



**THE ROLE OF THE COMMON LAW INTERDICT IN ENFORCING  
ENVIRONMENTAL COMPLIANCE THROUGH PUBLIC INTEREST  
ENVIRONMENTAL LITIGATION IN SOUTH AFRICA**

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## **DECLARATION**

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## **DEDICATION**

I dedicate this research to parents, siblings, friends and relatives, whose legacy of hard work and determination I am a testimony of.

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## CHAPTER ONE: INTRODUCTION

### 1.1 Introduction

As a result of industrial expansion, South Africa has experienced enormous economic growth over the past several years.<sup>1</sup> However, industrial progress has had a negative effect on the environment through the activities of both individuals and the corporate world.<sup>2</sup> Although a vast array of environmental laws have been implemented in a bid to alleviate the impact of industrial progress on the environment, the negative trend has not been stopped. For this reason cooperation between the government and the private sector in enforcing the law is of high importance. The private sector has pooled together its resources in the form of public interest environmental litigation (PIEL), but as it stands, it may be very difficult to get an interdict remedy to back environmental protection efforts.

Development of environmental rights jurisprudence in South Africa relies upon legal entities changing the manner in which they approach the environmental right.<sup>3</sup> The Constitution has taken the first step in granting parties litigating in the public interest *locus standi* as opposed to the previous position that denied them such access to the courts.<sup>4</sup> Nevertheless, remedies that were framed in the pre-constitutional milieu are still being applied with little adaptation to the Constitution's involvement.<sup>5</sup> A perusal of the remedies provided under statute and common law, shows that only reactive remedies were being awarded to public interest litigants, as opposed to the proactive remedies necessary for the adequate protection of the environment.<sup>6</sup>

### 1.2 Background of the study

Compliance with and enforcement of environmental law in South Africa has evolved since the promulgation of the Constitution.<sup>7</sup> Included within the Constitution is the environmental

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<sup>1</sup> Statistics South Africa *Statistical Release P0441* (2013) 2.

<sup>2</sup> F Oosthuizen „The Polluter Pays Principle: Just a Buzz word of Environmental Policy?“ (1998) 5 *SAJELP* 1.

<sup>3</sup> *Director: Mineral Development, Gauteng Region and Sasol Mining v Save the Vaal Environment and Others* 1999 (2) SA 709 (SCA) - hereafter *Save the Vaal*.

<sup>4</sup> *Patz v Greene & Co* 1907 TS 427- hereafter *Patz*; *Roodepoort- Maraisburg Town Council v Eastern Properties (Pty) Ltd* 1933 AD 31- hereafter *Roodepoort*.

<sup>5</sup> C Loots „Locus Standi to Claim Relief in the Public Interest Matters Involving the Enforcement of Legislation“ (1987) 104 *SALJ* 16, B van Niekerk 'The Ecological Norm in Law or the Jurisprudence of the Fight Against Pollution' (1975) 92 *SALJ* 78 and T Murombo 'Locus Standi to claim relief in the Public Interest in matters involving the Enforcement of Legislation' (1987) *SALJ* 131.

<sup>6</sup> M Kidd *Environmental Law* 2ed (2011) 271.

<sup>7</sup> The Constitution of the Republic of South Africa Act 108 of 1996 (1996 Constitution).

right<sup>8</sup> and the expanded *locus standi* provisions granting more people access to the courts.<sup>9</sup> Earlier environmental protection was difficult to enforce in the absence of an environmental legal norm and access to the courts;<sup>10</sup> making these two interlinked developments very welcome.

However, innovations which can lead to environmental protection cannot be effective without adequate redress being granted by the courts when they are approached. The courts have constantly applied remedies that were moulded to address private litigation grievances to public interest litigation matters, with little of the requirements being adapted to meet the different litigants' needs. One such remedy that has been applied in this manner is the common law interdict. This interdict is an important and effective remedy to supplement the efforts of public interest litigants. However, the courts still approach the interdict with a 19<sup>th</sup> century mind-set incorporating individual autonomy, rather than a 20<sup>th</sup> century approach that incorporates a community-based mind-set.<sup>11</sup>

The 20<sup>th</sup> century approach of placing the community's interests at heart is evident from the plethora of environmental laws all seeking to ensure that irreparable harm to the environment is kept at its lowest level.<sup>12</sup> The focus on ensuring behavioural changes along the lines of environmental compliance has however fallen short of acknowledging that man is a rational being seeking to maximise self-interest.<sup>13</sup> The violators of environmental laws are „strongly influenced by the likelihood of detection, coupled with the real risk of severe punishment.“<sup>14</sup> The remedies that seek to address environmental problems often do not do much justice to the environment or public interest due to their being reactive in nature.<sup>15</sup> The courts have the role of filling the gap that exists in the enforcement of the environmental statutes, so that the meaning of environmental right, enshrined in the Constitution is implemented. This dissertation seeks to investigate how the common law interdict remedy may be utilised by public interest litigants, to enhance environmental compliance in South Africa.

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<sup>8</sup> Ibid Section 24.

<sup>9</sup> Ibid.

<sup>10</sup> Van Niekerk (note 5 above).

<sup>11</sup> A Chayes „The Role of the Judge in Public Law Litigation“ (1979) 89 *Harvard LR* 1285.

<sup>12</sup> F Craigie, P Snigman and M Fourie „Dissecting Environmental Compliance and Enforcement“ in A Paterson and L Kotze (ed) *Environmental Compliance and Enforcement in South Africa: Legal Perspectives* (2009) 43.

<sup>13</sup> TF Malloy „Regulation, Compliance and the Firm“ (2003) 76 *Temple Law Review* 451.

<sup>14</sup> F Craigie, P Snigman and M Fourie (note 12 above).

<sup>15</sup> G Becker „Crime and Punishment: An Economic Approach“ (1968) 76 (2) *Journal of Political Economy* 117 and JD Silberman „Does Environmental Deterrence Work? Evidence and Experience Say Yes, But we need to Understand How and Why“ (2000) 30 *Environmental Law Reporter* 10523.

### **1.3 Objective of the study**

This dissertation will firstly explore the nature and importance of PIEL in the South African jurisprudence. Secondly, the nature and type of interdicts that can be applied through PIEL will be explored in order to assess how this remedy may fulfil the public interest litigants' goals. Lastly, it will be assessed whether or not there is a need for a new solution in South Africa to give effect to the environmental right.

### **1.4 Research Question(s)**

The main research question to be addressed in this discussion is the approach courts should adopt when an interdict is applied in the public interest, or in the interest of protecting the environment. Interpretation of the interdict requirements by the courts, in relation to private individuals is clear and definitive, but some dissonance still exists when the same remedy is sought in the public interest.<sup>16</sup> In order to respond to this broad question, the discussion will also look into the nature and importance of PIEL in South Africa.

The study will also look into the types of interdicts public interest litigants may seek a court of law to award. Thereafter, the requirements that have to be met when seeking an interdict will be discussed to show the challenges PIEL is likely to face. This question leads to an analysis of the way in which the challenges that public interest litigants are likely to face in meeting the interdict requirements, should be addressed when presented before the courts of law.

### **1.5 Assumptions underlying the study**

This study is written based on the realisation that the enforcement of environmental laws cannot be solely left for the state to undertake. Where possible, participation of the nation's citizens is needed so as to provide a robust environmental enforcement mechanism. The Constitution and the National Environmental Management Act (NEMA)<sup>17</sup> have put in place the legal and institutional framework necessary to accommodate public interest litigants who are willing to enforce environmental laws such as standing. However, currently the remedies awarded by courts to public interest litigants have been mainly reactive.<sup>18</sup> Protection of the

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<sup>16</sup> R Summers „Common Law Remedies for Environmental Protection“ in A Paterson and L Kotze (ed) *Environmental Compliance and Enforcement in South Africa : Legal Perspectives* (2009) 350.

<sup>17</sup> Act 107 of 1998 - hereafter NEMA.

<sup>18</sup> MA Rabie „Legal Remedies for Environmental Protection“ (1972) 5 (3) *The Comparative and International Law Journal of Southern Africa* 1.

environment requires proactive remedies, as opposed to reactive remedies in a bid to prevent irreparable harm to the environment.<sup>19</sup> Public interest litigants may look to the common law interdict as one of the proactive remedies that can effectively protect the environment. It is submitted that this remedy has the effect of protecting the environment before harm has occurred. It is thus of crucial importance that the interdict remedy be granted by the courts to both the state and citizens willing to undertake the task of protecting the environment as the Constitution envisaged.

### **1.6 Research Methodology**

This discussion is based upon primary research and is not a quantitative research study. This research method has been utilised because it is the best means of achieving the researchers' aim of critically analysing the interdict remedy. The study will rely on the Constitution, legislation, case law, books and published journal articles and theses relating to the objective and research questions set out above.

### **1.7 Overview of chapters**

This study is divided into five chapters. Chapter one is the introduction. The second chapter discusses the definition of PIEL, the role PIEL plays in South Africa, and where the mandate of PIEL in South Africa is founded. Chapter three will be devoted to analysing the nature of the different types of interdicts, and the requirements that need to be satisfied in order for an interdict to be granted. These requirements will be discussed with the objective of showing the challenges that public interest litigants may face within the current framework in seeking an interdict relief. There will also be a fourth chapter dedicated to examining the manner in which courts may assimilate a public interest litigant's application for an interdict, within the current framework of the interdict requirements. As an alternative, the discussion will look into the issue of whether a new remedy, as per the constitutional principles, needs to be developed. Chapter five concludes the whole discussion, and provides recommendations that public interest litigants may bring before the courts in the next instance when they seek an interdict aimed at protecting the environment.

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<sup>19</sup> Summers (note 16 above).

## CHAPTER TWO: CONCEPTUAL FRAMEWORK AND BASIC CONCEPTS

### 2.1 Introduction

Since the case of *Scenic Hudson Preservation Conference v Federal Power Commission*,<sup>20</sup> PIEL cases have been on the increase globally. This case set out the environmental litigation precedent on how courts may be utilised to help prevent, mitigate, remediate and seek compensation for harm done to the environment. Environmental protection can be effectively achieved through various means, one of these being the efforts of public interest litigants and the PIEL process. However, public interest litigants have faced numerous problems in trying to ensure that private individuals and government bodies comply with the nation's various environmental laws. South Africa has since made great strides in addressing some of the challenges that public interest litigants faced during the pre-constitutional era, but these resolutions have not been sufficiently effective in helping public interest litigants.<sup>21</sup>

This chapter will lay a foundation as to the meaning and importance of PIEL. Furthermore, an analysis into the development of PIEL under the common law, and its application in South Africa's constitutional dispensation will be explored.

### 2.2 Public Interest Environmental Litigation

The concept of PIEL is a fairly new concept in South Africa's jurisprudence. Globally, litigation which seeks to vindicate public rights is known as public interest litigation (PIL) or citizen suits.<sup>22</sup> PIEL however should be seen as a subset of PIL that is focused on promoting respect for the environment. In order to understand the concept of PIEL one first has to understand PIL; a term which unfortunately has no universally acceptable definition.<sup>23</sup>

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<sup>20</sup> 407 US 9256, 92 S Ct 2453 (1972). This is often regarded as the founding case in environmental litigation in which the court held that the applicants had a „special interest in aesthetic, conservational, and recreational aspects“ of activities the power plant in the mountain would cause.

<sup>21</sup> BJ Preston „Towards an Effective Guarantee of the Green Access: Japan's Achievements and Critical Points from a Global Perspective“ (2013) available at <http://www.lec.justice.nsw.gov.au> accessed on 18 November 2014. The author identifies the twelve conditions which are essential for effective public interest environmental litigation. The conditions include the lack of adequate environmental laws, justifiability, willing and able plaintiffs, knowledgeable, experienced and willing lawyers, funding of litigation, standing to sue, evidence to prove a case, independent, impartial and competent court, delay in hearing and determining cases, interlocutory practice and procedure and adequate remedies which is the focus of this study.

<sup>22</sup> H Hershkoff „Public Interest Litigation: Selected Issues and Examples (2005) available at <http://siteresources.worldbank.org/> accessed on 23 September 2014.

<sup>23</sup> Ibid.



Various authors who have sought to define the concept have, in most instances emphasised one component of PIL, which the author of this dissertation identifies as PIL's main focus.<sup>24</sup>

A general definition of PIL is given by Homburger.<sup>25</sup> This author defines PIL as a court action that is instigated by plaintiffs who are driven to claim relief that benefits the public at large, or a particular segment of the populace, rather than primarily benefitting the plaintiff's own interests.<sup>26</sup> This definition is similar to the one that is recommended by the South African Law Commission (SALC).<sup>27</sup> The SALC defines PIL as an „action instituted by a representative in the interest of the public generally, or in the interest of a section of the public, but not necessarily in that representative's own interest.“<sup>28</sup> The definitions given by Homburger and SALC, although broadly describing the PIL process, do not adequately reflect the core purpose of litigation which is in the public's interest. The core purpose of PIL should be seen through the eyes of one seeking to advance broader social objectives such as legal reform and human rights vindication. The vindication of legal rights and interests of individuals or groups through the litigation process is merely incidental to the attainment of the broader vision.<sup>29</sup>

PIEL can be defined along similar lines as PIL. Barker defines PIEL as litigation that has the particular objective of obtaining a legal remedy from the courts, or a decision, ruling from an administrative body, which will have the effect of protecting, conserving or advancing the conservation and protection of the environment.<sup>30</sup> It is submitted however that this definition does not specify the party seeking the remedy, since this remedy is sought by members of the community as opposed to private litigants.<sup>31</sup> Also, the goal and the purpose of PIEL, as in the definition advanced by Barker, may be achieved by private litigants who would have approached the courts seeking to rectify a private legal wrong, which may in the end benefit the community at large.<sup>32</sup> Lastly, this definition does not take into account the fact that

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<sup>24</sup> R Putman *Making Democracy Work: Civic Traditions in Modern Italy* (1993) 163.

