A DECADE OF DEVELOPMENTS IN SOUTH AFRICAN ENVIRONMENTAL JURISPRUDENCE: INSIGHTS REGARDING SOME OF THE DECISIONS HANDED DOWN BY OUR COURTS BETWEEN 1999 AND 2009

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ABSTRACT

The purpose of this paper is to consider, and critically to analyse, various judgments emanating from South Africa’s courts during the past decade which have implications for our understanding of environmental law; governance; and the role of this country’s courts in resolving environmental disputes.

In essence, this paper presents examples from our developing environmental jurisprudence in the 10 years since the enactment of the National Environmental Management Act, and explores some of the barriers that have arisen in the context of environmental litigation, and other factors that limit or otherwise hinder the achievement of sustainable development.

Among the cases considered (or referred to in this paper) are the judgment of the Supreme Court of Appeal (“SCA”) in the matter of Director: Mineral Development (Gauteng region) v Save the Vaal Environment; the decision of the Constitutional Court in Bato Star Fishing (Pty) Ltd v The Minister of Environmental Affairs and Tourism and 18 Others; the SCA’s decision in Oudekraal Estates (Pty) Ltd v The City of Cape Town & 4 Others (as well as the Cape High Court’s judgment in the subsequent application for judicial review in the Western Cape Provincial Division); the SCA’s decision in MEC for Agriculture, Conservation, Environment and Land Affairs v Sasol Oil (Pty) Ltd & Another; the decision of the North Gauteng High Court in the Transvaal Provincial Division in Endangered Wildlife Trust v Gate Development (Pty) Ltd; and the decisions of the Constitutional Court respectively in Fuel Retailers Association of Southern Africa v Director-General Environmental Management, Department of Agriculture, Conservation and Environment (Mpumalanga Province) & 12 Others, Walele v City of Cape Town and 5 Others, and Trustees for the time being of the Biowatch Trust v Registrar, Genetic Resources and 5 Others.

1 The High Courts in a number of the local and provincial divisions in South Africa, as well as judgments handed down by the Supreme Court of Appeal, and the Constitutional Court.
2 1999 (2) SA 709 (SCA).
3 2004 (4) SA 490 (CC).
4 Respectively in 2004 (6) SA 222 (SCA); and an unreported judgment of the Cape High Court per van Reenen J dated 9 October 2007 (Case No. 8112/2004)
5 2006 (5) SA 438 (SCA)
6 An unreported decision of the Transvaal Provincial Division of the High Court of South Africa (Case No. 28761/2005).
7 2007 (6) SA 4 (CC).
8 2008 (6) SA 129 (CC).
9 An unreported judgment of the Constitutional Court handed down on 3 June 2009.
**Introduction**

The main aims of this paper are to highlight positive developments in the judicial interpretation of South Africa’s environmental (and related) legislation, and to point out some areas of concern that have arisen in regard to pursuing and prosecuting the environmental right as enshrined in section 24 of the Constitution.  

As a point of departure, some extracts from two judgments, respectively handed down in 1999, and in 2007, (in other words at the beginning, and towards the end, of the period under review) are helpful in contextualising judicial developments in environmental law in the last 10 years.

The first extract is from the Supreme Court of Appeal’s judgment in the *Save the Vaal Environment* appeal\(^{11}\), where Mr. Justice Olivier, writing on behalf of a 5-judge SCA bench in early 1999, said the following:

> “Our Constitution, by including environmental rights as fundamental, justiciable human rights, by necessary implication requires that environmental considerations be accorded appropriate recognition and respect in the administrative processes in our country. Together with the change in ideological climate must also come a change in our legal and administrative approach to environmental concerns.”\(^{12}\)

The background to the statement quoted above was the SCA’s decision to reject an appeal, by the Gauteng Director of Mineral Development and the mining house concerned, where effectively those appellants’ proposition was that a group like the non-governmental organisation styled *Save the Vaal Environment* was not entitled to a hearing (or *audi alterem partem*, as it is referred to in South African law) before a decision was made in terms of the then applicable mining legislation,\(^{13}\) to grant rights to prospect and/or mine for coal reserves in an area proximate to the Vaal River.

