

# SOME BRIEF OBSERVATIONS ON FIFTEEN YEARS OF ENVIRONMENTAL RIGHTS JURISPRUDENCE IN SOUTH AFRICA

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## **Introduction**

South Africa has recently celebrated its fifteenth year of democracy. The country has achieved much during this period in terms of realizing and upholding the founding democratic values espoused in the opening sections of the *Constitution of the Republic of South Africa, 1996* (Constitution); including, among others: human dignity, the achievement of equality, the advancement of human rights and freedoms, constitutional supremacy, and the rule of law.<sup>1</sup> At the same time, the inclusion of an enforceable substantive environmental right in the Constitution<sup>2</sup> has sparked unprecedented development of the domestic environmental law and governance framework.

Section 24 of the Constitution entrenches a substantive environmental right, providing that:

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1. See Constitution section 1 (S.A.).

2. Constitution section 24. See discussion below.

Everyone has the right:

(a) To an environment that is not harmful to their health or well-being; and

(b) To have the environment protected, for the benefit of present and future generations, through reasonable legislative and other measures that:

(i) Prevent pollution and ecological degradation;

(ii) Promote conservation; and

(iii) Secure ecologically-sustainable development and use of natural resources while promoting justifiable economic and social development.

When section 24 is read with section 7(2) of the Constitution which provides that “the state must respect, protect, promote and fulfil the rights of the Bill of Rights,” it is clear that whilst everyone in South Africa must respect this right; the state incurs the additional duty to take positive action towards its fulfilment. However, the nature and scope of these duties depend on the way in which section 24 is interpreted and applied. The evolution of constitutional environmental law heavily relies on the ability of, and opportunity for the courts to concretize the (often elusive) meaning of all rights that may have a bearing on the environment. Accordingly, it is necessary for an independent and impartial judiciary to use its power to interpret, apply and “enforce” the substantive environmental right. The added benefit of the courts dealing with such a right, at least in the South African context, is that it creates a body of environmental rights jurisprudence that could guide the efforts of all authorities and others to respect, protect, promote and fulfill a right which aims to ensure protection and enjoyment of the environment and the health, well-being and quality of life for this and future generations.

Although South Africa has witnessed an array of interesting and significant environmental cases based on the common law and statutory law, this contribution focuses mainly on the role that the courts (the Constitutional Court and others) have played in the development of constitutional environmental rights jurisprudence since 1996.<sup>3</sup> The limited scope of this contribution does not, however,

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3. See for a more extensive discussion on the role of the South African judiciary in the country's environmental governance, LOUIS J. KOTZÉ & ALEXANDER R. PATERSON, *South Africa, in* THE ROLE OF THE JUDICIARY IN ENVIRONMENTAL GOVERNANCE: COMPARATIVE PERSPECTIVES 557-595 (Louis J.

detract from the validity of our observations with regard to the development of environmental jurisprudence in South Africa, generally. Due to the supremacy of the Constitution and the ensuing value attached to jurisprudence that deals with constitutional rights, environmental rights jurisprudence serves as a benchmark for the way in which South African courts approach (and should approach) all environmental cases. We are of the opinion that the role of the courts in the development of environmental rights jurisprudence in South Africa could be reminiscent of the role of the courts in the development of the country's environmental jurisprudence, generally. This is supported by the Constitutional Court's view that "[w]here legislation is enacted to give effect to a constitutional right, a litigant may not bypass that legislation and rely directly on the Constitution without challenging the legislation as falling short of the constitutional standard."<sup>4</sup> This provision encourages litigants and courts, where the facts and circumstances allow, to make use of environmental laws, as opposed to the constitutional environmental right, in litigating environmental cases. In addition, since most of South Africa's existing environmental laws stem from the constitutional (section 24) mother clause, broadly seen, the role of the courts in the development of environmental rights jurisprudence can be determined from rights-based jurisprudence per se, but indirectly, also from cases that involve laws that have developed subsequent to the inception of the constitutional environmental right.

In this respect, our hypothesis is that the role of the courts, generally, is four-fold: first courts "uphold" the law in practice by weighing rights and interests and then (hopefully) making reasonable, just, lawful and equitable findings; second, courts solve environmental disputes between parties by interpreting and then applying the law and in this sense they give practical effect to one of the most basic functions of law, namely, that of social control and maintaining social order;<sup>5</sup> third, while executing all their functions in

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Kotzé and Alexander R. Paterson eds, Kluwer Law International 2009). To the extent that overlap may occur between parts of the latter chapter and this contribution, we wish to acknowledge the valuable contribution and input of Prof. Alexander Paterson.

4. South African National Defence Union v. Minister of Defense, (2007) (5) S.A. 400 Par. 51, 52 (C.C.).

5. The social function of law can be understood in terms of Hart's explanation that: "...where there is law, there human conduct is made in some sense non-optional or obligatory." In this sense: "[T]he principal functions of the

terms of the previous two roles, courts simultaneously contribute, through analysis, interpretation and explanation, to a sounder and more useful, or refined, comprehension, and therefore, deepening of the environmental law discourse; and fourth, by doing so, the courts contribute to law-making.

