmental rights. Section 4 of the EMA states:

*'(1) Subject to the Constitution, every person living in Zambia has the right to a clean, safe and healthy environment.*

*(2) The right to a clean, safe and healthy environment shall include the right of access to the various elements of the environment for recreational, education, health, spiritual, cultural and economic purposes.'*<sup>210</sup>

Section 4(2) of the EMA shows how complex the environmental right is because it is connected to other socio-economic needs and rights. Accepting the right to a clean and healthy environment necessarily means accepting other rights such as the right to water and sanitation, right to education, right to health and right to decent housing. The environment is a complex of so many diverse factors and one could argue that the right to a clean, safe and healthy environment is not one right but a conglomeration of rights as the environment encompasses everything that surrounds human life and sustains human life. The environmental right is

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<sup>207</sup> Ibid art. 255(l)

<sup>208</sup> Ibid art. 256

<sup>209</sup> Environmental Management Act No 12 of 2011 section 6

<sup>210</sup> EMA section 4(1)(2)

important in litigation not just because it grants locus standi to those that want to uphold environmental concerns but also because it gives leverage in the merits of a case particularly where there is a clash of competing rights or concerns. In *Martha Kangwa and 27 Others v Environmental Council of Zambia (ECZ) and Nasla Cement Ltd and Attorney General*,<sup>211</sup> a case in which a group of small scale farmers sued the ECZ for granting permission to a cement manufacturing company to set up a cement factory in a designated farming area, one of the points upon which the decision of the judge hinged was the rights that a holder of title possesses against those without title deeds to their land. The farmers whose land was adjacent to the land upon which the factory was to be built did not own title deeds as some of them just inherited the land and others acquired it using the customary process. The Judge ruled that the property rights of the developer were more important: ‘The first plaintiff and the other farms surrounding the project have no title to land and cannot enjoy the same rights as a title-holder, the second defendant (Nasla Cement Ltd) in this case. The President has not granted land to them’.<sup>212</sup> The court ruled in favour of the company, but what the judge did not do was to weigh the property rights of the developer against the environmental rights of the farmers.

#### **4.3.1 Environmental Management Act and Legal Standing**

Section 110 of the EMA contains the standing requirements for environmental litigation and it states:

*‘(1) A person may sue for damages in respect of an act or omission that constitutes a contravention of this Act or that is likely to have an adverse effect, whether or not that person or any other person has suffered, or is likely to suffer, any loss or harm from the act or omission.*

*(2) The right of action in subsection (1) is in addition to any other legal rights or remedies available to a plaintiff or applicant.*<sup>213</sup>

These provisions in the EMA are a break from the strict common law standing rules that require one to demonstrate sufficient direct and personal interest. One does not need to be personally related to or affected by the environmental degradation or pollution in question before instituting legal proceedings seeking redress. These provisions have cleared the way for public

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<sup>211</sup> *Martha Muzithe Kangwa and 27 Others v Environmental Council of Zambia and Nasla Cement Ltd and the Attorney General* 2008/HP/245

<sup>212</sup> *Ibid* p. J53

<sup>213</sup> *Ibid* section 110(1)(2)

interest environmental litigation by human rights groups, environmental groups, faith-based organisations and other non-governmental organisations that seek to protect and conserve the environment. The relaxed standing requirements are a fulfilment of the principle of public participation in environmental protection and management which is found in the legislation. The participatory principle<sup>214</sup> is important not just at the stage of planning such as the drawing up of plans for land use and environmental impact assessments, but also in enforcement and litigation. In fact, sometimes litigation is required to ensure adherence to planning requirements as environmental protection and management agencies, and developers may at times neglect to perform their statutory duties and obligations. In the case of *Integrity Foundation v Zambia Wildlife Authority and Environmental Council of Zambia and Others*<sup>215</sup>, the plaintiff which is an anti-corruption organisation sought an order that the defendants who were wildlife and environmental management agencies should enforce the statutory requirement for undertaking an environmental impact assessment for a proposed mining project in a protected area.

#### **4.3.2 Environmental Management Act and Legal Costs**

Legal costs have always proven to be a formidable barrier to access to justice in Zambia. With the low number of lawyers in the country, the cost of hiring one is prohibitive for the vast majority of people. The general principles that ‘costs follow the event’<sup>216</sup> or ‘costs should follow the result’<sup>217</sup> and that ‘the loser pays’<sup>218</sup> are discouraging to would be litigants. The provisions in the EMA regarding court costs have made it is easier for those that would want to litigate in the public interest to do so without unduly worrying about the possibility of paying huge legal costs of the other party should they lose. The EMA states: ‘(4) A court shall not award any costs or damages against a person who initiates civil proceedings under subsection (1) unless the court finds that the primary motivation for the proceedings was not a concern for the public interest or the enhancement, protection or conservation of the environment.’<sup>219</sup> Previously, litigants in environmental cases would have to bear the costs if a claim was dismissed as was the case in *Martha Kangwa v ECZ and Nasla Cement Ltd.*

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<sup>214</sup> Ibid section 6(f)

<sup>215</sup> *Integrity Foundation v Zambia Wildlife Authority and Environmental Council of Zambia and Attorney General and Kafue District Council* 2003/HP/0321

<sup>216</sup> Harry Woolf, Jeffrey Jowell and Andrew Le Sueur *De Smith’s Judicial Review* 6<sup>th</sup> ed. (2007) Sweet & Maxwell, London p. 851

<sup>217</sup> Max du Plessis et al *Constitutional Litigation* p.130

<sup>218</sup> Ibid p. 130

<sup>219</sup> EMA section 110(4)

#### 4.4 Mines and Minerals Act of 1995 and the Environment

A dark period was experienced in Zambia between 1995 and 2008 as far as environmental protection, management and conservation was concerned. This was the period during which the country undertook the privatisation of the nationally owned copper mines in a bid to make them more profitable. The mines had become loss making following the collapse of metal prices on the international market and in order to attract foreign investment in the mining sector, the country enacted two pieces of legislation, the Investment Act of 1995 and the Mines and Minerals Act No. 31 of 1995. The Investment Act facilitated the acquisition of the mines by multinational corporations and provided guarantees that assured investors that their investments would be safe and that there would be no restrictions on the transfer of funds to foreign jurisdictions.<sup>220</sup> The Mines and Minerals Act provided for the negotiation of mining agreements with the multinational corporations which were called development agreements which would be binding on the State.<sup>221</sup> The mining agreements provided tax exemptions<sup>222</sup> and granted the mining companies indemnity from any environmental liabilities which meant that they could operate below the national environmental standards without any consequences as long as they adhered to the much lower standards in the agreed environmental plans. Needless to say, the mines were responsible for a lot of air, land and water pollution during this period.