The second collection of extracts is to be found in the Constitutional Court judgment in the *Fuel Retailers* matter.\(^{14}\)

The following statements are worth noting: Firstly, at paragraph [44], the Constitutional Court says the following, in the context of analysing the environmental right in our Bill of Rights in the South African Constitution:

> “What is immediately apparent from section 24 is the explicit recognition of the obligation to promote justifiable ‘economic and social development’. Economic and social development is essential to the well-being of humans. This Court has recognised that socio-economic rights that are set out in the Constitution are indeed vital to the enjoyment of other human rights guaranteed in the Constitution but development cannot subsist upon a deteriorating environmental base. Unlimited development is detrimental to the environment and the destruction of the environment is detrimental to development.”

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\(^{10}\) Constitution of the Republic of South Africa Act, 108 of 1996 (as amended).  

\(^{11}\) Reported in 1999 (2) SA 709 (SCA).  

\(^{12}\) At page 719 C to D.  

\(^{13}\) The Minerals Act, 50 of 1991.  

\(^{14}\) The full citation of the judgment is *Fuel Retailers Association of Southern Africa v Director-General Environmental Management, Department of Agriculture, Conservation and Environment (Mpumalanga Province) & 12 Others* 2007 (6) SA 4 (CC).  

\(^{15}\) See *Government of the Republic of South Africa and Others v Grootboom and Others* 2001 (1) SA 46 (CC); 2000 (11) BCLR 1169 (CC).
Promotion 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 inextricably linked.”

Also from the Constitutional Court’s judgment in *Fuel Retailers*, the following, on the Court’s interpretation of the meaning of sustainable development in South African law:

“As in international law, the concept of sustainable development has a significant role to play in the resolution of environmentally related disputes in our law. It offers an important principle for the resolution of tensions between the need to protect the environment on the one hand, and the need for socio-economic development on the other hand. In this sense, the concept of sustainable development provides a framework for reconciling socio-economic development and environmental protection.”

And finally, on the role of the Courts in environmental protection:

“The role of the courts is especially important in the context of the protection of the environment and giving effect to the principle of sustainable development. The importance of the protection of the environment cannot be gainsaid. Its protection is vital to the enjoyment of the other rights contained in the Bill of Rights; indeed it is vital to life itself. It must therefore be protected for the benefit of the present and future generations. The present generation holds the earth in trust for the next generation. This trusteeship position carries with it responsibility to look after the environment. It is the duty of the court to ensure that this responsibility is carried out. Indeed, the Johannesburg Principles adopted at the Global Judges Symposium underscore the role of the judiciary in the protection of the environment.”

It is my submission that the extracts quoted from the judgments in *Save the Vaal Environment*, and *Fuel Retailers*, indicate some of the positive substantive developments in our environmental jurisprudence in the past decade. In 1999, and in the context of a national Constitutional dispensation that commenced in final form only 3 years earlier, it was necessary and appropriate for the judges seized of the appeal in the *Save the Vaal Environment* matter to provide guidance and direction on the country’s legal and administrative approach to environmental concerns, particularly against the backdrop of what the Court refers to as the “change in the ideological climate”.

By 2007, and in the context of the *Fuel Retailers* decision, the focus of the Constitutional Court has refined somewhat, and particular guidance is provided on the role of South Africa’s courts in the context of environmental protection and giving effect to the sustainable development principle. In other words, our developing approach is becoming more sophisticated with the passage of time.

In a recent article in the *South African Law Journal* titled “From crude environmentalism to sustainable development: Fuel Retailers” written by Mr. Tumai Murombo the following point is

16 Judgment at page 21F to 21H.
17 At page 26A to B of the judgment (paragraph [57]).
19 Senior lecturer in law, University of the Witwatersrand, Johannesburg.
made, which is worth noting: “In the final analysis, the Fuel Retailers decision is a landmark development in the implementation of sustainable development in South African law. More importantly, it is the first decision by the Constitutional Court to affirm that the notion of sustainable development underpins the environmental rights enshrined in section 24 of the Constitution.” The learned author goes on to say that “one may expect the decision to alert the judiciary broadly to the need to infuse our environmental law with the idea of sustainability. The subsequent decision of the Constitutional Court in HDF Developers\textsuperscript{20} is further confirmation of the court’s determination to ensure that the right to an environment not harmful to our health and well-being is safeguarded through the promotion of the concept of sustainable development.”