<sup>25</sup> A Homburger „Private Suits in the Public Interest in the United States of America“ (1974) 23 *Yale LJ* 16.

<sup>26</sup> *Ibid* 387; C Loots (note 5 above) 132.

<sup>27</sup> SA Law Commission Project 88 *The Recognition of Class Actions and Public Interest Actions in South African Law* (August 1998) 6.

<sup>28</sup> *Ibid* 24. This is also the working definition adopted in the Public Interest and Class Actions Bill.

<sup>29</sup> YM Badwaza *Public Interest Litigation as practised by South African Human Rights NGOs: Any Lessons for Ethiopia*, (unpublished LLM thesis, University of Western Cape, 2005) 7.

<sup>30</sup> M Barker, „Standing to Sue in Public Interest Environmental Litigation: From *ACF v Commonwealth* to *Tasmanian Conservation Trust v Minister for Resources*“ (1996) 13 *EPLJ* 186.

<sup>31</sup> C McGrath „Flying Foxes, Dams and Whales: Using Federal Environmental Laws in the Public Interest“ (2008) 25 *EPLJ* 327.

<sup>32</sup> M Galanter „The Radiation Effects of the Courts“ in Boyum KO and L Mather (eds) *Empirical Theories about Courts* (1983) 117.

private litigants, such as giant corporations that have the primary goal of enhancing private gain, may conceal their cause within an environmental conservation basis as was the case in *Fuel Retailers Association of Southern Africa v Director-General: Environmental Management, Department of Agriculture, Conservation and Environment, Mpumalanga Province and Others*.<sup>33</sup> The definition that will be adopted in this discussion of PIEL relates to situations where a community group with the dominant purpose, not of protecting or vindicating private rights or interests, but protecting the environment, makes legal proceedings to a court or tribunal.<sup>34</sup> The end result of such a PIEL case should be aimed at setting a precedent that has sufficient impact to help the disadvantaged community which is not able to enforce their rights in a court of law.<sup>35</sup> The definition advanced above takes note of the important role that PIEL undertakes in enforcing the environmental right for the benefit of the broader population, who may not have the necessary resources to enforce their constitutionally enshrined right.

In addition to the remedy that a court of law may award to public interest litigants, such a verdict is taken up by other services that complement the litigation process in actually precipitating change on the ground. PIEL works closely with other professions in ensuring that the precedent granted by the court of law reaches the society that is meant to benefit from such a verdict. Legal education, research, lobbying, and advocacy are all important ingredients to a successful and effective implementation of the remedy that is awarded during PIEL proceedings.<sup>36</sup> Both the state and private individuals are bound by such court decisions and effectively the environment is protected.<sup>37</sup>

### **2.3 The importance of public interest environmental litigation**

In a young democracy that is in the process of developing its environmental jurisprudence, PIEL plays a pivotal role in developing the environmental culture of that country. It is important for the message of environmental social reform to become part of people's way of thinking; PIEL is one of the best means of driving this message home.<sup>38</sup> A single case that is brought before the courts radiates beyond the mere judicial boundaries and enters into the

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<sup>33</sup> 2007 (6) SA 4 (CC) – hereafter *Fuel Retailers*.

<sup>34</sup> McGrath (note 31 above) 327.

<sup>35</sup> F Kathree „Public Interest Law: Its Continuing role in South Africa“ (2002) *Johannesburg Bar Advocate Forum* 33.

<sup>36</sup> YM Badwaza (note 29 above) 8.

<sup>37</sup> Section 8(1) of the 1996 Constitution.

<sup>38</sup> H Hershkoff and A McCutcheon „Public Interest Litigation: An International Perspective“ in M McClaymont and S Golub (eds) *Many Roads to Justice* (2000) 96-97.

public realm.<sup>39</sup> At the same time, after such precedent has been granted, PIEL has the ability to enlighten and develop a culture of accountability with regards to socially acceptable environmental norms and hence promoting good governance. Lobel notes that the success of PIEL is not seen in the manner of the relief that is granted, but by the contribution such a relief would make to the society's livelihood.<sup>40</sup> The contribution that PIEL makes is essential in raising the low environmental right awareness among the South African population.

Environmental enforcement in South Africa as in many other jurisdictions cannot be left solely for the state to undertake. Although the state has been given the primary responsibility of ensuring environmental law compliance, it needs to integrate the efforts that the public sector brings in this area.<sup>41</sup> Loots notes that concerned citizens ought to assist the government in the enforcement of environmental laws since the government often lacks the resources to do this.<sup>42</sup> This is imperative given that the Constitution now grants everyone the right to a clean and healthy environment, a goal to which public interest litigants may help to achieve.<sup>43</sup> The National Water Act (NWA) for example grants the Minister, as the public trustee of the nation's water resources, the power to apply for an interdict, but such power has rarely been utilised.<sup>44</sup> The sporadic use of this power, notwithstanding the number of people violating their water licence conditions or operating without a licence, shows that the government needs the public's help in ensuring environmental compliance. The efforts that PIEL brings in filling this existing gap are crucial for „the development of a coherent and robust South African environmental jurisprudence.“<sup>45</sup>

PIEL in South Africa is of further vital importance due to the adoption of the principle of sustainable development, which has been the overarching theme in the development of most modern legal systems.<sup>46</sup> The decisions that are sometimes taken by government departments

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<sup>39</sup> Galanter (note 32 above) 122.

<sup>40</sup> J Lobel „Courts as Forums for Protest“ (2004) *UCLA Law Review* 548.

<sup>41</sup> N de Sadeleer, G Roller and M Dross *Access to Justice in Environmental Matters and The Role of NGOs: Empirical Findings and Legal Appraisal* (2005) 177.

<sup>42</sup> Loots (note 5 above) 31

<sup>43</sup> Ibid 30. M Kidd „Greening The Judiciary“ (2006) 3 *PER*. 72.

<sup>44</sup> Section 155 of the National Water Act 36 of 1998.

<sup>45</sup> Kidd (note 43 above) 84.

<sup>46</sup> The 1987 UN Commission on Environment and Development (The Brundtland Report) defined Sustainable development as:

development that meets the needs of the present without compromising the ability of the future generations to meet their own needs. It contains within it two key concepts: the concept of „needs“, in particular the essential needs of the world's poor, to which overriding priority should be given: and the idea of the words poor, to which overriding priority should be given: and the idea of limitations imposed by the state of technology and social organisation on the environments ability to meet present and future needs.

have emphasised only one of the factors of sustainable development; an anomaly which PIEL can be credited as having been in the forefront of correcting.<sup>47</sup> Good government decision-making, principles and public debate is encouraged by the efforts that PIEL undertakes in promoting sustainable development.<sup>48</sup>

#### 2.4 Public interest environmental litigation under common law

PIEL cases that were brought before the South African courts under common law were limited mainly to private nuisance related matters.<sup>49</sup> The main reason for so few cases being litigated in the public interest was because of the challenges presented in meeting the *locus standi* requirements.<sup>50</sup> The common law did not incorporate the 16<sup>th</sup> century Roman law principles that allowed the public to litigate to protect resources that were regarded as *res sacre* or *res publicae*.<sup>51</sup> A restrictive approach was applied under the common law whereby the *actio popularis* action that applied under Roman law ceased to exist.<sup>52</sup> In approaching a court of law, a litigant could only have his case decided after having satisfied the procedural aspects decided in *limine*. Two requirements had to be satisfied initially before the court would recognise the litigant as having standing. The first requirement that litigants need to satisfy for the court was whether the applicant had the necessary capacity to sue; a requirement most litigants found relatively easy to satisfy.<sup>53</sup> The second requirement was however relatively difficult to satisfy, as it related to showing the existence of a „legally enforceable right“ or „sufficient interest“.<sup>54</sup>

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<sup>47</sup> *Fuel Retailers* (note 33 above).

<sup>48</sup> BJ Preston „The Role of Public Interest Environmental Litigation“ (2006) 23 *EPLJ* 337.

<sup>49</sup> *Gien v Gien* 1972 (2) SA 113 (T); *Dell v The Council of Cape Town* (1879) 9 Buch 2.

<sup>50</sup> The only instance public interest litigation was heard under the common law was if it fell into one of the four exceptions. These exceptions fell under the *Patz v Greene & Co* principle; *Interdict de Libero Homine Exhibendo* (*habeas Corpus*) and Related Interdicts; Public Authorities as Representatives of the Public Interest and lastly ratepayers.

<sup>51</sup> L Baxter *Administrative Law* (1984) 664.

<sup>52</sup> *Bagnall v The Colonial Government* (1907) 24 SC 476 reinforced the fact that the *actio popularis* action did not exist in South African law as only a party that had an injury done to them could bring an action. The judge said that South African court had never recognized the right of an individual to vindicate the public rights in instances where the individual himself would not have sustained any direct injury or damage as a result of breach of the law.

<sup>53</sup> The basis of this requirement flows from the law of persons and company law that determine the categories of parties that have capacity to sue. An example relates to certain requirements that minors, prodigals and insolvent individuals have to establish before being accepted as having capacity to litigate. In relation to litigating in the public interest, Non-Profit Organisation (NPOs) are granted capacity to sue under s21 of the Companies Act 21 of 2008.

<sup>54</sup> Baxter (note 51 above) 664.

The interpretation of the second *locus standi* requirement was the main impediment that hampered public interest litigant's efforts under the common law.<sup>55</sup> The legally enforceable right that a litigant needed to establish was an interest that was direct and substantial to the litigant in their own personal capacity as opposed to that interest being indirect.<sup>56</sup> The courts firmly applied the interpretation of this principle, in the case of *Dalrymple and Others v Colonial Treasurer*.<sup>57</sup> In this case, it was stated that „no man can sue in respect of a wrongful act, unless it constitutes the breach of a duty owed to *him* by the wrongdoer or unless it causes *him* some damage in law“.<sup>58</sup> The application of the *actio popularis* action was hence completely done away with in this case, as in most public interest cases the litigants represent the interests of other individuals rather than acting on their own behalf.<sup>59</sup> Establishing the existence of a direct or personal interest is a standard too high for public interest litigants to meet, as the interests they represent is one to which all citizens are granted by the law.<sup>60</sup>

An important court decision involving a public interest litigant under the common law was that delivered in the case of *Bamford v Minister of Community Development and State Auxiliary Services*.<sup>61</sup> The importance of this case emanates from the effect of the judgment that was delivered by the court, a judgement that vindicated a public interest right. Watermeyer JP stated that regardless of the impermissibility of vindicating a public right under the then current law through an interdict, the remedy sought by the applicant had the similar effect of vindicating public interests and such could not be denied just because a single applicant sought such a remedy.<sup>62</sup> In this court case, the plaintiff who was a member of parliament sought an interdict restraining the respondent from erecting residences in a park falling under his constituency. The basis for the applicant's relief was that the public needed to have access to the park and such access would have been hindered if construction of the residences was allowed to continue.<sup>63</sup> The judge in granting the requested interdict accepted that the interdict was one sought to vindicate the public's right, regardless of this not being

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<sup>55</sup> F du Bois „Wellbeing and the Common Man: A Critical look at Public Interest Environmental Law in South Africa and India“ in D Robinson and J Dunkley (eds) *Public Interest Perspective in Environmental Law* (1995)139. The author notes that an exception was only granted in cases where life or liberty of another was in danger.

<sup>56</sup> Baxter (note 51 above) 650.

<sup>57</sup> *Dalrymple and Others v Colonial Treasurer* (1907) 24 SC 470.

<sup>58</sup> *Ibid* 379 [own emphasis].

<sup>59</sup> *Roodepoort* (note 4 above) 87.

<sup>60</sup> *Natal Fresh Produce Growers Association v Agroserve (Pty) Ltd* 1990 (4) SA 749 (N). The court did not accept the public interest litigants as having standing to represent it members unless it was able to show that it had interests separate from its members had been infringed.

<sup>61</sup> 1981 (3) SA 1054 (C).

<sup>62</sup> *Ibid* 1061 E.

<sup>63</sup> *Ibid* 1056E-F.

provided in the law.<sup>64</sup> What can be taken from the decision in *Bamford* is not that the interdict was granted to an individual litigant, but the court's gradual acceptance of the fact that public rights needed to be protected in the same way as individual rights. The judge took a bold move away from the traditional position that single litigants cannot litigate on the basis of a public interest, despite being couched in an individualistic way.

### **2.5 Public interest environmental litigation under the Constitution**

The challenges that PIL faced under the common law, and more specifically PIEL, were addressed in the Constitution.<sup>65</sup> The Constitution takes a completely different position from the one previously provided for under the common law through the introduction of new concepts. The environmentalists' call for the recognition of an „ecological norm,<sup>66</sup> or a „conservation ethic<sup>67</sup> were answered through the inclusion of the environmental right in section 24 of the Constitution. The environment was placed at the same level as all other political, socio and economic rights. Section 24 which forms the basis for all environmental laws applicable in South Africa states that 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) prevents pollution and ecological degradation;
  - (ii) promotes conservation; and
  - (iii) secures ecologically sustainable development and use of natural resources while promoting justifiable economic and social development.

However, having rights merely listed in the Constitution is not an answer in itself, a fact which was recognised by the drafters of the Constitution. The Constitution gives the state a special mandate to implement reasonable legislative and other measures that would ensure that an environment that is not harmful to people's health and well-being can be achieved. The meaning of the phrase „legislative measures“ in the environmental right is self-evident, but there is no clear meaning for the phrase „other measures.“ The phrase „other measures“ is broad enough to include measures taken by public interest litigants in their bid to ensure that

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<sup>64</sup> Ibid 1062 C.

