MUSHORIWA PASI CORPORATE ATTORNEYS

37 Lawson Avenue, Milton Park, Harare. Zimbabwe
Office: +263 4 793 322 / +263 4 793 323
info@mushoriwapasi.co.zw
www.mushoriwapasi.co.zw

SEC. 73: A NEW HOPE FOR ENVIRONMENTAL JUSTICE IN ZIMBABWE

Written by: Mr. T.R. Tanyanyiwa

"The weight of our civilisation has become so great, it now ranks as a global force and a significant wild card in the human future along with the Ice Ages and other vicissitudes of a volatile and changeable planetary system"[1]

It has become an all too tangible reality that a sustainable environmental policy must become our first goal and our first principle. Pre-existing norms of tackling environmental degradation have negated this belief. Therefore, **sec. 73 of the Constitution of Zimbabwe Amendment (No.20) Act, 2013** dealing with environmental rights is a welcomed innovation in the new constitution of Zimbabwe.

Sec. 73 referred to *supra* reads:

"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.

The state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of the rights set up in this section."

The section is similarly worded to **sec. 24 of the Constitution of the Republic of South Africa, 1996** and goes a long way in ensuring that the right to a clean and safe environment is justiciable before our courts.

Zimbabwe has always shown a keenness to protect the environment. This is evidenced by our signing of most if not all modern day international conventions aimed at safeguarding our earth's environmental heritage. However, on the

[1] D. Dumanoski, R*ethinking Environmentalism*, December 13, 1998.

domestic level the issue of environmental conservation has never taken centre stage. Even former President Mugabe's critique of neo-liberal development models[2] which are to blame for the lack of sustainable development and environmental degradation at the Earth Summit in South Africa in 2002 has not translated into a vibrant environmental policy at home.

Thus, the inclusion of sec. 73 is an exciting and novel conception that seeks to champion environmental justice in a manner without antecedent proportions in Zimbabwe. The question that those who are not acquainted with Zimbabwe's environmental policies may ponder is why sec. 73 is so important. This line of questioning is fuelled by the misconception that pre-existing laws already guarantee us the right to a clean and safe environment and that we are free to assert this right at any time. Yet this is not the case. Far from it, one would discover that accessing environmental justice in Zimbabwe is a conundrum. Whether this is by desire or by design is a matter for environmental conspiracy theorists.

Before sec. 73, there were four perceived ways in which the public could participate in environmental protection and have access to the courts to assert their environmental rights. The first means is through specific provisions in the Environmental Management Act[3]; secondly by a common law civil suit for nuisance; thirdly through a class action; and fourthly (more theoretical that reality) by approaching the Supreme Court to relax the issue of legal standing and/or using constitutional provisions of the previous constitution. Each of these means may appear attractive but they all have their limitations and headaches.

The Act definitely has environmental rights enshrined within its sec. 4. However, the issue for determination is whether these rights are enforceable or are merely the kind of environment that one is entitled to. The latter seems to be the case if a correct reading of this section is undertaken. This is further strengthened by the fact that the Act does not contain any legislative mechanisms for the ordinary citizen to enforce these rights.

Although the Act places criminal sanction on water pollution, its most notable contribution to access to environmental justice is the payment of compensation to affected third parties. This is in sec. 57 of the Act[4] which evokes the polluter pays principle[5] to include compensation to affected third parties for water pollution.

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[2] Former President Robert G. Mugabe of Zimbabwe, Speech at the World Summit on Sustainable Development (WSSD), Johannesburg, 2 September 2002, "Comrade President, 10 years, after Rio, the time has come for all of us to state quite categorically that the agenda of sustainable development is not compatible with the current dominant market fundamentalism coming from the proponents of globalisation."

[3] Environmental Management Act [Chapter 20:27].

[4] *Id.*, Sec 57 (2) (b).

[5] United Nations Conference on Environment and Development, Rio de Janeiro, Braz., June 3-14, 1992, *Rio Declaration on Environment and Development*, U.N. DOC. A/CONF.151/5/REV.1, princ.16, "National authorities should

Apart from this the rest of the Act goes on to dwell on policy considerations and the framework for environmental protection.

There are many limitations to be read from this. The first and most glaring is that there is no direct right for the ordinary citizen to approach the courts. It is only in the event where one is entitled to compensation by a violator of sec. 57 that a civil action may be launched to enforce this right to compensation. Apart from this it is the Environmental Management Agency created by the Act which is vested with the right to punish or make referral to the High Court for the determination of a matter.[6]

Secondly, it appears that it is only in the event of water pollution that compensation is entitled. This begs the question regarding all other forms of pollution. This is evidence of the grave inadequacies of our Act as it is presently authored. This leaves the Act looking like another piece of legislation more concerned with outlining legal aspirations rather than legal accountability. Hence, for citizens the statutory route is limited.