**Positive developments in the past decade in the development of South Africa’s environmental jurisprudence**

Against the backdrop sketched above, it is appropriate now to turn to a consideration of some of the other positive developments that have occurred in the last decade.

These include at least the following:

**Relative frequency of judgments**

The relative frequency with which issues have come before the courts for decision. On a last count of reported and unreported judgments handed down in the last 10 years, it was established that more than 70 judgments have been handed down by South African Courts since 1999, on matters of environmental import. The downside of course, of so many judgments, is that it indicates that environmental issues are a site of significant contestation, and in many instances, are resolved only through the adversarial approach that typifies High Court litigation.

**A positive approach to legal standing**

Another positive development is exemplified by the view taken relatively early in the development of our environmental jurisprudence in the context of a Constitutional dispensation, regarding legal standing (or *locus standi in iudicium*, as the courts refer to it). Examples of this phenomenon include judgments like that handed down by Mr. Justice Davis in the Silvermine Valley Coalition\textsuperscript{21} matter; and the judgment by the same judge in McCarthy v Constantia Property Owners Association\textsuperscript{22} A more recent example is to be found in the judgment of Mr. Justice van Reenen in the Tergniet and Toekoms Action Group judgment, in which judgment was handed down earlier this year.\textsuperscript{23}

**The role of policy in environmental decision-making**

Examples of other judgments that on the facts as presented to those courts, and the law applied to those facts, amount to a positive approach to efforts to ensure a sustainable existence on our part of this planet include the judgment by Justice O’Regan in Bato Star, where the Constitutional Court dealt with the allocation of marine living resources, and in particular, rights in the hake sector.\textsuperscript{24} In

\textsuperscript{20} MEC, Department of Agriculture, Conservation and Environment v HTF Developers (Pty) Ltd 2008 (2) SA 319 (CC).
\textsuperscript{21} 2002 (1) SA 478 (C).
\textsuperscript{22} 1999 (4) SA 847 (C).
\textsuperscript{23} An unreported Judgment of the Cape High Court (handed down on 23 January 2009) under Case No. 10083/2008.
\textsuperscript{24} That case deals with the role of policy in administrative decision-making and is regarded by some as one of the two or three most important Constitutional Court judgments handed down in the existence of that court.
considering reasonableness in administrative action (essentially, decision-making by government) the Constitutional Court had the following to say in *Bato Star*:

“What will constitute a reasonable decision will depend on the circumstances of each case, much as what will constitute a fair procedure will depend on the circumstances of each case. Factors relevant to determining whether a decision is reasonable or not will include the nature of the decision, the identity and expertise of the decision-maker, the range of factors relevant to the decision, the reasons given for the decision, the nature of the competing interests involved and the impact of the decision on the lives and well-being of those affected. Although the review functions of the court now have a substantive as well as a procedural ingredient, the distinction between appeals and reviews continues to be significant. The court should take care not to usurp the functions of administrative agencies. Its task is to ensure that the decisions taken by administrative agencies fall within the bounds of reasonableness as required by the Constitution.”

It is arguable against the backdrop of this decision, that it can be said that from relatively humble beginnings to its increasingly prominent role in South African judgments on review applications to do with environmental issues and also recently, in assisting to achieve an appropriate balance between competing imperatives in the contested terrain in marine living resource allocations, that policy has emerged as an increasingly important tool for decision-makers. If clearly drafted and appropriately applied, well-utilised policy increases the likelihood that review courts would be loath to intervene in setting aside decisions based on (among other factors as enumerated by Justice O’Regan) those policies. Policy creates an implementation “layer” at the interface between a statute and the achievement of its objectives.