In an effort to evaluate the role that the South African courts have played in the development of constitutional environmental rights jurisprudence during the past fifteen years, this contribution commences with an introductory overview of the structure and function of the courts, with specific reference to their general role in environmental governance. The discussion subsequently turns to South Africa's constitutional environmental right (section 24 of the Constitution), and to a succinct review of a selection of judgments in which the courts have engaged with this provision.<sup>6</sup>

### **The Judiciary: Foundation, Hierarchy and Access to Courts**

The Constitution sets out the South African court structure and procedures for the administration of justice.<sup>7</sup> It specifically prescribes that:

- (1) The judicial authority of the Republic is vested in the courts.
- (2) The courts are independent and subject only to the Constitution and the law, which they must apply impartially and without fear, favour or prejudice.
- (3) No person or organ of state may interfere with the functioning of the courts.
- (4) Organs of state, through legislative and other measures, must assist and protect the courts to ensure the independence, impartiality, dignity, accessibility and effectiveness of the courts.
- (5) An order or decision issued by a court binds all persons to whom and organs of state to which it applies.<sup>8</sup>

Noticeably, these provisions emphasize: the independence of the courts; the separation of powers doctrine; the supremacy of the

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law as a means of social control are ... to be seen in the diverse ways in which the law is used to control, to guide, and to plan life..." H.L.A. HART, *THE CONCEPT OF LAW* 40 (2d ed. Clarendon Press, Oxford, 1994).

6. Due to length limitations and the scope of this contribution, a selection of significant cases is explored. In similar vein, we do not engage in detailed analyses. The reader is however referred to additional material where applicable.

7. See Constitution chapter 8.

8. Constitution section 165.

Constitution which should guide judicial action; and the fact that both the state and citizens are subject to the judgments of the courts.

South Africa's hierarchy of courts include: the Constitutional Court; the Supreme Court of Appeal; High Courts; Magistrates' Courts; and any other court established or recognized in terms of an act of Parliament.<sup>9</sup> The Constitutional Court is the highest court in all constitutional matters.<sup>10</sup> The Supreme Court of Appeal is the highest court in all appeal matters, with the exception of constitutional matters.<sup>11</sup> High Courts can generally decide any constitutional matter except a matter that only the Constitutional Court may decide; and any other matter not assigned to another court by an act of Parliament.<sup>12</sup> There are currently thirteen divisions of the High Court established in South Africa. Magistrates' Courts may decide any matter determined by the Magistrates' Court Act 32 of 1944, but have no jurisdiction to hear constitutional matters.<sup>13</sup> In most instances, environmental matters are decided by the Constitutional Court, the Supreme Court of Appeal and the High Courts and disputes related to environmental rights *per se*, by the Constitutional Court and High Courts.

Regrettably, neither the Constitution, nor any other act of Parliament provides for a specialized environmental court in South Africa. In 2003, an Environmental Court was established in the Western Cape Province (Hermanus) and despite a fairly successful track record,<sup>14</sup> it was shut down in 2006 "due to the unwillingness of

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9. Constitution section 166. South African law employs the law of precedent or *stare decisis*, in that "lower" courts are bound by the decisions of "higher" courts unless the decision was subject to a material error.

10. Section 167(7) of the Constitution provides that "[A] constitutional matter includes any issue involving the interpretation, protection or enforcement of the Constitution."

11. Constitution section 168.

12. Constitution section 169.

13. There are approximately 250 Magistrates' Courts established in South Africa. The jurisdiction of the Magistrates' Courts is currently in the process of significant expansion in relation to civil matters. See MAGISTRATES' COURTS AMENDMENT BILL (January 15, 2010) available at [http://www.pmg.org.za/files/bills/100212magcourtamendBill\\_0.pdf](http://www.pmg.org.za/files/bills/100212magcourtamendBill_0.pdf) (accessed June 23, 2010).

14. It has been estimated that during its three year tenure (2003-2006) more than 400 cases were disposed of and eight out of ten cases resulted in a conviction. Most were abalone related but other environmental crimes were also prosecuted. F. CRAIGIE, P. SNIJMAN & M. FOURIE, *Environmental Compliance and Enforcement Institutions*, in ENVIRONMENTAL COMPLIANCE AND ENFORCEMENT IN SOUTH AFRICA: LEGAL PERSPECTIVES (Alexander R. Paterson & Louis J. Kotzé eds. Juta, 2009).

the Department of Justice and Constitutional Development to continue to provide extra personnel and facilities for a specialized court that was not mandated by specific legislation.”<sup>15</sup> Another such court was created in the Eastern Cape (Port Elizabeth) in 2007, but was also recently shut down for reasons similar to those advanced for the dismantling of the Western Cape court. Even though these two courts had a fairly high success rate, they only dealt with environmental crimes (mostly abalone poaching), and not environmental matters generally. In a sense, they therefore only functioned as specialized criminal courts which focused on environmental crimes. “General” and non-criminal environmental matters relating to, for example, environmental rights and justice, did not fall under the purview of the two environmental courts’ jurisdiction. While the contribution of these courts to the advancement of environmental enforcement and prosecution of environmental crimes should not be underestimated, their contribution to the advancement of environmental rights jurisprudence has been negligible.<sup>16</sup>

Access to justice is a cornerstone of the South African constitutional state. Access to courts and *locus standi* provisions are, therefore, constitutional imperatives and are further supported in the environmental context by statutory law provisions which aim to establish, extend and promote access to environmental justice. The Constitution provides extensive rights with respect to access to courts and *locus standi*. Section 34 states: “Everyone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum.”