The other way in which one may sue for a clean and safe environment is through a common law suit for nuisance. As environmental law is yet to become a fully developed notion in Zimbabwe it appears that it operates in public law through the Act but may also fall in the realm of private law, that is, civil law, more particularly having an inextricable relationship with the law of delict.

The law of delict recognises the common law on nuisance which seeks to adjust the conflicting interests of neighbouring occupiers of land. According to Feltoe[7], whilst a person should be at liberty to use and enjoy his land, he should not be permitted to use his land in such a way that he interferes with his neighbours' rights in an unreasonable fashion.

It is therefore inferred that where one interferes with the environment to the detriment of his neighbour(s), the latter has a common law right to seek remedy for such a nuisance and compensation where necessary. However, in this realm the rules of *locus standi in judicio* dictate that an individual has standing to bring such an action before the courts only in the presence of certain circumstances.

These circumstances are that that person must have some legal right or recognised interest at stake; the right or interest must be direct; and the right or interest must be personal. These requirements are cumulative. It is herein where the problem

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endeavour to promote the internalization of environmental costs and the use of economic instruments, taking into account the approach that the polluter should, in principle, bear the cost of pollution, with due regard to the public interest and without distorting international trade and investment."

[6] Environmental Management Act, op.cit., sec. 31.

[7] G. FELTOE, A ZIMBAWEAN GUIDE TO THE LAW OF DELICT (Legal Resources Foundation 2005), pp58.

lies. These considerations mean that one needs to prove that they are suffering some form of injury which is peculiar to them so as to assert their right to a clean and safe environment or compensation where loss has been suffered due to the abuse of the environment. So in the case of an action based on nuisance the petitioner has to be the adjacent neighbour.

Yet, this is almost always never the case; any injury suffered is usually communal in nature. Such a system fails to recognise that individuals and communities have an environmental interest that should be capable of legal enforcement in circumstances other than where their property or health interests are affected.

The worst betrayal that is exposed by this system is the inability to reconcile private interests and public concerns. Thus, justice is inadequately addressed as the enforcement of environmental rights is either treated as the prerogative of the state (if the tenets of the Act are assessed) or the individual directly affected.

Despite the limitation explored *supra*, English Law precedence which forms a partial heritage of the Zimbabwean legal system recognises that some forms of nuisance (for example, environmental degradation) can be a public nuisance and members of the public have the right to fight it. In the English case of *Attorney General v. P.Y.A Quarries Ltd*[8] LORD DENNING had this to say of public nuisance:

"It is a nuisance which is so widespread in its range and so indiscriminate in its effect that it would not be reasonable to expect one person to take proceedings on his own responsibility to put a stop to it, but that it should be taken on by the community at large."

This leaves class actions as another possible route to pursue access to environmental justice. However, this is a headache within itself. The Class Actions Act only recognises representative actions in certain limited circumstances.[9]

A reading of sec. 3 of the aforementioned Act leads to one conclusion that this legal recourse is wrought with considerations which make it difficult for the matter to even reach the trial stage. Here it seems the rules of procedure take precedence over the substantive nature of the matter presented before the courts. As such when one decides to mount a class action to defend community interests there are hurdles that will be faced and the process becomes another conundrum.

The final route that was open to the public was to approach the Supreme to relax the issue of *locus standi* or to interpret the right to life provision in the old Lancaster House Constitution in a favourable manner. The report of the proceedings of the workshop on protecting Africa's urban environment suggests that

[8] Attorney General v P.Y.A Quarries Ltd [1957] 2 Q.B 169.
[9] *See* Class Actions Act [Chapter 8:17], sec. 3.

our Supreme Court may take the route of the Indian Supreme Court which relaxed the orthodox requirements of *locus standi* and allowed public interest litigants to access the courts without the need to show 'personal interest or injury'.[10]

In the case of *Mumbhai Kamgar Sabha v. Abdulbhai*[11], the Indian Supreme Court held that:

"Test litigations, representative actions, pro bono publico and like-broadened forms of legal proceedings are in keeping with the current accent on justice for the common man and a necessary disincentive to those who wish to bypass the real issues on the merits by reliance on peripheral, procedural shortcomings...Public interest is promoted by a spacious construction of locus standi..."

Another way to go (which remains available in the new constitution) would be that theCcourts interpret the right to life clause to include the right of citizens to not have their lives endangered by environmental degradation. What this does is to make environmental rights justifiable, that is, one need only to prove that their rights or those of others have been infringed and not a personal interest in the matter or any other such considerations as required under delict. Our constitution allows everyone the right to protection by the law, that is, everyone should be able to have their day in court.[12]

Sec. 48 of the new constitution of Zimbabwe grants citizens the right to not have their life taken away from them unless where permitted by law.[13] Theoretically legal action may be mounted on the basis of applying a generous interpretation to this provision. My line of reasoning is derived from the manner in which the Indian Supreme Court has dealt with environmental litigation.

