

CASEBOOK

ON

ENVIRONMENTAL LAW

Volume 1

Editors:
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February 2009

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If we all did little, we would do much



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PREFACE

Environmental law litigation has become an essential tool for the management and enforcement of laws governing the environment and natural resources. It is founded on the principles of public participation, Public Trust Doctrine and sustainable development.

In Uganda environmental litigation has been developing and various environmental law cases on selected areas have been brought to courts of law. Greenwatch is one of the NGOs that has used this tool to advocate for public participation, the creation of an enabling legal and institutional framework and access to environmental justice.

One of the greatest limitations to the use of litigation as a tool in enforcement of environmental law has been limited legal resources in form of materials and training in environmental law. It is expected that with continued training and availability of materials on environmental law, the current situation will improve.

The main purpose of compiling and producing this Casebook is to enhance the capacity of legal practitioners and judicial officers in dealing with legal issues relating to the environment and natural resources management in Uganda.

This Casebook contains judicial decisions in Uganda and elsewhere that relate to the application of basic principles of environmental law, which go beyond the common law principles of nuisance, negligence and trespass. It also contains cases that relate to other important issues in environmental law and practice such as costs, procedure, choice of parties etc.

It is hoped that this book will help all of us in our common duty to protect the environment and to manage our natural resources sustainably.

February, 2009.

Kenneth Kakuru
Director, Greenwatch.

ACKNOWLEDGEMENT

This Compendium of environmental cases from Uganda and other jurisdictions has been compiled over a period of time from our network with local, regional and International Non Governmental Organisations.

In our ten years of environmental advocacy, **Greenwatch** has found that public interest litigation is an effective environmental law advocacy tool. We believe that judicial officers, practising lawyers and advocates will find this Casebook helpful and that it will promote jurisprudence and develop environmental law.

This Casebook is a joint work of **Greenwatch**, The **Environmental Law Institute** (ELI, Washington, D.C.), and **NEMA**.

We wish to acknowledge the invaluable help and support rendered by **Mr. Carl Bruch** and **Mr. John Pendergrass** of ELI, Mr. Peter Veit of the **World Resources Institute** (WRI of Washington D.C.) , **Mr. Robert Wabunoha** formerly of NEMA-Uganda, now of UNEP, Ms. Elizabeth Mrema of UNEP and Prof. Charles Okidi (formerly of UNEP) now of the University of Nairobi.

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February 2009

Kenneth Kakuru

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THE REPUBLIC OF UGANDA

**IN THE HIGH COURT OF UGANDA AT KAMPALA
MISC. CAUSE No. 0100 OF 2004**

**ADVOCATES COALITION FOR DEVELOPMENT
AND ENVIRONMENT..... APPLICANT
VERSUS**

ATTORNEY GENERAL..... RESPONDENT

BEFORE: THE HON. JUSTICE RUBY AWERI OPIO

*Constitutional Law: Article 44(1), 50(1) (2), 237(2) (b) Public Interest Litigation
Whether the applicants have locus standi*

*Environmental Law: Section 6 NEA, S.2, whether failure to provide an Environmental
Impact Assessment amounts to breach of statutory duties.*

The applicants sought orders and a declaration that issuing a private company a 50 year Forest permit by government in a forest Reserve for the purpose of growing sugarcanes was in contravention of the Constitution. The applicants argued that there was no project brief provided by the Company neither were the local communities' views sought and that the permit should be revoked. The respondent contended that the applicant had no *locus standi* and that no environmental impact assessment was required as long as measures to protect the environment were implemented.

HELD:

1. Failure to submit a project brief is a violation of the applicant's constitutional and statutory rights.
2. The respondent's actions are in violation of public trust.
3. Granting a permit to Kakira Sugar Works is unconstitutional and therefore null and void.
4. Being a public interest litigation matter, no costs are awarded.

Application allowed, no restoration orders made.

Editorial Notes: Although the applicants were successful in this action, they were unable to enforce the judgement as it was merely declaratory. The permit was mere revoked and the developer Kakira Sugar Works still occupying the forest, which it cut down and planted sugarcane in blatant violation of the law.

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT KAMPALA
MISCELLANEOUS CAUSE No. 0100 OF 2004

ADVOCATES COALITION FOR DEVELOPMENT AND ENVIRONMENT:..... APPLICANTS

VERSUS

ATTORNEY GENERAL:..... RESPONDENT

BEFORE: HON. MR. JUSTICE RUBBY AWERI OPIO

RULING:

This action was brought under public interest litigation. The first applicant is a non-Government organization duly registered and incorporated as a company limited by guarantee under the Laws of Uganda. It is involved in Public Policy Research and Advocacy work, which among others involves promoting the rule of law, protecting the environment and among others, involves promoting the environment and defending the public interest in the management, conservation and preservation of Uganda's natural resources.

The second applicant is an adult Ugandan formerly Secretary of Butamira Forest Environmental Pressure Group comprising a total membership of 1510 individuals.

The action was taken against the first respondent in his representative capacity under the Government Proceedings Act while the second respondent was sued as the Principal Government agent charged with the management of the environment and mandated to coordinate, monitor and supervise all activities in the field of the environment.

The application was brought by notice of motion under Article 41 (1) and 50 (1) and (2) of the constitution of the Republic of Uganda; Rule 3 (1) of the Fundamental Rights and Freedoms (Enforcement Procedure) Rules S.I No. 26 of 1992; order 2 rule 7 and order 48 rules 1 and 3 of the Civil Procedure Rules. The application is seeking for orders and declaration that:

(1) The granting of a permit to Kakira Sugar Works Ltd by the first respondent contravenes Article 39 and 237 of the Constitution of the Republic of Uganda and Section 43 of the Land Act and was made ultra vires and as such is null and void.

(2) The granting of the forest permit to Kakira Sugar Works Ltd by first respondent amount to the defacto degazetting its statutory obligations when it permitted Kakira Sugar Works Ltd to occupy a forest reserve and change the land use without carrying out a full Environmental Impact Assessment Study.

(3) The defacto degazetting Butamira Forest reserve is in violation of the applicants' rights to a clean and healthy environment and protection of the country's natural resources.

(4) The failure to submit a project brief is a violation of the applicants' Constitutional and Statutory rights covered under Article 39 and 245 of the Constitution; Section 3 and 19 of Cap 153; and Regulations 5, 6 and 12 of SI No.8/1998.

(5) The respondents failed to discharge their Statutory and constitutional environmental due diligence, fiduciary and preservative duty to the applicants as laid out in Article 20. (2), 39, 237 (2) (b) and 245 of the Constitution. Sections 6, 19,20 and 45 cap 153; Section 45 (1) and (4) of the Land Act; as well as Regulations 6, 7, 8, 9, 12, 13, 14, 15, 16, 17,18,19,20,21,22,24,25,26, of S.I No. 8/1998.

(6) A land use permit does not have/or cannot have the effect of changing the land use/regime of an area protected under Article 237 (2) (b) of the Constitution read together with Articles 39 and 245 of the Constitution; Section 45 (1) and (6) of the Land Act; and section 45 (1) (2, a), (3) and (5) of Cap. 153.

(7) An order directing the first respondent to revoke the permit and requiring second respondent to restore or take such measures as required of them under Ugandan law to restore the environment and preserve the ecological integrity of Butamira Forest Reserve.

(8) An environmental restoration order to be issued against the respondents directing them to restore the forest vegetation destroyed in Butamira Forest Reserve as a result of their issuing a land use permit in total disregard of the law.

(9) The respondents' actions are in violation of the doctrine of Public Trust as enshrined under the National objectives and directive principles of intergenerational equity as enshrined in the convention on Biological Diversity, 1992 and the Rio Declaration, 1992 which Uganda has either ratified and signed or subscribed to.

(10) No order be made as to costs.

The general grounds for the application are:

4 (a) That Government issued Kakira Sugar Works Ltd. with a 50 year sugar cane growing permit in respect of Butamira Forest Reserve in contravention of the constitution and the law.

(b) That the said defacto degazetting of Butamira Forest Reserve was affected amidst protest from the local communities who depended on the reserve for their livelihood through agro- forestry, and as such a full Environmental Impact Assessment ought to have been conducted by the second respondent.

(c) That no project brief, Environmental Impact Assessment and Environmental Impact Statement were submitted and or carried out by Kakira Sugar Works Ltd nor required of it by the first and second respondents; and neither were the local community's views and or concerns sought or addressed on the project before award of the land use license/permit.

(d) That the said award of land use license/permit violates the applicants' and other Ugandan citizens' rights to a clean and healthy environment, as well as, protection of the country's natural resources.

(e) That unless this application is granted the applicants and other citizens of Uganda will suffer irreparable damage and loss resulting from the violation of their right to a clean and healthy

environment as well as the failure to protect their natural resources.

The application was supported by affidavit of Godber Tumushabe the first applicants' executive Director and that of Sharif Budhugo, the second applicant. A brief background facts giving rise to this application would be of great propriety. The Butamira Forest Reserve was established by the then Busoga Kingdom Government in 1929. It measured approximately 5.4 square miles. It was gazetted as a local Forest Reserve under the management of the Kingdom Government. In 1939 the Forest Reserve was leased to Kakira Sugar Works for a period of 32 years for the purpose of producing of firewood for the sugar company. Although the Sugar Works had the lease of the forest they were denied the right to change the use of the land from forest to plantation. However all through the 1950s and beyond Kakira Sugar Works made several attempts to acquire the Reserve for sugar cane growing. A case in point was in 1954. Then in 1956 Kakira made another attempt to acquire part of the Forest Reserve in the name of a donation of a farm school to the Busoga Kingdom Government. The Forest officials resisted that attempt. Meanwhile, Kakira rejected alternative offers of land elsewhere in Busoga arguing that the location of the school in Butamira Forest Reserve was essential for advertising the donation.

That view was rejected by the then Provincial Forest officer for the Eastern Region in the strongest terms:

"Though I am certain that the District Commissioner and Agricultural Officer have tried very hard to meet the wishes of donor of the gift, it has just not been possible to fill them, with the exacting conditions which he has laid down. Likewise, it would be foolish not to realize very clearly the implications of the present position, that we are being asked to alienate 300 acres of a small and very hard-worn forest estate, with land available elsewhere to satisfy the self advertisement of one individual". (Emphasis is mine).

The matter was put to rest when Dictator Idi Amin took over and expropriated properties owned by Departed Asians and their businesses. However events took a new turn when the Asians were allowed to return and repossess their properties. In 1997 Kakira Sugar Works upon repossession, resurrected their dream to turn the Reserve into a plantation. They accordingly applied to the Forestry Department to utilize the Reserve for its operations. Their request was granted and a permit was allegedly issued giving the company right to use the reserve for general purposes. With this new permit but without undertaking Environmental Impact Assessment as required by law, the company embarked on a scheme to clear the existing forest estate and replace it with sugar cane plantations. The local community which depended on the forest for forest products and as a source of water complained and formed a pressure group in protest. The circumstances under which the permit was issued were investigated by the Inspector General of Government and later by the Parliamentary Committee on Natural Resources. The Committee found that the permit had been issued fraudulently and without due regard to the law.

It went further to recommend inter alia, that the permit be revoked. However, events took a new twist when the line Minister decided to take the matter to the floor of Parliament to pass a motion whether or not to allow Kakira Sugar Works to grow sugar cane in the Reserve. The motion was passed in favor of the project. To cut the long story short, a number of avenues were sought in order to solve the Butamira saga, including the office of the presidency to no avail. Hence this application.

The application was opposed by way of affidavit of one Justin Ecaat, the Director Environmental Monitoring and Compliance of the second respondent (NEMA).

The gist of the above affidavit is:

(i) That the second respondent advised Kakira Sugar Works Ltd to ensure, in the event that it was awarded the Land use of Butamira Forest Reserve by the Forestry Department, that the environment is protected. The said advice is contained in the letter of 13/6/2001 attached as annexure "A";

(ii) That the second respondent issued advice to the Ministry of Water, Lands and Environment on the Draft Terms of Reference (TOR) for a task force to carry out a socio economic assessment of the proposed degazetting of Butamira Forest Reserve. The Draft Terms of Reference is Annexure "B".

(iii) That the second respondent's technical opinion on the Forest Reserve was that no Environmental Impact Assessment (EIA) was required as long as measures to protect the environment were put in place.

(iv) That Butamira Forest Reserve was not degazetted and that only change in land use was granted taking into account the conditions stated above.

(v) That the second respondent did not fail to discharge its statutory functions, considering its actions outlined above.

(vi) That an environmental restoration order cannot be issued against the second respondent since its actions or advice did not harm, are not harming and are not likely to harm the environment in Butamira Forest Reserve in any way.

During the hearing the applicants were represented by Mr. Edson Ruyondo of Ruyondo and Company Advocates and Mr. Kenneth Kakuru of Kakuru and Company Advocates while the Attorney General's chambers represented the respondents. Both Attorneys rehearsed their respective affidavits in support of their positions.

The instant application raises four issues for determination:

- (1) Whether the applicants have standing in this matter;
- (2) Whether there was breach of Doctrine of public trust;
- (3) Whether second respondent failed in its duties;
- (4) Remedies available to the parties.

Before I set on the above issues I must make a general statement on the scope of environmental law and policy. There is no doubt that environmental law must be seen within the entire political, social, cultural and economic setting of the country and must be geared towards development vision. In other words, it must act as an aid to socio-economic development rather than a hindrance. The law must be in harmony with the prevailing government efforts and need to attract more foreign and local investment and channel national energies into more production endeavors in industry and sustainable exploitation of natural resources. Lastly it must be seen in the constitutional and administrative set up of the country.

With the above background in mind, I now proceed to discuss the issues raised in this matter.

(1) Locus Standi

One of the most spirited arguments by the respondent was that the applicants do not have locus standi to take up this action. It was contended that the applicants were mere impostors since they were not living near Butamira Forest Reserve. It was contended that people who live near Butamira who would be directly affected if the environment were to be upset by Government's dealings with the Reserve were not complaining about the decision Government had taken. It was concluded that the proprietors of Kakira Sugar Works Ltd to whom the responsibility of managing the Reserve was vested were living within its environs and as such as reasonable and rational human beings were not likely to endanger their own lives by polluting the environment in which they live.

The applicants brought this action under Article 50 of the Constitution claiming that their rights to a clean and healthy environment had been affected by the respondents' acts and omissions. That Article provides as follows:

"50 (1) Any person who claims that a fundamental or other right or freedom guaranteed under this constitution has been infringed or threatened, is entitled to apply to a competent court for redress which may include compensation.

(2) Any person or organization may bring an action against the violation of another person's or group's human rights.

The importance of the above law is that it allows any individual or organization to protect the rights of another even though that individual is not suffering the injury complained of or does not know that he is suffering from the alleged injury. To put it in the biblical sense the Article makes all of us our *"brother keeper"*. In that sense it gives all the power to speak for those who cannot speak for their rights due to their ignorance, poverty or apathy. In that regard I cannot hide any pride to say that our constitution is among the best the world over because it emphasizes the point that violation of any human right or fundamental right of one person is violation of the right of all.

I am fortified in that thinking by the growing number of cases on environmental justice and good governance where Article 50 of the Constitution have been applied:

In **Greenwatch Vs Attorney General and Another Misc. Cause No.140/2002**, an action was taken against the Attorney General and NEMA under Article 50 of the Constitution for among other things failing or neglecting their duties towards the promotion or preservation of the environment. It was held that the state owes that duty to all Ugandans and any concerned Ugandan has right of action against the Government of the Republic of Uganda and against NEMA for failing in its statutory duty.

In the **Environmental Action Network Ltd Vs The Attorney General and NEMA Misc. Application No.39J2001**. Article 50 of the Constitution was again interpreted where it was observed inter alia that the article does not require the applicant to have the same interest as the parties he or she seeks to represent or for whose benefit the action is brought.

Lastly in the recent case of **British American Tobacco Ltd v s The Environmental Action Network; High Court Civil Application No. 27/2003; Ntabgoba P.J** (as he then was) had a lengthy discussion of Article 50 of the Constitution of Uganda wherein he held that the said Article does recognize the existence of marginalized groups like children, illiterates, the poor and the deprived on whose behalf any person or a group of persons could take an action to enforce

their rights.

It is very clear from the above authorities that the applicants in this case were clothed with legal standing to take the instant action under Article 50 of the Constitution on behalf of the people of Butamira and other citizens of Uganda. They were therefore not busy bodies.

2. Whether there was breach of the Doctrine of Public Trust.

In very brief terms, the essence of the above doctrine is the legal right of the public to use certain land and waters. It governs the use of property where a given authority in trust holds title for citizens. Citizens have two co-existing interests in trust land; the *jus publicum*, which is the public right to use and enjoy trust land, and the *jus privatum*, which is the private property right that may exist in the use, and possession of trust lands. The state may convey the *jus privatum* to private owners, but this interest is subservient to the *jus publicum*, which is the state's inalienable interest that it continues to hold in trust land or water: See Paul M. Bray: the Public Trust Doctrine.

In Uganda the above doctrine has been enshrined in the 1995 Constitution in its National Objectives and Directive Principles of State Policy as follows:

"The state shall protect important natural resources, including land, water, wetlands, minerals, oil, fauna and flora on behalf of the people of Uganda".

The Doctrine is restated in Article 237 (2)(b) of the Constitution which states:

"The Government or a local" Government as determined by parliament by law, shall hold in trust for the people and protect, natural lakes, rivers, wetlands, forest reserves, game reserves, National parks, and any land to be reserved for ecological and tourist purposes for the common good of all citizens:

The above provisions were operationalized by Section 44 of the Land Act in the following terms:

"44 Control of Environmentally Sensitive areas

(1) The Government or a local government shall hold in trust for the people and protect natural lakes, rivers, ground water, natural ponds, natural streams, wetlands, forest reserves, national parks and any other land reserved for ecological and tourist purposes for the common good of all citizens

(2)

(3)

(4) The Government or a Local Government shall not lease out or otherwise alienate any natural resources referred to in this section.

(5) The Government or a Local Government may grant concessions or licenses or permits in respect of any natural resources referred to in this section subject to any law.

(6) Parliament or any other authority empowered by parliament may from time to time review any land held in trust by the Government or a Local Government whenever the community in the area or district where the reserved land is situated so demands".

Article 237 (2) (b) should be read together with section 44 (4) of the Land Act. The same should apply to Article 237 (2) (a) and Section 42 of the Land Act. The two provisions allow Government or a local government to acquire land in public interest subject to Article 26 of the Constitution and conditions set by parliament.

It is clear from the above expositions that Butamira Forest Reserve is land which government of Uganda holds in trust for the people of Uganda to be protected for the common good of the citizens. Government has no authority to lease out or otherwise alienate it. However, Government or a local government may grant concessions or licenses or permits in respect of land held under trust with authority from parliament and with consent from the local community in the area or district where the reserved land is situated.

In the instant case there was evidence that the permit was granted to Kakira Sugar Works amidst protests from local communities which raised up a pressure group of over 1500 members who depended on the reserve for their livelihood through agro-forestry, and source of water, fuel and other forms of sustenance. There was therefore breach of public trust doctrine. I must add that this doctrine was applied by the then Principal Forest Officer when he rejected the demands to alienate to Reserve to Kakira Sugar Works Ltd. in 1956: See quotation above.

3. Whether the second respondent failed in its statutory duties under the National Environment Act.

It was contended for the applicants the second respondent failed in its Statutory duties in allowing Kakira Sugar Works to change the land use in the Forest Reserve without an Environment Impact Assessment and project brief. It was further contended that the said project would affect the rights of the applicants to a clean and healthy environment and the right to the protection of the country's natural resources.

The National Environment Act established National Environment Management Authority (NEMA) the second respondent, as the overall body charged with the management of environmental issues in Uganda with power to co-ordinate, monitor and supervise all activities in the field of the environment.

It is upon the second respondent to ensure that the principles of environmental management set out below are observed:

(a) to assure all people living in the country the fundamental right to an environment adequate for their health and well being;

(b) to encourage the maximum participation by the people of Uganda in the development of policies, plans and processes for the management of the environment;

(c) to use and conserve the environment and natural resources of Uganda equitably and for the benefit of both present and future generations, taking into account the rate of population growth and the productivity of the available resources;

(d) to conserve the cultural heritage and use the environment and natural resources of Uganda for the benefit of both present and future generations;

(e) to maintain stable functioning relations between the living and nonliving parts of the

environment through preserving biological diversity and respecting the principle of optimum sustainable yield in the use of natural resources;

(f) to reclaim lost ecosystems where possible and reverse the degradation of natural resources;

(g) to establish adequate environmental protection standard and to monitor changes in environmental quality;

(h) to publish relevant data on environmental quality and resource;

(i) to require prior environmental assessments of proposed projects which may significantly affect the environment or use of natural resources;

(j) to ensure that environmental awareness is treated as an integral part of education at all levels;

(k) to ensure that the true and total costs of environmental pollution are borne by the polluter;

(l) to promote international co-operation between Uganda and other states in the field of the environment: See Section 2 of National Environment Act.

The duties of the second respondent are further spelt out in section 6 of the Act.

In the instant case the second respondent has been challenged for allowing Kakira Sugar Works to change land use in the Forest Reserve without Environmental Impact Assessment and project brief.

It was further contended that the said project would affect the rights of the applicants to a clean and health environment and the right to the protection of the country's natural resources. Lastly, it was contended that the second respondent had failed in its duty to conserve the environmental and natural resources for the benefits of the present and future generations.

In very brief terms an Environmental Impact Assessment is a study conducted to determine the possible negative and positive impacts which a project may have on the environment. It is conducted before the project is started in order to evaluate its socio-economic benefits to the citizens. It is a very vital dynamics in planning for sustainable development.

The legal and institutional framework in Uganda is to the effect that before any project which is described in the third schedule of the National Environment Act is carried out, the developer must first submit a project brief to the lead agency which is the second respondent. Thereafter an Environmental Impact Assessment shall be undertaken by the developer where the lead agency is of the view that the project:

(a) May have an impact on the environment;

(b) is likely to have a significant impact on the environment, or

(c) Will have a significant impact on the environment; Section 19 of the National Environment Act.

The Act also provides in the third schedule projects where Environmental Impact Assessment are mandatory. For the purpose of this case, they are:

(a) Any activity out of character with surroundings;

(b) Any activity causing major changes in land use;

(c) Forestry related activities, including clearance of forest areas;

(d) Large scale agriculture;

(e) Activities in natural conservation areas, including formulation or modification of forest management policies.

In the instant case it was indicated that the permit was to effect change in land use whereby Kakira Sugar Works was to use the forest Reserve for planting sugar canes. Such activity would definitely be out of character with surroundings since it would entail changes in the land use from forestry to agriculture. Moreover it would involve clearance of a large forest for the purpose of large-scale agriculture. Butamira is a natural conservation area. The law is clear that all the above activities would not be carried out without Environmental Impact Assessment. Butamira saga is more delicate because it involves the interest of the local community whereby even common sense should have demanded that an Environmental Impact Assessment study be carried out to determine social, political, cultural and economic impact of the project. If it is true that land in Uganda belongs to the people as provided in the laws, it should be equally true that the local community in Butamira should have been consulted as a matter of transparency, accountability and good governance as demanded by the public trust doctrine which I have alluded to above. For the above reasons I do agree that the second respondent failed in its duty to ensure that Environmental Impact Assessment was carried out as required by the law.