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15. *Id.*

16. There have recently been some indications by the Department of Water and Environmental Affairs that the reinstatement of ‘green courts’ is again in the cards. It seems that the renewed talks relating to the environmental courts have been prompted by the alarming findings on the state of environmental compliance and enforcement in South Africa in the recent DEAT NATIONAL ENVIRONMENTAL COMPLIANCE AND ENFORCEMENT REPORT 2008/2009 available at <http://www.info.gov.za/view/DownloadFileAction?id=112932> (accessed June 24, 2010). Despite there being no concrete plans to date to actually set up these institutions, it seems that there is some commitment from government, at least at policy level, to reconsider and re-establish these institutions. In the meantime, however, adjudication of environmental matters, including environmental rights, remains primarily with the ‘ordinary’ court structure discussed above. See in this respect R. Munshi, *It’s back to Green Courts*, FINANCIAL MAIL (July 3, 2009) available at <http://secure.financialmail.co.za/09/0703/features/> (accessed June 24, 2010).

The Constitution also provides for the requisite *locus standi* for those seeking to institute proceedings in a court of law.<sup>17</sup> In the pre-constitutional dispensation, the common law still regulated legal standing; a person who approached the court for relief had to show that he or she was personally harmed by the action that was being challenged<sup>18</sup> or that his or her legal rights were affected.<sup>19</sup> Public interest litigation, which is characteristic of environmental disputes and litigation, was accordingly nearly impossible during this period. The current approach is far more liberal as the Constitution provides that:

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

- (a) Anyone acting in their own interest;
- (b) Anyone acting on behalf of another person who cannot act in their own name;
- (c) Anyone acting as a member of, or in the interest of, a group or class of persons;
- (d) Anyone acting in the public interest;
- (e) And an association acting in the interest of its members.<sup>20</sup>

As a result of this liberal approach to *locus standi*, an almost non-exhaustive list of persons now has the requisite standing to approach a court for relief, opening up the opportunity for public interest litigation by allowing for the first time for class actions<sup>21</sup> as well as the opportunity to act on behalf of an unidentifiable class, or group of persons, with respect to the protection and enforcement of their

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17. Constitution section 38.

18. See *Patz v. Greene and Co.*, 1907 T.S. 427; *Director of Education Transvaal v. McCagie*, 1918 A.D. 616; *Milani v. South African Medical and Dental Council*, (1990) (1) S.A. 899 (T), and *Laskey and Another v. Showzone CC and Others*, (2007) (2) S.A. 48 (C).

19. See *Dalrympie v. Colonial Treasurer*, 1910 T.S. 372; *Bamford v. Minister of Community Development and State Auxiliary Services* (1981) (3) S.A. 1054 (C).

20. Constitution section 38.

21. However, to date, there have been no environmental class action suits in South Africa.

environmental rights.<sup>22</sup>

The above constitutional provisions on standing, however, only apply to instances where a right in terms of the Bill of Rights (chapter 2 of the Constitution) has allegedly been infringed. It would typically apply in a matter that involves the section 24 environmental right. However, the more restrictive common law position still applies to matters falling “outside” the Bill of Rights.<sup>23</sup> Mindful of the foregoing and the need for broadened *locus standi* in “non-Bill of Rights” environmental matters, the *National Environmental Management Act 107 of 1998 (NEMA)*<sup>24</sup> subsequently amended the common law position by granting the same array of persons and institutions (including those acting in the “environmental interest”) standing to approach the courts for appropriate relief with respect to any breach or threatened breach of environmental laws. Section 32 states in this respect that:

- (1) Any person or group of persons may seek appropriate relief in respect of any breach or threatened breach of any provision of this Act, including a principle contained in Chapter 1, or of any provision of a specific environmental management Act, or of any other statutory provision concerned with the protection of the environment or the use of natural resources;
  - (a) In that person’s or group of person’s own interest;
  - (b) In the interest of, or on behalf of, a person who is, for practical reasons, unable to institute such proceedings;
  - (c) In the interest of or on behalf of a group or class of persons whose interests are affected;
  - (d) In the public interest; and
  - (e) In the interest of protecting the environment.<sup>25</sup>

These provisions mirror the constitutional provisions related to *locus standi* discussed above, but differ in a significant respect: they also allow anyone to seek judicial recourse where that person or persons act *on behalf of the environment*. It would, accordingly, be possible in terms of section 32(1)(e) to literally act on behalf of or for

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22. L.A. FERIS, *Environmental Rights and Locus Standi*, in ENVIRONMENTAL COMPLIANCE AND ENFORCEMENT IN SOUTH AFRICA: LEGAL PERSPECTIVES (A.R. Paterson and L.J. Kotzé eds. Juta, 2009).

