

UNIVERSITY OF WESTERN CAPE



FACULTY OF LAW

**‘PUBLIC PARTICIPATION AND ENVIRONMENTAL LAW: A SOUTH
AFRICAN PERSPECTIVE’**

A MINI- THESIS SUBMITTED IN PARTIAL FULFILMENT OF THE REQUIREMENTS
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UNIVERSITY OF THE WESTERN CAPE.

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Declaration

I declare that Public Participation and Environmental Law: A South African Perspective is my own work, which it has not been submitted before for any degree or examination in any other university, and that all sources I have used or quoted have been indicated and acknowledged as complete references.

Mzubanzi Sisilana

Signed at Cape Town.....



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Key words

Ecosystems

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Environmental protection

Environmental Democracy

Environmental Governance

Human rights

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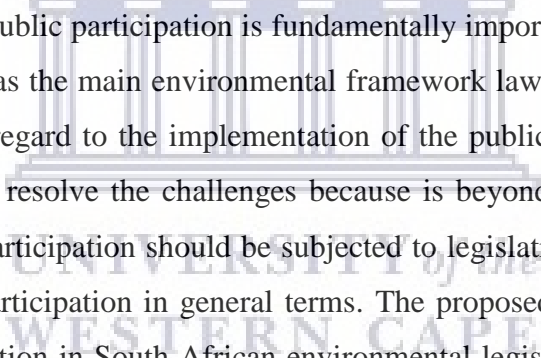
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Abstract

The Constitution of the Republic of South Africa ‘despite being one of the world’s most liberal constitutions, South Africans still have no transparent and participatory mechanisms for deciding democratically on the uptake of new technologies or development projects, even those which impact on millions of lives and livelihoods. There are limited opportunities for intervention in very circumscribed public participation processes, which are often derisory in the sharing of any sovereignty with citizens in the name of producing better public policy. When citizens are left out of debates confined to government and the business community, the only means of influencing policy is to petition, protest, or litigate, usually after the horse has bolted.’ Public participation is a very delicate issue in South Africa due to the history of the exclusion of certain people from the process of governance. When governments and business sectors make decisions about land development and natural resources, they certainly impact on the health, livelihoods and quality of life of local communities. Hence, it is vital that the public should have a right to be involved in environmental decision-making in order to enable them to know what is at stake, to be able to participate in the decision itself, and to have the capacity to challenge decisions that violate human rights and ecosystems.

This study seeks to demonstrate that public participation is fundamental to the protection of human rights, especially the rights of the most marginalised and vulnerable persons. Environmental rights generally require respect and protection by the government as well as positive action on the part of organs of state towards their fulfilment. Encouraging public participation should be the first step in promoting equity and fairness in the sustainable development context. This is important because when essential rights are lacking as between the government and the public, decisions that damage communities and the environment cannot be remedied. This validation is done by analysing the International law with regard to the concept of public participation and regard is made to binding international instruments and soft law instruments. The study proceeds to critically explore Constitutional provisions that encourage public participation and the various legislative reforms that also encourage the notion. The analysis concludes that public participation is not a stand-alone right in the Constitution; it finds application through a contextual and purposive interpretation of the provisions in the Constitution. The study argues that public participation is a tool used to realise

substantive rights in the Bill of Rights, including environmental rights. The study proceeds further to expose public participation within South African environmental legislation, NEMA being the primary environmental legislation that constructs the basic legal framework for the environmental rights guaranteed in section 24 of the Constitution. NEMA specifically requires participation of all interested and affected parties in environmental governance to be promoted, and that all people must have the opportunity to develop the understanding, skills and capacity necessary for achieving equitable and effective participation, and that participation by vulnerable and disadvantaged persons must be ensured. While NEMA encourages public participation, it is faced with challenges, in that it does not state how participation should be facilitated and scholars argue that failure diminishes the efficacy particularly with regard to enforcement because NEMA does not define public participation and as such public participation is not aligned with an informed and clear understanding of what it entails, it poses challenges in promoting and enforcing environmental rights enshrined in the Constitution.



The study concludes that public participation is fundamentally important for the protection of the environment. NEMA, as the main environmental framework law and other laws, like the NWA, are deficient with regard to the implementation of the public participation and these legislation reforms cannot resolve the challenges because is beyond their scope. The study recommends that public participation should be subjected to legislative reform that will deal specifically with public participation in general terms. The proposed legislation reform will strengthen public participation in South African environmental legislation in order to ensure true environmental democracy.

Acronyms

EIA	Environmental Impact Assessment
IPILRA	Interim Protection of Informal Land Rights Act
MPRDA	Mineral and Petroleum Resources Development Act
NA	National Assembly
NCOP	National Council of Provinces
NEMA	National Environmental Management Act
NEMAQA	National Environmental Management Air Quality Act
NEMBA	National Environmental Management Biodiversity Act
NWA	National Water Act
UN	United Nations
PAIA	Promotion of Access to Information Act
PAJA	Promotion of Administration Justice Act



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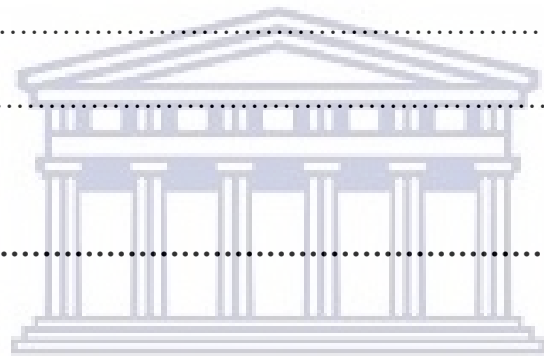
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CHAPTER 1

1.1 Introduction

Seemingly there is no legal definition of the concept ‘public participation’ in the environmental context. This view is affirmed by O’ Reilly who also states that ‘there is no definition of “public participation” ’ in the United Nations Convention on Access to Justice in Environmental Matters, which has been termed, arguably, the most important piece of environmental rights legislation in its time.¹ However, public participation is described as a process, by which interested and affected individuals, organisations, and government entities are consulted and included in the decision-making process.² Barton submits that, ‘public participation is a matter of a nation’s legal, political and administrative arrangements, and therefore closer to the heart of national sovereignty than many other issues in international environmental law. How a nation wishes to conduct its public affairs is a very political matter’.³ This process is essential to a democratic society because it promotes legitimacy and accountability in government decision-making process. Also involved citizenry become better educated about the issues that affect them.⁴ This process is very important in regard to environmental issues and environmental governance. Public participation is particularly important in South Africa, because before 1994, African, Coloured and Indian communities were excluded from meaningfully participating in decision-making within state and government institutions or structures. Legislation like the Group Areas Act⁵ and the Population Registration Act⁶ made it impossible for the majority of communities to engage with decision-makers openly and

¹ O’Reilly N ‘Come One, Come All? Public Participation in Environmental Law in Ireland: A Legal, Theoretical and Sociological Analysis’ (2005) 8 *Trinity College Law Review* 72.

² Bram AN ‘Public Participation Provisions need not contribute to Environmental Injustice’ (1996) 5 *Temple Political & Civil Rights Law Review* 149.

³ Barton B ‘Underlying Concepts and Theoretical Issues in Public Participation in Resources Development’ in Zillman D, Lucas A and Pring G (2ed) *Human Rights in Natural Resource Development: Public Participation in the Sustainable Development of Mining and Energy Resources* (2002) 84.

⁴ Bram AN ‘Public Participation Provisions need not contribute to Environmental Injustice’ (1996) 5 *Temple Political & Civil Rights Law Review* 153.

⁵ Act 41 of 1950.

⁶ Act 41 of 1950.

gainfully. In South Africa the considerations and levels of public participation are influenced not only by the legal and institutional framework, but also by other variables like the social and economic status of the citizens or affected parties.⁷

The South African legislature has made inroads in incorporating public participation in the laws regulating environmental decision-making. The South African law framework serves to show what an important role public participation is legally required to play as a result of a Bill of Rights that, *inter alia*, provides for an enforceable substantive environmental right.⁸ Section 24 provides that:

[E]veryone has the right-

- (a) to an environment that is not harmful to their health or wellbeing; and
- (b) to have the environment protected, for the benefit of the 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.⁹

Section 24(b) requires positive action on the part of government by means of reasonable legislative and other measures, which arguably implies a need for public participation in environmental decision-making at all levels.¹⁰ The Constitution further provides in section 32(1) that 'everyone has the right of access to: (a) any information held by the state, and (b) any information that is held by another person and that is required for the exercise or protection of any rights'.¹¹ This right includes the right that interested and potentially affected

⁷ Murombo T 'Beyond Public Participation: The Disjuncture between South Africa's Environmental Impact Assessment (EIA) Law and Sustainable Development' (2008) 3 *PER* 16.

⁸ Du Plessis A 'Public Participation, Good Environmental Governance and Fulfilment of Environmental Rights' (2008) 2 *PER* 16.

⁹ Constitution of the Republic of South Africa, 1996 (hereafter Constitution).

¹⁰ Du Plessis A 'Public Participation, Good Environmental Governance and Fulfilment of Environmental Rights' (2008) 2 *PER* 17.

¹¹ Section 32 of the Constitution.

parties have to full disclosure made to them as well as the right to be involved in every step of the decision-making process. The Constitution goes further to state that ‘national legislation must be enacted to give effect to this right and may provide for reasonable measures to alleviate the administrative and financial burden on the state’.¹² To fulfil this constitutional obligation Parliament promulgated legislation, such as the Promotion of Access to Information Act (“PAIA”)¹³ to ensure compliance with the rights enshrined in section 32 and in effect section 33 of the Constitution. This legislation gives everyone a right of access to any information held by the state and any information that is held by another person and that is required for the exercise or protection of any rights.¹⁴ The Promotion of Administrative Justice Act (“PAJA”)¹⁵ was enacted to ensure that administrative procedures are fair, the people are given the right to ask for reasons, and the citizens are given the right to have administrative action reviewed by a court or, where appropriate, an independent and impartial tribunal.¹⁶ These two pieces of legislation embrace the notion of public participation because once people receive information held by the state they are able to participate effectively in the decision-making process. Also, once people are given reasons for the administrative action that has impacted on them, they will be able to challenge such decision in a court.¹⁷ Section 152(1)(e) of the Constitution provides that one of the objectives of local government is to encourage the involvement of communities and community organisations in the matter of local government, thus embracing public participation.¹⁸ Section 195(e) and (g) state that as one of the basic values and principles governing public participation, the public must be encouraged to participate in policy making

¹² Section 32 of the Constitution

¹³ Act 2 of 2000.

¹⁴ Section 32(1) (a) & (b) of the Constitution.

¹⁵ Act 3 of 2000.

¹⁶ Section 33(3)(a) of PAJA.

¹⁷ Kotze JL ‘Environmental Governance’ in Peterson & Kotze (eds) *Environmental Compliance and Enforcement in South Africa: Legal Perspectives* (2009) 107-8 .

¹⁸ Section 152(1)(e) of the Constitution.

and that transparency must be fostered by providing the public with timely, accessible and accurate information¹⁹.

The National Environmental Management Act (“NEMA”)²⁰ was also promulgated against this background to give effect to this legislative requirement of the Constitution and serve as a framework for environmental protection. Section 2 of NEMA deals with the principles applicable throughout South Africa to the actions of all organs of state that may significantly affect the environment.²¹ These principles apply alongside all other appropriate and relevant considerations, including the state’s responsibility to respect, protect, promote and fulfil the social and economic rights as declared in chapter 2 of the Constitution, and in particular the basic needs of categories of persons disadvantaged by unfair discrimination.²² They serve as the general framework within which environmental management and implementation plans must be formulated.²³ They also serve as guidelines by reference to which any organ of state must exercise any function when taking any decision in terms of NEMA or any statutory provision concerning the protection of the environment.²⁴ They guide the interpretation, administration and implementation of NEMA, and any other law concerned with the protection or management of the environment.²⁵

The principles espoused by NEMA bind the actions of all organs of the state that may detrimentally affect the environment. These principles apply the constitutional rights in a practical environmental context, serve as the general framework within which environmental management and implementation plans are formulated, and also serve as guidelines for any

¹⁹ Section 195(e) and (g) of the Constitution.

²⁰ Act 107 of 1998 (hereinafter NEMA).

²¹ Section 2(1) of NEMA.

²² Section 2(1)(a) of NEMA.

²³ Section 2(1)(b) of NEMA.

²⁴ Section 2(1)(c) of NEMA.

²⁵ Section 2(1)(e) of NEMA.

state organ exercising any function concerning the protection of the environment.²⁶ These principles reflect public participation in environmental decision-making and promote decision-making taken in an open and transparent manner with access to information provided in accordance with the law.²⁷ NEMA requires participation of all interested and affected parties for environmental governance to be promoted, and all people to have the opportunity to develop the understanding, skills and capacity necessary for achieving equitable and effective participation, especially participation by vulnerable and disadvantaged persons.²⁸ NEMA requires that decisions must take into account the interests, needs and values of all interested and affected parties.²⁹ NEMA requires community well-being and empowerment to be promoted through environmental education and the raising of environmental awareness.³⁰ NEMA provides for the social, economic and environmental impacts of activities, including disadvantages and benefits, to be considered, assessed and evaluated, and the decision taken must be appropriate in light of such consideration and assessment.³¹ From the above discussion, it becomes clear that South African law affirms the importance of public participation and encourages people to be heard in a meaningful manner before decisions are taken which may lead to environmental injustice.

1.2 Problem Statement

David Fig states: ‘Despite having one of the world’s most liberal constitutions, South Africans still have no transparent and participatory mechanisms for deciding democratically on the uptake of new technologies or development projects, even those which impact on millions of lives and livelihoods. There are limited opportunities for intervention in very circumscribed

²⁶ Section 2(1)(b) and (c) of NEMA.

²⁷ Section 2(4)(k) of NEMA.

²⁸ Section 2(4)(f) of NEMA.

²⁹ Section 2(4)(g) of NEMA.

³⁰ Section 2(4)(h) of NEMA.

³¹ Section 2(4)(i) of NEMA.

public participation processes, which are often derisory in the sharing of any sovereignty with citizens in the name of producing better public policy. When citizens are left out of debates confined to government and the business community, the only means of influencing policy is to petition, protest, or litigate, usually after the horse has bolted'.³² He further states that

[I]n terms of environmental and health impacts, there has been a steady watering down of public participation, seen as a brake on development. The standard protocols used in environmental impact assessments have been streamlined, often resulting in too little time for sufficient public consultation. Often government resorts to the publication of opportunities for public comment in the *Government Gazette*, allowing only a 30-day response time. No efforts have been made nor have any resources been set aside to facilitate or promote effective public participation. The National Environmental Advisory Forum, which was a consultative body of civil society representatives established under NEMA, was subsequently abolished in later amendments to the Act.

This was done by amending section 24 of NEMA. The new provision empowers the Minister of Environmental Affairs to take an environmental decision, insofar as it relates to prospecting, exploration, mining or production, instead of the Minister responsible for Mineral Resources in certain circumstances; to clarify the provisions relating to integrated environmental authorisations and to provide for consultation with state departments and other stakeholders.³³

There are various objections often raised to the concept of public participation. Bram detects a few problems associated with public participation, in that 'increased public participation results in additional costs and delays to the final decision implementation'.³⁴ Also at times environmental issues and procedural process became more technical and public participation

³² Fig D 'Fracking and the Democratic Deficit in South Africa', available at <https://www.tni.org/files/dfig64.pdf> (accessed 29 February 2016).

³³ NEMA

³⁴ Bram A,N, 'Public Participation Provisions need not contribute to Environmental Injustice' (1996) 5 *Temple Political & Civil Rights Law Review* 154.

in decision-making more difficult.³⁵ This merely affects citizens of low income or racial minority communities because they are not able to expend vast amount of time or money following governmental hearings, lobbying politicians, and staying abreast of technical and procedural developments.³⁶ Public participation is often viewed as hampering the decision-making progress and as preventing swiftness in processes aimed at social and economic development.³⁷

While no legally accepted definition of public participation has been formulated, the Environmental Impact Assessment (“EIA”) Centre refers to public participation as a relationship between the public and the decision-maker that ranges from provision of information through various forms of increasingly interactive consultation to, ultimately, direct public control.³⁸ This viewpoint is supported by Du Plessis, who goes further to describe public participation in environmental decision-making as relating to the notion of participatory democracy and environmental justice and often comes to the fore in academic analyses of environmental rights.³⁹ Du Plessis regards public participation as all interactions between government and civil society, including the process by which government and civil society open dialogue, establish partnerships, share information, and otherwise interact to design, implement, and evaluate development policies, projects and programmes.⁴⁰ She states that public participation of communities in decision-making is regarded as a spin-off to

³⁵ Bram AN ‘Public Participation Provisions need not contribute to Environmental Injustice’ (1996) 5 *Temple Political & Civil Rights Law Review* 154.

³⁶ Bram AN ‘Public Participation Provisions need not contribute to Environmental Injustice’ (1996) 5 *Temple Political & Civil Rights Law Review* 155.

³⁷ Du Plessis A ‘Public Participation, Good Environmental Governance and Fulfilment of Environmental Rights’ (2008) 2 *PER* 23.

³⁸ EIA Centre Review Paper, Consultation and Public Participation in the EIA Process’ available at <http://www.art.man.ac.uk/EIA/publications> (accessed 29 February 2016).

³⁹ Du Plessis A ‘Public Participation, Good Environmental Governance and Fulfilment of Environmental Rights’ (2008) 2 *PER* 12.

⁴⁰ Du Plessis A ‘Public Participation, Good Environmental Governance and Fulfilment of Environmental Rights’ (2008) 2 *PER* 12.

decentralisation as a contemporary trend in local governance.⁴¹ The aim of public participation is generally to improve the lives of citizens and the actions of government. In order to exercise this responsibility, citizens must be granted certain rights, including access to information, the right to participate in environmental decision-making and to be able to challenge environmental decisions. O'Reilly perceives the importance of public participation in environmental matters as being attached to the growing concept of 'sustainable development' in environmental regulation that regards protection of the environment as the obligation and concern of all citizens.⁴²

1.3 Significance of the problem

Public participation is a very important process and is the instrument that can be used to facilitate the protection of environmental rights, promote sustainable development, embrace environment governance, and environmental democracy. This research will look at how the concept of 'public participation' is encouraged by the South African jurisprudence to provide meaningful environmental protection, and how it can be used to strengthen the legal framework in South Africa in order to promote the environmental right as enshrined in the Constitution. This research will also identify the challenges experienced within legislation frameworks in implementing effective public participation in environmental decision-making. This will be done by reviewing international environmental law and critically analysing South African environmental law.

⁴¹ Du Plessis A 'Public Participation, Good Environmental Governance and Fulfilment of Environmental Rights' (2008) 2 *PER* 12.

⁴² O'Reilly N 'Come One, Come All? Public Participation in Environmental Law in Ireland: A Legal, Theoretical and Sociological Analysis' (2005) 8 *Trinity College Law Review* 72.

Public participation is a sensitive issue in South Africa due to the history of the exclusion of certain people from the process of governance. When governments and business sectors make decisions about land development and natural resources, they certainly impact on the health, livelihoods and quality of life of local communities. Therefore, it is imperative that the public should have a right to be involved in environmental decision-making in order to enable them to know what is at stake, to be able to participate in the decision itself, and to have the capacity to challenge decisions that violate human rights and ecosystems.

1.4 Research question

Does South African environmental legislation facilitate the promotion of public participation pursuant to section 24 of the Constitution?

1.5 Argument

Public participation is fundamental to the protection of human rights, especially the rights of the most marginalised and vulnerable persons. Environmental rights generally require respect and protection by the government as well as positive action on the part of organs of state towards their fulfilment.⁴³ Encouraging public participation should be the first step in promoting equity and fairness in the sustainable development context. This is important because when essential rights are lacking as between the government and the public, decisions that damage communities and the environment cannot be remedied. This will require co-operation between the government, industry, public community groups (NGOs), advocates, industrial leaders, workers, academics and healthcare professionals to address environmental

⁴³ Du Plessis A 'Public Participation, Good Environmental Governance and Fulfilment of Environmental Rights' (2008) 2 *PER* 7.

issues.⁴⁴ This implies that for all those whose daily lives are adversely reflected by the quality of their environment, participation in environmental decision making is essential. Access to environmental information for all those who choose to participate in decision-making is integral to environmental matters.⁴⁵

1.6 Literature review

Scholars have written extensively on the concept of public participation. David Takacs argues that environmental issues are best handled with the participation of all concerned citizens at the relevant level. At the national level, each individual shall have appropriate access to information concerning the environment that is held by public authorities, including information on hazardous materials and activities in their communities and the opportunity to participate in the decision-making process.⁴⁶ Du Plessis describes public participation in layman's terms as the communication of views or concerns on public issues by those concerned or affected.⁴⁷ Public participation of communities in decision-making is regarded as a spin-off of decentralisation as a contemporary trend in local governance.⁴⁸ The EIA Centre regards public participation as a relationship between the public and the decision-maker that ranges from provision of information through various forms of increasingly interactive consultation to, ultimately, direct public control.⁴⁹ In both international and national contexts there is no contrary view. Davies avers that the term 'public participation' is vague; however, in its most general formulation it is any practice or activity through which individuals who are not

⁴⁴ Hazen S Director of the Environmental Assistance Division, Environmental Protection Agency, Washington D.C. available at <http://www.ourplannet.com/imgversn/86/hazen.html> (accessed 18 June 2015).

⁴⁵ Hazen S Director of the Environmental Assistance Division, Environmental Protection Agency, Washington D.C. available at <http://www.ourplannet.com/imgversn/86/hazen.html> (accessed 18 June 2015).

⁴⁶ Takacs D 'Environmental Democracy and Forest Carbon' (REDD) (2014) *Lewis and Clark School* 44 71

⁴⁷ Du Plessis A 'Public Participation, Good Environmental Governance and Fulfilment of Environmental Rights' (2008) 2 *PER* 6.

⁴⁸ Du Plessis A 'Public Participation, Good Environmental Governance and Fulfilment of Environmental Rights' (2008) 2 *PER* 6.