The pollution caused by the mines is evident from cases such as *James Nyasulu and Others v Konkola Copper Mines Plc*<sup>223</sup> in which the mining company polluted a stream that provided drinking water for the local community causing more than 2000 residents to suffer from various ailments. The indemnity provided by the development agreements was even used as a defence in the air pollution case of *Geofrey Elliam Mithi v Mopani Copper Mines Plc* which resulted in the death of the plaintiff's wife.<sup>224</sup> The emissions of sulphur dioxide from the mine were 70 times above the statutory limits.<sup>225</sup> Some of the development agreements even had provisions that forbade the government from making amendments to legislation that impacted on mining

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<sup>220</sup> John Lungu 'Copper Mining Agreements in Zambia: Renegotiation or Law Reform?' (2008) 35 *Review of African Political Economy* 403 at 406

<sup>221</sup> Mines and Minerals Act of 1995, Cap. 213 of the laws of Zambia, section 9

<sup>222</sup> Phillip Daniel and Emile M Sunley 'Contractual Assurances of Fiscal Stability' in Phillip Daniel et al (eds) *The Taxation of Petroleum and Minerals: Principles, Problems and Practice* (2010) Routledge, London. p.414

<sup>223</sup> *James Nyasulu and 2000 Others v Konkola Copper Mines and Others* 2007/HP/1286

<sup>224</sup> *Geofrey Elliam Mithi v Mopani Copper Mines Plc* 2014/HB/048 p. J2

<sup>225</sup> *Ibid* p. J13

and the environment.<sup>226</sup> The legality of the development agreements was debated and the government cancelled them through the enactment of the Mines and Minerals Development Act No. 7 of 2008.<sup>227</sup> The development agreements between the government of the Republic of Zambia and the international mining conglomerates show the importance of public interest litigation because we had a situation where the State which has a duty of protecting the public interest colluding with the mines to degrade and pollute the environment, as well as endangering the health and lives of the citizens. The State basically ceded its legislative and enforcement powers regarding mining and the environment through section 9 of the Mines and Minerals Act of 1995, allowing the multinational mining corporations to undertake mining activities without taking the necessary measures to prevent and mitigate pollution.

The right to life cannot be adequately protected without the right to a clean and healthy environment. When the State and its agencies fail to protect the lives and health of the citizens, it is only right that human rights groups and environmental groups fill the void by instituting law suits in the public interest. Public interest litigation is especially important in challenging laws that violate human rights.

## **5.0 Chapter 5**

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<sup>226</sup> John Lungu 'Copper Mining Agreements in Zambia' at 407

<sup>227</sup> Supra note 222 at 414

## **5.1 Comparative Analysis of the Impact of Locus Standi Requirements in Public Interest Environmental Litigation in South Africa and Zambia**

The phenomenon of climate change has brought to the fore the importance of paying attention to the environment, conserving and protecting it. The damage that has been done to the ozone layer, rising sea levels, the melting of the snow caps, droughts being experienced in some parts of the world leading to severe water shortages, the experience of regular storms in other parts, the disappearance of certain animal and plant species all point to the need for humanity to take measures to mitigate these occurrences. Human activities have altered the balance that is required to sustain life on earth and establishing effective legal frameworks that would regulate human activities so that they do not lead to environmental degradation and pollution is crucial. However, it is not enough to have good laws on the statute books. The laws must be enforceable and apply equally to private citizens, corporate citizens and all organs and agencies of the State. Justice only becomes a reality when the rule of law prevails with all persons, authorities and institutions being held accountable for their actions. The courts are the guardians and dispensers of justice and that is why they have to be accessible to all. While the rules of legal standing do have a legitimate purpose particularly in private law where the courts have to adjudicate over the competing rights and interests of private parties, in public law the strict application of standing rules can become a hindrance to access to justice.

## **5.2 Principles of Standing**

Thomas Cromwell says there are three basic principles that form the foundation of rules of standing, namely: (a) sufficient interest in the matter at issue; (b) unrestricted access to courts only regarding matters involving one's private rights, as distinct from public rights, as well matters in which one can show special interest or special injury and, finally, (c) the function of the Attorney General in choosing which matters of public interest should be brought before the courts.<sup>228</sup>

## **5.3 Sufficient Interest**

Historically, the rules of standing were meant to avoid a multiplicity of cases concerning the same wrongful act as was the case sometimes regarding issues like public nuisance. The requirement that someone must suffer special damage or injury in a public wrong was meant

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<sup>228</sup> Thomas A. Cromwell *Locust Standi: A Commentary on the Law of Standing in Canada* (1986) Carswell, Toronto p.165

to ensure that the best possible representative of the public who represented the greatest effect of the wrong was brought before the courts and received the necessary or required relief. There are cases, however, where no person suffers a greater degree of harm because a public harm may affect all members of the population equally. In such a situation, it would be difficult to correct the public wrong in the absence of a person with special interest or harm, especially if the public authorities whose duty it is to protect the public do not perform their functions. Traditional arguments in favour of standing rules have always associated having an interest with having a legitimate concern. Individuals not demonstrating personal interest in a case have been branded ‘busybodies’. This presumption that someone is a busybody or a meddler simply because they lack a personal interest is wrong because there are many people with legitimate concerns but who have no personal interests to gain. This is especially so in matters regarding the environment. The benefits of protecting and conserving the environment do not accrue in the interest of one person or group of persons or even one generation but for many generations to come.

