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Department: PUBLIC LAW AND JURISPRUDENCE

Title: ***"Compliance and enforcement: The Legal Suitability of the Utilisation of Criminal Sanctions in South African Environmental Law"***

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PLAGIARISM DECLARATION

I declare that **"Compliance and enforcement: The Legal Suitability of the Utilisation of Criminal Sanctions in South African Environmental Law"** is my own work, that it has not been submitted before for any degree or examination to any other university and that the sources I have used or quoted have been indicated and acknowledged as references.

Fuad Aldred Davids **Professor Werner Scholtz**

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I would firstly like to thank our Heavenly Father for the blessings and perseverance to complete this thesis. I dedicate this thesis to my Father, Francois Alexander Davids, who lost his battle to cancer on 17 June 2019, and also my grandmother, Elia Johanna Davids, and my uncle, Alfonso Ricardo Davids, who I lost during this 3 year journey. I would like to thank the following people for the important role they played in my journey:

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Abstract

In this thesis I analysed the suitability and effectiveness of the criminal sanction with regards to compliance and enforcement in South African environmental law. My central argument is that the criminal sanction is not the perfect mechanism to address compliance and enforcement in South African environmental law sufficiently.

Compliance and enforcement of South African environmental law has been a stumbling block for years since the implementation of the first piece of environmental legislation. Thus I explored compliance and enforcement in South Africa and identified the various issues that might be the reasons why compliance and enforcement in South African environmental law is not up to standard.

I also analysed criminal environmental enforcement and came to the conclusion that criminal law is not suitable for the exclusive enforcement of environmental law. The conclusion was drawn by also analysing the criminal environmental enforcement statistics and the administrative compliance and civil action statistics of 2014-2019 in South Africa. Criminal law possesses too many inherent weaknesses and with our overcrowded criminal justice system there is no capacity for presiding officers to properly apply their mind when adjudicating environmental offences.

Thus I explored the alternatives to the criminal sanction and discussed and evaluated the different compliance and enforcement mechanisms in our legislative framework. I came to the conclusion that our legislative framework is sufficient to deal with environmental offences and that no new pieces of legislation need to be passed. There are various other compliance and enforcement mechanisms within our legislative framework that are better suited to deal with environmental offences.

I came to the conclusion that the reasons for South Africa's failure in compliance and enforcement in environmental law is due to those responsible for compliance and enforcement lacking the necessary capacity, skill and resources to firstly ensure that the laws are complied with and enforce it when it is not complied with. I also argue for the resurrection of environmental courts in South Africa in light of the successes in foreign jurisdictions. My concluding argument is that the criminal sanction still has a role to play in

environmental compliance and enforcement in South Africa, however not as a primary mechanism.

List of Abbreviations and Acronyms

CC	Constitutional Court
CPA	the Criminal Procedure Act 51 of 1977
ECA	Environmental Conservation Act 73 of 1989
EMI	Environmental Management Inspector
MEC	Member of the Executive Council
MLA	Marine Living Resources Act 18 of 1998
NEMA	the National Environmental Management Act 107 of 1998
NFA	National Forests Act 84 of 1998
NHRA	the National Heritage Resources Act 25 of 1999
NNCO	Natal Nature Conservation Ordinance 15 of 1974
NPA	the National Prosecuting Authority
NWA	National Water Act 36 of 1998
PAJA	Promotion of Administration of Justice Act 3 of 2000
PELJ	Potchefstroom Electronic Law Journal
RC	Regional Court
SAJELP	South African Journal of Environmental Law and Policy
UK	United Kingdom
USA	United States of America
ZAWCHC	South African Western Cape High Court

ZASCA South African Supreme Court of Appeal

1. CHAPTER 1

1.1. TITLE

"Compliance and enforcement: *The legal suitability of the utilisation of criminal sanctions in South African Environmental Law"*

1.2. KEY WORDS

Environmental Law, sustainable development, criminal sanctions, effectiveness, suitability enforcement and compliance.

1.3. INTRODUCTION

Criminal sanctions are viewed as the primary mechanism for compliance and enforcement of environmental law in South Africa. A perfect example of this would be the *Lemthongthai*[1] case, where a Thai international was prosecuted for obtaining fraudulent permits to shoot and kill rhino for purposes of trophy hunting, when it was in fact his intention to illegally trade in rhino horn. He was sentenced to 13 years imprisonment and a fine of 1million rand. Criminal sanctions in this instance was effective, however, there are shortcomings that exist within this mechanism. Criminal prosecution in the environmental context are based on the contravention of an environmental law. In many instances the offender secures substantial financial advantage through the commission of the environmental offence and the imposed criminal sanction is frequently insufficient to adequately penalise the offender. This mechanism also fails to adequately address the environmental harm caused by the commission of the offence.[2]

Thus, the question arises: Are criminal sanctions are the most legally suitable manner in which to deal with environmental law offenders in order to improve enforcement and compliance of South African environmental law?

1 Lemthongthai v S [2014] ZASCA 131

2 Craigie F, Snijman P and Fourie M 'Dissecting Environmental Compliance and Enforcement' in Paterson A and Kotze LJ (1ed) *Environmental Compliance and Enforcement in South Africa: Legal Perspectives*, (2009) 54

In this thesis, compliance can be defined as 'obedience to a request or demand'[3]. Compliance can also be described as the adherence to legal and regulatory policy in relation to environmental laws and policies.

To alleviate the problem of compliance, academic commentary considers two theories of compliance. The first theory is the rationalist theory. This theory aims to establish certain and predictable consequences for non-compliance with the law, to enable actors to respond judiciously so as to avoid the inevitable sanction[4]. The second theory is the normative theory. This theory is based on the presumption that the regulated community will generally seek to comply with the law, but there may be objective factors which undermine its ability to do so, such as a lack of awareness or expertise, a shortage of resources, or the absence of appropriate incentives.

Enforcement, in turn, refers to the actions taken by government and others to achieve compliance within the regulated community and to correct or halt situations where such compliance is not present.[5]

Traditionally command-and-control mechanisms, such as the criminal sanction and administrative measures, were used to compel compliance. The traditional approach towards environmental compliance and enforcement in South Africa, however, appears to have shifted from a rationalist approach to a more normative approach in relation to wildlife and conservation.[6] In the industrial context the shift leans towards a rationalist approach with punishment being the key enforcement strategy for compelling compliance and achieving improved environmental performance.[7]

[3] Craigie F, Snijman P and Fourie M 'Dissecting Environmental Compliance and Enforcement' in Paterson A and Kotze LJ (1ed) *Environmental Compliance and Enforcement in South Africa: Legal Perspectives*, (2009) 41

[4] Craigie F, Snijman P and Fourie M 'Dissecting Environmental Compliance and Enforcement' in Paterson A and Kotze LJ (1ed) *Environmental Compliance and Enforcement in South Africa: Legal Perspectives*, (2009) 42

[5] Craigie F, Snijman P and Fourie M 'Dissecting Environmental Compliance and Enforcement' in Paterson A and Kotze LJ (1ed) *Environmental Compliance and Enforcement in South Africa: Legal Perspectives*,(2009) 44

[6] Craigie F, Snijman P and Fourie M 'Dissecting Environmental Compliance and Enforcement' in Paterson A and Kotze LJ (1ed) *Environmental Compliance and Enforcement in South Africa: Legal Perspectives*, (2009) 45

[7] Craigie F, Snijman P and Fourie M 'Dissecting Environmental Compliance and Enforcement' in Paterson A and Kotze LJ (1ed) *Environmental Compliance and Enforcement in South Africa: Legal Perspectives*, (2009) 45

The South African approach with regards to environmental compliance and enforcement is about ensuring adherence to statutory standards. Many of South African prescribed environmental standards are outdated and thus many of the prescribed mechanisms used to secure enforcement and compliance are, in some instances, inappropriate. A perfect example of this would be the traditional command and control mechanism i.e criminal -, administrative - and civil measures, as contained in Section 34N of the National Environmental Management Act, Act 109 of 1998 ("NEMA"), that are used in most instances of environmental transgressions. The command and control mechanism, although fairly simple, is rather inflexible as it fails to afford authorities the necessary discretion to tailor compliance and enforcement solutions to suit specific scenarios.[8]

There are two scenarios which warrant the prosecution of an environmental law. Firstly, where there is a persistent, noticeable failure to comply and, secondly, where there is a pollution incident which causes substantial and noticeable damage, hazards water supplies or involves the agency in heavy expenditure[9]. An important factor when determining whether to prosecute or not, is if the gravity of the harm caused is so great that it outweighs any other determining factor. The criminal sanction should be approached as a last resort to environmental law infractions due to the fact that in most instances the infraction is more due to the negligence of the offender rather than his/her ignorance of the law.

The South African criminal justice system is 'ill-suited, ill prepared and ill-resourced'[10] to be the default forum to deal with environmental law contraventions. There are various alternative measures available to ensure compliance and enforcement; incentive-based measures as well as voluntary measures. The former is concerned with encouraging and rewarding desired forms of behaviour, rather than sanction for non-compliance.[11] There are, however, disadvantages to this measure in that it also includes disincentives aimed at discouraging certain forms of behaviour. The latter refers to the generic array of measures which companies generally undertake, voluntary, to further their environmental performance.

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8 Craigie F, Snijman P and Fourie M 'Dissecting Environmental Compliance and Enforcement' in Paterson A and Kotze LJ (1ed) *Environmental Compliance and Enforcement in South Africa: Legal Perspectives*, (2009) 52

9 Kidd M 'Alternatives to the Criminal Sanction in the enforcement of Environmental law' (2009) 9 *SAJELP* 22

10 Fourie M 'How Civil and Administrative Penalties can change the face of Environmental Compliance in South Africa' (2009) *SAJELP* 7

11 Craigie F, Snijman P and Fourie M 'Dissecting Environmental Compliance and Enforcement' in Paterson A and Kotze LJ (1ed) *Environmental Compliance and Enforcement in South Africa: Legal Perspectives* (2009) 58

This includes self-regulatory measures and co-regulatory measures.[12] These measures are voluntary due to the fact that they are not required by law.

This thesis will examine the legal suitability of the criminal sanction in the enforcement and compliance of South African environmental law and also analyse the manner in which enforcement and compliance in South African environmental law can be improved.

1.4. RESEARCH QUESTION

"Is the criminal sanction the most legally suitable manner in which to deal with Environmental law offenders in South Africa to improve compliance and enforcement of South African environmental law?"

1.5. HYPOTHESIS

Criminal sanctions are the primary mechanism that is used in the compliance and enforcement of environmental law in South Africa. There are, however, various shortcomings that exist.

1.6. LITERATURE REVIEW

Melissa Fourie states *'At present, the primary way to ensure that a violator of South African environmental legislation pays a punitive monetary penalty is to prosecute the offender beyond reasonable doubt in a criminal court, and to rely on a magistrate to levy an appropriate fine.'*[13] This in itself is a problem as it places an unnecessary burden on our already overburdened criminal justice system. She also argues that one should look at civil and administrative penalty system that provides for the adjudication of contraventions and determination of monetary penalties on a balance of probabilities to significantly improve environmental compliance in South Africa. Which seems sensible, but one has to have regard to our National Environmental Legislative Framework as we possess sufficient legislation to also create a system of adjudication.

[12] Craigie F, Snijman P and Fourie M 'Dissecting Environmental Compliance and Enforcement' in Paterson A and Kotze LJ (1ed) *Environmental Compliance and Enforcement in South Africa: Legal Perspectives* (2009) 60

[13] Fourie M 'How Civil and Administrative Penalties can change the face of Environmental Compliance in South Africa' (2009) *SAJELP* 1

In addition to this, Marcia Mulkey[14] emphasises the importance of enhancing and supporting enforcement of environmental law on a sub-national, national and international basis. She discusses the important role that judges play in the environmental enforcement process.[15]

Feris[16] highlights the fact that criminal sanctions in South African environmental law have been largely ineffective due to the fact that penalties in environmental law are rarely sufficient to deter polluters. Criminal sanctions do not always lead to environmental improvement, thus authors advocate for the adoption of alternatives to the criminal sanction to address environmental abuse in South Africa.[17] Kidd[18] also states that when one considers the strengths and weaknesses of the criminal sanction, it is not difficult to conclude that it should not be the default enforcement mechanism. He also states that this approach is becoming increasingly unpopular in other countries and these countries are moving towards the use of "economic incentive-drives approaches or regulatory approaches"[19].

Odeku[20] argues that fines are usually imposed on environmental law perpetrators in South Africa and prison sentences rarely imposed. In most instances these perpetrators go 'scott-free'[21] and this is due to the lack of technically skilled personnel to prosecute these specialized crimes. Furthermore the level of degradation and pollution is constantly rising due to the fact that enforcement of existing environmental laws is very weak.[22]

[14] Mulkey ME ' Judges and Other Lawmakers: Critical Contributions to Environmental Law Enforcement' Sustainable development law and policy Vol 4 (2004) 2

[15] Mulkey ME ' Judges and Other Lawmakers: Critical Contributions to Environmental Law Enforcement' Sustainable development law and policy Vol 4 (2004) 2

[16] Feris LA ' Compliance Notices - A New Tool in Environmental Enforcement' 9 Potchefstroom Elec. L.J. 1 (2006) 1

[17] Feris LA ' Compliance Notices - A New Tool in Environmental Enforcement' 9 Potchefstroom Elec.L.J. 1 (2006) 1

[18] Kidd M 'Alternatives to the Criminal Sanction in the enforcement of Environmental law', (2009) 9 *SAJELP* 21

[19] Kidd M 'Alternatives to the Criminal Sanction in the enforcement of Environmental law' (2009) 9 *SAJELP* 26

[20] Odeku KO ' Accentuating criminal sanctions from environmental degradation: issues and perspectives' (2017) 8 Environmental Economics 28

[21] Odeku KO ' Accentuating criminal sanctions form environmental degradation: issues and perspectives' (2017) 8 Environmental Economics 28

[22] Odeku KO ' Accentuating criminal sanctions form environmental degradation: issues and perspectives' (2017) 8 *Environmental Economics* 29

2. CHAPTER 2: ENFORCEMENT AND COMPLIANCE

2.1. INTRODUCTION

The aim of environmental legislation is to ensure protection of the environment, in other words, to ensure that the earth's natural resources are preserved for present and future generations. This refers to the definition of sustainable development. Thus, without discussing it in full, one has to make reference to sustainable development when discussing environmental law and the protection of the environment. The most notable definition of sustainable development would be the one contained in the Bruntlandt Report. This definition states that sustainable development is development that meets the needs of present generations without compromising the ability of future generations to meet their own needs.[23]

There are many that believe that human needs take precedence over that of the environment and that we should be promoting economic growth and job creation. This results in the environment taking second place to this. Some, in turn, believe that we should be more concerned with providing for our children rather than to ensure the safety and security of endangered animal species. It is against this background that the protection of the environment is considered; the balance between economic growth and socio-economic development against the protection of the environment.

Environmental legislation has been in operation for some time now, however, enforcement and compliance is still a huge stumbling block for South Africa. Many argue that the main objective of enforcement is to promote environmental or ecological integrity.[24] Some authors argue that a major challenge for South African environmental law enforcement and compliance is the inability to design, develop and implement effective enforcement tools.[25]

Our environmental legislation and policies exist for a specific reason and that is to ensure the protection of our environment. Our legislation and policies cannot be treated as moot; it must be enforced and complied with. The foundation of our environmental legislative framework

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[23] Kidd M *The Protection of the Environment through the Use of Criminal Sanctions: A Comparative Analysis with Specific Reference to South Africa* (Unpublished LLD Thesis, University of Natal, 2002)

[24] Murombo T and Munyuki I 'The Effectiveness of Plea and Sentence Agreements in Environmental Enforcement in South Africa' *PER / PELJ* 2019 22

[25] Murombo T and Munyuki I 'The Effectiveness of Plea and Sentence Agreements in Environmental Enforcement in South Africa' *PER / PELJ* 2019 22

is Section 24 of the Constitution[26]. This section explicitly demands protection of the environment and warrants that it be protected through the rest of the legislative framework. One of the main pieces of legislation is the National Environmental Management Act ("NEMA").

This chapter will discuss Section 24 of the Constitution in so far as it has relevance to this thesis, compliance with the section and its importance in our country's enforcement and compliance quest. Together with this discussion will be made with regards to NEMA, the relevant case law to NEMA and with specific reference to the principles contained in Section 2 of NEMA and the sections that deal with enforcement and compliance.

The aim of this chapter is to discuss the Section 24 of the Constitution and the relevant provisions of NEMA relating to compliance and enforcement of environmental law of South Africa. This chapter will also consider the capability of our legislative framework in relation to the improvement of compliance and enforcement in South African environmental law.

2.2. THE RIGHT TO AN ENVIRONMENT – S24 OF THE CONSTITUTION OF THE REPUBLIC OF SOUTH AFRICA

Section 24 of the Constitution states that: "Everyone has the right (a) to an environment that is not harmful to their health or well-being; (b) to have the environment protected, for the benefit of present and future generations, through reasonable legislative and other measures that (i) prevent pollution and ecological degradation; (ii) promote conservation; and (iii) secure ecologically sustainable development and use of natural resources while promoting justifiable economic and social development."[27]

Enforcement and compliance within the South African environmental legislative is demanded by Section 24 of the Constitution[28]. Section 24 embodies the imperatives and constitutional mandate for environmental compliance and enforcement.[29] It is generally accepted that S24 has a twofold aim.[30] The first part of the right guarantees a healthy environment to everyone,

[26] Act 108 of 1996
[27] Act 108 of 1996
[28] The Constitution of the Republic of South Africa, Act 108 of 1996
[29] Feris L' Environmental rights and locus standi' in Paterson A and Kotze LJ (1ed) *Environmental Compliance and Enforcement in South Africa: Legal Perspectives* (2009) 133
[30] Feris L' Environmental rights and locus standi' in Paterson A and Kotze LJ (1ed) *Environmental Compliance and Enforcement in South Africa: Legal Perspectives* (2009) 133

in general, while the second part mandates the State to take certain measures in order to realise the guarantee of paragraph (a).[31] Paragraph (b) also provides for protection against any infringement by the State that negates environmental protection or that is harmful in any way to the environment.

In line with S24 (b), the legislature enacted a range of statutes that attempt to protect environmental resources and regulate harm that impacts adversely on the environment. This legislation also incorporates international environmental law such as duty to care principle and the polluter pays principle, and in so doing creates liability for environmental damage.[32]

This right can be interpreted to impose a positive obligation on the state and require them to take reasonable and legislative measures to achieve enforcement and compliance. When fulfilling its mandate as set out in S24, the state will have to ensure that it does so in a way which balances not only environmental considerations, but also social and economic considerations.[33]

Yacoob J stated in *Government of the Republic of South Africa v Grootboom*[34] that mere legislative measures are not sufficient to constitute constitutional compliance; the state has to act to achieve the intended result. The court had the opportunity also to define what is expected from the State when taking all reasonable legislative and other measures.