⁴⁹ EIA Centre Review Paper, 'Consultation and Public Participation in the EIA Process' available at <http://www.art.man.ac.uk/EIA/publications> (accessed 29 February 2016).

government officials express their views on political or policy matters.⁵⁰ This view is supported by Spyke who states that public participation is difficult to define because it takes so many forms. In its broadest form, participation can include education and information, review and reaction, and interaction and dialogue.⁵¹ It is accepted that the notion of public participation is based on the belief that those who are affected by a decision have a right to be involved in the decision-making process.⁵² Public participation is a concept that may be defined differently by different people and in a variety of contexts. To some this is a concept that can be used interchangeably with concepts such as civil participation, community participation and citizen participation.⁵³ Phooko agrees with this narrative in that, whilst the Constitution recognises the need for public participation, there is no agreed universal definition of what it means.⁵⁴ According to Madlala, public participation is the creation of opportunities and avenues for communities to express their views and opinions in matters of governance either directly or indirectly and communities must be engaged from the planning stage to the implementation and evaluation phases of a particular activity or project to ensure the transfer of skills, knowledge and ownership of the process to local people.⁵⁵ Mathebula sees the concepts differently in context, interpretation, meaning and application. To others the terms 'public involvement' and 'participation' are used as buzzwords for democracy through participation.⁵⁶

⁵⁰ Davies CJ, 'Environmental ADR and Public Participation' (1999-2000) 34 *VAL* 389.

⁵¹ Spyke NP 'Public Participation in Environmental Decision Making at the New Millennium: Structures New Spheres of Public Influence' (1998-1999) *Environmental Affairs Legal Review* 267.

⁵² International Association for Public Participation (2007) IAP2 Core Value, available at <https://www.iap2.org> (accessed 23 August 2018).

⁵³ Sebola MP 'Communication in South African Public Participation Process' The effectiveness of Communication Tools (2017) *African Journal of Public Affairs* 25.

⁵⁴ Phooko MS 'What should be the form of public participation in the law making processes? An analysis of South African cases (2014) *Obiter* 39-4.

⁵⁵ Madlala S *Participation in service delivery* (2005) Paper presented at the Service Delivery Conference in Johannesburg (2005).

⁵⁶ Mathebula N 'Community participation in the South African local government dispensation: A public administration scholastic misnomer' (2015) *International Public Administration Review* 185-199.

Nyalunga contends that public participation is a concept that is relatively new in South Africa, which suggests that there is a likelihood of some learning curves for the South African government in achieving a true success of what could be termed a public participation method.⁵⁷ On the other side, Rowe and Frewer perceive public participation as a concept that is synonymous with democracy, involvement, engagement, transparency and good governance.⁵⁸ Bozo and Hiemer concur with this analysis and go further to say that without these important elements the process of public participation may be thought of as having been flawed in implementation.

This concept is particularly important to the South African context because the Constitution is based on principles of good governance, and participation is a right that holds government accountable to the public.⁵⁹ Scholars argue that a strong and sound public participation process is deeply rooted in its recognition as the public as engines of policy formulation and decision-making. The involvement of the public in policy and decision-making is crucial and makes the lives of the policy makers simple rather than complex in the sense that the public themselves speak out in policy formulation and decision-making.⁶⁰ Draai and Taylor observe public participation as a proactive means to governance, assuming that the process is not entirely predefined in the interest of a particular but rather a holistic learning process.⁶¹ Roodt in his view, aligns the notion of public participation in essence to a political process that essentially should not be underpinned by party-political rhetoric; rather, the aim should be to establish

⁵⁷ Nyalunga D 'Enabling environment for public participation in local government' (2006) *International NGO Journal* 30.

⁵⁸ Rowe G and Frewer L.J 'A typology of public engagement mechanisms' (2005) *Science, Technology Human Values* 251-290.

⁵⁹ Bozo B and Hiemer L Community media and public participation – An unused potential, available at <http://www.afesis.org.za/local-economic-development> (accessed 13 September 2018).

⁶⁰ Bozo B and Hiemer L 'Community media and public participation – An unused potential, available at <http://www.afesis.org.za/local-economic-development> (accessed 13 September 2018).

⁶¹ Draai E and Taylor D 'Public Participation For Effective Service Delivery: A Local Government Perspective' (2009) *Journal of Public Administration* 113.

communication links among, *inter alia* ward committees, public officials and communities that allow for relationship-building to facilitate insight into the need for development as well as the monitoring and evaluation of projects.⁶²

The above arguments offer no acceptable or accurate definition of the meaning of public participation; the concept can take various forms. Nevertheless, it encourages both representation and participation by members of the community to meaningfully influence the decisions that affect their lives. It engages community members in learning and understanding community issues and the economic, social environmental, political, psychological and other impacts of associated courses of action. It incorporates the diverse interests and cultures of the community in the development process, and disengages support for any effort that is likely to adversely affect the disadvantaged members of a community. Work actively enhances the leadership capacity of community members, leaders and groups within the community. It also utilises a community's diversity to deepen shared understanding and procedures – outcomes of long-term benefit to the whole community or society.⁶³

O'Reilly argues that in recent times there has been a shift from command and control regulation to the idea of shared responsibility in environmental matters which views the protection of the environment as the obligation and concern of all citizens.⁶⁴ This is reflected in the growing importance attached to the concept of 'sustainable development' in environmental regulation as well as the increased emphasis on the significance of public

⁶² Roodt M 'Participation, civil society and development' (2001) in N Gathram *Participation, Civil Society and Social Work Practice* 13.

⁶³ Public Participation Framework for the South African Legislative Sector, available at <https://www.sals.gov.za/docs/pubs/ppf.pdf> (accessed 2 September 2016).

⁶⁴ O'Reilly N 'Come One, Come All? Public Participation in Environmental Law in Ireland: A Legal, Theoretical and Sociological Analysis' (2005) 8 *Trinity College Law Review* 72.

participation in environmental matters.⁶⁵ The latter is considered to be fundamental to the concept of ‘sustainable development’ because it increases the transparency and accountability of the government’s work in environmental matters and enables members of civil society to express their concerns.⁶⁶ Du Plessis is of the view that public participation in environmental affairs requires mechanisms to facilitate the involvement and contribution of people in decision-making processes.⁶⁷ The modalities of participation are determined in different countries by their particular laws and public authorities as well as by traditions and culture.⁶⁸ She takes as an example the position in South Africa, where explicit provision is made for public participation by means of *inter alia*, ward communities in local government, public meetings, public comment following press notices and integrated development planning in a range of different discussions relating to laws and policies.⁶⁹ This signifies the importance of public participation in environmental decision-making. The importance of public participation is further highlighted by Du Plessis elucidating that:

- (i) Affected persons likely to be otherwise unrepresented in environmental assessment and decision making processes are provided with an opportunity to present their views
- (ii) Communities may provide useful additional information to decision makers especially when cultural, social or environmental values are involved that cannot be quantified easily;
- (iii) Accountability of political and administrative decision makers is likely to be reinforced if environmentally relevant processes are open to the public view. Openness puts pressure on administrators to follow the required procedure in all cases;

⁶⁵ O’Reilly N ‘Come One, Come All? Public Participation in Environmental Law in Ireland: A Legal, Theoretical and Sociological Analysis’ (2005) 8 *Trinity College Law Review* 72.

⁶⁶ Andrusyevych A ‘The Right to Public Participation in Environmental Decision-Making in Ukraine: Challenge of Compliance’ (2008) 2 *Human Rights & International Legal Discourse* 213.

⁶⁷ Du Plessis A ‘Local Environmental Governance and the Role of Local Government in Realising section 24 of South African Constitution (2010) *REV* 12.

⁶⁸ Du Plessis A ‘Public Participation, Good Environmental Governance and Fulfilment of Environmental Rights’ (2008) 2 *PER* 12.

⁶⁹ Du Plessis A ‘Public Participation, Good Environmental Governance and Fulfilment of Environmental Rights’ (2008) 2 *PER* 12.

- (iv) Without integrating the viewpoints of citizens, environmental policy runs the risk of being delayed early in the implementation phase. Public participation enhances community ownership of decisions and resultant outcomes because of the community being part of the wider decision making process;
- (v) Stakeholder engagement may result in partnerships or alliances between interested parties and local government; and
- (vi) Public confidence in the reviewers and decision-makers is enhanced since citizens clearly can see in every case that all environmentally relevant issues have been fully and carefully considered.⁷⁰

On the other hand, Simon suggests that public participation should be used as one criterion for evaluating the effectiveness of regulatory institutions.⁷¹ This suggestion is based on the fact that public participation has been under discussion in different contexts, emerging from which is a notion of ‘effective participation’, not merely formal participation.⁷² In his view, effective participation does not just mean a notice published in a newspaper or a public meeting arranged by an agency. He goes further to say that real participation involves getting inside and being part of the process and engaging with what is going on in the process while it is unfolding, not after it is over.⁷³ Sewell and O’Riordan contend that political culture can influence the nature and effectiveness of participation. They further argue that although many attempts have been made to increase public participation in environmental decision-making, the political culture of most western countries has not always been able to accommodate it successfully.⁷⁴ On the other hand, Du Plessis argues that the effectiveness of public participation requires innovation and creativity on the part of governments’ decision-makers.⁷⁵ It has been observed from the

⁷⁰ Du Plessis A ‘Public Participation, Good Environmental Governance and Fulfilment of Environmental Rights’ (2008) 2 *PER* 12.

⁷¹ Simon AE ‘Valuing Public Participation’ (1999) *Ecology Law Quarterly* 725.

⁷² Simon AE ‘Valuing Public Participation’ (1999) *Ecology Law Quarterly* 757.

⁷³ Simon AE ‘Valuing Public Participation’ (1999) *Ecology Law Quarterly* 757.

⁷⁴ Sewell DWR & O’Riordan T ‘The culture of participation in environmental decision-making’ 1976 (16) *Natural Resources Journal* 10.

⁷⁵ Du Plessis A ‘Public Participation, Good Environmental Governance and Fulfilment of Environmental Rights’ (2008) 2 *PER* 25.

submissions above that there are difficulties experienced in implementing public participation in decision-making in environmental matters. Du Plessis is also of the view that the notion of public participation is facing challenges. Although public participation is widely advocated, few actual guidelines exist on how to achieve community involvement.⁷⁶ Public participation is often viewed as hampering decision-making progress and as preventing swiftness in processes aimed at social and economic development.⁷⁷

1.7 Research Methodology

This study will utilise a qualitative desktop research methodology relying on primary sources such as legislation, official documents, international instruments, and case law as well as secondary sources such as academic books and journal articles. The study will, through the research, critically examine and analyse these sources in order to better understand the concept of public participation in general and the challenges faced by the notion of public participation in environmental law in particular. This analysis will be conducted from a South African perspective. Although regard will be had to international practices, this will be limited to general discussion of the practice of public participation and the difficulties faced in facilitating the promotion of public participation in environmental law. The outcome of this research will illustrate how environmental legislation facilitates the promotion of public participation pursuant to section 24 of the Constitution.

1.8 Chapter structure

This study will be divided into five chapters.

⁷⁶ Du Plessis A ‘Public Participation, Good Environmental Governance and Fulfilment of Environmental Rights’ (2008) 2 *PER* 29.

⁷⁷ Du Plessis A ‘Public Participation, Good Environmental Governance and Fulfilment of Environmental Rights’ (2008) 2 *PER* 25.

Chapter 1

This chapter outlines the introduction to the study, the problem statement, the significance of the research, the literature review, the methodology to be used and the arguments.

Chapter 2

This chapter provides general discussion of International Law and International Environmental Law with regard to public participation.

Chapter 3

This chapter provides a constitutional analysis of the concept of public participation and statutes that gives effect to the concept.

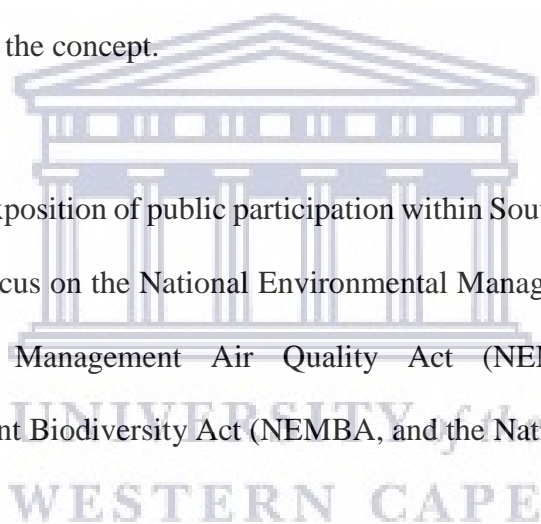
Chapter 4

This chapter provides an exposition of public participation within South African environmental legislation with specific focus on the National Environmental Management Act (NEMA), the National Environmental Management Air Quality Act (NEMAQA), the National Environmental Management Biodiversity Act (NEMBA), and the National Water Act (NWA).

Chapter 5

This chapter provides a conclusion and recommendations

This thesis concludes that public participation is essential to a democratic society on account in promoting legitimacy and accountability in government decision-making and its protection of fundamental human rights. It is therefore important to ensure that mechanisms are put in place to facilitate the involvement and contribution of people in the decision-making process. Environmental legislation has attempted, through other environmental laws, to give effect to the notion of public participation; however, all these legislative reforms are faced with



challenges in effectively implementing public participation. Hence, a recommendation is made for the drafting of a new law called the Public Participation Act to ensure that public participation provisions are enforced.



CHAPTER 2

GENERAL DISCUSSION OF INTERNATIONAL LAW AND INTERNATIONAL ENVIRONMENTAL LAW WITH REGARD TO PUBLIC PARTICIPATION.

2.1 Introduction.

The domestic environmental laws of all countries, including South Africa, are influenced by international law, as many environmental problems know no political boundaries. Globalisation, international trends and pressures have driven the development of national environmental laws and have resulted in developed and developing countries having a greater say in and influence on each other's environmental affairs.⁷⁸ The advent of a new democratic legal order has paved the way for a 'renaissance of international law' in South Africa.⁷⁹ The endorsement in chapter 14 of the Constitution of both international agreements and rules of customary international law in South African law is particularly pertinent to environmental concerns, as most of the emerging principles of international law incorporated into South African domestic law have their origins in international law or international 'soft' law.⁸⁰ Birnie and Boyle argue that international environmental law is merely part of international law as a whole, rather than a separate, self-contained discipline.⁸¹ They further argue that there is no distinct body of 'international environmental law' with its own sources and methods of law-making deriving from principles peculiar to environmental concerns.⁸² International environmental law is a branch of public international law.⁸³ It can be concluded from this argument that international law and international environmental law are interwoven. The resolution of international legal problems entails the application of international law in an

⁷⁸ Boyle AE and Redgewell C, *International Law and the Environment* 3 ed (2009) 3.

⁷⁹ Glazewski J *Environmental Law in South Africa* (2013) 2A-4.

⁸⁰ Glazewski J *Environmental Law in South Africa* (2013) 2A-4.

⁸¹ Birnie PW and Boyle AE *International Law and the Environment* 2 ed (2002) 1.

⁸² Birnie PW and Boyle AE *International Law and the Environment* 2 ed (2002) 1.

⁸³ Kiss D and Shelton D *Guide to International Environmental Law* (2007) 1.

integrated manner; thus international environmental law is nothing more or less than the application of international law to environmental problems.⁸⁴ Public participation is a general principle of law that firmly forms a part of the framework of international environmental law.⁸⁵ It influences the formation, content, interpretation and further development of international environmental law.⁸⁶ As such, it promotes a democratic process and facilitates the inclusion of non-state actors in environmental decision-making at national, regional and international level, by giving non-state actors the tools to influence environmental decision – enabling them to implement international environmental law.⁸⁷ The aim of this chapter is to give a general perspective of international law and environmental law with regard to public participation. The chapter will proceed to discuss how international law finds application within South African law, and a specific reference will be made to relevant provisions in the Constitution.

2.2 International Law and Public Participation

International law rests on several foundational principles, some of which have particular importance for the development of international environmental law.⁸⁸ Some scholars argue that public participation is one of the principles of international law. This argument is supported by Collins who contends that public participation is recognised as a general principle of international law since it gives state action legitimacy, fulfils the democratic process and is generally linked to human rights.⁸⁹ Its normative evolution is rooted in various binding and

⁸⁴ Birnie PW and Boyle AE *International Law and the Environment* 3 ed (2009) 2.

⁸⁵ Van Bekhoven J 'Public Participation as a General Principle in International Environmental Law: Its Current Status and Real Impact' (2016) 2 *National Taiwan University Law Review* 259.

⁸⁶ Van Bekhoven J 'Public Participation as a General Principle in International Environmental Law: Its Current Status and Real Impact' (2016) 2 *National Taiwan University Law Review* 259.

⁸⁷ Van Bekhoven J 'Public Participation as a General Principle in International Environmental Law: Its Current Status and Real Impact' (2016) 2 *National Taiwan University Law Review* 259.

⁸⁸ Kiss D and Shelton D *Guide to International Environmental Law* (2007) 11.

⁸⁹ Collins D 'Environmental impact Statements and Public Participation in International Law' (2010) *Manchester Journal of International Economic Law* 4.

non-binding instruments of international, regional, and domestic origin.⁹⁰ The right to participate is emphasised in several international instruments, among them being article 25 of the International Covenant on Civil and Political Rights and article 21 of the Universal Declaration of Human Rights that recognise public participation as central to equitable socio-economic development. What follows is a brief discussion of the international instruments binding and non-binding that recognise the principle of public participation.

2.3 Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters (The Aarhus Convention)

This convention is one of the first binding international instruments on environmental matters. The right of participation in decision-making relating to environmental matters was first declared in this convention.⁹¹ The convention provides that signatory states must take all necessary legislative, regulatory and judicial steps to ensure that the public is able to exercise its right to public participation in environmental decision-making. Citizens have the right to readily accessible information regarding environmental decisions; the public should be made aware of the nature of the activity and its potential environmental impacts and be given a reasonable opportunity to engage in effective participation in the decision-making process, which involves timely notification of meetings and the right to submit comments. Parties are required to take the results of the public participation into account as far as possible.⁹² South Africa was not a signatory to this convention however, South African Constitution entrenched the right to access to information, the right to just administrative action, and the right to

⁹⁰ Mikadze K 'Public Participation in Global Environmental Governance and the Equator Principles: Potential and Pitfalls' (2012) *German Law Journal* 1391.

⁹¹ Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters (The Aarhus Convention) (1998).

⁹² Arts 4-9 Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters (The Aarhus Convention) (1998).

environment which is not harmful to health or well-being. All these three concepts are the main pillars of the Aarhus convention.

2.4 Espoo Convention

The Convention on Environmental Impact Assessment in a Transboundary Context (the Espoo Convention) requires that environmental impact assessments (EIA) be conducted by States which may have caused pollution that crosses international borders. The treaty contains extensive provisions for public participation. Article 2 requires each party to take necessary legal, administrative or other measures to implement the provisions of the convention with respect to proposed activities that are likely to cause significant adverse transboundary impact; and to establish an EIA procedure that permits public participation.⁹³ The Espoo Convention is central into bringing together all stakeholders in order to prevent environmental damage before it happens. The Convention prescribes that the affected party shall respond to the party of origin within the time specified in the notification, acknowledging receipt of the notification and indicating whether it intends to participate.⁹⁴

2.5 Soft Law Instruments

2.5.1 The Rio Declaration (Agenda 21)

The right of public participation was firmly entrenched in Rio de Janeiro in 1992.⁹⁵ One major objective of the Agenda 21 initiative is to allow every local government to formulate its own local Agenda 21 with regard to sustainable development.

Principle 10 of the Rio Declaration on Environment and Development provides that:

[E]nvironmental issues are best handled with participation of all concerned citizens, at the relevant level. At the national level, each individual shall have appropriate access

⁹³ The Convention on Environmental Impact Assessment in a Transboundary Context (1991).

⁹⁴ Article 3(3) of The Convention on Environmental Impact Assessment in a Transboundary Context (1991).

⁹⁵ Jodoin S, Duyck S, and Lofts K 'Public Participation and Climate Governance: An Introduction' (2015) 24(2) *RECIEL* 117.

to information concerning the environment that is held by public authorities, including information on hazardous material and activities in their communities, and the opportunity to participate in decision-making process. State shall facilitate and encourage public awareness and participation by making information widely available. Effective access to judicial and administrative proceedings, including redress and remedy, shall be provided.⁹⁶

This non-binding action plan categorises public participation in three main components, namely access to information, opportunity to participate in decision-making, and access to judicial and administrative proceedings and remedies.⁹⁷ The provisions of this action plan rely on assurance by the parties that these three components are implemented in their domestic legal systems.⁹⁸

2.5.2 Johannesburg Declaration on Sustainable Development

This summit followed Agenda 21 and reinforces the principle of public participation. Paragraph 26 of the summit states that:

[W]e recognize that sustainable development requires a long-term perspective and broad-based participation in policy formulation, decision-making and implementation at all levels. As social partners, we will continue to work for stable partnerships with all major groups, respecting the independent, important roles of each of them.⁹⁹

This summit strongly reconfirmed the principle of public participation and its importance for international environmental decision-making.

⁹⁶ United Nations Conference on Environment and Development, *Rio Declaration on Environment and Development* (1992).

⁹⁷ Principle 10 *Rio Declaration on Environment and Development* (1992).

⁹⁸ Fitzmaurice M 'Some reflections on public participation in environmental matters as a human right in international law' (2002) 2 *Non-State Actors and International Law* 17.

⁹⁹ Art 26 of Summit Johannesburg Declaration on Sustainable Development (2002).

2.5.3 The Prevention of Transboundary Harm from Hazardous Activities

The Prevention of Transboundary Harm from Hazardous Activities requires that States parties provide any States likely to be affected by an environmentally hazardous activity with relevant information regarding the risk involved and the harm which may result. This was the text adopted by the Commission at its fifty-third session, in 2001, and submitted to the General Assembly as a part of the Commission's report covering the work of that session.¹⁰⁰ Article 9 requires consultation on preventive measures in order to agree on the measures to prevent significant transboundary harm or to minimise the risk. On the other hand, article 13 requires states concerned, by such means as appropriate, to provide the public likely to be affected by an activity with relevant information relating to that activity, the risk involved and the harm which might result and to ascertain their views.¹⁰¹ All these international instruments demonstrate that the principle of public participation has been included in several environmental agreements adopted around the world,¹⁰² and this principle is a significant safeguard against environment degradation. Increased participation in the institutions and processes of international law is necessary for the implementation of socio-economic and environmental objectives.¹⁰³ The principle of public participation constitutes a cornerstone of the multilateral climate regime.¹⁰⁴ Therefore, it is argued that the principle of public participation is an internationally recognised concept which plays an essential role in the protection of the environment.

¹⁰⁰ The Convention on Environmental Impact Assessment in a Transboundary Context (1991).