As Thomas Cromwell has suggested, perhaps there is need for a paradigm shift from a concentration on personal interests to a focus on the legitimacy and justiciability of the concern expressed by the litigant. It is not just the sufficiency of interest or degree of interest that should concern the courts but the degree of concern regarding the matters being brought before the court by the claimant or litigant. The question that the courts should be asking is not just ‘what does this person have to gain or what injury has this person suffered?’, but the courts should also ask ‘Is this a legitimate concern?’ As already highlighted, the expression ‘sufficient interest’ has not been clearly defined and is dependent on the facts and circumstances of each case.<sup>229</sup> The requirement of sufficient interest has been described as being ‘highly manipulable’<sup>230</sup> and can be used by judges to avoid adjudicating over certain matters for political or other reasons. It has also been applied unfairly as in the preference that has traditionally been granted to rate payers over other tax payers in challenging administrative decisions of local authorities in common law jurisdictions.<sup>231</sup> The determination of personal interest is often a subjective exercise and, therefore, it would not be a huge leap for the courts to use ‘legitimacy of concern’ alongside ‘sufficiency of interest’ as a determining factor in

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<sup>229</sup> Andre Rabie and Cor Eckard ‘Locus Standi: The Administration’s Shield and the Environmentalists’ Shackle’ (1976) 9 *The Comparative and International Law Journal of Southern Africa* 141 at 143

<sup>230</sup> Clive Plasket ‘Representative Standing in South African Law’ p.5 at [www.globalclassactions.stanford.edu/sites/default/files/documents/south\\_africa\\_national\\_report.pdf](http://www.globalclassactions.stanford.edu/sites/default/files/documents/south_africa_national_report.pdf) accessed on 12/04/2018

<sup>231</sup> *Ibid* p.9

establishing legal standing. Public interest litigation is a clear shift from a focus on ‘sufficiency of interest’ to ‘legitimacy of concern’.

The South African Constitution with its provision of public interest litigation in section 38 gives room for those who are motivated not by private and personal interests but by a legitimate concern for the public to institute legal proceedings. The Zambian courts have been gradually liberalising the standing requirements for the Bill of Rights, but sufficient interest remains a requirement. The *Nkumbula v Attorney General* case<sup>232</sup> is an example of the narrow application of the standing rules with the requirement that one must be directly affected by any threat to or contravention of any of the rights in the Bill of Rights. The *Attorney General v LAZ* case<sup>233</sup> saw a relaxation of the standing requirements with the Supreme Court declaring that it was not necessary for one to be personally affected by the contravention of a right, but one must still possess a sufficient interest in a matter. The *Mumba and Others v Electoral Commission of Zambia and Others* case<sup>234</sup> witnessed the re-assertion of the sufficiency of interest requirement, as well as the re-assertion of the role of the Attorney General as the guardian of the public interest. However, standing in the public interest in South Africa also faces a possible judicial restriction through the criteria that have been drawn up by the Constitutional Court to determine whether a person is genuinely acting in the public interest.<sup>235</sup> These criteria were drawn up by Judge O’Regan J in *Ferreira v Levin*<sup>236</sup> and expanded by Judge Yacoob J in *Lawyers for Human Rights v Minister of Home Affairs*.<sup>237</sup> Judge Yacoob stated that this list of criteria was not closed and is, therefore, open to further expansion. While these criteria might be helpful in determining persons that have a genuine interest in justice there is a possibility that they could be employed to impede access to courts in the future.

#### **5.4 Private Rights and Public Rights**

At common law, the adversarial system which is designed to settle disputes between private parties only recognises the legal standing of litigants who bring law suits that concern their private interests and private rights. The question of legal standing raises questions regarding the role of the courts in society. The role of the courts is not just to protect, promote and declare private rights, but it is also the role of the courts to protect public rights and in so doing promote

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<sup>232</sup> (1972) ZRL 204

<sup>233</sup> (2008) 1 ZR 21

<sup>234</sup> 2015/HP/0967

<sup>235</sup> Supra notes 129-131

<sup>236</sup> 1996 (1) SA 984 (CC) para 234

<sup>237</sup> 2004 (4) SA 125 (CC) para 18

and uphold legality and the general rule of law. The disinclination of the courts at common law to address issues of legality even in the face of evidence provided gave the impression that the role of the courts did not include holding public officials and public institutions accountable for the way they used their constitutional and statutory mandate. Through public interest litigation, the courts are able to allow individual members of the public, special interest groups including environmentalists and other non-state actors in the building and entrenchment of the rule of law. It also has to be remembered that courts are by nature docile institutions. This is where the judiciary differs from the other two branches of government, the Legislature and Executive, which can initiate action on their own. In contrast, the action of the courts has to be triggered by either the Executive or the citizens who bring matters for adjudication. A court cannot act on matters that are not presented to it for resolution. Unless it is moved, even if there is a 'hideous and flagrant violation of the constitution or other laws by the political organs of government, the court cannot intervene, except at the instance of a complainant'<sup>238</sup>. A country may have the best laws and an independent and objective judiciary, but if the mechanism of activating the courts into action is difficult to operate then justice will not be served. Expansive locus standi requirements that accommodate public interest litigation make it easier to activate the courts into action. The courts thrive on the action of an enlightened and rights-conscious citizenry.