I found that although the constitution of India contains provisions related to the environment such as Article 47 which deals with the protection of human health in relation to the environment, it is Article 21 which grants citizens a fundamental right to life that the Indian courts turn to so as to evoke environmental rights. As in Zimbabwe matters dealing with constitutional provisions have an automatic right to be heard by the Supreme Court.

Yet there are three major hurdles to this. The first is that this is a highly theoretical premise and any litigation mounted on this basis would be gutsy. Secondly, and closely tied to the first reason is that a problem which would have

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[10] T. Murombo, *Zimbabwe Environmental Law Association And Environmental Law Alliance World Wide Report Of The Proceedings Of The Workshop On Protecting Africa's Urban Resources* (2002), pp12-13.
[11] Mumbhai Kamgar Sabha v Abdulbhai AIR 1976 SC, 1455.
[12] *See* Constitution of Zimbabwe Amendment (No. 20), sec. 69; Lancaster House Constitution of Zimbabwe, sec. 18 (1).
[13] *See also* Lancaster House Constitution of Zimbabwe, sec. 12

been encountered in trying to interpret sec. 12 of the Lancaster House Constitution to encompass the right to a clean and safe environment is that the section is strictly concerned with political and civil deprivation of the right to life. It can be argued that the framers of the Lancaster Constitution (especially considering the circumstances under which the constitution was drafted) could not have perceived or intended the right to life provision to include the right to a clean and safe environment.

The third problem associated with this legal itinerary is that the Supreme Court had tended to be more restrictive in the interpretation of constitutional provisions. For example, in 2005 the Court was presented with an opportunity to imply the right to vote as falling under the protection of freedom of expression[14] but it shied away from doing so.[15]

The policy has been not to read into constitutional provisions what is not there. It may be argued that if the framers of our constitution meant to make justiciable the right to a clean and safe environment they would have done so in a manner reminiscent of sec. 24 of the constitution of the Republic of South Africa. Thus this route was frustrating.

The foregoing analysis has been critical in highlighting the flawed nature of our present system of access to environmental justice. Hence, the introduction of an environmental clause in the new constitution serves to pave a clear and unequivocal route that allows anyone and everyone to evoke that clause to safeguard against pollution and environmental degradation.

If sec. 73 is read together with sec. 85 of the new constitution it then means that the issue of *locus standi* ceases to be a factor in accessing environmental justice and further, anyone will have a right to protect the environment not only on behalf of themselves but also on behalf of others.

Sec. 73 serves to bring back to light the plight of environmental protection. It would be a promise that government policy will become 'green' and catalyse greater participation of the nation in the idea that we are responsible for our environment, we are the keepers of our resources and that we owe the next generation a good environmental awareness policy.

Further, the benefit of inclusion of environmental rights in the constitution has resulted in the inability of the legislature and indeed anyone to easily amend or repeal the constitutional provision. The prevailing problem with pre-Amendment (No.20) norms of environmental policies is that they are couched in legislative

[14] *Id.,* Lancaster House Constitution of Zimbabwe, sec. 20.
[15] *See* Madzingo & Ors v Minister of Justice and Parliamentary Affairs & Ors SC-100-05.

enactments which can be amended and repealed at a whim especially in the event of a new administration which may have a separate, if at all, an environmental policy.

Moreover, the clause now calls for higher standards and accountability from the legislature as well as the executive to public interest in the environment. As a result, people will gain better awareness of environmental protection and the legacy of our environment entrusted to us by generations gone before will be safeguarded under a new national drive.

Policies will be implemented to show a new conservative ethos. Environmental protection has no race, party or class, it is a collective responsibility carried not only by those in the high echelons of power but also by all private citizens.

In addition, a far reaching and specific constitutional norm will also direct other government policy. It will allow for the enactment and amendment of laws by the legislature with the protection of the environment in mind. It will also guide the judiciary in the interpretation of laws so that they reflect the spirit of a nation which has become conscious of the need to protect its environmental heritage. Also, when the executive implements the laws, it will do so with sensitivity to a progressive environmental policy.

Consequently, sec. 73 is a monumental step to a vibrant environmental policy for Zimbabwe. The environment is of great importance to both contemporary and future generations. Ensuring that environmental rights receive the strongest protection possible under our laws by inclusion in the constitution is a welcomed realisation that indeed our planet is in peril and we face inexorable collective extinction if we do not embrace dynamism in confronting the environmental challenges of our time.

We must never forget that:

"To be whole. To be complete. Wildness reminds us what it means to be human, what we are connected to rather than what we are separate from."[16]

[16] Terry Tempest Williams, Testimony for the United States Senate Subcommittee on Forest and Public Lands Management regarding the Utah Public Lands Management Act of 1995, Washington D.C., July 13, 1995.

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