¹⁰¹ Draft articles on Prevention of Transboundary Harm from Hazardous Activities (2001).

¹⁰² Ebbesson J 'Principle 10: Public Participation' *The Rio Declaration on Environment and Development: A Commentary* (2015) 287.

¹⁰³ Segger MCC and Khalfan A *Sustainable Development Law* (2006)164.

¹⁰⁴ Jodoin S, Duyck S, & Lofts K 'Public Participation and Climate Governance: An Introduction' (2015)24(2) *RECIEL* 117.

2.6 The Connection between International Law and South African Domestic Law

International law is binding at the international level, and it is no defence to breach of an international obligation on the ground that a state's domestic law differs or that the government of the state has failed to give effect to the international obligation.¹⁰⁵ Any contravention of an international obligation has certain consequences, which may lead to an order to cease the contravention or conform to the conduct of the law.¹⁰⁶ Ensuring compliance with international treaties and custom is one of the central issues in international law.¹⁰⁷ The principle of public participation has been given effect to by several treaties, some binding and some not binding; and South Africa has a duty to follow international law because the significance of international law is well recognised in the Constitution of South Africa. Birnie and Boyle argue that national law is the medium through which states will usually implement their international obligations and regulate the conduct of their own nationals and companies both inside their borders and beyond.¹⁰⁸ Section 231 regulates the signing, ratification, and implementation of international agreements or treaties.¹⁰⁹ Section 232 provides that customary international law is law in South Africa unless it is inconsistent with the Constitution or an Act of Parliament.¹¹⁰ On the other hand, section 233 forces the courts to interpret any legislation in conformity with international

¹⁰⁵ Kiss D and Shelton D *Guide to International Environmental Law* (2007) 16.

¹⁰⁶ Kiss D and Shelton D *Guide to International Environmental Law* (2007) 16.

¹⁰⁷ Kiss D and Shelton D *Guide to International Environmental Law* (2007) 18.

¹⁰⁸ Birnie PW and Boyle AE *International Law and the Environment* 2 ed (2002) 251.

¹⁰⁹ Section 231 of the Constitution provides:

(1) The negotiating and signing of all international agreements is the responsibility of the national executive.

(2) An international agreement binds the Republic only after it has been approved by resolution in both the National Assembly and the National Council of Provinces, unless it is an agreement referred to in subsection (3).

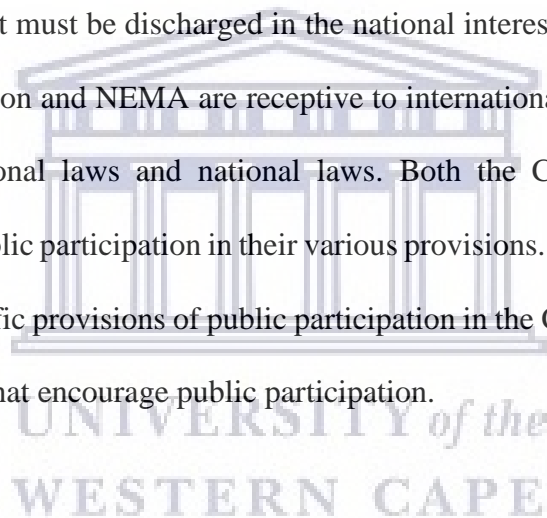
(3) An international agreement of a technical, administrative or executive nature, or an agreement which does not require either ratification or accession, entered into by the national executive, binds the Republic without approval by the National Assembly and the National Council of Provinces, but must be tabled in the Assembly and the Council within a reasonable time.

(4) Any international agreement becomes law in the Republic when it is enacted into law by national legislation; but a self-executing provision of an agreement that has been approved by Parliament is law in the Republic unless it is inconsistent with the Constitution or an Act of Parliament.

(5) The Republic is bound by international agreements which were binding on the Republic when this Constitution took effect.

¹¹⁰ Section 232 of the Constitution.

law over any alternative interpretation that is inconsistent with international law. Section 39(1)(b) also obliges the courts to consider international law when interpreting the Bill of Rights. According to the Constitutional Court, this provision embraces both binding and non-binding instruments of international law¹¹¹ and should be used as tools of interpretation.¹¹² Binding instruments includes treaties to which South Africa is a party or binding obligations resulting from such a treaty, such as United Nations Security Council resolutions and customary international law. Non-binding instruments include those which are not open to ratification, such as declarations of the UN General Assembly.¹¹³ These obligations also find expression in NEMA as a framework statute, and provide that international responsibilities relating to the environment must be discharged in the national interest.¹¹⁴ All these provisions indicate that the Constitution and NEMA are receptive to international law; and as such there is link between international laws and national laws. Both the Constitution and NEMA emphasise the need for public participation in their various provisions. The succeeding chapters will discuss in detail specific provisions of public participation in the Constitution, NEMA and other supporting statutes that encourage public participation.



2.7 Conclusion

This chapter affirms that international legal problems are resolved by the application of international law; and public participation is one of the recognised principles of international law, and its recognition gives state action legitimacy and fulfils the democratic process. There is a need to protect, preserve and improve the state of the environment for the benefit of present

¹¹¹ Dugard J 'Dugard's International Law A South African Perspective' (2005) 336-340.

¹¹² *State v Makwanyane and Another* (CCT3/94) [1995] ZACC 3; 1995 (6) BCLR 665; 1995 (3) SA 391; [1996] 2 CHRLD 164; 1995 (2) SACR 1 para 35.

¹¹³ De Wet E, and Du Plessis A 'The meaning of certain obligations distilled from international human rights instruments for constitutional environmental rights in South Africa' (2010) 10 *African Human Rights Law Journal* 347.

¹¹⁴ Section 2(4)(n) of NEMA.

and future generations. This can be achieved by giving citizens access to environmental information in order to be able to participate in decision-making process and have access to justice in environmental matters. Public participation as a principle is espoused by various binding and soft law international legal instruments that include the Aarhus convention and Agenda 21 initiative. These binding and soft law instruments are used as tools for interpretation. The Aarhus required signatory states to take all necessary legislative, regulatory and judicial steps to ensure the public is able to exercise its right to participate in environmental decision making. On the other hand Agenda 21 programme delineates public participation into three main components viz access to information, opportunity to participate in decision-making, and access to judicial and administrative proceedings and remedies. This action plan requires the parties to implement these three components in their domestic legal systems. South Africa has entrenched public participation in its various constitutional provisions and NEMA. This is because public participation is an international law principle and the South African Constitution recognised the importance of international agreements binding and non-binding in protecting human rights.



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CHAPTER 3:

CONSTITUTIONAL ANALYSIS OF PUBLIC PARTICIPATION AND STATUTES THAT GIVE EFFECT THERETO

3.1. Introduction

The late Chief Justice Pius Langa once held that: ‘The Constitution is located in a history which involves a transition from a society based on division, injustice and exclusion from the democratic process to one which respects the dignity of all citizens, and includes all in the process of governance.’¹¹⁵ Constitutional law provides a framework for the creation of law and the protection of human rights. South Africa’s history was characterised by high levels of state authoritarianism and state societal conflict from colonial times through to the beginning of a fully representative democracy.¹¹⁶ As a result the public was excluded from participating in any decision-making processes. The birth of democracy and the adoption of the Constitution served as a catalyst for community participation in government affairs.¹¹⁷ As such, the process of interpreting the Constitution must recognise the context in which it came about, and the Constitution’s goal of a society based on democratic values, social justice and fundamental human rights.¹¹⁸

¹¹⁵ *Investigating Directorate: Serious Economic Offences v Hyundai Motor Distributors (Pty) Ltd; in re Hyundai Motor Distributors (Pty) Ltd & Others v Smit NO & others* [2000] ZACC 12, 2001 (1) SA 545 (CC), 2000 (10) BCLR 1079 (CC) para 21.

¹¹⁶ Public Participation Framework for the South African Legislative Sector, available at <http://www.sals.gov.za/docs/pubs> (accessed 2 September 2016).

¹¹⁷ Williams JJ ‘Community Participation: Lessons from post-apartheid South Africa’ (2006) 27:3 *Policy Studies* 197.

¹¹⁸ *Investigating Directorate: Serious Economic Offences v Hyundai Motor Distributors (Pty) Ltd in re Hyundai Motor Distributors (Pty) Ltd & Others v Smit NO & Others* [2000] ZACC 12, 2001 (1) SA 545 (CC), 2000 (10) BCLR 1079 (CC) at para 21.

Before 1994, there were a few legislative provisions encouraging public participation in South Africa. The Constitution now guarantees the right to public participation through several of its provisions. Unlike most rights in the Bill of Rights, public participation is not provided for as a stand-alone right but finds application through a contextual and purposive interpretation of the provisions in the Constitution. Public participation has no uniform definition and as such it is devoid of universal application. However, as a point of departure, it has been referred to as the process which engages community members in understanding community issues that involve economic, social, environmental, political and other associated causes of action.¹¹⁹ Public participation seeks to allow for a consultative process to be initiated. As was noted by Du Plessis, our legal framework serves to show what an important role public participation legally is required to play as a result of a Bill of Rights that, *inter alia*, provides for an enforceable substantive right.¹²⁰ Section 24 of the Constitution was enacted as the ultimate source of all environmental law. This right affords everyone the right to an environment not detrimental to health or well-being.¹²¹ This environmental right forms part of the fundamental rights in the Bill of Rights intended to serve as the cornerstone of democracy, and its provision imposes duties on all three spheres of government to respect, protect, promote, and fulfil the environmental right.¹²² Glazewski states that the inclusion of an environmental right in the Bill of Rights must be seen in the context of policies, principles, legislation and case law developed on the advent of the democratic Constitution in 1994.¹²³ It is argued that the notion of public participation is a tool used to realise substantive rights in the Bill of Rights, including environmental rights. As such, it is claimed that a nexus exists between the idea of public

¹¹⁹ Draai E and Taylor D 'Public participation for effective service delivery: a local government perspective' (2009) *Journal of Public Administration* 113.

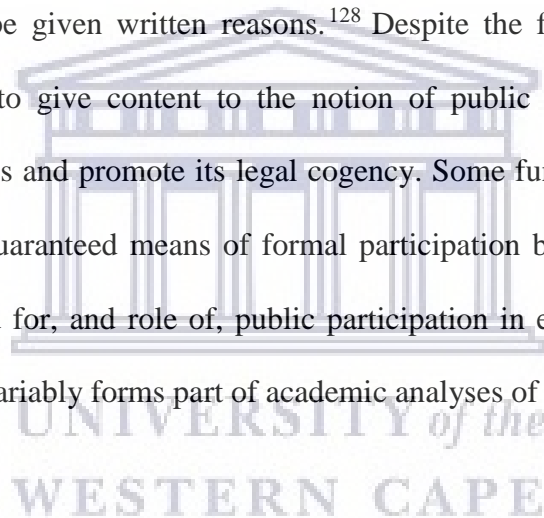
¹²⁰ Du Plessis A 'Public Participation, Good Environmental Governance and Fulfilment of Environmental Rights' (2008) 2 *PER* 16.

¹²¹ Section 24 of the Constitution.

¹²² Du Plessis A 'Local Environmental Governance and the role of local government in realising section 24 of the South African Constitution' (2010) 2 *STELL LR* 268.

¹²³ Glazewski J *Environmental Law in South Africa* (2013) 5-3.

participation and the fulfilment of environmental rights.¹²⁴ Public participation is facilitated through statutes such as PAIA and PAJA, both of which seek to give effect to other constitutionally entrenched rights. PAIA guarantees the right to any information held by the state as well as any information held by a private person which is required for the exercise or protection of any rights.¹²⁵ As Ngcobo CJ held, without access to information, the ability of citizens to make responsible decisions and participate meaningfully in public life is undermined.¹²⁶ This guarantee is supplemented by the rights guaranteed under PAJA which afford everyone the right to administrative action which is lawful, reasonable and procedurally fair.¹²⁷ Furthermore, PAJA entitles anyone whose rights have been adversely affected by administrative action to be given written reasons.¹²⁸ Despite the fact that no independent legislative reform exists to give content to the notion of public participation, the above guarantees directly buttress and promote its legal cogency. Some fundamental rights may be worthless if there is no guaranteed means of formal participation by rights holders in their implementation. The need for, and role of, public participation in environmental matters at different levels almost invariably forms part of academic analyses of environmental rights.¹²⁹



The aim of this chapter is to demonstrate that the drafting of the Constitution intended to include the concept of public participation, and that this was done to influence government policy outcomes so that they would reflect ‘the will of the people’¹³⁰ in accordance with the

¹²⁴ Du Plessis A ‘Local Environmental Governance and the Role of Local Government in realising section 24 of the South African Constitution’ (2010) *STELL LR* 13.

¹²⁵ Preamble of PAIA

¹²⁶ *President of the Republic of South Africa and Others v Mail and Guardian Ltd* 2012(2) SA 50 (CC) (2) BCLR 181 para 10.

¹²⁷ Preamble of PAJA

¹²⁸ Section 5 of PAJA

¹²⁹ Du Plessis A ‘Local Environmental Governance and the Role of Local Government in realising section 24 of the South African Constitution’ (2010) *STELL LR* 13. see also *Occupiers of 51 Olivia Road, Berea Township and 197 Main Street Johannesburg v City of Johannesburg and Others* (2008) ZACC para 7.

¹³⁰ Public Participation Framework for the South African Legislative Sector, available at <http://www.sals.gov.za/docs/pubs> (accessed 2 September 2016)

preamble of the Constitution. This chapter will analyse the importance of public participation in relation to section 24 of the Constitution, sustainable development, environmental governance, and environmental democracy and will proceed to evaluate the salient provisions in the Constitution that promote the notion of public participation. In concluding, the chapter will consider the legislation that supports the facilitation of public participation.

3.2 Constitutional perspective of public participation

South Africa occupies a unique global position in that public participation is constitutionally entrenched. The Constitution is the cornerstone of the South African government's attempts, after 1994, to entrench socio-economic and political rights for all and encourage citizens' involvement in decisions that affect them.¹³¹ It includes people's rights to equality, property, and 'an environment that is not harmful to their health or well-being',¹³² as well as a number of important provisions for civic participation and accountable governance, including a far-reaching *locus standi* clause and guarantees for citizens' rights to information and just administrative action. These constitutional rights have played an important role in influencing decisions by the courts related to public participation.¹³³

The Constitution provides that the National Assembly (NA) is elected to represent the people and to ensure government by the people under the Constitution. It does this by choosing the President, by providing a national forum for public consideration of issues, by passing legislation and by scrutinising and overseeing executive action.¹³⁴ At the very outset,

¹³¹ Hamann R 'South African Challenges to the theory and practice of public participation in environmental assessment' (2003) 10 *SAJELP* 23.

¹³² Section 24 of the Constitution.

¹³³ Hamann R 'South African Challenges to the theory and practice of public participation in environmental assessment' (2003) 10 *SAJELP* 24.

¹³⁴ Section 42(3) of the Constitution.

Parliament is enjoined to provide a national forum for public consideration of issues, thus guaranteeing the right to publicly participate. Furthermore, section 59 provides that the NA must facilitate public involvement in the legislative and other processes of the Assembly and its committees,¹³⁵ and conduct its business and the business of its committees publicly and in an open manner.¹³⁶ Similarly, section 42(4), read with section 72(1), outlines the role of the National Council of Provinces (NCOP) and how it too is enjoined to provide a national forum for public consideration of issues affecting the provinces by facilitating public involvement in its legislative¹³⁷ and other processes and those of its committees,¹³⁸ and conducting its business in an open manner, and holding its sittings, and those of its committees, in public.¹³⁹ Local government is also mandated by the Constitution to encourage the involvement of communities and community organisations in its matters.¹⁴⁰ Local government is important to facilitate sustained accountability and confidence in governance by engaging with the citizenry in a particular manner to effect improved service delivery.¹⁴¹ Building local democracy is a central role of local government as required in terms of various legislative prescripts, and municipalities should develop strategies and mechanisms to continuously engage with local communities.¹⁴²

¹³⁵ Section 59(1)(a) of the Constitution.

¹³⁶ Section 59(1)(b) of the Constitution.

¹³⁷ See also section 118(1) which provides for public access to and involvement in provincial legislatures by providing that a provincial legislature must:

(a) facilitate public involvement in the legislative and other processes of the legislature and its committees; and

(b) conduct its business in an open manner, and hold its sittings, and those of its committees, in public, but reasonable measures may be taken-

(i) to regulate public access, including access of the media, to the legislature and its committees; and

(ii) to provide for the searching of any person and, where appropriate, the refusal of entry to, or the removal of, any person.

¹³⁸ Section 72(1)(a) of the Constitution.

¹³⁹ Section 72(1)(b) of the Constitution.

¹⁴⁰ Section 152(1)(e) of the Constitution.

¹⁴¹ Draai E and Taylor D 'Public Participation for Effective Service Delivery: A Local Government Perspective' (2009) 44 *Journal of Public Administration* 112.

¹⁴² Draai E and Taylor D 'Public Participation for Effective Service Delivery: A Local Government Perspective' (2009) 44 *Journal of Public Administration* 116.

Section 195(1) of the Constitution provides that public administration must be governed by the democratic values and principles enshrined in the Constitution, including the following principles:

- Section 195(1)(e) – People’s needs must be responded to, and the public must be encouraged to participate in policy-making; and
- Section 195(1)(g) – Transparency must be fostered by providing the public with timely, accessible and accurate information.

South Africa’s jurisprudence is fortified largely through its judicial processes. It is through the courts that concepts are given meaning, context, and application. The importance of public involvement, for example, was noted by former Constitutional Court Judge Albie Sachs¹⁴³ when he stated: ‘That phrase in the Constitution about the public being involved was not simply [so that] the public can watch or make representations to . . . committees. It meant an ongoing act of connection and association.’¹⁴⁴ The case law examined below confirms the importance of public participation within a representative democracy.

*In Doctors for Life International v The Speaker of the National Assembly and others*¹⁴⁵ the court was required to decide whether, during the legislative process leading to the enactment of a variety of health-related statutes, the NCOP and the provincial legislatures failed to comply with their constitutional obligations to facilitate public involvement.¹⁴⁶ Ngcobo J found that

¹⁴³ *People’s Power, People’s Parliament: A Civil Society Conference on South Africa’s Legislatures*. 2012:18

¹⁴⁴ In this regard, Parliament plays a crucial role in ensuring that it enacts legislation which progressively realises and encourages the notion of public participation.

¹⁴⁵ *In Doctors for Life International v The Speaker of the National Assembly and others* 2006 (12) BCLR 1399 (CC)

¹⁴⁶ *In Doctors for life International v The Speaker of the National Assembly and Others* 2006 (12) BCLR 1399(CC) para 4.

public involvement provisions gave effect to an important feature of democracy: its participative nature:

The participation of citizens in government . . . forms the basis and support of democracy, which cannot exist without it; for title to government rests with the people, the only body empowered to decide its own immediate and future destiny and to designate its legitimate representatives.¹⁴⁷

Legislation, infused with a degree of openness and participation, will minimise dangers of arbitrariness and irrationality in the formulation of legislation. The objective in involving the public in the law-making process is to ensure that the legislators are aware of the concerns of the public.¹⁴⁸ Ngcobo J goes further to state that

[I]n my judgment, this Court not only has a right but also has a duty to ensure that the law-making process prescribed by the Constitution is observed.¹⁴⁹ Therefore, the Court holds our Constitution manifestly contemplated public participation in the legislative and other processes of the NCOP, including those of its committees. A statute adopted in violation of section 72(1)(a) and which has the effect of precluding the public from participating in the legislative processes of the NCOP is therefore invalid.¹⁵⁰

In the same case, Sachs J in his minority judgment, emphasised the ‘special meaning’ of public participation within our democratic context and stated that the effect of public participation should be that it envisages an active, participatory democracy. ‘Public involvement in our country has ancient origins and continues to be a strongly creative characteristic of our democracy.’¹⁵¹ The principle of consultation and involvement has become a distinctive part of

¹⁴⁷ *In Doctors for life International v The Speaker of the National Assembly and Others* 2006 (12) BCLR 1399(CC) para 204.

¹⁴⁸ *Doctors for life International v The Speaker of the National Assembly and Others* 2006 (12) BCLR 1399(CC) para 205.

¹⁴⁹ *In Doctors for life International v The Speaker of the National Assembly and others* 2006 (12) BCLR 1399(CC) para 211.

¹⁵⁰ *In Doctors for life International v The Speaker of the National Assembly and others* 2006 (12) BCLR 1399(CC) para 211.

¹⁵¹ *In Doctors for life International v The Speaker of the National Assembly and others* 2006 (12) BCLR 1399(CC) para 227.

our national ethos'.¹⁵² He stated further that public involvement was of particular significance for members of groups that had been the victims of processes of historical silencing.

It is constitutive of their dignity as citizens today that they not only have a chance to speak, but also enjoy the assurance they will be listened to. This would be of special relevance for those who may feel politically disadvantaged at present because they lack higher education, access to resources, and strong political connections. Public involvement accordingly strengthens rather than undermines formal democracy, by responding to and negating some of its functional deficits.¹⁵³

In another landmark judgment the Constitutional Court was called upon to consider two crucial issues: the first was whether sufficient public involvement was provided for by the provincial legislatures, and the second was whether the decision to exclude Merafong Municipality from Gauteng was rational.¹⁵⁴ The court's findings in *Merafong Demarcation Forum and others v President of the Republic of South Africa and others*¹⁵⁵ were divided over these issues. The majority found that the legislature created a reasonable opportunity for the public to express their views and that those views were taken into account, and, furthermore that the legislature did not exercise its powers irrationally.¹⁵⁶ The court emphasised that citizens must have a meaningful opportunity to be heard,¹⁵⁷ echoing the majority decision in *Doctors for Life*, which stated that the requirement to facilitate public involvement was in accordance with the contemplation in the Constitution of elements of participatory democracy, in addition to representative democracy. Participatory and representative democracy must be seen as

¹⁵² *In Doctors for life International v The Speaker of the National Assembly and others* 2006 (12) BCLR 1399(CC) para 227.

¹⁵³ *In Doctors for life International v The Speaker of the National Assembly and others* 2006 (12) BCLR 1399(CC) para 234.

¹⁵⁴ *Merafong Demarcation Forum and Others v President of the Republic of South Africa and Others* CCT (41/07) [2008] ZACC para 1.

¹⁵⁵ *Merafong Demarcation Forum and Others v President of the Republic of South Africa and Others* CCT (41/07) [2008] ZACC para 1.