Public interest litigation also highlights the fact that sometimes people may not be in a position to stand in their own name but may need others to do so for them. In addition, public interest litigation assists the courts to engage in a paradigm shift from the private rights and private interests paradigm which is characteristic of the adversarial court system that was designed to settle disputes between two parties to another paradigm that also accommodates the principle of legality that requires the State and its agencies to stay within the bounds of their defined powers and parameters. Public interest litigation reminds the courts that their duty is not just to settle private disputes but to maintain the rule of law by correcting government illegalities and violations of public rights by private entities. Even the courts themselves have also recognised the important part that has been played by civil society and particularly environmental groups in maintaining the rule of law in South Africa:

*'A perusal of the law reports shows how vital the participation of public interest groups has been to the development of this court's jurisprudence. Interventions by public interest groups*

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<sup>238</sup> Nwabueze, *BO Judicialism in Commonwealth Africa: The Role of the Courts in Government* (1977) Hurst and Company, London. p. 49

*have led to important decisions concerning the rights of the homeless, refugees, prisoners on death row, prisoners generally, prisoners imprisoned for civil debt and the landless. Similarly, the protection of environmental rights will not only depend on the diligence of public officials, but on the existence of a lively civil society willing to litigate in the public interest.*<sup>239</sup>

### **5.5 Role of the Attorney General**

The role of the Attorney General in South Africa and Zambia evolved differently. The focus of the South African Attorney General was prosecution whereas that of the Zambian Attorney General was civil litigation even though the latter still had an oversight role over prosecution until 2016. In contrast to Zambian law, there was no provision in South African law for a litigant to request the Attorney General to grant him permission to undertake litigation in the public interest through a relator action.<sup>240</sup> In the 1996 South African Constitution, the office of the Attorney General was transformed into the office of the National Director for Public Prosecutions. In contrast, in Zambia the function of prosecution is performed by the Director of Public Prosecutions while the Attorney General is an ex officio member of Cabinet as the chief government legal advisor whose role it is to represent government in civil law suits and to protect the public interest. The role of the Attorney General has somewhat declined in the Commonwealth as more offices and institutions have been created to protect public interests such as the Human Rights Commission<sup>241</sup> and the office of the Public Protector.<sup>242</sup>

### **5.6 Constitutional Provisions**

The biggest advantage that the South Africa environmental legal framework has over the Zambian one is that the former has integrated environmental rights into its Bill of Rights. The Bill of Rights is the most sacred part of any constitution as it safeguards the rights and freedoms of the citizens vis-a-vis the State. The environmental rights in Zambia are contained in legislation and there is a limitation clause that says the environmental rights are subject to the provisions in the Constitution. Many legal disputes involve a clash of competing rights and those rights have to be weighed against each other by the court in arriving at a decision. A right that is contained in the Bill of Rights of a Constitution will obviously carry more weight than a right that is contained in legislation. In the *Martha Kangwa v ECZ* case, the property rights

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<sup>239</sup> *Biowatch Trust v Registrar Genetic Resources, Executive Council for Genetically Modified Organisms, Monsanto South Africa (Pty) Ltd and Others* (2009) ZACC 14

<sup>240</sup> Andre Rabie 'Locus Standi' at 156

<sup>241</sup> Human Rights Commission Act 54 of 1994 section 7(1)(e)

<sup>242</sup> Harry Woolf et al *De Smith's Judicial Review* p.77

which are contained in the Bill of Rights prevailed over the environmental rights which are contained only in the EMA. There is a need for environmental rights to be included in the Bill of Rights to accord the environment greater protection.

### **5.7 Right to information**

Rights are often interrelated and interdependent which is the case with the right to a clean and healthy environment and the right to information.<sup>243</sup> The right to access information is sometimes referred to as a ‘leverage right’ because it protects and promotes other rights such as the right to health and the right to a fair trial. The South African Constitution guarantees the right to information that is held by the State and ‘any information that is held by another person and that is required for the exercise or protection of any rights’.<sup>244</sup> The provisions of Section 32 of the Constitution highlights the fact that the exercise or protection of some rights can be enhanced or compromised by the availability or lack of crucial information. Environmental rights are among those rights that depend heavily on the availability of accurate information for their protection. Information is important to determine the impact on the environment of industrial activities such as mining, agricultural activities such as the use of pesticides, tourism and the development of infrastructure like roads and housing. Citizens cannot make informed decisions without the necessary information. The right to information safeguards the right to an environment that is not harmful to health and wellbeing. Zambia needs to emulate South Africa by enhancing the right to a clean and healthy environment through the enactment of freedom of information legislation. The right to information assists the citizens to hold developers, commercial entities and the State to account regarding their activities that may destroy the environment. Information also allows the public to take part meaningfully in environmental governance. The importance of having the right to information can be seen from the experience that Zambia had with the development agreements that provided the mines with indemnity from environmental liabilities. These agreements had been kept secret by the government and it was only pressure from civil society and some multi-lateral organisations that led to their disclosure. The environment cannot be adequately protected where there is no transparency and accountability.

### **5.8 Constitutional Framework Supporting Common Law Development**

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<sup>243</sup> Saras Jagwanth ‘The Right to Information as a Leverage Right’ in Richard Calland and A Tilley eds. *The Right to Know the Right to Live: Access to Information and Socio-economic Justice* (2002) ODAC, Cape Town p.3

<sup>244</sup> South African Constitution section 32(1)(a)(b)