As for the right to a clean and healthy environment, the National Environment Act provides that every person shall have the right to a healthy environment and one of the duties of the second respondent is to ensure that all people living in the country have the fundamental right to an environment adequate for their health and wellbeing. Let me emphasize this point by picking quotation from the Indian Supreme Court in **MC Mehta Vs Union of India and others AIR 1988 Supreme Court 1037**.

"Man is both creature and molder of his environment which gives him physical sustenance and affords him the opportunity for intellectual, moral, social and spiritual growth. In the long and tortuous evolution of the human race on this planet a stage has been reached when through rapid acceleration of science and technology, man has acquired the power to transform his environment in countless ways and on an unprecedented scale. Both aspects of man's environment the natural and man made, are essential to his wellbeing and to the enjoyment of the basic human rights, even the right to life itself".

The right to health does not therefore stop at physical health. It covers intellectual, moral, cultural, spiritual, political and social wellbeing. Politically and socially, Butamira Forest Reserve

belongs to the local community in Butamira. The people of Butamira also have a moral, cultural economic and spiritual attachment to Butamira Forest Reserve as a source of sports, worship, herbal medicine, economy etc.

It was therefore not proper to deprive them without consulting them and conducting a proper study. Lastly in alienating the Reserve the second respondent also failed in its constitutional and statutory duty to conserve the environment and natural resources equitably and for the benefit of both the present and future generations.

4. Remedies available to the parties:

It is clear from the above analysis that Butamira permit if it was ever granted at all was null and void by the fact that no project brief and Environmental Impact Assessment were ever carried out as required by the law. The alienation of the reserve could only be done with due consultation of the local community and the relevant district as provided by the law. If the project is very vital for the development of the nation, proper procedure outlined above should have been followed to put it in place.

For the above reasons I find that the applicants are entitled to all the orders sought above except the restoration orders against the respondents. Such orders are only relevant to the party who is guilty of the environmental damage.

Lastly this being public interest litigation, I would not wish to make any orders as to costs. Public interest litigation usually involves the interest of the poor, ignorant, deprived, ill-informed, desperate and marginalized society where justice is always high horse. The courts of law should always be slow at awarding costs in such matters in order to enhance access to justice.

Conclusion:

In conclusion, this application is upheld with all the orders prayed for save orders for restoration. Parties to bear their own costs.



RUBBY AWERI OPIO

JUDGE

11/7/2005

Kenneth Kakuru
Edson Ruyondo for applicant
Mike Chibita for respondent

THE REPUBLIC OF UGANDA

**IN THE HIGH COURT OF UGANDA AT KAMPALA
MISCELLANEOUS APPLICATION No. 92 OF 2004
(ARISING FROM MISC. CAUSE No. 15 OF 2004)**

**GREENWATCH..... APPLICANT
VERSUS**

- 1. UGANDA WILDLIFE AUTHORITY**
- 2. ATTORNEY GENERAL..... RESPONDENT**

BEFORE: THE HON. JUSTICE GIDEON TINYINONDI

Constitutional Law: Article 50(1), (4) public interest litigation procedure
Civil Procedure: Order 37 Rule 2, 3 9 temporary injunction
Whether the applicant is likely to succeed in the main suit
Civil Procedure: Whether the applicant was required to serve the respondent with
a 45 days statutory notice as provided by the Government
Proceedings Act.

In this application the applicant sought an order for temporary injunction against the respondents restraining them from exporting or relocating any chimpanzee from Uganda to the Peoples Republic of China or any other place or country in the world. When the matter came up for hearing, counsel for the respondents raised a preliminary objection to strike out the application on the basis that, the respondents were not issued with a statutory notice as required by the Government Proceedings Act.

HELD:

1. Applications pursuant to Article 50 must be strictly restricted to the Civil Procedure Act and Rules and not S.1 Act 20 of 1969.
2. The damage complained of is of a material nature which would not adequately be compensated by award of damages.
3. To demand from an aggrieved party a 45 days notice, is to condemn them to infringement of their rights and freedoms for that period.

Objection overruled application to proceed on merit.

Editorial Notes: The main applicant was never heard. It is still pending. Parties agreed to settle the matter amicably by the respondent conceding UWA is only a trustee and does not own wildlife and as such had no right to export wildlife.

THE REPUBLIC OF UGANDA

**IN THE HIGH COURT OF UGANDA AT KAMPALA
MISCELLANEOUS APPLICATION NO. 92 OF 2004
(ARISING FROM MISC. CAUSE NO. 15 OF 2004)**

**GREENWATCH:..... APPLICANT
VERSUS-**

**1. UGANDA WILDLIFE AUTHORITY}
2. THE ATTORNEY GENERAL}..... RESPONDENT**

BEFORE: HONOURABLE JUSTICE GIDEON TINYINONDI

RULING:

In this application preferred under 037, rr 2(1) and 9 of the Civil Procedure Rules the applicant sought "an order of temporary injunction to issue against the respondents, their agents attorneys and assigns anybody or person acting in that or such similar capacity from exporting, transporting, removing, relocating any chimpanzee from Uganda to the Peoples Republic of China or any other place or country in the world until the hearing and determination of the main application herein or until further orders of this court. "

The grounds of the application were stated to be:

1. *That there is a pending application seeking a permanent injunction against the 1st respondent and for declaration that the decision of the 2nd respondent in respect of the subject matter herein is null and void ab intio and the same is pending hearing in this Court.*
2. *That the pending application against the respondents has great likelihood of success.*
3. *That the activities the applicants seek to restrain the respondents from doing are illegal and ultra vires the powers.*
4. *That on a balance of convenience it is just and equitable that this application be granted.*
5. *The respondents will not be prejudiced if the application is allowed but the applicants will be prejudiced if the Order is not granted as it will render nugatory the main suit herein. "*

One Sarah Naigaga swore an affidavit in support of the application stating:

1. That I am the Executive Director of the Applicant and the person in charge of running its day to day affairs and swear affidavit in that capacity.

2. That the applicant is a limited liability company limited by guarantee and incorporated under the laws of Uganda, and it is also registered in Uganda as a non-governmental institution under the Laws of Uganda.
3. That the applicant members are all Ugandans citizens of age and sound mind.
4. That the objectives of the applicant include among others the protection of the environment, including but not limited to flora and fauna, increasing public participation in the management of the environment and natural resources, enhancing public participation in the enforcement of their right to a healthy and clean environment.
5. That I have learnt from the 1st respondent that it intends to export Chimpanzees, from Uganda to China or elsewhere.
6. That we have had to take Court action in view of the urgency of this matter and the fact that the Executive Director of the 1st Respondent and its official Mr. Daniel Ankankwasa refused to talk to me about this.
7. That this followed press reports that the 1st applicant and other official of Government have already finalised plans to export Chimpanzees from their Sanctuary to Zoos in The peoples' Republic of China see annexure "A1 to A5."
8. That the decision would fundamentally affect the Chimpanzees and in turn impact negatively on the environment.
9. That by removing Chimpanzees from their natural habitat and exporting them to China the respondents would violate the applicants right to a clean and healthy environment as enshrined in the constitution.
10. That the Constitution demands that state and all its organs protect the natural resources of Uganda including flora and fauna and as the decision to export Chimpanzees from Uganda contravenes this directive principle of state policy.
11. That the decision to export Chimpanzees is null and void as it was made *ultra vires* the powers of the applicants.
12. That the law empowers the applicants to protect flora and fauna where they are and have no powers to alter the environment or move flora and fauna in a way that is not in the best interest of the environment.

13. That the decision to export Chimpanzees contravenes the Constitution directive principle of state policy that requires the state to ensure conservation on all natural resources.
14. That it is the duty of all the people of Uganda including the applicants to uphold and defend the Constitution and that this application is made in that spirit.
15. That applicants, and all other citizens of Uganda cannot enjoy a clean and healthy environment unless it had all its amenities, to wit air, water, land and mineral resources, energy including solar energy and all plant and animal life.
16. That the applicant would therefore be aggrieved by the decision and the action of the respondents in exporting Chimpanzees from Uganda, which action subtracts an essential ingredient of their environment.
17. That it is estimated that there are only 5000 Chimpanzees left in Uganda and therefore any further reduction in this number significantly affects the fauna component of the environment in Uganda.
18. That Chimpanzees are not goods or chattels, they do not belong to the Government of Uganda but are Uganda's natural heritage, and a gift from God and the respondents are only protecting them as trustees of the people of Uganda.
19. That it is just and equitable that this application be granted to maintain the *status quo* pending the final determination of the main application herein.
20. That if the *status quo* is not maintained and the Chimpanzees are exported it will be more difficult to reverse and therefore on a balance of convenience this application ought to be granted.
21. That I swear this affidavit in support of the applicants' application herein.
22. That all I have stated hereinabove is true and correct to the best of my knowledge.

At the hearing Dr. Joseph Byamugisha appeared for the respondent while Mr. Kenneth Kakuru represented the applicant. Dr. Byamugisha raised a preliminary objection. He submitted that this application which arose out of Miscellaneous Cause No. 15/2004 between the same parties should be struck out under 07, r11 (d) of the Civil Procedure Rules. His bases for this were

a).The 1st respondent is a scheduled corporation under the Civil Procedure and

Limitation [Misc. Provisions] Act, Cap.72 of the Laws of Uganda 2000. Section 2 thereof provides that no suit shall lie or be instituted against a scheduled corporation until the expiry of forty-five days after written notice has been delivered or left at its office etc. etc.

b). Before Miscellaneous Cause No. 15/2004, out of which this application arises was filed, no such notice as required in the Act (ante) was served on the Respondent.

Therefore Counsel's preliminary objection, he argued, was not directed against this application alone but also against Miscellaneous Cause No. 15/2004 which latter application was itself an incompetent suit on account of violating Section 2 of the Act (ante).

In support of his submissions learned Counsel cited **LYAKIYE -VS- ATTORNEY GENERAL: [19731] ULR 124** and **KAYONDO-VS-ATTORNEY GENERAL: 1988/90 HCB 127**. He prayed that this application and Miscellaneous Cause No. 15/2004 be struck out.

Mr. Kakuru replied as hereunder. He agreed that service of statutory notice on a corporation was mandatory. He also agreed with the legal position in the cases cited by Dr. Byamugisha. He, however, pointed out that position obtains in ordinary suits brought under the Civil Procedure Act and the Civil Procedure Rules.

That this application and the cause out of which it arises were not one of such suits.

That Miscellaneous Cause No. 15 of 2004 was brought under section 50 of the Constitution and Statutory Instrument No. 26 of 1992. That in **DR. J.W. RWANYARARE AND 2 OTHERS -V-S- ATTORNEY GENERAL: MISC. APPLICA TION NO. 85 OF 1993** the High Court held that in matters concerning the enforcement of human rights under the Constitution no statutory notice was required because to do so would result in absurdity as the effect of it would be to condone the violation of the right and deny the applicant the remedy.

Learned Counsel further argued that the Rules (under Statutory Instrument 26 of 1992) are specific for the enforcement of the rights and there is no statutory provision for a notice.

He cited **MISCELLANEOUS APPLICA TION NO. 140 OF 2002: GREENWATCH -VS- ATTORNEY GENERAL AND NEMA and MISCELLANEOUS APPLICA TION NO. 139 OF 2001 : GREENWA TCH –VS- ATTORNEY GENERAL AND NEMA.**

Finally learned Counsel referred to the decision of the Constitutional Court in **UGANDA ASSOCIATION OF WOMEN LAWYERS AND 5 OTHERS -VS- ATTORNEY GENERAL**

where the “*thirty days*” rule under the provision of rule 4(1) of the Fundamental Rights and Freedoms [Enforcement Procedure] Rules 1992 (legal Notice no. 4/1960 was discussed.

Dr. Byamugisha's reply was as follows. Article 50 of the Constitution was clear. It had two heads

- a). whether a right has been infringed;
- b). where the right is being threatened with infringement.

That in the former the reasoning by the High Court that a statutory notice would delay the infringement of the right would not be right. That therefore if that reasoning cannot stand in (a) so it cannot also stand in (b). That Section 2 of Cap.72 was mandatory despite the Fundamental Rights and Freedoms (Enforcement Procedure) Rules. Learned Counsel maintained that he would concede the point if the Constitutional Court had declared Section 2 of Cap. 72 (ante) unconstitutional as taking out the suits under Article 50 of the Constitution. But that court had not done so. And the High Court had no power to declare that this Act did not apply to Article 50 suits. Such a declaration by the High Court would have no effect of declaring the Act unconstitutional.

It is pertinent that I reproduce the provisions of Article 50 (1) Of (4) the Constitution.

“(1) Any person who claims that a fundamental or other right or freedom guaranteed under this Constitution has been infringed or threatened, is entitled to apply to a competent court for redress may include which compensation.”

(2).....

(3).....

(4). Parliament shall make laws for the enforcement of rights and freedoms under this Chapter.

I will also reproduce the provisions of the Fundamental Rights and Freedoms (Enforcement Procedure Rules (5.1. 26 of 1992,

This is one of the laws envisaged in Article 50 (4) above. Rule 7 reads

“7. Subject to the provisions of these Rules, the Civil Procedure Act and the rules made thereunder shall apply in relation to the application.” [Emphasis is mine.]

In *THE ENVIRONMENTAL ACTION NETWORK LTD. -VS- THE ATTORNEY GENERAL AND NEMA: HC MISC. APPL. NO 13/2001*, J.H. Ntabgoba, PJ. considered a similar preliminary objection as the present one. He stated :

“-----Although Rule 4 provides that no motion under Rule 3 shall be made without notice to the Attorney General and any other party affected by the application, Rule 7 clearly stipulates that ----.

Applying the so-called golden rule of interpretation, we assumed that besides Rule 7 of S.1. 26 of 1992, Parliament meant that any other rule of procedure should be applied. It is for this reason that I think that applications pursuant to Article 50 of the Constitution must be strictly restricted to the Civil Procedure Act and the rules thereunder and not under Section 1 of Act No. 20 of 1996 (read Cap. 72, S.2).....

I agree with this requirement that the respondent usually the Government or a scheduled Corporation needs sufficient period of time to investigate a case intended to be brought against it so as to be able to avoid unnecessary expense on protracted litigation. This rationale cannot apply to a matter where the rights and freedoms of the people are being or are about to be infringed. The people cannot afford to wait forty-five days before pre-emptive action is applied by Court. They need immediate redress. They need a short period which is one provided under the ordinary rules of procedure provided by the Civil Procedure Act and its Rules. To demand from an aggrieved party a forty-five days' notice is to condemn them to infringement of their rights and freedoms for that period which this Court would not be prepared to do.....'[Emphasis supplied.]

I have no better words to use than these in order to overrule the preliminary objection before me. It is accordingly overruled.


GIDEON TINYINONDI
JUDGE
28-04-2004

Dr. Byamugisha for 1st respondent.

Applicant and counsel absent.

COURT:

Ruling read.

GODFREY NAMUNDI

DEPUTY REGISTRAR

28-04-2004.

GREENWATCH

VERSUS
ATTORNEY GENERAL AND NATIONAL ENVIRONMENT MANAGEMENT
AUTHORITY (NEMA)

MISC. APPLICATION. No. 140 OF 2002

BEFORE: THE HON. MR. AG. JUSTICE LAMECK N. MUKASA

Civil Procedure : *Whether the plaint disclosed a cause of action.*
Civil Procedure : *Whether Order 1 Rule 8 of the CPR was complied with.*
Civil Procedure : *Whether the affidavit contravened Order 17 Rule 3(1) CPR hence should be dismissed as hearsay*

This miscellaneous cause was brought by notice of motion under Article 50 (1) and (2) of the Constitution of the Republic of Uganda, Rule 3(1) of the Fundamental Rights and Freedoms (Enforcement Procedure) Rules; 8,1 No. 26 of 1992, Order 2 Rule 7 and Order 48 Rules 1 and 3 of the Civil Procedure Rules.

The applicants sought the regulation of the manufacture, use, distribution and sale of plastic bags and restoration of the environment to the state it was before the menace caused by the plastic.

Counsel for the respondents raised preliminary objections; that the application had no cause of action that it didn't comply with Order 1 Rule 8 of the CPR which stipulates rules of representative action and that the application was supported by a defective affidavit which should be rejected.

Held.

1. The essential elements to support a cause of action against each of the two respondents have been satisfied.
2. Article 50 of the Constitution does not require that the applicant must have the same interest as the parties he or she seeks to represent or for whose benefit the action is brought. Court is under an obligation to hear the concerned citizen, in the instant case, the applicant.
3. In the two affidavits in support of this application, the deponent avers that the matter contained in each of the affidavits was based on the deponents' knowledge. Therefore, the third preliminary objection is overruled.

In the final result, the preliminary objections raised on behalf of the respondents are overruled.

Editorial notes: The main suit is still pending. NEMA did concede plastics violate the right to a clean environment but asserted it was putting regulations in place. No such regulations have ever been made. A private member's bill supported by environmental policy NGOs has never been allowed to go through Parliament. Government in order to frustrate the process announced in a budget speech of 2007 banning of plastics of less than 30 microns. The suit wants a ban of up to 100 microns.

THE REPUBLIC OF UGANDA

**IN THE HIGH COURT OF UGANDA AT KAMPALA
MISC. APPLICATION NO. 140 OF 2002.**

GREENWATCH:.....:APPLICANT

VERSUS

ATTORNEY GENERAL & NEMA:RESPONDENT

BEFORE: THE HON. MR. AG. JUSTICE LAMECK N. MUKASA

RULING:

This Miscellaneous Cause is brought by Notice of Motion under Article 50 (1) , (2) of the Constitution of the Republic of Uganda, Rule 3 (1) of the Fundamental Rights and Freedoms (Enforcement Procedure) Rules, S.I No. 26 of 1992, Order 2 Rule 7 and Order 48 Rules 1 and 3 of the Civil Procedure Rules. The application is brought by Greenwatch, a Non-Governmental Organisation registered and incorporated in Uganda as a company limited by guarantee. The objectives of the organisation include focusing on issues and problems of the Environment and using all avenues possible to monitor and expose danger to environment however caused and by whomsoever.

The application is brought against the Attorney General and the National Environment Management Authority. The Applicant seeks the following orders and declarations:

1. A declaration that manufacture, distribution, use, sale sell, disposal of plastic bags, plastic containers, plastic food wrappers, all other forms of plastic commonly known and referred to as "Kaveera" violates the rights of citizens of Uganda to a clean and healthy environment.
2. An order banning the manufacture, use, distribution and sale of plastic bags and plastic containers of less than 100 microns.
3. An order directing the second respondent to issue regulations for the proper use and disposal of all other plastics whose thickness is more than 100 microns including regulations and directions as to recycling, re-use of all other plastics.
4. An environmental restoration order be issued against both respondents directing them to restore the environment to the state in which it was before the menace caused by plastics.
5. An order directing the importers, manufacturers, distributors of plastics to pay for the costs of environmental restoration.
6. No order be made as to costs.

Under the Fundamental Rights Freedoms (Enforcement Procedure) Rules 1992, Rule 6 evidence at the hearing of an application shall be tendered by affidavit unless court directs that evidence be given orally on any particular matter. In that regard the Applicant filed two affidavits both sworn by Sarah Naigaga, the National Coordinator and Chief Executive Officer of the applicant. The first respondent filed an affidavit in reply deponed to by Mr. Malinga Godfrey, a State Attorney in the Attorney Generals Chambers. The second respondent filed an affidavit in reply deponed to by Mr. Patrick Kamanda, an Environmental Inspector with Second Respondent.

When the cause came up for hearing Mr. Oluka, who represented the Attorney General raised three preliminary points of objection. The first objection was that the application did not disclose

a cause of action against the Attorney General. The second objection was that the application was not proper before this court in that it was brought by the applicant on behalf of other Ugandans who had not authorised the applicant to do so and without leave of Court as legally required under Order 1 rule 8 of the Civil Procedure Rules before filing a representative suit. Thirdly that the application is supported by defective affidavits which should be rejected.

Mr. Robert Wabunoha, a Senior Legal Officer with the Second Respondent, on behalf of the second respondent associated himself with the objections raised on behalf of the first respondent. He particularly raised an objection that the application did not disclose a cause of action against the second respondent. I will start with the first objection, Whether the application discloses a cause of action against any of the respondents. Mr. Oluka, Counsel for the Attorney General submitted that the application did not satisfy the three essential elements to support a cause of action as set out in *Auto Garage vs Motokov (No.3) r 197/11* EA 514. that;

- (i) The plaintiff (applicant) enjoyed a right;
- (ii) The right has been violated, and
- (iii) The defendant (respondent) is liable.

The applicant is a Ugandan Company and Article 39 of the Constitution provides:

"Every Ugandan has a right to a clean and healthy environment"

See also Section 4 (1) of the National Environment Statute No. 4 of 1995.

Sarah Naigaga in paragraph 4 and 5 of the affidavit in support of this application avers that uncontrolled and discriminate use and disposal of plastics has caused harm to the environment and the plastics used as carrier bags, containers are dangerous to human health and life. Such averments amount to a plea of violation of every Ugandan's right to a clean and healthy environment.

Article 20 (2) of the Constitution provides:

"The rights and freedoms of the individual and groups enshrined in this chapter shall be respected, upheld and promoted by all organs and agencies of the Government and by all persons"

And Article 245 of the Constitution provides:

"Parliament shall, by law, provide for measures intended to:

- (a) protect and preserve the environment from abuse, pollution and degradation;
- (b) manage the environment for sustainable development and
- (c) promote environmental awareness".

The Constitution under the National Objectives and Directive Principles of State Policy; Objective (XXV11) provides:

"The Environment

- (i) The state shall promote sustainable development and public awareness of the need to manage land, air, water resources in a balanced and sustainable manner for the present and future generations.
- (ii) -----

(iii) The state shall promote and implement energy policies that will ensure that people's basic needs and those of environmental preservation are met" .

I have studied the application and the two affidavits filed in support and I found them pointing a finger at the State that it has failed or neglected its duty towards the promotion or preservation of the environment. The State owes this duty to all Ugandans. By so failing or neglecting the Government is in breach of its duty towards the citizens of Uganda. Any concerned Ugandan has a right of action against the Government of the Republic of Uganda, for that matter against the Attorney General in his representative capacity, to seek the enforcement of that failed or neglected duty of the State.

The National Environment Management Authority (second respondent) is a body corporate established under Section of 5 of the National Environment Statute No.4 of 1995 capable of suing or being sued in its corporate name. The Second Respondent has a mandatory duty, under the Statute, Section 3, to ensure that the principles of environmental management are observed. These principles include

(a) to assure all people living in the country the fundamental right to an environment adequate for their health and well being.

(g) to establish adequate environment protection standards and to monitor changes in environmental quality.

(i) to require prior environmental assessments of proposed projects which may significantly affect the environment or use of natural resources.

(k) to ensure that the true and total costs of environmental pollution are borne by the polluter.

See also Section 7 as to the functions of the Authority.

In paragraphs 5, 6, 7 and 10 of the affidavit in support dated 21st November 2002 are averments to the effect that the use of plastic containers is dangerous to the human health and life of Ugandans and in paragraph 9 that plastics are dangerous to domestic and wild animals and in paragraph 8 that plastic disposal is degrading the environment and threatening food security. Such averments read together with the prayer in the application for an order directing the second respondent to issue regulations for the proper use disposal, recycling and re-use of plastics amount to a plea that the second respondent is in breach of its statutory duty to ensure that the principles of environment management are observed, which duty it owes to the citizens of Uganda.