The court stated that when determining whether the state took all reasonable and legislative measures, it must be done in light of the functioning of all three spheres of Government.[35] This case prescribes the core minimum obligation that the State has to comply with. In discharging this minimum core obligation the state has to act to achieve the intended result, and legislative measures will have to be supported by appropriate, well-directed policies and programmes.[36] If the measures taken fail to respond to the needs of those most desperate, it cannot be regarded as if the state took all reasonable legislative and other measures.[37]

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[31] Feris L' Environmental rights and locus standi' in Paterson A and Kotze LJ (1ed) *Environmental Compliance and Enforcement in South Africa: Legal Perspectives* (2009) 133
[32] Feris L,' Environmental rights and locus standi' in Paterson A and Kotze LJ (1ed) *Environmental Compliance and Enforcement in South Africa: Legal Perspectives* (2009) p133
[33] Government of the Republic of South Africa v Grootboom 2001 (1) SA 46 (CC*)*
[34] 2001 (1) SA 46 (CC)
[35] Government of the Republic of South Africa v Grootboom2001 (1) SA 46 (CC) at para 39
[36] Government of the Republic of South Africa v Grootboom 2001 (1) SA 46 (CC) at para 42
[37] Government of the Republic of South Africa v Grootboom 2001 (1) SA 46 (CC) at para 42

Interpreted in the light of Section 24, the section mandates that the state take all reasonable legislative and other measures to fulfil its constitutional duty envisaged in the Section. Anything short of this will be regarded as a failure to comply with the mandate of the section.

The State has a duty to act as custodian of our nation's resources; to protect public interest in, and to ensure equitable access to, such resources and generally to ensure that all South Africans enjoy an environment of acceptable equality and to ensure the practice of sustainable development within all spheres of government.[38]

Government is subject to law and is supposed not only to observe in general terms, but to comply with every constitutional and legal duty imposed on it.[39] It is, however, a common occurrence that government fails to fulfil its constitutional duty. This failure might be due to instances where the government *bona fide* misinterprets legislation, negligently ignores or wilfully disregard its duties, or deliberately takes on imagined powers to achieve a particular political outcome.[40] Government's failures in our compliance and enforcement endeavours forms part of the reasons why compliance and enforcement still remains an obstacle in South Africa.

Section 24 of the Constitution not only forms the cornerstone of our environmental legislative framework, but it paves the way for future legislation and guides the courts in adjudication of environmental law. Thus the judiciary has an equally important role in enforcing constitutional rights and to address compliance and enforcement.

In view of the critical importance of S24 in terms of mandating compliance and enforcement, much reliance is placed on the way in which our courts interpret the section. In the *Fuel Retailers*[41] case the Constitutional court highlighted the importance of the integration of environmental protection with socio-economic development. The court also noted that environmental considerations must be balanced with socio-economic considerations and sustainable development and sustainable use and exploitation of natural resources are at the

[38] Blackmore A ' The relationship between the NEMA and the Public trust doctrine: The importance of the NEMA principles in safeguarding South Africa's biodiversity' (2015) 20 *SAJELP* 89

[39] Blackmore A 'The relationship between the NEMA and the Public trust doctrine: The importance of the NEMA principles in safeguarding South Africa's biodiversity' (2015) 20 *SAJELP* 89

[40] Blackmore A 'The relationship between the NEMA and the Public trust doctrine: The importance of the NEMA principles in safeguarding South Africa's biodiversity' (2015) 20 *SAJELP* 89

[41] Fuel Retailers Association of Southern Africa v Director General: Environmental Management, Department of Agriculture, Conservation and Environment, Mpumalanga Province 2007 (6) SA 4 (CC)

core of the protection of the environment.[42] The court went further to reiterate to importance that the judiciary has in giving effect to the concept of sustainable development and the protection of the environment.

There are other instances where the court also had opportunity or endeavoured to conceptualise the environmental right in an in-depth manner. One of these instances was in the HTF Developers[43] case. In this case the court stated that S24 (b) is similar to a directive principle and is aspirational in form.[44] This was incorrect, according to Feris[45]. The rights contained in the Bill of Rights are justiciable rights, meaning that these rights can be distinguished from directive principles in more than one way. The first instance being the fact that directive principles are simply affirmative instructions to the state and they are not binding, while fundamental rights such as S24 may either prohibit the state from doing something or place a positive obligation on them and fundamental rights are legally binding.[46] Secondly, S24(b) is clearly not aspirational in nature, the mandate stemming from S24 falls within the realm of real expectations.[47] The clear errors by the judiciary in the above case support the call of Kidd[48] for a greener judiciary.

The constitutional duty to ensure environmental compliance and enforcement is amplified in environmental legislation such as the ECA and NEMA. This legislation prescribes mechanisms encouraging and compelling compliance with, and facilitating enforcement of, South Africa's environmental regime.[49] NEMA especially forms an integral part of the effort to improve environmental compliance and enforcement in South Africa.

[42] Fuel Retailers Association of Southern Africa v Director General: Environmental Management, Department of Agriculture, Conservation and Environment, Mpumalanga Province 2007 (6) SA 4 (CC) at para 25 - 26

[43] HTF Developers (Pty) Ltd v Minister of Environmental Affairs and Tourism and Others 2006 (5) SA 512 (T)

[44] HTF Developers (Pty) Ltd v Minister of Environmental Affairs and Tourism and Others 2006 (5) SA 512 (T) at para 17

[45] Feris L ' Environmental rights and locus standi' in Paterson A and Kotze LJ (1ed) *Environmental Compliance and Enforcement in South Africa: Legal Perspectives* (2009) 135

[46] Feris L ' Environmental rights and locus standi' in Paterson A and Kotze LJ (1ed) *Environmental Compliance and Enforcement in South Africa: Legal Perspectives* (2009) 135

[47] Feris L ' Environmental rights and locus standi' in Paterson A and Kotze LJ (1ed) *Environmental Compliance and Enforcement in South Africa: Legal Perspectives* (2009) p135

[48] Kidd M 'Greening the Judiciary' (2006) *Potchefstroom Elec.L.J*. 1

[49] Craigie F, Snijman P and Fourie M 'Dissecting Environmental Compliance and Enforcement' in Paterson A and Kotze LJ (1ed) *Environmental Compliance and Enforcement in South Africa: Legal Perspectives* (2009) 47

2.3. THE NATIONAL ENVIRONMENTAL MANAGEMENT ACT, ACT 107 OF 1998

Before the enactment of NEMA, the only piece of environmental legislation that resembled framework legislation was the ECA. The title suggests that the act provides for the comprehensive protection of the environment, but in actual fact it addressed only certain aspects of environmental conservation.[50] Due to this and the fact that the ECA did not give effect to Section 24 of the Constitution, NEMA was enacted.

Section 2 of NEMA contains a set of principles which provides guidelines for the State in the exercise of their functions that may affect the environment. These principles also provide guidance for the interpretation and implementation of NEMA, as well as any other legislation that is concerned with the protection and management of the environment.[51] These principles are of paramount importance to the protection and management of the environment.[52]

These principles apply to place human needs at the forefront of environmental management and serve their physical, psychological, developmental, cultural and social interest equitably.[53] These principles are not simply a 'wish list'[54]; they apply to all organs of state and their actions which may significantly affect the environment.

NEMA mandates all organs of State to apply the principles to their decision-making, particularly when such decisions affect the environment and its biodiversity. These principles also serve as a general framework for environmental management and as a guide to environmental decision-making.[55] Thus any organ of State undertaking or contemplating a

[50] Kidd M 'The Constitution and Framework Environmental Legislation' in Kidd M (2ed) *Environmental Law* (2011) 35

[51] Theil S 'The problem with the normative content of Section 24 of the Constitution of South Africa' Nordic Journal of Human Rights 2019

[52] Fuel Retailers Association of Southern Africa v Director General: Environmental Management, Department of Agriculture, Conservation and Environment, Mpumalanga Province 2007 (6) SA 4 (CC) at para 67

[53] Kidd M 'The Constitution and Framework Environmental Legislation' in Kidd M (2ed) *Environmental Law* (2011) 36

[54] Kidd M 'The Constitution and Framework Environmental Legislation' in Kidd M (2ed) *Environmental Law* (2011) 36

[55] Blackmore A 'The relationship between the NEMA and the Public trust doctrine: The importance of the NEMA principles in safeguarding South Africa's biodiversity' (2015) 20 *SAJELP* 89

decision that may result in the degradation of the public trust entity must apply all the environmental principles individually and collectively. [56]

The court in the *Kyalami Ridge*[57] had the opportunity to consider when and how these principles apply. The court in essence also had to decide whether the activity in question may significantly affect the environment. The court correctly found that the principles only apply to activities that may significantly affect the environment.

The court, however, incorrectly found in this matter that the principles are not applicable to the controlling manner in which the organs of state use their property.[58] The court also stated that it was not appropriate for a court to decide whether the principles can be applied in a dispute between members of the public and the government in relation to activities that are not regulated by environmental implementation plans or other provisions formulated under NEMA.[59]

On the literal and figurative interpretation of Section 2 of NEMA, it is clear that the principles were enacted for disputes between members of public and anyone else, including the government and its members. It applies where there is a breach or a threatened breach of any of the provisions of NEMA or any statutory provision concerned with the protection of the environment. The section would be redundant if it did not apply to disputes between members of the public and government.[60] The Court clearly got it wrong in the *Kyalami Ridge*[61] case.

The *Fuel Retailers* [62] case, consequently thereafter, reiterated that these principles must be observed as they are of considerable importance to the protection and management of the environment.

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[56] Blackmore A ' The relationship between the NEMA and the Public trust doctrine: The importance of the NEMA principles in safeguarding South Africa's biodiversity' (2015) 20 *SAJELP* 89

[57] Minister of Public works v Kyalami Ridge Environmental Ridge Association 2001 (3) SA 1151 (CC)

[58] Minister of Public works v Kyalami Ridge Environmental Ridge Association 2001 (3) SA 1151 (CC) at para 68

[59] Kidd M 'The Constitution and Framework Environmental Legislation' in Kidd M (2ed) *Environmental Law* (2011) 39

[60] Kidd M 'The Constitution and Framework Environmental Legislation' in Kidd M (2ed) *Environmental Law* (2011) 39

[61] Minister of Public works v Kyalami Ridge Environmental Ridge Association 2001 (3) SA 1151 (CC)

[62] Fuel Retailers Association of Southern Africa v Director General: Environmental Management, Department of Agriculture, Conservation and Environment, Mpumalanga Province 2007 (6) SA 4 (CC)

The *Lagoonbay Investment*[63] case also highlighted the application of the principles contained in Section 2 of NEMA. The court reiterated that, when deciding an application for an environmental authorisation, a decision-maker must have regard to various principles contained in NEMA to ensure socially, environmentally and economically sustainable development, including avoiding environmental degradation, preserving cultural heritage, the responsible and equitable use of natural resources, community well-being and empowerment and the beneficial use of environmental resources for the service of the public interest.[64]

These sentiments were shared in the *Really useful Investments*[65] case. The court stated that NEMA was enacted to provide for co-operative environmental governance by establishing principles for decision-making on matters affecting the environment, institutions that will promote cooperative governance and procedures for coordinating environmental functions exercised by organs of state and to provide for certain aspects of the administration and enforcement of other environmental management laws. [66]

The court in all this instances emphasizes the importance of taking cognisance of environmental legislation and its demands, when considering taking decisions which might adversely affect the environment. It also highlights the importance of legislation, such as NEMA, and the role it has in our country's struggles with compliance and enforcement of environmental law.

Chapter 7 of NEMA explicitly deals with enforcement and compliance. Part 2 deals with the relevant provisions to this dissertation.

Section 28 of NEMA revolves around the duty of care principle and the remediation of the environment when damage is caused to it. It specifically states that an owner, person authorised to use the land or person in control of the land who causes, has caused or may cause significant pollution or degradation of the environment must take reasonable measures to prevent such pollution or degradation from occurring, continuing or recurring, or, in so far

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63 Minister of Local Government, Environmental Affairs and Development Planning Western Cape v Lagoonbay Lifestyle Estate (Pty) Ltd, George Municipality, Cape Windlass Environmental Action Group and 24 Others [2013] ZACC 39

64 Minister of Local Government, Environmental Affairs and Development Planning Western Cape v Lagoonbay Lifestyle Estate (Pty) Ltd, George Municipality, Cape Windlass Environmental Action Group and 24 Others [2013] ZACC 39 at para 65

65 Minister of Water and Environmental Affairs v Really Useful Investments (436/2015) [2016] ZASCA 156

66 Minister of Water and Environmental Affairs v Really Useful Investments (436/2015) [2016] ZASCA 156 at para 30

as such harm to the environment is authorised by law or cannot reasonably be avoided or stopped, to minimise and rectify such pollution or degradation of the environment.[67] The measures that must be taken are found in subsection (3) of S28.

Another important aspect of this section is that it authorises the Director-General or provincial head of department to carry out the necessary administrative functions to compel an offender to take the necessary measures envisaged in ss3 and to hold that person accountable for the costs of remediation of the environment should they fail to take the necessary steps to avoid environmental harm or degradation. The costs referred to in the subsection can be recovered, proportionally and according to the degree to which each offender is liable, from multiple offenders as determined by the Director-General or provincial head of department. The intention of the legislature in this instance is to prevent employers hiding behind the actions of their employees.

Significantly, section 28(12) of NEMA introduces a statutory *mandamus* in South African environmental law, which allows a person to apply to court for an order that directs the Director-General of the head of the provincial department to take steps specified in S28 (4) to ensure that the polluter or responsible party addresses significant pollution or environmental degradation.[68] The application can only be brought if he/she had informed the Director-General or provincial head of department of the breach of duty of care in terms of s28(1) and if the Director-general or provincial head of department failed to provide written confirmation that the responsible party was instructed to take remedial action.

Section 29 deals with the protection of workers refusing to do environmentally hazardous work. This section confirms that no person may be held civilly-, criminally- or disciplinary liable for refusing to perform work that they in good faith and reasonably believe would result in an imminent or serious threat to the environment. This section protects the employees that sometimes are coerced by employers to perform tasks that are detrimental to the environment. It is an important feature that NEMA possesses to safeguard vulnerable employees.

Section 30 relates to the control of environmental incidents. An incident is defined as 'an unexpected, sudden and uncontrolled release of a hazardous substance, including from a

[67] S28(1) of the National Environmental Management Act 107 of 1998
[68] Van der Linde M 'National Environmental Management Act 107 of 1998 (NEMA)' in Strydom HA and Kind ND (2ed) *Environmental Management in South Africa* (2009) 213

major emission, fire or explosion that causes, has caused or may cause significant harm to the environment, human life or property'[69]. An example of an emergency incident would be the collapse of a dam wall or a mine shaft. Environmental emergencies may be caused by natural, technological or human induced factors or a combination of all three and have the potential to cause severe harm to the environment, as well as loss of human life or property.

Section 30 places a duty on the person responsible for the environmental incident to report to the relevant authorities on a number of aspects related to the incident, including individuals whose health and safety may be affected. Furthermore, the responsible person is obliged to undertake all reasonable steps to contain and minimise the effects of the incident on the environment; to undertake clean-up procedures; to remedy the effects of the incident; and to assess the immediate and long-term effects of the incident on the environment and public health.[70]

Mining activities, especially, generate significant concern in terms of their potential adverse impact on the environment. Potential environmental hazards and risks associated with mining operations include land contamination from waste dumps, contamination of ground and surface water systems, the release of hazardous materials and the stability of dams with a safety risk.

The above incidents are regular occurrences in South Africa, thus it is of great significance and importance that the legislature has made provision in environmental legislation to deal with environmental incidents. It gives employers and employees clear guidelines to mitigate the effects and consequences of these incidents.

Section 31 revolves around access to information held by the State and the protection of whistle blowers. The right to access to information is contained in s32 (2) of the Constitution. NEMA further provides for access to information held by the State that relates to the implementation of NEMA, the state of the environment and the actual and future threats to the environment. This includes, but not limited to, information on emissions to air, water, soil and the production, handling, transportation, treatment, storage and disposal of hazardous waste and substances.[71] Equally the State also has a right to obtain information on the

[69] S30(1)(a) of the National Environmental Management Act 107 of 1998
[70] S30(4) of the National Environmental Management Act 107 of 1998
[71] Van der Linde M 'National Environmental Management Act 107 of 1998 (NEMA)' in Strydom HA and Kind ND (2ed) *Environmental Management in South Africa* (2009) 217

environment from any person. Grounds for refusal of such a request include unreasonableness of the request; national security; the protection of commercially confidential information or protection of personal privacy.[72]

Similar to section 29 of NEMA, this section also provides that no person may be held civilly-, criminally- or disciplinary liable on account of having disclosed any information, if that person in good faith reasonably believed at the time the information was disclosed, that he or she was disclosing evidence of an environmental risk. The disclosure has to be made in accordance with subsection (5) of NEMA.

Section 32 prescribes the legal standing of those who may enforce environmental laws. Standing in environmental litigation has become easier to secure as a result of the standing provisions contained in our Bill of Rights and the inclusion of the environmental right in our Constitution.[73] Prior to these provisions applicants had to show a direct personal or financial interest in the matter in order to have the necessary standing. The person who approaches the court must act either in own interest; in the interest of a person who is unable to institute proceedings; in the interest of, or on behalf of a group or class of persons, whose interests are affected; or in the public interest; or in the interest of protecting the environment.[74]

It is therefore much more convenient than in the past to litigate in the interest of the environment. It makes sense that a provision such as section 32 has been included if one takes into account for example affected, vulnerable communities who do not have the necessary funds to litigate against mining companies seeking to take advantage of their vulnerability. NEMA allows these individuals to also request court not to grant cost orders against them provided that the matter was brought in good faith, public interest and in the interest of protecting the environment.

Section 33 and 34[75] are probably the most important as it deals with the private and public prosecution of individuals who contravene and commit an offence in terms of environmental law.

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[72] S31(c) of the National Environmental Management Act 107 of 1998

[73] Van der Linde M 'National Environmental Management Act 107 of 1998 (NEMA)' in Strydom HA and Kind ND (2ed) *Environmental Management in South Africa* (2009) 218

[74] Section 32 (1) of the National Environmental Management Act 107 of 1998

[75] The National Environmental Management Act 107 of 1998

Section 33 deals with private prosecution and it gives anyone the authority to prosecute, in public interest and in the interest of the protection of the environment, any individual or juristic person who commits a breach or threatens to commit a breach of their duty towards the environment. This prosecution is done in terms of Section 7 and 8 of the Criminal Procedure Act 51 of 1977 ("CPA") and done through any person entitled to practise as an advocate or attorney of the Republic of South Africa. These sections also outline the specific procedure to be followed by the person seeking private prosecution.

The recognised rule in South Africa, when an offence is committed, common law or statutory, that the offender be prosecuted by a public prosecutor on behalf of and in the name of the State. Section 33 of NEMA and Section 7 and 8 of the CPA is the exception to this rule. In the instance where a public prosecutor declines to prosecute the matter, the offender can be prosecuted in terms of these mentioned provisions.