The environmental rights in South Africa are also backed by the broad standing rules that provide for public interest litigation as well as representative standing in the Constitution. The enhanced standing rules in the NEMA, therefore, have a firm foundation in the Constitution. There is a great synthesis in the South African legal framework between the Constitutional and statutory provisions, on the one hand, and the jurisprudence of the courts on the other hand. The common law standing rules even in non-environmental matters can be developed through this framework to facilitate public interest litigation which is important in challenging administrative inefficiencies and illegalities. The Zambian common law rules of standing are developing from the influence of other Commonwealth countries' court decisions and practices sometimes without due regard to the constitutional and statutory legal frameworks informing the decisions and practices of the foreign courts. This is evident from cases such as *Frank Bwalya v MMD and Attorney General*,<sup>245</sup> and *LAZ v Attorney General*.<sup>246</sup> The concept of public interest litigation is still not clearly defined as there are influences coming from various jurisdictions with slight nuances in meaning. The concept of public interest litigation that was debated in the *Attorney General v LAZ* case was the Indian one where a litigant is allowed to bring a case in the public interest as long as it is brought in the name of the marginalised and the poor.<sup>247</sup> The sensitivity of the Zambian courts to developments elsewhere in the Commonwealth is good for the sake of flexibility, but it has its own challenges when it comes to clarity of legal concepts. The Zambian legal system needs a much more structured and cohesive constitutional and statutory legal framework to guide the development of the common law. The status of public interest litigation generally remains unclear, but public interest environmental litigation appears to have developed a surer footing with section 110 of EMA.

## **6.0 Chapter 6**

### **6.1 Conclusion**

South Africa and Zambia share a common heritage of the influence of English common law although the former is also influenced by Roman-Dutch law. South Africa's common law is, therefore, more 'hybrid' or mixed than Zambia's common law.<sup>248</sup> The common law standing rules that would allow one to present a case before the courts, however, were almost identical.

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<sup>245</sup> 2010/HP/630

<sup>246</sup> (2008) 1 ZR 21

<sup>247</sup> *Ibid* para 45

<sup>248</sup> Kate O'Regan 'The Best of Both Worlds?' p.2

The two aspects of standing, capacity to sue and sufficient interest, had to be satisfied. These two aspects have been stumbling blocks to public interest litigation with the former affecting the ability of loose organisations and associations to institute litigation on behalf of their members or litigation in the interest of the general public; the latter affected both individuals and organisations. The common law's focus on settling disputes resulted in the requirement that one show sufficient direct personal interest by disclosing threats to or violations of one's rights or interests. In the South African case, there were only two exceptions to the rule: when there was a threat to life or liberty,<sup>249</sup> and when legislation had been passed in the interest of a group to which one belonged.<sup>250</sup> The courts only allowed one to defend one's private rights and interest.<sup>251</sup> The role of defending public rights was basically seen to be the responsibility of the State and its agencies with the office of the attorney-general having the specific responsibility of defending public rights particularly in Zambia. The courts' focus on private interests and rights at common law made it difficult for individuals and groups to institute litigation that would challenge the legality of administrative decisions and actions where one's personal rights or interests were not at stake. At common law, the courts would not allow adjudication of a case concerning the legality of administrative action without an aggrieved party whose rights or interests were violated or threatened being involved. The 'citizen's action' where an individual could bring matters before the courts in the interest of the general public was not available at common law.

Public Interest Litigation is of special importance when it comes to environmental litigation because environmental matters are not private matters even though private individuals or specific groups of people may bear the brunt of particular incidents of pollution or environmental degradation. The environment is one unified system that supports all life on earth and there are no national, regional or municipal boundaries when it comes to the environment.<sup>252</sup> Maintaining an environment that supports health and wellbeing is the responsibility of everyone and not just the state. The common law standing rules made it difficult for public interest environmental litigation to be undertaken. Public interest litigation is effective in holding to account public officials and public bodies that have the statutory mandate to protect the environment. It allows individuals to enforce legislation that is meant to

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<sup>249</sup> Supra note 74

<sup>250</sup> Supra note 73

<sup>251</sup> Dalrymple v Colonial Treasurer at 379

<sup>252</sup> NEMA definition of environment

protect the environment in situations where public bodies fail to do so.<sup>253</sup> In a world where governments prioritised wealth creation and job creation through commerce, trade and industry, environmental considerations took second place. The introduction of public interest litigation through the enactment of the interim constitution in South Africa which broadened the standing rules concerning the Bill of Rights and included the right to an environment that promotes health and wellbeing in the Bill of Rights provided environmental groups and other non-governmental organisations with the opportunity to contribute to the protection, conservation and promotion of the environment through public interest litigation. The National Environmental Management Act became the legislative expression of the environmental right with further expansion of the rules of standing as all pieces of legislation with an aspect of environmental management and protection were accorded the broad standing rules.<sup>254</sup> The NEMA standing provisions are unique in the sense that they not only allow individuals and groups to litigate in the interest of the public, but they also allow litigation ‘in the interest of protecting the environment’.<sup>255</sup>

The jurisprudence of the South African courts shows how important environmental rights are in granting standing. Where there is an established threat to or violation of a right, then standing is automatically granted. The environmental rights give leverage to environmental litigants. The omission of important processes such as environmental impact assessments before licenses such as mining licenses are issued could be deemed to be a violation of the right to health and wellbeing.<sup>256</sup> The environmental right also gives leverage when measures aimed at protecting and conserving the environment come into conflict with property rights. Sometimes it becomes necessary to deprive property owners of certain land uses or to impose restrictions on their use of water. Other times, it may be necessary to expropriate land in the public interest or in the interest of the environment. Environmental rights make these processes easier to achieve. The environmental rights can only be effectively protected where there is transparency with full and accurate information regarding activities and their possible impact on the environment and the public’s health and wellbeing. Zambia needs to include its environmental right to a clean and healthy environment in its constitutional bill of rights, as well as a freedom of information right to give support to the environmental right. Even though the constitution does acknowledge that ‘access to environmental information’ is important to ‘enable people

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<sup>253</sup> *Wildlife Society v Minister of Environmental Affairs*

<sup>254</sup> NEMA Section 32(1)

<sup>255</sup> NEMA Section 32(1)(e)

<sup>256</sup> Loretta A Feris and Dire Tladi ‘Environmental Rights’ p.262

preserve, protect and conserve the environment’,<sup>257</sup> this access to information is not guaranteed as a right.