I therefore find that the three essential elements to support a cause of action against each of the two Respondents have been satisfied. The first objection is overruled.

The second ground of objection is that the application was improper before this court as it did not comply with the provisions of Order 1 Rule 8 of the Civil Procedure Rules.

Mr. Oluka argued that the first prayer in the Notice of Motion makes reference to the fact that "Kaveera violets the rights of citizens of Uganda to a clean and healthy environment".

He submitted that there was not leave of Court allowing the Applicant to represent all Ugandan and he contended that the application amounted to a representative suit. He made reference to Rules 7 of the Fundamental Rights and Freedoms (Enforcement Procedure) Rules 1992 which make the Civil Procedure Act and the Rules made there under applicable to proceedings under these Rules.

Counsel also referred to Constitutional Petition No. 11 of 1997 *James Rwanyarare & Another vs. Attorney General* in which it was argued for the first petitioner that he had properly brought the petition on behalf of a group known as the Uganda Peoples Congress since under Article 50 (2) of the Constitution a group may bring a petition on grounds of violation of their human rights and or freedoms and further that the group's petition is not a representative action requiring compliance with Order 1 Rules 8 CPR requiring leave of Court. The Constitutional Court held, inter alia, that the first petitioner acted unlawfully in bringing the representative action as he did. That he could only bring the petition on his own behalf. The group's petition was held incompetent.

The above petition is distinguishable from the instant application. Order 1 Rules 8 CPR provides “where there are numerous persons having the same interest in one suit, one or more such persons may, with the permission of the court, sue or be sued or may defend in such suit, on behalf of or for the benefit of all persons so interested. But the court shall in such case give notice of the institution of the suit to all such persons either by personal service or where, from the number of persons or any other cause, such service is not reasonably practicable, by public advertisement, as the court in each case may direct”. (the underlining is mine).

The rule concerns a group of persons identifiable by their common interest in the suit. Unlike in Petition No. 11 (above) where the group was members of the Uganda Peoples Congress, in this Application the subject matter of the complaint is of common and general interest not just to a group but to all citizens of Uganda. Consequently it is impracticable, to make all the citizens of Uganda give consent to the application as required under the rule for a representative suit.

In *The Environmental Action Network Ltd vs. The Attorney General and National Environment Management Authority*, Application No.39 of 2001 the Principle Judge, Mr. Justice J.H. Ntabgoba stated:

" ----- the State Attorney failed, in his preliminary objection, to distinguish between actions brought in a representative capacity pursuant to Order 1 Rule 8 of the Civil Procedure Rules, and what are called Public interest litigation which are the concern of Article 50 of the Constitution and S. 1 No. 26 of 1992. The two actions are distinguishable by the wording of the enactment or instruments pursuant to which they are instituted. Order 1 Rule 8 of the Civil Procedure Rules governs actions by or against the parties (i.e. plaintiff or defendant) together with parties that they seek to represent and they must have similar interest in the suit. On the other hand, Article 50 of the Constitution does not require that the applicant must have the same interest as the parties he or she seeks to represent or for whose benefit the action is brought".

Article 50 of the Constitution provides

"(1) Any person who claims that a fundamental or other right or freedom guaranteed under this Constitution has been infringed and threatened is entitled to apply to a competent court for redress which may include compensation.

(2) Any person or organisation may bring an action against the violation of any person's or groups human rights"

From the wording of clause (2) above any concerned person or organisation may bring a public interest action on behalf of groups or individual members the country even if that group or individual is not aware that his fundamental rights or freedoms are being violated.

There is limited public awareness of the fundamental rights or freedoms provided for in the Constitution, let alone legal rights and how the same can be enforced.

Such illiteracy of legal rights is even evident among the elites. Our situation is not much different from that in Tanzania where Justice Rugakingira, in the case of *Rev. Christopher Mtikila vs. The Attorney General*, High of Court of Tanzania Civil Case No.5 of 1993 (unreported), stated "*Given all these and other circumstances, if there should spring up a public spirited individual and seek the Court's intervention against legislation or actions that pervert the Constitution the Court, as guardian and trustee of the Constitution and what it stands for, is under an obligation to rise up to the occasion and grant him standing*".

It is just appropriate that a body like the applicant, comes up to discharge the Constitutional duty cast upon every Ugandan to promote the constitutional rights of the citizens of Uganda and the institution of a suit of this nature is one of the ways of discharging that duty. This court is under an obligation to hear the concerned citizen, in the instant case the Applicant. The Second preliminary objection is accordingly overruled.

The third ground of objection is that the application is supported by defective affidavits which should be rejected. Mr. Oluka argued that in both affidavits in support of the application, the deponent, Sarah Naigaga, avers that what was stated in each of the affidavits was true and correct to the best of her knowledge. Yet in paragraphs 4 and 7 of the affidavit dated 11th March 2003 she states that she has obtained from the Environmental Law Alliance Worldwide which is an international Non-Governmental Organisation Network a scientific' study analysing plastic waste management in India by Priya Narayan which study was annexed to the affidavit. Counsel argued that the findings as annexed and referred to in the affidavit were not by the deponent, Sarah Naigaga, since she was not involved in the research. He submitted that these findings were hearsay and contravened the provisions of Order 17 rule 3 (1) CPR.

Further that Sarah Naigaga was not an expert on environmental matters

Order 17 rule 3 (1) CPR provides:

"Affidavits shall be confined to such facts as the deponent is able of his own knowledge to prove, except an interlocutory application, on which statements of his belief may be admitted, provided that the grounds thereof are stated".

Counsel submitted that this application was not an interlocutory application.

In the two affidavits in support of this application the deponent avers that the matters contained in each of the affidavits were based on the deponent's knowledge. Knowledge can be acquired through human senses like seeing, hearing, smelling, tasting or touching followed by understanding and perceiving what has been sensed.

In paragraph 5 of the second affidavit in support of the second affidavits in support of the application the deponent gives the means of her knowledge as opposed to information. She avers:

"5. That I have read and understood the study I do agree with its findings and recommendations".

The veracity and credibility of the study by the means of which the deponent acquired knowledge

deponed to and attached to her affidavit could be challenged but not at this stage. That can be done at the hearing of the application by adducing evidence to disprove, discredit or contradict the study's findings and conclusions.

In Miscellaneous **Application No. 39 of 2001** (above), the deponent to the affidavit in support of the application deponed that he had recently learnt of several medical reports high-lighting the damages of exposure to second hand smoke or environmental tobacco smoke. The deponent set out various reports which he said had high-lighted the dangers of exposure to second hand smoke or environmental tobacco smoke. The learned Principle Judge reproduced some of these reports and went on the state:

"I would myself hesitate to challenge his averments because they are supported by research reports and scientific disclosures".

I am of a similar view. The third preliminary objection is accordingly overruled. In the final result, the preliminary objections raised on behalf of the respondents are overruled. The hearing of the application should proceed on merit. Since in the main application it is prayed that no order be made as to costs, in the same spirit, I accordingly make no order as the costs occasioned by the objections.

Signed

LAMECK N. MUKASA

AG. JUDGE

4/7/03.

**JANE LUGOLOBI & 9 OTHERS
VERSUS
GERALD SEGIRINYA T/A SMART CURRY POWDER FACTORY**

MISC. APPLICATION No. 371 OF 2002.

BEFORE : THE HON. MR. AG. JUSTICE LAMECK N. MUKASA

Civil Procedure: Whether the status quo was maintained
Civil Procedure: Whether the consequences of manufacture could be remedied by award of damages
Civil Procedure : Whether the precautionary principle could be applied.
Civil Procedure: Whether the temporary injunction could be issued on a Balance of convenience

This application was brought by Chamber Summons under Order 37 rules 1, 2 and 9 of the Civil Procedure Rules.

The applicants sought a temporary injunction restraining the respondents from carrying on the manufacture and processing of curry powder at the respondents factory in a residential area in Kanyanya, Kampala. Counsel for the applicants submitted that if orders were granted in line with the averments in the respondents affidavit in reply, that would meet the ends of justice as they would meet the status quo as stated by the respondent and would reduce the suffering complained of by the applicants.

Counsel for the applicants therefore prayed for an order for temporary injunction restraining the respondent from operating the factory outside the hours of 8.00 a.m. to 11.00 p.m., restraining him from operating the factory on Sundays so that he operates six days a week from Monday to Saturday and requiring the respondent to comply with his averments of paragraph 16 of the affidavit in reply that he operates the factory one week in three months and four weeks in one year.

Held:

1. The main purpose for a temporary injunction is to preserve the status quo pending the disposal of the main suit.
2. The law is that where facts are sworn to in an affidavit and they are not denied or rebutted by the opposite party, the presumption is that such facts are accepted. **See *Massa V Achen* [1978] HCB 297**
3. The averments in the Respondents affidavit in reply are neither denied nor rebutted. Without going into further merits and demerits of the application, I order that pending final disposal of H.C.C.S. No. 482 of 2001 the manufacturing and processing of curry powder at the Respondents factory be maintained at the status quo as stated by the Respondent in his affidavit in reply, that is to say; the machinery at the factory be operated between the hours from 8 a.m. to 6 p.m. and that the machinery be operated for only one week within a continuous period of three months.
4. The order as to costs in the main suit shall apply in this application.

Application upheld.

Editorial notes: This matter was finally concluded but the factory was not closed. Instead court ordered NEMA to suspend production. The tort aspects of the suit were discussed. The plaintiffs here appealed.

THE REPUBLIC OF UGANDA

**IN THE HIGH COURT OF UGANDA AT KAMPALA.
MISC. APPLICATION NO.371 OF 2002
(Arising from HCCS No. 482 of 2001)**

**JANE LUGOLOBI & 9 OTHERS} :::APPLICANTS
VERSUS**

**1. GERALD SEGIRINYA
2. T/a SMAT CURRY POWDER FACTORY::::::::::::::::::::::::::::::::::::: RESPONDENTS**

BEFORE: HON. MR. AG. JUSTICE LAMECK N. MUKASA.

RULING:

This is an application by the plaintiff/ applicants for an order of temporary injunction against the defendant/ respondent, his employees, assignees, agents and workmen restraining them from carrying on the manufacture and processing curry powder at the Respondents factory at Lutunda Zone Kanyanya, Kampala. The application is brought by Chamber Summons under Order 37 rules 1,2 and 9 of the Civil Procedure Rules.

The grounds for the application are that: -

1. The applicants have filed a suit H.C.C.S. No. 482 of the 2001 now pending before this court restrain the Respondent from carrying on the business of curry powder manufacturing in their neighborhood contrary to the law.
2. The continued manufacturing and processing of the curry powder at the Respondents premises continues to be a health hazard to the Applicants whose conditions of living have become unbearable because of the activities of the Respondent.
3. The consequences of continued processing of curry powder in the neighborhood of the applicants by the Respondent are so serious and long term that they cannot be compensated by the damages.
4. The Precautionary Principle is applied in this case.

It is just and equitable on balance of convenience to issue the injunction.

The application is supported by an affidavit sworn by Jane Lugolobi, one of the plaintiff /applicants, dated 7th June 2003. The deponent therein states in paragraph 3 that since the institution of the main suit the respondent has installed bigger machinery increased the time of production and the factory emits more pollution than before. That as a result she has been falling sick with headaches, stomach pains, eyes and skin irritation and many other ailments.

She is unable to dry her clothes or food outside the house, for more than 10 minutes and cannot leave her windows or doors open. Because of the continued vibrations her pit latrine and those of

others have cracked and are in danger of collapsing and she cannot read, write or listen to the radio or television. That the gas used in the factory is likely to have long time health effects, which may be fatal from the factory to make the neighbors uneasy or ill. In paragraph 15 and 16 of his affidavit the respondent avers that he does not operate the factory at night, the factory operates from 8.00a.m to 6.00p.m and that the factory machine operates for only one week within every three months, this operates only four weeks in a given year.

In his submission counsel for the applicants submitted that if orders were granted in line with the averments in the respondents affidavit in reply, that would meet the status quo as started by the respondent and would reduce the suffering complained of by the applicants. Counsel therefore prayed for an order for an order for temporary injunction to issue restraining the respondent from operating his factory outside the hours of 8.00 a.m. -11.00p.m, restraining him from operating the factory on Sundays so that he operates only six days a week from Monday to Saturday and requiring the respondent to comply with the averments in paragraph 16 of the affidavit in reply that he operates the factory one week in three months and four weeks in one year.

At this stage proof of facts on which the main suit is based is not required.

The main purpose for a temporary injunction is to preserve the status quo pending the disposal of the main suit. See *Noormohamed Jammohanod vs. Kassamali Virji Madhain (1953) EACA 8*.

The applicants have been prompted to institute this application by the conduct of the Respondent as deponed to in the affidavit in support of this application wherein in paragraph 4 it is stated: -

4: "That since the suit was instituted he has installed bigger machinery increased the time of production and the factory emits more pollution than ever before"

In his affidavit in reply the respondent stated: -

15: "That I do not operate the factory at night. The factory operates from 8.00a.m. to 6.00p.m.

16: That I operate the factory for only one week and after one week I spend about three months without switching on the factory because the materials processed are packed and sold off within about three months. That means in one year I operate the machine for only about four weeks".

The law is that where facts are sworn to in an affidavit and they are not denied or rebutted by the opposite party, the presumption is that such facts are accepted. See *Massa vs. Achen [1978] HCB 297*.

The above averments in the respondents affidavit in reply are neither denied nor rebutted. In fact as, already pointed out above, the applicants will be satisfied if the status quo as stated by the respondent in paragraph 15 and 16 of the affidavit in reply is preserved. In the circumstances without going into further details of the merits and demerits of the application I hereby make the following orders: -

1. Pending the final disposal of H.C.C.S No.482 of 2001 the manufacturing and processing of curry powder at the respondents factory at Lutunda Zone, Kanyanya must be maintained at the status quo as stated by the Respondent in his affidavit in reply, that is to say: -
 - (i) the machinery at the factory must be operated between the hours from 8.00 a.m. to 6.00p.m.

- (ii) the machinery at the factory must be operated for only one week within a continued period of three months.

2. The order as to costs in the main suit shall bind the costs for this application.

I so order.

SGD: LAMECK. N. MUKASA

AG. JUDGE

28/04/03

Mr. Kenneth Kakuru - counsel for the applicants/ plaintiffs

Mr. Lutakome - counsel for the respondent/ defendant

BRITISH AMERICAN TOBACCO LTD.
-VERSUS-
THE ENVIRONMENTAL ACTION NETWORK LTD.
HCCS NO. 27 OF 2003

BEFORE : THE PRINCIPAL JUDGE, MR. JUSTICE J.H. NTABGOBA

<i>Environmental law enforcement:</i>	<i>Whether court can order for warning labels On cigarette packets and commercials</i>
<i>Constitutional law:</i>	<i>Enforcement of rights under Article 22</i>
<i>Constitutional Law:</i>	<i>Public Interest cases under Article 50(2)</i>
<i>Constitutional Law:</i>	<i>Whether Article 50(2) allows class actions – as forum for representative action</i>
<i>Constitutional Law:</i>	<i>Whether Article 50 excuses compliance with Procedural requirements under civil procedure.</i>

An application was brought by notice of motion. The appellant is M/s The Environmental Action Network, Ltd. (TEAN). The application was filed under Article 50(2) of the Constitution of Uganda 1995 and rule 3 of the Fundamental Rights and Freedoms (enforcement Procedure) Rules – Statutory Instrument No. 26 of 1992.

The application seeks the following 3 orders of the Court, which in this instance will be summed up in one ground or conclusive complaint which is;

The respondent as a manufacturer of a dangerous product is under a legal duty to fully and adequately warn consumers of its product of the full extent of the risks associated therewith.

Held:

- a) Failure to make full disclosure of the dangers or risks of smoking cigarettes to the consumers is too remote taking away of the life of such consumers.
- b) The Constitution of Uganda does recognize the existence of the needy and oppressed persons and therefore it allows actions of public interest group to be brought on their behalf. Order 1 rule 8 of the Civil Procedure Rule should apply to such needy persons, but Order 1 Rule 8 is concerned with “persons having the same interest in one suit”, but the lacuna can be filled by laws to conform with the Constitution. Therefore it is clear that the action can base on Article 22(1) of the Constitution.
- c) On whether Article 50(2) of the Constitution authorizes the filing of class action as a form of representative action, can be governed by the procedure under Order 1 rule 8 of the Civil Procedure. The procedure Rules cannot govern them simply because they do not share the concerns of violating their rights with those who bring actions on their behalf.
- d) The court cannot determine fully and sufficiently the kind of information to be included in the desired labels and publications it simply has no expertise to do so.
The application is unclear and embarrassingly ambiguous and could not pass the test. Needless to add that such consideration would not fall under the preview of application number 27 of 2003. It would have been a consideration during the hearing of application number 70 of 2002 which in any event, is struck out with costs to the applicant in the present application.

THE REPUBLIC OF UGANDA

**IN THE HIGH COURT OF UGANDA AT KAMPALA
CIVIL APPL. NO. 27/2003
(ARISING FROM MISC. APPL. NO.70/2002)**

**BRITISH AMERICAN TOBACCO LIMITED.....APPLICANT
VERSUS
THE ENVIRONMENTAL ACTION NETWORK LTD.....RESPONDENT**

BEFORE: HON. THE PRINCIPAL JUDGE, MR. JUSTICE J.H. NTABGOBA

RULING

An application was made by notice of motion. The applicant is M/s Environmental Action Network, Ltd. (TEAN in short). The application was filed under Article 50(2) of the Constitution of Uganda 1995 and rule 3 of the Fundamental Rights and Freedoms (enforcement Procedure) Rules-Statutory Instrument No. 26 of 1992. The application seeks the following 3 orders of the court, namely,

- A declaration that the respondent's (M/s British American Tobacco, Uganda Ltd.) failed to warn the consumers and potential consumers of its cigarettes of the health risks associated with smoking of the said products.
- A declaration that the respondent's failure to warn consumers and potential consumers of its cigarettes of the health risks associated with their smoking constitutes a violation of or a threat to such persons' right to life as prescribed under Article 22 of the Constitution of the Republic of Uganda.
- An order that the respondent place on packets of its cigarettes, its advertising and marketing materials, and at all its advertising and marketing events, warning labels or signage, with such wording, graphics, size and placement as in the court's determination, are sufficient to fully and adequately inform consumers of its cigarettes of the full risks to their health.

The application was supported by the affidavit of Mr. Philip Karugaba the representative of TEAN. The affidavit sets forth a number of grounds for the application. The grounds are very many and varied. The conclusive complaint is contained in ground (1), which is that "the respondent as a manufacturer of a dangerous product is under a legal duty to fully and adequately warn consumers of its product of full extent of risks associated therewith.

So far the background I have given to Miscellaneous Application No.70 of 2002 suffices for a ruling on miscellaneous application No. 27 of 2003, which challenges the said Application No. 70 of 2002.

Application No. 27 of 203 was brought by notice of motion under order 6 rule 29 and order 48 rule 1 of the Civil Procedure Rules. It was filed by British American Tobacco Uganda Limited (BAT), the respondent in Application No.70 of 2002. BAT relies on a number of questions, which are as follows:

"(a) Whether Article 22 of the Constitution, which prohibits the "intentional" taking of life, can be interpreted to apply to an alleged failure of a manufacturer of a commercial product to warn consumers or potential consumers of possible health risks associated with the use of the product."

(b) “Whether Article 22 of the Constitution is capable of being violated by private conduct in the circumstances of this case, namely, an alleged failure of a manufacturer to warn consumers of potential health risks associated with the use of its product.”

(c) “Whether Article 50(2) of the Constitution authorizes the filling of constitutional actions on grounds of “public interest” by private persons or it is confined to the bringing of ordinary representative actions to stop actual violations of human rights of specific persons or groups.”

(d) “ Whether Article 50(2) of the Constitution authorizes the filling of “Class actions” as a forum of representative action or is confined only to representation of specific and identifiable persons or groups.”

(e) “Whether Article 50(2) of the Constitution, which permits any person or organization to bring an action as representative of other persons or groups for violation of their human rights can be interpreted to excuse compliance with the procedural requirements applicable to representative actions generally, such as the necessity to leave of court prior to filling the action.”

It seems to me that the above 5 questions are straightforward and therefore they require straightforward answers. I will therefore deal with them in the order they have been put.

Clearly, Article 22(11) of the Constitution prohibits deprivation intentionally of a person’s life. It follows therefore that whoever wants to bring an action under this provision must first have his right either been violated or being violated or about to be violated, and such violation must be intentional; in which case the action brought must allege violation, past, present or imminent. He must also allege the intention to violate. He must pursuant to order 6 rule 2 of the Civil Procedure Rules, plead the particulars of the violation as well as of the intention to violate. That is, in other words, he must specially plead the two with the view to specifically prove them.

In the application No. 70 of 2002, the applicant (TEAN) alleges failure of the respondent (British American Tobacco Uganda Limited - BATUL) to adequately inform the smokers of their product i.e. tobacco of the dangers of smoking. In fact the application is brought by TEAN as a public interest litigator bringing the action on behalf of consumers and potential consumers of the cigarettes manufactured by BATU, the respondent. The question is whether TEAN’S action was appropriately brought under Article 50(2) of the Constitution or whether it is not a proper action in tort, which should have been brought, or negligence.

I now come to the import of the first question, which challenges the validity of bringing Application No.70 of 2002 under Articles 22(1) and 50(2) of the Constitution. That the application should allege, (specially plead, with particulars) the intention to deprive the life of the litigant is central to the question. Failure to make full disclosure of the dangers or risks of smoking cigarettes to the consumers of the cigarettes seems to be too remote to taking away of the life of such consumers. It seems to me that failure to disclose such dangers may have alternative intentions, such as not to demote the business of selling cigarettes; to attribute intention to kill such failure would call for strict, if not impossible proof. I think that Application No.70 of 2003 should be a tortious action. I would also hold that to the extent that it alleges failure to disclose information about the dangers of smoking and remoteness of such failure to the taking away of the life of the litigants as well as failure to specially plead the intention to take away such life, I do strike the application out as showing no cause of action.

A lot of argument was made to state that Article 50(2) of the Constitution cannot have envisaged public interest litigation to be brought by bodies or groups such as TEAN. In fact it was argued that the Article differs from section 38 of the South African Constitution. Mr. Byenkya for BATU vehemently argued that whereas the South African Constitution caters for the interest group

litigation under sub-section (d) of the section 38, namely “any one acting in the public interest”, no such provision can be read into Article 50(2) of our Constitution. He argued that to read such provision into the words of Article 50(2) of our Constitution “any person or organization” and “person’s group of person’s” would amount to interpreting the Constitution. He went as far as asking this court to refer to the matter to the Constitutional Court under Article 137 of the constitution because, he argued, it would be the Constitutional Court to have the competence to interpret the Constitution. With due respect, I find nothing in the interpretation of the words “person or organization” and “person’s or group of persons” which this court cannot interpret and which must be referred to the Constitutional Court.