The approach to costs in environmental litigation

Another area in the jurisprudence that can be regarded as a favourable development (with one jarring exception, recently put to rights in the Constitutional Court’s decision in the *Biowatch* judgment) is the jurisprudence that has developed around the provisions of section 32 of the National Environmental Management Act. Those provisions broaden judicial discretion not to award costs in a matter in which an applicant has not succeeded in the relief sought but notwithstanding that fact, is found not to have litigated vexatiously. Section 32(2) of NEMA provides that 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 NEMA including the NEMA section 2 principles, or any provision of a specific environmental management act, or of any other statutory provision concerned with environmental protection or use of natural resources. That court can exercise that discretion if it is of the opinion that the person or group of persons in question acted reasonably out of a concern for the public interest or in the interest of protecting the environment and in that regard, had made due efforts to use other means reasonably available for obtaining the relief sought. An example of those

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25 At paragraph [45] of the judgment.
26 See for example, the role that a policy promulgated under the Environment Conservation Act, 73 of 1989 played in the decision of the Cape High Court in *Save the Klein Hangklip Association v The Minister of Planning, Administration and Culture of the Province of the Western Cape and 2 Others* (unreported judgment of the Cape High Court under Case No. 10543/1998, per Conradie and van Heerden JJ).
27 Most notably, the judgments of the Witwatersrand Local Division respectively in the matters of *BP Southern Africa (Pty) Ltd v MEC for Agriculture, Conservation, Environment and Land Affairs* 2004 (5) SA 124 (W); and *Sasol Oil and Another v Metchalfe NO* 2004 (5) SA 161 (W). See in this regard the judgment of the Supreme Court of Appeal in *MEC for Agriculture, Conservation, Environment and Land Affairs v Sasol Oil (Pty) Ltd and Bright Sun Development cc* 2006 (5) SA 438 (SCA).
28 Judgment was handed down by the Constitutional Court on 3 June 2009.
reasonable efforts would include, in my view, a properly formulated access to information request under the Promotion of Access to Information Act.

The judgment of the Constitutional Court in *Trustees for the time being of the Biowatch Trust v Registrar, Genetic Resources and 5 Others* provided a welcome fillip for environmentalists in regard to the proper judicial approach to determining costs awards in constitutional litigation.29

After finding that the case before it raised matters of special constitutional concern, the Court took the view that a “question of general importance arises, namely whether the general principles developed by the courts with regard to costs awards need to be modified to meet the exigencies of constitutional litigation.”30

The Court finds that in regard to the decisions respectively by the High Court, and the Supreme Court of Appeal, to the effect that the State should not bear the costs incurred by Biowatch in those Courts, both Courts disregarded essential features. The High Court gave no indication that it had properly measured the extent of Biowatch’s victory in successfully launching “a meritorious application to secure its rights to information in relation to constitutionally-protected environmental interests”.31 The Courts *a quo* also failed to pay appropriate attention to the constitutional character of the litigation, and the chilling effect of depriving Biowatch of its costs. The Constitutional Court goes on to find that the omission of the constitutional dimension constituted a serious misdirection.

The Court concludes that the State is obliged to bear the consequences of its approach, which the Court describes (in the context of the root cause of the dispute) as the obduracy of the State officials’ refusal to supply information they were duty-bound to give. The Court goes on to find that the failure of the High Court to order the State to pay Biowatch’s costs “was manifestly wrong”.32

The Constitutional Court considered it inappropriate to intervene in the costs order granted against Biowatch by the Supreme Court of Appeal because Biowatch (in applying for leave to appeal to the Constitutional Court) took issue only with the High Court costs order and with the Judgment of the Full Court.

As regards Biowatch’s costs incurred in the Constitutional Court application, the costs order followed the result. By virtue of Biowatch’s success, it was awarded the costs incurred in the Constitutional Court process. The result of this component of the judgment is that the State was ordered to pay Biowatch’s costs in the Pretoria High Court, and in the Constitutional Court.

A key factor in the Constitutional Court’s decision that no costs order should be made in respect of the participation by Monsanto related (once again) to the failure of the state functionaries to fulfil their constitutional and statutory responsibilities that spawned the litigation and obliged the parties (including Monsanto) to come to Court.33

The Judgment in *Biowatch* appropriately sets out the principles that should govern the award of costs in constitutional litigation and effectively reverses the chilling effect (principal on non-
governmental organisations) of the initial costs order made by the Pretoria High Court and thereafter, by a full bench of that Court in the first appeal.