The Zambian environmental legislative framework has seen remarkable developments in terms of incorporating internationally recognised environmental principles, strengthening mechanisms for integrated environmental management, and broadening the standing requirements in the EMA. However, the concept of public interest litigation is not yet clearly defined. Zambian common law continues to be heavily influenced by court decisions in the commonwealth, but most of these commonwealth countries are developing their jurisprudence from clearly defined constitutional and legislative frameworks that inform and guide their public interest litigation. The South African constitutional and legislative framework has provisions for the development of the common law and the concept of public interest litigation is fairly well defined. The South African courts have clarified that ‘public interest standing’ is not necessarily the same as ‘standing based on public opinion’.<sup>258</sup> The Constitutional court held: ‘If public opinion were to be decisive, there would be no need for constitutional adjudication’.<sup>259</sup> It summed up the point by stating that the ‘assessment of popular opinion is essentially a legislative and not a judicial function’.<sup>260</sup>

The South African Constitutional Court has even set criteria to determine genuine public interest claims, although this has its own dangers as highlighted in the preceding chapter. The concept of public interest has been discussed in the Zambian courts, but without any real legislative backing. In the *Frank Bwalya v Attorney General* case, Judge Patrick Matibini discussed the concept of public interest litigation stating that when an applicant brings an application, the applicant must prove that ‘the “public” has sufficient interest in the remedy requested’.<sup>261</sup> It has to be noted that the judge in his discussion of public interest litigation was justifying the requirement of ‘sufficient interest’ in public interest litigation. The judge, however, did not clarify whether Zambian law generally accommodates public interest litigation. This was a matter that was disputed in the *Attorney General v LAZ* case<sup>262</sup> and Judge Matibini left the question open in the *Frank Bwalya* case. As argued in the previous chapter, it is desirable that the requirement for one to have sufficient interest should be understood in the

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<sup>257</sup> Constitution of Zambia Act No.2 art 255(m)

<sup>258</sup> Max du Plessis et al Constitutional Litigation p.47

<sup>259</sup> *S v Makwanyane* 1995 (3) SA 391 (CC) para 89

<sup>260</sup> *Ibid*

<sup>261</sup> 2010/HP/630

<sup>262</sup> (2008) 1 ZR 21

sense of having a 'legitimate concern'. The lack of clarity on what is meant by public interest litigation in general has the potential to affect public interest environmental litigation.

Public interest is important because it helps the courts to clarify the law, especially laws that attract different and differing interpretations. When judges are given the opportunity to interpret the law through public interest litigation, the law develops as legislative lacunae are identified and practical ways of applying the law are identified or amendments may be proposed. Public interest cases have the power to attract the attention of the public thereby raising the consciousness of the public over certain matters that may need addressing. Increased public awareness promotes transparency and accountability of public bodies.

## **Bibliography**

### **South African Legislation**

Atmospheric Pollution Prevention Act 45 of 1965

Constitution of South Africa 1996

Criminal and Magistrates' Court Procedure Amendment Act No. 39 of 1926

Criminal Procedure Act No. 51 of 1977

Criminal Procedure and Evidence Act No. 31 of 1917

Environment Conservation Act 73 of 1989

General Law Amendment Act No. 46 of 1935

Human Rights Commission Act No. 54 of 1994

Interim Constitution of South Africa 1994

Marine Living Resources Act 18 of 1998

Mineral and Petroleum Resources Development Amendment Act No. 49 of 2008

National Environmental Management: Biodiversity Act 10 of 2004

National Environmental Management: Air Quality Act 39 of 2004

National Environmental Management: Waste Act 59 2008

National Environmental Management Act 107 of 1998

National Water Act 36 of 1998

Promotion of Administrative Justice Act 3 of 2000

South Africa Act of 1909

### **South African Case Law**

Bagnall v The Colonial Government (1907) 24 SC 470

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

Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Others 2004 (4) SA 490 (CC)

Biowatch Trust v Registrar Genetic Resources and Executive Council for Genetically Modified Organisms and Monsanto South Africa (Pty) Ltd and Others (2009) ZACC 14

BP Southern Africa (Pty) Ltd v MEC for Agriculture, Conservation and Land Affairs 2004 (5) SA 124 WLD

Carmichele v Minister of Safety and Security 2001 (4) SA 938 (CC)

Concerts CC v Rinaldo Investments (Pty) Ltd and Others 2013 (3) BCLR 251 (CC)

Davis v Bekker NO and Smit 1934 TPD 384

Dalrymple v Colonial Treasurer 1910 TS 372

Dell v Town Council of Cape Town (1879) 9 Buch 2

Ferreira v Levin NO and Others; Vryenhoek and Others v Powell NO and Others 1996 (1) SA 984 (CC)

Eisenberg and Associates v Minister of Home Affairs 2003 (5) BCLR 514 (C)

Electoral Commission v Langeberg Municipality 2001 (3) SA 925 (CC)

Hichange Investments (Pty) Ltd v Cape Produce Company (Pty) Ltd t/a Pelts Products and Others 2004 (2) SA 393 (E)

Jacobs v Waks 1992 (1) SA 521 (A)

Lawyers for Human Rights and Another v Minister of Home Affairs and Another 2004 (4) SA 125 (CC)

Lionswatch Action Group v MEC: Local Government, Environmental Affairs and Development Planning and Others 5278/2013 [2015] ZAWCHC 213 (05 March 2015)

Maluleke v MEC for Health and Welfare 1999 (4) SA 367 (T)

Mazibuko and Others v City of Johannesburg and Others 2010 (4) SA 1 (CC)

Minister of Health and welfare v Woodcarb (Pty) Ltd 1996 (3) SA 155 (N)

Mukaddam v Pioneer Foods (Pty) Ltd and Others (CCT 131/12) [2013] ZACC 23

Ngxuza v Permanent Secretary and Department of Welfare, Eastern Cape 2001 (2) SA 609 (E)