It is elementary that “persons”, “organizations” and “groups of persons” can be read in article 50(2) of the Constitution to include “public interest litigants”, as well as all the litigants listed down in (a) to (e) of Section 38 of the South African Constitution. In fact, the only difference between the South African provision (i.e. Section 38) and our provision (under Article 50(2) is that the former is detailed and the latter is not. That is my considered view based on the reality that there are in our society persons and groups of persons whose interest is not the same as the interest of those who Lord Diplock referred to as “spirited” persons or groups of persons who may feel obliged to represent them i.e. those persons or groups of persons acting in the public interest. To say that our constitution does not recognize the existence of needy and oppressed persons and therefore it cannot allow actions of public interest groups be brought on their behalf is to demean the Constitution. It has been argued that Order 1 rule 8 of the Civil Procedure Rule should apply to such needy persons, but Order 1 rule 8 is concerned with” persons having the same interest in one suit”. The needy persons and the public interest group persons would have not the same interest in one suit. Then there is rule 7 of statutory Instrument 26 of 1992 which commands that the procedure under actions brought under Article 50 (2) of the Constitution should show the ordinary rules of procedure. Since actions in representative suits under Order 1 rule 8 of the Civil Procedure Rules cannot be brought by public interest groups, then there is a lacuna which can be filled by recourse to Article 273 of the Constitution which provides that:

“(1) Subject to the provisions of this article, the operation of the existing law after the coming into force of this constitution shall not be affected by the coming into force of this Constitution but the existing laws shall be construed with such modifications adaptations, qualifications and exceptions as may be necessary to bring it into conformity with this Constitution.”

(Underlining added by me for emphasis).

I think it is pertinent also to quote Article 273(2) which gives the definition of “Existing law” to include Statutory Instrument No.26 of 1992 and Order 1 rule 8 of the Civil Procedure Rules. It states that:

“For the purposes of this Article, the expression ‘existing law’ means the written and unwritten law of Uganda or any part of it as existed immediately before the coming into force of this Constitution, including any Act of Parliament or Statute or Statutory instrument enacted or made before that date which is to come into force on or after that date.”

Having thus held, can it reasonably be argued that only the litigants in (a), (b),(c) and (e) of section 38 of the South African Constitution are catered for in our Constitution, Article 50(2). To hold thus would, in my considered opinion, be tantamount to the argument that our provision does ignore the type of persons or groups who cannot bring an action in their own right. Such persons or groups include children, the illiterate and disabled, who cannot access courts to contest violations of their rights and these are the persons who

need the assistance of public litigation groups, and who, in any case, fall within Article 50(2) of the Constitution as I have held.

In this regard, I do not agree at all with Counsel Byenkya's argument that no distinction can be drawn between these groups of persons and the group of persons represented or purported to be represented by Dr. Rwanyarare & Others in Constitutional Petition No.11 of 1997 (***Dr. James Rwanyarare & Anor –vs.- Attorney General***).

The distinction is quite obvious. Dr. Rwanyarare and another were representing the group described in the application as "specific and identifiable existing persons or groups". Such group is the one referred to as the Uganda Peoples Congress. With due respect, the Constitutional court at pp.21 and 22 of the judgement in the Rwanyarare, case cannot have been talking about the type of persons or groups of persons I have referred to above namely, the children, the disabled and the illiterates. These are persons who cannot be served under order 1 rule 8 of the Civil Procedure Rules; the reasons being that they are not easily identifiable; they cannot be served as they would have no capacity to respond with a view to requesting to be joined in the action and there is no similar interest with those who represent them. They only need the interest groups to represent them. To say that either these people are lumped together with the members of Rwanyarare's interest or that they do not fall under the Constitution in Article 50(2) of the Constitution is to belittle the foresight of the framers of the Constitution.

In my view of the legal issues raised by Mr. Byenkya's submission will still discuss the rest of the questions put. I think, however, that I have already discussed question number 2, namely, that the action as brought in application No. 70 of 2002 cannot be based on Article 22(1) of the constitution. The answer to question, (b) is in the negative.

Question (c) is "whether Article 50(2) of the Constitution authorizes the filling of Constitutional actions on grounds of "public interest" by private persons or is confined to the bringing of ordinary representative actions to stop actual violations of the human rights of specific persons or groups.

I would be repeating myself if I stated again that representative actions are not restricted to actions brought by persons or groups who have similar interest in the actions i.e." numerous persons having the same interest in one suit" (order 1 rule 8): There are representative actions which can be filed by public interest litigation persons or group of persons such as TEAN. These are the persons mentioned in (d) of section 38 of the South African Constitution (and Article 50(2) of our Constitution), as "any one acting in the public interest".

I have already stated that Article 50(2) of the Constitution cannot be said not to envisage the persons and groups of persons mentioned in subsection (d) of section 38 of the South African Constitution and therefore (d) can read in our Article 50(2) of the Constitution. I have given the example of the beneficiaries of (d) of the South African Constitution and said that as long as they exist in Uganda, they cannot be said to be ignored by our Constitution. I see such beneficiaries as the silent sufferers of violation of human rights. They are deprived, incapable who require volunteer public interest litigating groups. The question of who would pay the costs raised by the Constitutional Court in the Rwanyarare petition does not arise because of the reasons I have given in support of their inability and inaccessibility to answer summons were such summons served in the manner provided by Order 1 rule 8 of the Civil Procedure Rules. The litigating public interest persons or groups would meet the costs and the litigating public interest persons or groups would meet other expenses of actions on their behalf. I would go further and say that Article 50(2) of the Constitution authorized public interest litigation by private persons, as it does authorize litigation through ordinary representative actions to stop actual violations of the human rights of specific

persons and groups. If for instance an individual subjects a person to torture, cruel, inhuman or degrading treatment or punishment, such persons would have recourse to court under Article 50(2) of the constitution.

The 4th question is whether Article 50(2) of the Constitution authorizes the filling of ‘Class action’ as a form of representative action or is confined only to representation of specific and identifiable existing persons or groups.” I know I would be repeating myself. Suffice it to say that as long as that class of specific and identifiable existing persons or groups does not contain the group of children, illiterates, the poor and the deprived, then my answer would be that the question is unfair and inconsiderate. It all depends therefore on what one means by specific and identifiable existing persons or groups’. I should again quote order 1 rule 8 of the civil Procedure Rules to drive home my argument.

The rule provides that:

“ Where there are numerous persons having the same interest in one suit, one or more of such persons may, with the permission of the court, sue or be sued, or may defend in such suit, on behalf of or for the benefit of all persons so interested. But the court shall in such case give notice of the institution of the suit to all such persons either by personal service or, where, from the number of persons or any other cause, such service is not reasonably practicable, by public advertisement, as the court in each case may direct.”

There are crucial expressions in this order, which determine answers to the question put. Such expressions are:

- Numerous persons having the same interest
- May sue or be sued or may defend in such suit.
- Personal service or by public advertisement.

It is inevitable that I refer once again to the petition of ***Dr. James Rwanyarare & another –vs.- Attorney General*** (Petition No.11 of 1997). Dr. Rwanyarare & another in that petition had similar interest with fellow U.P.C. members. They could therefore sue on behalf of the fellow members of UPC, and naturally and logically order 1 rule 8 should apply. The same should apply, say to members of a football club, of a golf club or of a trade union. But the question is can the rule apply to groups of people who, because of inability or incapability, engendered by say, ignorance, poverty, illiteracy, infancy etc., cannot sue or be sued or defend a suit for the simple reasons that apart from being indigent, they cannot even identify their rights or their violations. These are the groups who badly need the services of the “public interest groups” like TEAN to bring action on their behalf under what paragraph 38 (d) of the South African Constitution is referred to as “public interest persons,” but who have no similar interest in the action with those they represent.

It cannot be denied that such group of persons are found in our society and we cannot hide our heads in the sand by saying that the Constitution does not expressly mention them and therefore they must be excluded from the Constitutional provision regarding recourse to remedies when their rights are violated. It is to be remembered that such groups cannot be served either directly or indirectly. They have neither postal address nor telephones. Their fate depends entirely on the public interest litigation groups or persons and they are not personally identifiable; yet they exist and can be identified only as a group or groups. The constitution cannot escape from authorizing representative action, without interest sharing with those who represent them. That is why article 273 of the Constitution becomes handy because the rules of procedure are, in this respect, rendered inoperable by the Constitution.

Needless to say that it would be illogical to argue that actions brought by such persons or groups

of persons for the redress of the violation of their inalienable rights should be governed by the procedure under order 1 rule 8 of the Civil Procedure Rules. The procedure cannot govern them simply because they do not share the concerns of violating their rights with those who bring action on their behalf. The 5th question which is:

“Whether Article 50(2) of the Constitution, which permits any person or organization to bring an action as the representative of other persons or groups for violation of their human rights can be interpreted to excuse compliance with the procedural requirements applicable to representative actions generally, such as the necessity to seek leave of court prior to filling the action.”

This question must have been motivated by the illusions that representative actions must be brought only by persons and groups of persons who share the same interest in the action (i.e. suit) with the persons and the groups they represent in the action. Once it is clear, and I hope now it is, that there exists that group of persons who need not necessarily have the same interests with those who institute actions on their behalf, then question number 5 of this application does not arise.

Before I take leave of this application I feel obliged to comment on some of the applicant’s sought after relief in Application No.70 of 2002. Prayer number 3, for instance, seeks “An order that the Respondent place on packets of cigarettes, its advertising and marketing events, warning labels and signage, with such wording, graphics, size and replacement as in the court’s determination, are sufficient to fully and adequately inform consumers of its cigarettes of the full risks to their health.”

With due respect, this prayer is asking too much from the court. The court cannot determine fully and sufficiently the kind of information to be included in the desired labels and publication. It simply does not have the expertise to do so; and in fact, the way the prayer is couched, it imposes on the court a duty it cannot discharge. It was up to the applicant to present the court with the information it required for the court to consider. The application is unclear and embarrassingly ambiguous and could not pass the test. But I hasten to add such consideration would not fall under the preview of application number 27 of 2003. It would have been a consideration during the hearing of application number 70 of 2002 which I have, in any event, struck out with costs to the applicant in the present application.

Signed

J.H. NTABGOBA
PRINCIPAL JUDGE

16/04/2003

The ruling is read in presence of Mr. Karugaba and Mr. Byenkya. Also present is Mr. Richard Wejuri, Company Secretary of BAT and Mr. Edward Karugaho, Court Clerk.

**GREENWATCH (U) LTD. –vs.- A.G & UGANDA ELECTRICITY TRANSMISSION
COMPANY LTD. HCCT-00-CV-MC-0139 OF 2001**

Before : **The Honorable Mr. Justice F.M.S. Egonda – Ntende**

Constitutional law : *Whether Access to the PPA came within, the exception provided under Article 41 of the Constitution.*

Constitutional law : *Whether the applicant was a citizen in the meaning of Article 41.*

Constitutional law : *Whether the PPA was a public document within the meaning of Article 41.*

Civil Procedure : *Whether the respondent No. 2 a limited liability company can be a government agency.*

Civil Procedure: *Whether government was party to this action.*

The Government of Uganda entered into an agreement or a series of agreements, the main being the implementation agreement, with AES Nile Power Ltd. covering the building, operation and transfer of a Hydro Electric Power complex at Dumbell Islands on the river Nile, near Jinja Uganda. In consequence of the implementation agreement, a power purchase agreement (PPA) was executed by AES Nile Power Ltd. and Uganda Electricity Board, a Statutory Corporation at the time established and wholly owned by the Government of Uganda.

The applicant is an NGO and a company limited by guarantee incorporated in the Republic of Uganda. The main mission of the Company is environmental protection through advocacy and education. It sought to obtain a copy of the Power Purchase Agreement from the government of Uganda in vain. The government stated that the Power Purchase Agreement (PPA) is a comprehensive document with a lot of information including the sponsor’s technical and commercial secrets. It therefore contains clauses on confidentiality and protection of intellectual property, which do not permit them to make it available to the entire public. Following this, the applicant commenced the action against the Attorney General and UETCL.

Held:

The state does not have to be party to the agreement in order for it to fall under Article 41 of the Constitution. This was enough to trigger the application in Article 41 of the Constitution as against the Government of Uganda. The mere fact that a company is a limited liability company is not sufficient to disqualify the company from the possibility of being a government agency for purposes of Article 41 of the Constitution.

A limited liability company with Ugandans as its shareholders is a citizen for purposes of Article 41 of the constitution.

Since the Minister of Energy signed the Implementation Agreement on behalf of the government of the Republic of Uganda, we being a member of the executive organ of the government of Uganda, and this Implementation Agreement is an Act in her official capacity. It is therefore a public document. This application is allowed in part and dismissed in part with no orders as to costs.

Editorial notes: UETCL filed an appeal against the ruling. However the appeal was later withdrawn.

REPUBLIC OF UGANDA

**IN THE HIGH COURT OF UGANDA AT KAMPALA
HCT-00-CV-MC-0139 OF 2001.**

**GREENWATCH (U) LIMITED =====} APPLICANT
VERSUS**

**1. ATTORNEY GENERAL AND
2. UGANDA ELECTRICITY TRANSMISSION ===== } RESPONDENTS
COMPANY LTD.**

BEFORE: THE HONOURABLE MR. JUSTICE F.M.S EGONDA – NTENDE.

RULING.

1. The Government of Uganda entered into an agreement or a series of agreements, the main agreement being the Implementation Agreement, with the AES Nile Power Limited covering the building, operation and transfer of a hydro electric power complex at Dumbell Island, on the River Nile, near Jinja, Uganda. In addition, in consequence of the Implementation Agreement, a Power Purchase Agreement (PPA) was executed by AES Nile Power Limited and Uganda Electricity Board, a statutory corporation at the time, established and wholly owned by the Government of Uganda, with the commercial monopoly to generate, transmit and sell electric current in Uganda.
2. Mr. Kabagambe Kaliisa in an affidavit filed in this case states that the Government in its sovereign capacity made undertakings to the parties to the Power Purchase Agreement including AES Nile Power Company and in all related agreements, not to divulge the said Agreements to the public. Doing otherwise would not only impair the economic credibility and sovereignty of Uganda, but would also amount to a breach by the State of its sovereign commitments under the said agreements.
3. The Applicant is an NGO and a company limited by guarantee incorporated in the Republic of Uganda. The main mission of the Company is environmental protection through advocacy and education. It sought to obtain a copy of the Power Purchase Agreement from the Government of Uganda in vain. The Government responded to the request, in a letter dated 23rd November, 2001, from the Permanent Secretary to the Applicant in the following words, “I refer to your letter to the Commissioner, Energy Department, dated 1st November 2001, on the above subject. The Power Purchase Agreement (PPA) is a comprehensive document with a lot of information including the sponsor’s technical and commercial secrets. It therefore contains clauses on confidentiality and protection of intellectual property, which do not permit us to make it available to the entire public.”
4. Following this letter, the Applicant commenced this action initially against the Attorney General. The Attorney General maintained the previous position of Government as noted above and filed affidavits opposing this action. The court asked the Respondent for a copy of the agreement in question. Respondent’s counsel promised to avail the agreement to court in a couple of days. However, that was not to be. Court was notified in a letter from the Attorney General’s Chambers that the document did not exist. The applicants then filed a further affidavit with both the Implementation Agreement and Power Purchase Agreement annexed thereto. Apparently, the copies came from those copies of

- the agreement that had been supplied to the Parliament. The document purporting to be a Power Purchase Agreement is in reality a copy of the Implementation Agreement, save for the first or cover page that shows it to be a Power Purchase Agreement.
5. At this point, it became clear that a Power Purchase Agreement did in fact exist, and the parties to it were, Uganda Electricity Board and AES Nile Power Limited. Subsequently Uganda Electricity Transmission Company Lt., the successor to the Uganda Electricity Board, in respect of this agreement was added as Respondent No.2.
 6. Mr. Kenneth Kakuru, learned counsel for the Applicant, submitted that the Applicant was entitled under Article 41 of the Constitution to have access to information that is in the hands of the state, its organs and agencies. He submitted that Respondent No.2 being a wholly government owned company was a state agency which was obliged to comply with the provisions of this article. He submitted that the obligation was on the respondents to show that access to the Power Purchase Agreement came within the exceptions provided under article, in terms of state sovereignty or state security or privacy.
 7. Mr. James Matsiko, the learned Principal State Attorney who appeared for the Attorney General submitted that this application was frivolous and vexatious as the applicant was seeking a document that is the PPA, which was already in his possession. Secondly, he submitted that the Applicant was not a citizen who under Article 41 was the only authorized person to have access to information in state hands. The Applicant does not fall into the categories of citizenship that the Constitution created. Only natural persons were envisioned to be citizens.
 8. Mr. Matsiko further submitted that the PPA was not a public document within the meaning of the Evidence Act, and the declaration sought in that regard, that is to declare the same a public document, are without basis in law. Mr. Matsiko also submitted that Government was not a party to the PPA, and therefore, was not a proper party to this action. Lastly, he submitted that the Respondent No.2 is not a Government Agency or organ, as it has a separate legal existence. He referred to the case of Mugenyi and Co. v. Attorney General, Supreme Court Civil Appeal No. 43 of 1995(unreported). He prayed that this application be dismissed with costs.
 9. Mr. Dennis Wamala, learned counsel for Respondent No.2 opposed this application. Firstly, he submitted that the Power Purchase Agreement was not a public document within the meaning of Section 72 of the Evidence Act, as none of the parties was a legislative, executive or judicial public official of the Government of Uganda. Neither was the Respondent No.2 an official body or tribunal within the meaning of Section 72 of the Evidence Act. The Respondent No.2 being a private limited liability company made its documents private documents in accordance with Section 73 of the Evidence Act. Secondly, he submitted that this application is brought under article 41 of the Constitution which provides access to information in state hands or in the hands of organs of state. The Respondent No.2 being a limited liability company was not an organ of the state, and was therefore outside the ambit of the provision. At the same time, Mr. Wamala submitted that as the shares of the Respondent No.2 are freely transferable, it cannot be said that the Respondent No. 2 is an organ of state or an official body.
 10. Thirdly, Mr. Wamala submitted that the applicant is not a citizen of Uganda for purposes of Article 41 of the Constitution. This is because under article 10 and 12 of the

Constitution, citizenship refers to persons born in Uganda. In the alternative, Mr. Wamala submitted that in the event that the court held the Power Purchase Agreement to be a public document, this action was premature as no demand has been to the Respondent No.2 seeking access to this agreement. He prayed that this application be dismissed with costs.

11. Section 72 of the Evidence Act defines documents that are public documents. It states, “ The following documents are public documents---- documents forming the acts or records of the acts of the sovereign authority; of official bodies and tribunals; and of public officers, legislative, judicial and executive, whether of Uganda, or any other part of the Commonwealth, or of the Republic of Ireland, or of a foreign country; public records kept in Uganda of private documents.”
12. I agree that the Respondent No. 2 or its officials are not part of the legislative or judicial or executive organs of the Government of Uganda. And quite probably it is not an official body or tribunal within the meaning ascribed to those two categories in terms of the Section 72 of the Evidence Act. But perhaps that is not sufficient to answer whether the Power Purchase Agreement is not a public document, in light of the peculiar circumstances surrounding the Power Purchase Agreement.
13. The Honorable Syda Bbumba, Minister of Energy and Mineral Development signed the Implementation Agreement on behalf of Government of the Republic of Uganda. The Minister is without doubt a member of the executive organ of the Government of Uganda, and this Implementation Agreement is an act in her official capacity. It is therefore a public document.
14. In the interpretation section of Implementation agreement, ‘basic agreements’ are stated to be, “This agreement, the Power Purchase Agreement, and the agreements, other than the Financing Agreements, that are required to be executed on or before the Financial Closing in Connection with the Project, as the same may be amended from time to time.”
15. Section 2.2 of the Implementation Agreement provides, “ The Company shall design, finance, insure, construct, own, operate, and maintain the Complex and design, finance and insure (during construction) and construct the UEB Line in accordance with the applicable laws of Uganda, all applicable Consents, the Basic Agreements and the Financing Agreements.” In effect the company undertakes as part of the Implementation Agreement to comply with the Basic Agreements which includes the Power Purchase Agreement.
16. Under Section 3.4 of the Implementation Agreement, the Government undertakes to execute a Guarantee to the AES Nile Power Limited in the form of Annex C to the agreement. It shall set out below section 2.1 of the Annex C, the Guarantee.

“In consideration of the Company entering into the Implementation Agreement and the Power Purchase Agreement, Government of Uganda hereby irrevocably and unconditionally guarantees to the company for the term hereof as provided in section 2.1 the full and prompt payment of any amounts payable by UEB under the Power Purchase Agreement and that have not been paid by UEB as provided in the Power Purchase Agreement, provided that amounts in dispute under the Power Purchase Agreement, shall not be due and owing for purposes of this Guarantee until after the expiration of the dispute resolution procedures provided for in the Power Purchase Agreement, including the 30- day period for payment

after resolution of a dispute provided for in section 8.4 (c) thereof (collectively, the “Guaranteed Obligations”); and agrees as a primary obligation to indemnify the Company on demand by the Company from and against any loss incurred by the Company as a result of any of the obligations of UEB under or pursuant to the Power Purchase Agreement being or becoming void, voidable, unenforceable or ineffective as against UEB or any reason whatsoever, whether or not known to the Company or any other person, the amount of such loss being the amount which the Company would otherwise have been entitled to recover from UEB.”