<sup>65</sup> 1996 Constitution.

<sup>66</sup> Van Nierk (note 5 above) 78.

<sup>67</sup> PD Glavovic „The Need for Legislative Adoption of Conservation Ethic“ (1984) *Comparative and International Law Journal of South Africa* 148.

the environmental right is given effect through seeking an interdict in a court of law.<sup>68</sup> It is only through the integration of the state's legislative measures, and private sector's „other measures“ that the vision of having an environment that is not harmful to one's health or well-being can be attained.

Whilst recognising that the public and private sector's cooperation in the enforcement of the environmental right is imperative, the challenges that the public face in accessing the court were further addressed in section 38 of the Constitution. The Constitution widens the categories of parties that can have access to the courts from the previously held common law position. The effect of these exceptionally widened standing provisions allows for the possibility of „other measures“ being implemented through the courts by the private sector. Section 38 states 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; and
- (e) an association acting in the interest of its members.

The full attainment of the environmental right would have been ineffective had the *locus standi* restrictions that hindered public interest litigants' efforts under the common law continued to operate. The broadening of the *standi* provisions is effectively in line with the environmental right which recognises that „everyone“ should live in an environment that is not harmful to their health and well-being. The possibility of improving the quality of life for all people and ensuring that they are able to reach their full free potential, can be achieved

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<sup>68</sup> J De Waal and I Currie *The Bill Of Rights Handbook* 4<sup>th</sup> ed (2001) 405.

when some public interest members who may not have a direct interest in the matter are given the leeway to act on behalf of others.<sup>69</sup>

Falling in line with the liberated *locus standi* provisions and giving effect to the environmental right in the Constitution is section 32 of NEMA. The national environmental framework legislation in section 32 significantly extends the *locus standi* categories further than is provided for in the Constitution. Section 32 of NEMA headed „Legal standing to enforce environmental laws“ states that:

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.

The effect of the standing provisions in section 38(d) of the Constitution and section 32(d) of NEMA is that PIEL can occur in a simpler manner for the broader benefit of society than was the case presented under common law. The past clearly shows that it was too simplistic to presume that the state can effectively protect the public's interests effectively without the help of other role players, importantly in the form of public interest litigants.<sup>70</sup> The state acknowledges these lessons from the past and shows its commitment to protecting the environment with the aid of civil society in NEMA's preamble. The preamble of NEMA states „that the law should be enforced by the state and that the law should facilitate the enforcement of environmental laws by civil society.“<sup>71</sup> The *locus standi* provisions therefore

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<sup>69</sup> Preamble 1996 Constitution.

<sup>70</sup> Baxter (note 51 above) 644.

<sup>71</sup> Preamble of NEMA.



effectively pave the way for public interest litigants to help the State in the task of protecting the environment.

A further important provision in NEMA is the considerable extension of the *locus standi* provisions beyond those recognised in section 38 of the Constitution. Public interest litigants may seek standing under NEMA to enforce the environmental right in the public interest, or in the interest of protecting the environment.<sup>72</sup> This is an important provision given that at times the public may not have an identifiable interest in need of protection, instead the environment would be deteriorating and in need of protection. Public interest litigants effectively have the option of establishing standing in the Constitution and NEMA based on public interest, and more importantly in the interest of protecting the environment under NEMA.

## **2.6 Public interest environmental litigation and remedies**

The discussion above shows that establishing the existence of direct sufficient interest was a major impediment preventing PIEL cases from appearing before the courts under the common law. In the few cases that public interest litigants sought to vindicate public interest, the courts dismissed the cases as the second standing requirement would not have been satisfied.<sup>73</sup> It is from this point of view that one notices that the courts were more inclined to vindicate private rights, as opposed to incorporating the interest of the public. That same court system is the one that currently has been tasked with the responsibility of formulating remedies applicable to all cases that come before it. The courts in the common law era formulated remedies that were set to achieve the purpose of vindicating private rights. This position continued to operate without change, notwithstanding that the era in which these remedies were developed did not acknowledge the presence of the *actio popularis* action.<sup>74</sup> Public interests that are now provided for in the Constitution are equally worthy of adequate protection.

The Constitution has since changed the previous position that hindered courts from recognising the standing of public interest litigants. The Constitution and NEMA have expressly extended the standing provision which caters for matters brought in the public

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<sup>72</sup> Section 32 of NEMA.

<sup>73</sup> *Von Molkte v Costa Areosa* 1975 (1) SA 255 (C). check spelling – not AREOSA??

<sup>74</sup> *Verstappen v Port Edward Town Board and Others* 1994 (3) SA 569 (D).

interest. The major problem for public interest litigants in South Africa is now more along the lines of the remedies that a court of law awards in a public interest case that seeks to protect the environment for the public, or the environments' interest.

The interdict remedy under the common law was one where an applicant sought to protect his interests from being jeopardised by another individual, before a final decision was granted on trial. It is important to note the fact that only parties which were recognised as having standing to initiate the case or defend the claim in their individual or personal capacity, could approach the court. It is as such that the interdict relief was developed primarily for the reason of resolving disputes involving private individuals.

It is interesting to note that whereas the concerns of private litigants and public interest litigants are so diverse from each other, the interdict remedy still seems to cater for private litigants. The diverseness of private and public interest litigants was acknowledged by O'Regan in *Ferreira v Levin NO*.<sup>75</sup> The judge stated that

Existing common law rules of standing have often developed in the context of private litigation. As a general rule, private litigation is concerned with the determination of a dispute between two individuals, in which relief will be specific and, often, retrospective, in that it applies to a set of past events. Such litigation will generally not directly affect people who are not parties to the litigation. In such cases, the plaintiff is both the victim of the harm and the beneficiary of the relief. In litigation of a public character, however, that nexus is rarely so intimate. The relief sought is generally forward-looking and general in its application, so that it may directly affect a wide range of people. In addition, the harm alleged may often be quite diffuse or amorphous.<sup>76</sup>

In light of such decisions made by the Apex court, one would think that remedies awarded by courts should take into account the different goals that are sought to be achieved from private and public interest litigation. The standing provisions as listed in section 38 of the Constitution and section 32 of NEMA need to be effectively given meaning to, and not by merely allowing public interest litigants access to the courts but through granting effective remedies. The common law interdict remedy may be regarded as not being capable of addressing environmental challenges independently as the remedy seeks mainly to protect

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<sup>75</sup> 1996 (1) SA 984 (CC) – hereafter *Ferreira*.

<sup>76</sup> Ibid 229.

and enforce private rights and their obligations with environmental interests being protected when attached with private individual rights as was the case in *Bamford*<sup>77</sup> and *Tergniet and Toekoms Action Group v Outeniqua Kreosootpale (Pty) Ltd.*<sup>78</sup> The expanded *locus standi* provisions on their own are ineffective in aiding the desire of public interest litigants to protect the environment in the public interest, or in the environment's own interest. For this reason, other measures may need to be adopted by the court, which in this case entails an expanded interpretation of the common law interdict requirements as will become more apparent from the discussion below.

## 2.7 Conclusion

The important role public interest litigants play in a society such as South Africa cannot be over emphasised. Public interest litigants play an important role in the development of an environmental law jurisprudence, whilst at the same time playing the watchdog role over the state's enforcement function, and private individual's compliance with the law. The means of ensuring that social change is brought into the field of environmental law can be effectively undertaken by broadening the platform that accommodates public interest litigants. This platform has been granted in the Constitution and NEMA, but regardless of this remedies are still couched in a manner that seeks to vindicate claims akin to those raised under the common law era. The interdict remedy is one relief that falls under „other measures“ that public interest litigants can seek in ensuring that an environment not harmful to one's health and well-being is attained.

The next chapter will discuss the requirements of the interdict remedy and show how the remedy has traditionally been interpreted, and the problem that this interpretation entails for public interest environmental law litigants.

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<sup>77</sup>*Bamford* (Note 61above). DV Cowen 'Toward Distinctive Principles of South African Environmental Law: Some jurisprudential perspectives and a role for legislation' (1989) 52 *THRHR* 8.

<sup>78</sup> Case 10083/2008 (C) 23 January 2009 (unreported) – hereafter *Tergniet*.

## CHAPTER THREE: THE COMMON LAW INTERDICT

### 3.1 Introduction

The meaning of PIEL and the important role it plays in the enforcement of the environmental right in South Africa has been explored in the preceding chapter. This chapter will focus on the common law interdict remedy; the requirements that need to be satisfied and the problems public interest litigants are likely to encounter when seeking this remedy in a court of law. This chapter will also discuss the two types of interdicts that public interest litigants may seek in enforcing environmental law compliance.

### 3.2 The nature and importance of an interdict in environmental law

An interdict is a court order that seeks to protect an existing right from an alleged illegitimate activity that may violate one's rights or statutory provisions.<sup>79</sup> An interdict is the most suitable remedy that public interest litigants may seek in ensuring environmental compliance, due to the speed with which it may be obtained, and the impact it bears on addressing the harm. The interdict has the ability to put to an end any harmful activity at a very early stage before the harm can take effect. It can furthermore be stated that an interdict is „not a remedy for past invasion of rights, but is concerned with the present or the future“<sup>80</sup> thereby making it a suitable measure that can be taken to protect the environment. It has been described as an extra ordinary remedy and of a summary nature, which enables it to play an important role in protecting the environment.<sup>81</sup> It is because of this that an interdict aids public interest litigants when taking a proactive intervention in protecting the environment.<sup>82</sup>

The main purpose of PIEL is to prevent irreparable harm to the environment before it develops further. This purpose is in line with Lord Denning's assertion that „the delay of justice is a denial of justice.“<sup>83</sup> To address the goal of public interest litigants, a variety of remedies are placed at their disposal, but none seem more suited to address the goal that the common law interdict seeks to achieve. This invaluable implementation mechanism can prevent heritage buildings from being destroyed, wetlands being filled up and the air or water

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<sup>79</sup> CB Prest *Interlocutory Interdicts* (1993) 2.

<sup>80</sup> LTC Harms „Interdict“ in WA Joubert (ed) *The Law of South Africa* Vol 11 Second Reissue (2008) 390.

<sup>81</sup> DE Van Loggerenberg Jones & Buckle *The Civil Practice of the Magistrates Courts in South Africa* 10<sup>th</sup> ed (2011) 164.

<sup>82</sup> M Kidd „Alternatives to the Criminal Sanctions in the Enforcement of Environmental Law“ (2002) 9 *SAJELP* 42.

<sup>83</sup> *Allen v Sir Alfred McAlpine & Sons Ltd* (1968) 2 QB 245.

contaminated.<sup>84</sup> Given the wide standing provisions, public interest litigants can now seek invaluable relief and effectively guarantee a halt on continued harm to the environment.

Application of the interdict remedy, in a bid to protect the environment has been acknowledged in other jurisdictions, such as Canada. In the case of *MacMillan Bloedel Ltd v Mullin*,<sup>85</sup> the court stated that:

The forest that the Indians know and use will be permanently destroyed..... the island's symbolic value will be gone. The subject matter of the trial will have been destroyed before the rights are decided ..... The courts will not be able to do justice in the circumstances. That is the sort of result that the courts have attempted to prevent by granting injunctions.

### **3.3 Types of interdicts**

In the environmental sphere, at least two scenarios usually present themselves in which public interest litigants seek an interdict from the courts. The first situation is where a private party performs an activity that is detrimental to the environment, with or without the knowledge of the unlawfulness of their activity. Secondly, public interest litigants could seek an interdict against a State department that has been granted the mandate of enforcing an environmental statute but is failing to live up to its mandate. Other situations under which interdicts can be sought include situations where a decision is pending review or in a damages claim.<sup>86</sup> However the two types of scenarios that usually present themselves in environmental law described above can adequately be addressed in the form of a prohibitory or mandatory interdict. The nature of these two types of interdicts is the subject of discussion under the following subheadings:

#### **3.3.1 Prohibitory interdict**

A prohibitory interdict is an order that is granted by a court of law „requiring a person to abstain from committing a threatened wrong or from continuing an existing one.“<sup>87</sup> In the environmental context, this example presents itself for example when one makes illegal air emission into the atmosphere without a permit. This type of circumstance is the one that leads

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<sup>84</sup> J Glazewski *Environmental law in South Africa* (2005)124.

<sup>85</sup> 1985 3 W.W.R 577 (B.C.C.A) 70-71.

<sup>86</sup> *Kruger and Others v Mangaung Plaaslike Munisipaliteit* (5001/2008) ZAFSHC (19 December 2008); *Ngubane v South African Transport Service* 1991 (1) SA 756 (AD).