23. *Id.*

24. NEMA is South Africa’s primary environmental framework law and provides generic provisions (including environmental management principles) regulating all environmental media and sectors and all public and private actions which may affect the environment.

25. Constitution section 32.

the environment; not only on behalf of oneself or other persons where their environmental interests are being affected. NEMA's *locus standi* provision, therefore, seems to follow a more eco-centric, as opposed to a strictly anthropocentric, approach to the enforcement of environmental interests.

In summary, it is evident that an array of South African courts have jurisdiction to hear environmental cases and that these courts have very little discretion to deny people legal standing in the event of environmental disputes generally, and more specifically, disputes which concern environmental rights. It merits at this point to show how the courts have thus far interpreted and applied the country's first substantive and enforceable constitutional environmental right. For this purpose, section 24 is briefly discussed, followed by an overview of a selection of cases that involved this provision.

### **The Environmental Right**

As was indicated above, South Africa's constitutional transformation marked the birth of constitutional protection of peoples' environmental interests as set forth in section 24 of the Constitution. The literature dealing with the scope and meaning of section 24 abounds<sup>26</sup> with most authors agreeing that this provision imposes both negative and positive obligations on the state.<sup>27</sup> Even so, continuous judicial interpretation and clarification of the obligations and deeper meaning of this right are invaluable to guide environmental governance on the part of the authorities and to direct conduct in the private sphere. To date, domestic judicial guidance in this respect has been limited inasmuch as only in a few cases have the courts directly engaged with the substantive meaning of section 24(a) and (b).

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26. See J. GLAZEWSKI, ENVIRONMENTAL LAW IN SOUTH AFRICA 67-68, 72-81 (2d ed. LexisNexis Butterworths, 2005); M. KIDD, ENVIRONMENTAL LAW 18-23 (Juta, 2008); I. CURRIE & J. DE WAAL, THE BILL OF RIGHTS HANDBOOK 521-530 (5th ed. Juta, 2005); L. Feris, *The Socio-Economic Nature of Section 24(b) of the Constitution – Some thoughts on HTF Developers (Pty) Ltd v Minister of Environmental Affairs and Tourism (HTF)* 23 SA PUBLIEKREG / PUBLIC LAW [SAPR/PL] 194-207 (2008); L. Feris and D. Tladi, *Environmental Rights*, in D. BRAND AND C. HEYNS, SOCIO-ECONOMIC RIGHTS IN SOUTH AFRICA 249-266 (Pretoria University Press, 2005); KOTZÉ ET AL., *supra* note 3, at 560-562, 572-579; and A.A. DU PLESSIS, FULFILMENT OF SOUTH AFRICA'S CONSTITUTIONAL ENVIRONMENTAL RIGHT IN THE LOCAL GOVERNMENT SPHERE 239-254 (Wolf Legal Publishers, 2009).

27. As was indicated above, these duties arise from an inclusive reading of sections 24 and 7(2) of the Constitution.

The entire South African environmental law and governance framework is premised on the environmental right. This right is therefore the rationale behind, justification for, and foundation and impetus of environmental governance in South Africa. Section 24(a) of the Constitution is exceptionally broad and the notions of “environment,” “health” and “well-being” as they appear in section 24(a) are each loaded with probable meaning. The statutory definition of “environment” as it appears in section 1 of the NEMA shows that the environment transcends mere ecological interests and also includes, for example, the socio-economic and cultural dimensions of the inter-relationship between people and the natural environment.<sup>28</sup> “Health” in the context of the environmental right refers to health to the extent that it can be negatively affected by external factors and causes including, for example, pollution or exposure to hazardous substances. Moreover, it is generally understood that health should be broadly viewed to include both mental and physical integrity<sup>29</sup> as well as quality of life. “Well-being” seems to refer to a person’s welfare<sup>30</sup> and is intended to cover those environmental interests which do not necessarily have health implications.<sup>31</sup> “Well-being” implies that people must be protected against environmental harm which may impact on their ability to be content and at ease; it has a spiritual and psychological meaning.<sup>32</sup> It can similarly cover the built environment,<sup>33</sup> the enjoyment of a sustainable livelihood,<sup>34</sup>

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28. See KIDD, *supra* note 26, at 20.

29. See Feris & Tladi, *supra* note 26, at 260; L. Feris *Environment in*, I. CURRIE AND J. DE WAAL THE BILL OF RIGHTS HANDBOOK 526 (5 ed. Juta, 2005); J.C. MUBANGIZI, PROTECTION OF HUMAN RIGHTS IN SOUTH AFRICA A LEGAL AND PRACTICAL GUIDE 128 (Juta, 2004); and L.J. Kotzé, *The Judiciary, the Environmental Right and the Quest for Sustainability in South Africa: A Critical Reflection*, 16 REVIEW OF EUROPEAN COMMUNITY AND INTERNATIONAL ENVIRONMENTAL LAW 300 (2007).

30. In this context, welfare should be understood as a contented state of being happy and prosperous.

31. A.A. Du Plessis, *Adding Flames to the Fuel: Why Further Constitutional Adjudication is Required for South Africa’s Environmental Right to Catch Alight*, 15 SOUTH AFRICAN JOURNAL OF ENVIRONMENTAL LAW AND POLICY [S.A.J.E.L.P.] 65 (2008).