17. It is clear to me from the foregoing that the Basic Agreements, or at least the Implementation Agreement and the Power Purchase Agreement are so intertwined that one can not fully comprehend the full import of the Implementation Agreement without reading and digesting the Power Purchase Agreement. Neither of these two agreements is complete without the other. I find that the Power Purchase Agreement is in effect incorporated into the Implementation Agreement by reference. As the Implementation Agreement is a public document, and the Power Purchase Agreement is incorporated by reference into the Implementation Agreement, I find therefore that the Power Purchase Agreement is a public document too.
18. The third declaration sought by the applicant is that refusal to avail the Power Purchase Agreement and other related agreements to the Applicant is in violation of the Applicant’s constitutional rights to access to information guaranteed under article 41(1) of the Constitution. Under this head, the Respondent No.1 contends that as it is not a party to the Power Purchase Agreement, it was not the right party to be asked to avail this agreement. The action against it in this regard, it further contended, was misconceived.
19. I reject this argument. I accept that Government is not one of the signatories to the Power Purchase Agreement. Nevertheless, I have already found that the Power Purchase Agreement was incorporated by reference into the Implementation Agreement to which the Respondent No.1 is a party. The Respondent No. 1 was rightfully in possession of the Power Purchase Agreement. Initially, the Respondent No. 1 admitted the existence of the Power Purchase Agreement in the affidavit of Mr. Kabagambe Kaliisa, Permanent Secretary of the Ministry of Energy and Mineral Development, dated 11th July, 2002.
20. In a subsequent affidavit of 18th October, 2002, Mr. Kabagambe Kaliisa states that the Power Purchase Agreement was executed between UEB and AES Nile Power Limited. It is clear that the Ministry of Energy and Mineral Development had all the information pertaining to the agreement sought by the applicant, and for reasons it gave; it refused to avail this agreement to the applicants. The action against it cannot therefore be misconceived on account of the Government not being a party to the Power Purchase Agreement. Article 41(1) of the Constitution refers to ‘information in possession of the state.’ What is important is possession of the information by the state.
21. The Respondent No.2 contends that no demand has ever been made for the Power Purchase Agreement by the Applicant. And as such this action is premature and misconceived as against it. I agree that no demand has ever been made. This was probably inevitable in light of the veil of secrecy that Government attached to the basic agreements to the extent that details related to these agreements only arose during these proceedings. By the time it was evident that the Respondent No. 2 was a successor to UEB for purposes of this agreement, these proceedings had commenced. The response of the Respondent No. 2 to this claim, as we shall see when we consider the other arguments

- of the Respondent No.2, is that the Applicant is not entitled to have access to this agreement. Even if a formal demand is made the response of the Respondent No. 2 is known. I do not therefore accept the argument that this action is premature against the Respondent No. 2.
22. Both learned counsel for the respondents join in the argument that the applicant is not entitled to access to information for two reasons. Firstly, that the Power Purchase Agreement is in the hands of the Respondent No. 2 which is not an organ or agency of the state. Secondly, that the applicant is not a citizen of Uganda within the meaning of article 41 as the Constitution only contemplates natural persons to be citizens of Uganda. I will deal with both arguments in that order. I shall begin by setting out article 41(1) of the Constitution.
- “(1) Every citizen has a right of access to information in the possession of the state or any other organ or agency of the state except where the release of the information is likely to prejudice the security or sovereignty of the state or interfere with the right to privacy of any other person.”*
23. In the first place, I have found that the Power Purchase Agreement was incorporated by reference into the Implementation Agreement and was in possession of Government. On that account, it was information in possession of the state. Article 41 refers to information in possession of the state. The state does not have to be a party to the agreement in question, for the agreement to be in possession of the state. What is important here is the possession in whatever capacity occurring. It has been shown by the affidavit of Mr. Kabagambe Kaliisa that Government was in possession of the Power Purchase Agreement. This was enough to trigger the application of article 41 of the Constitution as against the Government of Uganda.
24. Secondly, I reject the argument that the mere fact a company is a limited liability company that is sufficient to disqualify the company from the possibility of being a government agency for purposes of article 41 of the Constitution. It is the totality of circumstances surrounding the company that must be taken into account before determining whether it is a government agency or not.
25. In the instant case UEB, or Uganda Electricity Board in full, was a governmental parastatal organization set up by statute with Government as its full and sole owner for the purpose of developing and supplying power to the people of Uganda. In pursuance of its main objectives, it signed the Power Purchase Agreement with AES Nile Power Limited as part of a series of agreements negotiated by Government and AES Nile Power Limited. I have no doubt in my mind that the UEB qualified to be a government agency for purposes of Article 41 of the Constitution and with regard to the undertaking under the Power Purchase Agreement. This is so especially in light of the incorporation of the Power Purchase Agreement into the Implementation Agreement.
26. Uganda Electricity Transmission Company Limited, a limited liability company, wholly owned for the time being by Government has now succeeded Uganda Electricity Board. For purposes of this power project, I think it matters little that the successor Company is a limited liability company. The company is an agent of Government in ensuring that the power is available to the people of Uganda. The company’s obligations as successor to UEB, clothe it with agency of the state for purposes of this project. The Respondent is the sole purchaser of the power from the project being executed between AES Nile Power Limited and Government. Government guarantees the continued existence of UEB and its

successors in title, and ability to purchase the power produced. Information in the company's possession on account of this project is information, in my view, in the hands of a state agency.

27. Mr. Matsiko did not address me at all on the exceptions provided under article 41 of the Constitution, that is, State security and state sovereignty that were raised in Mr. Kabagambe Kaliisa's affidavit. I take that those grounds of defense were abandoned. The affidavit does not disclose how disclosure to the public of the agreements in question would affect the security of the state or its sovereignty. It just lays a claim without providing the grounds to reach such a conclusion. I accordingly reject the claim that disclosure would affect the security or sovereignty of the state.
28. Turning to the question of whether the Applicant is a citizen within the terms of article 41 of the Constitution, the question may best be considered by analogy with another provision that assures certain rights to be available to citizens. This is article 237 of the Constitution which provides that land in Uganda belongs to the citizens of Uganda and shall vest in them in accordance with the land tenure systems provided in the Constitution. That a limited liability company incorporated in Uganda with all its members being citizens of Uganda qualifies to own land in Uganda is not a question at all. That a company is accepted as a citizen of Uganda albeit a corporate citizenship, if I can call it thus.
29. I take it that this ought to be the same position with regard to article 41 of the Constitution for consistency of the law. Indeed corporate bodies can enforce rights under the bill of rights for they are taken as persons in law, though not natural persons. Similarly for citizenship, it is possible for a corporate body to be a citizen unless I suppose the provision in question is very clear in stating that it is restricted to natural persons as citizens. This is not the case with article 41. I therefore find that a corporate body could qualify as a citizen under article 41 of the Constitution to have access to information in the possession of state or its organs and agencies.
30. On the evidence before me it has not been shown that the Applicant qualifies as a corporate citizen. No evidence has been adduced as to its membership, much as it has been established that it is a limited liability company incorporated in Uganda and limited by guarantee. On that account alone, I decline to grant the declaration that it is entitled to access the information sought in the possession of both Respondent under article 41 of the Constitution.
31. In the result I declare that the Implementation Agreement and the Power Purchase Agreement are public documents. This application is allowed in part and dismissed in part with no order as to costs.

Dated, signed and delivered this 12th day of November, 2002.

F. M.S EGONDA – NTENDE.
JUDGE.

**SIRAJI WAISWA –vs.- KAKIRA SUGAR WORKS LTD.
H. C. MISC. APPLIC. NO. 230 OF 2001**

Before : **The Honorable Mr. Justice. Yorokamu Bamwine.**

Civil Procedure: Order 37 Rule 2,3 and 9 temporary injunction

Civil Procedure: Whether the applicant is probably to succeed in the main suit

Civil Procedure: Whether the applicant will suffer irreparable damage/injury which would not adequately be atoned for by an award of damages

Civil Procedure: Whether the application will be decided on a balance of Convenience

This is an application by chamber summons under Civil Procedure Rules for a temporary injunction for orders:-

- a) Restraining the respondent/defendant from acquiring Butamira reserve and uprooting the forest to establish a sugar cane plantation.
- b) Restraining the respondent/defendant servants or agents from evicting, intimidating, threatening or in anyway interrupting or destroying the plaintiffs/applicants and other residents use and occupation of Butamira forest reserve until the disposal of the main suit or until further orders of this court.
- c) Costs of the suit be provided for.

The grounds of the application appear in the affidavit of Siraji Waiswa, the applicant and they are briefly that:-

The purpose of a temporary injunction is to preserve matters in status quo until the matter to be investigated in the main suit is finally resolved. The conditions must generally be satisfied before an injunction of this nature is granted.

Held:

1. The facts as gathered from the application and the pleadings in the main suit show that there are some questions of environmental concerns and individual interest. When the stage is reached, court will make an appropriate decision on the matter. As for now there are equal chances of success or failure by either party.
2. The damages complained of are of a material nature which would not adequately be compensated by an award of damages done.
3. Since the defendant is ready to respect the status quo, there is nothing they validly stand to lose in the event that the status quo is enforced by court order. The balance of convenience is therefore in favor of the temporary injunction being granted. Application granted to last six months.

Editorial notes: The plaintiff seems to have been compromised by the defendant. He withdrew instructions and appointed a lawyer who also acts for the defendant. The lawyer immediately withdrew the suit. A fresh suit was filed with all the 268 plaintiffs. It is still pending.

**THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT JINJA
MISC. APPLICATION No. 230/2001
(ARISING FROM CIVIL SUIT No. 69/2001).**

SIRAJI WAISWA:.....APPLICANT/PLAINTIFF

VERSUS

KAKIRA SUGAR WORKS LTD.RESPONDENT/DEFENDANT

BEFORE: THE HONOURABLE MR. JUSTICE YOROKAMU BAMWINE

RULING

This is an application by Chamber Summons under 0.37 rr.2, 3 and 9 of the Civil Procedure Rules for a temporary injunction for orders:-

- (a) Restraining the respondents/defendant from acquiring Butamira reserve and uprooting the forest to establish a sugarcane plantation.
- (b) Restraining the respondent/defendant servants or agents from evicting, intimidating threatening or in anyway interrupting or destroying the applicant/plaintiff's and other residents use and occupation of Butamira Forest reserve until the disposal of the main suit or until further orders of this court.
- (c) Costs of the suit are provided for.

The grounds of the application appear in the affidavit of Siraji Waiswa, the applicant, and are briefly that:

- The applicant has on his own behalf and on behalf of other peasant farmers of Butamira Forest Reserve filed a suit against the respondent/defendant;
- The suit is as yet unheard but the respondent/defendant has diverse dates entered the disputed forest reserve and uprooted trees therein and routinely destroyed seed nurseries;
- The destruction of the suit property would render the suit nugatory and result in irreparable damage to the environment;
- The applicant has a strong case with great likelihood of success.

At the hearing of the application, Mr. Kenneth Kakuru for the applicant brought to the attention of this court a letter dated 19th July 1998. It is from the Commissioner of Forestry to the Managing Director Madhvani Group of Companies. In the letter, the Commissioner was informing the addressee that a degazetting schedule had been submitted to Solicitor General's office. In the same letter, the Managing Director was being authorized to use the entire Butamira Forest Reserve within the Group of Companies estate for any activities as the company deems fit. In another letter dated 3rd August 2000 from Ag. Commissioner for Forestry, Mr. Deo Byarugaba, the General Manager of the respondents/defendant company was being informed that he author's recent visit to the reserve had revealed that the company was uprooting the planted trees in preparation for growing sugarcane.

This, said the Commissioner, was a gross violation of the law governing Forests in Uganda. A permit (No.3264) dated 28/7/1998 was accordingly cancelled. The manager was directed to remove all company property not later than 30/4/2000.

In an appropriate response to the above measures, the company's Senior Manager Corporate

Affairs K.P. Eswar wrote to the Ag. Commissioner for Forestry proposing to make available to the Forest Department a total of 1247Ha of land in Uganda within a period of 6-12 months which piece of land would then be gazetted as a Forest reserve in exchange for Butamira forest, which could be degazetted and leased to Kakira Sugar Works for general purpose use. The last letter is also dated 9th May 2000 from the District Forestry Officer Jinja addressed to the Executive Director NEMA. The gist of the letter is that Butamira Forest Reserve (1257Ha) had been extensively uprooted by the Respondent/defendant Company in preparation for sugarcane growing. The Officer was calling for intervention of NEMA. In his address to court, Mr. Kakuru noted that the threat to destroy the environment was real and it requires urgent attention. He down played Mr. K.P. Eswar's averments in his affidavit of 21/11/2001 in which the deponent States that the respondent ceased all its activities in June 2000, way before the institution of the main suit in July 2001 more than a year later. This was re-echoed by Mr. Taremwa, counsel for the respondent. Mr. Taremwa's point is that since the respondent ceased operations in the area in June 2000, it was not necessary to bring up the application and impliedly the main suit. In his opinion, the application was being brought in bad faith and is frivolous. In reply to this, Mr. Kakuru said that the applicant does not have to wait until the environment is destroyed and he starts complaining. Any court can seek court redress to prevent likely harm to the environment.

I listened very carefully to the addresses of both counsels for the parties also had a careful perusal of the documentary evidence especially the affidavit of Eswar. The conditions for grant of the temporary injunction have been re-echoed in a number of cases. They include:

1. ***GEILLA VS.GASMAN BROWN & CO.LTD (1973) E.A.358***
2. ***NOORMOHAMED JAN MOHAMED VS. KASSAMALI VIRJI MADHVANI (1953) 20 EACA 8.***

The purpose of a temporary injunction is to preserve matters in status quo until the matter to be investigated in the main suit is finally resolved. Three conditions must generally be satisfied before an injunction of this nature is granted.

1. The applicant must show a prima facie case with a probability of success in the main suit. The facts as I gather them from the application and the pleadings in the main suit show that there are some questions of environmental concerns and individual interests to be investigated in the main suit. To declare that the applicant has not shown a prima facie case with a probability of success in the main suit before the parties are heard would be to pre-judge issues. For now, I would hesitate to state that before the hearing of the main suit commences, the defendant is set to raise a preliminary point of law that the suit is prolix, frivolous and vexatious, pre-mature, bad in law and an abuse of court process. When that stage is reached, court will make an appropriate decision on the matter. As of now, there are equal chances of success or failure by either party.

2. A temporary injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury, which would not adequately be atoned for by an award of damages. This is a matter to do with the alleged destruction of the environments far as the individual interest is concerned, the damages would be appropriate. However, a matter to do with destruction of the environment would affect not only parties to this suit but also current generations to generations to come. Damages to the applicant alone would not remedy the injury to mankind as a whole. I would therefore find that the damage complained of is of a material nature, which would not adequately be compensated by an award of damages alone.

3. Where there is doubt, the court will decide an application on a balance of convenience. The respondent's case is that since June 2000 the threat to the environment has ceased. My

reading of the letter dated 19/4/2001 addressed to Principal Private Secretary to His Excellency the President by the Permanent Secretary, Ministry of Water, Lands and Environment shows that the debate on the matter still continues. The impression that since June 2000 the threat is no more is therefore misleading. To depend on the good will of one party to the conflict would, in my view, be deceptive. And since the respondent is ready to respect the status quo, I do not see what they validly stand to lose in the event that the status quo is enforced by court order. The applicant does not have to wait until his presumed rights are violated before he lodges an application for a temporary injunction. The balance of convenience is therefore in favor of the temporary injunction being granted.

For the reasons stated above, I would grant the remedy sought herein and order restraint on the part of the defendant from uprooting the forest to establish a sugarcane plantation during the pendency of the main suit. The defendant would be restrained from evicting, intimidating, threatening or in any way interrupting the status quo during the pendency of the main suit or until a lasting solution shall be provided by Government, whichever comes first. To avoid abuse of court process, the life span of this injunction shall be six months from date of this ruling, subject to renewal for a just cause.

Costs of this application shall be in the cause.

Signed

YOROKAMU BAMWINE
JUDGE

29/11/2001.

**THE ENVIRONMENTAL ACTION NETWORK LTD. -VS- THE ATTORNEY
GENERAL & NATIONAL ENVIRONMENT MANAGEMENT AUTHORITY (NEMA)**

H.C. MISC. APPLIC. NO. 39 OF 2001

Before: **The Honorable Principal Judge – Mr. Justice J. H. Ntabgoba**

Evidence: *Whether evidence that smoking in public was hearsay*

Evidence: *Whether experts were essential in establishing the effects of
Public smoking as provided for in Section 43 of the Evidence Act*

Civil Procedure: *Whether the Attorney General and NEMA ought to have
Been given 45 days notice as provided for in S.I of Act No. 20 of 1969
(as amended)*

Civil Procedure: *Whether the application ought to have been brought under
Order 1 Rule 8 of the CPR*

On the 31st May 2001 an application by notice of motion was filed in this court by a limited liability company called The Environmental Action Network Ltd. Herein referred to as the applicant. In the affidavit of Phillip Karugaba sworn in support of the application, he described the applicant as a public interest litigation group bringing the application bona fide in its own behalf and on behalf of the non-smoking members of the public under Article 50(2) of the Constitution, to protect their rights to a clean and healthy environment, their right to life and for the general good of public health in Uganda.

The respondents brought preliminary objections which are put in the issues there above.

Held;

- a) The veracity and credibility of evidence is challenged during the hearing when such evidence is adduced and not preliminary objection. This preliminary objection is over ruled basing on the evidence the applicant seeks to adduce by affidavits.
- b) Application brought under Article 50 of the Constitution are governed by the fundamental rights and freedoms (enforcement procedure) Rule (S.I No. 26/92) therefore the objection that the application did not comply with S.I of Act No. 20 of 1969 (as amended) is over ruled
- c) Order 1 Rule 8 of the Civil Procedure Rules governs actions by or against the parties (i.e. plaintiff or defendant) together with other parties, that they seek to represent, and they must have similar interest in the suit. On the other hand, Article 50 of the constitution as not require that the applicant must have the same interest as the parties he or she seeks to represent or for whose benefit the action is brought. Therefore objection (c) is overruled.
- d) The preliminary objections raised on behalf of the Attorney General and NEMA, the respondents are overruled. And they are ordered to pay costs for the consequent delay in hearing the main application

THE REPUBLIC OF UGANDA

**IN THE HIGH COURT OF UGANDA AT KAMPALA
MISC. APPLICATION No. 39 OF 2001**

**THE ENVIRONMENTAL ACTION NETWORK LTD}::: APPLICANT
VERSUS
THE ATTORNEY- GENERAL }
NATIONAL ENVIRONMENT }::: RESPONDENTS
MANAGEMENT AUTHORITY (NEMA)}**

BEFORE:- THE HON. PRINCIPAL JUDGE – MR. JUSTICE J.H. NTABGOBA

RULING

On the 31st May, 2001 an application by notice of motion was filed in this Court by a Limited Liability Company called The Environmental Action Network Ltd. I will herein refer to it as the applicant. In the affidavit of Phillip Karugaba sworn in support of the application, he describes the applicant as a Public Interest Litigation group bringing the application bona fide in its own behalf and on behalf of the non-smoking members of the public under Article 50(2) of the Constitution, to protect their rights to a clean and healthy environment, their right to life and for the general good of public health in Uganda.

Mr. Karugaba depones that he has recently learnt of several medical reports highlighting the dangers of exposure to second hand smoke or environmental tobacco smoke. He sets out various reports, which he says have highlighted the dangers of exposure to second hand smoke or environmental tobacco smoke. They include:-

The United States Surgeon General’s Report: - “The Health consequences of Involuntary Smoking (1986) which contains the following conclusions: -

- involuntary smoking is a cause of disease, including lung cancer, in healthy non-smokers;
- the children of parents who smoke compared with children of non-smoking parents have increased frequency of respiratory infections, increased respiratory symptoms and slightly smaller rates of increase in lung functions as the lung matures;
- the simple separation of smokers and non-smokers within the same air space may, reduce, but not eliminate the exposure of non-smokers to environmental tobacco smoke (ETS).

The United States Environmental Protection Agency (EPA) Report: Respiratory health effects of passive smoking: Lung cancer and other disorders in children (1992) made the following major conclusions: -

- that based on the weight of the available scientific evidence, exposure to Environmental Tobacco Smoke presents a serious and substantial health impact;
- Environmental Tobacco Smoke is a human lung carcinogen, responsible for approximately 3,000 lung cancer deaths annually in us non-smokers;
- Environmental Tobacco Smoke exposure is usually associated with increased risk of lower respiratory infections such as bronchitis, pneumonia. 150,000 to 300,000 cases annually in infants and young children up to 18 months of age are attributed to ETS;
- Environmental Tobacco Smoke is casually associated with increased prevalence of fluid in the middle ear, symptoms of upper respiratory tract irritation and small but significant

- reduction in lung function;
- Environmental Tobacco Smoke exposure is casually associated with additional episodes and increased severity of symptoms in children with asthma 200,000 to 1,000,000 asthmatic children have their condition worsened by exposure to Environmental Tobacco Smoke;
- Environmental tobacco smoke is a risk factor for new cases of asthma in children who have not previously displayed symptoms;
- Environmental Tobacco Smoke is classified as a Group A Carcinogen under EPA's Carcinogen assessment guidelines. This classification is reserved for those compounds or mixtures, which have been shown to cause Cancer in humans, based on studies in human populations and for which no safe level of exposure is known.

The National Health and Medical Research Council Report: "the Health Effects of Passive Smoking: A scientific Information Paper" concludes that: -

- Passive smoking contributes significantly to the risk of Sudden Infant Death Syndrome;
- Children Exposed to Environmental Tobacco Smoke are about 40% more likely to suffer from asthmatic symptoms than those who are not exposed;
- About 8% of childhood asthma is attributed to passive smoking (about 46,500 children per year);
- The risk of heart attack or death from coronary heart disease is about 24% higher in people who never smoke but who live with a smoker, compared to unexposed people who never smoke;
- People who never smoke and live with a smoker have a 30% increase in risk of developing lung cancer compared to people who never smoke and live with a smoker, to about 12 new cases of lung cancer and 11 deaths from lung cancer per year who never smoke".

I would stop here but suffice it to say that Phillip Karugaba, in his affidavit gave many more details about the dangerous effects of Passive smoking.

I would myself hesitate to challenge his averments because they are supported by research reports and scientific disclosures.

In paragraph 17 of his affidavit he depones that " non-smoking Ugandans have a constitutional right to life under Article 22 and constitutional rights to a clean and healthy environment under Article 39 of the Constitution of the Republic of Uganda".

In paragraph 18 of the affidavit he refers to the United Nations Convention on the Rights of the Child, to which Uganda is a signatory and states that " children have rights to adequate standards of health under Article 24, a right to life under Article 6 and a right to an adequate standard of living under Article 27". He adds in paragraph 19 of the affidavit that "according to a recent report: -

"Tobacco and Children's' rights" released by the World Health Organization, exposure to second hand smoke is an infringement of a child's right to life and to an adequate standard of health".

Mr. Karugaba concludes that "the said rights of non-smokers and the rights of the children are being threatened by the unrestricted practice of persons smoking in public places". (See paragraph 20 of the affidavit).

It is in light of the above that this application seeks from this Court the following declarations and orders: -

A declaration that smoking in public places constitutes a violation of the rights of non-smokers to a clean and healthy environment as prescribed under Article 39 of the Constitution of the Republic of Uganda and s. 4 of the National Environment Statute 1995.

If I may comment on this declaration being sought, my view is that it is too sweeping. It could have been worded thus:-

- 1) “A declaration that unregulated smoking in public places constitutes a violation of the rights of non-smoking members of the public; and that the respondents should take appropriate measures to regulate smoking in public places so as to provide a clean and healthy environment to the non-smoking members of the public”.
- 2) A declaration that smoking in public places constitutes a violation of the rights of the non-smoking members of the public to the right to life as prescribed under Article 22 of the Constitution of the Republic of Uganda.
Here again I thought that the wording of the prayer should have been that “ Un- regulated smoking in public places violates the right to life of non-smoking members of the public contrary to Article 22 of the Constitution ---.
- 3) A declaration that smoking in a public place constitutes an offence under Ss. 156 and 172 of the Penal Code.
- 4) An order that the 1st Respondent (i.e. The Attorney- General) take steps to ensure the prosecution of persons committing offences under sections 156 and 172 of the Penal Code Act.
- 5) An order that the second respondent takes the necessary steps to ensure the enjoyment by the Ugandan public of their right to a clean and healthy environment.

It is pertinent, at this juncture, to point out that in my ruling of 17/07/2001, I struck out prayers 3 and 4 of this application on the ground that smoking in public is not a crime either under the Penal Code Act or under any of our statutes, and Courts have no jurisdiction to create crimes or criminalise any acts. Nor do Courts possess any powers to order prosecution, which is the power strictly reserved for the Director of Public Prosecution.

This present ruling is on several preliminary objections raised by Mr. Oluka Henry, a State Attorney which appear in paragraph 8 of his Additional Affidavit in Reply sworn on the 18th July, 2001. I will do no better than extract the entire paragraph: -

“That the Respondent will at the hearing of this application raise preliminary objections seeking to declare that the applicant has no cause of action, that the evidence on the affidavit in support is based on hearsay; that the applicant company is not an expert on the effects of secondary cigarette smoke; that the applicant cannot claim to represent the Uganda public and that no notice that the present suit would be filed against the respondents was filed as provided for in the Civil Procedure and Limitations (Miscellaneous Provisions) Act as amended of 1969 and the Civil Procedure and Limitations (Miscellaneous Provisions)(Amendment) Act 2000”.