<sup>87</sup> Van Loggerenberg (note 80 above) 168.

a public interest litigant seeking a prohibitory interdict, as was done in the case of *Tergniet*.<sup>88</sup> The application for a prohibitory interdict in environmental protection is crucial to prevent damage caused to the environment which in most cases would be irreversible were the interdict not sought. A prohibitory interdict also has the ability to end harmful activities, or at least minimise the damage that may be caused to the environment.<sup>89</sup>

In the case of *Tergniet*, a public interest litigant sought to interdict a wooden pole manufacturer who was violating provisions of two environmental laws. The respondent was violating provisions of the Atmospheric Pollution Prevention Act,<sup>90</sup> and the Land Use and Planning Ordinance.<sup>91</sup> These statutes regulated the release of noxious and/or offensive gases into the atmosphere in a bid to give effect to the environmental right guaranteed in the Constitution.<sup>92</sup> The respondent's defence against the court awarding the interdict was that since the statute provided for criminal sanctions, there was an alternative remedy than that wished by the respondents; and so the applicant's relief should have been denied. The court however disagreed with this assertion stating that the instigation of criminal sanctions for the infringement of APPA provisions would at times be woefully inadequate.<sup>93</sup> Criminal sanctions in the environmental context are of little use in regulating anticipated future transgressions to the environment, and this had a bearing on the judge's decision.<sup>94</sup> The judge came to the conclusion that in such circumstances, no other appropriate or alternative relief lies in the hands of the victim, other than a prohibitory interdict against the transgressor of the environmental statute to stop the pollution.<sup>95</sup>

The importance of seeking a prohibitory interdict has also been acknowledged, even by governmental departments, as can be witnessed in the case *Minister of Health and Welfare v Woodcarb*.<sup>96</sup> This case involved an interdict application by the minister against a sawmill producer that was operating in contravention of the Atmospheric Pollution Prevention Act.<sup>97</sup> Hurt J stated that since the act did not provide for specific remedies the minister or any other interested parties, could enforce against a party contravening the act, and could not be limited

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<sup>88</sup> *Tergniet* (note 78 above) 12.

<sup>89</sup> Loots (note 5 above) 27.

<sup>90</sup> Section 9(1) of the Atmospheric Pollution Prevention Act 45 of 1965 – hereafter APPA.

<sup>91</sup> Act 15 of 1985 – hereafter LUPO.

<sup>92</sup> *Tergniet* (note 78 above) 12.

<sup>93</sup> *Ibid* 47.

<sup>94</sup> *Ibid*.

<sup>95</sup> *Ibid*.

<sup>96</sup> 1996 (3) SA 155 (N) -hereafter *Woodcarb*.

<sup>97</sup> APPA (note 89 above).

to criminal penalties for contraventions of the act.<sup>98</sup> The respondents were interdicted by the court from carrying on the wood burning process on the land under contention, and the right of the populace to live in an environment not detrimental to one's health and well-being was achieved.<sup>99</sup> The court under the Interim Constitution clearly saw the interdict as one of the only remedies available to ensure that an environment not detrimental to one's health or well-being could be attained.<sup>100</sup>

### 3.3.2 Mandatory interdict

A mandatory interdict, unlike a prohibitory interdict, is an order that requires a person to do a positive act to remedy a wrongful state of affairs for which he is responsible, or to do something which he ought to do."<sup>101</sup> The purpose of a mandatory interdict is „to compel the performance of a specific statutory duty and to remedy effects of unlawful action already taken“.<sup>102</sup> The mandatory interdict (*mandamus*) is usually sought against public bodies in circumstances where that state department falls short of its statutory obligations.<sup>103</sup> In these instances, the court orders that the state departments perform their statutory duties. Few *mandamus* interdicts have been granted by the courts due to the interdicts' enforcement challenges, but this has not deterred public interest litigants, in the form of PIEL, from seeking a *mandamus* in a bid to protect the environment.

The case of the *Wildlife Society of Southern Africa and others v Minister of Environmental Affairs and Tourism*,<sup>104</sup> is one such scenario. A *mandamus* was sought against a state department for its failure to fulfil its statutory obligations. The applicants in this case were seeking an interdict that would compel the state department to enforce provisions under the Environment Conservation Act.<sup>105</sup> The provisions prohibited the development and establishment of buildings within the restricted Transkei coastal conservation area.<sup>106</sup> The court in this instance granted the *mandamus* against the state department. Pickering J found that decisive measures needed to be taken by the government department against the illegal

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<sup>98</sup> *Woodcarb* (note 95 above) 1611-162A.

<sup>99</sup> *Ibid* 165.

<sup>100</sup> Section 29 of the Constitution of the Republic of South Africa, Act 200 of 1993(interim Constitution).

<sup>101</sup> *Van Loggerenberg* (note 80 above) 169.

<sup>102</sup> *Baxter* (note 51 above) 690.

<sup>103</sup> *Ibid*.

<sup>104</sup> (1996) 3 All SA 462 (Tk) - hereafter *Wildlife Society*.

<sup>105</sup> Act 73 of 1989- hereafter ECA.

<sup>106</sup> *Wildlife Society* (note 103 above) 3.

land practice by users, especially since the measures that had been taken before were indicative of a totally ineffective and unsuitable manner to address the imperative problem.<sup>107</sup>

Although the *Wildlife Society* case was decided under the now repealed section of the Environment Conservation Act,<sup>108</sup> this decision has a bearing on the application of other statutes in effect. One such environmental statute, in terms of which a *mandamus* may be sought, is the National Water Act (NWA).<sup>109</sup> Section 155 of the NWA gives the minister of water the power to interdict a party violating the water legislation provisions. Public interest litigants may seek a *mandamus* compelling the minister to direct any individual contravening the NWA to discontinue with any such activity, and to remedy adverse effects that would have arisen from such contraventions, since he acts as a trustee of the nation's water resources.<sup>110</sup>

In a recent case of *Kloof Conservancy v Government of the Republic of South Africa and Others*<sup>111</sup> the court was faced with a similar instance in which a *mandamus* was sought by public interest litigants against the government. The government through the various departments had failed to publish and apply an alien invasive species list as per the mandate required in chapter 5 of the National Environmental Biodiversity Act (NEMBA). The failure by the government to publish the invasive species' regulations effectively rendered the whole section of the Act redundant and frustrated the efforts of citizens willing to fight alien and invasive species.<sup>112</sup> Vahed J after looking at the totality of circumstances and the government actions, held that the government's actions in failing to publish the list by the 31st August 2006, as mandated under NEMBA was unlawful and unconstitutional.<sup>113</sup> The various respondents in the case, were instructed to ensure that all steps that are deemed necessary and within their authority under the law had to be taken to ensure that every organ of state in every sphere of government complies with the obligations under section 76(2) and (4) of NEMBA requiring the preparation of the invasive species lists.<sup>114</sup> This case illustrates the important role that public interest litigants play in ensuring that environmental compliance takes place effectively through remedies such as the *mandamus* interdict.

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<sup>107</sup> Ibid 475.

<sup>108</sup> ECA (note 104 above).

<sup>109</sup> NWA (note 44 above).

<sup>110</sup> Ibid Section 3.

<sup>111</sup> (12667/2012) [2014] ZAKZDHC 60 (22 October 2014).

<sup>112</sup> Ibid para 127.

<sup>113</sup> Ibid para 140

<sup>114</sup> Ibid para 140.



### 3.4 The interdict requirements

The common law interdict, though sharing similarities with the English law injunction remedy is grounded upon Roman-Dutch law principles.<sup>115</sup> The requirements that a party needs to satisfy in an interdict application have been maintained as per the writings of Van der Linden in relation to a *mandament poenaal* application.<sup>116</sup> The writings of Van der Linden were an important guide to the court's formulation of the final interdict requirements in the case of *Setlogelo v Setlogelo*.<sup>117</sup>

The requirements flowing from this case have been maintained over the years in their solid form. In order to obtain a final interdict, an applicant needs to show the presence of a clear right, an injury actually committed or reasonably apprehended, and lastly, an absence of similar protection by any other ordinary remedy.<sup>118</sup> In an interim interdict application, the requirements are slightly different to those required in a final interdict application. The applicant would need to establish the existence of a *prima facie* right; the apprehension of irreparable harm; that the balance of convenience favours the granting of an interdict and lastly the absence of any other satisfactory remedy.<sup>119</sup> The requirements discussed above in relation to an interim or final interdict application have subtle yet significant differences.<sup>120</sup>

The interim and final interdict requirements differ in regards to the threshold level that has to be established and the number of requirements that have to be satisfied. In order to be granted an interim interdict, the right only has to be *prima facie* established even if it is open to some doubt.<sup>121</sup>

This is in contrast to a final interdict application in which the right has to be „clear“: an applicant would need to prove on a balance of probabilities, the right which he seeks to protect.<sup>122</sup> Furthermore, the interim interdict has an extra requirement of balance of convenience.<sup>123</sup> The focus of this study will however dwell primarily on the final interdict as opposed to the interim interdict. Focus is given to the final interdict because it is the one that calls for a „permanent cessation of the unlawful course of conduct or state of affairs“<sup>124</sup> hence

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<sup>115</sup> Harms (note 79 above) 294.

<sup>116</sup> Prest *The Law and Practice of Interdicts* (1996) 42.

<sup>117</sup> *Setlogelo v Setlogelo* 1914 AD 221,227.

<sup>118</sup> Harms (note 79 above) 396.

<sup>119</sup> *LF Bohoff Investments (Pty) Ltd v Cape Town Municipality* 1969 (2) SA 256 (C) 267A-F.

<sup>120</sup> Summers (note 16 above) 347.

<sup>121</sup> *Webster v Mitchell* 1948 (1) SA 1186 (W) 1189.

<sup>122</sup> Prest (note 115 above) 43.

<sup>123</sup> Summers (note 16 above) 348.

<sup>124</sup> DE Van Loggerenberg (note 80 above) 81.

fulfilling the ultimate aim of PIEL, whereas with an interim interdict the parties would still need to return to court for the final determination of the order.<sup>125</sup> The interpretation of the final interdict requirements by the courts will now be assessed, whilst also showing how PIEL may find it difficult to show that requirement.

### 3.4.1 Clear right

The first requirement that a party seeking an interdict has to show is the existence of a clear right. One needs to bring forth substantive evidence before a court of law for it to determine whether there exists a clear right, based on facts produced.<sup>126</sup> The evidence that one presents before a court of law should be able to show the existence of a clear legal right, rather than a mere moral right.

In most environmental law related matters that came before the courts in the pre constitutional law era, a clear right was shown on the basis of property law rights.<sup>127</sup> The interdict was mainly sought in nuisance related matters. The applicant would usually complain that the respondent's conduct of making noise,<sup>128</sup> odours,<sup>129</sup> smoke<sup>130</sup> and pollution related activities interfered with the use and enjoyment of their property. Nuisance and neighbour law was the only substantive law that could aid in preventing harm to the environment. The courts only recognised the applicant's clear right to a healthy environment within the immediate vicinity of the applicant because of reliance on neighbour law. The act that an applicant complained of had to be one that amounted to a nuisance, or would cause harm to the applicant for it to be protected under neighbour law.

Protecting the environment on a broader spectrum has been a greater challenge as discussed in chapter two. However, before the advent of the Constitution and environmental statutes, property law played an important role in preventing environmentally harmful activities to the immediate parties involved.

Public interest litigants would most probably have difficulty in showing the existence of a clear right due to the absence of an identifiable natural person present, to show how the clear

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<sup>125</sup> Loots (note 5 above) 16. SB Levetan *Effectively Preventing Environmental Pollution and Ecological Degradation: The Role of the Common Law Interdict* (unpublished LLM Thesis, University of Cape Town, 2007).

<sup>126</sup> DE Van Loggerenberg (note 80 above) 85.

<sup>127</sup> *Dell v The Council of Cape Town* (1879) 9Buch 2; *Bristow v Coleman* 1976 (2) 252 (R).

<sup>128</sup> *Holland v Scott* (1882) 2 EDC 307 – hereafter *Holland*; *Prinsloo v Shaw* 1938 AD 570; *Nelson Mandela Metropolitan Municipality and Others v Greyvenouw CC* (2004)2 SA 81 (SE).

<sup>129</sup> *Winshaw v Miller* 1916 CPD 439.

<sup>130</sup> *Gibbons v SA Railways and Harbours* 1933 CPD 521.

right to a healthy environment was being infringed. In most environmental, law-related interdict applications, an identifiable natural person applies for the interdict, and therefore is able to show how the clear right to a healthy environment is in need of protection. A litigant seeking an interdict in their personal capacity feels the consequences of an infringement of the clear right to a healthy environment in their individual capacity, as opposed to public interest litigants who cannot use the same argument. In a public interest case, the health of the parties is not immediately under threat; rather the litigation is done because of the public's interest in the health of the environment.<sup>131</sup> Public interest litigants are unlikely to be able to convince the court of a clear right to an environment not harmful to health, but can seek to rely on the right to an environment that is not harmful to their well-being.<sup>132</sup>

The approach adopted by the court in interpreting a clear right in current constitutional law has been maintained from when it was applied in the pre constitutional law era. The courts still interpret the clear right requirement as intractably linked with an identifiable natural person - usually an applicant in the litigation matter. A case in which the courts have not been prepared to go beyond the physical, and including the aesthetic or spiritual dimension of the environmental right, is in the case of *Paola v Jeeva NO and Others*.<sup>133</sup> The case involved an appeal by the applicant against a decision that had been made in relation to the National Building Regulations and Building Standards Act.<sup>134</sup> The decision taken in terms of the act allowed for alterations to occur to the neighbour's property, which effectively hindered the applicant's view from his own property. The court held that allowing such an interest to be protected „would result in chaos and create great confusion in the development world“.<sup>135</sup> This decision was however reversed by the Supreme Court of Appeal, holding that the loss of a view was a factor that should be taken into account since it had a bearing on the property's value.<sup>136</sup> The proposed development was noted as having the effect of being able to „significantly diminish the value of the applicants adjoining property,“<sup>137</sup> which was contrary to applicable legislation. In this instance, although the court attached the market value notion, it did not unequivocally accept the same value as being aesthetic in nature, which is

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<sup>131</sup> *Capital Park Motors CC and Another v Shell South Africa Marketing (Pty) Limited and Others* 2006 JDR 0105 (T); *Hoffman v City of Cape Town & Another* CPD Case No. 12726/2005, 13 March 2006 (unreported).

<sup>132</sup> M Kidd „Public Interest Environmental Litigation: Recent Cases Raise Possible Obstacles“ (2010) 13 (5) *PER* 36.