Patz v Greene 1907 TS 427

Rail Commuter Action Group v Transnet Ltd t/a Metrorail 2003 (5) SA 518 (C)

Raubenheimer v Johannes Bredenkamp Trust 2006 (1) SA 124 (C)

Roodeport-Maraisburg Town Council v Easter Properties Ltd 1933 AD 87

South African Optometric Association v Frames Distributors (Pty) Ltd t/a Frames Unlimited 1985 (3) SA 100 (O)

Tergniet and Toekoms Action Group and 34 Others v Outeniqua Kreosootpale (Pty) Ltd and Others Case 10083/ 2008 (C) 23 January 2009 (Unreported)

Transitional Government for the Territory of South West Africa v Eins 1998 (3) SA 369 (A)

Transvaal Indian Congress v Land Tenure Advisory Board 1955 (1) SA 85 (T)

Van Huyssteen NO v Minister of Environmental Affairs and Tourism 1995 (9) BCLR 1191 (C)

Van Rooyen and Others v The State and Others 2001 (4) SA 396 (T)

Verstappen v Port Edward Town Board 1994 (3) SA 569 (D)

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

Wood and Others v Ondangwa Tribal Authority and Another 1975 (2) SA 294 (A)

### **Zambian Legislation**

Constitution of Zambia Act 1973

Constitution of Zambia Act 1991

Constitution of Zambia Act No. 18 of 1996

Constitution of Zambia Act No. 1 of 2016

Constitution of Zambia Act No. 2 of 2016

Electoral Act No. 12 of 2006

Environmental Management Act No. 12 of 2011

Environmental Protection and Pollution Control Act, Chapter 204 of the Laws of Zambia

English Law (Extent of Application) (Amendment) Act No. 6 of 2011

English Law (Extent of Application) (Amendment) Act No. 14 of 2002

High Court Act, Chapter 27 of the Laws of Zambia

Mines and Minerals Act of 1995, Chapter 213 of the Laws of Zambia

Mines and Minerals Development Act No. 7 of 2008

Mines and Minerals Development Act No. 11 of 2015

Mines and Minerals Development (Amendment) Act No. 14 of 2016

Supreme Court Act, Chapter 25 of the Laws of Zambia

### **Zambian Case Law**

Arthur Wina and Others v Attorney General 1990/HP/1878

Attorney General v Law Association of Zambia (2008) 1 ZR 21

Dean Mung'omba and Others v Peter Machungwa and Others (2003) ZR 17

Dean Mung'omba and Anti-Corruption Commission v Peter Machungwa and Attorney General (SCZ Judgment No. 3 of 2003)

Derrick Chital v Attorney General (SCZ Judgment No. 14 of 1995)

Dora Siliya and Others v Attorney General and Electoral Commission of Zambia 2013/HP/1159

Frank Bwalya v Attorney General 2010/HP/630

Geoffrey Elliam Mithi v Mopani Copper Mines Plc 2014/HP/048

Harry Nkumbula v Attorney General (1972) ZRL 204

Integrity Foundation v Zambia Wildlife Authority and Environmental Council of Zambia and Attorney General and Kafue District Council 2003/HP/0321

James Nyasulu and 2000 Others v Konkola Copper Mines Plc and Environmental Council of Zambia and Chingola Municipal Council 2007/HP/1286

Martha Muzithe Kangwa and 27 Others v Environmental Council of Zambia and Nasla Cement Company and Another 2008/HP/245

Magnum (Z) Ltd v Basit Quadri (Receiver/Manager) and Grindlays Bank (Z) Ltd (1981) ZR 141 HC

Mwamba and Another v Attorney General (SCZ Judgment No. 10 of 1993) Unreported

Richard Mumba and Others v Electoral Commission of Zambia and Attorney General and Law Association of Zambia and Others 2015/HP/0967

Zambia International Hotels Ltd v First Alliance Bank (Z) Ltd 2015/HP/0752

### **Commonwealth Cases**

Australian Conservation Foundation Inc v Commonwealth (1980) 146 CLR 493

Gouriet v Union of Post Office Workers (1978) AC 435

John Reginald Phelps Dumas v The Attorney General of Trinidad and Tobago Civil Appeal No. P 218 of 2014

Inland Revenue Commissioners v National Federation of Self-Employed and Small Businesses Ltd (1981) 2 All ER

### **Books**

Burchell, Jonathan *Principles of Delict* (1993) Juta & Co. Ltd, Cape Town.

Burns, Yvonne *Administrative Law* (2013) LexisNexis, Cape Town.

Craig, Paul *Administrative Law* (2008) Sweet & Maxwell, London.

Cromwell, Thomas A *Locus Standi: A Commentary on the Law of Standing in Canada* (1986) Carswell, Toronto.

DeSmith and Woolf, Harry and Jowell, Jeffrey *Judicial Review of Administrative Action* 5ed (1995) Sweet and Maxwell, London.

Du Plessis, Max and Penfold, Glen and Brickhill, Jason *Constitutional Litigation* (2013) Juta, Cape Town.

Glazewski, Jan and du Toit, Louise (eds) *Environmental Law in South Africa* (2013) LexisNexis, Durban. (Service Issue 2, November 2014)

Glazewski, Jan and Bradfield, Graham *Environmental Justice and the Legal Process* (1999) Juta, Cape Town.

Hoexter, Cora *Administrative Law in South Africa* (2007) Juta, Cape Town.

Hoexter, Cora *Administrative law in South Africa* 2ed (2012) Juta, Cape Town.

Horn, Nico 'The Independence of the Prosecutorial Authority of South Africa and Namibia: A Comparative Study' in Horn, Nico and Anton Bosl (eds) *The Independence of the Judiciary in Namibia* (2008) MacMillan Education, Windhoek.

Jagwanth, Saras 'The Right to Information as a Leverage Right' in Calland, Richard and Tilley, A (eds) *The Right to Know the Right to Live: Access to Information and Socio-economic Justice* (2002) ODAC, Cape Town.