Paragraph 8 of Mr. Oluka’s affidavit raises the following issues which I must discuss in this ruling: -

- That the evidence on the affidavit in support of application No. 39/2001 is based on hearsay.
- That the applicant company is not an expert on the effects of secondary cigarette

- smoking.
- That the applicant company cannot claim to represent the Ugandan public. (Here I suppose Mr. Oluka is referring to the non-smoking members of the Ugandan public).
- That the applicant (suit) did not comply with the provision S. 43 of the Evidence Act. The section is about persons who give opinion on foreign law, or science or art etc. as experts.

In some situations Court may wish to call such experts to give opinion, but in some other situations the Court could take judicial notice of the opinions without having to necessarily call them. I, however, agree with Counsel for the applicant that even if it was compulsory for experts mentioned in S. 43 of the Evidence Act to testify, that would not be necessary with regard to evidence produced by affidavit because that is the import of S. 2 of the Evidence Act.

Besides, Mr. Oluka's preliminary point in which he brands the documentary presentation, by affidavit, of scientific findings and reports, is premature and therefore misplaced. The veracity and credibility of evidence is challenged during the hearing when such evidence is adduced and not preliminary objection. I would overrule this preliminary objection based on the evidence the applicant seeks to adduce by affidavits.

I will now deal with another preliminary objection by Mr. Oluka where he challenges the application on the ground that it did not comply with s. 1 of Act No. 20 of 1969 (as amended), which requires the Attorney-General and specified corporations, including NEMA, to be given a notice of intention to sue of 45 days. Here again, with due respect, Mr. Oluka's objection is misconceived and should be overruled. Applications brought under Article 50 of the Constitution are governed by the Fundamental Rights and Freedoms (Enforcement Procedure) Rules (S.I. No. 26/92). Although Rule 4 provides that no motion (under Rule 3) shall be made without notice to the Attorney-General and any other party affected by the application, Rule 7 clearly stipulates that "subject to the provisions of these Rules, the Civil Procedure Act and the Rules thereunder shall apply in relation to application".

Applying the so called golden rule of Statutory Interpretation, we would be wrong if we assumed that besides Rule 7 of S.I. No. 26 of 1992, Parliament meant that any other rule of procedure should be applied. It is for this reason that I think that applications pursuant to Article 50 of the Constitution must be strictly restricted to the Civil Procedure Act and the rules thereunder and not under S.1 of Act No. 20 of 1969. The Attorney-General and NEMA in this application therefore got the notice they are supposed to get. Incidentally, this was also the decision in *Rwanyarare & 4 others Vs. Attorney-General* (High Court Miscellaneous. Application No. 85 of 1993). If the rationale for applying the Civil Procedure Act and the Rules there under instead of S.1. of Act 20 of 1969, the Court has this to say: -

"The object of S. 80 is to give the Secretary of State for India an opportunity of settling the claim, if so advised, without litigation or, to enable him to have an opportunity to investigate the alleged cause of complaint and to make amends, if he thought fit, before he was impeded in the suit".

I agree with this requirement that the respondent, usually Government or a Scheduled Corporation which is supposed to be busy as Government, needs sufficient period of time to investigate a case intended to be brought against it so as to be able to avoid unnecessary expense on protracted litigation. This rationale cannot apply to a matter where the rights and freedoms of the people are being or about to be infringed. The people cannot afford to wait 45 days before pre-emptive action is applied by Court. They would need immediate and urgent redress. They need a short period which is one provided under the ordinary rules of procedure provided by the Civil Procedure Act and its Rules. To demand from the aggrieved party a 45 days notice is to

condemn them to infringement of their rights and freedoms for that period which this Court would not be prepared to do. Any alleged infringement must be investigated expeditiously before damage is done.

Other preliminary objection raised by the learned State Attorney is that the applicant cannot claim to represent the Ugandan Public and therefore they should have brought the application under Order 1 Rule 8 of the Civil Procedure Rules which demands that: -

8(1) Where there are numerous persons having the same interest in one suit, one or more of such persons may, with the permission of the Court, sue or be sued, or may defend in such suit, on behalf of or for the benefit of all persons so interested. But the Court shall in such case give notice of the institution of the suit to all such persons either by personal service or, where, from the number of persons or any other cause, such service is not reasonably practicable, by public advertisement, as the Court in each case may direct”.

(2) Any person on whose behalf or for whose benefit a suit is instituted or defended under sub-rule (1) may apply to the Court to be made a party to the suit”.

Here again the State Attorney failed, in his preliminary objection, to distinguish between actions brought in a representative capacity pursuant to Order 1 Rule 8 of the Civil Procedure Rules, and what are called Public Interest Litigation which are the concern of Article 50 of the Constitution and S.I. No. 26 of 1992. The two actions are distinguishable by the wording of the enactments or instruments pursuant to which they are instituted. Order 1 Rule 8 of the Civil Procedure Rules governs actions by or against the parties (i.e. plaintiff or defendant) together with other parties that they seek to represent, and they must have similar interests in the suit. On the other hand, Article 50 of the Constitution does not require that the applicant must have the same interest as the parties he or she seeks to represent or for whose benefit the action is brought.

The wording of Article 50 of the Constitution, especially clauses (1) and (2) clearly show what I am saying. It is instructive to quote them: -

“50 (1) Any person who claims that a fundamental or other right or freedom guaranteed under this Constitution has been infringed or threatened, is entitled to apply to a competent Court for redress which may include compensation.

(2) Any person or organization may bring an action against the violation of another person’s or group’s human rights”.

Clause (2) answers Mr. Oluka’s argument that the applicant in this application cannot claim to represent the Ugandan non-smoking public. There are also decided cases which decided that an organization can bring a public interest action on behalf of groups or individual members of the public even though the applying organization has no direct individual interest in the infringing acts it seeks to have redressed. In the case of RE. –Vs-. I.R.C. Exp. Federation of Self- Employed (H.L. (E)) [1982] A. C. 643, Lord Diplock said: -

“It would, in my view, be a grave lacuna in our system of public law, if a pressure group, like the federation or even a single public – spirited tax payer, were prevented by out-dated technical rules of locus standi, from bringing the matter to the attention of the Court to vindicate the rule of law and get the unlawful conduct stopped”. (See also [1901] 2 All. E.R. 93 at p. 107]”.

In his rather politico-judicial reasoning to support public interest litigation on behalf of the poor, indigent and unprivileged members of the Tanzanian Society by Public spirited organizations such as The Environmental Action Network Ltd., Lugakingira, J. of the High Court of Tanzania (as he then was) had this to say in the case of *Rev. Christopher Mtikila –Vs- The Attorney*

General in Tanzanian Civil Suit No.5 of 1993 (unreported): -

“The relevance of public litigation in Tanzania cannot be over-emphasized. Having regard to our socio-economic conditions, these (sic) development promise more hopes to our people than any other strategy currently in place. First of all, illiteracy is still rampant. We were recently told that Tanzania is second in Africa in wiping out illiteracy but that is a statistical juggling which is not reflected on the ground. If we were that literate it would have been unnecessary for Hanang District Council to pass by laws for compulsory adult education which were recently published as Government Notice No. 191 of 1994. By reason of this illiteracy a greater part of the population is unaware of their rights, let alone how the same can be realized.

Secondly, Tanzanians are massively poor. Our ranking in the World on the basis of per capita income has persistently been the source of embarrassment. Public interest litigation is a sophisticated mechanism which requires professional handling. By reason of limited resources that the vast majority of our people cannot afford to engage lawyers even where they are aware of the infringement of their rights and the perversion of the Constitution. Other factors could be listed out but perhaps the most painful of all is that over the years since Independence Tanzanians have developed a culture of apathy and silence. This, in large measure is a product of institutionalized mono-party politics which, in its repressive dimension, like detention without trial sapped up initiative and guts, the people found contentment in being receivers without being seekers. Our leaders very well recognize this, and the emergence of transparency in governance they have not hesitated to affirm it. When the National Assembly was debating Hon. J. S. Warioba’s private motion on the desirability of a referendum before some features of the Constitution were tampered with, Hon. Sukwa said Sukwa, after the interruptions by his colleagues, continued and said -----

“ Given all these and other circumstances., if there should spring up a public-spirited individual and seek the Court’s intervention against legislation or actions that pervert the Constitution, the Court, as guardian and trustee of the Constitution and what it stands for, is under an obligation to rise-up to the occasion and grant him standing”.

My understanding of Lugakingira J’s lengthy statement is that the interest of public rights and freedoms transcend technicalities, especially as to the rules of procedure leading to the protection of such rights and freedoms. This is also the message in Lord Diplock’s words cited above in [1901] 2 ALL E.R. 93 at p. 107.

If I may revert to Miscellaneous Application No. 39 of 2001, the applicant say they are especially interested in the infringement of the rights and freedoms of the poor, and children – those who cannot know and appreciate their rights and freedoms and who do not know where to go and how to go there for redress. It is not compelling that a body like the applicant stands up for them and fights for their cause. I think the applicant deserves hearing and I will hear it.

The preliminary objections raised on behalf of the Attorney-General and NEMA, the respondents, are overruled –And they are ordered to pay costs for the consequent delay in hearing the main application. It should be urgently fixed for hearing on merit. I so order.

Signed

J.H. NTABGOBA
PRINCIPAL JUDGE

28.08.01

**GREENWATCH AND
ADVOCATES COALITION FOR DEVELOPMENT & ENVIRONMENT**

-VERSUS-

**GOLF COURSE HOLDINGS LTD.
H.C. MISC. APPLIC. NO. 390 OF 2001**

BEFORE: HIS LORDSHIP AKIIKI – KIIZA

Civil Procedure: O.37 P.1;7 and 9 of the Civil Procedure Rules

Civil Procedure: Whether the application is inter parties

*Civil Procedure: Whether there is a serious question to be tried in the head
suit*

Civil Procedure: Whether the applicant might suffer irreparable damages

This is an application seeking for a temporary injunction. The main prayer of the applicants is that an injunction is issued against the respondents, restraining them from developing plots 64 – 86, Yusuf Lule (Kitante Road) Kampala until the main suit herein is heard and determined.

Held:

- a) The first requirement is complied with this application is inter parties and each party has filed their pleadings.
- b) The suit property being property of the respondent and KCC and NEMA having given a great light on the project and them being the controlling and regulatory authorities respectively, this weighs leaving against the applicants success in the legal suit.
- c) There is no irreparable damage to be suffered by the applicants or the public whose interest they claim to represent. This application must fail the respondents will have their taxed costs.

Editorial notes: The matter is still pending in court. At the time the suit was filed, the hotel and shopping mall had not been constructed. Now both have been fully functional for a long time. The respondent's lawyer appealed for security of costs which was granted. Greenwatch was ordered to pay 50 million about US\$ 30,000 and it appealed. The appeal has never been heard or even fixed. The main suit is still pending in court.

THE REPUBLIC OF UGANDA.

**IN THE HIGH COURT OF UGANDA AT NAKAWA.
MISC. APPLICATION No 390/2001.
(ARISING FROM H.C.C.S. NO.834/2000)**

**1. GREENWATCH
2. ADVOCATES COALITION FOR =====APPLICANTS/PLAINTIFFS.
DEVELOPMENT & ENVIRONMENT}**

VERSUS

GOLF COURSE HOLDINGS LTD. }=====RESPONDENT/DEFENDANTS

BEFORE: HIS LORDSHIP AKIIKI-KIIZA

RULING:

This is an application seeking for temporary injunction. It is taken out under the provisions of 0.37 p.1,7 and 9 of the civil Procedure Rules, and is supported by Kenneth Kakuru's affidavit.

The main prayer of the applicants are that;-

- An injunction is issued against the respondents, restraining them from developing plots 64-86, Yusuf Lule (Kitante Road)-Kampala until the main suit herein is heard and determined.

The grounds of the application as set out in the chamber summons are:

- That the applicants have filed a suit against the respondents/defendants and the same is pending hearing in this court.
- That the respondent/defendant is putting the suit property are destroying the environment and if this application is not granted, the environment shall suffer irreparable damage.
- That the respondent/defendant is putting the suit property are destroying the environment and if this application is not granted, the environment shall suffer irreparable damage.
- That the applicants have a strong case with great likelihood of success.

Further it is contented in the supporting affidavit that failure to grant the injunction would render the out come of the head suit nugatory.

The brief facts of the head suit are as follows. The defendants are owners of the suit piece of land on which they are constructing a Hotel. The plaintiffs are described as Non-Governmental organizations, whose main objectives are policy research and advocacy for protection of the environment and environmental rights in Uganda.

The plaintiffs are claiming that the construction of the Hotel on the suit land is threatening the environment and that it contravenes the law, as it is on the wetland and green areas. The defendants are therefore seeking to stop construction and protect, conserve the environment and uphold the environmental law.

Both learned counsel made lengthy submissions for and against the grant of the temporary injunction. Before I tackle the main issue in this application, some reference was made about the number of plaintiffs in this case. The plain talks of 1st and 2nd plaintiffs, as both are non-

Governmental organizations. They say they are bringing the action under S. 72 of NEMA statute. Under the interpretation decree, a person includes inter-alia, an association or body of persons corporate or incorporates. Hence in my view, they have the necessary locus standi in bringing this suit.

However, the plaint is clearly signed by the 1st plaintiff, Greenwatch, only! The second plaintiff never signed the plaint at all. My learned predecessor in this case, Lady Justice Anne Magezi, considered this matter. I will only refer to those sections of her ruling (H.C.C. MIS. Application No. 1004/2000) which concerned the application for a temporary injunction.

It is my view that in order for the application before Lady Justice Magezi, to have succeeded, the party who signed the pleadings must have confirmed with either O. Ir. 8 (1) or O. 1r 12(2) of the CPR.

In the application before Justice Magezi, the second plaintiff or his representative swore the affidavit in support of the application for a temporary injunction. The learned judge, rightly in my view, threw out the application, as the person who had purported to swear the application was a stranger to the head suit, as he never signed the plaint, despite the fact that he purported to be or purported to represent the second plaintiff.

The plaint in its present form has only one plaintiff, i.e., Greenwatch is not suing in representative capacity, and hence it is the only party suing the defendant.

(See the case of *Sonko and Oros.Versus Haruna and Anor [1971]. EA 443 and Johnson Versus Moss [1969] EA. 654, and a recent case of this Court of *Zabuloni Munoka and Oros. Versus Bukemba Estates Ltd.* H.C.C.S. 432/87, unreported.)*

This is in accordance with O.1 r. 8 (1) of the civil procedure rules. On the other hand, if Greenwatch was representing both plaintiffs, then Advocates Coalition for Development and Environment, (ACODE) must give a written authority to that effect. This is in conformity with O.1-r.12 (2) of the Civil Procedure Rules.

(See the case of *S.K Mubiru & Anor.Versus G.W. Byensiba [1985] HCB 106, and Zabuloni Munoka & Oros Versus Bekemba Estates Ltd.* H.C.C.S. NO. 432/87 unreported).

It appears Greenwatch has no such written authority from ACODE, and as this is neither a representative action, a representative of ACODE could not have deponed an affidavit in support of the application filed by Greenwatch.

However the position in the instant case is different from that before Lady Justice Magezi in H.C.C. Misc. Application No. 1004/2000. This application is filled by Greenwatch. The affidavit in support of the application is deponed by a representative of Greenwatch. Therefore in my opinion, Greenwatch has a right to be heard and is not affected by the non-existing of the second applicant.

I will now turn to the merits or otherwise of the instant application. Circumstances in matters like that before me differ from case to case. Each case therefore is to be decided upon its own facts given the prevailing circumstances at the time of lodging/hearing the application.

It is however now settled that while granting or refusing to grant a temporary injunction, court has to consider the following: -

There must be a pending head suit. The application of this nature must be inter-parties.

That there is a serious question to be tried in the head suit and that the applicant has a prima facie case where by there is a probability of being entitled to the relief sought in that suit.

The applicant might otherwise suffer irreparable damage, which would not be adequately compensated by way of damage.

If the court is on doubt on the above, court will decide the application on the balance of convenience

(See the following cases: *Robert Kavuma Versus Hotel International, Supreme Court, Civil Appeal No. 8/90, unreported, and L.D. Cotton International Versus African Farmers Associates B. V. and Anor.* [1996] HCB. 57.

The first requirement is compiled with. There is H.C.C.S. NO.834/2000. This application is inter-parties and each party has filed their pleadings. The next question is whether there is a serious question to be tried in the head suit and the likelihood of success. There is need for the applicants in their affidavit in support of the application to specifically state that the question to be tried during the trial is serious and that prima facie they are likely to succeed. (See the case of *Nitco Ltd, Versus Hope Nyakairu* [1992-93] HCB. 135) Per Karokora J, as he then was. In the instant case, the applicants' affidavit is silent on the likelihood of success of their claim at the trial, though the chamber summons alludes to it.

Secondly the respondents through their affidavit in reply, state that they are the owners of the suit land, comprised in plots 6-86-Yusufu Lule Road this not challenged by the applicants in their adrift in support of the application. It was held in the case of *David Bakirahakye Vs. A.G. & 7 Oros.* H.C.C.S. NO. MMB 14/90 (MBARARA REGISTRY) per Karokora J, as he then was, that granting an interim (temporary injunction) to restrain a respondent from using the land to which he has a certificate of title, which in law is conclusive evidence of ownership, when no fraud has been proved, would be tantamount to contravening the provisions of S. 184 of R.T.A. I entirely agree with the learned judge. This is more so in this case, where the applicants/plaintiffs are not claiming any proprietary interest at all, in the plot on which the construction is taking place.

Their interest is stated to be in public of nature. I am aware that the NEMA statute gives them the right to sue but in my view this does not diminish the fact that the suit property belongs to the respondents and in absence of proved fraud their title is impeachable!

The respondents in the affidavit in reply contented that controlling Authority of Kampala City Council and the National Environment Management Authority which is the Regulatory Authority on matters concerning the environmental matters, have given a green light to the construction of the Hotel on the present site. In my view, both KCC & NEMA are public bodies, which we put in place to ensure that private developers, like the respondents, conform to standards as laid down by law. This would be done by carrying out some investigations.

It appears in this case this was done and they gave a green light to the respondent to go ahead with the project. This in my view weighs heavily against the applicant's success in the head suit.

As to whether the applicants will suffer irreparable damage, which would not be adequately compensated by way of damages, I do not see how the applicants are likely to suffer any irreparable damage. As I have already said, they don't have any proprietary interest in the suit property. What they appear to be claiming is that, the respondents are using their property wrongly. That they should not use it for something else. They claim further that the construction of the hotel now going on is contrary to public interest, as the area is a wetland and a green area.

On the other hand, the respondents are maintaining that both the controlling authority (KCC) and

the regulatory authority (NEMA) gave a go ahead after carrying out impact assessment. In my view, these public bodies are in place to ensure that the provisions of the NEMA statute are complied with and hence they take care of the public interest the applicants are claiming to protect.

It is in my view that there is no irreparable damage to be suffered by the applicants or for that matter the public whose interest they claim to represent. Even if the damage is caused, this could be put right under the provisions of the provisions of s. 68 of the NEMA statute.

This section provides for restoration. This restoration would be definitely at the respondents' expense. All in all I find that the applicants have failed to prove irreparable damage which can not be adequately compensated in damages.

After a careful considering of all the submissions of both learned counsel and perusal of the affidavits and after considering the law applicable, both statutory and case law, I am of a considered view the this application must fail. The respondents will have their taxed costs.

Signed

AKIIKI-KIIZA
JUDGE

20.10.01

Order:

The Register to read the ruling to the parties. The right of appeal should be explained. It is as of right no leave is required.

AKIIKI-KIIZA
JUDGE
20.07.01.

**THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT KAMPALA
MISC. APPLICATION No. 444 OF 2001
(Arising out of Misc. Appl. No. 39 of 2001)**

**B.A.T. (U) LTD.....APPLICANT
-VERSUS -
THE ENVIRONMENTAL ACTION NETWORK LTD.....RESPONDENT**

BEFORE: - HON. THE PRINCIPAL JUDGE – MR. JUSTICE J.H. NTABGOBA

RULING.

This is a ruling on the application filed and argued on behalf of the British American Tobacco Uganda Ltd.

The application brought pursuant to Order 1 Rule 10(2) of the Civil Procedure Rules 5 and 7 of the Fundamental Rights and Freedoms (Enforcement Procedure) Rules S.I No. 26 of 1992 as well as Order 48 Rule 3 of the Civil Procedure Rules, seeks order that: -

- the applicant be added respondent to Miscellaneous Application No. 39 of 2001, and
- the costs of the application be provided for.

The grounds relied on by the applicant are as follows: -

- That the respondent has filed Miscellaneous Application No. 39 of 2001 under Article 50(1) and (2) of the Constitution seeking for declarations that smoking in Public Places is a violation of the rights of non-smoking members of the Public and that smoking in Public constitutes and offence.
- That the applicant was not made a party to the said application.
- That the orders sought by the respondent in the said application will be necessary in order for the Court to effectually and completely adjudicate upon and settle all questions involved in the application.

The BAT application was supported by the affidavit of one Richard Wejuli-Wabwire who deponed that he is an advocate of this Court and the Company Secretary of the applicant Company. His affidavit deponed to the 4 grounds enumerated above and to nothing else in addition.

In reply Mr. Phillip Karugaba who claims to be one of the applicant's members deponed that: -

- The application No. 39 of 2001 seeks only to protect non-smoking members of the public especially vulnerable groups like women, children and workers in hospitality industry from the proven dangers of second hand smoke and passive smoking;
- The focus of the main application is to control only the place of consumption of Tobacco Products and is not targeted against B.A.T, the applicant, its manufacturing, distribution or retail processes nor against its particular Customers;
- it is far-fetched to believe that if the respondent is successful in application NO. 39 of 2001, B.A.T, the applicant will suffer gross financial consequences or at all;
- the two respondents in application No. 39 of 2001 do not contest the science on dangers of second hand smoke and are according to their affidavits in reply already working on measures to address the problem;
- there is nothing in the affidavit of the applicant to suggest that it contests the scientific basis on which the respondent seeks it relief.

There were many other deponements in Phillip Karugaba's affidavit including that: -There are other manufacturers, importers, distributors and retailers who may seek to be joined to the main application if the applicant is to be believed and becomes successful.

I must confess, I do not grasp the relevance of this paragraph 9 of Phillip Karugaba's affidavit because, even if the other manufacturers, importers, distributors and retailers, in Uganda joined the application, Court would be able to entertain them. Except for this paragraph, however the rest of the deponents of Phillip Karugaba outlined in the paragraphs quoted above are, to a large extent true. Application No. 39 of 2001 is not about declarations against the manufacture, importation, distribution and retailing of Tobacco in Uganda. As Karugaba deponed, the thrust of the application is against smoking in public places and, if you like, it is against those who smoke in the public so as to injure or jeopardize the health of non-smokers like children and other innocent passive smokers. My reading of the application is that it seeks provision by NEMA and Government of places for smokers separate from those of non-smokers. This is acknowledged by the respondent when they say that they are still working on the modalities of redressing the situation, and that the application is premature.

Having said this, I should make it clear that the other declarations and decisions sought in application No. 39 of 2001, namely, a declaration that smoking in public is a criminal offence contrary to Sections 156 and 172, are declarations which this court would not be competent to make. A criminal offence is a creature of Statute and therefore court cannot declare an act criminal unless a Statute makes it so. I agree relief sought in paragraphs 3,4 and 5 of the application must be of concern to B.A.T. They are: -

“1. A declaration that smoking in a public place constitutes an offence under S. 156 and 172 of the Penal Code”;

“2. An order that the 1st respondent take steps to ensure the prosecution of persons committing offences under Sections 156 and 172 of the Penal Code”;

“3. An order that the 2nd respondent take the necessary steps to ensure the enjoyment by the Uganda public of their right to a clean and healthy environment”.