¹⁵⁶ *Merafong Demarcation Forum and Others v President of the Republic of South Africa and Others* CCT (41/07) [2008] ZACC para 116.

¹⁵⁷ *Merafong Demarcation Forum and Others v President of the Republic of South Africa and Others* CCT (41/07) [2008] ZACC para 27.

mutually supportive. Public involvement also enhances responsible citizenship and the legitimacy of government and accords with the constitutional principle of co-operation and communication between national and provincial legislatures.¹⁵⁸ In essence this case illustrates that the responsibility to facilitate public participation is a procedural rather than a substantive responsibility. The adjudication of socio-economic rights by the courts and the principles of public participation are mutually inclusive.¹⁵⁹ The judiciary is thus very clear on the significance of public participation. Not only does the Constitutional Court confirm that the right is guaranteed but it also delineates the elements of that guarantee in line with other constitutional principles. The court notes that it has a right and a duty to ensure that the law-making process prescribed by the Constitution is observed. The Constitution itself does not provide for a specific legislative reform attached to public participation but does encourage its implementation in other statutes. This view is supported by the court in finding that any legislation that violates the right of the public to participate is invalid.¹⁶⁰ The judgments discussed above, which are in no way exhaustive, make it clear that although the courts promote the facilitation of public participation by all organs of state, their role in enforcing this notion is mainly procedural¹⁶¹ and the substantive elements thereof are given effect to through legislative enactments.

3.3 Section 24 of the Constitution

Section 24 consists of two main parts: the first being a right to an environment that is not harmful to health or well-being and the second consisting of a right to protection of the

¹⁵⁸ *Merafong Demarcation Forum and Others v President of the Republic of South Africa and Others* CCT (41/07) [2008] ZACC para 26.

¹⁵⁹ Tshoose CI 'The Role of Public Participation Viewed in the Context of Adjudicating Socio-economic Rights' (2017) *Southern African Public Law* 3.

¹⁶⁰ *In Doctors for life International v The Speaker of the National Assembly and Others* 2006 (12) BCLR 1399(CC) para 201.

¹⁶¹ In line with the doctrine of separation of powers.

environment. The first part guarantees every person the right to a healthy environment while the second part mandates the state to ensure compliance with the first part.¹⁶² Woolman and Bishop argue that through the word ‘everyone’, section 24 acknowledges that the right is to be enjoyed by all people.¹⁶³ Glazewski challenges this view by saying that ‘everyone’ in section 24 raises a number of issues concerning its meaning in the context of environmental concern.¹⁶⁴ His reasoning is based on the philosophical and ethical question of whether ‘everyone’ refers to humans only or whether the right by its nature extends to animals or other inanimate objects.¹⁶⁵ Some scholars argue for the extension of environmental rights to animals and plants.¹⁶⁶ Scholtz contends that section 24 is formulated in an anthropocentric way which implies that the reason for the protection of the environment is for the health and well-being of people.¹⁶⁷ Anthropocentrism regards humans as separate from and superior to nature, and holds that human life has *intrinsic* value; while other entities including animals, plants, and mineral resources, are resources that may justifiably be exploited for the benefit of humankind. (Emphasis added)¹⁶⁸ This approach views the environment as something for the benefit of all humans.¹⁶⁹ The anthropocentric approach is human-centred and emphasises the value of securing natural resources to further social and economic development.¹⁷⁰ In terms of this

¹⁶² Section 24 provides that: everyone has the right-

- (a) *to an environment that is not harmful to their health or well-being; and*
- (b) *to have the environment protected, for the benefit of present and future generations, through reasonable legislative and other measures that —*
 - (i) *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.*

¹⁶³ Woolman S and Bishop *Constitutional Law of South Africa* 2ed Revision Service 6 (2014) 50-10.

¹⁶⁴ Glazewski J *Environmental Law in South Africa* (2013) 5-10.

¹⁶⁵ Glazewski J *Environmental Law in South Africa* (2013) 5-10.

¹⁶⁶ Glazewski J *Environmental Law in South Africa* (2013) 5-10.

¹⁶⁷ Scholtz W ‘The Anthropocentric approach to Sustainable Development in the National Environmental Act and the Constitution of South Africa’ (2005) 1 *TSAR* 70.

¹⁶⁸ Anthropocentrism Philosophy available at <https://www.britannica.com/topic/anthropocentrism> (accessed 16 October 2018) see also Stone CD ‘Should Trees Have Standing towards Legal Rights for Natural Objects’ (1972) 45 *Southern California Law Review* 450-501.

¹⁶⁹ Scholtz W ‘The anthropocentric approach to Sustainable Development in the National Environmental Act and the Constitution of South Africa’ (2005) 1 *TSAR* 70

¹⁷⁰ Glazewski J *Environmental Law in South Africa* (2013) 5-10 80, see also Kidd M *Environmental Law: A South African Guide* 2 ed (1997) 35.

approach, the natural environment is seen as something of economic value to human interests, needs and wants.¹⁷¹ The basis of this approach is equitable access to natural resources for all humans of both present and future generations.¹⁷² It is argued that if one applies a contextual and purposive interpretation to section 24, taking into consideration that the section is framed in an anthropocentric manner, then section 24 places people and their needs at the forefront of environmental protection. This argument is aligned to that of Du Plessis, who reveals the implicit link between public participation and fulfilment of the environmental rights by stating that states have an internationally recognised obligation to respect, protect, promote and fulfil their citizens' human rights, inclusive of environmental rights.¹⁷³ She also reveals the explicit linkages between public participation and fulfilment of environmental rights by describing participation in environmental decision-making as an effective tool to establish environmental priorities, offering solutions to environmental challenges and allowing for preparation, execution and application of the most accurate decision possible.¹⁷⁴ Murombo and Valentine argue that public interest litigation supported by public participation is the main tool to ensure effective compliance with environmental laws.¹⁷⁵ They further argue that in an emerging economy such as South Africa, the divide between those fighting for environmental protection and those promoting development is greater, given the urgent need for socio-economic development after apartheid.¹⁷⁶ They concede that balancing development and conservation is a challenge; however; this challenge is addressed through procedural and substantive

¹⁷¹ Carlson DH & Van Staden F 'Environmental Concern in South Africa: The Development of a Measurement Scale' (2006) *New Voices in Psychology*, Vol 2, Issue 1, 3-7.

¹⁷² Section 24(b) of the Constitution.

¹⁷³ Du Plessis A 'Public Participation, Good Environmental Governance and Fulfilment of Environmental Rights' (2008) 2 *PER* 12 page 6.

¹⁷⁴ Du Plessis A 'Public Participation, Good Environmental Governance and Fulfilment of Environmental Rights' (2008) 2 *PER* 12 page 8.

¹⁷⁵ Murombo T and Valentine H 'Slapp Suits: An Emerging Obstacle to Public Interest Environmental Litigation in South Africa' (2011) 27 *SAJHR* 85.

¹⁷⁶ Murombo T and Valentine H 'Slapp Suits: An Emerging Obstacle to Public Interest Environmental Litigation in South Africa' (2011) 27 *SAJHR* 85.

guarantees and public participation in environmental decision-making.¹⁷⁷ Public participation in environmental decision-making is about linking the citizen to environmental governance, and it provides the means through which environmental rights are exercised.¹⁷⁸

In the South African environmental context, environmental rights have two aspects, namely substantive and procedural rights. The substantive right is entrenched in section 24 of the Constitution and it gives everyone the right to an environment that is not harmful to their health and their well-being. On the other hand, the procedural right comprises the right of access to environmental information, public participation and access to justice. Both these rights are fundamental to environmental protection. Procedural environmental rights are considered a condition and way to safeguard the implementation of substantive environmental rights.¹⁷⁹ By having environmental information for participation in environmental decision-making, management and supervision, the public is given an opportunity to enforce substantive environmental rights. The principle of public participation is part of various human rights because it is fused in the international and regional instruments.¹⁸⁰ The human rights confirm that public participation is essential element of environmental decision-making procedures.¹⁸¹ This indicates that there is interrelated relationship between procedural and substantive rights. Procedural rights, such as the right to environmental information, participation in environmental decision-making process and remedies in the event of environmental harm, empower citizens to influence environmental decisions and policies, which is integral to

¹⁷⁷ Murombo T and Valentine H ‘ Slapp Suits: An Emerging Obstacle to Public Interest Environmental Litigation in South Africa’ (2011) 27 *SAJHR* 85.

¹⁷⁸ Du Plessis A ‘Public Participation, Good Environmental Governance and Fulfilment of Environmental Rights’ (2008) 2 *PER* 12 page 25.

¹⁷⁹ Xiao ZHU, Shenghang W, Ehemann EM ‘Development of Environmental Rights in China : Substantive Environmental Rights or Procedural Environmental Rights’(2017) *Frontiers of Law in China* 29

¹⁸⁰ See article 25 of the *International Covenant on Civil and Political Rights* and article 13 of the *African Charter on Human and Peoples’ Rights*.

¹⁸¹ Van Bekhoven J ‘Public Participation as a General Principle in International Environmental Law: Its Current Status and Real Impact’ (2016) 2 *National Taiwan University Law Review* 236.

environmental protection.¹⁸² Also procedural rights give rise to a view that a fully informed public with rights of participation in environmental decision-making and access to information for environmental harm lead to environmental protection.¹⁸³ Procedural rights are indispensable to the implementation and enforcement of environmental rights.¹⁸⁴ That belief is premised on the understanding that environmental protection and sustainable development cannot be left to governments alone, but require civic participation to encourage democratic decision-making.¹⁸⁵

3.4 Sustainable Development and Public Participation.

Glazewski argues that the contemporary international norm which underpins environmental law generally is the notion of sustainable development.¹⁸⁶ Its origin is traced back to the Brundtland Report, which describes sustainable development as development which meets the needs of the present generation without compromising the ability of future generations to meet their own needs.¹⁸⁷ Feris is of the view that this definition of the report does not only give effect to the notion that priority must be given to the needs of the poor, but also captures the limitations to development imposed by the present state of technology and social organisation on the environment's ability to meet present and future needs.¹⁸⁸ This report recognises public participation as a necessary means for achieving sustainable development by specific groups that include indigenous people and NGOs.¹⁸⁹ The notion of sustainable development

¹⁸² Leib LH 'Human Rights and the Environment' (2011) 3 *Philosophical, Theoretical and Legal Perspectives* 81.

¹⁸³ Shelton D 'Developing Substantive Environmental Rights' (2010) 1 (1) *Journal of Human Rights and Environment* 91.

¹⁸⁴ Feris L 'Constitutional Environmental Rights an under-utilised resource' (2008)24 *SAJHR* 36.

¹⁸⁵ Birnie P, Boyle A & Redgwell C *International Law and the Environment* 3 ed (2009) 288-289.

¹⁸⁶ Glazewski J *Environmental Law in South Africa* (2013) 1-16.

¹⁸⁷ World Commission on Environment and Development 1987.

¹⁸⁸ Feris L 'Constitutional Environmental Rights : An Under- utilised resource' (2008) 24 *SAJHR* 40

¹⁸⁹ Segger MCC and Khalfan A *Sustainable Development Law* (2006) 157.

endeavours to integrate environmental protection, economic development, and social upliftment, the three pillars of sustainable development, into decision-making.¹⁹⁰ Birnie claims that sustainable development encompasses a number of substantive elements which include integration of environmental protection and economic development; the right to development, sustainable utilisation and conservation of natural resources, intergenerational equity and intra-generational equity.¹⁹¹ Birnie extricates the substantive elements of sustainable development from its procedural elements which comprises environmental assessment, access to information, and public participation in decision-making.¹⁹² On the other hand, Bekhoven asserts that public participation is connected to other principles of international environmental law, such as the principle of sustainable development.¹⁹³ This contention is affirmed by Richardson and Razzaque, who aver that sustainable development policies usually include forms of public participation to assist decision-makers in identifying the uncertainties and risks of certain activities.¹⁹⁴ It is contended that public participation, supported by transparency and access to justice, is one of the most recognised principles of sustainable development.¹⁹⁵ In this regard, states must ensure broad public participation in initiatives for sustainable development, through access to information and access to justice.¹⁹⁶ Segger and Khalfan argue that this is based on social laws, such as respect for human rights to assembly, freedom of speech and expression. The state must ensure that all persons have effective access to relevant information held by public and private actors regarding sustainable development.¹⁹⁷ They further argue that effective participation depends on attention to disparities within society and removal of

¹⁹⁰ Tladi D 'Strong Sustainability, Weak Sustainability, Intergenerational Equity and International Law' (2003) 28 *South African Yearbook of International Law* 200.

¹⁹¹ Birnie P, Boyle A and Redgwell C *International Law and the Environment* 3 ed (2009) 116-123.

¹⁹² Birnie P, and Boyle A and Redgwell C *International Law and the Environment* 3 ed (2009) 95.

¹⁹³ Van Bekhoven J 'Public Participation as a General Principle in International Environmental Law: Its Current Status and Real Impact' (2016) 2 *National Taiwan University Law Review* 234.

¹⁹⁴ Richardson BJ and Razzaque J 'Public Participation in Environmental Decision-Making' (2006) *Environmental Law for Sustainability* 165-194.

¹⁹⁵ Segger MCC and Khalfan A *Sustainable Development Law* (2006) 156.

¹⁹⁶ Segger MCC and Khalfan A *Sustainable Development Law* (2006) 156.

¹⁹⁷ Segger MCC and Khalfan A *Sustainable Development Law* (2006) 156.

obstacles to participation by vulnerable group such as minorities or the poor.¹⁹⁸ Procedural rights, including public participation, access to environmental information and decision-making are important elements of the law relating to sustainable development.

The concept of sustainable development is essentially important in the South African context for the reason that it is embedded in section 24 of the Constitution.¹⁹⁹ The inclusion of the concept has a significant role to play in the resolution of environment-related disputes in our law.²⁰⁰ The concept of sustainable development provides a framework for reconciling socio-economic development and environmental protection.²⁰¹ The Constitution recognises the interrelationship between the environment and development, and it also recognises the need for the protection of the environment. The protection of the environment and socio-economic development can be achieved through the ideal of sustainable development.²⁰² Therefore, there is a clear link between the concept of sustainable development and the notion of public participation in the protection of the environment. This view is reinforced by Murumbo who observes that the concept of sustainable development focuses on the needs of people and the need to limit development to sustainable levels. To understand needs and to properly determine whether a given project meets the needs of any generation, it is important for the opinions of that generation to be heard because public engagement brings accountability and transparency.²⁰³ This link has been established by international law. Bradshaw and Burger claim that public participation is generally accepted as an integral component of sustainable

¹⁹⁸ Segger MCC and Khalfan *A Sustainable Development Law* (2006) 156.

¹⁹⁹ Section 24(b)(iii) of the Constitution.

²⁰⁰ *Fuel Retailers Association of Southern Africa v Director –General; Environmental Management, Department of Agriculture, Conservation and Environment, Mpumalanga Province and others* CCT67/06 (2007) ZACC 13 para 57.

²⁰¹ *Fuel Retailers Association of Southern Africa v Director –General; Environmental Management, Department of Agriculture, Conservation and Environment, Mpumalanga Province and others* CCT67/06 (2007) ZACC 13 para 57.

²⁰² *Fuel Retailers Association of Southern Africa v Director –General; Environmental Management, Department of Agriculture, Conservation and Environment, Mpumalanga Province and others* CCT67/06 (2007) ZACC 13 para 45.

²⁰³ Murombo T 'Beyond Public Participation: The Disjuncture between South Africa's Environmental Impact assessment (EIA) Law and Sustainable Development' (2008) 3PER 8.

development. This is evidenced by the White Paper on Environmental Management Policy for South Africa that sets sustainable development and the incorporation of the interests, needs and values of all interested and affected parties as the main vision for the policy.²⁰⁴ Scholtz submits that the ideal of sustainable development plays an important role in the pursuit of the rule of law in order to improve the quality of life for all South Africans.²⁰⁵ This implies that sustainable development creates an appropriate balance between individual and collective rights. The principle of sustainable development has a specific environmental lineage and must be regarded as a distinctive principle of environmental law.²⁰⁶

3.5 Environmental Democracy and Public Participation

A system that requires the participation of everyone with a stake in environmental issues is referred to as environmental democracy.²⁰⁷ The rights of access to information, public participation, and access to justice in environmental matters were recognised as the environmental democracy rights by principle 10 in the Rio Declaration.²⁰⁸ Environmental democracy is the right and ability of the public to freely access relevant and timely information, provide input and scrutiny into decision-making, and to challenge decisions made by public or private actors which may harm the environment or violate their rights before an accessible, independent and fair legal authority.²⁰⁹ These rights, also referred to as procedural rights, provide the legal basis to enable transparency of environmental information, open and inclusive

²⁰⁴ *The White Paper on Environmental Management Policy for South Africa* (published in GN 749 in GG 188894 of 15 May 1998).

²⁰⁵ Scholtz W 'The anthropocentric approach to Sustainable Development in the National Environmental Act and the Constitution of South Africa' (2005) 1 *TSAR* 85.

²⁰⁶ Henderson G W P 'Some thoughts on distinctive principles of South African Environmental Law' (2001) 8 *SAJELP* 154.

²⁰⁷ Janka DG 'Environmental Democracy in Ethiopia: Emphasis on Public Participation in Environmental Impact Assessment Process.' (2010) 200.

²⁰⁸ The United Nations *Conference on Environment and Development* (1992).

²⁰⁹ Worker J and De Silva L 'The Environmental Democracy Index' (2015) *World Resource Institute* 2

decision-making and the ability to challenge unfair decisions.²¹⁰ Environmental democracy is understood as a system where the public controls those who make decisions that affect the environment.²¹¹ According to Hazen, environmental democracy means that environmental issues must be addressed by all those affected by the outcome, not just by governments and industrial sectors. She adds that for those whose daily lives are impacted by the quality of their environment, participation in environmental decision-making is important.²¹² This implies that the notion of public participation is central in environmental decision-making process and is a significant element of environmental democracy. Environmental democracy favours and requires the participation of the public in decisions that will have an impact, be it positive or negative, on the environment.²¹³ The environmental issues are best handled with the participation of all concerned citizens, at all levels; public participation in environmental decision-making enhances the government's ability to respond to public concerns and demands, to build consensus and to improve acceptance and compliance with decisions, and it is in the nature of democracy to involve the public in decisions that are likely to affect their interests in their environment.²¹⁴ The proper implementation of these rights increases information flow between governments and the public and it also intensifies the legitimacy of decisions and accountability.

²¹⁰ Worker J and De Silva L 'The Environmental Democracy Index' (2015) *World Resource Institute 2*.

²¹¹ Janka D G 'Environmental Democracy in Ethiopia: Emphasis on Public Participation in Environmental Impact Assessment Process.' (2010) 205.

²¹² Hazen S 'Environmental democracy' available at <http://ww.unep.org/ourplanet/imgversn/86hazen.html> (accessed 22 February 2019).

²¹³ Janka D G 'Environmental Democracy in Ethiopia: Emphasis on Public Participation in Environmental Impact Assessment Process.'(2010) 200.

²¹⁴ Janka D G 'Environmental Democracy in Ethiopia: Emphasis on Public Participation in Environmental Impact Assessment Process.'(2010) 207.

3.6 Environmental Governance and Public Participation

Environmental governance is defined as a normative institutional regulatory intervention and social construct that is predominantly based on law and that aims to influence how people interact with the environment. It entails a pluralistic, dynamic, multi-level, multi-actor response and process of change which pragmatically aims to change human behaviour *vis-a-vis* the environment, and idealistically to optimize environmental benefits and use, while at the same time seeking to protect and preserve sufficient environmental capital for the present and future generations.²¹⁵

It is also referred to as the processes of decision-making involved in controlling and managing the environment and natural resources. Principles, such as, inclusivity, representativity, accountability, efficiency, and effectiveness in decision-making, as well as social equity and justice, are the foundations of good governance.²¹⁶ These are values that are indispensable in implementing and enforcing substantive environmental law as they ensure that citizens are aware of, and involved in, the decision-making processes and have the ability to effectively advocate for environmental protection.²¹⁷

In the South African context it requires public administration to be governed by the democratic principles and values enshrined in the Constitution, and should involve public participation. Public participation is central to any democratic governance order as it allows the public to have a say in decision-making that affects them.²¹⁸ This is because public participation

²¹⁵ M Toxopüs and LJ Kotzé 'Promoting Environmental Justice through civil-based instruments in South Africa' (2017) *Law Environment and Development Journal* 54.

²¹⁶ State of Environment available at https://www.environment.gov.za/sites/default/files/docs/part2_environmental_governance.pdf (accessed 17 October 2018).

²¹⁷ Feris L 'Constitutional Environmental Rights: An Under- utilised resource' (2008) 24 *SAJHR* 73.

²¹⁸ M Toxopüs and LJ Kotzé 'Promoting Environmental Justice Through civil-based instruments in South Africa' (2017) *Law Environment and Development Journal* 56.

improves the quality of the decisions that are made, as people are given the opportunity to represent specific interests that may contribute to more appropriate decision in the end.²¹⁹ In environmental governance, it is essential to provide the public with a stage on which to participate in order to ensure that they understand the issues at hand and have capacity to participate effectively. Feris argues that environmental problems mainly affect people who are already subjected to socio-economic disadvantage, and environment governance responds to such circumstances. This notion finds its mandate in section 24 of the Constitution and places a positive obligation on the state to make decisions that ensure the protection of the environment. She argues further that as a result of this mandate there is a clear nexus between environmental governance and the environmental right contained in section 24.²²⁰ In order to enforce substantive environmental rights states need to have well recognised procedural rights like public participation and environmental information built into national laws or specific environmental legislation with clear enforcement methodology to improve environmental governance. The state is primarily responsible for the execution of environmental governance in such a way that realises the right to have the environment protected, for the benefit of the present and future generations.²²¹

The importance of public participation in environmental governance was revealed in *Petro Props (Pty) Ltd v Barlow and Another*,²²² an application for interdict brought to prevent the respondent from continuing with the public campaign against the construction of a fuel station which had been approved by the environmental authorities in an ecologically sensitive

²¹⁹ M Toxopüs and LJ Kotzé 'Promoting Environmental Justice Through civil-based instruments in South Africa' (2017) *Law Environment and Development Journal* 56.

²²⁰ Feris L 'Constitutional Environmental Rights: An Under- utilised resource' (2008) 24 *SAJHR* 77.