32. See L. Collins, *Are We There Yet? Revisiting the Right to Environment in International and European Law*, 3 MCGILL INT’L J. SUSTAINABLE DEV. L. & POL’Y 150 (2007) (Can); J.C. MUBANGIZI, PROTECTION OF HUMAN RIGHTS IN SOUTH AFRICA A LEGAL AND PRACTICAL GUIDE 128 (Juta, 2004); J.B. COBB, POSTMODERNISM AND PUBLIC POLICY 122 (Suny Press, 2002); M. Kidd, *Suburban Aesthetics and the Environmental Right* 4 *South African Journal of Environmental Law and Policy* [SAJELP] 257, 260-262 (1997); GLAZEWSKI, *supra* note 26, at 77; Feris & Tladi, *supra* note 26, at 260.

33. See, generally, GLAZEWSKI, *supra* note 26, at 77; J. McConnachie

environmental benefit-sharing or the cultural and/or religious value that people attach to natural resources such as forests or lakes.<sup>35</sup> Knowledge or reasonable anticipation or fear of a threat to humans' environment and natural resources anywhere (environmental vulnerability) could also impact on human well-being.<sup>36</sup>

Section 24(b) (i)-(iii) lists a number of positive state obligations such as the duty to prevent pollution and ecological degradation. Whilst the language is less ambiguous than in the case of section 24(a), the obligations themselves are void of any explanatory detail. For example, what does it mean for authorities in three different spheres of government to take "reasonable and legislative measures to secure ecologically sustainable development?" What would be "reasonable" in this instance and further, how should "ecological sustainable development" be understood in a country in transition known for its abundance of minerals but limited water resources and great disparities in wealth?

The meaning, scope and reach of section 24 are clearly very broad. This results in endless possibilities for "everyone" to seek judicial recourse where it is believed that any aspect, entitlement or guarantee under the environmental right has been infringed. It will be up to the courts to decide in each instance whether or not environmental interests related to health, well-being or any of the positive obligations listed in section 4(b) are at stake and merit judicial action. However, the "vastness" of section 24 also means that until the courts clarify its meaning, scope and reach, it is up to law-, policy- and decision-makers to try and make sense on their own of their obligations in terms of this provision. Unless and until the courts direct otherwise, organs of state can only undertake such activities

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*Environmental Conservation in South Africa – Its Application to the Built Environment* 5 SOUTH AFRICAN JOURNAL OF ENVIRONMENTAL LAW AND POLICY 99, 104-109 (1998), the supporting observations of the court in *Director: Mineral Development, Gauteng Region, and Another v. Save the Vaal Environment and Others* 1999 (2) SA 709 (SCA) 715 and the minority judgment of Sachs J. in the case of *Fuel Retailers Association of Southern Africa v. Director-General Environmental Management, Department of Agriculture, Conservation and Environment Mpumalanga Province and Others* 2007 (10) BCLR 1059 (CC) par 116.

34. For a definition of sustainable livelihood see R. Chambers and G. Conway, *Sustainable Rural Livelihoods: Practical Concepts for the 21st Century* INSTITUTE OF DEVELOPMENT STUDIES DISCUSSION PAPER 296 (1991) 6 available at <http://www.smallstock.info/reference/IDS/dp296.pdf> (accessed 23 June 2010).

35. See Du Plessis, *supra* note 31, at 66.

36. See also Kidd, *supra* note 26, at 21.

which they believe satisfy the section 24(b) obligation to protect the environment through “reasonable and other measures...” In a similar vein, until such time as it is shown otherwise, the legislature can only pass legislation which it believes satisfies the section 24(b) obligation to “take reasonable legislative” action and which sufficiently covers the substantive protection envisioned by the environmental right.

In short, therefore, the environmental right is sufficiently comprehensive and all-encompassing to provide “everyone” in South Africa with the possibility of seeking judicial recourse in the event that any of several potential aspects related to the right or guarantee derived therefrom is infringed.<sup>37</sup> Together with broad legal standing in environmental cases, this environmental right should go a long way in encouraging aggrieved parties to approach courts in their pursuit of environmental justice. Also, as we have shown, section 24 seems to be comprised of multiple layers of potential meaning due to the comprehensive scope of notions such as health and well-being. Therefore, in line with our earlier hypothesis, it seems as if the value of environmental rights jurisprudence transcends the courts’ upholding of the law and the weighing of different rights and interests in deciding constitutional environmental matters.