It should also be noted that this section also empowers a prosecutor to prosecute any other environmental offence in terms of any national or provincial legislation, municipal by-law, authorization, licence or permission; it is not restricted to offences under NEMA.[76] This section allows for prosecution where there was a breach or a threatened breach of any duty to act, other than a public duty that was rested on any organ of state.[77]

An important feature of this section is that it allows the private prosecutor or the party instituting the prosecution to ask for a cost order against the accused in the event that the prosecution was successful.

The suitability of this section towards the protection of the environment can be argued in two ways. One could argue that, in light of the deficiencies of the criminal sanction and public prosecution, this might be a viable option to curb environmental offenders and improve the enforcement of environmental law. On the other hand, would it not be better to hand over the matter to the Director of Public Prosecutions, who is better equipped to deal with such matters?

[76] Mujuzi JD 'Private prosecution of environmental offences under the South African National Environmental Management Act: Prospects and challenges' 29 *S. Afr. J. Crim. Just.* 24 (2016)
[77] Section 33(1)(a) of the National Environmental Management Act 107 of 1998

The recent *Uzani* [78] judgment proved otherwise. Uzani Environmental Advocacy CC attempted and succeeded to privately prosecute BP South Africa in accordance with S33 of NEMA. In order to satisfy the court that they complied with the requirements of the section, Uzani had to prove that their written notice to the Director of Public Prosecutions ("DPP") was not defective in terms of S33(2) of NEMA[79]; that there was prior consultation with the DPP before instituting the private prosecution[80]; that private prosecution is in the public interest or in the interest of the protection of the environment as contemplated in S33(1) of NEMA[81]; and that the private prosecution is permissible within the context of applications made under S24(G) of NEMA[82].

The court reasoned that Uzani Environmental Advocacy CC ("Uzani") had met the necessary requirements to institute a private prosecution. The court stated that Uzani, contrary to the belief and argument of BP, had concluded the consultation process with the DPP in accordance with S8 of the CPA. Although there was no face-to-face consultation, the court stated that the CPA did not require it. It was sufficient that there was correspondence between Uzani and the DPP and it can be inferred from the correspondence that the DPP had no objection to the private prosecution.[83]

Another important aspect of the court's judgment was the discussion relating to the prosecution must be in the public interest or in the interest of the protection of the environment. In this regard S33(1) of NEMA provides that 'any person may in the public interest; or in the interest of the protection of the environment, institute and conduct a prosecution in respect of any breach or threatened breach of any duty, other than a public duty resting on an organ of state, in any national or provincial legislation or municipal bylaw, or any regulation, licence, permission or authorisation issued in terms of such legislation, where that duty is concerned with the protection of the environment and the breach of that

[78] Uzani Environmental Advocacy CC v BP Southern Africa (Pty) Ltd (CC82/2017) [2019] ZAGPPHC 86; [2019] 2 All SA 881 (GP); 2019 (5) SA 275 (GP) (1 April 2019)
[79] Uzani Environmental Advocacy CC v BP Southern Africa (Pty) Ltd (CC82/2017) [2019] ZAGPPHC 86; [2019] 2 All SA 881 (GP); 2019 (5) SA 275 (GP) (1 April 2019) at para 75
[80] Uzani Environmental Advocacy CC v BP Southern Africa (Pty) Ltd (CC82/2017) [2019] ZAGPPHC 86; [2019] 2 All SA 881 (GP); 2019 (5) SA 275 (GP) (1 April 2019) at para 75
[81] Uzani Environmental Advocacy CC v BP Southern Africa (Pty) Ltd (CC82/2017) [2019] ZAGPPHC 86; [2019] 2 All SA 881 (GP); 2019 (5) SA 275 (GP) (1 April 2019) at para 75
[82] Uzani Environmental Advocacy CC v BP Southern Africa (Pty) Ltd (CC82/2017) [2019] ZAGPPHC 86; [2019] 2 All SA 881 (GP); 2019 (5) SA 275 (GP) (1 April 2019) at para 75
[83] Uzani Environmental Advocacy CC v BP Southern Africa (Pty) Ltd (CC82/2017) [2019] ZAGPPHC 86; [2019] 2 All SA 881 (GP); 2019 (5) SA 275 (GP) (1 April 2019) at para 89

duty is an offence'[84]. BP contended that the attempted prosecution is not in public interest, however the court decided otherwise. The court found the prosecution to be in the interest of the protection of the environment.

This judgment illustrated that it is not always necessary to rely on a public prosecutor or the NPA. This judgment is significant due to the fact that there has not been any successful reported private prosecution.

Section 34 of NEMA, in turn, deals with criminal proceedings when an accused is convicted of an offence listed in Schedule 3 of NEMA. Section 34 also allows a criminal court to enquire into the amount of any loss suffered by a victim as a result of the commission of the offence in question, without the necessity of a separate civil trial, and to give judgment in the amount proved in favour of the victim. This serves as a useful tool to identify the civil consequences of the environmental offence.

This section introduces the concept of strict criminal liability for environmental crimes. This allows for the criminal liability of employers and directors of companies for environmental crimes committed by their employees or their companies. The rationale behind this is that strict liability contributes to the efficient administration of regulatory legislation and, secondly, that strict liability encourages and stimulates compliance with the provisions of the legislation.[85]

What is noticeable about this section is that it only deals with offences listed in Schedule 3 of NEMA and the judgment given is executable as if it was given in a civil court. Similarly, to a Section 33 private prosecution, an accused can also be ordered to pay the reasonable costs incurred to prosecute the matter. This section also, different from Section 33, applies to instances when there was an omission by any manager, agent or employee to act. In the event where there was a duty to act and he/she omitted, relating to offences in Schedule 3 of NEMA, he/ she can be convicted under this section. The same applies to Directors who had the duty to take reasonable steps to stop the harm form occurring.

Section 34 and Schedule 3 of NEMA forces businesses and other stakeholders to consider it when they consider the actual risk involved in not complying with any law or policy. The

[84] Section 33(1) of the National Environmental Management Act 107 of 1998
[85] Kidd M 'The use of strict liability in the prosecution of environmental crimes' 15(1) *S. Afr. J. Crim.Just.* 23 (2002)

Blue Platinum Ventures[86] case perfectly illustrates the ability of Section 34 to hold Directors personally liable for environmental harm and degradation caused by their company.

The significance of this judgment is that it prevents perpetrators from hiding behind their companies or any legal entity that they might use to conduct business. Section 34 in this instance allowed the court to hold the owner of this business personally liable for failing to take reasonable steps to prevent harm and degradation to the environment.

Some of the offences under Schedule 3 include offences for contravening legislation regulating heritage resources, water, forests, veld and forest fires, biological diversity and air quality. The penalties for some of these offences are severe, ranging from a fine of a million for a section 28(14) offence, to fines of five million Rand (coupled with periods of imprisonment) for contravening Section 24F (1) (a) of the NEMA.

2.4. CONCLUSION

Most environmental offences are prosecuted by a public prosecutor and in most of these instances the measure used to discipline these offences, is the criminal measure or the traditional command-and-control mechanism.

Similar to other countries, and as mentioned, South Africa uses criminal measures as a primary deterrent to environmental law offenders. Criminal law has, however, failed to meet the aims of environmental law, namely to curb contamination and to rehabilitate degraded environments.[87] Criminal law has several weaknesses. These include, but are not limited to, high cost of litigation, risk of unsuccessful prosecution, lack of knowledge on the part of prosecutors and the judiciary, low conviction rates, low fines and poor crime detection and investigation.

In the following chapter I will discuss, in depth, criminal sanctions as the primary deterrent for environmental offenders, the strengths and weaknesses and also its suitability and effectiveness in our compliance and enforcement regime.

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[86] The state v Blue Platinum Ventures 16 (Pty) Ltd and Matome Samuel Maponya NaphunoRN126/13 (9 January 2014)

[87] Murombo T and Munyuki I 'The Effectiveness of Plea and Sentence Agreements in Environmental Enforcement in South Africa' *PER / PELJ* 2019 (22)

In this chapter I conclude that the South African legislative is sufficient to deal with environmental law offenders. S24 of the Constitution and NEMA is a solid enough foundation to further develop environmental legislation and improve compliance and enforcement within the South African legislative framework. I am of the view that it is not, at this stage, necessary to add further environmental legislation, but rather to improve the framework that we currently possess.

3. CHAPTER 3: ENFORCEMENT AND COMPLIANCE: THE CRIMINAL SANCTION

3.1. INTRODUCTION

In general, government has historically relied on the traditional command-and-control mechanism to regulate enforcement and compliance with environmental law in South Africa.[88] The most common method used to punish environmental offenders is the criminal sanction. The criminal sanction is identified by the fact that it stigmatises certain forms of behaviour. It attracts community condemnation, it involves punishment and it is the only measure whereby offenders can be subjected to imprisonment.[89]

Some authors criticise the fact that the criminal sanction is so commonly used due to the fact that not all environmental offences are morally wrong and thus criminal punishment does not always justify the amount of harm that was done.[90] In order to determine why the criminal sanction is used as a response to most environmental offences, discussion will have to be made with regards to criminal law in general, its purpose and aims, strengths and weaknesses and its suitability to environmental law. In order to also fully comprehend the use of the criminal sanction it will only be appropriate to also discuss criminal law and its place in our legal system.

In the South African legislative regime there are various methods available to deter environmental law offenders. These include civil-, voluntary-, involuntary and criminal measures. Legislation such as NEMA, the ECA and the National Water Act ("the NWA") has made it possible for government to not solely rely on the criminal sanction. Hence this chapter will also contain a brief discussion on the various other methods available to government in their enforcement and compliance endeavours. Chapter 4 of this thesis will contain a more detailed discussion of the alternatives to the criminal sanction and whether they are more suitable to deal with environmental offenders.

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88 Patterson A and Kotze LJ 'Towards a more effective environmental compliance and enforcement regime for South Africa" in in Paterson A and Kotze LJ (1ed) *Environmental Compliance and Enforcement in South Africa: Legal Perspectives* (2009) 375

89 Kidd M 'Criminal Measures' in Paterson A and Kotze LJ (1ed) *Environmental Compliance and Enforcement in South Africa: Legal Perspectives* (2009) 241

90 Kidd M 'Criminal Measures' in Paterson A and Kotze LJ (1ed) *Environmental Compliance and Enforcement in South Africa: Legal Perspectives* (2009) 241

The main purpose of this chapter will be to determine why it is that government relies so heavily on the criminal sanction in the enforcement of environmental law. To determine this, I will also make use of the national enforcement and compliance statistics of the last 5 years and present discussion on these statistics. This will provide insight into whether the criminal sanction, moving forward, should for instance be used in tandem with other measures and whether it should remain the default manner to deal with environmental law offenders.

3.2. CRIMINAL LAW

3.2.1. CRIMINAL LAW AND THE CONSTITUTION

Criminal law is an elaborate mechanism for regulating and controlling the behaviour and conduct of citizens. It is characterised by three major functions namely law enforcement, prosecution of crime and punishment.[91] Criminal law was established to achieve the arrest, trial and punishment of wrongdoers. To be criminally liable for committing a crime there is certain requirements that have to be met. It must be proven that the accused, beyond a reasonable doubt, committed some form of wrongful conduct which coincided in time with a guilty state of mind.

Criminal law is thus that part our law that mainly defines certain forms of human conduct as crimes and prescribes the punishment for it. Criminal law is also the social mechanism that is used to coerce members of society, through the threat of pain and suffering, to abstain from conduct which is harmful to various interests of society.[92] Its object is also to promote the welfare of society and its members by establishing and maintaining peace and order.[93] In aiming to reach its object, the criminal law system protects the community's interest and also the individual's basic rights of person and property.

Criminal law, similar to any other law in our country, is subject to the supreme law of the country; the Constitution and in particular section 35[94]. This section contains rights that are specifically relevant to environmental enforcement. One of these include a right to a fair trial which is relevant in the criminal enforcement of environmental law with regards to the

[91] Milton JRL 'Criminal Law in South Africa – 1976-1986' *ActaJuridica* 1987 34
[92] Kruger B 'The impact of the Constitution on the South African criminal law sphere' *2001 Journal for Juridical Science* 26 (3) 117
[93] Kruger B 'The impact of the Constitution on the South African criminal law sphere' 2001 *Journal for Juridical Science* 26 (3) 117
[94] The Constitution of the Republic of South Africa, Act 108 of 1996

gathering of evidence through search and seizure; statutory presumptions infringing the right to be presumed innocent, to remain silent and not to testify; the right to challenge evidence in cases where scientific evidence may be adduced; and the right to self-incrimination.[95]

For purposes of the discussion on criminal law and environmental law, let us consider these constitutional rights in summation. Search and seizure is of vital importance in a criminal investigation and evidence is often seized in the ensuing trial. Search and seizure is also important in relation to the investigator obtaining proper authorisation to conduct a lawful search and seizure, without proper authorisation any evidence that is seized won't be allowed in trial.[96] For instance when a load of abalone is seized, in order for the State to obtain a conviction, they would have to have obtained proper authorisation to conduct the search and seizure.

The right to remain silent, the right not to testify and the right to be presumed innocent may be infringed by the so called reverse onus provisions.[97] These provisions place the onus on the accused person to disprove one of the elements of the offence. They often take the form of a presumption where the accused person is presumed to have committed an offence is a certain element is proven.

The right to challenge scientific evidence adduced by way of an affidavit is also potentially relevant in environmental law matters, for instance where a pollution limit has been exceeded. In *S v Van der Sandt* it was held that the affidavit or certificate must contain all the necessary information and the accused person must be informed that the affidavit or certificate is prima facie proof of its content.[98] The deponent to the affidavit may therefore be called to testify or verify the contents of the affidavit.

The final constitutional issue, the right to self-incrimination, may be relevant in relation to the admissibility of information gathered in an environmental audit that was carried out by the accused person. These constitutional issues are of great importance especially when we consider the role of criminal law in environmental law.

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[95] Kidd M 'Criminal Measures' in Paterson A and Kotze LJ (1ed) *Environmental Compliance and Enforcement in South Africa: Legal Perspectives* (2009) 245-246

[96] Kidd M 'Criminal Measures' in Paterson A and Kotze LJ (1ed) *Environmental Compliance and Enforcement in South Africa: Legal Perspectives* (2009) 246

[97] Kidd M 'Criminal Measures' in Paterson A and Kotze LJ (1ed) *Environmental Compliance and Enforcement in South Africa: Legal Perspectives* (2009) 246

[98] Kidd M 'Criminal Measures' in Paterson A and Kotze LJ (1ed) *Environmental Compliance and Enforcement in South Africa: Legal Perspectives* (2009) 246

3.2.2. STRENGTHS AND WEAKNESSES OF CRIMINAL LAW

A common feature of enforcement provisions in environmental legislation is the persistence of criminal penalties as a method of punishing the offender. This is well established already. Later in this chapter discussion will also be made with regards to statistics on the sentencing of environmental crimes, in general, to illustrate the persistent use of criminal sanctions in enforcement of environmental law.

Having also considered the aims and purpose of criminal law in South Africa, I now turn to consider the strengths and weaknesses inherent to criminal law. This will assist in determining the reasons why it is used as the primary deterrent to environmental law offenders. It is important to consider these as it will play an important role when consideration is given with regards to the suitability of the criminal sanction as well as the alternative measures to the criminal sanction.

The main reason our country makes use of criminal law to deal with environmental offenders is due to the fact that it includes punishment as an element. Punishment is defined by retribution and deterrence.[99] Retribution involves the idea that criminal punishment is an instrument whereby society's condemnation and disapproval of the offender's act are imposed on the offender.[100] Deterrence, in turn, involves either individual deterrence, where an offender is deterred for repeating offences, or general deterrence, where one offender is punished to deter others from offending.

The above is one of the main strengths of criminal law. Criminal law brands the offender with a criminal record, impairing the future of the offender and in the same sense also helping to ensure that the offence is not committed in the future. These distinguish the criminal sanction from the other enforcement measures. That being said there are certain instances that does not warrant imprisonment or that the criminal sanction be used as the method of enforcement.

The most recognisable weaknesses of criminal law is the severe cost and time implications a prosecution has and the procedural safeguards it includes like the right to fair trial and due

[99] Kidd M 'Criminal Measures' in Paterson A and Kotze LJ (1ed) *Environmental Compliance and Enforcement in South Africa: Legal Perspectives* (2009) 241

[100] Kidd M 'Criminal Measures' in Paterson A and Kotze LJ (1ed) *Environmental Compliance and Enforcement in South Africa: Legal Perspectives* (2009) 241

process.[101] Criminal prosecution also places a massive burden of enforcement agencies to prepare for court; officials are also reluctant to attend court. It also seems that there is almost always an issue when it comes to proving the crime that was committed and also reluctance by officials to punish offenders for offences seen as morally neutral.[102] Kidd[103] defines these as the inherent weaknesses of criminal law. There are also weaknesses that are contingent. These include inadequate policing, lack of public awareness, difficulties in investigating matters, lack of expertise by court officials and the latter also leading to inadequate penalties. This is in addition to the already weak criminal justice system in South Africa which is plagued with delays, inefficiencies, low conviction rates and a general inability to deal with the influx of criminal cases.

Due to these inherent and contingent weaknesses there are certain authors, such as Michael Kidd[104], Alexander Patterson and Louis J Kotze[105], who argue that criminal measures should only be used as a measure of last resort. In the event that the offence is likely to attract a small penalty, authorities should, in the interests of efficiency consider an alternative measure to the criminal measure.

In South Africa the weaknesses of criminal environmental enforcement largely remains an issue, and beyond an experimental attempt with marine resources, South Africa does not have a specialised environmental court.[106] This type of court refers to courts and tribunals that specifically deal with environmental offences; they would thus discharge the Criminal- and High Courts from predominantly being the court of first instance when environmental offences are committed.

In light of the strengths and weaknesses mentioned, it would only be appropriate to also consider the manner in which environmental crimes are sentenced under criminal law in South Africa.

[101] Kidd M 'Criminal Measures' in Paterson A and Kotze LJ (1ed) *Environmental Compliance and Enforcement in South Africa: Legal Perspectives* (2009) 243
[102] Kidd M 'Criminal Measures' in Paterson A and Kotze LJ (1ed) *Environmental Compliance and Enforcement in South Africa: Legal Perspectives* (2009) 243
[103] Kidd M 'Criminal Measures' in Paterson A and Kotze LJ (1ed) *Environmental Compliance and Enforcement in South Africa: Legal Perspectives* (2009) 243
[104] Kidd M 'Criminal Measures' in Paterson A and Kotze LJ (1ed) *Environmental Compliance and Enforcement in South Africa: Legal Perspectives* (2009) 243
[105] Paterson A and Kotze LJ 'Towards a More Effective environmental compliance and enforcement regime for South Africa' in Paterson A and Kotze LJ (1ed) *Environmental Compliance and Enforcement in South Africa: Legal Perspectives* (2009) 376
[106] Murombo T and Munyuki L 'The effectiveness of plea and sentence agreements in Environmental enforcement in South Africa' (2019) *22 Potchefstroom Elec. L.J.* 1

3.2.3. SENTENCING ENVIRONMENTAL CRIMES

Due to the criminal sanction being the default manner of enforcement in South African environmental law, the most sentences imposed on offenders are fines and imprisonment. There are certain instances where an offence does not warrant a fine or imprisonment, where the appropriate sentence would be for example an order directing an offender to rather restore the harm caused by the offence committed. This section will discuss and analyse the sentencing options that are available under criminal law and also the sentencing measures that are most commonly used.