²²¹ Kotze LJ 'The application of Just Administrative Action in the South African environmental governance sphere: An analysis of some contemporary thoughts and recent jurisprudence' (2004) 2 *PER* 36.

²²² *Petro Props (Pty) Ltd v Barlow and Another* (2006) SA 160 (W) para 2.

wetland.²²³ The first respondent and second respondent (Ms Barlow), an environmental activist, opposed the application on the basis that building and operating a service station would result in the degradation of wetland and sought to mobilise public opinion against the development by using media, public meetings and submissions to various levels of government.²²⁴ The court was enjoined to weigh up the competing interest of the applicant's property right against the respondent's right to freedom of expression.²²⁵ The court found in favour of the respondent, recognising that her interest in rallying the campaign was generous and made in the interest of protection of the environment in the common good.²²⁶ This case demonstrates that mobilising a community to protect and enforce environmental rights through participation can have positive effects; thus public participation becomes an essential tool in environmental governance in order to protect environmental rights.

3.7 Legislation promulgated under the Constitution

The rights guaranteeing public participation under the Constitution can only be directly relied on in exceptional circumstances, such as where a provision of any legislation is challenged as an infringement of this guarantee.²²⁷ There have been various legislative reforms that have been enacted to give content to the notion of public participation. These Acts have sought to set out principles which will protect and promote the rights enshrined in the Bill of Rights. A discussion of all the Acts would go beyond scope of this thesis. The discussion will therefore be limited to those reforms that encourage public participation within the context of PAIA,²²⁸ PAJA,²²⁹ and the Systems Act.²³⁰

²²³ *Petro Props (Pty) Ltd v Barlow and Another* (2006) SA 160 (W) para 2.

²²⁴ *Petro Props (Pty) Ltd v Barlow and Another* (2006) SA 160 (W) para 3.

²²⁵ *Petro Props (Pty) Ltd v Barlow and Another* (2006) SA 160 (W) para 53.

²²⁶ *Petro Props (Pty) Ltd v Barlow and Another* (2006) SA 160 (W) para 55.

²²⁷ Currie I and Klaaren J 'The Promotion of Access to Information Act (2002) *Politeia* 24

²²⁸ Act 2 of 2000.

²²⁹ Act 3 of 2000.

²³⁰ Act 32 of 2000.

3.7.1 Promotion of Access to Information Act

The appalling events of South Africa's past were committed in a culture of secrecy aided by a regime which blocked effective access to information.²³¹ The government under the new democratic dispensation therefore sought to transform South African society.²³² The new Constitution was adopted and the right of access to information was guaranteed.²³³ PAIA was enacted as a direct response to the constitutional instruction in section 32(2) to foster a culture of transparency and accountability in public and private bodies by giving effect to the right of access to information.²³⁴ The right of access to environmental information is a cornerstone of public participation in environmental governance. It is vital that people are adequately informed as to the state of the environment and issues which may impact on the environment in order to ensure that their participation is meaningful.²³⁵ The right of access to information from government agencies or private bodies is crucial in the environmental context, as much governmental decision-making has direct or indirect consequences for the environment.²³⁶ PAIA achieves this by providing that citizens have a right of access to information which is necessary for the exercise or protection of any of their rights.²³⁷ The right to access to information is an instrument to achieve social change by empowering people to uplift

²³¹Calland R 'Illuminating the Politics and the Practice of Access to Information in South Africa' available at <http://www.foip.saha.org.za/static/paper-wars-access-to-information-in-south-africa> (accessed 10 September 2018).

²³² Van der Walt, R 'Access to Information: Information Disclosure in some South African Organisations' (2007) 38(1) *South African Journal of Business Management* 25.

²³³ Section 32 of the Constitution gives content to this right and provides:

- (1) Everyone has the right of access to -
 - (a) any information held by the state; and
 - (b) any information that is held by another person and that is required for the exercise or protection of any rights
- (2) National legislation must be enacted to give effect to this right and may provide for reasonable measures to alleviate the administrative and financial burden on the state.

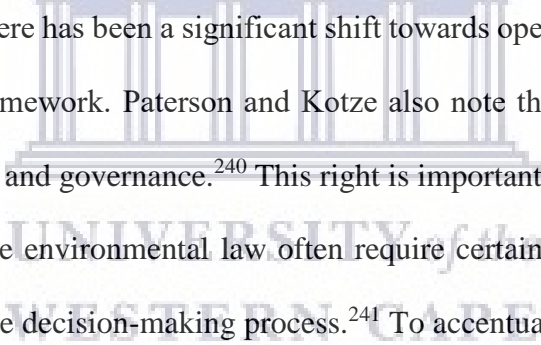
²³⁴ PAIA, Preamble

²³⁵ Kidd M 'The National Environmental Management Act and Public Participation' (1999) 6 *SAJELP* 26.

²³⁶ Glazewski J *Environmental Law in South Africa* (2013) 5-41.

²³⁷ Preamble of PAIA

themselves from poverty and disempowerment. In order for this to happen the government must discharge certain duties.²³⁸ It is necessary for a person to request information held by the state and/or any other person which may have an impact on an aggrieved person, and the state or a person is required to disseminate the information requested in order to promote and fulfil the right of access to information. This information may specifically relate to information used during, decision-making, including policies and criteria used by administrative bodies.²³⁹ The right of access to information is significantly important to the realisation of the notion of public participation as a whole because without access to information about activities that have a potentially negative impact on the environment, affected people will not be able to engage in the decision making-process.



Since PAIA's inception, there has been a significant shift towards openness and accountability in South Africa's legal framework. Paterson and Kotze also note the relevance of access to environmental information and governance.²⁴⁰ This right is important because members of the public who wish to enforce environmental law often require certain information in order to participate effectively in the decision-making process.²⁴¹ To accentuate the importance of this information, Kidd gives the following example: people who live in the vicinity of a factory causing air pollution may require information from the state about the conditions attached to the registration certificate under which the factory operates.²⁴² He emphasises the importance of this provision in that the right is applicable not only against the state, but also against individuals, and the information could be very useful in the environmental sphere since the

²³⁸ Ntlama N 'The Effectiveness of the Promotion of Access to Information Act 2 of 2000 for the protection of socio-economic rights' (2003) 2 *STELL* 275.

²³⁹ Kotze JL 'A Critical Survey of Domestic Constitutional Provisions relating to Environmental protection in South Africa' (2008) 14 *Tilburg Law Review* 316.

²⁴⁰ Du Plessis, W 'Access to Information' in Paterson and Kotze *Environmental Compliance and Enforcement in South Africa: Legal Perspectives* (2009) 197.

²⁴¹ Kidd M 'The National Environmental Management Act and Public Participation' (1999) 6 *SAJELP* 27.

²⁴² Kidd M 'The National Environmental Management Act and Public Participation' (1999) 6 *SAJELP* 27.

state might not always have sufficient information for the member of the public to ascertain that there is a breach of law.²⁴³ Kotze cites as an example that inaccessible information held by the Department of Water Affairs and Forestry, which was used during the assessment of an environmental authorisation, may be demanded by an affected developer who feels that his or her right to administrative justice has been infringed due to the unreasonable delay during the decision-making process.²⁴⁴ NEMA meaningfully extends the rights of access to information provided in PAIA to environmental matters. Section 2(4)(k) provides that a decision must be taken in an open and transparent manner, and access to information must be provided in accordance with the law. Access to environmental information consists of two elements, namely the availability of information about the environment and the mechanisms of public authorities to provide environmental information. This information includes information on materials and activities that have or potentially have a serious negative impact on the environment such as the presence of hazardous materials within a community.²⁴⁵ Access to information held by the state may be particularly relevant in the environmental context because administrative decision-making and consideration of certain technical criteria and policy considerations may have a bearing on the environment and developers involved.²⁴⁶ It is argued that access to environmental information is vital for public participation because it enables the public to obtain knowledge about factors such as the decision-making processes, the decision to be taken and the relevant facts and interests necessary to make informed personal choices.²⁴⁷

²⁴³ Kidd M 'The National Environmental Management Act and Public Participation' (1999) 6 *SAJELP* 27.

²⁴⁴ Kotze JL 'A Critical Survey of Domestic Constitutional Provisions relating to Environmental protection in South' (2008) 14 *Tilburg Law Review* 316.

²⁴⁵ Van Bekhoven J 'Public Participation as a General Principle in International Environmental Law: Its Current Status and Real Impact' (2016) 2 *National Taiwan University Law Review* 231.

²⁴⁶ Kotze JL 'A Critical Survey of Domestic Constitutional Provisions relating to Environmental protection in South' (2008) 14 *Tilburg Law Review* 318.

²⁴⁷ Van Bekhoven Public Participation as a General Principle in International Environmental Law: Its Current Status and Real Impact' (2016) 2 *National Taiwan University Law Review* 231.

The importance of the right of access to information came before Constitutional Court in the *Biowatch Trust* case.²⁴⁸ Biowatch Trust, an environmental watchdog, requested information from government bodies with statutory responsibilities for overseeing genetic modification of organic material (GMOs).²⁴⁹ This request was based on the right of access to information in section 32(1) of the Constitution and various other statutory provisions. These requests were directed to the department and its agencies, who did not respond adequately to the requests, which necessitated Biowatch launching an application in the North Gauteng High Court against the Registrar for Genetic Resources. Biowatch was successful in its application and was granted access to most of the categories of information to which it had sought access.²⁵⁰ In granting the order, the trial court judge Dunn AJ did not award costs in favour of the Biowatch, based on the fact that he was convinced by the respondent's arguments that Biowatch's requests were vexatious, oppressive and amounted to a fishing expedition. Biowatch unsuccessfully appealed to the full bench of the High Court, and to the Supreme Court of Appeal. As a last resort, Biowatch approached the Constitutional Court where Sachs J concluded that it was in the interest of justice to hear the appeal as it raised constitutional issues. He held that the trial judge misdirected himself by failing to take into account:

- (i) The fact that Biowatch was a public interest non-governmental organisation; and
- (ii) That it was not litigating on its own behalf but in public interest.²⁵¹ Therefore, it was not correct to begin the inquiry by a characterisation of the parties; rather the starting point should be the nature of the issues because equal protection

²⁴⁸ *Trustees for the time being of the Biowatch Trust v Registrar, Genetic Resources and others* (2009) ZACC para 14.

²⁴⁹ *Trustees for the time being of the Biowatch Trust v Registrar, Genetic Resources and others* (2009) ZACC para 2.

²⁵⁰ *Trustees for the time being of the Biowatch Trust v Registrar, Genetic Resources and others* (2009) ZACC para 4.

²⁵¹ *Trustees for the time being of the Biowatch Trust v Registrar, Genetic Resources and others* (2009) ZACC para 14-16.

before the law required that costs awards were not dependent on whether the parties are acting in their own interest or in public interest.²⁵²

Sachs J specified what the general approach should be in relation to suits between private parties and the state; this would apply in constitutional litigation with regard to the role of appellate courts in appeals against costs awards where the state is sued for a failure to fulfil its constitutional and statutory responsibilities for regulating competing claims between private parties.²⁵³

In deciding the issues Sachs J invoked section 31 of NEMA in particular, that deals with access to information and protection of whistle-blowers²⁵⁴ and which provides that a court may decide not to award costs against unsuccessful litigants who are acting in the public interest or to protect the environment and who had made due efforts to use other means for obtaining the relief sought.²⁵⁵ In concluding, Sachs J characterised the case as litigation in which private parties with competing interests were involved in relation to determining whether the state had appropriately shouldered its constitutional and statutory responsibilities. Therefore, the trial judge misdirected himself, justifying intervention by the Constitutional Court; as such there should be no order of costs against the private parties involved in the matter. The state was accordingly ordered to pay Biowatch's costs in the High Court and Constitutional Court, and the order directing Biowatch to pay Monsanto's (respondent's) costs was set aside.²⁵⁶ The court highlighted that the case had involved constitutional issues both as regards the right of access

²⁵² *Trustees for the time being of the Biowatch Trust v Registrar, Genetic Resources and others* (2009) ZACC para 16.

²⁵³ *Trustees for the time being of the Biowatch Trust v Registrar, Genetic Resources and others* (2009) ZACC para 14.

²⁵⁴ Section 31 NEMA

²⁵⁵ *Trustees for the time being of the Biowatch Trust v Registrar, Genetic Resources and others* (2009) ZACC para 19.

²⁵⁶ *Trustees for the time being of the Biowatch Trust v Registrar, Genetic Resources and others* (2009) ZACC para 60.

to information protected under section 32 and that the information sought related to environmental rights protected by section 24 of the Constitution.²⁵⁷ Section 32 is envisioned to encourage the facilitation of transparent and accountable government²⁵⁸ and, while section 32 is not an absolute right, all organs of state are, in terms of section 7(2) of the Constitution, obliged to respect, promote and fulfil this right in addition to other rights in the Bill of Rights.²⁵⁹ The inclusion of a right of access to information in the Bill of Rights is essential and is in conformity with international law in the interests of fostering accountable and participatory government generally.²⁶⁰

The right of access to information was also emphasised by the court in *Occupiers of 51 Olivia Road, Berea Township and 197 Main Street Johannesburg v City of Johannesburg and others*.²⁶¹ This case concerned the eviction of the illegal occupiers of an inner-city building which was earmarked by the City of Johannesburg as part of an urban regeneration project. The occupiers argued that the city did not provide them with an adequate hearing before deciding to evict them.²⁶² The SCA in considering this argument based its finding on the fact that the buildings were unsafe and unhealthy and ordered the city to provide housing assistance to those in desperate need by relocating them to a temporary settlement area. The Constitutional Court after allowing leave to appeal, issued an interim order aimed at ensuring that the city and

²⁵⁷ *Trustees for the time being of the Biowatch Trust v Registrar, Genetic Resources and others* (2009) ZACC para 45.

²⁵⁸ *Trustees for the time being of the Biowatch Trust v Registrar, Genetic Resources and others* (2009) ZACC para 34.

²⁵⁹ Glazewski J *Environmental Law in South Africa* (2013) 5-42.

²⁶⁰ Johannessen L 'Freedom of Expression and Information in the New South Africa Constitution and its Compatibility with International Standards' (1994) 10 *SAJHR* 261-235.

²⁶¹ *Occupiers of 51 Olivia Road Berea Township and 197 Main Street Johannesburg v City of Johannesburg and Others* (2008) ZACC para 16.

²⁶² *Occupiers of 51 Olivia Road Berea Township and 197 Main Street Johannesburg v City of Johannesburg and Others* (2008) ZACC para 7.

the occupiers engaged with each other meaningfully on certain issues.²⁶³ This was made in an attempt to resolve difficulties and differences placed before the court in light of the values of the Constitution and the rights and duties of the citizens concerned and to alleviate the plight of the occupiers by making the buildings safe and conducive to occupation. As the result of the interim order, an agreement was reached between the city and the occupiers through meaningful engagement in order to resolve the eviction problems. The court indicated that the constitutional value of openness in the process of meaningful engagement required during negotiation in a policy plan or programmes that talk to the rights of community, required the municipality to furnish complete and accurate information that would enable affected communities to reach reasonable decisions.²⁶⁴ The appeal succeeded and the court set aside both orders of the High Court and SCA on the basis that the proceedings would have been obviated if there had been meaningful engagement before the case had been started.²⁶⁵ This judgment strengthens PAIA in that the right of access to information places a duty on the state to meaningfully engage with the communities affected. Meaningful engagement is a two-way process in which the government and the persons involved consult with one another in order to achieve a pre-determined objective. Access to information is therefore fundamental to the notion of public participation because once members of the public have access to information they are able to contribute to and participate meaningfully in the decision-making processes. Ngcobo CJ stated that in a democratic society the effective exercise of a right also depended on the right of access to information. The right of access to information was also crucial to the realisation of other rights in the Bill of Rights. Without access to information, the ability of

²⁶³ *Occupiers of 51 Olivia Road, Berea Township and 197 Main Street Johannesburg v City of Johannesburg and Others* (2008) ZACC para 5.

²⁶⁴ *Occupiers of 51 Olivia Road, Berea Township and 197 Main Street Johannesburg v City of Johannesburg and Others* (2008) ZACC para 21.

²⁶⁵ *Occupiers of 51 Olivia Road, Berea Township and 197 Main Street Johannesburg v City of Johannesburg and Others* (2008) ZACC para 53.

citizens to make responsible decisions and participate in public life was undermined.²⁶⁶ The importance of access to information during environmental decision-making process cannot be over-emphasised, because once the information is made available, people are able to participate effectively, and earnestly engage in development decisions.²⁶⁷ Public participation is a necessary condition for ensuring the sustainability of development activities.²⁶⁸

3.7.2 Promotion of Administrative Justice Act

The right to just administrative action is provided for by the Constitution.²⁶⁹ Section 33 embraces the concept of administrative justice which *inter alia* aims to ensure good governance and administration, fair dealing within an administrative context, enhance protection of the individual against abuse of State power, promote public participation in decision-making and strengthen the notion that public officials are answerable and accountable to the public they are meant to serve.²⁷⁰ All decisions made by administrative officials in terms of environmental legislation had to conform to the requirements of PAJA.²⁷¹ Consequently, when an administrator acts in an unlawful manner and contrary to the public interest when administering its functions, the state may be held liable.²⁷² PAJA was enacted to give effect to administrative

²⁶⁶ *President of the Republic of South Africa and others v Mail and Guardian Media Ltd* (2012) (2) SA 50 (CC) para 10.

²⁶⁷ T Murombo 'Beyond Public Participation: The Disjuncture between South Africa's environmental impact assessment (EIA) law and Sustainable Development' (2008) 3 *PER* 22/23.

²⁶⁸ T Murombo 'Beyond Public Participation: The Disjuncture between South Africa's environmental impact assessment (EIA) law and Sustainable Development' (2008) 3 *PER* 22/23.

²⁶⁹

- (1) *Everyone has the right to administrative action that is lawful, reasonable and procedurally fair*
- (2) *Everyone whose rights have been adversely affected by administrative action has the right to be given written reasons*
- (3) *National legislation must be enacted to give effect to these rights, and must-*
 - (a) *provide for the review of administrative action by a court or, where appropriate, an independent and impartial tribunal;*
 - (b) *impose a duty on the state to give effect to the rights in subsections (1) and (2); and*
 - (c) *promote an efficient administration.*

²⁷⁰ Kotze JL 'A Critical Survey of Domestic Constitutional Provisions relating to Environmental protection in South' (2008) 14 *Tilburg Law Review* 318.

²⁷¹ Kidd M *Environmental Law* (2011) 27.

²⁷² Kotze JL 'A Critical Survey of Domestic Constitutional Provisions relating to Environmental protection in South' (2008) 14 *Tilburg Law Review* 318.

action that is lawful, reasonable and procedurally fair as well as to facilitate the receipt of written reasons for that administrative action or decision. Kidd asserts that the effectiveness of environmental law depends largely on administrative action which is lawful, reasonable and procedurally fair.²⁷³ Administrative justice is aimed to ensure good governance and administration, ensure fair dealing within the administrative context, enhance protection of the individual against abuse of state power, promote public participation in decision-making and strengthen the notion that public officials are answerable and accountable to the public they are meant to serve.²⁷⁴ This right is directly linked to the notion of public participation and it promotes the involvement of the community in decision-making, because when an organ of the state exercises a power or performs a public function, this should be done in an open and transparent manner, thus ensuring accountability. This position was confirmed by the Supreme Court of Appeal in *The Director: Mineral Development, Gauteng Region Sasol Mining (Pty) Ltd v Save the Vaal Environmental and others*²⁷⁵ where the court held that the *audi alteram partem* rule applied when an application for a mining licence is made, and that interested parties should be notified and be given an opportunity to raise their objections in writing.²⁷⁶ The court further held that the Constitution, by including environmental rights as fundamental, justiciable human right, by necessary implication required that environmental consideration be accorded appropriate recognition and respect in the administrative processes in our country.²⁷⁷

²⁷³ Kidd M *Environmental Law* (2011) 27.

²⁷⁴ Kotze LJ 'The Application of Just Administration Action in the South African Environmental Governance Sphere: An analysis of some contemporary thoughts and recent jurisprudence' (2004) 2 *PER* 1.

²⁷⁵ *The Director: Mineral Development, Gauteng Region Sasol Mining (Pty) Ltd v Save the Vaal Environmental and Others* [1999] ZASCA 9 para 20.

²⁷⁶ *The Director: Mineral Development, Gauteng Region Sasol Mining (Pty) Ltd v Save the Vaal Environmental and Others* [1999] ZASCA 9 para 20.

²⁷⁷ *The Director: Mineral Development, Gauteng Region Sasol Mining (Pty) Ltd v Save the Vaal Environmental and Others* [1999] ZASCA 9 para 20.

3.7.3 Local Government Municipal Systems Act

The Constitution is underpinned by principles of good governance, which also highlights the importance of public participation as an essential element of successful local governance.²⁷⁸ Section 152 of the Constitution confirms citizens' rights, and more specifically, the rights of communities to be involved in local governance. Municipalities are obliged to encourage the involvement of communities and community organisations in local government. This obligation extends to the way in which a municipality operates and functions.²⁷⁹ Chapter 4 of the Municipal Systems Act provides in section 16(1) that a municipality must develop a culture of municipal governance that complements formal representative government with a system of participatory governance.²⁸⁰ This legislation serves as a catalyst for encouraging public participation by the community. Public participation must therefore be understood as playing an essential part in the consolidation and enhancement of our democracy. It is vital because it

²⁷⁸ Enhancing Public Participation available at <https://www.ecngoc.co.za> (accessed 3 September 2018)

²⁷⁹ Section 118 of the Constitution provides that:

- (1) a provincial legislature must-
- (a) facilitate public involvement in the legislative and other processes of the legislature and its committees; and
 - (b) conduct its business in an open manner, and hold its sittings, and those of its committees, in public, but reasonable measures may be taken
 - (i) to regulate public access, including access of the media, to the legislature and its committees; and
 - (ii) to provide for the searching of any person and, where appropriate, the refusal of entry to, or the removal of, any person

The Municipal Systems Act 32 of 2000 obliges municipalities to:

²⁸⁰ Encourage, and create conditions for, the local community to participate in the affairs of the municipality, including in

- (i) the preparation implementation and review of its integrated development plan in terms of Chapter 5
- (ii) the establishment, implementation and review of its performance management system in terms of Chapter 6
- (iii) the monitoring and review of its performance, including the outcomes and impact of such performance:
- (iv) the preparation of its budget
- (v) strategic decisions relating to the provision of municipal services
 - (a) contribute to building the capacity of
 - (i) the local community to enable it to participate in the affairs of the municipality; and
 - (ii) councillors and staff to foster community participation; and
 - (c) use its resources, and annually allocate funds in its budget, as may be appropriate for the purpose of implementing paragraphs (a) and (b)

makes government open and accountable for its actions.²⁸¹ In order for the community to participate meaningfully, they need to be adequately informed. This entails knowing what is happening within the community and what the important issues are; knowing what is happening in the broader society; and knowing what decisions will be made and what legal rights will ensue.²⁸² The primary principle behind public participation is that all the stakeholders affected by a public authority's decision or actions have a right to be consulted and to contribute meaningfully to such decision.²⁸³ The municipalities are obligated to take into account the interests and concerns of the residents when they drafts by-laws, policy and when they implement their programmes.²⁸⁴ This is because the municipalities work in close proximity to the community.