Environmental rights jurisprudence can go a long way in providing the people in South Africa and especially organs of state, with a sounder, more useful and refined comprehension of the substantive meaning of section 24. It can indeed also deepen the domestic environmental law discourse and indirectly contribute to the design of environmental law and policy so that it is consistent with the values espoused in the Constitution, as well as the environmental right itself. Also, environmental rights jurisprudence is necessary to establish a more definite standard against which to judge the environmentally relevant behavior and activities of, for example, organs of state. Moreover, in as far as several national constitutions currently provide for an environmental right or directive principle of state policy, it is also possible for the South African courts’ interpretation of section 24 to guide foreign courts in the interpretation and analysis of the environmental provisions in their own domestic constitutional law. Further, the wording of section 24 is

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37. The scope of possible claimants under the right is extended by the constitutional and statutory provisions on *locus standi* and access to courts that were discussed above.

largely reminiscent of the wording in article 24 of the African Charter on Human and Peoples' Rights,<sup>38</sup> which also makes it possible for rights-based decisions of the South African courts to (in bottom-up fashion) guide the African Commission or, once it is established, the African Court on Human and Peoples' Rights, in its interpretation and application of the regional environmental right. The potential role of the environmental rights jurisprudence of South Africa in comparative constitutional or human rights law, however, is beyond the scope of this contribution and is not further explored here. The following sections briefly review and comment on a selection of cases where the South African courts have reflected on the meaning and relevance of the environmental right.

### The Judiciary and the Environmental Right

The benefits of having an enforceable constitutional environmental right in deciding environmental cases of different sorts is a reality which may, unfortunately, take longer than a mere fifteen years to thoroughly settle in judicial thinking. Nevertheless, in light of increased environmental stresses and impacts in South Africa,<sup>39</sup> the importance of recognizing and upholding a person's constitutional entitlement to an environment that is not detrimental to health or well-being cannot be neglected or circumvented by the legislature, the executive or the judiciary. In a number of cases that have thus far been decided by the courts, it seems as if the courts have not taken the opportunity to concretize section 24 and have "neglected" to interpret the environmental right where the facts and circumstances begged for this right to be applied in a concrete way. Examples of such cases are *Minister of Health and Welfare v Woodcarb (Pty) Ltd and Another*<sup>40</sup> and *Minister of Public Works and Others v. Kyalami Ridge Environmental Association and Others*.<sup>41</sup> However, in at least three decisions of the

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38. African (Banjul) Charter on Human and Peoples' Rights (African Charter), June 27, 1981.

39. Evidenced by the government's recent publication of, inter alia, the DEAT *National Environmental Compliance and Enforcement Report 2008/2009* available at: <http://www.info.gov.za/view/DownloadFileAction?id=112932> (accessed June 24, 2010), the *Blue Drop Report on South African Drinking Water Quality Management Performance* (2010) and the *Green Drop Report on South African Water Quality Management Performance* (2009) both available via: <http://www.dwaf.gov.za> (accessed June 25, 2010).

40. 1996 (3) SA 155 (NPD). For a brief discussion of this case see KOTZÉ & PATERSON, *supra* note 3, at 572.

41. 2001 (3) SA 1151 (CC). available at <http://www.saflii.org/za/cases/>

courts since 1996, the judiciary took on the opportunity to grapple (albeit to a limited degree) with the substantive content of section 24.

In *BP Southern Africa (Pty) Ltd v. MEC for Agriculture, Conservation and Land Affairs*<sup>42</sup> (decided by the High Court) the matter concerned the application for a permit to establish a new petrol/gas filling station. Subsequent to having considered the statutorily prescribed environmental impact assessment procedure, the environmental authority turned down the application. It based its decision on various decision-making guidelines some of which were of a socio-economic as opposed to a strictly environmental nature. The applicant was of the view that the authority's mandate was limited to a consideration of environmental issues. The authority, on the other hand, relied on the constitutional environmental right and NEMA to argue that its mandate extended to cover both socio-economic *and* environmental issues. In deciding this case, the court confirmed that environmental authorities had a constitutional duty to give effect to section 24 and this duty included the "taking of reasonable legislative and other measures" – and the design and application of decision-making guidelines. The court reiterated that apart from being reasonable, these measures must also contribute to the progressive realization of the right concerned. Accordingly, the court approved of the environmental authority's decision to refuse the environmental authorization sought in this matter.

The *BP* court proceeded to analyze the importance of sustainable development in the South African legal order and confirmed that it will "...play a major role in determining important environmental disputes in future."<sup>43</sup> It was regarded by the court as the "fundamental building block" around which South African environmental legal norms have been designed. In its frequently quoted *dictum*, the court stated that:

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

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ZACC/2001/19.html (accessed June 24, 2010). For a brief discussion of this case See KOTZÉ PATERSON, *supra* note 3, at 578.

42. *BP* case, 2004 (5) SA 124 (WLD) available at <http://www.saflii.org/za/cases/ZACC/2007/25.html> (accessed June 23, 2010).

43. *Id.* par A at 144.

environmental impact, taking coherent cognisance of the principle of intergenerational equity and sustainable use of resources in order to arrive at an integrated management of the environment, sustainable development and socio-economic concerns. By elevating the environment to a fundamental justiciable human right, South Africa has irreversibly embarked on a road, which will lead to the goal of attaining a protected environment by an integrated approach, which takes into consideration, *inter alia*, socio-economic concerns and principles.<sup>44</sup>

The contribution that the *BP* court has made in relation to an understanding of section 24 lies in its a) confirmation of the socio-economic factors in the relationship between people and the environment; b) view that the entire environmental right must be interpreted in the context of inter-generational environmental protection and within the context of sustainable development; c) emphasis on the fact that the positive duties that the state incurs in terms of the environmental right require an integrated approach which takes into consideration environmental concerns as well as socio-economic concerns and principles; d) recognition that constitutional environmental protection requires the balancing of different rights and interests; and e) acknowledgement that there is an undeniable link between the environmental right and sustainable development in that a rights based-approach to environmental governance elevates the status of environmental governance to a constitutional level, which should enable the achievement of sustainability.