As I told counsel at the hearing a criminal offence is a creature of a Statute. Courts do not create criminal offences and therefore it would not be within the competence of this court to decide that smoking in public places is a crime, as, indeed, it is not competent for the court to order the prosecution of persons who smoke in public. The power to prosecute vests in the Director of Public Prosecution who is not subject to court orders in his decision to prosecute or not to prosecute.

Having then declined to adjudicate on the issues of criminality, my view is that the concerns of B.A.T are no longer valid or credible. It is for this reason that I decided not to accommodate the application of B.A.T to be joined as respondents in application No. 39 of 2001. And having allayed the applicant's fears that I would decline to decide on the issue of criminality of smoking in public places, counsel for B.A.T nevertheless forged ahead to argue the issues that did not concern his client. It is for this reason that in dismissing its application I awarded costs against it.

The above are my reasons for dismissing this application and for the award of costs that I made.

J.H. NTABGOBA
PRINCIPAL JUDGE

17/7/01

**THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT KAMPALA
MISC. APPLICATION No. 909 OF 2000**

BYABAZAIRE GRACE THADDEUS - VS. - MUKWANO INDUSTRIES

Civil Procedure- Cause of action-whether plaintiff had to comply with standards under S.25 NEMA Statute.

Civil Procedure- Locus standi- whether plaintiff could receive remedies under S.4 of the National Environment Statute of 1995

The applicant filed the chamber summons application under Order 7, Rule 11 and 19 of the Civil Procedure Rules seeking order that

- a) The plaint in High Court Civil suit No.486 of 2000 be rejected.
- b) The plaintiff ordered to pay the defendant the costs of the suit and this application.

The main ground of this application was stated to be that the plaintiff disclosed no cause of action.

The plaintiff was operating a factory located adjacent to residential homes including the plaintiffs rented apartment at Kibuli mosque, zone 1. The plaintiff alleged that the smoke is obnoxious, poisonous, repelling and hazardous to the community around and to the plaintiff in particular who is already affected in health.

Held:

It is trite law that in deciding the issue of cause of action only the plaint has to be looked:

- The plaintiff stated in parg.3 of his reply to the written statement of defence- “ 3. In reply to the defendants’ pargs.8 and 9, the plaintiff avers that his legal right to sue emanates from the right to a healthy environment under the same NEMA Statute (Act) Section 4.”
- The plaintiff is bound by this pleading. It is in this vein that I now hold that no right has been defined by NEMA under part VI of the statute.
- I hold that the plaint has failed to establish the first essential element for a cause of action, viz., a defined right (enjoyed by the plaintiff).

In view of the above holding, I find little difficulty in holding that the plaint fails on the second and third essential elements. The *Auto Garage case* is an authority for the legal proposition that, “ the provision that a plaint not disclosing a cause of action shall be rejected is mandatory”

I shall follow this decision in the present case.

NEMA is the only person vested with the power and duty to sue for violations committed under the Statute; further that the only recourse available to every person whose right under this statute is violated is to inform NEMA or the local Environment committee of such violation.

The plaintiff has no locus standi to sue for any violation under this statute.

Editorial notes: this is a case in which the lawyer should have taken more care. He made very poor pleadings leaving the judge with no option. He ought to have proceeded either under Article 50 of the Constitution or S.72 of NES.

**THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT KAMPALA
MISC. APPLICATION No. 909 OF 2000
(Arising from Civil Suit No.466 of 2000)**

**BYABAZAIRE GRACE THADDEUS:: PLAINTIFF
VERSUS
MUKWANO INDUSTRIES::DEFENDANT**

BEFORE: THE HON. MR. JUSTICE G. TINYINONDI

RULING

The Defendant/Applicant filed this Chamber Summons application under Order 7, Rule 11 and 19 of the Civil Procedure Rules seeking the following orders: -

- “(a) That the plaint in High Court Civil Suit No. 466 of 2000 be rejected;
- (b) That the Plaintiff be ordered to pay to the Defendant the costs of the suit and this application.”

The main ground of the application was stated to be that the plaint disclosed no cause of action. An affidavit in support was also filed. It was sworn by Alykhan Kamali who deponed, inter alia:

1. That I am Executive Director of the Defendant applicant company and make this deposition in that capacity.
2. That I have read the plaint and reply to our Written Statement of Defence filed by the Applicant and understood them. Copies of the said pleadings are attached hereto as annexure A1 and A2 to this affidavit. A copy of our defence is attached and marked annexure B.
3. That it is clear that from the statements in the plaint that the Plaintiff brings a suit based on the alleged emissions of noxious gases into the air by the Defendant.
4. That it is clear from the statement in paragraph 3 of the reply filed by the Plaintiff in response to our written statement of defence that the Plaintiff purports to bring this action under the provisions of Section 4 of the National Environment Statute of 1995.
5. That I am informed by my Advocates whom I verily believe, that the aforesaid provision does not create a right to bring legal action on any individual but vests it instead in the National Environment Management Authority or on local environment committees formed under the Act.
6. That I am further informed by my Advocates, whom I verily believe, that any actions arising from the alleged emission of gases into the atmosphere must be brought in conformity with the said Statute, which is the overriding law in environmental matters.
7. That I am further informed by my that no action can lie against any person in respect of emissions unless such emissions exceed standards and guidelines prescribed by the National Environment Management Authority under the National Environment Statute.
8. That I have read the plaint and reply carefully and it is clear that they do not allege that the aforesaid standards have been established by the relevant authorities, or that the alleged emissions from our factory exceed the said standards, or that any measurements have been made in accordance with the provisions of the said Statute to determine the quality of gas emissions from the factory, or indeed, that they exceed such prescribed standards in any degree.
9. That I verily believe that in the absence of any statement as to the aforesaid material facts the plaint does not disclose a cause of action against our company.

10. That I have also noted that the plaintiff has indicated the subject matter of the suit as being valued at Shs. 60,000,000/=.

The Plaintiff/Respondent did not file an affidavit in reply.

At the hearing of the application, Mr. Byenkya, Counsel for the Applicant, rehearsed the contents of both the Chamber Summons application and the affidavit. He referred to paragraphs 4 and 6 of the Plaintiff – (the Plaintiff was annexed to the Chamber Summons application) which read –

*“4. The cause of action is a continuing tort which persists as follows: -
The Defendant operates a factory located just adjacent to Kibuli Police Barracks which is adjacent to residential homes including the Plaintiff’s rented apartment at Kibuli, Mosque Zone 1. The said smoke is obnoxious, poisonous, repelling and a health hazard to the community around and to the Plaintiff in particular who is already affected in health.*

The said escape of this smoke from the Defendant’s premises is occasioned further by the Defendant’s negligence in the following particulars:

Particulars of enhancing negligence:

- Failing to control obnoxious, poisonous and health hazard smoke from emission from the factory.
- Failing to purify the smoke to a safe level before emission.
- Failing to alert the residents in the neighborhood about the possible effects of the smoke emitted.
- Failing to notify the local authorities on the nature and health effect of the smoke being emitted.
- Failing to effect environmental levels established nationally and internationally.
- Failing to enforce smoke emission levels commensurate to a living, working or residential area and neighborhood.
- Failure to submit the National Environmental Management Authority details pertaining to the emission of toxic levels.”

Learned Counsel also referred to paragraph 3 of the Plaintiff’s Reply to the Written Statement of Defence, which reads –

“3. In reply too the Defendant’s paragraphs 8 and 9, the Plaintiff avers that this right to sue emanates from the right to a healthy environment under the same NEMA Statute, section 4.”

Learned Counsel for the Applicant argued that whereas the said section creates a right to a healthy environment, it also specifically provides for who will bring court action. He referred to Section 4 (3). The sub-section reads: -

“(3). In furtherance of the right to a healthy environment and enforcement of the duty to maintain and enhance the environment, the Authority or the local environment committees so informed under subsection (2) is entitled to bring an action against any other person whose activities or omissions have or are likely to have a significant impact on the environment to –

- prevent, stop or discontinue any act or omission deleterious to the environment;
- compel any Public Officer to take measures to prevent or to discontinue any act or omission deleterious to the environment;
- require that any on-going activity be subjected to an environmental audit in accordance with section 23 of this Statute;

- require that any on-going activity be subjected to environmental monitoring in accordance with section 24 of this Statute;
- request a court order for the taking of other measures that would ensure that the environment does not suffer any significant damage”.

Learned Counsel submitted on the right to NEMA or the local environmental committee. He referred to sections 4(2) and 17 of the Statute (ante). They read –

“4 (2). Every person has a duty to maintain and enhance the environment, including the duty to inform the Authority or the local environment committees of all activities and phenomena that may affect the environment significantly.”

17 (1) A Local Government System shall on the advice of the District Environment Committee appoint Local Environment Committees.

When appointed, the functions of the Local Environment Committee shall include the following :

- to prepare a Local Environment work plan which shall be consistent with the National Environment Action Plan and the District Environment Action Plan;
- to carry out public environmental education campaigns;
- to mobilize the people within its local jurisdiction to conserve natural resources through self-help;
- to mobilize the people within its local jurisdiction to restore degraded environmental resources through self- help;
- to mobilize the people within its local jurisdiction to improve their natural environment through voluntary self-help;
- to monitor all activities within its local jurisdiction to ensure that such activities do not have any significant impact on the environment;
- to report any events or activities which have or are likely to have significant impacts on the environment to the District Environment Officer, or to the appropriate Resistance Committee, Council or such other person as the District Resistance Council may direct;
- to carry out such other duties as may be prescribed by the District Resistance Committee or urban council in consultation with the Authority.”

Counsel submitted that the Plaintiff does not claim to be either of the two (the Authority or the Local Environment Committee) and therefore cannot establish a right under section 4 of the Statute and therefore had no locus standi.

Learned Counsel further submitted that even if the Plaintiff had a locus under common, law nuisance he had not pleaded the facts necessary to establish a cause of action. He submitted that Section 109 of Statute provides for what conforms to the Statute. Let me cite the section –“109.

“Any law existing immediately before the coming into force of this Statute relating to environment shall have effect subject to such modifications as may be necessary to give effect of this Statute; and where any such law conflicts with this Statute, the provisions of this Statute shall prevail.”

He noted that emission of gases into the air was covered by Section 58 of the Statute.

“ 58 (1).No person shall pollute or lead any other person to pollute the environment contrary to any of the standards or guidelines prescribed or issued under part VI and VII of this Statute.

(2). Notwithstanding sub-section (1), a person may exceed the standards and guidelines referred to in sub-section (1) if authorized by a pollution licence under Section 61 of this

Statute.”

That for the Defendant to be labeled a polluter he must have acted under Parts VI and VII of the Statute. Counsel referred to Sections 3 (2) and 58 of the Statute. He also argued that in relation to air, emission standards are set out in Section 25 (1) (a) and (b) by NEMA. That in order for a cause of action to be established the Plaintiff must allege that the standards have been established and their particulars, and it must also allege that the emissions from the factory are in excess of those standards. That the plaintiff must also allege that the polluter has no licence and is therefore in breach. Learned Counsel submitted that none of the above had been pleaded. He cited C.A. No. 1/97: *AG vs. TINYEFUZA (S.C) and AUTO GARAGE & OTHERS vs. MOTOKOV (No. 3: [1971] EA 514*, regarding what constitutes a cause of action.

The next objection by counsel for the applicant was that no correct fee had been paid. That while the plaintiff stated in paragraph 8 of the plaint that the subject matter was valued at Shs. 60,000,000/= (Shillings Sixty million only); the fees paid were only Shs. 9,000/= (Shillings Nine thousand only) for two suits, as per the annexed general receipt. That under Order 7, Rule 11 of the Civil Procedure Rules the plaint was liable to be rejected. He prayed accordingly.

Finally, Learned Counsel argued that the plaint sought monetary relief purely. That, Sections 3 and 4 of the Statute prescribed the remedies none of which was monetary. That therefore, the plaint could not claim to be founded on section 4 of the Statute, and that, therefore, no plaint can legitimately claim general or special damages. I do not agree with Counsel that section 3 covers his argument. I however agree with him on the rest of the argument in this paragraph.

Mr. Olanya, Counsel for the plaintiff/respondent, replied as follows. The Chamber Summons application had been rendered improper on account of Counsel for the defendant/applicant introduction of insufficient fees which had not been included in the grounds. Court fees should have been introduced under section 100 of the Civil Procedure Act. Learned Counsel cited *MARGARET KIWANA VS. CHIEF REGISTRAR OF TITLES: MISC. APPL. 22/92* to say that Court should not entertain the issue of fees in this application.

In answer to the 1st submission by the applicant’s counsel, counsel for the respondent submitted that “this was clearly a common law action occasioned by the Defendants’ negligence”. He referred court to paragraph 3 of the plaint.

With regard to the plaintiff’s locus standi, counsel stated that it was derived from the common law of nuisance and could not be negated by the Statute. He also cited Section 109 of the Statute.

With respect to the cause of action, learned counsel for the plaintiff/respondent alleged that the plaint did not have to comply with Section 58 of the Statute and did not have to plead the standards that were violated. He submitted that paragraphs 3 and 6 of the plaint sufficiently laid out the particulars.

Counsel for the respondent further contended that the required court fees were in fact paid. That in the plaint the plaintiff sought four reliefs. That the court fees are paid on the reliefs claimed but not on the value of the subject matter. That Order 7, Rule 11 does not refer to the valuation of the subject matter but to the reliefs. He further contended that the obligation to value and assess court fees was on court and not the plaintiffs. That if the court assessed the plaintiff’s reliefs at Shs. 4,500/=, which the plaintiff paid, the court could not, in the absence of revaluation, condemn the Plaintiff to the rejection of his plaint. That the court had not ordered any revaluation and so the application was premature. Counsel prayed for the rejection of the Chamber Summons

application with costs.

In reply, counsel for the applicant briefly stated that there was no need to order a revaluation of court fees where the plaintiff made the value clear.

I shall start with the question of the cause of action. I would settle for the statement of Spry, V.P in the AUTO GARAGE case (ante) at p. 519 D that –

“ I would summarize the position as I see it by saying if a plaintiff shows that the plaintiff enjoyed a right, that the right has been violated and that the Defendant is liable then, in my opinion, a cause of action has been disclosed.....”

Thus in summary, a cause of action is constituted by the aforesaid three essential elements. Starting with the element that the plaintiff enjoyed the right, I will state this. An action founded on the provisions of a Statute must conform to those provisions and a plaintiff cannot look beyond those provisions unless so provided by clear provisions of the Statute in question.

Section 4 of the Statute expressly vests a right to a healthy environment in every person, including the plaintiff hereon. One needs to know what is meant by a “healthy environment”. It is my considered view, that parts VI and VII of the Statute provide, in technical terms, how a “healthy environment” can be described. Part VI describes standards in respect of “air quality”, “water quality”, “standards of discharge of effluent into water”, “standards for the control of noxious smells”, and many other standards. This part of the Statute goes a step further in stating that the Authority, i.e. NEMA, is the body entrusted with the duty of establishing these standards. In my considered view, it is only after the standards have been established that one can gauge the totality of the right to a healthy environment. It is at this point that violation of the right can be described or pointed out without any difficulty both by the victim of the violation and the arbiter in any dispute.

Finally it is only at this point that the victim can invoke Section 58 of the Statute. Learned Counsel for the applicant contended that the plaintiff did not allege the establishment of the said standards, that they had been violated and in what manner. Learned Counsel for the Respondent replied that paragraphs 3 and 6 of the plaintiff had clearly pleaded the particulars. That the Plaintiff’s case was not based on the Statute and so he need not plead the particulars therein. This Court would have settled for the latter argument but for what I am going to point out here below.

It is trite law that in deciding the issue of cause of action only the plaintiff has to be looked at: In the present action the plaintiff stated in paragraph 3 of his reply to the written statement of defence – “3. In reply to the defendant’s paragraphs 8 and 9 the plaintiff avers that his legal right to sue emanates from the right to a healthy environment under the same NEMA statute (Act) Section 4.”

The plaintiff is bound by this pleading. It is in this vein that I now hold that no right has been defined by NEMA under part VI of the Statute. I proceed from this premise to hold that the plaintiff has failed to establish the first essential element for a cause of action, viz., a defined right (enjoyed by the plaintiff).

In view of the above holding, I find little difficulty in holding that the plaintiff fails on the second and third essential elements. The AUTO GARAGE case (ante) is authority for the legal proposition that “ the provision that a plaintiff not disclosing a cause of action shall be rejected is mandatory.” I shall follow this decision in the present case.

The second point raised by Counsel for the Applicant concerned the right to sue. Section 5 of the

Statute reads –

“5 (1). There is established a body to be called the National Environment Management Authority in this Statute referred to as the “Authority”.

(2).The Authority shall be a body corporate with perpetual succession and a common seal.

(3).The Authority shall, in its own name be capable of suing and being sued and doing and suffering all acts and things as bodies corporate may lawfully do or suffer.” [Emphasis is mine]

Contrast this with the provisions of section 4(2), which reads –

“(2) Every person has a duty to maintain and enhance the environment, including the duty to inform the Authority or the local environment committees of all activities and phenomena that may affect the environment significantly.” [Emphasis is mine].

I find and hold that NEMA is the only person vested with the power and duty to sue for violations committed under the Statute; further that the only recourse available to every person whose right under this Statute is violated is to inform NEMA or the local environment committee of such violation. The plaintiff has no locus standi to sue for any violation under this Statute.

Counsel for the applicant also sought to have the plaint rejected under Order 7, r. 11 (c) because of payment of insufficient fee. I consulted with the High Court Civil Registry and was given to understand that based on paragraph 8 of the plaint, the correct fee ought to have been Shs. 157,000/= (Shillings One hundred and fifty seven thousand shillings only). As a matter of fact, there was a general receipt on the court file showing Shs. 9,000/= (Shillings nine thousand shillings only) as “fees for Civil Suit 465 and 466/2000” i.e. two suits. As is clear from the head of this ruling, the parent suit for this application is C.S. 466, I was utterly amazed by the vehement assertion by counsel for the respondent that the required fees were in fact paid etc. I would not buy this argument. Rather I would not reject the plaint under rule 11(c) without first ordering the plaintiff to pay the correct fee and after the plaintiff disobeys the court order.

To conclude the application is hereby upheld and the plaint rejected for the reasons I have endeavored to give. The plaintiff shall pay the costs of this application.

Signed

G. Tinyinondi
JUDGE.

24/01/2001

7/2/2001: 9:20 am

Ms. Kembabazi holding brief for Mr. Byenkya for the applicant/defendant.

Mr. Alenyo for the respondents.

Jolly – Court clerk.

Court: An affidavit of service dated 6/2/2001 indicates that counsel for the respondent was duly served but he is not here.

Signed,

Deputy Registrar

THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA

MISCELLANEOUS APPLICATION No. 39 OF 2001

**THE ENVIRONMENTAL ACTION NETWORK LTD..... APPLICANT
VERSUS**

- 1. ATTORNEY GENERAL**
- 2. NATIONAL ENVIRONMENT MENAGEMENT
AUTHORITY.....RESPONDENTS**

BEFORE: THE HON. JUSTICE MR. J. H NTABGOBA

Civil Procedure: Whether the application for leave to appeal was made within the stipulated time.

Civil Procedure: Whether an application can be amended without leave of court.

On 10th September 2001 the applicants filed an application for leave to appeal at the court of appeal with a title “in the Court of Appeal of Uganda...” without an accompanying affidavit. The applicants were granted an adjournment to amend the notice of motion instead they filed a fresh application with a supporting affidavit on 15th October 2001.

When the matter came up for hearing, counsel for the respondent objected to the application on grounds that it was time barred as it was not brought within 14 days from date of order intended to be appealed against.

HELD:

1. The second application for leave to appeal was filed out of time.
2. The second application could not amend the first one without leave of court.
3. Since the first application filed out in time was withdrawn, there was no application to amend and the second application was filed out of time.

Application struck out.

Editorial Notes: This matter eventually was referred to the court of appeal where it was discussed.

THE REPUBLIC OF UGANDA

**IN THE HIGH COURT OF UGANDA AT KAMPALA
MISC. APPLIC. NO. 39 OF 2001**

THE ENVIRONMENTAL ACTION NETWORK LTD:.....APPLICANT

VERSUS

**1. ATTORNEY GENERAL }
2. NATIONAL ENVIRONMENT }.....RESPONDENTS
MANAGEMENT AUTHORITY }**

BEFORE: The Hon. The Principal Judge, Mr. Justice J.H. NTABGOBA

RULING.

On 10th September 2001 the Attorney General and National Environment Management Authority (NEMA), herein to be referred to as the applicants, filed Miscellaneous Application No. 609 of 2001 in this Court but headed “In the Court of Appeal of Uganda at Kampala” but they did not accompany it with a supporting affidavit. For the omission to accompany it with an affidavit, Mr. Oluka has informed Court that he had inadvertently made the omission.

With regard to the heading “In the Court of Appeal of Uganda” which I should have thought Counsel could have verbally applied to amend on 19/9/2001 when the application instead made the following application:-

“The respondents were not served. I just discovered it now. So it is clear we did not serve them. I also want to amend so that the application is in the High Court and not in the Court of Appeal.”

He did not apply for leave to amend. I granted him the adjournment as applied for in the following words:-

“Hearing is adjourned to 17/10/2001”.

The learned State Attorney rather than amend, went ahead to file a fresh application for leave to appeal to the Court of Appeal, which this time he duly accompanied with a supporting affidavit. He filed it on 15th October 2001.

On 17/10/2001 when the application was called for hearing Mr. Karugaba Phillip, learned Counsel for the Environmental Action Network Ltd., the respondent, raised a preliminary objection to the effect that the application was time barred because it was not brought within 14 days as required under Rule 39(2)(a) of the Court of Appeal Rules which provides that:-

“(a) Where an appeal lies with leave of the High Court, application for the leave shall be made informally at the time when the decision against which it is desired to appeal is given; or failing that application or if the Court so orders, by notice of motion within fourteen days of the decision.”

My decision against which it is desired to be made on 28/9/2001 and the learned State Attorney did not then make any informal application for leave to appeal. Of course he was absent even

though he had been notified of the date of reading the decision. I agree with him when he argues that his earlier application filed “in the Court of Appeal of Uganda at Kampala” was filed within the stipulated period of 14 days, but he withdrew it and instead of amending it, brought a fresh application which was filed late.

Learned State Attorney may be right when, basing on the wording of Rule 3 of Order 48 of the Civil Procedure Rules, he argues that his application “in the Court of Appeal of Uganda at Kampala” was proper without a supporting affidavit. I agree with him on that argument in view of the wording of the rule which implies that a notice of motion not grounded on evidence by affidavit may be proper. However, his argument seems to shoot him in the arm when he argues that the present application is the same as the one filed “in the Court of Appeal of Uganda..” since the present one has a supporting affidavit. I should, in fact, mention that he had no authority to amend his application without the leave of the Court in view of the provision of Order VI (as amended by Statutory Instrument No. 26 of 1998) which in Rule 19 provides that:-

“A plaintiff may, without leave, amend his plaint once at anytime within 21 days from the date of issue of summons to the defendant or, where a Written Statement of Defence is filed, then within 14 days from the filing of the Written Statement of Defence or the last of such written statements.”