3.8 Conclusion:

This chapter demonstrates that the notion of public participation is constitutionally entrenched in South Africa. The Constitution provides for and the courts have interpreted with approval, the procedural application of the concept of public participation and have further confirmed its interrelatedness with the other rights enshrined in the Bill of Rights. It is claimed that a nexus exists between the idea of public participation and the fulfilment of environmental rights. This argument is affirmed by Du Plessis who reveals implicit and explicit linkages between public participation and fulfilment of environmental rights. She argues that the link offer solutions to environmental challenges. Public participation is very important in a constitutional democracy as it contributes to the functioning of a representative democracy. It encourages citizens of the country to be actively involved in public affairs. It enhances the civic dignity of those who

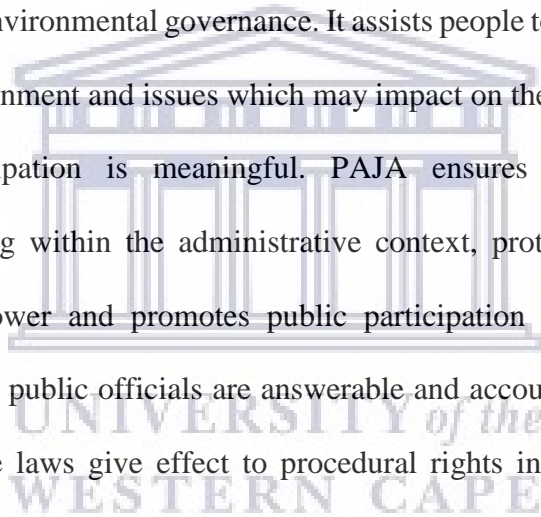
²⁸¹ Du Plessis A *Environmental Law and Local Government in South Africa* Juta and Co.

²⁸² Democracy, Government & Public Participation at available at <http://www.paralegaladvice.org.za/wp-content/uploads/2016/05/03-PLM2015-Democracy.pdf> (accessed 28 August 2018).

²⁸³ Enhancing Public Participation available at <https://www.ecngoc.co.za> (accessed 3 September 2018).

²⁸⁴ Enhancing Public Participation available at <https://www.ecngoc.co.za> (accessed 3 September 2018).

participate by enabling their voices to be heard and taken account of. The environmental right in section 24 forms part of the democratic system in South Africa and it stands in close relation to the values of human dignity, equality and freedom and must therefore be respected, protected and fulfilled by everyone. The Constitution promotes and protects environmental rights through democratic principles, such as public participation, whose principles seek to ensure that people are empowered and encouraged to participate meaningfully in decisions that have the potential to affect them. The notion of public participation is closely related to, environmental democracy and environmental governance and is a necessary means to achieve sustainable development. The right of access to information found in PAIA is a cornerstone of public participation in environmental governance. It assists people to be adequately informed as to the state of the environment and issues which may impact on the environment in order to ensure that their participation is meaningful. PAJA ensures good governance and administration, fair dealing within the administrative context, protection of the individual against abuse of state power and promotes public participation in decision-making and strengthens the notion that public officials are answerable and accountable to the public they are meant to serve. These laws give effect to procedural rights in the Constitution. Local government forms part of the operational state and as such is co-responsible for the realisation of the constitutional environmental right whilst one of the constitutional objectives of local government is to promote a safe and healthy environment. It has been observed that, in protecting the environment, public participation is an essential tool to ensure that decisions that may significantly affect the environment are scrutinised and made from an informed point of view. Public participation plays a significant role in protection of substantive rights including environmental rights entrenched in section 24



CHAPTER 4

EXPOSITION OF PUBLIC PARTICIPATION WITHIN SOUTH AFRICAN ENVIRONMENTAL LEGISLATION

4.1 Introduction

The discussions in the previous chapter demonstrated that public participation plays a significant role in the protection of substantive rights, including environmental rights entrenched in section 24 of the Constitution. Section 24 gives effect to NEMA as the environmental framework law in South Africa. NEMA is the product of an environmental management policy development process which includes an extensive public participation processes.²⁸⁵ NEMA provides for co-operative environmental governance by establishing principles for decision-making on matters affecting the environment.²⁸⁶ This chapter will evaluate how the concept of public participation is embedded within the South African environmental law. A specific focus will be directed at principles enumerated under NEMA, Environmental Impact Assessments, the Air Quality Act and the Biodiversity Act by elucidating how the notion of public participation is encouraged in order to protect the environmental right.

4.2 National Environmental Management Act:

NEMA constructs the basic legal framework for the environmental rights guaranteed in section 24 of the Constitution.²⁸⁷ NEMA provides generic principles and obligations in relation to all activities that affect or may affect the environment.²⁸⁸ This legislation is greatly significant in

²⁸⁵ Kidd M 'The National Environmental Management Act and Public Participation'(1999) 6 *SAJELP* 21.

²⁸⁶ Preamble of NEMA

²⁸⁷ *BP Southern Africa (Pty) Limited v MEC for Agriculture, Conservation, Environment & Land Affairs* (2004) SA para 124, para145, and para149.

²⁸⁸ Du Plessis A and Kotze LJ 'The Heat Is On: Local Government and Climate Governance in South Africa' (2014) 58 *Journal of African Law* 159.

enabling public participation, in that it seeks to broaden the scope for civil society groups to assist the state in monitoring environmental standards. At the same time, NEMA recognises that rights to participation need to be supported by capacity building amongst those who want to make use of the rights.²⁸⁹

4.2.1 Principles enumerated under NEMA

NEMA sets out the national environmental management principles which apply throughout South Africa to the actions of all organs of state which may significantly affect the environment.²⁹⁰ These principles serve as the general framework within which environmental management and implementation plans are formulated, and also serve as guidelines for any state organ exercising any function concerning the protection of the environment.²⁹¹ These principles shall apply alongside all other appropriate and relevant considerations, including the state's responsibility to respect, protect, promote and fulfil the social and economic rights in chapter 2 of the Constitution, and in particular the basic needs of categories of persons disadvantaged by unfair discrimination.²⁹² The principles guide the interpretation, administration and implementation of this Act, and any other law concerned with the protection or management of the environment,²⁹³ and are thus explicitly applicable to the environmental right in the Constitution. The principles require environmental management to place people and their needs at the forefront of their concern, and to serve their physical, psychological, developmental, cultural and social interests equitably.²⁹⁴ One of the cornerstone principles of NEMA is public participation in the implementation of environmental legislation.²⁹⁵

²⁸⁹ Hamann R 'South African Challenges to the Theory and Practice of Public Participation in Environmental Assessment' (2003) 10 *SAJELP* 24.

²⁹⁰ Section 2(1) NEMA.

²⁹¹ Section 2(1)(b) and (c) of NEMA.

²⁹² Section 2(1)(a) NEMA.

²⁹³ Section 2(1)(e) NEMA.

²⁹⁴ Section 2(2) NEMA.

²⁹⁵ Kidd M 'The National Environmental Management Act and Public Participation' (1999) 6 *SAJELP* 2.

The NEMA principle encourages public participation by demonstrating that the participation of all interested and affected parties fulfils an important role in environmental law and so is a requirement of impact assessments.²⁹⁶ Section 2(4)(f) requires that the participation of all interested and affected parties in environmental governance must be promoted, and that all people must have the opportunity to develop the understanding, skills and capacity necessary for achieving equitable and effective participation, and that participation by vulnerable and disadvantaged persons must be ensured. These principles embody public participation in environmental decision-making and promote decision-making taken in an open and transparent manner with access to information provided in accordance with the law.²⁹⁷

The notion of public participation outlines three important components, namely, access to information, participation in decision-making, and access to justice. These components are fundamentally important to achieve public participation in the environmental context. Kidd argues that public participation may lead to improvement in the legitimacy of environmental policies, objectives and actions.²⁹⁸ Access to information is vital for people to be informed as to the state of the environment and issues which may affect the environment; thus assisting in meaningful participation.²⁹⁹ The right to access to information is both a right on its own as well as a right to leverage other human rights, such as the environmental right within the context of socio-economic activities.³⁰⁰ NEMA empowers members of the public to further

²⁹⁶ Henderson G WP 'Some thoughts on distinctive principles of South African Environmental Law' (2001) 8 *SAJELP* 67.

²⁹⁷ Section 2(4)(k) NEMA.

²⁹⁸ Kidd M 'The National Environmental Management Act and Public Participation' (1999) 6 *SAJELP* 22.

²⁹⁹ Kidd M 'The National Environmental Management Act and Public Participation' (1999) 6 *SAJELP* 26.

³⁰⁰ Ashukem JN 'A comparative analysis of the right to access to environmental information in South Africa and Uganda' (2017) 33 *SAJHR* 454.

environmental interests through litigation in order to protect the environment.³⁰¹ It is argued that the vigorous implementation of these procedural rights has a potential to significantly contribute to the realisation of substantive rights, and they are a prerequisite and final remedy for protecting and respecting substantive rights.³⁰² The envisaged public participation can only be achieved if interested and affected parties are given access to information, without which participation becomes impossible.

The challenge that is facing NEMA is that although the principles encourage participation, it does not state how they should be facilitated. This failure renders the principle to some extent deficient, particularly with regard to enforcement. To this end, Toxopeüs and Kotze argue that ‘this principle is not enforceable *per se* because it is a principle’; it must at the very least guide decision-making and could be relied on by parties who contend that proper participation has not taken place.³⁰³ In this regard Henderson submits these principles are generally expressions of policy rather than of substantive law. He further submits that the function of the principles is *inter alia* to guide the interpretation, administration and implementation of the Act and any other law concerned with the protection or management of the environment.³⁰⁴ He avers that for this reason, any statutory principles of environmental law are materially different in nature from legally-binding common law distinctive principles until they receive judicial interpretation. They do not have the same binding effect.³⁰⁵ It is submitted that although NEMA principles may be used as a guide to interpretation, it is apparent that NEMA itself has not

³⁰¹ Section 32 of NEMA

³⁰² Ashukem JN ‘A comparative analysis of the right to access to environmental information in South Africa and Uganda’ (2017)33 *SAJHR* 454.

³⁰³ M Toxopeüs and LJ Kotzé ‘Promoting Environmental Justice Through civil-based instruments in South Africa’ (2017) *Law Environment and Development Journal* 61.

³⁰⁴ Henderson G W P ‘Some thoughts on distinctive principles of South African Environmental Law’ (2001) 8 *SAJELP* 144.

³⁰⁵ Henderson G W P ‘Some thoughts on distinctive principles of South African Environmental Law’ (2001) 8 *SAJELP* 144.

established immutable rules of law or substantive rights and obligations that would invariably have to be followed or enforced by the courts.³⁰⁶ This is because these principles are unlike distinctive principles that may be developed in the common law and by which rights and obligations may be determined.³⁰⁷ It follows that the NEMA principles are not enforceable *per se* because they are just principles. Since the NEMA principles encourage the notion of public participation, it does not define public participation; and as such public participation provision is not aligned with an informed and clear understanding of what it entails, this also poses challenges in promoting and enforcing environmental rights enshrined in the Constitution. To this end, Toxopeüs and Kotze suggest that the legislature revisits NEMA in respect of monitoring and enforcement in order to consider including within this framework environmental law comprehensive provisions that could properly facilitate public participation.³⁰⁸ Du Plessis supports this proposal by suggesting

[A] broad revision of national environmental policy and legislation that is applicable to all spheres of government, to create uniformity in the structure and purpose of public participation in environmental governance, [that] would ultimately amount to taking several steps forward in promoting environmental justice through public participation'.³⁰⁹

The significance of public participation was recognised in the case of *Duduzile Baleni and others v Minister of Mineral Resources*³¹⁰ This matter concerned the application by Transworld Energy and Minerals (Pty) Ltd for a mining right in respect of land held by the Umgungundlovu community near Xolobeni on the Wild Coast.³¹¹ The applicant members of the

³⁰⁶ Henderson G W P 'Some thoughts on distinctive principles of South African Environmental Law' (2001) 8 SAJELP 155.

³⁰⁷ Henderson G W P 'Some thoughts on distinctive principles of South African Environmental Law' (2001) 8 SAJELP 155.

³⁰⁸ M Toxopeüs and LJ Kotzé 'Promoting Environmental Justice through civil-based instruments in South Africa' (2017) *Law Environment and Development Journal* 62.

³⁰⁹ Du Plessis 'Some comments on the sweet and bitter of the National Environmental Law Framework for Local Environmental Governance' (2009)24 *SAPR/PL* 22.

³¹⁰ *Baleni and Others v Minister of Mineral Resources and Others* (73768/2016) [2018] ZAGPPHC 829.

³¹¹ *Baleni and Others v Minister of Mineral Resources and Others* (73768/2016) [2018] ZAGPPHC 829 para 4

Umgungundlovu community approached the High Court for an order declaring that, *inter alia*, the Minister of Mineral Resources lacked the authority to grant a mining right in terms of section 23, read with section 22, of the Mineral and Petroleum Resources Development Act, 2002 (MPRDA), on land anywhere in the Republic of South Africa owned or occupied under a right to land held in terms of any tribal, customary or indigenous law or practice of a tribe, as defined by the Interim Protection of Informal Land Rights Act, 1996 (IPILRA), unless the provisions of the IPILRA have been complied with.³¹² The applicants further argued that the Minister of Mineral Resources was bound to obtain their community's full and informed consent before the granting of any mining right to Transworld Energy and Mineral Resources (Pty) Ltd in terms of section 23 read with section 22 of the MPRDA.³¹³ The applicants contended that the mining activities would not only bring about the physical displacement from their homes but would lead to an economic displacement of the community and bring about a complete destruction of their cultural way of life.³¹⁴ The applicants further contended that the community within which they lived had not consented to the mining activities.³¹⁵ The issue was the prior consent by the community members. To strengthen their argument, the applicants relied on section 2(1) of the IPILRA which requires prior consent to be free and informed.³¹⁶ In opposing the application, the respondents did not recognise that the applicants had a right to consent before the granting of a mining right and relied on the provisions of the MPRDA which in their view merely required that the community must be consulted before the Minister awarded a mining right to an applicant.³¹⁷ Therefore, the court was enjoined to interpret the provisions of MPRDA that related to consultation and the provisions of IPILRA that related to

³¹² *Baleni and Others v Minister of Mineral Resources and Others* (73768/2016) [2018] ZAGPPHC 829 para 3 and para 6.

³¹³ *Baleni and Others v Minister of Mineral Resources and Others* (73768/2016) [2018] ZAGPPHC 829 para 18.

³¹⁴ *Baleni and Others v Minister of Mineral Resources and Others* (73768/2016) [2018] ZAGPPHC 829 para 18.

³¹⁵ *Baleni and Others v Minister of Mineral Resources and Others* (73768/2016) [2018] ZAGPPHC 829 para 24.

³¹⁶ *Baleni and Others v Minister of Mineral Resources and Others* (73768/2016) [2018] ZAGPPHC 829 para 25.

³¹⁷ *Baleni and Others v Minister of Mineral Resources and Others* (73768/2016) [2018] ZAGPPHC 829 para 26.

consent and decide which took authority above the other. In interpreting the MPRDA provisions, the court looked at section 23(A) of the Act which provides that, the Minister may impose such conditions as she considers necessary to promote the rights and interests of communities, including requiring the participation of the community.³¹⁸ The court also looked at the consent requirement and consultation process required by these two acts and confirmed that these two processes differed; the former contemplated an agreement whilst the latter envisaged a process of consensus-seeking that might not necessarily be an agreement.³¹⁹ Also the two acts purported to serve different purposes. The MPRDA set out to regulate mining activities for the benefit of all South Africans, whereas IPILRA was enacted to provide for the temporary protection of certain rights and interests in land which were not otherwise adequately protected by law.³²⁰ Having duly considered both Acts, the court concluded that these two Acts could operate alongside one another and be interpreted to read harmoniously. In instances where land was held on a communal basis, affected parties must be given sufficient notice and be afforded a reasonable opportunity to participate, either in person or through representatives.³²¹ The court declared that the first respondent lacked authority to grant a mining right to the fifth respondent without the full and informed consent of the applicants (the Umgungundlovu Community) as the holder of rights on land.³²² This judgment differentiates between consent and consultation and emphasises the importance of participation of interested and affected persons in a decision-making process. The IPILRA seeks to provide for the protection of certain rights and interests in land that were previously not protected by the law. Such protection ensures that communities have a right to decide what should happen to land in which they have an interest, and offers communities legal control over their land according to

³¹⁸ *Baleni and Others v Minister of Mineral Resources and Others* (73768/2016) [2018] ZAGPPHC 829 para 67.

³¹⁹ *Bengwenyama Minerals (Pty) Ltd and Others v Genorah Resources (Pty) Ltd and Others* 2011 (4) SA 113 (CC)

³²⁰ *Baleni and Others v Minister of Mineral Resources and Others* (73768/2016) [2018] ZAGPPHC 829 para 75.

³²¹ *Baleni and Others v Minister of Mineral Resources and Others* (73768/2016) [2018] ZAGPPHC 829 para 77.

³²² *Baleni and Others v Minister of Mineral Resources and Others* (73768/2016) [2018] ZAGPPHC 829 para 84.

customary law and usages practised by them.³²³ Most significantly no person may be deprived of any informal right to land without his or her consent.³²⁴ The only exception was that a person may be deprived of such right or right in communal land in accordance with the custom or usage of the community concerned.³²⁵ In instances where land is held on a communal basis, affected and interested parties must be given sufficient notice and be afforded a reasonable opportunity to participate at any meeting where a decision to dispose of their rights to land is taken.³²⁶

4.2.2 Environmental Impact Assessment (EIA)

Chapter 5 of NEMA promotes the integration of the principles of environmental management set out in section 2 regarding all decisions which may have a significant effect on the environment.³²⁷ This is to ensure an adequate and appropriate opportunity for public participation in decisions that may affect the environment.³²⁸ NEMA recognises that sound environmental decision-making is intrinsically linked to the principle of administrative justice, and specifically includes a comprehensive framework for public participation in the environmental authorisation process.³²⁹ Public participation plays a critical role in the Environmental Impact Assessment (EIA) process in South Africa.³³⁰ EIA is defined as the official appraisal of the likely effects of a proposed policy, programme or project on the environment, alternatives to the proposal, and measures to be adopted to protect the

³²³ *Baleni and Others v Minister of Mineral Resources and Others* (73768/2016) [2018] ZAGPPHC 829 para 77 and para 83.

³²⁴ Section 2(1) of IPILRA.

³²⁵ Section 2(2) of IPILRA.

³²⁶ Section 2(4) of IPILRA.

³²⁷ Section 23(1)(2)(a) of NEMA.

³²⁸ Section 23(1)(2)(e) of NEMA.

³²⁹ King P and Reddell C 'Public Participation and Water Use Rights' (2015) *PELJ* (18) 950.

³³⁰ Aregbesola M, Means K, and Donaldson 'Interested and affected parties (I&APS) and consultants' viewpoints on the public participation process of the Gautrain Environmental Impact Assessment' (EIA)(2011) 1274.

environment.³³¹ Public participation is integral in the EIA process because it is viewed as fair for the public to be involved in issues that affect them.³³² It allows people to feel that their views and values are heard and are then incorporated into proposed programmes or projects.³³³ It improves the quality and effectiveness of the project.³³⁴ The public are less hostile and more involved in the project,³³⁵ and the local community is better able to understand its environment and intervene in environmental problems by applying past experience.³³⁶ In terms of the EIA regulations, an environmental practitioner must, in relation to an application for environmental authorisation which requires either basic assessment or scoping and environmental impact assessment:

- (i) Conduct at least the public participation process set out in the EIA regulations,
- (ii) Open and maintain a register of all interested and affected parties;
- (iii) Consider all comments and representations received following the public participation process; and
- (iv) Provide opportunities for comments to be raised on any reports prepared in relation to the basic assessment or scoping and EIA process.³³⁷

It is clear from the above that the requirement of public participation in environmental authorisation is encouraged because it plays an important role in providing people who may be affected by administrative action with an opportunity to engage with the process and make representations. The information obtained during such process serves to ensure that

³³¹ Gilpin A 'Environmental impact assessment' (EIA): cutting edge for the twenty-first century (1995) 4.

³³² Shepherd A. & Bowler C 'Beyond the requirements: Improving public participation in EIA' (1997) 40(6) *Journal of Environmental Planning and Management* 725-738.

³³³ Burchy, M & Race D 'The twists and turns of community participation in natural resource management in Australia; what is missing?' (2001) 44(3) *Journal of Environmental Planning and Management* 293-308.

³³⁴ Enserink B & Monnikhof R A H 'Information management for public participation in co-design process: Evaluation of a Dutch example' (2003) 46(3) *Journal of Environmental Planning and Management* 315-344.

³³⁵ Knaap, GJ Matier D & Olshanky R 'Citizen advisory groups in remedial action planning: Paper tiger or key success?' (1998) 41(3) *Journal of Environmental Planning and Management* 337-354.