For purposes of this discussion, I will start with an example to illustrate how environmental crimes are sentenced under the South African criminal justice system. The specific example is with reference to a Sappi-owned paper mill in Mpumalanga in 1989. This mill emitted a large quantity of toxic pollutant, which polluted certain rivers in the area, which were also important watercourses in the area.[107] This emission caused significant damage to the watercourse and also resulted in the death of various fishes in the rivers. The owner of the mill pleaded guilty in the Nelspruit Magistrates' Court and a fine of R6 000-00 was imposed, the maximum fine under the Water Act at that time was R50 000-00.[108]

For a company that size the fine was simply 'the cost of doing business'[109]. Even though this was more than 20 years ago, not much has changed in our justice system, with specific reference to the prosecution of environmental law offences. As mentioned, in South Africa the most common sentence for an environmental offence would be a fine or imprisonment. The latter almost never being imposed. To date no offender, in South Africa, has been imprisoned for committing an environmental offence. This is alarming, to say the least.

Environmental crime has serious social and economic impacts on the daily lives of our people, even though some may not think so. Water pollution can cause cancer in children and adults, while illegal fishing can cause the stock of a particular fish species to fall, resulting in unemployment for fishers. Thus the sentencing of an environmental offender is of vital importance.

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[107] Kidd M 'Sentencing Environmental Crimes' (2004) 11 *SAJELP*

[108] Kidd M 'Sentencing Environmental Crimes' (2004) 11 *SAJELP*; The case was decided by way of plea bargain and was thus unreported

[109] Kidd M 'Sentencing Environmental Crimes' (2004) 11 *SAJELP*

In a recent international operation by Interpol, a Ukrainian captain of an international vessel, the More Sodruzhestva, was found guilty of discharging sewage into South African coastal waters. In this case a sentence of R300 000-00 or 24 months imprisonment was imposed, of which half was suspended for five years, provided that the offender was not convicted of a similar offence.[110] The Master and owners were also held personally liable for contravening certain domestic legislation to which South Africa is a party and a fine of R1.7 million was also imposed. [111]

In essence the above sentence may seem appropriate, however if one compares the damage caused by the offence, it is not. The adequacy of penalties imposed on environmental offenders is seriously in question and, most of the time, not appropriate. The penalty must justify the harm. The penalties available in South Africa is adequate, however the imposition of penalties is the problem.[112] It would appear that the penalties equates to no more than 'a slap on the wrist' [113] to these offenders. For these reasons, and before considering the compliance and enforcement statistics in South Africa, it will be useful to consider the other sentencing options available.

The first of these alternative sentencing options are a fine for a continuing offence. This entails fining an offender for the period of time the offence continues.[114] This method is provided for in the ECA[115], the National Heritage Resources Act[116] ("the NHRA") and the Western Cape Planning and Development Act[117] ("the WCPDA"). Another sentencing option would be a compensation order. Section 300 of the CPA[118] provides for a criminal court to enquire on the loss the victim suffered as a result of the environmental offence. The advantage of this is that no civil proceedings have to be held. Provisions such as this section allows for courts to impose a remedial order for damage caused to the environment. The

[110] https://www.fishingindustrynewssa.com/2018/11/26/first-for-south-africa-captain-gets-criminal-conviction-for-pollution/ (accessed 16 July 2020)
[111] https://www.fishingindustrynewssa.com/2018/11/26/first-for-south-africa-captain-gets-criminal-conviction-for-pollution/ (accessed 16 July 2020)
[112] Kidd M 'Sentencing Environmental Crimes' (2004) 11 *SAJELP*
[113] Kidd M 'Sentencing Environmental Crimes' (2004) 11 *SAJELP*
[114] Kidd M 'Sentencing Environmental Crimes' (2004) 11 *SAJELP*
[115] Section 29 of Act 73 of 1989
[116] Section 51(3) of Act 25 of 1999
[117] Section 64(2) of Act 7 of 1999
[118] Act 51 of 1977

reparation order, in contrast, although similar, requires the offender to repair the damage themselves.[119]

The next two alternative sentencing options are a fine equivalent to value and fine equivalent to the advantage gained. The former is contained in the National Parks Act[120] and provides for a fine not exceeding three times the commercial value of the animal in respect of which the offence of unlawful hunting was committed.[121] Thus the offender can be fined a maximum of three times worth the harm that he/she committed. The latter, similar, provides for a fine equivalent to the advantage gained by the offender in failing to comply with the relevant legislation.[122] NEMA[123] makes provision for this sentencing option.

Some statutes also make provision for forfeiture of items upon conviction for an offence. These include items that were instrumental to the committing of the offence. Examples would be illegal hunting equipment, other weapons directly used in the commission of the offence and unlicensed dangerous substances.[124] Examples of such legislator demands would be S215B of the Natal Nature Conservation Ordinance[125] ("the NNCO") and S68 of the Marine Living Resources Act[126] ("the MLA"). These sections make provision for a court to make an order that when a person is convicted of an offence in terms of the NNCO and the MLA, in addition to any other penalty imposed, the fishing vessel, equipment and the proceeds of the sale of such illegally caught fish can be forfeited to the State.

Community service is also a viable option when sentencing a criminal environmental law offender. The National Forests Act[127] ("the NFA") allows for a person convicted of a fourth category offence to be sentenced, on his/her first offence, to a fine or community service. The community service imposed, if possible, must be one that benefits the environment. Community service is particularly useful in the case of impecunious offenders.[128]

Revocation of a license or permit is useful where an offence involves contravention of the conditions of the license or the permit. The court must determine whether the offence

[119] Kidd M 'Sentencing Environmental Crimes' (2004) 11 *SAJELP*
[120] Act 57 of 1976
[121] Kidd M 'Sentencing Environmental Crimes' (2004) 11 *SAJELP*
[122] Kidd M 'Sentencing Environmental Crimes' (2004) 11 *SAJELP*
[123] Section 34(3) of Act 107 of 1998
[124] Kidd M 'Sentencing Environmental Crimes' (2004) 11 *SAJELP*
[125] Ordinance 15 of 1974
[126] Act 18 of 1998
[127] Act 84 of 1998
[128] Kidd M 'Sentencing Environmental Crimes' (2004) 11 *SAJELP*

constitutes a revocation of the license of the license or permit. Only the National Forests Act[129] contains such a provision. It is submitted that this provision should be contained in every piece of environmental legislation.

Prohibition on further development is an option that has application only in limited listed activities found in the NHRA. If the owner of a certain place is convicted for an offence in terms of the Act involving destruction of, or damage to, the place, the Minister may, on advice of relevant authorities, serve the owner with an order that no further development of such place may be undertaken, except for repairing the damage and maintaining the cultural value of the place, for a period not exceeding 10 years specified in the order.[130] The offender will be liable for the penalty and will be prohibited from the intended development.

The purpose of the evaluation above was to illustrate that there are options available other than imprisonment and a fine in our environmental legislation. The use of each of the above sentencing options would depend on the circumstances and the offence that was committed. In the following chapter an elaborate evaluation will be done on the various other enforcement and compliance measures available, alternative to the criminal sanction.

3.3. THE EFFECTIVENESS AND SUITABILITY OF THE USE OF THE CRIMINAL SANCTION IN SOUTH AFRICAN ENVIRONMENTAL COMPLIANCE AND ENFORCEMENT

3.3.1. CHARACTERISTICS OF THE CRIMINAL SANCTION

The criminal sanction in South Africa entails the application of environmental legislation and the CPA when offenders are punished for committing environmental offences. Perpetrators are prosecuted in terms of this legislation and a sentence is imposed. Most of the time the sentence imposed is inappropriate or not suitable. Criminal sanctions operate in such schemes as to punish behaviours of those who do not carry out all or part of their activities within the approved scope of authorisation.[131] Criminal sanctions operate to punish offenders that are in violation of environmental legislation and fail to uphold their constitutional duty, in terms of Section 24 of the Constitution.

[129] Section 58 (8) of Act 84 of 1998
[130] Section 51 (9) of Act 25 of 1999
[131] Odeku KO ' Accentuating criminal sanctions form environmental degradation: issues and perspectives' (2017) 8 *Environmental Economics* 28

The criminal sanction requires well-resourced and capacitated enforcement authorities, as its control function often becomes time-consuming and expensive.[132] It is also rather inflexible; one size fits all approach, in that it fails to afford authorities the necessary discretion to tailor compliance and enforcement solutions that suits specific categories of transgressions.[133] Furthermore it provides no incentive to the regulated community to exceed the prescribed legal standard, as it will suffer sanction only if it does not meet the prescribed standard.

Notwithstanding the above, South Africa have relied almost exclusively on the criminal sanction to compel compliance and to enforce environmental legislation. With that being said, I will now turn to the effectiveness and suitability of the criminal sanction.

3.3.2. THE CRIMINAL SANCTION: EFFECTIVENESS AND SUITABILITY

Most of South Africa's older environmental laws contain criminal measures and as mentioned, historically, this was used as the primary environmental enforcement method. The promulgation of NEMA brought about a more hybrid system of enforcement methods, however, if we analyse NEMA and other post-apartheid environmental laws, you will notice that they are filled with criminal measures.[134] The difficulty with this is that environmental offences are being treated as commercial and common law offences, such as fraud, money laundering, tax evasion and malicious damage to property.[135] This result in the sanction imposed on the environmental offender being wholly inadequate.

It is indeed so that, although not always adequate and appropriate, criminal sanctions play an important role in the deterrence of environmental offenders. However, most of the time it

[132] Craigie F, Snijman P and Fourie M 'Dissecting Environmental Compliance and Enforcement' in Paterson A and Kotze LJ (1ed) *Environmental Compliance and Enforcement in South Africa: Legal Perspectives* (2009) 52

[133] Craigie F, Snijman P and Fourie M 'Dissecting Environmental Compliance and Enforcement' in Paterson A and Kotze LJ (1ed) *Environmental Compliance and Enforcement in South Africa: Legal Perspectives* (2009) 52

[134] Craigie F, Snijman P and Fourie M 'Dissecting Environmental Compliance and Enforcement' in Paterson A and Kotze LJ (1ed) *Environmental Compliance and Enforcement in South Africa: Legal Perspectives* (2009) 53

[135] Craigie F, Snijman P and Fourie M 'Dissecting Environmental Compliance and Enforcement' in Paterson A and Kotze LJ (1ed) *Environmental Compliance and Enforcement in South Africa: Legal Perspectives* (2009) 53

fails to adequately addresses the environmental harm caused by the offence.[136] To properly discuss the reasons as to why certain authors find the criminal sanction ineffective and unsuitable to the deterrence of environmental law offenders, it would be appropriate to first look at the criminal environmental enforcement statistics in South Africa.

	2014 – 2015	2015 – 2016	2016 – 2017	2017 – 2018	2018 – 2019
ARRESTS BY EMI'S	1259	939	1092	926	820
DOCKETS REGISTERED	2019	1497	1526	1257	1028
CASES HANDED TO NPA FOR PROSECUTION	257	293	416	446	424
DECLINED TO PROSECUTE	24	61	74	18	Unknown
PLEA BARGAIN	15	13	11	8	4
ACQUITTALS	6	5	10	10	14
CONVICTIONS	65	52	76	53	38
ADMISSION OF GUILT FINES ISSUED	1390	998	1010	872	957
ADMISSION OF GUILT FINES PAID	686	695	628	523	Unknown
TOTAL VALUE OF FINES PAID	R418 181-00	R564 850-00	R393 891-00	R251 300-00	R312 930-00

South African criminal environmental enforcement statistics for the period 2014 – 2019[137]

[136] Craigie F, Snijman P and Fourie M 'Dissecting Environmental Compliance and Enforcement' in Paterson A and Kotze LJ (1ed) *Environmental Compliance and Enforcement in South Africa: Legal Perspectives*(2009) 53

[137] Department of Environmental Affairs *National Environmental Compliance and Enforcement Report* 2014 - 2019

What this table illustrates is how many arrests were made each year by Environmental Management Inspectors ("EMI's"), how many dockets were registered, how many of those dockets went to the National Prosecuting Authority ("NPA") to be prosecuted, how many the NPA declined to prosecute, how many of those offences the offenders were acquitted, convicted and entered into plea bargains with the State. It also illustrates how many admissions of guilt fines were issued and how many of them were actually paid by offenders and lastly, the total value of the fines that were paid.

The first noticeable fact is the offenders' lack of appreciation for environmental compliance. There were a total of 5227 admission of guilt fines issued, meaning that needs to be paid, only 2532, from 2014 – 2018, were paid. It means that less than 50% of the issued fines were paid. The question is why. Another noticeable fact; is the total number of dockets that were registered and the number of them that were handed to the NPA for prosecution. The total of dockets that were registered were 7327 and the number of them handed to the NPA were 1836 and, from 2014 – 2018, 177 of the 1836 the NPA declined to prosecute. Thus 25% of the 7327 was handed to the NPA and 9% of the 25% was not prosecuted. This implies only 14% of the 7327 were prosecuted. The question once again is why. It is the understanding of the writer that once a docket is registered with the NPA for prosecution; the investigator is of the view that there is a *prima facie* case to prosecute. The last observation that is made is the low conviction rate of the 14% of the cases that were handed to the NPA to prosecute. Although the statistics above is only illustrative of the past 5 years, the statistics is still alarming.

Michael Kidd[138] argues that the reason for the alarming statistics above can be due to the fact that most of the presiding officers, presiding over these matters, received their legal training before the promulgation of most of the environmental legislation. Perfect example of this would be the *Kyalami Ridge*[139] case, where the presiding officer failed to properly interpret Section 2 of NEMA, as discussed in Chapter 2 of this thesis. Kidd[140] argues that the problem is not only with the presiding officers, but with the legal practitioners as well. If legal practitioners and prosecutors had the necessary skill and knowledge to interpret environmental legislation, they would have the ability to argue the matters properly.

[138] Kidd M 'Greening the Judiciary' (2006) *Potchefstroom Elec.L.J*. 1
[139] Minister of Public works v Kyalami Ridge Environmental Ridge Association 2001 (3) SA 1151 (CC)
[140] Kidd M 'Greening the Judiciary' (2006) *Potchefstroom Elec.L.J*. 1

Due to the weaknesses and ineffectiveness of the criminal sanction, some authors also argue that criminal sanctions should only be used in instances where the offence demands a severe penalty.[141] The sanction is the law's ultimate threat.[142] It is uniquely coercive and uniquely expensive and it puts excessive responsibility on the government. In a country such as South Africa, where state resources are strained and often directed at all other sectors other than the environmental sector, the central role that the State has to play with the command and control mechanism may be too big of a ask. This is evident in our country, where on paper the command is present, but in the field the control is absent.[143] Also one of the biggest burdens on the State is to set standards that have to be complied with, especially where these standards are not uniform, but rather industry specific. The problem is not setting the uniform standard; the problem is that it can become excessively rigid and financially burdensome on the State.

Command and control usually requires the regulated parties to comply with either explicitly set standards or best available technology.[144] If the regulated party meets the standard, there is no incentive to reduce for example emissions further by development or installation of new technology. The command and control approach, therefore, constitutes a license to for example pollute, provided the pollution remains within the predetermined level.[145] The uniform standards the command and control approach relies on, often fails to take into account different situations and the assimilative capacities of different local and regional environments.[146]

The command and control approach usually also focuses on an 'end of pipe approach'[147]. This mandates emission levels rather than providing for alternative cleaner technology approaches. The command and control does not take into account a holistic approach.[148]

[141] Kidd M 'Criminal Measures' in Paterson A and Kotze LJ (1ed) *Environmental Compliance and Enforcement in South Africa: Legal Perspectives* (2009) 243
[142] Kidd M 'Criminal Measures' in Paterson A and Kotze LJ (1ed) *Environmental Compliance and Enforcement in South Africa: Legal Perspectives* (2009) 243
[143] Odeku KO 'Accentuating criminal sanctions for environmental degradation: Issues and perspectives' (2017) 8 *Environmental Economics* 30
[144] Odeku KO 'Accentuating criminal sanctions for environmental degradation: Issues and perspectives' (2017) 8 *Environmental Economics* 30
[145] Odeku KO 'Accentuating criminal sanctions for environmental degradation: Issues and perspectives' (2017) 8 *Environmental Economics* 30
[146] Odeku K O 'Accentuating criminal sanctions for environmental degradation: Issues and perspectives' (2017) 8 *Environmental Economics* 28
[147] Odeku K O 'Accentuating criminal sanctions for environmental degradation: Issues and perspectives' (2017) 8 *Environmental Economics* 28

There are also, however, instances where the criminal sanction is effective and suitable. Section 34 of NEMA is a perfect example of such an instance. The section was used to great effect in the *Blue Platinum Ventures case*[149]. The company and co-owner were charged with commencing an activity under 1(e) of Listing Notice 2 of 2006. The activity entailed the clearing of vegetation and excavation of large holes and pits, which caused soil erosion and other serious harm to the surrounding environment. The accused were charged in terms of NEMA, the co-owner specifically in terms of Section 34[150] for failing to take all reasonable steps that were necessary in the circumstances to prevent damage caused by his company to the environment. The accused was sentenced to 5 years imprisonment, wholly suspended for 5 years on condition that no similar offence is committed. Also on condition that the accused rehabilitates all the areas which were damaged by the company's mining activities.

This judgment illustrated the ability of Section 34[151] to put the court in a position to hold individuals, who caused harm and degradation in the name of a juristic person, personally liable. The fact that the accused was sentenced will have a huge impact on his business.[152] This also serves as a deterrent to future perpetrators that the court will not hesitate to criminally sanction offenders, individual or corporate entity, for committing environmental offences.[153] Offenders will not be able to hide behind the protection of their company while continuously harming the environment.

In most of the environmental offences committed, a corporate entity is involved, thus vicarious liability of an employer for the harm caused by his employee seems sensible. Section 34 of NEMA provides for this. Chapter 2 of this thesis discusses the section; hence it is not necessary to discuss the content thereof. Michael Kidd[154] suggests strengthening the criminal sanction with different forms of liability. In environmental legislation, in general, vicarious liability is used to ensure that is implementation is not hindered by employers evading their duties and responsibilities by hiding behind the sins and omissions of their

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[148] Odeku KO 'Accentuating criminal sanctions for environmental degradation: Issues and perspectives' (2017) 8 *Environmental Economics*
[149] S v Blue Platinum Ventures 16 (Pty) Ltd RC 126/13
[150] Act 107 of 1998
[151] Act 107 of 1998
[152] Odeku K O 'Accentuating criminal sanctions for environmental degradation: Issues and perspectives' (2017) 8 *Environmental Economics* 28
[153] Odeku K O 'Accentuating criminal sanctions for environmental degradation: Issues and perspectives' (2017) 8 *Environmental Economics* 28
[154] Kidd M 'Criminal Measures' in Paterson A and Kotze LJ (1ed) *Environmental Compliance and Enforcement in South Africa: Legal Perspectives* (2009) 247

servant or employees.[155] The prosecution, however, in a trial where an alleged environmental offence is committed, needs to prove express or implied permission of the employer of principal.[156] Thus the section requires some degree of fault on the part of the principal or employer. The accused person does not bear the onus of proving anything, as the provision does not raise the possibility of conviction despite reasonable doubt.[157] The accused employer, however, will have to raise evidence that he or she did take steps to prevent the offence in order to rebut the evidential burden of the section. Thereafter, the prosecution will need to prove beyond reasonable doubt that the steps that were taken; were not all the reasonable steps necessary to avoid the harm that was caused.