<sup>133</sup> 2002 (2) SA 391 (D) – hereafter *Paola*.

<sup>134</sup> Act 103 of 1997.

<sup>135</sup> *Paola* (note 132 above) 399.

<sup>136</sup> 2004 (1) SA 396 (SCA).

<sup>137</sup> *Ibid* 402A-B.

unfortunate.<sup>138</sup> The author of this dissertation is of the view that the court could have still reached a similar conclusion by also having placed emphasis on the aesthetic value the applicant placed on nature, a view other people also hold in high esteem.

Interpreting the interdict requirements in such a light diminishes the extended *locus standi* provisions and the environmental right in the Constitution. Public interest litigants, seeking to protect the environment in the form of PIEL, should be able to utilise the constitutional right and environmental statutes as a basis of showing their clear right. The courts however, have not been easily persuaded by such an assertion in finding a clear right, as reflected in the case of *Tergniet* discussed above.

In the case of *Tergniet* the applicants requested a final interdict and sought to establish a clear right based on the fact that they were residents in the area concerned. The court merely accepted this argument without further explanation that the:

applicants as residents and/or property owners living in close proximity to the first respondent's property have a fundamental right to an environment that is not harmful to their health or well-being and to have the environment protected for the benefit of present and future generations.<sup>139</sup>

The applicants ought to have been able to satisfy this requirement of a clear right based on the Constitution.<sup>140</sup> The court however in this instance linked the clear right requirement with the second requirement of harm, which would be felt by the residents in their individual capacity.<sup>141</sup> The clear right the court recognises is one where the environment will not cause health effects to individuals, and the protection of the environment on itself has not been given much attention. The judge was unlikely to have easily come to the conclusion that a „clear right“ requirement had been fulfilled if the interdict had been sought in the public interest alone.

Another case involving a private interdict application with important bearing on a public interest litigants“ application for an interdict is that of *Interwaste (Pty) Ltd and Others v*

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<sup>138</sup> L Feris „Environmental Rights and Locus Standi“ in A Paterson and L Kotze (ed) *Environmental Compliance and Enforcement in South Africa: Legal Perspectives* (2009)138.

<sup>139</sup> *Tergniet* (note 78 above) 38, relying on Section 24 of the 1996 Constitution.

<sup>140</sup> Kidd (note 131 above) 33.

<sup>141</sup> *Ibid.*

*Coetzee and Others*.<sup>142</sup> The court in this case did not accept that a „clear right“ could be established merely on the basis of contravention of an environmental statute. The applicants in this case were seeking to interdict the respondents from operating a landfill site unlawfully.<sup>143</sup> Section 20 of the National Environmental Management Waste Act<sup>144</sup> required one to have a licence in order to operate a landfill site; the respondent in this case did not have such a licence. The applicants relied on the lack of a licence as the basis upon which they sought to show that they had a „clear right“ that warranted their interdicting the respondent“s activities.“<sup>145</sup> The judge was however not „convinced“ that the respondent“s activities of operating a landfill site without a licence *per se* gave the applicants a clear right.<sup>146</sup> It is important to note that in the eyes of the court, a clear right is only one which is „palpable, tangible or real“ as opposed to being abstract or hypothetical.<sup>147</sup>

Horn JP“s response in relation to how one can establish a clear right shows how difficult it would be for public interest litigants to show that they had a clear right which was in need of protection, as provided for in the legislative provisions. The statutes, by requiring a party to operate with a licence are actually seeking to protect everyone“s clear right to an environment that is not harmful to their health or well-being. The enforcement of this right has been given solely to the state, but this does not warrant indiscriminate continuance of violation of the statute provisions, and should be enforced even by the public. Public interest litigants however find it increasingly difficult to establish the existence of a clear right based on constitutional or environmental statute contravention.

Public interest litigants would also find it difficult to enforce public-centred legislation since the clear right to enforce such statutes is, in the courts view, the responsibility of the state. The interpretation of the clear right requirement on this basis maintains a counterproductive pre constitution era mentality. In the *Interwaste*<sup>148</sup> case, the judge stated that one cannot act as an enforcer of environmental legislation which „falls squarely within the domain of the environmental authorities who are after all directly responsible for the enforcement of the

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<sup>142</sup> (Case 23921/2012) (GPJ) 22 April 2013 hereafter *Interwaste* (unreported) 25.

<sup>143</sup> *Ibid* 1.

<sup>144</sup> Act 59 of 2008.

<sup>145</sup> *Ibid* 19.

<sup>146</sup> *Ibid* 26.

<sup>147</sup> *Ibid* 25.

<sup>148</sup> *Interwaste* (note 141 above).

environmental legislation“.<sup>149</sup> The courts“ view in such matters is still based on the common law interpretation of the clear right requirement, which sees the State as the only enforcer of public rights. In this light, the enforcement of statutes would mean that in most cases public interest litigants would require permission from a government department if they were to succeed in establishing a clear right based on the breach of a statute, regardless of the s32 provisions of NEMA being applicable.<sup>150</sup>

### **3.4.2 Injury actually committed or reasonably apprehended**

The second requirement that public interest litigation needs to show is with regards to an injury actually committed, or which is reasonably apprehended.<sup>151</sup> The applicant seeking an interdict should, on the facts brought before the court, establish that an invasion of the applicant's right would result in him/her facing prejudice or injury.<sup>152</sup> This requirement flows from the clear right requirement that is needed to be established as discussed above. A link usually exists between the clear right that one alleges to be under threat in the first requirement, would most likely result in injury emanating to the plaintiff.

There is dissonance in the courts“ interpretation of the injury or harm requirement in the environmental law context. Currently, the courts still interpret the requirement of injury or harm from an individual“s point of view. However, this requirement ought to be satisfied based on the statutory or constitutional right to prevent harm to the environment.<sup>153</sup> The courts are usually convinced that the injury requirement is satisfied, when the act complained of results in detrimental health effects to specific litigants, not the general public. The word „injury“ is taken to mean an act that interferes with the applicant“s rights with regards to his person or property, and that result in prejudice.<sup>154</sup> The interpretation of the injury requirement in this manner refutes the efforts made by public interest litigants when exercising the environmental rights in the Constitution, given effect in the environmental statutes.<sup>155</sup>

The challenge that public interest litigants face in establishing the injury requirement flows from the „rule“ in *Patz v Greene and Co.*<sup>156</sup> In the case of *Patz*,<sup>157</sup> the court stated that where a litigant relies on statutes that are enacted for the general public, and when seeking an

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<sup>149</sup> Ibid 28.

<sup>150</sup> Ibid.

<sup>151</sup> Harms (note 79 above) 398.

<sup>152</sup> Ibid.

<sup>153</sup> Summers (note 16 above) 350.

<sup>154</sup> Prest (note 115 above) 44.

<sup>155</sup> Ibid.

<sup>156</sup> *Patz* (note 4 above).

<sup>157</sup> Ibid.

interdict on grounds of that statute's contravention, one would need to establish special damages suffered.<sup>158</sup> The applicant has to show that the injury or damages s/he is experiencing, as opposed to what other members of the public are experiencing, is unique.<sup>159</sup> The approach adopted in *Patz*<sup>160</sup> has been followed consistently with approval in two other environmental law-related cases in the public interest, both before and after the Constitution.

In *Verstappen v Port Edward Town Board and Others*,<sup>161</sup> the first respondent, a local municipality was operating a waste disposal site without a permit as required by section 20(1) of the ECA.<sup>162</sup> The applicant, who co-owned a property situated near the waste disposal site sought to interdict the first respondent from any activities akin to disposal of waste. The applicant's basis for seeking an interdict was that disposal of the waste was amounting to a nuisance. The alternative basis on which the applicant based the application was that the waste disposal site was operating unlawfully.<sup>163</sup> The court dismissed the interdict application on the basis that the applicant lacked *locus standi*. It also reiterated the decision taken in *Patz* that one needed to prove that the applicant has suffered or would suffer special damage due to the continued act.

The court in *Laskey and Another v Showzone CC and Others*,<sup>164</sup> decided after the advent of the Constitution, to follow the trend set in *Patz*. This case was one where the applicants were seeking to interdict the respondent from making a noise nuisance based on the noise control regulations. This is the similar conclusion that was reached in the case of *Patz*<sup>165</sup> that found out that the noise control regulation had been enacted in the public interests. The court emphatically reiterated that where injury is actually committed or reasonably apprehended, the respondent's conduct should have given rise to a private nuisance for it to be actionable.<sup>166</sup> It follows that in all statutes enacted in the public interest, one needs to show harm to themselves in their individual capacity. Freedman, in regards to the *Showzone* case, was disappointed that courts made use of the common law rules which effectively made the

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<sup>158</sup> Summers (note 16 above) 352.

<sup>159</sup> Van Loggerenberg (note 80 above) 174.

<sup>160</sup> *Patz* (note 4 above).

<sup>161</sup> *Verstappen* (note 74 above).

<sup>162</sup> ECA (note 104 above).

<sup>163</sup> *Verstappen* (note 74 above) 572.

<sup>164</sup> *Laskey and Another v Showzone CC and Others* 2007 (2) SA 48 (C) - hereafter *Showzone*.

<sup>165</sup> *Ibid* 18.

<sup>166</sup> *Ibid* 16.

regulations enacted from the statute redundant.<sup>167</sup> The common law rules were seen as severely curtailing the complainant's ability to bring actions seeking to enforce statutes in cases where the applicants brought such an action not in their own interests but rather in the environment's interests, or that of the general public.<sup>168</sup> This has been a common trend in most environmental legislation that seeks to protect the general population. Apart from the other reasons that Freedman disagrees with, in the judgement in *Showzone* he states that Binns-Ward AJ missed an opportunity to clarify how legal standing mentioned in section 32 of NEMA and final interdict requirements are linked, in particular the applicants need to show the presence of a clear right and that one's rights have been infringed by the defendant.<sup>169</sup>

It would be very difficult, given the nature of the environmental statutes, for PIEL to show the existence of the injury or harm requirement in order to be granted an interdict. Environmental statutes are generally enacted in the interests of protecting the public, or the environment, as opposed to protecting the interest of private parties. The strict interpretation of injury based on ownership rights, or alternatively showing special damage, almost renders it impossible for public interest litigants to establish this requirement. The courts currently continue to disregard the changed environment in which such legislation now applies.<sup>170</sup> The usefulness of the interdict for enforcing public centred legislation can in the current constitutional era be seriously questioned.<sup>171</sup> Public interest litigants may find it very difficult to satisfy this requirement, as it is the environment that's suffering the actual physical injury, and not the particular litigant bringing the court action.<sup>172</sup>

### 3.4.3 No alternative remedy

This last requirement in respect of which the court needs to be satisfied before granting a final interdict in a PIEL application, is in relation to there not being any other „satisfactory“ or „appropriate relief“ available to the applicant.<sup>173</sup> The court takes this requirement seriously due to the fact that an interdict is of an extraordinary and summary nature.<sup>174</sup> Therefore a court is more cautious in granting an interdict where the possibility exists for another remedy

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<sup>167</sup> W Freedman „Hear no evil: Noise pollution, the law of nuisance, and the noise control regulations – *Laskey v Showzone* CC 2007 (2) SA 48 (C)“ 2009 SAJELP 91.

<sup>168</sup> Ibid page 88.

<sup>169</sup> Ibid page 90.

<sup>170</sup> Summers (note 16 above) 351.

<sup>171</sup> Ibid.

<sup>172</sup> Kidd (note 131 above) 37.

<sup>173</sup> Van Loggerenberg (note 80 above) 174.

<sup>174</sup> Summers (note 16 above) 346.



that can bring about the same outcome the applicant seeks. The most commonly considered alternative relief to interdict applications is the *aquilian* action or criminal sanctions.

The requirement that there should be no alternative remedy does not usually prove difficult for public interest litigants to establish. This is because the mere existence of other remedies which a court may grant does not warrant the denial of an interdict relief. The courts assess the alternative relief to see whether there are „better“ remedies, and also whether they can be expeditiously sought to secure a similar goal to that which the interdict seeks to achieve.<sup>175</sup> The alternative relief has to be adequate in those circumstances; be ordinary and reasonable; has to be a legal remedy and a remedy able to grant similar protection.<sup>176</sup> Delictual<sup>177</sup> and criminal sanctions<sup>178</sup> have been considered as alternative remedies in interdict applications. However, the shortcomings of the criminal and *aquilian* action as alternative remedies in the environmental sphere have all been well documented.<sup>179</sup> These two types of remedies cannot be considered as adequate alternative remedies in a PIEL interdict application, although some courts will still award them instead of an interdict.

The courts“ interpretation of this remedy has been more along the lines of addressing persistent unlawful conduct rather than on-going harm to the environment. The goal of public interest litigants is to protect the environment against irreplaceable damage through proactive remedies, which at times are overlooked.<sup>180</sup> However in *Verstappen*<sup>181</sup> the court accepted that in environmental law, proactive remedies may be required and this takes the form of an interdict to which a damages claim will unlikely be a satisfactory alternative.<sup>182</sup> The same can be said of criminal sanctions which are retrospective by seeking to address past actions. Criminal sanctions are aimed at improving the future and not immediately correcting harm. In this light, the interdict remedy will be the most suitable relief in the environmental law

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<sup>175</sup> *Whitton v. Canada (Attorney General)*, [2002] 4 F.C. 126, 36.

<sup>176</sup> Harms (note 79 above) 399 and the cases cited thereunder.

<sup>177</sup> J Barboza „The ILC and environmental damage“ in P Wetterstein (ed) *Harm to the Environment: The Right to Compensation and the Assessment of Damages* (1997) 73-81; P Wetterstein *Harm to the Environment: The Right to Compensation and the Assessment of Damages* (1997) and EHP Brans *Liability for Damage to Public Natural Resources: Standing, Damage and Damage Assessment* (2001).