The substance of (and findings in) applications for judicial review of environmental decisions

Another positive development is the frequency (and substantive relevance) of review applications heard in our High Courts in the last 10 years and in some cases, on appeal thereafter. A good example would be the so-called third Oudekraal case which was a review application seeking the review and setting aside of a 50-year old decision taken in 1947 by the erstwhile Administrator of the Cape Province, approving a township development plan for the slopes of a portion of Bantry Bay, beyond Camps Bay, above the world-famous drive between Camps Bay and Llandudno and adjacent to a portion of the Table Mountain National Park. The essence of the judgment by Justices van Reenen and Yekiso in deciding to review and set aside a decision some 50 years after it was taken was the pertinent and centrally relevant circumstance that a consequence that would flow from validating the administrators decision would be irreconcilable with the principle of legality, which is an aspect of the rule of law binding on courts in that validating the decision would allow criminal conduct in the form of the desecration of graves. This is a reference to the existence of highly significant kramats, or burial places of esteemed persons of Islam, which are situated on the site proposed to be developed.

Jurisprudence regarding administrative orders

Another positive development is to be found in a judgment that built on the jurisprudence developed by the Supreme Court of Appeal in the second of the Oudekraal cases. The judgment referred to in this context is that of Mr. Justice Bosielo in the Silverton Ridge case. What is edifying about Mr. Justice Bosielo’s judgment is his clear restatement of principles articulated in the SCA in the second Oudekraal case, in regard to how the citizenry of this country is obliged to respond to administrative actions encompassing directives or orders, by government. In essence, the primary question raised before the court was whether the respondents had acted correctly in refusing to comply with compliance notices issued by the provincial department concerned and consequently, whether a person is obliged to comply with or give effect to a decision by an administrative body where he or she perceives that order to be invalid.

The Court in Silverton Ridge held that the decision by the respondents to disregard the compliance notices was fundamentally misconceived and that it should have been abundantly clear to the respondents that they were acting contrary to the clear and peremptory provisions of the direction to stop work on a development that had not been authorised under the environmental impact assessment legislation applicable at the time. The court expressed its concern that the conduct of the respondents was both inimical to and seriously subversive of a sound and efficient system of public administration. The court stressed further that the facts of the case are an excellent demonstration of what may happen if members of the public are allowed to disregard decisions by organs of state which they, rightly or wrongly, regard as invalid. The essential principle that the SCA applies, in the second Oudekraal case, to the question of whether a person who has been served with a directive to stop doing something, for example, by a provincial environmental department, can willy-nilly ignore that administrative act where it doesn’t suit one, is recorded in the judgment, as follows: “Until the administrator’s approval (and also the consequences of the approval) is set aside by a court in proceedings for judicial review it exists in fact and has legal consequences that simply cannot be ignored. The proper function of a modern State would be considerably compromised if all administrative acts could be given effect to or could be ignored depending on the view the subject takes of the validity of the Act in question. No doubt it is for
this reason that our law has recognised that even an unlawful administrative act is capable of producing legally valid consequences for so long as the unlawful act is not set aside.”

Writing in her column in the Business Day Weekender on 28 September 2007 under the banner “Environmental judgment a triumph” Carmel Rickard says the following about Mr. Justice Bosielo’s decision: “Good-judge stories are becoming a bit like Man Bites Dog – unusual enough to warrant comment.” She goes on to say that in this decision, Mr. Justice Bosielo backed two vital causes: “An environmental concern that seeks to balance development with care of the natural world, and the principle of [the rule of] law itself”.

Activist jurisprudence in ‘SLAPP’ suits

Another positive benefit in the past ten years is the emergence of activist jurisprudence, for example, in the development of our jurisprudence in relation to so-called “SLAPP” litigation. The acronym stands for strategic litigation against public participants. In particular here, it is appropriate to refer to the judgment of Mr. Justice Tip in the matter of Petro Props (Pty) Ltd v Nicole Enid Barlow and the Libradene Wetland Association. In that case the difference between the parties lay in the applicant’s view that a successful media campaign to bring to the public’s attention the applicant’s proposed construction of a fuel filling station on an area alleged to be a wetland was the result of unlawful conduct whereas the respondent maintained that she and her associates were entitled to pursue the avenues that they did and that this entitlement enjoys constitutional protection.