From Chapter 2 and the content of this chapter, Section 34[158] seems to be the most effective form of the criminal sanction. The question is whether it is enough. The arguments against the criminal sanction as primary deterrent seem to be more than those for it. Ineffectiveness seems to outweigh effectiveness. At the outset and from the statistics and arguments mentioned above, the criminal sanction is not as effective as it perceives to be.

3.4. CONCLUSION

The purpose of this chapter was to determine why it is that the State relies so heavily on the criminal sanction. It has already been established that most authors argue that the criminal sanction should only be used in the most extreme circumstances and as an option of last resort. It has also been established that the criminal sanction is effective in some circumstances.

It is definitely clear that the criminal sanction, in principle, is not the problem for our country. It was the view from the writer from the outset of this thesis that South Africa possesses sufficient measures to deter environmental offenders, hence the reason that the State relies so heavily on it. The shortcoming in South Africa in respect of criminal enforcement of environmental legislation is not due to the legislation, but rather due to the use thereof by the agencies, prosecutors, judiciary and all those in charge of enforcing the legislation to achieve

[155] Kidd M 'Criminal Measures' in Paterson A and Kotze LJ (1ed) *Environmental Compliance and Enforcement in South Africa: Legal Perspectives* (2009) 250
[156] Kidd M 'Criminal Measures' in Paterson A and Kotze LJ (1ed) *Environmental Compliance and Enforcement in South Africa: Legal Perspectives* (2009) 250
[157] Kidd M 'Criminal Measures' in Paterson A and Kotze LJ (1ed) *Environmental Compliance and Enforcement in South Africa: Legal Perspectives* (2009) 250
[158] Act 108 of 1998

compliance with it. These role players lack the necessary resources, capacity and political will to apprehend offenders and prosecute them.[159] Even when a prosecution is instituted, the judiciary fail to use all the tools to their disposal. The key to successful enforcement and compliance appears to not be in legislative reform, but rather raising the capacity and resources of all role players involved in the environmental compliance and enforcement effort.

The following chapter will revolve around the alternative measures available in our legislative framework and its effectiveness and suitability in relation to the deterrence of environmental offenders.

[159] Kidd M 'Criminal Measures' in Paterson A and Kotze LJ (1ed) *Environmental Compliance and Enforcement in South Africa: Legal Perspectives* (2009) 251

4. CHAPTER 4: ALTERNATIVES TO THE CRIMINAL SANCTION

4.1. INTRODUCTION

Given the many shortcomings of the criminal sanction, it is only appropriate that we consider the alternatives to it. The traditional command and control mechanism is becoming increasingly unpopular in South Africa.[160] Many other countries are departing towards a more hybrid approach where there is an increased use of economic incentive-driven approach or regulatory approach, involving negotiated agreements between regulator, usually the state, and the regulated community as to performance and indicators.[161] Due to the many limitations that command and control mechanism poses, it is not surprising that South Africa is also following the trend of foreign jurisdictions and is increasingly seeking to supplement the traditional measures with alternative compliance measures.[162]

Below, similar to the previous chapter, is a table showing the administrative and civil compliance and enforcement statistics for South Africa from 2014 – 2019. This table illustrates the different measures that are currently in use by our country in their quest towards a more effective compliance and enforcement regime.

	2014 – 2015	2015 – 2016	2016 – 2017	2017 – 2018	2018 – 2019
WARNING LETTERS ISSUED	364	309	296	324	154
PRE-DIRECTIVES ISSUED	111	290	261	286	179
PRE-COMPLIANCE NOTICES ISSUED	436	422	562	576	635
DIRECTIVES ISSUED	57	146	144	103	55

[160] Kidd M 'Alternatives to the Criminal Sanction in the enforcement of Environmental law' (2009) 9 *SAJELP* 26

[161] Kidd M 'Alternatives to the Criminal Sanction in the enforcement of Environmental law' (2009) 9 *SAJELP* 26

[162] Paterson A and Kotze LJ 'Towards a More Effective environmental compliance and enforcement regime for South Africa' in Paterson A and Kotze LJ (1ed) *Environmental Compliance and Enforcement in South Africa: Legal Perspectives* (2009) 377

FINAL COMPLIANCE NOTICES ISSUED	125	58	133	128	163
CIVIL COURT APPLICATIONS LAUNCHED	1	0	7	2	0
S24G ADMINISTRATIVE FINES: TOTAL VALUE PAID	R14 005 423	R8 019 250	R9 776 445.22	R10 064 949.65	R5 983 518.51
S24: TOTAL OF FINES PAID	100	91	119	110	71

South African administrative enforcement and civil action statistics for the period 2014 – 2019[163]

If we draw comparison with the criminal enforcement statistics, on the outset, it would seem that administrative and civil enforcement is more effective than criminal enforcement. It also seems that the data collected is somewhat insufficient and inadequate to draw a final inference from. One statistic that stands out is the total value of S24G fines paid. Once again, at first glance, it seems very positive, however, in reality it is not. If you divide the value of the fines by the total of fines that were paid, it amounts to 'the cost of doing business'[164] for most of the offenders.

The fact that pre- and final notices were issued also gives an indication that the alleged offenders are not intimidated by authority or that they do not feel compelled to comply with the measure that is being implemented. This is illustrative of our country's struggles with compliance and enforcement in environmental law. The conclusion that can be drawn from this table is that it is wholly inadequate to reflect the effectiveness of alternative enforcement and compliance methods in South African environmental law. A full analysis is required to properly answer the research question of this thesis.

[163] Department of Environmental Affairs *National Environmental Compliance and Enforcement Report* 2014 - 2019

[164] Kidd M 'Sentencing Environmental Crimes' (2004) 11 *SAJELP*

This chapter will focus on the alternative measures in our legislative framework. Consideration will be given to administrative measures, incentive based measures, voluntary measures and civil and common law remedies. A full analysis will be done on what each of these measures entails the advantages and disadvantages, approach and application of each of them and its suitability and effectiveness as compliance or enforcement mechanism.

The purpose of this chapter is to determine whether these measures should be given more consideration as primary measures of enforcement and compliance in our quest for a more efficient and compliant environmental regime.

4.2. ALTERNATIVE MEASURES TO THE CRIMINAL SANCTION

4.2.1. ADMINISTRATIVE MEASURES

4.2.1.1. INTRODUCTION

Administrative measures, in general, form an integral part of the South African environmental compliance and enforcement regime. Theoretically they are a relatively simple, inexpensive, flexible and sharp instrument applicable in a broad array of circumstances.[165] Administrative measures also provide a very attractive alternative for les grave situations where administrators do not seek criminal recourse through the courts.[166] They may be used in addition to, or instead of, criminal prosecutions and allow officials to direct offenders to comply and, where they have breached a law, to remedy the harm caused.[167] Many authors have advocated for the adoption of alternative mechanisms to address the environmental abuse in South Africa.[168]

While the criminal sanction is reserved for a more serious offence and persistent wrongdoing, the administrative measures are also likely to be taken seriously by offenders and in many instances allow for the remediation of damage caused to the environment. Due to the wide discretion that is afforded to authorised officials, administrative measures represent a tool

[165] Paterson A and Kotze LJ 'Towards a More Effective environmental compliance and enforcement regime for South Africa' in Paterson A and Kotze LJ (1ed) *Environmental Compliance and Enforcement in South Africa: Legal Perspectives* (2009) 376

[166] Paterson A and Kotze LJ 'Towards a More Effective environmental compliance and enforcement regime for South Africa' in Paterson A and Kotze LJ (1ed) *Environmental Compliance and Enforcement in South Africa: Legal Perspectives* (2009) 376

[167] Winstanley T, 'Administrative Measures' in Paterson A and Kotze LJ (1ed) *Environmental Compliance and Enforcement in South Africa: Legal Perspectives* (2009) 225

[168] Feris LA ' Compliance Notices - A New Tool in Environmental Enforcement' 9 *Potchefstroom Elec. L.J.* 1 (2006)

which, if properly applied and used, can be far more incisive and useful than the often more blunt instrument of a criminal prosecution.[169]

Administrative measures included in empowering legislation are directives, abatement notices, compliance notices and provisions empowering the withdrawal of authorisation that regulate a particular activity. In this part of the chapter analysis will be made of each of these measures, their characteristics, advantages and disadvantages, approach and application and their suitability and effectiveness.

In their simplest form, administrative measures consist of a notice issued by an environmental authority that identifies the illegal or harmful activity, contains evidence thereof, and requires the person to take specific action and corrective steps within a specified time period to remedy the contravention or harm.[170] In the event the event that the offender fails to comply, the authorities can usually take further legal action, such as approaching court to compel compliance with the notice and/or undertake the work set out in the notice and recovering their cost incurred in doing so from the notice recipient. Also, failure to comply with an administrative measure may lead to the withdrawal of an environmental authorisation and can constitute an offence in certain circumstances.[171]

If these measures are properly used, they may result in being more effective and relatively inexpensive, allowing environmental authorities with appropriate expertise to regulate in quite specific ways human activities that impact on the environment, rather than relying on non-specialised courts to do so at the instance of individuals.[172] These measures may also allow for the State to punish offenders without prosecuting them.

Common criticisms of administrative measures in South Africa are that they lack teeth.[173] However, the fact that criminal liability is being attached to non-compliance allows citizens to compel authorities to implement them. Further criticism is that the application there of,

[169] Winstanley T 'Administrative Measures' in Paterson A and Kotze LJ (1ed) *Environmental Compliance and Enforcement in South Africa: Legal Perspectives* (2009) 225

[170] Craigie F, Snijman P and Fourie M 'Dissecting Environmental Compliance and Enforcement' in Paterson A and Kotze LJ (1ed) *Environmental Compliance and Enforcement in South Africa: Legal Perspectives* (2009) 55

[171] Craigie F, Snijman P and Fourie M 'Dissecting Environmental Compliance and Enforcement' in Paterson A and Kotze LJ (1ed) *Environmental Compliance and Enforcement in South Africa: Legal Perspectives* (2009) 55

[172] Winstanley T, 'Administrative Measures' in Paterson A and Kotze LJ (1ed) *Environmental Compliance and Enforcement in South Africa: Legal Perspectives* (2009) 225

[173] Winstanley T, 'Administrative Measures' in Paterson A and Kotze LJ (1ed) *Environmental Compliance and Enforcement in South Africa: Legal Perspectives* (2009) 225

more specific the compliance notice, issued under NEMA, is limited to a narrow array of specific environmental management acts. Government should seriously consider extending the application of compliance notices to a far broader array of environmental laws and designating greater numbers of EMI's tasked with their application, particularly in local and provincial spheres of government.[174]

Advantages, in general, of administrative measures are, unlike criminal measures, they are implemented by relevant environmental authorities and through the judicial system.[175] Furthermore, the jurisdictional facts that need to be present prior to the issue of the relevant administrative notice are generally far less onerous to establish than the onus of proof in criminal proceedings.[176] These factors make administrative measures potentially far more expedient and cost-effective than criminal sanctions for achieving enforcement.

4.2.1.2. TYPES OF ADMINISTRATIVE MEASURES

4.2.1.2.1. DIRECTIVES

There are numerous pieces of legislation under which Directives can be issued such as S28 of NEMA, S19 of the NWA and S31A of the ECA.[177] These powers allow competent authorities to direct a person or entity to do or refrain from doing something in order to achieve better environmental performance or to prevent environmental harm.[178]

Directives issued under NEMA and the NWA are triggered by the breach of an offender's duty of care.[179] Under both these statutes a direct obligation is imposed on anyone who is causing, has caused or may cause pollution in the future to take reasonable measures to prevent that pollution from occurring, continuing or recurring. These measures may include the investigation, assessment and evaluation of environmental impacts; the stopping or

[174] Winstanley T, 'Administrative Measures' in Paterson A and Kotze LJ (1ed) *Environmental Compliance and Enforcement in South Africa: Legal Perspectives* (2009) 225

[175] Craigie F, Snijman P and Fourie M 'Dissecting Environmental Compliance and Enforcement' in Paterson A and Kotze LJ (1ed) *Environmental Compliance and Enforcement in South Africa: Legal Perspectives* (2009) 56

[176] Craigie F, Snijman P and Fourie M 'Dissecting Environmental Compliance and Enforcement' in Paterson A and Kotze LJ (1ed) *Environmental Compliance and Enforcement in South Africa: Legal Perspectives* (2009) 56

[177] Winstanley T 'Administrative Measures' in Paterson A and Kotze LJ (1ed) *Environmental Compliance and Enforcement in South Africa: Legal Perspectives* (2009) 226

[178] Winstanley T 'Administrative Measures' in Paterson A and Kotze LJ (1ed) *Environmental Compliance and Enforcement in South Africa: Legal Perspectives* (2009) 226

[179] Winstanley T 'Administrative Measures' in Paterson A and Kotze LJ (1ed) *Environmental Compliance and Enforcement in South Africa: Legal Perspectives* (2009) 226

modification of any act causing pollution; containment of the pollutant; elimination of the source of the pollution; or remediation of the effects of the pollution or degradation.[180] Under the ECA the competent authority must be satisfied that a human activity has seriously damaged, endangered or detrimentally affected the environment. In such an instance the competent authority may direct a person either to stop polluting or environmentally degrading activities, or to take specified steps to eliminate, reduce or to prevent the damage, danger or detrimental effect from occurring.[181]

The advantages of directives, generally, are that they empower competent authorities to impose specific requirements that are appropriate to the circumstances in question.[182] The directives issued under NEMA may be exercised even where the polluting activity is legally authorised, thus enabling the continued improvement of environmental performance. In addition thereto, NEMA directives can be used to manage environmentally harmful activities not otherwise legally regulated, such as those that may not trigger an environmental impact assessment under NEMA because of the way in which the listed activities are defined.[183] These directives under NEMA may be used in an emergency and the formalities required in issuing them may be complied with relatively quickly.

The disadvantages of directives are that they require the decision-maker too objectively, rather than subjectively, satisfy them that reasonable measures have not been taken and when issuing the directive they must take into account factors which are clearly articulated in NEMA. Furthermore where a directive is issued under NEMA and there is failure to comply, it does not a criminal offence and accordingly cannot be resolved by criminal proceedings, but rather with costly civil litigation. However, under the NWA and the ECA non-compliance does constitute an offence, thus potentially rendering these directive powers to be more useful than that under NEMA.[184]

[180] Winstanley T 'Administrative Measures' in Paterson A and Kotze LJ (1ed) *Environmental Compliance and Enforcement in South Africa: Legal Perspectives* (2009) 227
[181] Winstanley T 'Administrative Measures' in Paterson A and Kotze LJ (1ed) *Environmental Compliance and Enforcement in South Africa: Legal Perspectives* (2009) 227
[182] Winstanley T 'Administrative Measures' in Paterson A and Kotze LJ (1ed) *Environmental Compliance and Enforcement in South Africa: Legal Perspectives* (2009) 227
[183] Winstanley T 'Administrative Measures' in Paterson A and Kotze LJ (1ed) *Environmental Compliance and Enforcement in South Africa: Legal Perspectives* (2009) 227
[184] Winstanley T 'Administrative Measures' in Paterson A and Kotze LJ (1ed) *Environmental Compliance and Enforcement in South Africa: Legal Perspectives* (2009) 231

It is evident that directives are indeed a possible and effective method to obtain better environmental performance or to prevent future environmental harm. It is up to the State to empower more competent officials to properly utilise this method.

4.2.1.2.2. COMPLIANCE NOTICES

The general purpose of compliance notices are to seek to ensure legal compliance by defaulting parties.[185] This notice may be issued by an EMI, within his/her mandate, where there are reasonable grounds for believing there is non-compliance either with a provision of the law for which the inspector has been designated or with a permit issued under the specific law. [186] NEMA [187] contains the minimum requirements with regards to the content of compliance notices. It must include details regarding the non-compliant conduct; steps that must be taken and the period in which the steps must be taken in order to achieve compliance; prohibited conduct and the period of prohibition; and the process to be followed in lodging an objection to the compliance notice.[188]

Different from directives, in the event where there is non-compliance with a compliance notice, it will constitute a criminal offence and can lead to revocation or variation of a permit that was issued. However, when issuing the notice, an EMI must be duly mandated to do so in terms of the specific environmental management act and there must reasonable grounds for believing that a person has not complied with a specific Act or permit that was issued. There are no requirements under NEMA that invites the consideration of representations prior to the issuing of the notice.[189] However, due to the fact that the issuing of the notice falls within the ambit of an administrative action, as defined under PAJA, the intended recipient must be given opportunity to comment on the draft notice before it is finally issued.[190]

[185] Winstanley T 'Administrative Measures' in Paterson A and Kotze LJ (1ed) *Environmental Compliance and Enforcement in South Africa: Legal Perspectives* (2009) 234
[186] Winstanley T 'Administrative Measures' in Paterson A and Kotze LJ (1ed) *Environmental Compliance and Enforcement in South Africa: Legal Perspectives* (2009) 234
[187] Section 311 of Act 107 of 1998
[188] Winstanley T 'Administrative Measures' in Paterson A and Kotze LJ (1ed) *Environmental Compliance and Enforcement in South Africa: Legal Perspectives* (2009) 234
[189] Winstanley T 'Administrative Measures' in Paterson A and Kotze LJ (1ed) *Environmental Compliance and Enforcement in South Africa: Legal Perspectives* (2009) 235
[190] Winstanley T 'Administrative Measures' in Paterson A and Kotze LJ (1ed) *Environmental Compliance and Enforcement in South Africa: Legal Perspectives* (2009) 235

What is significant about this mechanism is that it affords quite a wide discretion for issuing of the notice. Feris [191] argues that this discretion can be interpreted to mean that the compliance notice might be used to enforce provisions that require the relevant authority to issue a directive. Section 28 of NEMA, for instances, places a general duty of care to prevent environmental pollution and degradation. More specifically, Section 28(4)[192] provides for the enforcement of Section 28(1)[193] and it does not stipulate the format of the directive to be used. It also does not state that the section can only be enforced by a specified directive.[194] Thus one can draw the conclusion that compliance notices can be used to enforce Section 28 of NEMA.[195]

The advantage of compliance notices are that they are a quick remedy for enforcement and they may be issued by any duly authorised EMI.[196] This can also be seen as a disadvantage as the EMI has to be duly authorised to act under a specific environmental Act. Until a compliance notice is suspended, a recipient must comply with the notice.[197] From the regulator's perspective this can be seen as an advantage and a temporary solution to stop environmental harm from being caused. From the regulated individual's perspective it can be seen as a disadvantage as there are no provisions for objectives to the compliance notice.