<sup>178</sup> M Kidd *The Protection of the Environment through the Use of Criminal Sanctions: A Comparative Analysis with Specific Reference to South Africa* (Unpublished PhD Thesis, University of Natal, 2002); M Kidd „Environmental crime – Time for a rethink in South Africa?“ (1998) 5 *SAJELP* 181, 204; C Loots „Making environmental law effective“ (1994) 1 *SAJELP* 17, 18 and MA Rabie „Legal Remedies for Environmental Protection“ (1972) 5 (3) *The Comparative and International Law Journal of Southern Africa* 262.

<sup>179</sup> *Ibid.*

<sup>180</sup> Summers (note 16 above) 352.

<sup>181</sup> *Verstappen* (note 74 above).

<sup>182</sup> *Ibid* 569A.

context that guarantees protection of the environment against further harm occurring to the environment.

The interdict remedy is the better suited remedy to fulfil the goal of public interest litigants. The environment and the „ecosystems are generally irreplaceable“<sup>183</sup> and the interdict may be the only remedy that the court may grant in order to prevent harm before it arises. However, regardless of the courts being convinced of the absence of another suitable relief to an interdict, the remedy will not be granted when the other two requirements discussed above, are not satisfied. All three requirements need to have been satisfied at the beginning, before the interdict remedy can be awarded.

### **3.5 Conclusion**

The discussion above has focused on the requirements that need to be satisfied before a court in South Africa grants a final interdict. These requirements have not changed since their adaptation from the writings of Van der Linden, making it difficult to accommodate public interest litigants. PIEL was not recognised under the common law, and enforcement of public statutes was generally the sole responsibility of the state. The Constitution and various environmental statutes have now recognised the need for inter sectorial enforcement and partnership, but this has not been adopted universally as reflected in the cases highlighted in this chapter.<sup>184</sup>

The next chapter therefore will look closely at how the courts, given the wide tool of interpretation, can accommodate public interest litigants seeking to enforce public statutes and rights. An alternative discussion will debate whether the common law needs a new tool to be formulated in order to achieve the goal of public interest litigants.

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<sup>183</sup> Summers (note 16 above) 352.

<sup>184</sup> Section 38 of the 1996 Constitution.

## CHAPTER FOUR: THE NEED FOR APPROPRIATE RELIEF

### 4.1 Introduction

Environmental protection requires swift and effective remedies when parties approach a court of law. While PIEL has played an important role in trying to protect the environment, efforts in the past have been hampered by some procedural aspects. The various challenges faced by public interest litigants have been discussed in the preceding chapters, particularly the remedies a court of law awards in the litigation process. The inherent limitation of an interdict's remedy is that it mainly provides for the protection of a private litigant's environmental needs, a view that existed in the past industrialised society.<sup>185</sup> This view has drastically changed as the Constitution now protects the public needs, which the interdict remedy should also reflect.

The Constitution and various environmental statutes have acknowledged the importance of PIEL, and this appreciation should also be reflected in the remedies granted in the litigation process. This chapter will discuss how courts may adapt the common law interdict in order to accommodate public interest litigants. In the alternative, a discussion of what constitutes appropriate relief will be undertaken.

### 4.2 Extended interpretation of the interdict requirements

A public interest litigant's main challenge in being granted the common law interdict, relates to showing the presence of a clear right, and injury or harm apprehended. These common law requirements need to be redeveloped in order to accommodate the new challenges to which the Constitution has sought to address, by introducing new concepts and principles.<sup>186</sup>

#### 4.2.1 Establishing a clear right

The absence of an individual's ability to show a clear right is one of the main challenges that hinder a public interest litigant's request for a final interdict. The courts may develop the common law by accepting that a public interest litigant satisfies the clear right requirement, based on a literal reading of the constitutional or legislative environmental right. Developing the law in this manner would make the courts accommodate public interest cases within the ambit of the *Setlogelo*<sup>187</sup> interdict requirements.

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<sup>185</sup> Cowen (note 77 above) 8.

<sup>186</sup> PN Bhagwati, „Judicial Activism and Public Interest Litigation“ (1985) 23 *Columbia Journal of Transnational Law* 565.

<sup>187</sup> *Setlogelo* (note 116 above).

The first challenge that a litigant seeking a final interdict faces is convincing the court about the presence of a clear right. The Constitution or the environmental statutes should be able to be used as a basis upon which a clear right is shown to exist in both private and public interest litigation cases. The Constitution acting as the supreme law of the land, and binding on all organs of state has given everyone a right to an environment that is not harmful to one's health and well-being.<sup>188</sup> This right alone should be enough for public interest litigants to show that they have a clear right that is in need of protection through an interdict remedy.

The answer to the challenges discussed above can be found in section 32 of NEMA which provides for what could be regarded as a clear right, in that the public have the right to act as the enforcer of environmental legislation. Section 32 of NEMA expressly states that one can seek appropriate relief for breach of provisions to the act or any of the guiding environmental principles listed in the act. The application of section 32 of NEMA is akin to that of section 38 of the Constitution, which also allows for the public to act as enforcer of environmental legislation in enforcing public centred legislation. This view was mentioned with approval in the case of *Ferreira*.<sup>189</sup> In this case, the court stated that one can act as an enforcer of environmental legislation when one can:

- a. Allege that one of the fundamental rights set in the Bill of Rights has been infringed or threatened: and
- b. Show that one of the categories of persons listed in paragraphs (a) to (e) has a „sufficient interest“ in obtaining a remedy.<sup>190</sup>

Currie and De Waal further reinforce this assertion stating that the only determining factor that should enable one to act as an enforcer of environmental legislation, is whether there has been a violation of a right set in the Bill of Rights and show sufficient interest in the remedy sought.<sup>191</sup> The concept of sufficient interest has to be generously interpreted and not be restrictively interpreted taking note of the case that is brought before the court.<sup>192</sup> In this light, the desire to protect the environment ought to suffice as sufficient interest to which public interest litigants have a clear right to act to protect the various environmental statutes.

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<sup>188</sup> Section 8 of the 1996 Constitution.

<sup>189</sup> *Ferreira* (note 75 above).

<sup>190</sup> *Ibid* 164-168.

<sup>191</sup> Currie and de Waal (note 68 above) 84.

<sup>192</sup> *Van Huyssteen NO v Minister of Environmental Affairs and Tourism* 1996 (1) SA 283 (C).

The judiciary's approach to the clear right requirement requires adaptation to meet the needs of the general public.<sup>193</sup> The need for a different approach in relation to public guaranteed rights was also recognised in *Save the Vaal Environment*.<sup>194</sup> The court stated that:

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 the ideological climate must also come a change in our legal and administrative approach to environmental concerns.<sup>195</sup>

The judiciary can show the public that a new legal climate now exists by acknowledging that public interest litigants have a clear right to a healthy environment as enshrined in the constitution. Environmental issues that were often ignored in the past have now been given their rightful prominence and weight, through their inclusion in a justiciable environmental right found in the Constitution.<sup>196</sup> The right that public interest litigants seek to protect is a clear right to an environment that is not harmful to one's health or well-being, as recognised in the Constitution.<sup>197</sup> It is submitted that Carstensen AJA in *Vaal Justice Environmental Alliance v Company Secretary of Arcelormittal South Africa Ltd and others*,<sup>198</sup> correctly recognised that for the effective enforcement of the environmental right:

An association of person, *each of whom have the right in terms of s24 (a) can bind together to enforce their rights...* [and] even if I have extended the meaning of s24 (a), I have no doubt that s24 (b) is applicable and assists the applicant following the sentiments expressed by the Supreme Court of Appeal that "together with the change in the ideological climate must also come a change in the legal and administrative approach to environmental concerns."<sup>199</sup>

The protection of the environment is something to which parties involved in public litigation hold dearly, and one which courts should equally protect in the same manner that people's health is protected through the traditional clear right interpretation. According to Glazewski:

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<sup>193</sup> C Tollefson „Towards a Costs Jurisprudence in Public Interest Litigation“ (2004) 83 *Can.Bar Rev* 476.

<sup>194</sup> *Save the Vaal* (note 3 above).

<sup>195</sup> *Ibid* 20.

<sup>196</sup> *BP Southern Africa (Pty) Limited v MEC for Agriculture, Conservation, Environment and Land Affairs* 2004 (5) SA 124 (W) 142 C.

<sup>197</sup> Kidd (note 131 above) 36.

<sup>198</sup> Case 39646/12 SGHC 3 June 2013 (Unreported).

<sup>199</sup> *Ibid* 12 and 13 [own emphasis].

In the environmental context, the potential ambit of a right to 'well-being' is exciting but potentially limitless. The words nevertheless encompass the essence of environmental concern, namely a sense of environmental integrity; a sense that we ought to utilise the environment in a morally responsible and ethical manner. If we abuse the environment we feel a sense of revulsion akin to the position where a beautiful and unique landscape is destroyed, or an animal is cruelly treated.<sup>200</sup>

The phrase „well-being“ by Glazewski was given the stamp of approval by Murphy J in *HTF Developers (Pty) Ltd v Minister of Environmental Affairs and Tourism*.<sup>201</sup> The court stated that the term well-being should be seen as one that is „open-ended and manifestly [...] incapable of precise definition“.<sup>202</sup> It is evident that the courts ought to protect the spiritual and psychological value people ascribe to the environment since the environment itself cannot enforce such a right.<sup>203</sup> The environmental well-being has to be protected so that the public“s „sense of environmental security and safekeeping“<sup>204</sup> is protected just as any other socio-economic rights are protected. Protection of the environment by public interest litigants cannot only be attributed to health reasons, since others feel a moral responsibility and a desire to protect the environment. In this instance a right that is established requires no further substantiation.

Glazewski and Murphy J have noted that they are in agreement that parties who have an interest in protecting the environment have a clear right to have the environment protected from any threatening act. When litigating in the interests of the environment, the persistent allowance of illegally detrimental activities that interfere with the environmental integrity can be taken as infringing on other people“s right to an environment that is not harmful to their health or well-being.<sup>205</sup> On the other hand, the public right is infringed each time an activity occurs which interferes with the ordinary comfort of human beings.<sup>206</sup>

The interpretation of the word „well-being“ in a broad manner, as mentioned above is also in line with how other constitutionally enshrined rights have been interpreted. The court in *Ferreira*<sup>207</sup> advocated for the adoption of a broad approach to interpreting constitutional

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<sup>200</sup> Glazewski (note 83 above) 86.

<sup>201</sup> 2006 JDR 0328 (T) 18 – hereafter *HTF Developers*.

<sup>202</sup> Ibid.

<sup>203</sup> CD Stone „Should Trees Have Standing--Toward Legal Rights for Natural Objects“ (1972) *S. CAL. LR* 450.

<sup>204</sup> A du Plessis „South Africa“s Constitutional Environmental Right (Generously) Interpreted: What is in it for Poverty? (2011) 27 *SAJHR* 295.

<sup>205</sup> Kidd (note 131 above) 37.

<sup>206</sup> *Holland* (note 127 above) 314.

<sup>207</sup> *Ferreira* (note 75 above).

issues. Chaskalson P stated that broadly interpreting standing „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 protection to which they are entitled“.<sup>208</sup> The same rationale can be extended to the protection of the environment, since a healthy environment, and its continued well-being, needs to be protected whilst simultaneously protecting individuals“ rights to a healthy environment. The courts should endeavour to give a broad interpretation to environmental rights, as not only are the litigant“s own rights under threat, but other parties may also face similar rights“ violations but unable to access the courts.<sup>209</sup>

In a bid to avoid this obstacle, most public interest litigants seeking an interdict to protect the environment, establish the clear right requirement based on the unlawful activity the defendant will be undertaking. This trend is evident in the recent undecided court case of *Mapungubwe Action Group and Others v Limpopo Coal (PTY) Ltd and Others*.<sup>210</sup> The applicants in this case are seeking three interdicts against the defendant namely the use of water interdict, the nature reserve interdict and an overall interim interdict. The applicants“ clear right to water interdict rests upon the defendants“ use of water in breach of section 4 and 22 (1) of the NWA as opposed to either the environmental right or the general public right to clean water, which this author is suggesting should be enough to meet this requirement. The public interest litigant“s failure to use the constitutional or legislative environmental right as a basis on which the clear right requirement can be established evidently shows how this is a challenge, leaving public interest litigants establishing this requirement based upon violation of statute.<sup>211</sup>

It follows the discussion above that the courts should change the manner in which they approach the environmental right, given that the Constitution has clearly granted the public a clear right of protecting the environment. For one to be granted a final interdict, he or she should be able to establish the clear right requirement on the basis of the Constitution, or on statutes“ wide interpretation of the term „well-being“. However, this is not the only challenge

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<sup>208</sup> Ibid 165.

<sup>209</sup> Ibid 168.

<sup>210</sup> ZAGSJHC (10/30146).

<sup>211</sup> Founding affidavit Part 7;The applicants however request the court for an interim interdict arguing that the mining right the mining right would result in unacceptable pollution, ecological degradation and damage to the environment. The inclusion of the environmental protection basis to supplement the other argument is particularly important and interesting to note how the court will decide on this argument alone as in all instances it may create the precedence such advocated in this discussion.

public interest litigants have to face before being granted an interdict. Another challenge needing to be addressed is the second requirement for an interdict application, and this relates to an injury actually committed. The courts' approach to public interest litigants fulfilling this requirement is the focus of the next discussion.