In *HTF Developers (Pty) Ltd v. Minister of Environmental Affairs and Tourism and Others*<sup>45</sup> (also decided by the High Court) the court dealt to some degree with the substantive content of both section 24(a) and section 24(b). The case concerned the legality of an administrative directive issued by a provincial environmental authority. The applicant had secured approval from the local government for the subdivision and development of residential units on an untransformed ridge comprising of a sensitive environment. The applicant commenced with the clearing and conducting of earthworks

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44. *Id.* par B-D at 144.

45. *HTF Developers* case, 2006 5 SA 512 (T) available at: <http://www.saflii.org/za/cases/ZAGPHC/2006/132.html> (accessed June 23, 2010). For a critical analysis of the case see Feris L 'The Socio-Economic Nature of Section 24(b) of the Constitution – Some thoughts on *HTF Developers (Pty) Ltd v Minister of Environmental Affairs and Tourism* (HTF) 23 *SAPR/PL* (2008) 194-207.

on the site in preparation for the proposed development. In response to complaints received from the public, the provincial authority stepped in and issued a directive that the applicant immediately cease clearing the site and cease its construction activities on the site, and design and implement a plan for the land's rehabilitation. The authority argued that the applicant's activities on the site were illegal, since it had failed to secure the necessary provincial authorization prior to commencing its activities. The applicant challenged the legality of the directive, *inter alia*, on the basis that the activity was not covered by existing regulations. In the interpretation and application of the relevant legislation and policies, the court turned to the environmental right which it described as consisting of two parts. In relation to section 24(a), the court confirmed that it guarantees the fundamental right of everyone to an environment that is not harmful to their health or well-being. The court confirmed that the term "well-being" is open-ended and "manifestly incapable of precise definition."<sup>46</sup> The potential challenge of this interpretation comes to the fore in the court's subsequent remark that "[n]evertheless, it (the term well-being) is critically important in that it defines for the environmental authorities the constitutional objectives of their task."<sup>47</sup>

The *HTF* court, however, fails to provide an original description or analysis of how the notion "well-being" should be interpreted in this case. The court is further of the view that section 24(b) imposes programmatic and positive obligations on the state to protect the environment. The court, however, wrongly interprets section 24(b) as being reminiscent of an "aspirational" constitutional directive principle as opposed to an enforceable environmental right. Nevertheless the court, in approving of the existence and content of the authority's ridges policy (which is premised on the view that the ecological and socio-cultural value of ridges in the Gauteng Province must be conserved), interprets section 24(b) as conferring upon authorities a stewardship role, whereby "the present generation is constituted as the custodian or trustee of the environment for future generations."<sup>48</sup>

The *HTF* court, in our view, contributes to a deeper understanding of section 24 by showing that a) the content of section

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46. *HTF Developers* case par 18.

47. *Id.*

48. *Id.*

24(a) cannot necessarily be separated from the positive obligations contained in section 24(b); b) constitutional environmental protection raises issues of inter-generational equality which imply a stewardship role on the part of the state; and c) the rights and interests of certain individuals may have to be limited in order to realize and protect the constitutional environmental right.

In *Fuel Retailers Association of South Africa (Pty) Ltd v. Director-General Environmental Management Mpumalanga and Others*,<sup>49</sup> the Constitutional Court for the first time thoroughly dealt with the environmental right. This case, similar to the *BP* case, dealt with the nature and scope of the environmental authority's obligation to consider the social, economic and environmental impact of the proposed establishment of a petrol filling station, as well as whether the environmental authority complied with that obligation. The Constitutional Court confirmed that the need to protect the environment and the need for social and economic development, as well as "their impact on decisions affecting the environment and obligations of environmental authorities in this regard, are important constitutional questions."<sup>50</sup> With reference to section 24 of the Constitution, the Court also confirmed that socio-economic development had to be balanced against environmental protection.<sup>51</sup> In an attempt to balance social, environmental and economic concerns, the Court *inter alia* stated that: "[p]romotion of development requires the protection of the environment. Yet the environment cannot be protected if development does not pay attention to the costs of environmental destruction. The environment and development are thus inexorably linked."<sup>52</sup> The court also embarked on a lengthy analysis of relevant scholarly writing and international jurisprudence pertaining to "sustainable development," and concluded that where decision-makers are guided by the concept of sustainable development they will ensure socio-economic development that is ecologically rooted.<sup>53</sup> The court further concluded that the obligation

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49. 2007 (10) BCLR 1059 (CC) (*Fuel Retailers* case) available at <http://www.saflii.org/za/cases/ZACC/2007/13.html> (accessed June 24, 2010). See for a discussion of the knowledge gaps that remain in relation to the meaning and scope of application of section 24 despite the *Fuel Retailers* case, Du Plessis, *supra* note 31, 58-84.

50. *Fuel Retailers* case par 41.

51. *Id.* at par 44-45.