Overall the compliance notice also seems like a competent and suitable enforcement tool to improve our environmental enforcement and compliance aims. It would also depend on the State's employment of skilled and qualified EMI's. Compliance notices is an administrative remedy that could play an important role in ensuring adherence to environmental laws and regulations.[198]The hope is that alternative mechanisms such as compliance notices will be used more frequently and utilised more broadly.

[191] Feris LA,' Compliance Notices - A New Tool in Environmental Enforcement' 9 *Potchefstroom Elec. L.J.* 1 (2006)
[192] Act 107 of 1998
[193] Act 107 of 1998
[194] Feris LA,' Compliance Notices - A New Tool in Environmental Enforcement' 9 *Potchefstroom Elec. L.J.* 1 (2006)
[195] Feris LA,' Compliance Notices - A New Tool in Environmental Enforcement' 9 *Potchefstroom Elec. L.J.* 1 (2006)
[196] Winstanley T 'Administrative Measures' in Paterson A and Kotze LJ (1ed) *Environmental Compliance and Enforcement in South Africa: Legal Perspectives* (2009) 235
[197] Winstanley T 'Administrative Measures' in Paterson A and Kotze LJ (1ed) *Environmental Compliance and Enforcement in South Africa: Legal Perspectives* (2009) 235
[198] Feris LA,' Compliance Notices - A New Tool in Environmental Enforcement' 9 *Potchefstroom Elec. L.J.* 1 (2006)

4.2.1.2.3. ABATEMENT NOTICES

Abatement notices empowers a competent authority to direct a defaulting party to do something to decrease an activity which is causing pollution or nuisance, or is problematic in some or other way. Examples of abatement notices include smoke and dust abatement notices under the Health Act[199]. A prominent feature of these notices is that they may be issued where a competent authority is of the view that a nuisance exists or a dangerous condition requires remediation.[200]

Due to the fact that the issuing of abatement notices constitutes an administrative action, failure to comply with the procedural requirements of Promotion of Administration of Justice Act[201] ("PAJA") will render the notice vulnerable to judicial review. There also exists an obligation on the competent authority, issuing the notice, to find guidance in the principles of NEMA. Abatement notices, in general, will only be useful for achieving compliance in particular cases, and the value of many of them may have been replaced by the broad directive powers contained in NEMA and the NWA.[202]

4.2.1.2.4. NOTICES TO COMPLY WITH AUTHORISATIONS OR WITHDRAWAL OF AUTHORISATIONS AND ADMINISTRATIVE PENALTIES

Circumstances where a right-holder breaches the conditions of an authorisation that regulates a particular activity, the most suitable and effective administrative measure available to a competent authority may simply be to issue notice to the right-holder that the permit conditions are being breached and the breach should be remedied.[203] In the event of non-compliance the authorisation will be withdrawn.

There are instances under NEMA, where the right-holder will be notified or given opportunity to comment or make representations prior to the withdrawal of an environmental authorisation. In the absence of specific procedural requirements in relation to the withdrawal

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[199] Act 63 of 1977
[200] Winstanley T 'Administrative Measures' in Paterson A and Kotze LJ (1ed) *Environmental Compliance and Enforcement in South Africa: Legal Perspectives* (2009) 236
[201] Act 3 of 2000
[202] Winstanley T, 'Administrative Measures' in Paterson A and Kotze LJ (1ed) *Environmental Compliance and Enforcement in South Africa: Legal Perspectives* (2009) 237
[203] Winstanley T, 'Administrative Measures' in Paterson A and Kotze LJ (1ed) *Environmental Compliance and Enforcement in South Africa: Legal Perspectives* (2009) 237

of the authorisation, compliance with PAJA[204] will be necessary. As mentioned already, failure to comply with these requirements will make the withdrawal subject to judicial review. Kidd argues, correctly, that the continuation of the permitted activity, following the withdrawal of the authorisation, might necessitate the application to court for an interdict. [205]

NEMA introduced the concept of administrative penalties, in very narrow circumstances, where an application is made for rectification owing to the unlawful commencement of a listed activity without the necessary environmental authorisation.[206] Kidd, however, points out that the use of administrative penalties may fall foul of the Constitution and suggests that they will only withstand constitutional scrutiny if the infringement is relatively minor and the corresponding penalty small.[207] The right to appeal, however, may overcome this difficulty. NEMA allows for all appeals made by officials who have delegated powers, and does not allow for an appeal against a decision made by a Member of the Executive Council ("MEC"). Thus unless the decision to impose an administrative fine was made under delegated authority it could not be subject to appeal, and may therefore, as Kidd rightly points out, fall foul of the Constitution.[208]

4.2.1.3. EVALUATION OF ADMINISTRATIVE MEASURES

When one compares administrative measures to criminal measures, the immediate advantage that comes to mind is the lower standard of proof than that of a criminal trial, the fact that they are relatively inexpensive to administer, that they are potentially more efficient and that they may result in less opposition by offenders.[209] The most important and significant advantage, Feris[210] argues, is the fact that administrative measures may be tailored to suit a specific set of circumstances and may result in appropriate and adequate remediation, an outcome that a criminal prosecution is unlikely to achieve.

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[204] Act 3 of 2000

[205] Kidd M 'Alternatives to the Criminal Sanction in the enforcement of Environmental law' (2009) 9 *SAJELP*

[206] Winstanley T 'Administrative Measures' in Paterson A and Kotze LJ (1ed) *Environmental Compliance and Enforcement in South Africa: Legal Perspectives* (2009) 237

[207] Kidd M 'Alternatives to the Criminal Sanction in the enforcement of Environmental law' (2009) 9 *SAJELP*

[208] Kidd M 'Alternatives to the Criminal Sanction in the enforcement of Environmental law' (2009) 9 *SAJELP*

[209] Kidd M 'Alternatives to the Criminal Sanction in the enforcement of Environmental law' (2009) 9 *SAJELP*

[210] Feris LA ' Compliance Notices - A New Tool in Environmental Enforcement' 9 *Potchefstroom Elec. L.J.* 1 (2006)

The variety of administrative measures that are available is fairly comprehensive and the powers granted to competent authorities are fairly wide. Administrative measures, in general, also provide an effective method of law enforcement if executed correctly. Thus it can be submitted that there is no need for reform, but rather ensuring that those tasked with the powers becomes properly educated and acquires the necessary skills to competently execute their duties.

4.2.2. CIVIL MEASURES

4.2.2.1. INTRODUCTION

Environmental legislation has largely replaced common law as the primary source of environmental law and for purposes of this chapter brief mention will be made with regards to the common-law remedies that are available to the State. Common-law remedies have always played an important role in environmental compliance and enforcement in South Africa. Its purpose is to halt unlawful environmental harm and degradation by way of an interdict and, secondly, to recover damages for environmental harm under the law of delict.[211]

In general, common law remedies have been very limited in South Africa. Interdicts has been the most successful method of enforcement among the common law remedies as it has been used to halt unlawful emission of foul or offensive odours, smoke, light, noise and effluent discharges. [212] The two most common civil remedies that are available and that is used in our environmental regime is, as mentioned, interdicts, delictual applications or actions and actions or applications under nuisance legislation.

Nonetheless common-law remedies will continue to play an important role in South Africa's compliance and enforcement efforts.[213] This potential is, however, plagued by many inherent procedural and substantive constraints, evidentiary obstacles and the fact that most of the remedies are founded on the protection of individual proprietary interests as opposed to public and/or environmental interests. This is so as civil measures are mostly administered

[211] Paterson A and Kotze LJ 'Towards a More Effective environmental compliance and enforcement regime for South Africa' in Paterson A and Kotze LJ (1ed) *Environmental Compliance and Enforcement in South Africa: Legal Perspectives* (2009) 378

[212] Paterson A and Kotze LJ 'Towards a More Effective environmental compliance and enforcement regime for South Africa' in Paterson A and Kotze LJ (1ed) *Environmental Compliance and Enforcement in South Africa: Legal Perspectives* (2009) 378

[213] Paterson A and Kotze LJ 'Towards a More Effective environmental compliance and enforcement regime for South Africa' in Paterson A and Kotze LJ (1ed) *Environmental Compliance and Enforcement in South Africa: Legal Perspectives* (2009) 378

through the courts.[214] The main disadvantage to this is that most court actions and applications are exceedingly complex, costly, time-consuming and risky. Thus as opposed to the criminal prosecution, common-law remedies does not seem like the most viable option to cure our damaged compliance and enforcement efforts.

NEMA has, however, introduced a range of statutory mechanisms which aim to overcome these practical constraints.[215] NEMA, read with the Constitution, significantly extends locus standi of persons seeking civil recourse through courts.[216] Furthermore NEMA empowers citizens to approach courts for orders compelling the environmental authorities to implement various administrative measures. The statute even goes so far as to allow members of the public to approach the court in the interest of the environment to seek an appropriate relief.[217]

The common law refers to the legal principles that evolved over time through the decisions of courts and doctrine of judicial precedent. Through application of these principles courts have settled disputes brought before them by private individuals asserting their competing rights. This body of common law principles and the remedies available have been used historically to control conduct that adversely on the environment.[218] In contrast, statutory regulation of conduct that adversely impacts on the environment is based on a rigid approach in terms of which the state controls conduct by means of a range of statutory obligations and prohibitions.[219] This method is referred to as the command and control approach. The prediction that enforcement of environmental law and effective administrative controls would diminish the significance of common-law remedies in addressing environmental harm has not been borne out.[220] The reason for this is that the common law approach offers more flexibility than that of the regulatory approach.[221] This flexibility is highlighted by an ability to adapt to

[214] Craigie F, Snijman P and Fourie M 'Dissecting Environmental Compliance and Enforcement' in Paterson A and Kotze LJ (1ed) *Environmental Compliance and Enforcement in South Africa: Legal Perspectives* (2009) 57

[215] Blackmore A 'The relationship between the NEMA and the Public trust doctrine: The importance of the NEMA principles in safeguarding South Africa's biodiversity' (2015) 20 *SAJELP* 89

[216] Blackmore A 'The relationship between the NEMA and the Public trust doctrine: The importance of the NEMA principles in safeguarding South Africa's biodiversity' (2015) 20 *SAJELP* 89

[217] Blackmore A 'The relationship between the NEMA and the Public trust doctrine: The importance of the NEMA principles in safeguarding South Africa's biodiversity' (2015) 20 *SAJELP* 89

[218] Summers R 'Common Law Remedies for Environmental Protection' in Paterson A and Kotze LJ (1ed) *Environmental Compliance and Enforcement in South Africa: Legal Perspectives* (2009) 340

[219] Summers R 'Common Law Remedies for Environmental Protection' in Paterson A and Kotze LJ (1ed) *Environmental Compliance and Enforcement in South Africa: Legal Perspectives* (2009) 340

[220] Summers R 'Common Law Remedies for Environmental Protection' in Paterson A and Kotze LJ (1ed) *Environmental Compliance and Enforcement in South Africa: Legal Perspectives* (2009) 340

[221] Summers R 'Common Law Remedies for Environmental Protection' in Paterson A and Kotze LJ (1ed) *Environmental Compliance and Enforcement in South Africa: Legal Perspectives* (2009) 340

the unique facts applicable to a specific dispute. The effectiveness of the criminal sanction in achieving environmental compliance and enforcement has been in question for quite a while, it is thus for this reason that the attention of the State is shifting towards finding alternative enforcement mechanisms. [222]

It is premature to state that criminal sanctions will be replaced, in its entirety, as primary deterrent for environmental offenders; however what we can state is that action needs to be taken. The purpose of this part of the chapter is to determine and examine the role that common-law remedies can fulfil in the compliance with- and enforcement of environmental legislation. The success of common law remedies in regulating conduct that is harmful to the environment will be, to a large extent, dependant on the effectiveness of the remedies that have developed over time to safeguard rights protected at common law.

4.2.3. COMMON LAW REMEDIES AND THE PROTECTION OF THE ENVIRONMENT

4.2.3.1. THE INTERDICT

An interdict is a discretionary remedy granted by courts in terms of which a person is ordered to refrain from certain conduct or to undertake a particular act. It can be granted as an interim order and as a final order depending on the circumstances and the relief sought. The interdict is the most commonly remedy used. Interdicts remain a valuable tool in South Africa's environmental compliance and enforcement efforts and have been successfully used by both environmental authorities and the public to stop environmental degradation and illegal action and to order the offender to rehabilitate any resultant damage.[223]

In order to succeed with an interim interdict the court must be satisfied that the applicant applying for an interdict has a prima facie right, has a well-grounded apprehension of irreparable harm, the balance of convenience favours granting the interim relief and that there is no satisfactory remedy available to the applicant.[224] For the court to rule the interim interdict as final, it must be satisfied that the applicant has a clear right, there must an injury

[222] Summers R 'Common Law Remedies for Environmental Protection' in Paterson A and Kotze LJ (1ed) *Environmental Compliance and Enforcement in South Africa: Legal Perspectives* (2009) 340

[223] Craigie F, Snijman P and Fourie M 'Dissecting Environmental Compliance and Enforcement' in Paterson A and Kotze LJ (1ed) *Environmental Compliance and Enforcement in South Africa: Legal Perspectives* (2009) 57

[224] Kidd M ' Public interest environmental litigation: recent cases raise possible obstacles' *PER* vol.13 n.5 Potchefstroom Jan. 2010

actually committed or reasonably apprehended and there must be no satisfactory alternative remedy available to the applicant.[225]

A prohibitory interdict, to refrain a person from continuing with certain conduct, is likely the most effective mechanism to stop conduct which constitutes a nuisance or to prohibit conduct giving rise to environmental harm.[226] One issue, however, which may hamper the effectiveness of this tool, is where there is a dispute of the facts between parties. Courts have consistently ruled that a final interdict can only be granted if the facts as stated by the respondent, together with the admitted facts as pleaded by the applicant, justify such an order.[227] It is common cause that that any dispute of fact prevalent during the hearing of an urgent interdict application may well undermine its success, thus precluding a potentially useful common-law remedy in the environmental context.[228]

4.2.3.2. THE LAW OF DELICT

The Aqiulian action provides that a person is liable for damage wrongfully caused by intentional or negligent conduct to the person or property of another. The purpose behind this is primarily to compensate the injured party and to place them in a position they would have been had the delict not been committed. The purpose of this section is to determine extent to which the law of delict provides an effective mechanism for enforcing environmental standards or reducing pollution through imposing liability for environmental damage caused by an offender.

There are, however, certain requirements that need to be proven before an offender can be held liable under the law of delict. These requirements are conduct, wrongfulness, fault, causation and damage. The first requirement pertains to conduct, in the form of act or omission that causes harm. In the context of environmental pollution it may be difficult to establish what or whose conduct is giving rise to the harm in question.[229] If and when the conduct element is established, it has to be established that the conduct was wrongful. The

[225] Kidd M ' Public interest environmental litigation: recent cases raise possible obstacles' *PER* vol.13 n.5 Potchefstroom Jan. 2010
[226] Kidd M ' Public interest environmental litigation: recent cases raise possible obstacles' *PER* vol.13 n.5 Potchefstroom Jan. 2010
[227] Summers R 'Common Law Remedies for Environmental Protection' in Paterson A and Kotze LJ (1ed) *Environmental Compliance and Enforcement in South Africa: Legal Perspectives* (2009) 346
[228] Summers R 'Common Law Remedies for Environmental Protection' in Paterson A and Kotze LJ (1ed) *Environmental Compliance and Enforcement in South Africa: Legal Perspectives* (2009) 346
[229] Summers R 'Common Law Remedies for Environmental Protection' in Paterson A and Kotze LJ (1ed) *Environmental Compliance and Enforcement in South Africa: Legal Perspectives* (2009) 341

test that courts uses is an objective test to determine whether or not the conduct in question was wrongful. The process is mostly dependant on judicial discretion based on the expected objective conduct of a reasonable person.[230] The element of fault also needs to be established and it can be, as mentioned above, negligent or intentional.

The law of delict also requires that there must be a causal link between the damage that was caused and the act that was committed. This element comprises of factual causation and legal causation. The former meaning that a *factual nexus* must exist between the conduct and the harm. The latter meaning that there has to be legal causation. The test for this sub-element is a flexible test which takes into account all relevant factors in order to determine whether the law requires the offender be held delictually liable.[231]

Theoretically the law of delict is an important tool in the context of environmental compliance and enforcement.[232] Its purpose is to restore the position of the injured party to the position it would have been had the conduct by the offender not occurred. Practically, however, it seems rather very time consuming seeing that different elements needs to be proven before an offender can be held delictually liable. Summers[233] argues that a further constraint of the aquilian action is concerned with correcting historical behaviour, in contrast to interdictory relief, which is principally aimed at correcting future behaviour. The interdictory relief seems far more effective in the context of environmental compliance and enforcement. Due to the fact that various elements need to be proven, there is limited success in South Africa with the aquilian action[234], thus if these constraints are not overcome, the aquilian action will remain limited in its effectiveness as a tool in achieving environmental compliance and enforcement in South Africa.

[230] Summers R 'Common Law Remedies for Environmental Protection' in Paterson A and Kotze LJ (1ed) *Environmental Compliance and Enforcement in South Africa: Legal Perspectives* (2009) 341
[231] Summers R 'Common Law Remedies for Environmental Protection' in Paterson A and Kotze LJ (1ed) *Environmental Compliance and Enforcement in South Africa: Legal Perspectives*(2009) 341
[232] Summers R 'Common Law Remedies for Environmental Protection' in Paterson A and Kotze LJ (1ed) *Environmental Compliance and Enforcement in South Africa: Legal Perspectives* (2009) 341
[233] Summers R 'Common Law Remedies for Environmental Protection' in Paterson A and Kotze LJ (1ed) *Environmental Compliance and Enforcement in South Africa: Legal Perspectives* (2009) 342
[234] Summers R 'Common Law Remedies for Environmental Protection' in Paterson A and Kotze LJ (1ed) *Environmental Compliance and Enforcement in South Africa: Legal Perspectives* (2009) 342

4.2.4. EVALUATION OF CIVIL MEASURES

If we distinguish between interdicts and the law of delict, the interdict would seem the most effective common-law remedy in the context of environmental harm and degradation.[235] However, the interdict has several procedural and substantive constraints to the effective reliance upon interdictory relief as a means of enforcing compliance with environmental legislation and preventing or limiting damage to the environment.[236] Interdictory relief has proven to be more successful, in the prevention of harm to the environment, than the recovering of damages by way of the law of delict.[237]

To recover damages from an offender for causing damage to the environment requires several evidentiary burdens being satisfied. These requirements are particularly difficult to satisfy in the context of environmental compliance and enforcement.[238] In particular the element requiring the proof of harm, proving that the harm caused was due to the conduct of the offender can be difficult, time consuming and very expensive and this alone may preclude the law of delict as being an effective tool in establishing environmental liability.[239]

Common-law remedies are confined to the use of court processes and from what was stated above it would seem that the potential success of these remedies is mostly dependent on the judiciary. The judiciary holds the key to unlocking the potential of these remedies playing an important role in environmental compliance and enforcement in South Africa. That being said, one has to take into account the disadvantages of court proceedings and being confined thereto. Litigation, as mentioned, is expensive, risky and a very uncertain process. Thus relying on common-law remedies to ensure environmental compliance and enforcement will be limited to instances where the complainant has the necessary finances to litigate. One then has to draw the conclusion that common-law remedies are definitely not the most suitable manner in which to deal with environmental offenders.