#### 4.2.2 Injury requirement

The common perception that actual injury, or irreparable harm, manifests itself through physical harm or pecuniary loss lacks authority. The courts need to move away from the traditional understanding of injury such that public interest litigants can be able to show actual injury or irreparable harm requirement. The physical consequences that one usually suffers as a result of a particular act are merely incidental to the unlawful activity that would have been undertaken.<sup>212</sup> *V&A Waterfront Properties (Pty) Ltd and Another v Helicopter and Marine Services (Pty) Ltd and Others*,<sup>213</sup> is authority to the fact that whilst physical injury is the most common means of proving the manifestation of injury that occurs, it is not the only form. Howie P in his own words stated that:

It is hard to imagine that a rights invasion will not be effected most often by way of physical conduct but to prove the necessary injury or harm it is enough to show that a right has been invaded. *The fact that physical means were employed or physical consequences sustained is incidental.*<sup>214</sup>

Injury or harm is only rightfully physically felt in the physical in most political and social rights, but is different when such a right sought be protected is an environmental right. Injury to the environment or the public's environmental right, does not need to have a physical attribute especially where on-going injury and breach of the clear right is occurring.<sup>215</sup> In the event of on-going violation to the environment, the continued occurrence of the illegal activity causes harm and injury to the environment and also to the people living in that environment.<sup>216</sup> The main aim of an interdict is to help prevent such situations from occurring in the first place, since the physical harm has spill-over effects which are usually irreparable.<sup>217</sup> The contention in environmental protection is always based on the premise that prevention is more effective than the cure that is sought after the fact.

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<sup>212</sup> *Kolbatschenko v King NO 2001 (4) SA 336 (C)* 346B–H.

<sup>213</sup> *V & A Waterfront Properties (Pty) Ltd and Another v Helicopter and Marine Services (Pty) Ltd and Others* 2006 (3) All SA 523 (SCA).

<sup>214</sup> *Ibid* 21 [Own emphasis].

<sup>215</sup> *Tegra (NSW) Pty Ltd v Gundagai Shire Council* 2007 NSWLEC 806, 17-19.

<sup>216</sup> *Ibid*.

<sup>217</sup> *Woodcarb* (note 95 above) 169 B-C.



Furthermore, the continued strict application of the „rule“ in *Patz*<sup>218</sup> in today’s constitutional era is misplaced, since it was introduced to deal with circumstances where public interest litigation was not tolerated.<sup>219</sup> The Constitution has now clarified the position of public interest litigants in section 38, and the continued application of the *Patz*<sup>220</sup> principle is unwarranted as it now lacks relevance.<sup>221</sup> The implication of doing away with the „rule“ in *Patz* by the courts means that in environmental statutes enacted for the public benefit, the requirement of showing special damage would not be necessary. The applicants would not necessarily need to wait until their rights are infringed or to have suffered some loss before attempting to institute a court action. Public interest litigants seeking to enforce environmental statutes would only have to show that they are suffering injury as a result of a breach of their clear environmental right.

#### **4.3 Development of the common law**

The courts are bestowed with a virtually impossible challenge when it comes to assessing whether there is any other satisfactory or appropriate relief in the event that public interest litigants cannot be granted an interdict. In most court applications, applicants seek a specific relief, or in the alternative, appropriate relief as per the constitutional and legislative enactments. The Constitution contains numerous provisions that allow for courts to come up with new remedies where a constitutional right has been infringed. This is a scenario permitted by both the Constitution and NEMA to which public interest litigants can also seek the court to consider. It is arguable that interpreting the common law interdict remedy, within these traditional boundaries, is inadequate as a means of protecting the environmental right, hence the need for new remedies.

The discussion above showed the manner in which the interdict requirements may be developed in order to accommodate public interest litigants within the traditional interdict requirements. If the courts find that the clear right requirement can be satisfied based on the constitutional right, and that the continued occurrence of an illegal activity satisfies the harm requirement, then development of the common law would not be necessary since the remedy so desired would be granted. However, if the courts do not find favour with the above interpretations in order to accommodate public interest litigants, the courts would need to

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<sup>218</sup> *Patz* (note 4 above).

<sup>219</sup> Kidd (note 131 above) 39.

<sup>220</sup> *Patz* (note 4 above).

<sup>221</sup> Kidd (note 131 above) 40.

grant *appropriate relief* in those instances. Section 38 of the Constitution permits the courts to grant *appropriate relief* for the alleged infringement of any of the enshrined rights included in the bill of rights. Section 32 of NEMA mandates courts to grant appropriate relief with a broader application to breach of the act, the environmental principles, provisions of specific environmental statutes or any provision that seeks to protect the environment and the natural resources.<sup>222</sup>

A prerequisite for the courts to look into developing the common law and granting appropriate relief was set out in the *Hichange*<sup>223</sup> case, where Leach J stated that:

Two stages which cannot be hermetically separated from each other [have] to be considered in developing the common law beyond existing precedent. The first is to consider whether the existing common law requires development in accordance with the objectives set out in s 39(2) of the Constitution, an inquiry requiring a reconsideration of the common law in the light of s 39(2). It is only when this inquiry leads to a positive answer that the court is called upon to concern itself with the second stage *viz* how such development is to take place in order to meet the s 39(2) objectives.

The common failure by the courts to accept the need for a broad interpretation of the interdict requirements in the manner discussed would necessarily mean that the first test set out in the *Hichange* case is satisfied.<sup>224</sup> The common law interdict remedy would in that instance be rendered inadequate to address the needs of PIEL. The second requirement of the test as set out by Leach J would be the next logical step on how the law ought to be developed.

The trends and developments in which the courts are interpreting the field of law that comes before them arguably leads to the call that environmental concerns need similar attention. The common law interdict remedy, as it has been applied prior to the enactment of the constitution calls for developments inclusive of how legal practitioners make submissions to the court in environmental matters. These sentiments are echoed in the words of Blackmun J in the United States of America, where he stated that such development does not necessarily mean that there should be:

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<sup>222</sup> Section 32 NEMA.

<sup>223</sup> *Hichange Investments (Pty) Ltd v Cape Produce Co (Pty) Ltd t/a Pelts Products* 2004 (2) SA 393 (E).

<sup>224</sup> Kidd (note 131 above) 42.

Run-of-the-mill litigation... if only we choose to acknowledge and reach then-significant aspects of a wide, growing and disturbing problem, that is, the Nation's and the world's deteriorating environment with its resulting ecological disturbances. Must our law be so rigid and our procedural concepts so inflexible that we render ourselves helpless when the existing methods and traditional concepts do not quite fit and do not prove to be entirely adequate for new issues?

The starting point to developing the common law is section 8(3) of the Constitution that applies specifically where a provision of the bill of rights has been infringed. Section 8(3) commands the courts to develop the common law to the extent to which legislation has not given effect to that right where necessary.<sup>225</sup> The courts' role in this area is of vital importance: they ought to remain vigilant in ensuring that the common law is developed to reflect and „promote the spirit, purport and objects of the Bills of Rights“.<sup>226</sup> The judiciary should aid public interest litigants' efforts to give effect to the environmental right by developing the common law as discussed below.

#### **4.4 The meaning of appropriate relief**

The matter that an applicant brings before a court of law is usually the guiding factor that the courts use in formulating what can be ascribed to as appropriate relief. In most instances the aggrieved party seeks to be placed in a similar position they held prior to the violation of their right.<sup>227</sup> The courts, as a result seek to balance the interests of all parties affected by the infringement of the constitutional right so that the relief awarded achieves this aim.<sup>228</sup> The corrective justice approach is however unsuitable in addressing public interest environmental concerns since it benefits the immediate court litigants as opposed to the public at large.<sup>229</sup>

A better approach in formulating an appropriate remedy is to address environmental concerns through the distributive justice approach. A distributive justice remedy serves the broader interests of society and at the same time incidentally provides for individual interests of the litigants.<sup>230</sup> This is particularly important in the environmental law context where

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<sup>225</sup> Section 8 (3) of the 1996 Constitution.

<sup>226</sup> Ibid section 39(2). *Carmichele v Minister of Safety and Security and another* 2001 (10) BCLR 995 (CC) 37.

<sup>227</sup> MC Modak-Truran „Corrective Justice and the Revival of Judicial Virtue“ (2000) 12 *Yale Journal of Law & Humanities* 250.

<sup>228</sup> K Roach „The Limits of Corrective Justice and the Potential of Equity in Constitutional Remedies“ (1991) 33 *Arizona LR* 859.

<sup>229</sup> Ibid.

<sup>230</sup> K Cooper-Stephenson „Principle and Pragmatism in the Law of Remedies“ in Jeffrey Berryman (ed) *Remedies: Issues and Perspectives* (1991) 19.

infringement of the environmental right that affects various citizens should be addressed in one court action.<sup>231</sup> Appropriate relief in the environmental arena is one that would weigh the effects of non-compliance and the long term effectiveness of the relief, whilst serving the interests of both present and future generations.<sup>232</sup> The court has to be satisfied that the appropriate remedy will in the end address the wrong that has been done, deter future violations, and also that the compliance with the order granted can be monitored.<sup>233</sup> These three concerns considered by the court are pivotal for the advancement of any constitutional right since most people have challenges accessing the courts. In the end, the relief that the court grants has an impact on how parties conform to the constitutional rights and deter future violations.<sup>234</sup>

#### **4.5 Courts' approach to appropriate relief**

Over the years, the courts have battled to give meaning to the phrase „appropriate relief“ mainly in the area of socio-economic rights. The courts' approach in social grant cases provides insightful guidance and precedent as to how the courts should develop environmental rights remedies in public environmental interests. The court in the case of *Fose v Minister of Safety and Security*<sup>235</sup> saw that the common law and constitutional remedies were inadequate in addressing the needs of the applicants. This can be noted where the court held that:

Appropriate relief will in essence be relief that is required to protect and enforce the Constitution. Depending on the circumstances of each particular case the relief may be a declaration of rights, an interdict, a *mandamus* or *such other relief as may be required to ensure that the rights enshrined in the Constitution are protected and enforced. If it is necessary to do so, the courts may even fashion new remedies to secure the protection and enforcement of these important rights.*<sup>236</sup>

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<sup>231</sup> Roach (note 227 above) 859.

<sup>232</sup> Currie & de Waal (note 68 above) 198.

<sup>233</sup> *Hoffmann v South African Airways* 2001 (1) SA 1 (CC) 45.

<sup>234</sup> C Mbazira *Litigating socio-economic rights in South Africa: A choice between corrective and distributive justice* (unpublished LLM thesis, University of Pretoria, 2009) 92.

<sup>235</sup> 1997 3 SA 786 (CC).

<sup>236</sup> *Grootboom and Others v Oostenberg Municipality and Others* 2000 3 BLLR 277 (C) [own emphasis].

The courts have been guided by the nature of the right that has been infringed, and means that such right has been infringed.<sup>237</sup> Central to the courts' final decision in all instances is what the courts would consider to be an effective remedy in those circumstances.<sup>238</sup>

The need to protect the litigant's constitutional rights by granting appropriate relief was considered in the *Mahambehlala*<sup>239</sup> and *Mbanga*<sup>240</sup> cases. These two cases involved litigants whose social grants had been unlawfully terminated, and the administrative system did not provide for the necessary relief. Justice J in *Mahambehlala*<sup>241</sup> stated that in instances where the common law remedies are inadequate to vindicate applicant's rights, it is imperative that new remedies are forged as per the mandate in section 38 of the Constitution. In the social grant cases, appropriate relief from the courts' point of view would be in the form of awarding damages to the applicants.<sup>242</sup> The court further reiterated that:

In the determination of appropriate relief, it is important to bear in mind that, although constitutional remedies will often be forward looking to ensure that the future exercise of public power is in accordance with the principle of legality . . . Moreover, in my respectful view, in order to vindicate the Constitution one should have regard to the basic values and principles enshrined therein. In this regard section 195(1) of the Constitution is of importance. It provides that public administration should be governed by the democratic values and principles enshrined in the Constitution, including the maintenance of the high standard of professional ethics, the provision of services impartially, fairly, equitably and without bias, and the necessity to respond to the needs of the people. Bearing in mind the observation of Justice J in Fose's case . . . *that appropriate relief means that which is 'specifically fitted or suitable', it seems to me that it would be just and equitable for an aggrieved person in the position of the applicant to be placed in the same position which she would have been had her fundamental right to lawful and reasonable administrative action not been unreasonably delayed, and*

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<sup>237</sup> *Treatment Action Campaign* 2002 (5) SA 721 (CC) 106.

<sup>238</sup> *Ibid* 102.

<sup>239</sup> *Mahambehlala v Minister of the Executive Council for Welfare, Eastern Cape and another* 2002 (1) SA 342 (SE).

<sup>240</sup> *Mbanga v Member of Executive Council of Welfare Eastern Cape* 2001 JDR 328, 368I– 369B.

<sup>241</sup> *Mahambehlala* (note 238 above).

<sup>242</sup> This view is however not shared by other authors -B Batchelor *Constitutional Damages for the Infringement of a Social Assistance Right in South Africa: Are Monetary Damages in the Form of Interest a Just and Equitable Remedy for Breach of a Social Assistance Right?* (Unpublished LLM thesis, University of Fort Hare, 2011).