Kidd, Michael *Environmental Law* 2ed (2011) Juta, Cape Town

Kotze, Louis J and du Plessis, Anel and Ferris, W L and M Oliver *South African Environmental Law through the Cases* (2008) LexisNexis, Durban.

Loots, Cheryl 'Standing, Ripeness and Mootness' in Woolman, Stuart and Bishop, Michael (eds) *Constitutional Law of South Africa* 2ed (2013) Juta, Cape Town.

Moules, Richard *Environmental Judicial Review* (2011) Hart Publishing, Oxford.

Nwabueze, BO *Judicialism in Commonwealth Africa: The Role of the Courts in Government* (1977) Hurst and Company, London.

Paterson, A and Kotze, L (eds) *Environmental Compliance and Enforcement in South Africa: Legal Perspectives* (2009) Juta Ltd, Cape Town.

Stewart, William J *Delict* (1993) Sweet & Maxwell, Edinburgh

Woolf, Harry and Jowell, Jeffrey and Le Sueur, Andrew *De Smith's Judicial Review* 6ed (2007) Sweet and Maxwell, London

### **Journals**

Bray, Elmene 'Jacobs v Waks from an Environmental Angle' (1992) 7 SA Public Law 329

Bray, W 'Locus Standi in Environmental Law' (1989) 22 The Comparative and International Law Journal of Southern Africa 33

Church, WL 'The Common Law and Zambia' (1974) 6 *Zambian Law Journal* 1

Devenish, GE 'Equality before the Law: The Constitutional and Legal Background of the Office of the Attorney General' (1979) April Issue 139 *De Rebus* 189

Devenish, GE 'Locus Standi Revisited: Its Historical Evolution and Status in Terms of Section 38 of the South African Constitution' (2005) 38 *De Jure* 28

Edgar, Andrew 'Public and Private Interests in Australian Administrative Law' (2013) 36 *UNSW Law Journal* 202

Gupta, Chandra P 'Harry Mwaanga Nkumbula and Attorney General for the Republic of Zambia' (1973) 5 Zambia Law Journal 147

Kidd, M 'Greening the Judiciary' (2006) 9 PER/PELJ 3

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

Kotze, Louis J and du Plessis, Anel 'Some Brief Observations on Fifteen Years of Environmental Rights Jurisprudence in South Africa' (2010) 3 Journal of Court Innovation 157

Loots, Cheryl 'Keeping Locus Standi in Chains' (1987) 3 South African Journal on Human Rights 66

Lungu, John 'Copper Mining Agreements in Zambia: Renegotiation or Law Reform?' (2008) 35 Review of African Political Economy 403

Lord Reid 'The Judge as Law Maker' (1972) 12 The Journal of Public Teachers of Law 22

Mantziaris, Christos 'The Attorney-General and the Public Interest' (2004) 25 Adelaide Law Review 211

Murombo, Tumai 'Strengthening Locus Standi in Public Interest Environmental Litigation: Has Leadership Moved from the United States to South Africa' (2010) 6 Law Environment and Development Journal 163

Ndulo, Muna and Kent, Robert B 'Constitutionalism in Zambia: Past, Present and Future' (1996) 40 Journal of African Law 256

Ngcukaitobi, Tembeka 'The Evolution of Standing Rules in South Africa and their Significance in Promoting Social Justice' (2002) 18 South African Journal on Human Rights 590

Rabie, Andre and Eckard, Cor 'Locus Standi: The Administration's Shield and the Environmentalists' Shackle' (1976) 9 The Comparative and International Law Journal of Southern Africa 141

Roederer CJ 'Working the Common Law Pure: Developing the Law of Delict (Torts) in Light of the Spirit, Purport and Objects of South Africa's Bill of Rights' (2009) 26 Arizona Journal of International and Comparative Law 427

Swanepoel, CF ‘The Judicial Application of the “Interest” Requirement for Standing in Constitutional Cases: “A Radical and Deliberate Departure from Common Law”’ (2014) *De Jure* 63

Swanepoel, CF ‘The Public-Interest Action in South Africa: The Transformative Injunction of the South African Constitution’ (2016) 41 *Journal for Juridical Science* 29

Tokar, Janice J ‘Administrative Law: Locus Standi in Review Proceedings’ (1984) 14 *Manitoba Law Journal* 209

Van Rensen, Tobias P ‘Locus Standi in South African Environmental Law: A Reappraisal in International and Comparative Perspective’ (1995) 2 *South African Journal of Environmental Law and Policy* 121

Zimba, Lawrence ‘Two Test Cases as to the Constitutionality of the Introduction of a One-Party State Contrasted: The Zambia One-Party Case of *Harry Nkumbula v Attorney General* and the Sierra Leone One-Party Case of *Steele and Others v Attorney General*’ (1981) 13 *Zambia Law Journal* 45

### **Law Commissions**

Law Reform Commission of British Columbia ‘Report on Civil Litigation in the Public Interest’ LRC 46 (1980)

### **Papers**

O’Regan, Kate ‘The Best of Both Worlds? Some Reflections on the Interaction Between the Common Law and the Bill of Rights in Our New Constitution’ A paper delivered at the second Colloquium Constitution and Law held at Potchefstroom on 30 October 1998.

Preston, Brian J ‘Standing to Sue at Common Law in Australia’ A paper presented to the Joint Seminar on Legality of Administrative Behaviours and Types of Adjudication at Xian, People’s Republic of China, April 2006.

### **Electronic**

Plasket, Clive ‘Representative Standing in South African Law’ ([http://globalclassactions.stanford.edu/sites/default/files/documents/south\\_africa\\_national\\_report.pdf](http://globalclassactions.stanford.edu/sites/default/files/documents/south_africa_national_report.pdf)) accessed on 24<sup>th</sup> July, 2017.