[235] Summers R 'Common Law Remedies for Environmental Protection' in Paterson A and Kotze LJ (1ed) *Environmental Compliance and Enforcement in South Africa: Legal Perspectives* (2009) 368
[236] Summers R 'Common Law Remedies for Environmental Protection' in Paterson A and Kotze LJ (1ed) *Environmental Compliance and Enforcement in South Africa: Legal Perspectives* (2009) 368
[237] Summers R 'Common Law Remedies for Environmental Protection' in Paterson A and Kotze LJ (1ed) *Environmental Compliance and Enforcement in South Africa: Legal Perspectives* (2009) 368
[238] Summers R 'Common Law Remedies for Environmental Protection' in Paterson A and Kotze LJ (1ed) *Environmental Compliance and Enforcement in South Africa: Legal Perspectives* (2009) 368
[239] Summers R 'Common Law Remedies for Environmental Protection' in Paterson A and Kotze LJ (1ed) *Environmental Compliance and Enforcement in South Africa: Legal Perspectives* (2009) 368

4.3. INCENTIVE-BASED MEASURES

4.3.1. INTRODUCTION

Incentive-based measures are founded on the idea that it is more efficient and effective to encourage and reward desired forms of behaviour rather than to sanction non-compliance.[240] These measure are, however, not always positive as they include disincentives aimed at discouraging certain forms of behaviour. The range of incentive-based measures is diverse and includes market-based instruments, regulatory incentives and information-based incentives. These measures portray a more viable option than the traditional command-and-control in the South African environmental compliance and enforcement regime. They are, theoretically, more economically efficient, flexible and promote innovation, encourage voluntary action, overcome inherent market failures, potentially raise revenue for environmental governance and relief the regulatory burden imposed on the government.[241] These measures, in the form of taxes, license and permit fees, subsidies, user charges and disposal charges, are growing more prominently in the South African environmental compliance and enforcement regime.

The main difference between the traditional command-and-control mechanism and the measures mentioned above, are that the former is state-centred and predominantly found upon directive-based regulations. Various objectives and acceptable standards are prescribed and applied, monitored and enforced by way of administrative and criminal measures.[242] Meanwhile self-regulatory instruments are not state-centred, but rather initiated by industry who voluntarily prescribes objectives and acceptable standards and the mechanisms to achieve them. State interference is a rare occurrence.

Incentive-based measures seek to encourage compliance and enforcement with state objectives and standards through motivation and reward, as opposed to direct regulation.[243] Incentive-based measures can also be perverse in nature where they actively encourage the

[240] De Vries FP and Hanley N ' Incentive-Based Policy Design for Pollution Control and Biodiversity Conservation: A Review' *Environ Resource Econ* 63 (2016) 687

[241] Paterson A and Kotze LJ 'Towards a More Effective environmental compliance and enforcement regime for South Africa' in Paterson A and Kotze LJ (1ed) *Environmental Compliance and Enforcement in South Africa: Legal Perspectives* (2009) 377

[242] Paterson A 'Incentive-based Measures' in Paterson A and Kotze LJ (1ed) *Environmental Compliance and Enforcement in South Africa: Legal Perspectives* (2009) 298

[243] Paterson A 'Incentive-based Measures' in Paterson A and Kotze LJ (1ed) *Environmental Compliance and Enforcement in South Africa: Legal Perspectives* (2009) 298

opposite of the desired state objective or standard.[244] In this part of the chapter the aim is to examine and analyse the different incentive-based measures that are available and to determine its potential effectiveness in the South African compliance and enforcement regime.

4.3.2. TYPES OF INCENTIVE-BASED MEASURES

4.3.2.1. MARKET-BASED INCENTIVES

This incentive aims, through the use of market processes and market-based instruments, to influence economic behaviour in order to achieve certain desired objectives. These measures are most commonly implemented through existing market mechanisms[245], for example where authorities seek to directly reward certain forms of behaviour by providing appropriate tax benefits, deposit-refund systems and subsidies. The purpose of these measures is to cure market failure caused by the externalities which occur when environmental costs are incurred without payment.[246] It also seeks to manipulate the relative prices that individuals, industry and organisation, face in the provision and use of environmental goods and services in order to cure market failure to internalise environmental costs frequently unaccounted for in ordinary market relations, promote the efficient use and management of environmental goods and services, and raise revenue for environmental expenditure financing.[247] Market-based incentives encourage persons to go beyond compliance.

The most recent development in positive market-based instruments was the implementation of the Carbon Tax Act[248] which came into effect on 1 June 2019. Tax benefits is also one of the positive market-based instruments that seek to directly reward the actions of individuals, industry and organisations which actively seek to minimise their environmental impacts or to contribute to the protection and conversation of natural resources.[249] Through the Carbon Tax

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[244] Paterson A 'Incentive-based Measures' in Paterson A and Kotze LJ (1ed) *Environmental Compliance and Enforcement in South Africa: Legal Perspectives* (2009) 298

[245] Dippenaar, M., 2018, 'The role of tax incentives in encouraging energy efficiency in the largest listed South African businesses' *South African Journal of Economic and Management Sciences* 21 (2018) 1

[246] Dippenaar M 'The role of tax incentives in encouraging energy efficiency in the largest listed South African businesses', *South African Journal of Economic and Management Sciences* 21 (2018) 1

[247] Dippenaar M 'The role of tax incentives in encouraging energy efficiency in the largest listed South African businesses' *South African Journal of Economic and Management Sciences* 21 (2018) 1

[248] Act 15 of 2019

[249] Paterson A 'Incentive-based Measures' in Paterson A and Kotze LJ (1ed) *Environmental Compliance and Enforcement in South Africa: Legal Perspectives* (2009) 299

Act, the South African National Treasury is imposing taxes on local activities that release significant amounts of greenhouse gases. These gases trap heat in the earth's atmosphere, which leads to global warming. This can be viewed as a major step towards a more effective compliance and enforcement regime in South Africa.

Deposit-refund systems, in turn, involve the imposition of a deposit at point of sale on certain products which are generally suitable for reuse or recycling. A perfect example of this would be the initiative recently imposed by the Coca-Cola Company where individuals are refunded a deposit for returning empty 1.5l coke bottles that are marked with a green label. The objective of this incentive is to encourage and facilitate the reuse or recycling of suitable used products, thereby removing them from the general waste disposal system.[250]

Another form of positive market-based incentive is direct subsidies. Direct subsidies are grants of assistance, generally financial in nature, by the state to individuals, industry and organisations to promote activities which are considered beneficial and of strategic importance to the economy or society in general.[251] The key objective behind their implementation is to encourage activities which would otherwise be economically unsustainable or undertaken at insufficient levels owing to economic constraints. These subsidies have been introduced globally in various sectors such as energy, forestry, agriculture, transport, water supply, water treatment, waste management and fisheries.[252] These subsidies can be positive and negative in nature. It is positive in the sense that they can ensure the viability of various activities which contribute towards environmental sustainability and negative because they can prolong environmental unsustainable activities which, if not for the subsidy, would otherwise not be economically viable. [253]

In contrast, negative market-based instruments seek to impose costs on individuals, industry and organisations whose activities impact negatively on the environment. They mostly take the form of emission, effluent and disposal charges; user charges; licensing tariffs; product taxes and performance bonds.

[250] Paterson A 'Incentive-based Measures' in Paterson A and Kotze LJ (1ed) *Environmental Compliance and Enforcement in South Africa: Legal Perspectives* (2009) 299
[251] Paterson A 'Incentive-based Measures' in Paterson A and Kotze LJ (1ed) *Environmental Compliance and Enforcement in South Africa: Legal Perspectives* (2009) 301
[252] Paterson A 'Incentive-based Measures' in Paterson A and Kotze LJ (1ed) *Environmental Compliance and Enforcement in South Africa: Legal Perspectives* (2009) 301
[253] Paterson A 'Incentive-based Measures' in Paterson A and Kotze LJ (1ed) *Environmental Compliance and Enforcement in South Africa: Legal Perspectives* (2009) 301

Product taxes are also imposed on various products in an attempt to build into their price the indirect environmental costs associated with their production, use and disposal. Similarly to user charges they can be differentiated in order to encourage the use of various products and variants thereof. While taxes are imposed on certain products, performance bonds, in turn, requires an individual, industry or organisation to submit a performance bond or financial guarantee which can be used to encourage compliance with specified targets, objectives and permitting conditions.

Ultimately conclusion can be drawn that the aim of all these measures mentioned above is to manipulate individuals, industries and organisations to strive to achieve better compliance with certain targets in the environmental context.

4.3.2.2. REGULATORY AND INFORMATION-BASED INCENTIVES

The former can generally be described as an instrument which encourages individuals, industry and organisations to go beyond the regulated standards by reducing the regulatory burden on those that demonstrate high levels of environmental performance and investment in environmental management.[254] These actions are classified as self-regulatory and the rationale behind this is to facilitate and reward such initiatives and in so doing reducing associated administrative, compliance and enforcement obligations and costs on the part of both the regulator and the regulated. Examples of regulatory incentives would be reduced reporting requirements, reduced inspections, and fast-track permitting procedures for expansions, upgrades or associated developments undertaken by individual, industry or organisation. [255]

Information-based incentives, in turn, are concerned with the behaviour of both producers and consumers through the collection and public distribution of information relating to environmental performance.[256] Similar to other incentive based measures, these measures can also take a positive and negative form. These measures enhance awareness on environmental issues, such as technical assistance programmes, advertising, eco-labelling, performance

[254] Dippenaar M 'The role of tax incentives in encouraging energy efficiency in the largest listed South African businesses' *South African Journal of Economic and Management Sciences* 21 (2018) 1

[255] Dippenaar M 'The role of tax incentives in encouraging energy efficiency in the largest listed South African businesses' *South African Journal of Economic and Management Sciences* 21 (2018) 1

[256] Paterson A 'Incentive-based Measures' in Paterson A and Kotze LJ (1ed) *Environmental Compliance and Enforcement in South Africa: Legal Perspectives* (2009) 305

reporting, group empowerment programmes and small business incentive schemes.[257] Paterson [258] opines that, specifically, the introduction of eco-labelling can encourage industries to alter their activities or modes of production to secure anticipated market advantage associated with the label. It can also contribute towards public awareness and change patterns of consumption as consumers seek to support the labelled products over their non-labelled counterparts. Another example of an effective information-based incentive is environmental performance auditing and reporting that is being used as a tool for collating and distributing information relating to the environmental performance of individuals, industry and organisations.[259]

4.3.3. EVALUATION OF INCENTIVE-BASED MEASURES

Each of these measures discussed above has their own independent function, but the research above rather indicate that in tandem they might function better. Theoretically it also seems like a step into a better direction in the context of compliance and enforcement in South African environmental law. I state theoretically these measures seems the most appropriate, in the same sense one has to also question why then it is not used more prominently in the context of environmental compliance and enforcement in South Africa.

If we compare incentive-based measures to the traditional command and control mechanism there is certain features of the former that makes it a more suitable method of improving compliance and enforcement in South African environmental law. Incentive-based measures are far more inexpensive and not so resource constraint as the implementation of the traditional command and control mechanism. With criminal law being the primary tool under the latter, one has to take into account the deficiencies associated with criminal, as discussed in the previous chapter. The command and control is also not as flexible in approach in comparison to incentive-based measures which more flexible and adaptive to the

[257] Kidd M 'Alternatives to the Criminal Sanction in the enforcement of Environmental law' (2009) 9 *SAJELP*

[258] Paterson A 'Incentive-based Measures' in Paterson A and Kotze LJ (1ed) *Environmental Compliance and Enforcement in South Africa: Legal Perspectives* (2009) 305

[259] Paterson A 'Incentive-based Measures' in Paterson A and Kotze LJ (1ed) *Environmental Compliance and Enforcement in South Africa: Legal Perspectives* (2009) 305

circumstances which may arise. The former is also more reactive as opposed to being proactive which makes it inappropriate for combating environmental degradation.[260]

Incentive-based measures are more economically efficient, flexible, can promote and facilitate greater innovation, encourage voluntary action, relieve regulatory burdens imposed on the state and promote better use of state resources.[261] The only question surrounding the use of this measure is the ability of the state to utilise these measures, because research illustrates that although measures such as these exist the state fails to consider them. Incentive-based measures seem like a suitable option to improve compliance and enforcement in the context of the South African environmental law regime.

4.4. VOLUNTARY COMPLIANCE MEASURES

4.4.1. INTRODUCTION

The term voluntary indicates that there is no legal obligation on regulated parties to comply. These measures are an array of measures that generally companies undertake voluntarily to further their environmental performance and it includes self-regulatory- and co-regulatory measures.[262] Examples of the above also include a firm's decision to reach energy-efficient emission targets or reduce pollution beyond what is required by the law. Voluntary measures are supplementary forms of environmental management and cannot and should not replace state regulation[263], thus meaning that these measures should be used in addition to other measures which may be appropriate to any given circumstances.

The ideology behind voluntary compliance measures is that in an ideal society industry would conduct itself with due consideration for the environment, dispensing with the need for state unnecessary state regulation. From a regulator's perspective this would be the ideal society and state resources could be utilised in sectors where it is needed the most. Resource constraints would be something of the past and compliance and enforcement would not be an

[260] Paterson A 'Incentive-based Measures' in Paterson A and Kotze LJ (1ed) *Environmental Compliance and Enforcement in South Africa: Legal Perspectives* (2009) 306

[261] Paterson A 'Incentive-based Measures' in Paterson A and Kotze LJ (1ed) *Environmental Compliance and Enforcement in South Africa: Legal Perspectives* (2009) 306

[262] Craigie F, Snijman P and Fourie M 'Dissecting Environmental Compliance and Enforcement' in Paterson A and Kotze LJ (1ed) *Environmental Compliance and Enforcement in South Africa: Legal Perspective s*(2009) 59

[263] Lehmann K 'Voluntary Compliance Measures' in Paterson A and Kotze LJ (1ed) *Environmental Compliance and Enforcement in South Africa: Legal Perspectives* (2009) 269

issue in our environmental regime anymore. However, the times we are living in are not ideal and society as a whole is not without imperfection. Nonetheless consideration has to be given to these measures in order to determine the best way forward for South African environmental compliance and enforcement.

4.4.2. TYPES OF VOLUNTARY COMPLIANCE MEASURES

4.4.2.1. UNILATERAL COMMITMENTS

These types of commitments refer to firms recognising the environmental impacts of their products and processes; and of their own initiative take action to mitigate the harmful effects thereof.[264] Defining characteristics of unilateral commitments are that they are developed and adopted by industry without intervention from the state and the duties it places on its members are in addition to those required by regulation.[265] Examples of self-regulation include adoption of industry codes of practice to certification schemes, labelling schemes and various self-imposed strategies and policies.

Self-regulation or these unilateral commitments are often referred to as advancing the traditional command and control forms of regulation or even supplementing them.[266] In such an instance the command and control is presented as a more primitive approach where self-regulation is a more evolved and sophisticated alternative to traditional forms of regulation. It is, however, not sufficient that industries or enterprises declare themselves committed to reducing environmental harm; what matters is that they actually reduce measures that improve their environmental performance.

An example of unilateral commitments in South-Africa is the South African Bureau of Standards which operates in conjunction with the International Organisation for Standardisation, whose purpose is to facilitate international trade by developing a set of common standards with which goods and services must comply if a firm wishes to be

[264] Lehmann K 'Voluntary Compliance Measures' in Paterson A and Kotze LJ (1ed) *Environmental Compliance and Enforcement in South Africa: Legal Perspectives* (2009) 275
[265] Lehmann K 'Voluntary Compliance Measures' in Paterson A and Kotze LJ (1ed) *Environmental Compliance and Enforcement in South Africa: Legal Perspectives* (2009) 275
[266] Lehmann K 'Voluntary Compliance Measures' in Paterson A and Kotze LJ (1ed) *Environmental Compliance and Enforcement in South Africa: Legal Perspective s*(2009) 276

certified. The value of this is that it creates an international language, enabling manufacturers in all parts of the world to produce goods to identical technical specifications.[267]

As promising as self-regulation sounds, similar to all the measures already discussed, it does pose certain shortcomings. Particular shortcomings of self-regulation that have been identified are that there is a lack of sanctioning and the consequent extensive participant by free-riders undermines the effectiveness and credibility of self-regulation. Contrary to the traditional command and control mechanism, self-regulation also has no authoritative figure or body to which all firms or industry participants have to report. South-Africa has no developed in such a manner where industries can be totally self-regulated.

4.4.2.2. NEGOTIATED AGREEMENTS

These agreements can be referred to as agreements that have been entered into between regulator and industry. The objectives of these agreements are to inculcate an environmentally conscious ethos with the industry, without insisting that participants deliver measurable environmental targets.[268] The effectiveness of these agreements can be classified similar to unilateral agreements in that they lack enforceability or sanctioning. This makes this measure unattractive to members who rely on their membership as a proxy for improving performance.[269] Authors argue that this form of regulation is also highly unlikely to deliver improved environmental performance by participants or members of specific industries.[270]

Both the United Kingdom ("UK") and South Africa have adopted the use of negotiated agreements as an environmental tool, and hopefully the successes and failures of the UK will guide South Africa in its implementation thereof.[271] South Africa's implementation of negotiated agreements stems from s35 of NEMA which permits the conclusion of environmental management co-operation agreements between different organs of state and private bodies. However, what should be kept in mind is that although the provisions exist, it is does not necessarily mean that it is being implemented. There is no evidence that South

[267] Lehmann K 'Voluntary Compliance Measures' in Paterson A and Kotze LJ (1ed) *Environmental Compliance and Enforcement in South Africa: Legal Perspectives* (2009) 276
[268] Lehmann K 'Voluntary Compliance Measures' in Paterson A and Kotze LJ (1ed) *Environmental Compliance and Enforcement in South Africa: Legal Perspectives* (2009) 283
[269] Lehmann K 'Voluntary Compliance Measures' in Paterson A and Kotze LJ (1ed) *Environmental Compliance and Enforcement in South Africa: Legal Perspectives* (2009) 283
[270] Lehmann K 'Voluntary Compliance Measures' in Paterson A and Kotze LJ (1ed) *Environmental Compliance and Enforcement in South Africa: Legal Perspectives* (2009) 284
[271] Lehmann K 'Voluntary Compliance Measures' in Paterson A and Kotze LJ (1ed) *Environmental Compliance and Enforcement in South Africa: Legal Perspectives* (2009) 284

Africa is implementing these agreements. Like most of South African environmental legislation, the state fails to properly use all the compliance and enforcement tools to its disposal. This research is evident of that. In this regard Scholtz[272] argues that authorities in South Africa lack capacity to address complex environmental problems in an effective manner.