³³⁶ Lane M B & McDonald G 'Community-based environmental planning: Operational dilemmas, planning principles and possible remedies' 48(5) *Journal of Environmental Planning and Management* 709-731

³³⁷ Environmental Impact Assessment (EIA) regulations 41, 42, and 43 in GN 10328 GG 38282 of 4 December 2014.

administrative decisions are made from an informed perspective.³³⁸ However, there are challenges detected in the EIA process, in that it lacks guidance during the public participation process because there are no specific provisions relating to the holding of public meetings or direct engagement with the public.³³⁹

The importance of public participation during all stages of the environmental decision-making process was considered in *Earthlife Africa (Cape Town) v Director-General Department of Environmental Affairs and Tourism*.³⁴⁰ In this case the consultant appointed by Eskom undertook an EIA, accompanied by an extensive process of participation. They completed all the steps envisaged by EIA regulations and submitted the environmental impacts report (EIR) to the department and interested parties including the applicant, for comment.³⁴¹ During September 2002, the Legal Resource Centre (LRC) on behalf of the applicant made various efforts to obtain access to further information and documents relating to the draft EIR from the department, Eskom and the consultants. However, when all their attempts were futile, a review application was brought before the court in terms of section 36 of PAJA.³⁴² The grounds for the review were based on the claim that the right to procedurally fair administrative action been infringed and as such the applicant was entitled to a fair hearing that is reasonable opportunity to make written representations before a decision was made by the Director-General (DG). The court held that there was nothing in the Act (ECA) or the regulations that expressly excluded public participation or the application of the *audi alteram partem* rule during this ‘second stage’

³³⁸ King P and Reddell C ‘Public Participation and Water Use Rights’ (2015) *PELJ* (18) 947.

³³⁹ Ridl J, Couzens E ‘Misplacing NEMA? A consideration of some problematic aspects of South Africa’s new EIA regulations’ (2010) (13)5 *PER/PELJ* 96/189.

³⁴⁰ *Earthlife Africa (Cape Town) v Director-General Department of Environmental Affairs and Tourism* 2005 3 SA 156 (C)

³⁴¹ *Earthlife Africa (Cape Town) v Director-General Department of Environmental Affairs and Tourism* 2005 3 SA 156 (C) para 26.

³⁴² *Earthlife Africa (Cape Town) v Director-General Department of Environmental Affairs and Tourism* 2005 3 SA 156 (C) para 27.

of the process. In accordance with settled authority therefore, it followed that procedural fairness demanded application of the *audi alteram partem* rule at all stages.³⁴³ The administrative law principle of *audi alteram partem* could be used to facilitate effective public participation and raising of objections to administrative government decisions which may affect environmental rights and interests, and certainly in those instances where concerned citizens had not been given an opportunity to raise objections to administrative decisions.³⁴⁴ This implied that where the rights or interests of persons had been affected, the *audi alteram partem* rule should be considered on the basis that a person whose rights are to be affected has the right to be heard. This principle may be used effectively as a means to participate in decision-making relating to the environment.

4.3 National Environmental Management Air Quality Act (NEMAQA)

This Act was promulgated to reform the law regulating air quality to prevent pollution and ecological degradation and to secure ecologically sustainable development while promoting justifiable economic and social development.³⁴⁵ It also provided for national norms and standards regulating air quality monitoring, management and control by all spheres of government, for specific air quality measures and for matters incidental thereto.³⁴⁶ This regulation is aligned with the constitutional right (section 24(b)) as well as South Africa's international obligations.³⁴⁷ The Act gives effect to section 24(b) of the Constitution in order to enhance the quality of ambient air to secure an environment that is not harmful to the health

³⁴³ *Earthlife Africa (Cape Town) v Director-General Department of Environmental Affairs and Tourism* 2005 3 SA 156 (C) para 89.

³⁴⁴ Toxopius M and Kotzé LJ 'Promoting Environmental Justice through civil-based instruments in South Africa' (2017) *Law Environment and Development Journal* 54.

³⁴⁵ Preamble of NEMAQA.

³⁴⁶ Preamble of NEMAQA.

³⁴⁷ Du Plessis A 'Some comments on the sweet and bitter of the National Environmental Law Framework for Local Environmental Governance' (2009)24 *SAPR/PL* 74.

and well-being of people.³⁴⁸ The Act imposes obligations on local governments to protect and enhance the quality of air in accordance with the environmental principles³⁴⁹ whose application is guided by the national environmental management principles set out in section 2 of NEMA, which require interested and affected persons to participate in environmental decisions that affect them. The national norms and standards established by the Act are aimed at ensuring opportunities for public participation in the protection and enhancement of air quality and requires public access to air quality information.³⁵⁰ This is to prevent air pollution and degradation of air quality, to reduce discharges, to promote air quality management, to monitor air quality effectively, to regularly report on air quality and to comply with related international law obligations³⁵¹ such as Kyoto.³⁵²

4.4 National Environmental Management: Biodiversity Act (NEMBA)

This Act is aimed to provide for the management and conservation of South Africa's biodiversity within the framework of NEMA; to protect species and ecosystems and to facilitate sustainable use of indigenous biological resources.³⁵³ Local authorities have an obligation to align any municipal environmental conservation plan with the norms and standards contained in the national biodiversity framework³⁵⁴ in order to abide by the provisions of any biodiversity management agreement regarding the implementation of a biodiversity management plan.³⁵⁵

One of the principles provides that the Biodiversity Management Plan for Ecosystems (BMP-E) should engage stakeholders and enhance collaboration as fundamental to the process of developing and implementing a BMP-E – seeking voluntary participation of relevant

³⁴⁸ Section 2(b) of NEMAQA.

³⁴⁹ Section 3 and 5 of NEMAQA.

³⁵⁰ Section 7(2) of NEMAQA.

³⁵¹ Du Plessis A 'Some comments on the sweet and bitter of the National Environmental Law Framework for 'Local Environmental Governance' (2009)24 *SAPR/PL* 75.

³⁵² Kyoto Protocol to the United Nations Framework Convention on Climate Change (1997).

³⁵³ Preamble of NEMBA.

³⁵⁴ Section 39(2) of NEMBA.

³⁵⁵ Section 44 of NEMBA.

stakeholders. Section 99 encourages the Minister to consult all Cabinet members whose area of responsibility may be affected by the exercise of the power in accordance with principles of co-operative governance set out in chapter 3 of the Constitution, and allow public participation to take place.³⁵⁶ In terms of section 100 of the Act, the Minister must allow public participation to take place by giving a notice of the proposed exercise of the power in the government gazette and a national newspaper inviting members of the public to submit to the Minister within 30 days requests for information sufficient to enable the public to submit meaningful representations or objections – and in certain circumstances allow any interested person or the community to present oral representations. The Minister must give due consideration to all representations received.³⁵⁷

4.5 National Water Act (NWA)

This law regulates water use through a range of mechanisms. The preamble recognises that water is a natural resource that belongs to all people, disavowing the discriminatory laws and practices of the past that prevented equal access to water, and use of water resources.³⁵⁸ It also recognises the need for the integrated management of all aspects of water resources and, where appropriate, the delegation of management functions to a regional or catchment level so as to enable everyone to participate in water management.³⁵⁹ Sections 41(2)(c) and 41(4) require the competent authority to invite public participation in the case of an application for a water use licence.³⁶⁰ According to King and Reddel, although these provisions encourage public participation and recognise the link between sustainable water resource management and the environmental rights of citizens, the Act has failed to provide an enabling platform for robust

³⁵⁶ Section 99 of NEMBA.

³⁵⁷ Section 100 of NEMBA.

³⁵⁸ Preamble of NWA.

³⁵⁹ Act 36 of 1998

³⁶⁰ Section 41 of the NWA.

public participation.³⁶¹ The NWA does not provide an inclusive mechanism for public participation which ensures the ventilation of all potential issues. Although section 41(4) provides some guidance as to the information required in a media notice concerning a water use licence application, the provision is deficient in the detail as to the nature and extent of public participation procedure in respect of interested and affected parties.³⁶² Section 41 was considered in the review application by the *Escarpment Environment Protection Group*³⁶³ before the North Gauteng High Court against three decisions by the Water Tribunal regarding appeals.³⁶⁴ The single issue stated before the court was:

Whether a responsible authority has not invoked its power under section 41(4)(a)(ii) of the NWA to require a licence applicant to give notice of its application for a water use licence and to state in such notice that written objections may be lodged against the application before a specified date; does a person who has nevertheless lodged a written objection in time to enable him to participate in the decision-making process have, if the licence is granted against his objection, a right of appeal to the Water Tribunal under section 148(1)(f) of the NWA?³⁶⁵

In answering this question, the Court considered the requirements of section 41 of the NWA and stated that an application under section 41 constituted an administrative action.³⁶⁶ Therefore those affected by such application were, under section 33(1) of the Constitution and section 3 of the PAJA, entitled to administrative action that was lawful, reasonable and procedurally fair.³⁶⁷ In the circumstance, the court found that the word ‘may’ in section 41

³⁶¹ King P and Reddell C ‘Public Participation and Water use Rights’ (2015) 4 PER/PELJ 954.

³⁶² King P and Reddell C ‘Public Participation and Water use Rights’ (2015) 4 PER/PELJ 955.

³⁶³ *Escarpment Environment Protection Group v Department of Water Affairs* (2013) ZAGPPHC 505 (GNP)

³⁶⁴ *Escarpment Environment Protection Group v Department of Water Affairs* (2013) ZAGPPHC 505 (GNP) para 6.

³⁶⁵ *Escarpment Environment Protection Group v Department of Water Affairs* (2013) ZAGPPHC 505 (GNP) para 20.

³⁶⁶ *Escarpment Environment Protection Group v Department of Water Affairs* (2013) ZAGPPHC 505 (GNP) para 20.

³⁶⁷ *Escarpment Environment Protection Group v Department of Water Affairs* (2013) ZAGPPHC 505 (GNP) para 23.

afforded a complete discretion to the responsible authority, and the responsible authority was duty bound to require that steps be taken to facilitate public participation.³⁶⁸ This implied that the responsible authority, when faced with an application for a water use licence that would affect the rights or legitimate expectations of others, was required to ensure procedural fairness in its decision-making by ensuring public participation. The court acknowledged the importance of public participation in environmental decision-making, holding that:

Participation is an essential tool to ensure that decisions that may significantly affect the environment are scrutinised and made from an informed point of view. The decision making process both advances the constitutional values of openness and is advanced by providing platforms for those affected to air their views.³⁶⁹

The court found the decision of the Water Tribunal to be arbitrary and set it aside, declaring that the appellants had standing to pursue their appeal before the Water Tribunal.³⁷⁰

Section 56(1) of NWA regulations was then published to provide for more detailed public participation provisions in water use licence applications in an attempt to close the gap that existed in section 41 of the Act by stipulating the time frame in the process of public participation. These regulations do not adequately address the challenges that exist in section 41 of the Act; they lack detail concerning public participation in the environmental decision regarding water resource management, which makes it difficult to implement.

³⁶⁸ *Escarpment Environment Protection Group v Department of Water Affairs* (2013) ZAGPPHC 505 (GNP) para 23

³⁶⁹ *Escarpment Environment Protection Group v Department of Water Affairs* (2013) ZAGPPHC 505 (GNP) para 50

Escarpment Environment Protection Group v Department of Water Affairs (2013) ZAGPPHC 505 (GNP) para 70

³⁷⁰ *Escarpment Environment Protection Group v Department of Water Affairs* (2013) ZAGPPHC 505 (GNP) para 70

4.6 Conclusion:

The discussion above illustrates the innovative lengths that South Africa's environmental legislation has gone to embrace the notion of public participation. NEMA recognises that the concept of public participation plays a significant role in the protection of environment. The NEMA principles require environmental management to place people and their needs at the forefront of its concern through public participation. The NEMA principles are the foundation of public participation in the implementation of environmental legislation. The NEMA principles encourage public participation by demonstrating that participation of all interested and affected parties is fundamental and fulfils an important role in the environmental law. However, although NEMA and its principles demand public participation, it does not state how it should be facilitated, which to some extent weakens implementation of public participation. It is argued that NEMA principles are used as a guide in interpretation, administration, and implementation and, as such, are not binding simply because they are not aligned with an informed and clear understanding of what it entails, which poses challenges in promoting and enforcing environmental rights.

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NEMAQA legislation provides protection to the environment by providing reasonable measures for the prevention of pollution and ecological degradation. The Act gives effect to the directive in section 24 of the Constitution to enhance the quality of ambient air for the sake of securing an environment that is not harmful to the health and well-being of people. The Act imposes obligations on local government to protect and improve the quality of air in accordance with the environmental principles in NEMA, which requires interested persons to participate in environmental decisions that affect them. NEMBA on the other hand, requires local authorities to align municipal environmental conservation plans with norms and standards contained in the biodiversity framework. The Act encourages the Minister to consult with the

Cabinet in accordance with the principles of co-operative governance and allow the public to participate by making meaningful representations which the Minister is obliged to consider. Public participation is integral to the NWA. The Act requires a competent authority to invite public participation in relation to an application for a water use licence. However, it does not provide inclusive mechanisms for public participation to ensure the ventilation of all potential issues. The judiciary plays an important role in encouraging public participation, as confirmed in various court decisions discussed in this chapter.

It is clear that the notion of public participation not only plays a significant role in the protection of environment; it is integral to the promotion and implementation of environmental law. Consequently, it is argued that South African environmental law facilitates the promotion of the public participation pursuant to section 24 of the Constitution.



CHAPTER 5

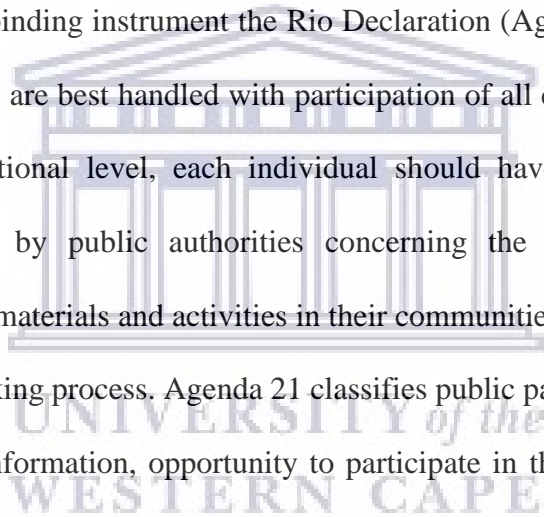
CONCLUSION AND RECOMMENDATIONS

5.1 Conclusion

Government and business sector decisions about land development and natural resources, impact on the environment, health, livelihoods, and quality of life of local communities. Therefore, it becomes imperative that the public should have a right to be involved in environmental decision-making so that they know what is at stake and are able to participate effectively in the decision itself and to have the capacity to challenge decisions that violate human rights and ecosystems. The essential question this thesis seeks to answer is whether South African environmental legislation facilitates the promotion of public participation pursuant to section 24 of the Constitution. Chapter one argues that public participation is fundamental to the protection of human rights, especially the rights of the most marginalised and vulnerable persons. Environmental rights generally require respect and protection by the government as well as positive action on the part of organs of state towards their fulfilment. As a result, encouraging public participation should be the first step in promoting equity and fairness in the sustainable development context; participation in environmental decision-making is essential and access to environmental information for those who choose to participate in decision-making is integral. Although public participation is encouraged in environmental matters, it is difficult to define because it takes so many forms; in its broadest form it can include education and information, review and reaction, and interaction and dialogue.

Chapter two commences by accepting that public participation is a general principle of law that forms part of the framework of international environmental law. It influences the formation, content, interpretation and further development of South African environmental law. This promotes a democratic process and facilitates the inclusion of non-state actors in environmental

decision-making at national, regional and international level, by giving non-state actors the tools to influence environmental decision-making and enable them to implement international environmental law. Its normative evolution is rooted in various binding and non-binding instruments of international, regional and domestic origin. The first binding international instrument is the Aarhus Convention which requires signatory states to take all necessary legislative, regulatory and judicial steps to ensure that the public is able to exercise its right to participate in environmental decision-making. The Espoo Convention prescribes that the affected party shall respond to the party of origin within the time specified in the notification, acknowledging receipt of the notification and indicating whether it intends to participate. This was followed by the non-binding instrument the Rio Declaration (Agenda 21) which stressed that environmental matters are best handled with participation of all concerned citizens at the relevant level. At the national level, each individual should have appropriate access to information that is held by public authorities concerning the environment, including information on hazardous materials and activities in their communities, and the opportunity to participate in decision-making process. Agenda 21 classifies public participation in three main categories viz access to information, opportunity to participate in the decision-making, and access to judicial and administrative proceedings and remedies. This convention encourages the state parties to implement these three components in their domestic legal systems. Chapter two demonstrates that the principle of public participation is notable for its binding and non-binding international instruments to which South Africa is a party; which means it has an obligation to follow the international law. That obligation finds expression in section 231 of the Constitution which regulates the signing, ratification, and implementation of international agreements or treaties. Section 232 provides that customary international law is law in South Africa unless it is inconsistent with the Constitution or an Act of Parliament; and section 233



obliges the courts to interpret any legislation in conformity with international law over any alternative interpretation that is inconsistent with international law.

Chapter three commences by providing the constitutional perspective of public participation by asserting that, after the advent of democracy, the Constitution became the foundation of the South African government's attempt to entrench socio-economic and political rights for all, and encourage citizens to be involved in decisions that affect them. The Constitution entrenched a number of important provisions for civil participation and governance accountability, some of which enjoin Parliament to provide a national forum for public consideration of issues that guarantee the right to participate publicly. The National Assembly and the National Council of Provinces are also enjoined to consider issues affecting the public and provinces by facilitating public involvement in their legislative process and committees in an open manner. Local government is mandated by the Constitution to encourage the involvement of communities and community organisation in its matters in order to facilitate sustained accountability and governance by engaging with citizens in order to effect improved service delivery. Chapter three goes on to discuss various landmark judgments that significantly endorse public participation. The degree of openness and participation minimises dangers of arbitrariness and irrationality. Justice Sachs indicated that public involvement is of particular significance for members of groups that have been the victims of a process of historical silencing. It is constitutive of their dignity as citizens today that they not only have a chance to speak, but also enjoy the assurance they will be listened to. The judiciary is thus very clear on the significance of public participation. Not only does the Constitutional Court confirm that right, but it also sets out the elements of that guarantee it in line with other constitutional principles.

Having emphasised the significance of public participation provisions in the Constitution, chapter three progresses to discuss the environmental right found in section 24 of the Constitution and its protection through public participation. Scholars unanimously agree that section 24 is framed in an anthropocentric way, which implies that the reason for the protection of the environment is the health and well-being of people. If one applies a contextual and purposive interpretation to section 24, taking into consideration that the section is framed in an anthropocentric fashion, then section 24 places people and their needs at the forefront of environmental protection. Du Plessis argues that the enforcement of environmental rights is linked to public participation in that states have an internationally recognised obligation to respect, protect, promote and fulfil their citizens' human rights, inclusive of environmental rights. She describes public participation in environmental decision-making as an effective tool to establish environmental priorities and offer solutions to environmental challenges. The right of access to environmental information, public participation, and access to justice, also called procedural rights or environmental democracy rights, are fundamentally important in the protection of the environment. Procedural environmental rights are considered as a condition and way to safeguard the implementation of substantive environmental rights. Procedural rights are indispensable to the implementation and enforcement of environmental rights. The principle of public participation forms part of the body of human rights, fused in international and regional instruments. The human rights confirm that public participation is essential element of environmental decision-making procedures. Therefore, there is no doubt that the relationship between public participation, sustainable development, environmental governance, and substantive environmental rights is interlinked and interrelated and provides protection to the environment.

Chapter three proceeds to detail various legislative reforms that have been enacted to give content to the notion of public participation. The first, PAIA, was enacted as a direct response to the constitutional instruction in section 32(2) and intends to foster a culture of transparency and accountability in public and private bodies by giving effect to the right of access to information. The right of access to environmental information is a cornerstone of public participation in environmental governance. It is vital that people are adequately informed as to the state of the environment and issues which may impact on the environment in order to ensure that their participation is meaningful. Citizens' right of access to information under this act is necessary for the exercise or protection of any of their rights. The right of access to information is important to the realisation of the notion of public participation as a whole because without access to information about activities that have potential negative impact on the environment, affected people will not be able to engage in the decision-making-process. PAJA was enacted to ensure that administrative action is lawful, reasonable and procedurally fair, involving giving written reasons for that administrative action or decision. Kidd proclaims that the effectiveness of environmental law depends largely on administrative action which is lawful, reasonable and procedurally fair. Administrative justice is intended to ensure good governance and administration, ensure fair dealing within the administrative context, enhance protection of the individual against abuse of state power, promote public participation in decision-making and strengthen the notion that public officials are answerable and accountable to the public they are meant to serve.

The, Local Government Municipal Systems Act is underpinned by principles of good governance, and highlights the importance of public participation as an essential element of successful local governance. Municipalities are obliged to encourage the involvement of communities and community organisations in local government.

Chapter four is substantially important to this thesis, answering the research question posed in chapter one, whether South African environmental law facilitates the promotion of the public participation pursuant to section 24 of the Constitution. The answer is revealed by scrutinising South African environmental legislation, specifically NEMA, NEMAQA, NEMBA, and the NWA. NEMA is the environmental framework law in South Africa, constructing the legal framework for the environmental rights guaranteed in section 24 of the Constitution. NEMA provides generic principles and obligations in relation to all activities that affect or may affect the environment. This legislation is greatly significant for public participation, in that it seeks to broaden the scope for civil society groups to assist the state in monitoring environmental standards. NEMA recognises that rights to participation need to be supported by capacity building amongst those who want to make use of the rights. NEMA sets out the national environmental management principles which apply throughout the nation to the actions of all organs of state which may significantly affect the environment. These principles serve as the general framework within which environmental management and implementation plans are formulated, and also serve as guidelines for any state organ exercising any function concerning the protection of the environment. One of the cornerstone principles of NEMA is public participation in the implementation of environmental legislation. The NEMA principles encourage public participation by demonstrating that the participation of all interested and affected parties fulfils an important role in environmental law and is a requirement of impact assessments. Section 2(4)(f) specifically requires participation of all interested and affected parties in environmental governance to be promoted, and that all people must have the opportunity to develop the understanding, skills and capacity necessary for achieving equitable and effective participation, and that participation by vulnerable and disadvantaged persons must be ensured. NEMA recognises that sound environmental decision-making is intrinsically linked to the principle of administrative justice, and specifically includes a comprehensive

framework for public participation in the environmental authorisation process. Chapter three goes on to argue that although the NEMA encourages public participation, it is faced with challenges, in that it does not state how participation should be facilitated. Scholars argue that this failure diminishes the efficacy of the principle to some extent, particularly with regard to enforcement. To this end, Toxopeüs and Kotze argue that ‘this principle is not enforceable *per se* because it is a principle’; it must, at the very least, guide decision-making and could be relied on by parties who contend that proper participation has not taken place. In this regard, Henderson submits that these principles are generally expressions of policy rather than of substantive law. He further submits that the function of the principles is *inter alia*, to guide the interpretation, administration and implementation of the Act and any other law concerned with the protection or management of the environment. For these reasons, any statutory principles of environmental law, until subject to judicial interpretation, are materially different in nature from the legally binding common law distinctive principles. They do not have the same binding effect. It is submitted that although the NEMA principles may be used as a guide to interpretation, it is apparent that NEMA itself has not established immutable rules of law or substantive rights and obligations that would invariably have to be followed or enforced by the courts. This is because these principles are unlike distinctive common law principles that may be developed in the common law to determine rights and obligations. NEMA principles are not enforceable *per se* because they are just principles. Although NEMA encourages the notion of public participation, it does not define public participation; and as such public participation provision is not aligned with an informed and clear understanding of what it entails, it poses challenges in promoting and enforcing environmental rights enshrined in the Constitution.