*that relief placing her in such a position would be appropriate as envisaged by the Constitution.*<sup>243</sup>

In the environmental law context, the call for an appropriate remedy was considered in the case of *Hichange*.<sup>244</sup> It is submitted that the court correctly held that such relief should not be limited to that which is provided for in legislation or the common law where sufficient grounds existed that would warrant relief outside of these boundaries.<sup>245</sup> The common law as reflected was a rigid body of law only seeking to remedy the needs of the parties to the court action, whereas it should have also considered the public affected by such a case.<sup>246</sup> Leach J stated that:

the range of remedies from which such relief could be selected was not restricted to existing common-law remedies...I have no doubt that this court has a particular duty to ensure that, within the bounds of the Constitution, effective relief be granted for the infringement of any of the rights entrenched in it. In our context an appropriate remedy must mean an effective remedy, for without effective remedies for breach, the values underlying and the rights entrenched in the Constitution cannot properly be upheld or enhanced. Particularly in a country where so few have the means to enforce their rights through the courts, it is essential that on those occasions when the legal process does establish that an infringement of an entrenched right has occurred, it be effectively vindicated. The courts have a particular responsibility in this regard and are obliged to 'forge new tools' and shape innovative remedies, if needs be, to achieve this goal.<sup>247</sup>

The rationale flowing from these cases is that the remedy courts should award in PIEL cases should have a similar impact as the relief sought in the first instance. Development of the law, or coming up with a new remedy, is not easy for the court to convey. The remedy that the courts have to formulate should not only be applicable to the litigants at hand, but should also have prospective application. In light of public interest litigants, the remedy should be one that can also be utilised by private parties, regardless of them being able to seek an interdict with ease.<sup>248</sup> The remedy should be forward looking and proactive, and it should adequately vindicate the environmental right, which can be noted in the English law injunction remedy.

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<sup>243</sup> *Mahambehlala* (note 238 above) 355J – 356D [Own emphasis].

<sup>244</sup> *Hichange* (note 197 above).

<sup>245</sup> *Ibid* 408B.

<sup>246</sup> *Mbazira* (note 233 above) 79.

<sup>247</sup> *Hichange* (note 222 above) 409E–F.

<sup>248</sup> S Liebenberg *Socio-Economic Rights: Adjudication under a Transformative Constitution* (2010) 338.

#### 4.6 Injunction of English law

Cowen stated that South African lawyers seeking to protect the environment should go beyond principles, and look to other developing countries on how they have made the transition to deal with different problems of a modern industrial society; an injunction is one such remedy.<sup>249</sup> The courts can show doctrinal innovation in developing the law by assimilating the injunction remedy as a new remedy applicable in South African law. Prest defines an injunction as a „judicial process whereby a party is ordered to refrain from doing, or to do, a particular thing“<sup>250</sup> in the form of an interlocutory or perpetuity injunction. Similar to an interdict, an injunction has the capacity to accommodate both the interests of the private litigants, whilst at the same time accommodating public interest cases within the frame of the requirements.

The injunction has been in existence for a long period of time in other legal systems, and has been developed along constitutional principles to which South Africa also subscribes. It has been suggested that the injunction utilised in the Canadian jurisprudence should be adopted, as this is where the constitutional court of South Africa constantly refers when interpreting constitutional rights.<sup>251</sup> Assimilating an injunction radically transforms the manner in which the environmental right is protected, and at the same time gives effect to the broad *locus standi* provisions.

The courts“ adoption of the injunction remedy in South African law should be guided by the requirements framed in the Canadian case of *Manitoba*<sup>252</sup> which were reiterated in the case of *R.J.R Macdonald*.<sup>253</sup> The Canadian apex court stated that before an injunction could be awarded, a court had to be satisfied with regards to the three requirements.<sup>254</sup> These three requirements are: Is there a serious issue to be tried? Will the applicant suffer irreparable harm if the injunction is not granted? And which party will suffer the greater harm from granting or refusing the remedy pending a decision on the merits?

The first requirement that would need to be satisfied is whether the applicant has a serious issue to be tried. The interpretation of this requirement is made by looking at whether „the

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<sup>249</sup> Cowen (note 77 above) 8.

<sup>250</sup> Prest (note 115 above) 82.

<sup>251</sup> *S v Makwanyane and Another* 1995 (3) SA 391 (CC) referred to the case of *Kindler v Canada (Minister of Justice)* (1992) 6 CRR (2d) 193.

<sup>252</sup> *Manitoba (A.G.) v. Metropolitan Stores Ltd* [1987] 1 SCR 110 – hereafter *Manitoba*.

<sup>253</sup> *R.J.R Macdonald Inc. v. Canada (Attorney General)* [1994] 1 S.C.R. 311 – hereafter *Macdonald*.

<sup>254</sup> The traditional requirements usually included a fourth requirement which relate to the applicant undertaking to pay damages to the defendant if the applicant would eventually fail in the end. This requirement was eventually done away with since usually in public interest litigation cases this was a huge impediment.

claim is not frivolous or vexatious; in other words, that there is a serious question to be tried.<sup>255</sup> The alleged infringement of a constitutional right is a serious allegation on the part of public interest litigants, which the courts cannot ignore. The court would be bound to consider the second and third requirements, unless the judge considers the case to be frivolous or vexatious. Broadening the frame of the cases that seek injunctions will in no way clog the courts' role, due to the huge litigation costs, but in essence will make sure that all rights are given equal weight by the courts, rather than procedural grounds hindering their determination.

The second requirement that would be considered in an injunction application relates to the applicant showing the occurrence of irreparable harm if the relief is not to be granted. This requirement is the core to an injunction application, and at the same time to the protection of all rights. The nature of irreparable harm that an applicant would need to show relates only to the nature of harm as opposed to the magnitude of the harm.<sup>256</sup> Monetary quantification or curability of the harm is not an important determining factor in the court's decision as to whether this requirement has been fulfilled, the only determining factor is the nature of the harm sought to be prevented.<sup>257</sup> This is the core of a public interest litigant's basis in seeking such a relief, due to the nature of the harm that occurs to the environment.

In most instances environmental harm is usually cumulative and restoration is almost impossible. As such, the environment cannot be seen as a mere commodity to which it can be replaced or quantified. The principles of liability in environmental law are only applicable to private parties rather than to the protection of the environment, hence the irreparability of the environment. In instances where public interest litigants seek a prohibitory injunction, showing the requirement of irreparable harm to the public would prove not to be difficult, since it is the very nature of the government department's mandate to undertake it. The requirement would be shown by an indication that the department under statute was given such a mandate to implement the legislation, and is failing to do so, thereby causing the environment harm.

Lastly, the courts need to be convinced in relation to the third requirement that involves balancing the comparable inconvenience to the parties by weighing which of the two parties will suffer greater harm by not awarding the injunction. Cassels states that „the question

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<sup>255</sup> *Manitoba* (note 251 above) 32.

<sup>256</sup> P Perell „The Interlocutory Injunction and Irreparable Harm“ (1989) 68 *Can Bar Rev* 548.

<sup>257</sup> *Macdonald* (note 252 above) 311.



before the court is not which party stands to suffer the greater harm, but rather *what interests deserve protection and how are those interests to be valued*.<sup>258</sup> Though the public interest is usually the guiding factor, public interest litigants will not always warrant such a favour in being awarded an injunction against the other party. The applicant seeking an injunction would need to base their arguments on how the public would benefit from the relief sought, as opposed to the harm the public would face when the same relief is not awarded.<sup>259</sup>

#### **4.7 Conclusion**

The courts have an important role to play in assisting public interest litigants in their efforts to protect the environment. The interdict is the only remedy currently available under common law that can effectively and immediately prevent irreparable harm from occurring to the environment. However, public interest litigants may face challenges in fulfilling these interdict requirements. In order to address these problems the courts may need a broader approach to the clear right requirement by allowing public interest litigants to establish a clear right based on their constitutional right to an environment that is not harmful to one's health or well-being. The adoption of this would be sufficient to address the main challenge public interest litigants face in getting an interdict. The second challenge that public interest litigants face is showing the occurrence of injury or resultant prejudice. This can be addressed through acknowledging that by allowing the illegal activity to persist, the constitutional right is violated and hence causing injury. By adopting these interpretations, private disputes that currently use the interdict remedy, can be broadened to include public interests, as intended for by the Constitution.

The application for an interdict in a PIEL case protects the environment against further irreparable harm, and the denial of an interdict based on the traditional interdict requirements is unfortunate. It was noted above that the courts are not bound to grant appropriate relief from those remedies already provided for under existing common law and statutory remedies, but can forge new tools, such as an injunction, as this has been tried and tested in other legal systems to protect the environment. Rather than being one-sided, an injunction is a relief that can be applied by both public and private parties to address all their needs. The traditional manner in which the environment has been protected, on a private basis, has been found

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<sup>258</sup> J Cassels, „An Inconvenient Balance: The Injunction as a Charter Remedy“ in J Berryman (ed) *Remedies: Issues and Perspectives* 1991) 306 [Own emphasis].

<sup>259</sup> *Macdonald* (note 252 above) 345 A.

wanting with the government being slow to fulfil its mandate in this regard. The courts in South Africa continue to play a crucial judicial activist role in socio-economic rights, and similar action is needed in relation to the environmental right, which may require its own tailored remedy.

## CHAPTER FIVE: CONCLUSION AND RECOMMENDATIONS

### 5.1 Introduction

This study has discussed how the environmental right, despite being embedded in the Constitution and given effect in various statutes, has become the basis upon which PIEL needs effective remedies, such as the interdict, to support the aims of public interest litigants. In the course of the discussion, the challenges that public interest litigants continue to face within the present constitutional milieu were highlighted. These challenges are seen as seriously undermining the gains the Constitution has brought. The study also shows that the efforts of public interest litigants in giving effect to the environmental right, have to be supplemented by the judiciary through granting the interdict remedy. However, the core focus of this discussion has been the nature and importance of the interdict remedy in fulfilling the goals of public interest litigants, whilst discussing the various alternatives that courts can take when faced with an interdict application within the current requirements framework. Public interest litigants play an important role in ensuring that an environment that is not harmful to people's health and well-being is secured, and this should be complemented by the remedies the courts award.

### 5.2 Recommendations

In the previous chapters, the important role that public interest litigants play in South Africa's environmental law jurisprudence, and the challenges faced in accessing the only available and effective relief has been highlighted. Statutes that are intended to provide remedies for the breach of environmental provisions have been mainly reactive in nature, and therefore unsuitable for meeting the needs of public interest litigants. Because the punishment given to violators is seen as a cost of doing business, the society that is meant to benefit from such remedies granted by the court, has seen no benefit as irreparable harm to the environment may have already occurred.

In order to mitigate some of the issues discussed above, the following suggestions are put forward:

- a) The importance of environmental protection in society should be placed at the forefront by the courts in the same manner as the socio-economic rights have been protected through effective remedies. The remedy that the court grants in a public interest case does not only signal a victory in that immediate court action, but

regulates the action of future conduct. Society is made more aware of the existence of the various environmental statutes, and the importance of court decisions in maintaining a healthy environment. This helps future violations to be quickly brought to light and preventative actions taken where possible.

- b) The government departments should work more closely with the various environmental public interest groups. NEMA envisages such cooperation between the State and the private sector in relation to the enforcement of the environmental statutes. It is through the cooperation between these two parties that government departments are made aware of statute violations, and at the same time implement punitive measures.
- c) The judiciary should be able to provide adequate remedies to address the needs of the litigants. It is suggested that the common law interdict requirements be adapted to be in line with the constitutional principles, or alternatively the courts adopt the English law injunction relief. It can be noted that the two reliefs all operate in the same manner and are broad enough to accommodate private litigants' injunction applications where a violation to other constitutional rights would have occurred. The denial of effective remedies on the basis of procedural impediments does not do any good for the development and protection of the environment.

### **5.3 Conclusion**

More than fifteen years after the enactment of the much celebrated transformative Constitution of South Africa and the various environmental statutes, the approach used to enforce the nation's environmental laws is still a concern.<sup>260</sup> With the state and the private litigants being more focused on attaining the needed socio-economic rights, violations to environmental laws have not had similar attention. Although public interest litigants have taken the mandate of enforcing the environmental right from the constitutional mandate, these efforts still face numerous challenges with regard to the remedies that are granted by the courts.

With regard to developing the environmental jurisprudence in South Africa, the nature and importance of PIEL has been discussed. It was noted that protection of the environment

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<sup>260</sup> K Klare „Transformative constitutionalism and the common and customary law 2010 26 *South African Journal on Human Rights* 403.

requires the courts to develop a new outlook when approaching environmental cases brought in the public interest, or in the interest of protecting the environment. Protection of the environment can now occur in the public interest under the Constitution, or in the interests of protecting the environment under NEMA. These extended *locus standi* provisions are a means by which the environmental right can be effectively addressed, contrary to the position that existed under the common law. The courts however continue to apply common law interdict requirements. Having been framed to deal with private rights, these requirements are being used in areas of public rights, thereby making it difficult for public litigation to fulfil the requirements of the interdict remedy.

The interdict remedy as it stands can be regarded as an inadequate remedy where litigation occurs in the public interest, or in the interests of protecting the environment. Having noted the challenges of the interdict remedy in its present form, chapter four highlighted the possible solutions that the courts may implement when an interdict is sought in the environmental context. Two alternatives were presented to the courts in which the interpretation process adopted can be that used for other constitutional rights. This in essence would ensure that a party could be indicted for operating contrary to environmental provisions, or the state indicted for not enforcing the statutes. In the event of these suggestions not finding favour in the eyes of the courts, the constitutional principles acting as the guiding factor would require appropriate relief to be granted, which may occur in the form of the English law injunction.

The courts approach to the enforcement of the environmental right by public interest litigants should be addressed in the same manner as for private litigants. The Constitution has extended the *locus standi* provisions, and this should flow to the nature in which the environmental right is enforced; if not the supremacy of the Constitution is undermined. Appropriate recognition by the courts of the changed ideological climate should be made clear by granting proactive remedies when applied for in public interest cases. The continued neglect of this ideological change makes the constitutional extended *locus standi* provision redundant as far as environmental protection is concerned, resulting in continued harm to the environment.

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