With negotiated agreements, similar to unilateral agreements, what matters is whether its use can potentially yield the desired environmental targets; and if so, whether the targets equal or exceed those that could have been obtained by regulation; and the comparative costs to government and industry of each approach. Thus when considering whether to implement negotiated agreements we must be mindful of this and also the fact that its implementation may lead to weak target setting far short of the improvements that could have been achieved given the available technology; it may lack sufficient strong incentives or sanctions to ensure compliance; and that it requires significant resources to develop them.[273]

4.4.3. EVALUATION OF VOLUNTARY COMPLIANCE MEASURES

The United States of America ("USA)" and certain countries in Europe implemented and are making use of various voluntary compliance measures. An example of these measures being used is the public voluntary program in USA named the 33/50 programme. This program was introduced by their Environmental Protection Agency and its primary purpose was to demonstrate whether voluntary partnerships could augment the Agency's traditional command and control approach by bringing about targeted reductions more quickly than normal regulations would.[274] The program was between the government, industry and the community. It was introduced in 1990 with the objective to reduce the release into the environment by 33 percent over 2 years, and by 50 percent over 5 years.[275] The program proved successful.

[272] Scholtz W 'Co-operative and Participatory Governance via the Implementation of Environmental Management Co-operation Agreements' (2004) 11 *South African Journal of Environmental Law and Policy* 183

[273] Lehmann K 'Voluntary Compliance Measures' in Paterson A and Kotze LJ (1ed) *Environmental Compliance and Enforcement in South Africa: Legal Perspectives* (2009) 286

[274] Lehmann K 'Voluntary Compliance Measures' in Paterson A and Kotze LJ (1ed) *Environmental Compliance and Enforcement in South Africa: Legal Perspectives* (2009) 289

[275] Lehmann K 'Voluntary Compliance Measures' in Paterson A and Kotze LJ (1ed) *Environmental Compliance and Enforcement in South Africa: Legal Perspectives* (2009) 289

These voluntary measures may prove successful and effective, however, as mentioned previously, South Africa's compliance and enforcement regime is not developed to the extent that it can successfully accommodate and use voluntary compliance measures.

4.5. CONCLUSION

The purpose of this chapter was to determine whether alternative compliance and enforcement mechanisms should be given more consideration by the State and environmental authorities. What this chapter has taught is that when comparison is made between the traditional command and control mechanism and alternative measures, there are an array of reasons which indicates that the traditional methods is not the only way forward for the South African environmental compliance and enforcement regime. The traditional method, criminal sanctions or prosecution, is a one size fits all approach and it does not make sense to continue exclusively with this outdated method of compliance and enforcement.

In general the measures discussed above can be classified as simple, flexible, economically efficient, sharp, diverse, innovative, expedient, specific and theoretically effective. Mention is made that these measures are theoretically effective due to the fact that South Africa has persisted with traditional methods and these measures have not been implemented to its fullest extent. What should also be borne in mind when we consider the implementation of these measures is that most of them require specific expertise from the authorities and officials responsible for its implementation, monitoring and enforcement. This research has shown that the state lacks the resources, capacity, skill and expertise to always deal with environmental offenders. However all is not lost, there are various ways in which they can acquire the necessary capacity, skill and expertise to deal with these matters. These ways and methods will be discussed in the following chapter.

The conclusion that can be made from this chapter is that alternative measures should be given more consideration when the state deals with environmental offenders. There is no other way in which we can improve our compliance and enforcement, but to use what is at our disposal and develop it to such an extent that it always proves effective and suitable to each unique situation.

5. CHAPTER 5: CONCLUSION AND RECOMMENDATIONS

The thesis determined whether the criminal sanction is the most legally suitable manner in which to deal with environmental law offenders. In determining this the writer analysed in detail the state of compliance and enforcement in South-Africa, the criminal sanction as a method of punishment for environmental law offenders and the suitability of other mechanisms as a replacement for or enhancement of the criminal sanction. The outcomes were that there is consensus among authors that compliance and enforcement in South African environmental law is not what it ought to be.

The South African environmental compliance and enforcement regime has, unfortunately, developed in a rather piecemeal manner, focussing on various priority areas and relying heavily on the traditional command and control mechanisms.[276] Pressing capacity and resource constraints, fragmented institutional structures and political pressure for immediate and visual results have effectively stunted not only the implementation of these traditional mechanisms, but also undermined the opportunity for relevant authorities to take a step back from their regulatory functions in order to critically think about how to formulate a more effective environmental compliance and enforcement regime.[277]

The inference that we can make from the above is that there is a need for change in the South African environmental compliance and enforcement regime. Before discussing the ways in which we can improve the current state of compliance and enforcement in South African environmental law, a brief, but comprehensive discussion of the preceding chapters will be made.

Chapter 2 of this thesis revolved around compliance and enforcement, in general, in South Africa and the state of our environmental legislative framework. One of the few positives that can be taken from these chapters is that the legislative framework is sufficient to deal with environmental offenders, at this stage no new legislation needs to be introduced. The foundation of our legislative framework is founded on the Bill of Rights, S24 of the

[276] Craigie F, Snijman P and Fourie M 'Dissecting Environmental Compliance and Enforcement' in Paterson A and Kotze LJ (1ed) *Environmental Compliance and Enforcement in South Africa: Legal Perspectives* (2009) 64

[277] Craigie F, Snijman P and Fourie M 'Dissecting Environmental Compliance and Enforcement' in Paterson A and Kotze LJ (1ed) *Environmental Compliance and Enforcement in South Africa: Legal Perspectives* (2009) 64

Constitution and also in the series of principles contained in NEMA.[278] NEMA will play a vital role in not only adjudication of environmental law matters in court, but also in the resurrection of our environmental compliance and enforcement regime.

Chapter 2 highlights the importance of NEMA In particular, as mentioned, Section 2, 33 and 34. NEMA was drafted to ensure sound and sustainable environmental management decision-making and the achievement of the environmental right.[279] NEMA also reinforces the implication that government is subject to the law and is obligated not only to observe it, but to comply with every constitutional and legal duty that comes with it.

Chapter 2 also identified various instances where the courts had the opportunity to interpret the principles in S2 of NEMA, in some instances they failed and in other they succeeded. The *Kayalami Ridge*[280] case, discussed in this chapter, is a perfect example of the lack of knowledge most presiding officers is courts have on environmental law and its interpretation and application. This is indicative of the capacity and capability constraints that still exist among the legal practitioners, presiding officers and environmental authorities. Environmental legislation has been existence for at least 20 years and by now one would assume that it should be familiar among authorities.

Thus, the key issues identified in this chapter was that the South African environmental legislative framework consists of sufficient legislation to improve the compliance and enforcement regime and the reason why compliance and enforcement is problematic can be attributed to the lack of resources, capacity, capability and skill of those entrusted to enforce the law and ensure that it is complied with.

Chapter 3 considered the criminal sanction as primary method to punish environmental law offenders. This chapter focussed on the use of the criminal sanction, its advantages and disadvantages and its effectiveness and suitability to the improvement of the environmental compliance and enforcement regime of South Africa. This chapter identified also the inherent weaknesses of criminal law in general and the manner in which South Africa currently deals with environmental offences.

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[278] Blackmore A 'The relationship between NEMA and the public trust doctrine: The importance of the NEMA principles in safeguarding South Africa's Biodiversity' (2015) 20 *SAJELP* 89

[279] Blackmore A 'The relationship between NEMA and the public trust doctrine: The importance of the NEMA principles in safeguarding South Africa's Biodiversity' (2015) 20 *SAJELP* 89

[280] Minister of Public works v Kyalami Ridge Environmental Ridge Association 2001 (3) SA 1151 (CC)

The purpose of chapter 3 was to determine why it is that the State relies so heavily on criminal law for the punishment of environmental offenders. The reasons that were identified were that they lack the necessary skill, resources and capacity to utilise the other methods available to them. Michael Kidd[281], Alexander Patterson and Louis J Kotze[282] argue that criminal law should be used as a last resort option when it comes to enforcement of environmental law. It should be used only in instances where the harm to the environment justifies the use of criminal prosecution. This is an argument that is accepted in this thesis.

Another alarming issue identified in the chapter was that even when the criminal sanction was used to punish environmental offenders, the offenders often receive sentences that do not justify the harm they have done to the environment. For some it is perceived as 'the cost of doing business'[283]. Thus the conclusion was reached that criminal law or the criminal sanction or the traditional command-and-control methods were no longer appropriate in the improvement of our environmental compliance and enforcement regime. It is not the most effective manner in which to deal with environmental law offenders.

Thus, Chapter 4 explored the possibility of alternative manners of compliance and enforcement in an attempt to aid or replace criminal sanctions as a whole. It, firstly, identified that there are too many shortcomings that exist with the criminal prosecutions of environmental crimes and, secondly, that there are an increase in countries that are moving away from the traditional approach and moving towards a more hybrid approach. The use of this similar approach was considered in the chapter. The chapter, similar to in chapter 3, considered the South African compliance and enforcement statistics and the inference can be drawn that although it seemed a more positive outlook in comparison to criminal compliance and enforcement, it still seemed inadequate. A proper exploration into the various alternative compliance and enforcement methods were needed.

Various methods were identified that could prove more suitable to improve the compliance and enforcement regime. The point of departure was administrative measures, which already has an important role when it comes to compliance. Examples of such measures include pre-compliance notices, compliance notices, abatement notices and various forms of directives.

[281] Kidd M 'Criminal Measures' in Paterson A and Kotze LJ (1ed) *Environmental Compliance and Enforcement in South Africa: Legal Perspectives* (2009) 241

[282] Paterson A and Kotze LJ 'Towards a More Effective environmental compliance and enforcement regime for South Africa' in Paterson A and Kotze LJ (1ed) *Environmental Compliance and Enforcement in South Africa: Legal Perspectives* (2009) 376

[283] Kidd M,' Sentencing Environmental Crimes' (2004) 11 *SAJELP*

This measure can be identified as simple, flexible, has a lower standard of proof and is more cost effective to administer. This measure is one of the alternative methods that would ensure better environmental performance if executed properly by those tasked with it.

The common law also plays an integral part in the South African environmental compliance and enforcement regime. Interdicts will always be useful especially when seeking urgent and immediate relief. Interdicts have been one the most effective methods of enforcement in South African environmental law [284] and its purpose is to halt or stop illegal activities such as emission of smoke and offensive odours. The main disadvantages of interdicts, however, are that they involve court processes which can be expensive, time consuming, complex and risky. My submission would still be that common law remedies such as an interdict will be useful; however it should only be used when absolutely necessary. The law of delict also poses similar constraints due to its unnecessary evidential burden and the fact that it too has to be administered through the already overcrowded court system.

Incentive-based measures portrayed a more positive option in that it seems more efficient and effective as opposed to a criminal sanction for non-compliance.[285] These measures are categorised as being more economically efficient, flexible, can promote and facilitate greater innovation, encourage voluntary action, relieve regulatory burdens imposed on the state and promote better use of state resources.[286] Examples of incentive-based measures include market-based incentives, regulatory based incentives and information based incentives. These types of measures aim to incentivise organisations or industries to comply with state objectives and standards. The only shortcoming concerning this measure is the implementation there of due to the state's lack of resources, capacity, skill and capability. This measure can definitely be used when considering ways in which to improve compliance and enforcement in South African environmental law.

The concluding alternative measure discussed was voluntary compliance which in theory referred to conditional self-regulation. This refers to instances where stakeholders undertake

[284] Paterson A and Kotze LJ 'Towards a More Effective environmental compliance and enforcement regime for South Africa' in Paterson A and Kotze LJ (1ed) *Environmental Compliance and Enforcement in South Africa: Legal Perspectives* (2009) 378

[285] Craigie F, Snijman P and Fourie M 'Dissecting Environmental Compliance and Enforcement' in Paterson A and Kotze LJ (1ed) *Environmental Compliance and Enforcement in South Africa: Legal Perspectives* (2009) 58

[286] Paterson A 'Incentive-based Measures' in Paterson A and Kotze LJ (1ed) *Environmental Compliance and Enforcement in South Africa: Legal Perspectives* (2009) 298

to voluntarily comply with certain standards and objectives. In a country such as South Africa voluntary compliance measures would not even be an option given the propensity of non-compliance among the different industries, individuals and organisations. Nonetheless examples include unilateral- and negotiated agreements. Voluntary compliance or rather conditional self-regulation is not an option for the improvement of environmental compliance and enforcement in South Africa.

If the above is carefully considered, the conclusion that I have come to is that the criminal sanction is not the perfect mechanism to exclusively address compliance and enforcement in South African environmental law.

The key problem that was identified in this research was that our government and all other necessary role players responsible for enforcing compliance with environmental law, lacks the necessary skill, capacity and resources to, at most times, properly apply their mind and implement the most suitable methods to curb environmental harm and degradation. Our government should start by employing individuals capable of being taught certain skills and spend the necessary time to train and educate individuals on environmental law and how to implement it. This applies to all organs of State. The fact that some of them received their legal education when environmental law was fairly new is not an excuse anymore. Magistrates and judges are responsible for decisions that have adverse effects not only on the environment, but also on those communities affected by the environmental harm and degradation caused by offenders. Thus they carry huge responsibility and proper training of these individuals is essential to improving compliance and enforcement in South African environmental law.

Although this research came to the conclusion that our environmental legislative framework is sufficient for the time being, improvements should always be considered. This recommendation can be applied parallel with what was mentioned in the preceding paragraph. Improvement of our legislative framework will not be possible when the correct personnel are not employed. Improvement of our legislative framework will only be possible if there is a general awareness of environmental law, how it ought to operate and be implemented. Accordingly authorities, all organs of State and those tasked with ensuring environmental compliance and enforcement should invest time and resources in raising

public awareness of the benefits associated with an improved environmental compliance and enforcement regime.[287]

Improved compliance and enforcement regime can confer economic benefits on industry by encouraging improved efficiency and innovation, and ensure that those members of the regulated community who chose to incur the cost of complying with environmental legislation are not unduly prejudiced compared to those who chose to not comply.[288] Compliance also potentially reduces the financial burden on the state to remediate pollution and degradation and it can also potentially reduce the need for communities to live in polluted and unhealthy environments. Lastly, a proper compliance and enforcement regime can contribute to the protection of our natural resources on which human society is dependant for their survival.

The criminal sanction is not the most legally suitable manner for environmental compliance and enforcement; however the criminal sanction is still required especially in instances where the harm and degradation justifies it. I would suggest a hybrid system where cognisance is taken of the other options available to authorities when considering punishment for environmental offenders. Our regime will not function properly without the use of the criminal sanction and thus I am of the view that it should not be abolished or disregarded completely. What I would also suggest is that conversation should be initiated regarding specialised environmental courts. Environmental courts and tribunals have become more common in foreign jurisdictions.[289] There are already more than 1500 environmental courts and tribunals globally and they are proving to be successful in addressing environmental issues in those countries.[290] Examples of such courts are the Land and Environment Court of New South Wales in Australia which has been functioning for more than 40 years. Kruger[291] also argues that the preference of Environmental Courts is related to the fact that they have the potential for centralising environmental expertise so as to address complexed

[287] Craigie F, Snijman P and Fourie M 'Dissecting Environmental Compliance and Enforcement' in Paterson A and Kotze LJ (1ed) *Environmental Compliance and Enforcement in South Africa: Legal Perspectives* (2009) 64

[288] Craigie F, Snijman P and Fourie M 'Dissecting Environmental Compliance and Enforcement' in Paterson A and Kotze LJ (1ed) *Environmental Compliance and Enforcement in South Africa: Legal Perspectives* (2009) 64

[289] Kruger R 'The Silent Right: Environmental rights in the Constitutional Court of South Africa' *Constitutional Court Review* 9 (2019) 491

[290] Kruger R 'The Silent Right: Environmental rights in the Constitutional Court of South Africa' *Constitutional Court Review* 9 (2019) 491

[291] Kruger R 'The Silent Right: Environmental rights in the Constitutional Court of South Africa' *Constitutional Court Review* 9 (2019) 491

environmental issues. South Africa previously had the Environmental Court in Hermanus which predominantly dealt with abalone related offences and this court had a very high success rate.[292] The primary purpose of this court was to prosecute abalone poachers; however it also dealt with matters relating to illegal trade of rhino horn, water pollution and other marine offences.[293]The court had Regional Court status and could prosecute the entire jurisdiction of the Western Cape and it could impose higher penalties on offenders. The court was, however, closed down not to long after it was opened due to a political decision taken to close down all specialised courts which lacked legislative mandate.[294]

What was taken from this brief establishment of the court, was that having a specialised court and prosecutors allowed for the building of expertise and experience in South African environmental law which meant prosecutors were more able to identify effective arguments and block the defences that had previously set poachers free; collaboration and sharing of expertise between law enforcement agencies increased in order to ensure sound legal standing of cases and the success of the court rested largely on this collaborative effort; a training manual was developed by the prosecutors, detailing the proper application of South African marine regulations, including information needed to successfully prosecute poaching cases. The manual was distributed at training sessions and posted on-line; and environmental cases were given prioritised attention resulting in the rapid hearing of cases and the prosecution of an unprecedented number of environmental criminals.[295] The proper functioning of this court was not without its challenges. There were limited availability of specialised prosecutors and magistrates in environmental law and there was a lack of training for enforcement officials in legislation, policy and procedure.[296]

I would insist on the resurrection of environmental courts and tribunal in South Africa. I argue also that the challenges identified with the functioning of the court can be overcome. What is needed to achieve this is robust environmental legislation to allow courts to deliver and impose more stringent sentences, a clear legal mandate to ensure that these courts can be established and operate continuously and proper training and education of individuals tasked

[292] Kruger R 'The Silent Right: Environmental rights in the Constitutional Court of South Africa' *Constitutional Court Review* 9 (2019) 491
[293] www.stopillegalfishing.com (accessed on 5 November 2020)
[294] www.stopillegalfishing.com (accessed on 5 November 2020)
[295] www.stopillegalfishing.com (accessed on 5 November 2020)
[296] www.stopillegalfishing.com (accessed on 5 November 2020)

with presiding and prosecuting these matters. In the light of the Uzani[297] judgment private prosecution can also be pursued in these courts.

The existing practices in South Africa are clearly not effective and environmental courts would present opportunity to mainstream environmental issues and build a stronger and improved environmental jurisprudence[298]. The Criminal compliance and enforcement statistics, as well as the administrative and civil enforcement statistics mentioned in Chapters 3 and 4 above, are indicative of the fact that change is needed in South African environmental compliance and enforcement.

I am thus of the view that the establishment of environmental courts and tribunals will have a positive effect on compliance and enforcement in South African environmental law. Together with the improvement of the challenges identified in this thesis, I foresee no reason why the state of our compliance and enforcement regime cannot be of better quality.

(28 292 words)

[297] Uzani Environmental Advocacy CC v BP Southern Africa (Pty) Ltd (CC82/2017) [2019] ZAGPPHC 86; [2019] 2 All SA 881 (GP); 2019 (5) SA 275 (GP) (1 April 2019)

[298] Kruger R 'The Silent Right: Environmental rights in the Constitutional Court of South Africa' *Constitutional Court Review* 9 (2019) 492

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