Chapter four continues to examine the notion of public participation in the NEMAQA. This Act provides protection to the environment by providing reasonable measures for the prevention of pollution and ecological degradation. The Act gives effect to section 24 of the

Constitution in order to enhance the quality of ambient air for the sake of securing an environment that is not harmful to the health and well-being of people. The Act imposes obligations on local government to protect and improve the quality of air in accordance with the environmental principles in NEMA which require interested and affected persons to participate in environmental decision that affect them. This demonstrates that the notion of public participation is essential to the protection of the environment, and the obligation to facilitate this is delegated to local government. NEMBA on the other hand also demonstrates that local authorities are required to align municipal environmental conservation plans with norms and standards contained in the biodiversity framework. The Act encourages the Minister to consult with the Cabinet members in accordance with the principles of co-operative governance and allow the public to participate by making meaningful representations which the Minister is obliged to consider.

In respect of the NWA, public participation is imperative. The Act requires the competent authority to invite public participation in relation to an application for a water use licence. While the Act encourages public participation, it does not provide an inclusive mechanism for public participation that ensures the ventilation of all potential issues that are raised in the process. This Act is also faced with challenges in that it does not provide an enabling platform for robust public participation. It lacks detail as to the nature and extent of the public participation procedure in respect of interested and affected parties.

In conclusion, this thesis has traced the origins and importance of the principle of public participation from the binding and non-binding international instruments of international law which find expression into South African law. The thesis has demonstrated that public

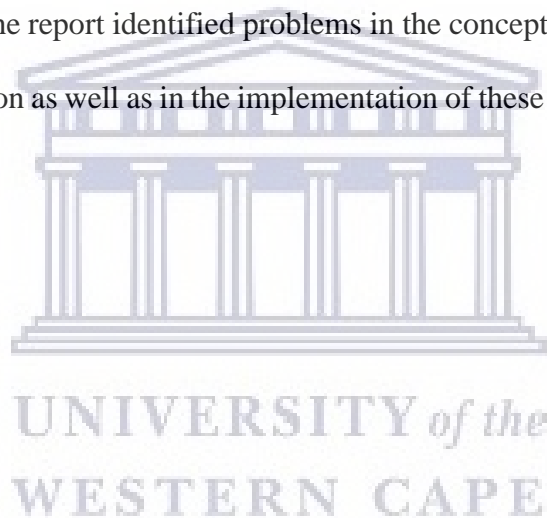
participation is a well-recognised principle of international law since it gives state action legitimacy and fulfils the democratic process. It facilitates the inclusion of non-state actors in environmental decision-making. This principle is fundamentally important for the protection of the environment. Although the principle facilitates protection of the environment, it has challenges with regard to implementation of public participation. NEMA, as the main environmental framework law and other laws, like the NWA, are reforms that seek to promote and protect environmental management, but are deficient with regard to the implementation of the public participation. As such these legislative reforms cannot resolve the problems faced by implementing public participation, because the notion of public participation is beyond their scope.

5.2 Recommendations

In order to resolve some of the challenges identified in chapter four, this thesis recommends that provisions for public participation be subjected to legislative reform. Such legislation should deal specifically with public participation in general terms and strengthen the enforcement aspect of this important concept. Such legislative reform would assist legislation like NEMA with the interpretation and implementation of its principles. The proposed reform will strengthen public participation in South African environmental legislation in order to ensure true environmental democracy. The proposed legislation should be read together with other laws that facilitate public participation and will clearly define the concept and method to be followed in participation. The legislation will also provide a standardised form that public participation should take what does public participation entail, and what does it mean³⁷¹ because there is no currently accepted definition of public participation. Phooko proposes that

³⁷¹ Phooko MR 'Conflict between Participatory and Representative Democracy a call for model on Public Participation in Law- making process in South Africa' (2017) *Obiter* 538

a Public Participation Act should be enacted to define what public participation entails, making a provision for allowing the public to seek clarity on why their views are not reflected in the promulgated law or decision or policy and whether their views were all considered and had an influence in the process.³⁷² This recommendation should be linked to the recommendations made in a high-level panel report headed by former President Kgalema Montlanthe which proposed a review of all legislation that includes a public participation component, including provisions that relate to Parliament's interaction with citizens. The report observed that 'public participation in existing legislation provides an opportunity to tap into capacity, energy and resources that vest within citizens to drive change and meaningfully participate in processes that affect their lives.'³⁷³ The report identified problems in the conceptualisation of the existing frameworks for participation as well as in the implementation of these legislative provisions.³⁷⁴



³⁷² Phoko MR 'What should be the form of Public Participation in the Law Making Process? An Analysis of South African Cases' (2014) 35(1) *Obiter* 58.

³⁷³ Motlanthe K *Report of the High level Panel on the assessment of key legislation and the acceleration of fundamental change* (2017) 65.

³⁷⁴ Motlanthe K *Report of the High level Panel on the assessment of key legislation and the acceleration of fundamental change* (2017) 65.

Bibliography

Books & Chapters

Birnie PW and Boyle AE *International Law and the Environment* 2 ed (2002) New York: Oxford University Press.

Birnie P, Boyle A & Redgwell C *International Law and the Environment* 3 ed (2009) New York: Oxford University Press.

Boyle AE and Redgwell C, *International Law and the Environment* 3 ed (2009) New York: Oxford University Press.

Dugard J '*Dugard's International Law A South African Perspective*' 3 ed (2005) Lansdowne: Juta.

Du Plessis A *Environmental Law and Local Government in South Africa* (2015) Claremont, Cape Town: Juta.

Glazewski J *Environmental Law in South Africa* (2013) Durban: LexisNexis, Butterworths.

Kidd M *Environmental Law: A South African Guide* 2 ed (1997) Kenwyn: Juta.

Kiss D and 'Shelton D *Guide to International Environmental Law*' (2007) Leiden/Boston Martinus Nijhoff Publishers.

Segger MCC and Khalfan A *Sustainable Development Law* (2006) New York: Oxford University Press.

Woolman S and Bishop *Constitutional Law of South Africa* 2 ed Revision Service 6 (2014) South Africa: Pretoria University Law Press.



Articles and Journal

Andrusevych A 'The Right to Public Participation in Environmental Decision-Making in Ukraine: Challenge of Compliance' (2008) 2 *Human Rights & International Legal Discourse* 213.

Aregbeshola M, Means K, and Donaldson 'Interested and affected parties (I&APS) and consultants' viewpoints on the public participation process of the Gautrain Environmental Impact Assessment' (EIA)(2011) 1274.

Ashukem JN 'A comparative analysis of the right to access to environmental information in South Africa and Uganda' (2017) 33 *SAJHR* 454.

Barton B 'Underlying Concepts and Theoretical Issues in Public Participation in Resources Development' in Zillman D, Lucas A and Pring G (2 ed) *Human Rights in Natural Resource Development: Public Participation in the Sustainable Development of Mining and Energy Resources* (2002) 84.

Bram A N 'Public Participation Provisions need not contribute to Environmental Injustice' (1996) 5 *Temple Political & Civil Rights Law Review* 149.

Burchy, M & Race D 'The twists and turns of community participation in natural resource management in Australia; what is missing?' (2001) 44(3) *Journal of Environmental Planning and Management* 293-308.

Collins D 'Environmental impact Statements and Public Participation in International Law' (2010) *Manchester Journal of International Economic Law* 4.

Currie I and Klaaren J 'The Promotion of Access to Information Act (2002) *Politeia* 24

Davies CJ, 'Environmental ADR and Public Participation' (1999-2000) 34 *VAL* 389.

De Wet E, and Du Plessis A 'The meaning of certain obligations distilled from international human rights instruments for constitutional environmental rights in South Africa' (2010) 10 *African Human Rights Law Journal* 347.

Draai E and Taylor D 'Public Participation For Effective Service Delivery: A Local Government Perspective' (2009) *Journal of Public Administration* 113.

Du Plessis A 'Public Participation, Good Environmental Governance and Fulfilment of Environmental Rights' (2008) 2 *PER* 16.

Du Plessis A 'Local Environmental Governance and the Role of Local Government in Realising section 24 of South African Constitution' (2010) *REV* 12.

Du Plessis A 'Local Environmental Governance and the role of local government in realising section 24 of the South African Constitution' (2010) 2 *STELL LR* 268.

Du Plessis A and Kotze LJ 'The Heat Is On: Local Government and Climate Governance in South Africa' (2014) 58 *Journal of African Law* 159.

Du Plessis A 'Some comments on the sweet and bitter of the National Environmental Law Framework for Local Environmental Governance' (2009) 24 *SAPR/PL* 22.

Du Plessis, W 'Access to Information' in Paterson and Kotze *Environmental Compliance and Enforcement in South Africa: Legal Perspectives*' (2009) 197.

Ebbesson J 'Principle 10: Public Participation' *The Rio Declaration on Environment and Development: A Commentary* (2015) 287.

Enserink B & Monnikhof R A H 'Information management for public participation in co-design process: Evaluation of a Dutch example' (2003) 46(3) *Journal of Environmental Planning and Management* 315-44.

Feris L 'Constitutional Environmental Rights an under-utilised resource' (2008) 24 *SAJHR* 36.

Fitzmaurice M 'Some reflections on public participation in environmental matters as a human right in international law' (2002) 2 *Non-State Actors and International Law* 17.

Hamann R 'South African Challenges to the theory and practice of Public Participation in Environmental Assessment' (2003) 10 *SAJELP* 23.

Henderson G W P 'Some thoughts on distinctive principles of South African Environmental Law' (2001) 8 *SAJELP* 154.

Janka DG 'Environmental Democracy in Ethiopia: Emphasis on Public Participation in Environmental Impact Assessment Process.'(2010) 200.

Jodoin S, Duyck S, and Lofts K 'Public Participation and Climate Governance: An Introduction' (2015) 24(2) *RECIEL* 117.

Johannessen L 'Freedom of Expression and Information in the New South Africa Constitution and its Compatibility with International Standards' (1994) 10 *SAJHR* 235-61.

Kidd M 'The National Environmental Management Act and Public Participation' (1999) 6 *SAJELP* 26.

King P and Reddell C 'Public Participation and Water Use Rights' (2015) *PELJ* (18) 950.

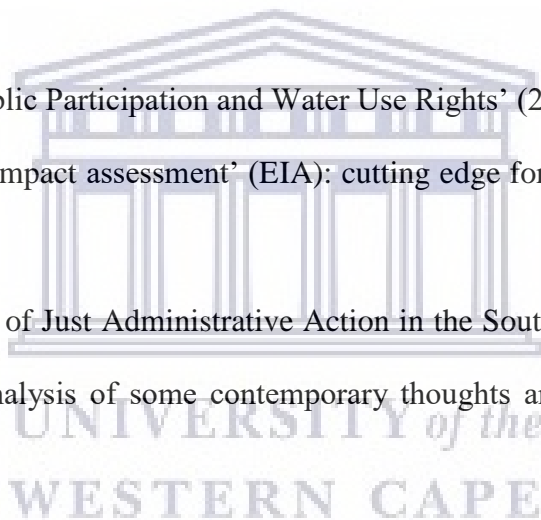
Gilpin A 'Environmental impact assessment' (EIA): cutting edge for the twenty-first century (1995) 4.

Kotze LJ 'The application of Just Administrative Action in the South African environmental governance sphere: An analysis of some contemporary thoughts and recent jurisprudence' (2004) 2 *PER* 36.

Kotze JL 'A Critical Survey of Domestic Constitutional Provisions relating to Environmental protection in South Africa' (2008) 14 *Tilburg Law Review* 316.

Kotze JL 'Environmental Governance' in Peterson & Kotze (eds) *Environmental Compliance and Enforcement in South Africa: Legal Perspectives* (2009) 107-8 .

Knaap, GJ Matier D & Olshanky R 'Citizen advisory groups in remedial action planning; Paper tiger or key success?' (1998) 41(3) *Journal of Environmental Planning and Management* 337-54.



Lane M B & McDonald G 'Community-based environmental planning: Operational dilemmas, planning principles and possible remedies' 48(5) *Journals of Environmental Planning and Management* 709-31.

Leib LH 'Human Rights and the Environment' (2011) 3 *Philosophical, Theoretical and Legal Perspectives* 81.

Madlala S 'Participation in Service Delivery (2005) Paper presented at the Service Delivery Conference in Johannesburg' (2005) 14

Mathebula N 'Community participation in the South African local government dispensation: A public administration scholastic misnomer' (2015) *International Public Administration Review* 185-99

Mikadze K 'Public Participation in Global Environmental Governance and the Equator Principles: Potential and Pitfalls' (2012) *German Law Journal* 1391

Murombo T 'Beyond Public Participation: The Disjuncture between South Africa's Environmental Impact Assessment (EIA) Law and Sustainable Development' (2008) 3 *PER* 16

Murombo T and Valentine H 'Slapp Suits: An Emerging Obstacle to Public Interest Environmental Litigation in South Africa' (2011) 27 *SAJHR* 85

Ntlama N 'The Effectiveness of the Promotion of Access to Information Act 2 of 2000 for the protection of socio-economic rights' (2003) 2 *STELL* 275

Nyalunga D 'Enabling environment for public participation in local government' (2006) *International NGO Journal* 30

O'Reilly N 'Come One, Come All? Public Participation in Environmental Law in Ireland: A Legal, Theoretical and Sociological Analysis' (2005) 8 *Trinity College Law Review* 72

Phooko MS 'What should be the form of public participation in the law making processes'? An analysis of South African cases (2014) *Obiter* 39-41



Phooko MR 'Conflict between Participatory and Representative Democracy a call for model on Public Participation in Law- making process in South Africa' (2017) *Obiter* 538

Richardson BJ and Razzaque J 'Public Participation in Environmental Decision-Making' (2006) *Environmental Law for Sustainability* 165-94

Ridl J, Couzens E 'Misplacing NEMA? A consideration of some problematic aspects of South Africa's new EIA regulations' (2010) (13)5 *PER/PELJ* 96/189

Rowe G and Frewer L.J 'A typology of public engagement mechanisms' (2005) *Science, Technology Human Values* 251-90

Roodt M 'Participation, civil society and development' (2001) in N Gathram *Participation, Civil Society and Social Work Practice*

Sebola MP 'Communication in South African Public Participation Process' The effectiveness of Communication Tools (2017) *African Journal of Public Affairs* 25

Scholtz W 'The Anthropocentric approach to Sustainable Development in the National Environmental Act and the Constitution of South Africa' (2005) *1 TSAR* 70

Shepherd A. & Bowler C 'Beyond the requirements: Improving public participation in EIA' (1997) 40(6) *Journal of Environmental Planning and Management* 725-38

Shelton D 'Developing Substantive Environmental Rights' (2010) 1 (1) *Journal of Human Rights and Environment* 91

Sewell DWR & O 'Riordan T 'The culture of participation in environmental decision-making' 1976 (16) *Natural Resources Journal* 10

Simon AE 'Valuing Public Participation' (1999) *Ecology Law Quarterly* 725.

Spyke NP 'Public Participation in Environmental Decision Making at the New Millennium: Structures New Spheres of Public Influence.' (1998-1999) *Environmental Affairs Legal Review* 267.

Takacs D 'Environmental Democracy and Forest Carbon' (REDD) (2014) *Lewis and Clark School* 44- 71

Tshoose CI 'The Role of Public Participation Viewed in the Context of Adjudicating Socio-economic Rights' (2017) *Southern African Public Law* 3.

Tladi D 'Strong Sustainability, Weak Sustainability, Intergenerational Equity and International Law' (2003) 28 *South African Yearbook of International Law* 200.

Toxopüs M and Kotzé LJ 'Promoting Environmental Justice through civil-based instruments in South Africa' (2017) *Law Environment and Development Journal* 54

Van Bekhoven J 'Public Participation as a General Principle in International Environmental Law: Its Current Status and Real Impact' (2016) 2 *National Taiwan University Law Review* 259.

Van der Walt, R 'Access to Information: Information Disclosure in some South African Organisations' (2007) 38(1) *South African Journal of Business Management* 25.

Williams JJ 'Community Participation: Lessons from post-apartheid South Africa' (2006) 27:3 *Policy Studies* 197.

Worker J and De Silva L 'The Environmental Democracy Index' (2015) *World Resource Institute* 2.

Xiao ZHU, Shenghang W, Ehemann EM 'Development of Environmental Rights in China: Substantive Environmental Rights or Procedural Environmental Rights' (2017) *Frontiers of Law in China* 29

Legislation

Constitution of the Republic of South Africa, 1996

Group Areas Act No. 41 of 1950

National Environmental Management Act No. 107 of 1998 (NEMA)

Mineral and Petroleum Resources Development Act, 2002 (MPRDA)

Population Registration Act 41 of 1950

Promotion of Access to Information Act No.2 of 2000 (PAIA)

Promotion of Administrative Justice Act No.2 of 2000 (PAJA)

Local Government Municipal System Act No. 32 of 2000

Interim Protection of Informal Land Rights Act No.31 of 1996 (IPILRA)

National Environmental Management Air Quality Act No.39 of 2004 (NEMAQA)

National Environmental Management: Biodiversity Act No.10 of 2004 (NEMBA)

National Water Act No. 36 of 1998 (NWA)

Treaties and Conventions

Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters (The Aarhus Convention) (was signed on 25 June 1998 and entered into force on 30 October 2001).

The Convention on Environmental Impact Assessment in a Transboundary Context (the Espoo Convention) (entered into force 10 September 1997).

United Nations Conference on Environment and Development, Rio Declaration on Environment and Development (entered into force 12 August 1992).

Johannesburg Declaration on Sustainable Development (signed 04 September 1992)

The Prevention of Transboundary Harm from Hazardous Activities (signed 13 November 2001)

Internet Sources

Anthropocentrism Philosophy available at <https://www.britannica.com/topic/anthropocentrism> (accessed 16 October 2018).

Bozo B and Hiemer L Community media and public participation – An unused potential, available at <http://www.afesis.org.za/local-economic-development> (accessed 13 September 2018).

Calland R ‘Illuminating the Politics and the Practice of Access to Information in South Africa’ available at <http://www.foip.saha.org.za/static/paper-wars-access-to-information-in-south-africa> (accessed 10 September 2018).

Democracy, Government & Public Participation available at <http://www.paralegaladvice.org.za/wp-content/uploads/2016/05/03-PLM2015-Democracy.pdf> (accessed 28 August 2018).

EIA Centre Review Paper, Consultation and Public Participation in the EIA Process’ available at <http://www.art.man.ac.uk/EIA/publications> (accessed 29 February 2016).

Enhancing Public Participation available at <https://www.ecngoc.co.za> (accessed 3 September 2018).

Fig D ‘Fracking and the Democratic Deficit in South Africa’, available at <https://www.tni.org/files/dfig64.pdf> (accessed 29 February 2016).

Hazen S Director of the Environmental Assistance Division, Environmental Protection Agency, Washington D.C. Available at <http://www.ourplannet.com/imgversn/86/hazen.html> (accessed 18 June 2015).

Hazen S ‘Environmental democracy’ available at <http://www.unep.org/ourplanet/imgversn/86/hazen.html> (accessed 22 February 2019).

International Association for Public Participation (2007) IAP2 Core Value, available at <https://www.iap2.org> (accessed 23 August 2018).

Public Participation Framework for the South African Legislative Sector, available at <http://www.sals.gov.za/docs/pubs> (accessed 2 September 2016)

State of Environment available at https://www.environment.gov.za/sites/default/files/docs/part2_environmental_governance.pdf (accessed 17 October 2018)

Case Law

Baleni and Others v Minister of Mineral Resources and Others (73768/2016) [2018] ZAGPPHC 829

Bengwenyama Minerals (Pty) Ltd and Others v Genorah Resources (Pty) Ltd and others 2011 (4) SA 113 (CC)

BP Southern Africa (Pty) Limited v MEC for Agriculture, Conservation, Environment & Land Affairs (2004) SA

Doctors for life International v The Speaker of the National Assembly and Others 2006 (12) BCLR 1399(CC)

Earthlife Africa (Cape Town) v Director-General Department of Environmental Affairs and Tourism 2005 3 SA 156 (C)

Escarpment Environment Protection Group v Department of Water Affairs (2013) ZAGPPHC 505 (GNP) 23

Fuel Retailers Association of Southern Africa v Director-General; Environmental Management, Department of Agriculture, Conservation and Environment, Mpumalanga Province and others CCT67/06 (2007) ZACC 13

Investigating Directorate: Serious Economic Offences v Hyundai Motor Distributors (Pty) Ltd; in re Hyundai Motor Distributors (Pty) Ltd & Others v Smit NO & others [2000] ZACC 12, 2001 (1) SA 545 (CC), 2000 (10) BCLR 1079 (CC)

Merafong Demarcation Forum and Others v President of the Republic of South Africa and Others CCT (41/07) [2008] ZACC

Minister of Water and Environmental Affairs and Another v Rally Useful Investments 219 (Pty) Ltd and another [2016] ZASCA 156; [2017] 1 All SA 14 (SCA); 2017 (1) SA 505 (SCA)



Occupiers of 51Olivia Road, Berea Township and 197 Main Street Johannesburg v City of Johannesburg and Others (2008) ZACC

President of the Republic of South Africa and Others v Mail and Guardian Ltd 2012(2) SA 50 (CC) (2) BCLR 18

State v Makwanyane and Another (CCT3/94) [1995] ZACC 3; 1995 (6) BCLR 665; 1995 (3) SA 391; [1996] 2 CHRLD 164; 1995 (2) SACR 1

The Director: Mineral Development, Gauteng Region Sasol Mining (Pty) Ltd v Save the Vaal Environmental and Others [1999] ZA SCA

Trustees for the time being of the Biowatch Trust v Registrar, Genetic Resources and others (2009) ZACC