In dismissing the application for an interdict with costs, the court had the following to say: “All things being equal, Ms. Barlow and the Association bear a standard that any vibrant democratic society would be glad to have raised in its midst. Their interest in motivation is selfless, being to contribute to environmental protection in the common good. None of them stands to gain material personal profit. Their modus operandi is entirely peaceful. It is mobilised within a self-funding voluntary association. It is geared towards public participation, information gathering and exchange, discussion and the production of community-based mandates. Its accompanying public discourse and media coverage have been fair, with participants and readers alike being presented in a balanced way with the viewpoints of all sides. In my view, conduct of that sort earns the support of our constitution in this context, it should be borne in mind that the Constitution does not only afford a shield, to be resorted to passively and defensibly. It also provides a sword, which groups like the Association can and should draw to empower their initiatives and interests.”

The value of dissenting judgments

The value and role of dissenting judgments must also not be underestimated as a positive development in our jurisprudence. Indeed, in an open and flourishing democracy, the role of well-considered dissent should be encouraged and facilitated as it is not only a defining aspect of an independent judiciary, but also encourages the necessary debate required in order properly to understand the competing imperatives (and positions) of different parties and/or constituencies.

34 Second Oudekraal case at para [26] on page 24 (reported in 2004 (6) SA 222 (SCA)).
35 2006 (5) SA 160 (W).
36 Examples of important dissenting judgments include those by Mr. Justice Sachs in the Fuel Retailers Association matter; and the dissenting judgment written by Acting Deputy Chief Justice O’Regan (on behalf of a 5-judge minority) in Walele’s case. (The majority judgment was written by Mr. Justice Jafta and 5 judges of the Constitutional Court concurred with it). In Wary Holdings (Pty) Ltd v Stalwo (Pty) Ltd and Another [2008] ZACC 12 Mr. Justice Kroon wrote the majority judgment on behalf of a 7-judge majority and Mr. Justice Yacoob wrote a minority judgment with which Judge Justices Nkabinde and O’Regan concurred.
Some downsides of the last 10 years

A discursive analysis of the developments reflected by 10 years’ of environmental jurisprudence would be incomplete without mentioning some of the negatives, or downsides.

At least the following are worthy of consideration:

The interdict and its role in environmental protection

The interdict which is something of a ‘blunt instrument’ when one seeks to utilise it in efforts to prohibit unsustainable environmental practises, and particularly, those that might involve seeking to prevent, by way of an interdict, the breach of conditions in an environmental authorisation; or where an applicant for interdictory relief has to prove the jurisdictional requirements of, for example, section 28 of NEMA in an application to interdict conduct that is prohibited in terms of that provision.

Additional to the well-formulated requirements to succeed in an application for interim interdictory relief (or a final interdict, for that matter) is the burden, often, of having to prove urgency in cases where for example a development has commenced unlawfully and one now seeks to interdict that activity until the main challenge to its legality (for example, by way of a review application) can be heard and disposed of by the court that will hear the review. It has been my observation, in a number of interdict applications, that there is an element of inflexibility to the interdict requirements that sometimes determines the outcome of the interdict application in a manner that simply doesn’t achieve environmental sustainability.

Judicial discretion in review applications

Another difficult issue one often grapples with in High Court applications for judicial review is the burden of persuading a review judge not to utilise the broader discretion, afforded him or her by the dictum by Mr. Justice Brand in the Associated Pension Funds matter (in a judgment of the Supreme Court of Appeal) which holds that even on a presumption that the review grounds are good and that the application should succeed, a judge may, for what have been referred to as “dictates of pragmatism and practicality”, refuse to grant the order sought and thereby, to overturn the administrative action that is sought to be impugned on review. Essentially, that discretion is invoked, in my experience, in a situation where the development is significantly advanced, either because a number of people have bought plots within the developing property or, even worse, in a situation where the concrete has already flowed. Invariably these types of challenges to any unlawfulness in regard to the grant of the environmental approval (or allegations of breaches of any conditions imposed) have to be brought in an application in two parts – Part A being an application for (interim) interdictory relief pending the resolution of Part B which is invariably a judicial review application, sometimes with alternative relief in the form of an application for a declaration of rights. The requirements imposed on an applicant in order to succeed in Part A are stringent and somewhat inflexible.