52. *Id.* at par 44 at 25.

53. *Id.* at par 58 at 33 and par 79 at 45-46.

to ensure that the essence of sustainability is reflected in the governance processes of environmental authorities is primarily that of the judiciary.<sup>54</sup> It reiterated that the courts: “. . . have a crucial role to play in the protection of the environment. When the need arises to intervene in order to protect the environment, they should not hesitate to do so.”<sup>55</sup>

The main contribution of the Constitutional Court in the *Fuel Retailers* case seems to have been its detailed analysis of “sustainable development” and the evident importance the court attributed to this ideal. Perhaps, the decision’s most important contribution, however, has been the confirmation that the judiciary plays a very important role in upholding the rule of environmental law, and that courts will not hesitate to intervene where questions of sustainability and environmental rights arise. Unfortunately, and in spite of the inspiring observations of the court, as in the case of the *BP* and *HTF* cases, it failed to give new insight into the substantive meaning and scope of the environmental right itself.

### Conclusion

The superiority, impartiality, independence, and ability of the South African judiciary to uphold the Constitution and the rule of law are prerequisites for a successfully functioning constitutional state. This is even truer when considering the country’s racial discriminatory past under the apartheid regime; a regime which effectively eroded all confidence and trust in justice and the rule of law. The Constitution, the current statutory framework, the judiciary, and the executive authority, generally speaking, have done much to restore faith in the South African legal process during the past fifteen years of democracy. While environmental law is still in its infancy when compared to other legal disciplines in South Africa, it can reasonably be expected that the courts will, apart from their work in other areas of law, increasingly uphold, develop and further enrich the environmental law discourse (including rights-based jurisprudence) by means of its adjudicative responsibilities. It is similarly hoped that as part of the ongoing process of learning and development, the Department of Justice and Constitutional Development will actively

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54. *Id.* at par 102 at 56-57.

55. *Id.* at par 104 at 58.

pursue endeavours to reinstate specialized environmental courts and continue to “green the judiciary” by investing in environmental training, for example.

We have argued that environmental rights jurisprudence is important for an improved understanding and subsequent strengthening of the environmental protection afforded by section 24 of the Constitution. We have also argued that the courts’ interpretation and application of section 24 may, by virtue of the status of the Constitution, be of significant theoretical value for the subsequent design, amendment, implementation and interpretation of South African environmental law, generally. We have also shown that the elusive wording of section 24(a) and the ambiguity of the positive duties listed in section 24(b) still leave room for speculation about the scope of protection afforded by the environmental right. In this regard, the possibilities and options are legion; the courts have a clean slate since no court has yet attempted to expound on the meaning of a significant part of the environmental right. The review of the *BP, HTF Developers* and *Fuel Retailers* cases showed that in most cases the courts, to date, only have confirmed the generally accepted meaning of section 24(a) and (b). In relation to the limited number of cases that thus far have attempted to engage in the illumination of the deeper meaning of section 24, we agree with and uphold the concerns that were raised by authors such as Feris, before.<sup>56</sup>

It is therefore concluded that the role that the courts have played in the development of constitutional environmental rights jurisprudence since 1996 has been minimal. However, given the impact that environmental rights-based decisions could have, the potential role that the courts could play in the future, is significant. This is not to say that South Africa necessarily needs a large number of environmental rights cases; it is not an issue of quantity. A single flagship decision on the meaning and scope of section 24 could have a momentous impact on the quality of subsequent environmental decisions.

Having said this, we also acknowledge that the potential impact and role of the courts with respect to the development of

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56. See, for example, L. Feris, ‘Constitutional Environmental Rights: An Underutilised Resource’ Unpublished Paper presented at the 5th Annual IUCN Academy of Environmental Law Colloquium, Parati, Brazil, June 2007 at 2 (source on file with authors); KOTZÉ & PATERSON, *supra* note 3, at 579.

environmental rights jurisprudence does not solely lie in the hands of the courts. To be able to play a more dynamic role, the courts depend on the institution of cases by claimants that would allow the application and interpretation of section 24. The courts, in other words, rely on people making use of their environmental right and *locus standi* to protect different environmental interests in different types of contexts. The courts also rely on properly formulated, correct and comprehensive arguments in environmental cases that invite the constitutional environmental right to the litigation arena. Courts cannot invent facts or speak on behalf of any of the parties; they can only pronounce on what is before them. Seen this way, the role of the courts in developing environmental rights jurisprudence depends to a great extent on the contribution and involvement of many other parties and factors. For the courts, therefore, to be able to play an increasingly active role in the development of environmental rights jurisprudence, it may be further necessary to look beyond the obvious. It seems necessary to take several steps back and ask, for example, what is the role of environmental education and rights awareness, an environmentally pro-active society with the necessary *locus standi*, the quality of environmental lawyers that appear in environmental cases and the contribution of institutions in charge of training, capacitating and sensitizing South Africa's judiciary and other sectors of the legal fraternity with respect to environmental issues. Despite these myriad challenges and remaining questions, we are nevertheless excitedly anticipating the manner in which environmental rights jurisprudence and for that matter, environmental jurisprudence, generally, is going to unfold before this country's courts in the next fifteen years.