In a situation where Part A of the application doesn’t succeed and the interdict is not granted, then for all practical purposes, the review application is often rendered moot by the fact that the development is at such an advanced stage when the review is heard in the ordinary course, that the Court will not grant an order that will have the effect of stopping it. Sometimes the palliative

remedy afforded by the court in the context of that unsatisfactory result is to utilise section 32 of NEMA and not award costs against the applicant.

The costs of running litigation

Other downsides that immediately spring to mind are the extraordinary costs of running litigation, which simply cannot be quantified at the outset of a litigious matter, given the number of vagaries that accrue to litigation. Sometimes a relatively straightforward and apparently innocuous application gets bogged down in a number of secondary disputes, some of which create their own causes for action and/or discrete applications.

Greening the judiciary

Another downside, although it is being cured by the relative frequency with which matters are litigated, is the fact that judges, and often counsel, have to be brought up to speed on developments in this specialist field in order properly to argue, and give judgment on, environmental disputes. Some years ago there was a groundswell of support for the idea of specialist environmental courts or tribunals such as those that operate in other jurisdictions, for example, Australia, but the idea has never really taken off in this country and appears to be losing rather than gaining currency.

Quo vadis? (And other concluding remarks)

In closing, it is suggested that the notions both of “environmental law” and consequently, “environmental jurisprudence”, are significantly broader than one might have envisaged when the 1996 Constitution commenced and the constitutional right to an environment not harmful to health or well-being with co-relative obligations on the State (among others) to secure ecologically sustainable development and use of natural resources, while promoting justifiable economic and social development. This has a lot to do not just with the overarching constitutional requirements in regard to the legal regulation of environmental issues but also because of the overlay provided by codified administrative law provisions in this country. The Promotion of Administrative Justice Act\(^{38}\) in the Constitution entitles us to administrative action that is lawful, reasonable and procedurally fair which means that the law that governs decision-making in environmental issues is often the primary point of departure for litigation on environmental rights and/or obligations.

The question of ‘where to from here’ is a difficult one to answer, not least because of the enormous challenges facing our courts at present on fronts that have nothing to do with the further development of sound environmental jurisprudence.

I am of the considered view, however that the foundations laid by developments in our environmental jurisprudence in the past decade provide a vibrant and fertile ground for this country’s judiciary to take a lead in achieving sustainable development in South Africa, and beyond our borders. In fact, I would go further and venture that our courts already play a leading role, certainly in the African context, in the development of a legal \textit{milieu} that reflects our country’s constitutional imperatives.

Another issue that requires consideration in the future is the distinction between (and development of) the role of the courts as described in this paper, and the role of so-called “environmental courts” or “eco-courts”. A good point of departure in regard to understanding the respective roles and responsibilities of South Africa’s High Court, the Supreme Court of Appeal and the Constitutional

\(^{38}\) Act 3 of 2000.
Court, as opposed to the role of environmental courts, is to define what we mean in regard to the latter. In essence, what is meant by an 'environmental court' is a court dedicated to prosecuting environmental crimes. A good example (and good precedent in that context) is the so-called “Abalone Court” that existed previously in Hermanus, in the Western Cape. Essentially, that court was a branch of the Magistrate’s Court, with the same powers and obligations as imposed by the statutes and rules that guide and govern magistrate’s courts generally. It had well-trained prosecutors and magistrates who, by focusing exclusively on these types of prosecutions, achieved a very high percentage of convictions. As matters stand today, environmental prosecutions often fall through the cracks, given the range of other cases before magistrate’s courts. In the last few years, this country has seen the development and coming into operation of environmental laws with significant punitive provisions, in the form of criminal and civil sanctions (as well as in regard to administrative penalties). A notable recent example is the National Environmental Management: Waste Act\textsuperscript{39} which came into operation on 1 July 2009. The Waste Act includes sanctions of up to 10 years in prison and fines of up to R10 million for certain contraventions of its provisions.

There is no reason why one couldn’t investigate the possibility of establishing an environmental court that could prosecute crimes committed under environmental laws. This aspect will hopefully be one of a number of important issues debated during the course of the conference.

\textsuperscript{39} Act 59 of 2008.