In this case, even assuming that the application filed “in the Court of Appeal of Uganda...” was properly filed and therefore amended by the one filed on 15th October 2001, there is no sign that it was served on the respondent, although to be fair to the applicants, the respondent must have received the notice of motion. The point I am making, however, is that it did neither comply with the 21 days or the 14 days provided in Order 6 Rule 19 (as amended by S.I. No. 26/98). And no leave is shown to have been sought to amend.

The learned State Attorney then makes a mistake when he argues that his application was on a point of law. His application was to enable him to challenge this court that it failed to refer to an authority of the decision in the Rwanyarare petition and that the Court should have held that Misc. Application No. 39/2001 was a nullify in so far as the applications therein should have sought the permission of the Court to represent the public.

A part from my decision that in public interest litigation there was no need to follow order 1 rule 8 of the Civil Procedure Rules, as also there was no requirement to sue under Act 20 of 1969, I see nothing being a point of law being sought to be appealed against. I think the appeal sought was on a point of fact, namely, the alleged failure of the Court to follow the Rules of procedure. But this is a by the way. The fact is that neither did the applicants file the amendment within the stipulated period nor did they seek leave of the court to amend outside that period.

It is in light of the above that I struck out the application (amendment) and promised to give these reasons in support of my decision.

Signed

J.H. NTABGOBA.
PRINCIPAL JUDGE
6/11/01

**THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT KAMPALA**

Misc. Cause No. 268 of 1999

**NATIONAL ASSOCIATION OF PROFESSIONAL ENVIRONMENTALISTS
VS
AES NILE POWER.**

Civil Procedure-application-order 48 r 1 & 2, s.109 Civil Procedure Act

Civil Procedure-cause of action-what procedures to follow-whether remedies available to applicant

Civil Procedure-temporary injunction-conclusion of PPA-approval of EIA by NEMA-whether procedure adopted in seeking relief under S.72 NEMA Statute was competent

This application was brought by way of notice of motion under Order 48 Rules 1 and 2 of the Civil Procedure Rules, s.109 of the Civil Procedure Act and S.72 of the NEMA Statute.

It sought a temporary Injunction to stop the respondent from concluding a power purchase agreement with the Government of Uganda until the “National Environment Management Authority (NEMA)” had approved an Environmental Impact Assessment (EIA) on the project.

The motion further sought declarations that such approval of the EIA is a legal pre-requisite and that endorsement of the project by Parliament without NEMA approval of the EIA would contravene a law and thus be illegal, null and void and of no effect.

Held.

1. In the circumstances of the case, the applicant has reason to seek the intervention of this court in so far as no approval of the environmental aspects of the study has been brought in evidence to satisfy the requirements of s.20 (b) of the NEMA Statute. To this extent, he’s entitled to bring the action.
2. I am able to declare though not in terms of the declaration sought that the EIA’S presented by the respondents consultant in this project must be approved by the lead agency and the National Environment Management Authority.
3. The declaration sought by the appellant relating to parliamentary approval is unnecessary to consider since parliament would equally be advised and is capable of knowing their power. Since no approval has been given by Parliament, this court can’t inquire as to whether it will or will not grant the approval in contravention of the law.

In the circumstances, the declarations sought in the motion are not granted; save that this court declares that approval of the EIA by NEMA is required under s.20 of the NEMA Statute.

The injunction is also denied.

Editorial notes: This is a case in which the lawyer should have taken more care. He made very poor pleadings leaving the judge with no option. He ought to have proceeded either under Article 50 of the Constitution or S. 72 of NES.

THE REPUBLIC OF UGANDA

**IN THE HIGH COURT OF UGANDA AT KAMPALA.
MISC. CAUSE No. 268 OF 1999.**

**NATIONAL ASSOCIATION OF
PROFESSIONAL ENVIRONMENTALISTS }::::::::::::::::::::::::::::: APPLICANT
VERSUS**

AES NILE POWER LIMITED::::::::::::::::::::::::::::::::::::: RESPONDENT

BEFORE: THE HON. JUSTICE RICHARD O. OKUMU WENGL.

RULING

This application by way of Notice of Motion was brought under Order 48 Rules 1 and 2 of the Civil Procedure Rules, section 101 of the Civil Procedure Act and Section 72 of the NEMA Statute which I take to refer to the National Environment Management Authority Statute 4 of 1995. It seeks a temporary injunction to stop the Respondent concluding a power purchase agreement with the Government of Uganda until the “National Environment Management Authority (NEMA)” has approved an Environmental Impact Assessment (EIA) on the project.

The motion further seeks declarations that such approval of the EIA is a legal pre-requisite and that any endorsement of the project by Parliament without this EIA approval would contravene the law. The end result is that the applicant is asking Court to stop signature of the agreement with the Executive and declare that its endorsement by Parliament without NEMA approval of the EIA would contravene a law and thus be illegal, null and void and of no effect. The motion was supported by the affidavit of Mr. Frank Muramuzi, the President of the applicant, a Non-Governmental Organization active in the area of environment protection. When the application came for hearing the Respondents were not represented nor were they in Court. There was no clue that the Respondents were contesting the claim. An affidavit of service was filed indicating that process was served on the Respondents’ Chief Administrator Mr. Henry Kikoyo who signed and stamped on a copy of the motion on 29th March 1999. On an application by Counsel for the applicant this matter proceeded ex-parte.

Mr. Kenneth Kakuru learned Counsel for the applicants first tussled with the issue of procedure. He submitted that under the NEMA Law there was no prescribed procedure to be followed by an applicant who seeks a remedy under that law. Counsel submitted that under section 72 of the NEMA Statute any party who feels that the environment is being harmed or is under threat of being harmed may bring an action to prevent or stop such harm and obtain an order from Court if the environment has been harmed to restore it. He urged this Court to hold that in the circumstances the main issue was that there was a danger of a law being violated and all that he needed was a declaration to this effect and an order to prohibit the infringement. Counsel submitted that there was no pecuniary claim against the Respondent or any injury claim as such but that whereas an Environmental Impact Study (EIS) has been submitted by the Respondent for consideration and approval by NEMA, the Respondent was in high gear of having the Implementation Agreement and Power Purchase Agreement approved and executed before the NEMA approval. Learned Counsel referred this Court to Articles 2.8 (a) of the Implementation Agreement that states: -

“(a) The Company shall prior to Financial closing conduct or cause to be conducted an

Environmental Impact Study in accordance with the Laws of Uganda. Such Environmental Impact Study shall be subject to approval by the Government of Uganda,”

Learned Counsel further pointed out that under paragraph 3.2 of the same agreement the Government of Uganda would on signing the agreement proceed to compulsorily acquire the site, the staging area and the inundated land and the U.E.B shall acquire rights to the route, way leaves and easements. Mr. Kakuru contended that since signing these agreements would trigger all these activities, it would enable the Respondents circumvent the law in contravention of which the project would be endorsed. The NEMA approval which is progressing at its statutory pace would be rendered meaningless if not nugatory. The danger of acting in this way and getting Parliament to endorse the project and the Executive to sign the agreements prior to the approval by NEMA was that the NEMA law would have been contravened in the process. Mr. Kakuru argued that by-passing NEMA procedures, which was possible so long as Parliament and the Executive actions above had been concluded, was the bone of contention. He further contended that the NEMA procedure was a protective measure which the public who are concerned with the project would invoke as part and parcel of public protection of the environment and accessing the Constitutional guarantee of the right to a clean and healthy environment. He submitted that the NEMA procedure was a necessary ingredient of this right and that the short cut being adopted by the Respondent to avoid compliance was in effect directed at violating the NEMA Statute and ultimately the Constitutional regime of Environmental rights in Uganda.

Mr. Kakuru then referred to Order 37 of the Civil Procedure Rules and argued that the requirement therein for there to be a pending suit when seeking injunctions was inapplicable. He stated that this was a case of public interest litigation to protect a public right while Order 37 was restricted to property disputes, private law rights in contract and tort. Counsel argued that this was the reason why although he sought an order of a temporary injunction, he did not proceed under Order 37 of the Civil procedure Rules. He cited *Nakito & Brothers Ltd. Vs. Katumba* to support the view that under Section 2 of the Civil Procedure Act a Notice of Motion is a suit. He prayed that this Court accepts the motion and entertains it as such and grant the relief sought. He contended that Environmental Law has opened up new horizons for litigation and adjudication having codified common law especially in respect of locus standi and procedure that is required to take an urgent track. This complied with the new Constitutional Mandate on a clean and healthy environment which required that such matter be dealt with expeditiously by Notice of Motion rather than by way of a plaint. Counsel contended that this action was about breach of law whereby the respondent navigates his project around NEMA procedure and presses for Parliament to endorse it and the Executive to sign the deal.

I must confess that I found it difficult diagnosing the claim and the remedy in this case. In the first place the proposed implementation agreement which has been initially stipulated, in article 2.8 cited earlier, that EIA shall be subject to approval by the Government of Uganda. The respondent only undertook to conduct the study which it did and left the approval process to the Government. In other words, the respondent does not have to or want to subject himself to the process of getting the approval which the other party the government has the responsibility to do. If therefore the Government executes the agreement as it is, these terms would be binding and this Court cannot speculate that indeed the agreements would or would not be signed before the approval of the impact study by NEMA. It would however not be difficult to expect that such approval would be obtained after which the project can be considered environmentally viable and can be implemented. But the suspicions and concerns raised by the applicant that unfortunately have not been dispelled by hearing the respondents or reading any counter raised many issues.

The level of suspicious regard towards the Respondent was clearly brought out by the argument

that the moment the agreements are signed major actions by the Government and UEB are set in motion rendering NEMA procedures superfluous. It was further brought out by Counsel for the applicants' reference to the brittle low capital base of the Respondents whose share capital was Shs.1,000,000/= only yet it was headed for a US \$ 500 million project with massive civil works. This he argued could not promise much for the "Polluter-pays" principle of environmental law. Counsel contended that this unlikelihood of the respondent company passing through the eye of the needle placed in its way by NEMA process and criteria, made the alternative of the shortcut attractive to the respondents. In clause 3.2 of the implementation agreement, the respondent is specifically protected against environmental liabilities that may not encumber any land acquired by the Government and UEB besides NEMA approval being the responsibility of Government in the first place. Finally counsel for the applicants while praying for the orders and declarations sought in the motion, stated that no orders for costs were being sought in this matter which was brought as a public interest issue.

As correctly sensed by counsel for the applicant the issues raised by this application relate to whether there is a cause of action, what the procedures should be and if the remedies sought are available to the applicant. I would rather approach it this way and as a result be able to determine if the matter is not frivolous. In his submission Counsel contended that the application was not frivolous as it was brought to address legal concerns. Violation of the law, he said, was not a frivolous matter. Counsel argued that the applicant being an NGO has come to Court seeking the enforcement of the law which was in danger of being violated in the process of which the public right to environmental protection was being infringed. He submitted that the alteration of the environment being planned by the Respondents could or could not be harmful. The impairment of the environment could only be determined by the process of approval of the EIA by NEMA.

As can be seen this application is canvassing wide environmental concerns. It is only in looking at the legal basis of these concerns that the issues can be determined. According to the National Objectives and Directive Principles in the Constitution of Uganda the state is empowered to promote sustainable development and to prevent or minimise damage and destruction to land, air and water resources resulting from pollution or other causes. The state and local governments are further enjoined in the Environmental Objectives (Objective No. XVII) to create and develop parks, reserves and recreation areas and ensure the conservation of Natural Resources. It shall also promote the rational use of natural resources so as to safeguard and protect the bio-diversity of Uganda. Article 245 of the Constitution mandated Parliament to provide by law, measures intended to protect and preserve the environment from abuse, pollution and degradation; to manage the environment for sustainable development and to promote environmental awareness.

The NEMA Statute No. 4 of 1995 is for the purpose of this provision such a law being then the existing law. Now under this Statute environmental Impact Assessment studies are required before any development project such as the one pursued by the respondents is approved. The respondent has conducted the study having appointed W S Atkins International as the study Consultants. This is annexure B to the second supplementary affidavit of Mr. Muramuzi. In this affidavit the deponent states that the study as presented did not address the issue of the loss of the Bujagali Falls and the appropriateness of acquiring alternative cheaper and environmentally more friendly sources of power. The deponent states further that whatever information was provided in respect of this and in particular in respect of Karuma Falls was incomplete and misleading. The deponent then states that this together with the ambiguity in the name of the Respondent was likely to lead to rejection of the study by NEMA and to reflect on the capacity of the Respondent to carry on the proposed project without resort to an environmental disaster. The study was conducted for "AES Nile Power" a joint venture between AES Electric Ltd., a UK wholly owned subsidiary of the AES Corporation, a US Company and Madhvani International of Uganda –

according to the W S Atkins Executive summary (annexture B). According to the first supplementary affidavit , Mr. Muramuzi averred that contrary to this statement the Respondent is not a foreign Company but a local company with only Shs.20,000/= paid up capital. He doubted the capacity of such an entity to execute a project of the magnitude proposed without causing great environmental destruction, massive flooding and elimination of the spectacular Bujagali Falls. He further deponed that a failed project would interfere with the natural flow of the River Nile and cause other environmental products without even producing Electric Power. He lastly deponed that the investment license held by the respondent had no capacity to demonstrate ability to mitigate environmental damage before signing any agreement as required by the law. In presenting its case the applicant relied on section 35 and 72 of the NEMA Statute and Regulations made under that law and suggested that the legal regime for environmental protection was a novel area with imprecise justifiability issues.

Section 35 of the NEMA Statute prohibits certain works on rivers and lakes that affect the flow or the bed and or divert or block a river or drain a river or lake. Section 72 of the Statute provides the parallel avenue for a person to apply to Court notwithstanding any action by the NEMA authority for an environmental restoration order against a person who has harmed, is harming or is likely to harm the environment. Sub section 2 of that section provides –

“(2) For the avoidance of doubt it shall not be necessary for the Plaintiff under this section to show that he has a right of or interest in the property in the environment or land alleged to have been harmed or in the environment or land contiguous to such environment or land”.

The environmental Impact Assessment is a study that is required to be conducted as the guiding environmental regulation model for implementation of certain projects. Dams on rivers is one such project as stated in the Third Schedule. Electrical Infrastructure is another. In section 97, it is a criminal offence for any person to fail to prepare an EIA contrary to section 20 of the Act. And a person who fraudulently makes a false statement in an environment Impact Statement commits an offence. I have however not been able to pin point the consequence of proceeding with a project once one has placed an impact study with NEMA or no green light has come from NEMA. Section 20 (6) of the NEMA Statute requires that the environmental aspects of a project as spelt out in an Environment Evaluation be approved first.

The above describes briefly the general legal landscape where the applicants concerns are located. The first issue is whether the procedure adopted by him is proper and competent. There is no prescribed procedure to seek environmental relief under section 72 cited by Counsel. The reading of sub-section 2 of that section would however imply two things. Firstly it refers to a Plaintiff. This would in my mind directly refer to proceeding by way of plaint. Secondly this section appears to be the enactment of class actions and public interest litigation in environmental law issues. This is because it abolishes the restrictive standing to sue and locus standi doctrines by stating that a plaintiff need not show a right or interest in the action. There is also an administrative remedy available in section 69 of the Statute which empowers NEMA to issue environmental restoration orders. Section 71 empowers NEMA to enforce its own orders. The recourse to Court is however subjected to exhaustion of this remedy as the section 72 proceeding before Court is without prejudice to the powers of NEMA under section 69 of the Statute. But even then this application does not seek order under section 72 of the NEMA Statute.

Although the applicant cited the section and contended that the respondent is likely to harm the environment he has not prayed for an order to restore the environment. What he has sought is an injunction to stop the signing of the agreements and declarations. An injunction of this nature

cannot be given in my view since the agreements per se do not alter the environment though the execution thereof places the respondent in a position so as to be able to alter the environment by commencing works. I would conclude here that if this is correct then the order sought relates to a matter that by itself is not proximate to environmental damage as such though the signed agreement could be evidence of a reasonable likelihood of possible harm about to be done to the environment.

Without going into the realm of freedom of contract, I would find it hard to prevent the act of signing the agreement as such. Partly I am aware of executive discretion in this matter, which I hope would be exercised with full awareness that a procedure such as the conduct of an acceptable EIA has to be complied with, and the government or its agency has to be satisfied that the works envisaged will not damage the environment. I think the executive is bound to follow the law and a remedy would be available if indeed a private party caused it to go into a hazardous project. There are many procedures available. For instance writs of certiorari, prohibition and mandamus are available.

Also proceedings under Article 50 of the Constitution on breaches of an environmental right or freedom would be available. In all these proceedings a notice of motion would be the correct pleading in my view to commence these actions. However, since the applicant did not move this Court for the above remedies, I would have difficulty reaching a decision that injunctive and declaratory relief could be secured by proceeding the way the applicant did without invoking Article 50 of the Constitution and the Fundamental Rights and Freedoms (Enforcement) Rules S.I 26 of 1992. The latter rules made under the repealed Judicature Act 1967 are applicable in my view to proceedings under Article 50 of the Constitution as they were saved by the Judicature Act 1996.

Counsel for the applicant asked this Court to entertain this application on the ground that the applicant had come to Court for redress and could not be turned away. I have already stated that the applicant had a right to take action without having to show standing to sue on account of the clear provisions of the NEMA Statute. However, standing to sue is a procedural question not a substantive one like the issue of cause of action. But it is also true that a declaratory action is open to an individual without having to demonstrate a cause of action.

In other cases a cause of action needs to be raised in the pleadings and where the cause of action is obviously and almost incontestably bad, the Court would not entertain the matter. Otherwise a party would not be driven from the judgment seat without having his right to be heard. In deciding whether there is a cause of action one looks ordinarily only at the plaint (or pleadings). The case of *The Attorney-General Vs. Olwoch* - (1972)EA 392 is authority for this point, and has been followed in other cases after it. This is the position which obtains in other jurisdictions on this question in respect of civil actions and even public interest law suits which the applicant claims his own to be. In the Canadian case of *Operation Dismantle & Others Vs. The Queen and Others* (1983) ICF 429 the motion sought to bar the testing of Cruise Missiles in Canada which the Plaintiff contended violated the Canadian Charter of Rights. The Court stated that beyond the statement of claim it could not admit any further evidence and the statement stands and falls on the allegations of fact contained in it, so long as they were susceptible to constituting a scintilla of a cause of action. The test to be applied was whether the germ of a cause of action was alleged in the claim. The Court further held that if the statement contained sufficient allegations to raise a justifiable issue then even the claim cannot be corrected by amendment and there was no compliance with rules of practice this does not render the proceedings void in which an irregularity occurs which can be corrected by an amendment. The Supreme Court of Nigeria in *Thomas & Others Vs. Olufusoye* (1987) LRC (Const.) 659 defined cause of action to:

“Comprise every fact (though not every piece of evidence) which it would be necessary for the plaintiff to prove if traversed to support his right to the judgment of the Court ... every fact which is material to be proved to enable the plaintiff to succeed. The words, have been defined as meaning simply a factual situation the existence of which entitled one person to obtain from the Court a remedy against another person and it is the subject matter or grievance founding the action, not merely the technical cause of action.”

The Nigerian Supreme Court in that case cited the dictum of Lord Pearson in *Drummond – Jackson Vs. British Medical Association* (1970) 1 WLR 688 (C.A.) where it was held:

“Where the statement of claim discloses no cause of action and if the Court is satisfied that no amendment however ingenious will cure the defect the statement of claim will be struck out and the action dismissed. Where no question as to the civil rights and obligations of the plaintiff is raised in the statement of claim for determination the statement of claim will be struck out and the action dismissed.”

I have discussed these issues because the arguments raised by Counsel for the applicants claim beyond just the ordinary private law rights litigation to the wider issues relating to public interest law and a situation where a party merely seeks declaratory orders relating to compliance with the law failure of which has potential danger for the environment.

I am satisfied that in the circumstances of this case the applicant has reason to seek the intervention of this Court in so far as no approval of the environmental aspects of the study has been brought in evidence to satisfy the requirements of section 20 (6) of the NEMA Statute. To this extent he is entitled to bring this action. As a public spirited body, the applicant is espousing the public interest although I must say he has done so rather too quickly, almost prematurely. To this extent I accept to entertain the application which though procedurally faulty could be cured by amendment. In any case there was no challenge put forward by the respondents and the applicant would be at liberty to pursue further his substantive claims by filing amended pleadings in place of the motion filed in Court. I am able to declare though not in terms of the declaration sought that the EIAs presented by the Respondent’s consultant in this project must be approved by the Lead Agency and the National Environment Management Authority. This is the distance I can go in this matter. It has already been stated earlier that it is the view of the Court and I restate it that the signing of the protested agreements are the subject of the law. It is however not for this Court to stop the signing of agreements by injunction or otherwise since signing agreements per se does not cause environmental disasters. If an agreement is signed and it is in contravention of any law, then it can be challenged. Any action based on it can also be challenged. Therefore it is in the interest of the parties to it to conform to the law.

The declarations sought by the applicant relating to the Parliamentary approval is unnecessary to consider since Parliament would equally be advised and is capable of knowing their power. Since no approval has been given by Parliament this Court cannot inquire as to whether it will or will not grant the approval in contravention of the law. In the circumstances the declarations sought in the Motion are not granted; save that this Court declares that approval of the EIA by NEMA is required under Section 20 of the NEMA Statute. The injunction is also refused. This matter proceeded ex-parte. I am surprised why this was the case. I must say that a party must come to the Court to be heard. In Court matters epistolary proceedings have not taken root in this Country. No amount of media action, or reaction though effective can be substitute to going to Court to challenge ones adversary. To ignore Court Summons is itself fool hardy and places the party so summoned in a desert. However, no costs were asked for this action and I order none.

Signed

RICHARD O. OKUMU WENGI

Ag. JUDGE

19/04/99

23/04/99: Kakuru for Applicants
Henry Kikoyo representing the respondents.

Court; - Ruling delivered in the presence of the above parties.

Signed

GODFREY NAMUNDI

DEPUTY REGISTRAR, CIVIL.

THE REPUBLIC OF UGANDA

**IN THE HIGH COURT OF UGANDA AT KAMPALA
CIVIL APPEAL No. 3 OF 1996**

**DR. BWOGI RICHARD KANYEREZI..... APPELLANT
VERSUS**

**THE MANAGEMENT COMMITTEE
RUBAGA GIRLS SCHOOL..... RESPONDENT**

BEFORE: THE HON. JUSTICE E.S LUGAYIZI

Civil Procedure: Whether the plaint disclosed a cause of action
Civil Procedure: Whether government was a party to this action
Tort: What amounts to a private nuisance?

This was an appeal. The applicant by notice of motion filed an application seeking a permanent injunction. The main prayer of the applicant was that an injunction is issued against the respondent restraining them from using the VIP toilets at the lower boundary of the school which were directly adjoined to his home. The appellant contended that, if the VIP toilets were used, they would emit smelly gases directly into his house thus constituting a private nuisance.

HELD:

1. A private nuisance is private where it exclusively affects a private person and interferes with enjoyment of his land.
2. A permanent injunction is issued against the respondent from using the twelve VIP toilets.
3. The respondents allowed 90 days to relocate the toilets from date of judgement.
4. The respondent pay costs.

Appeal allowed

Editorial notes: Such an action could not have been brought by a party not directly affected.

**THE REPUBLIC OF UGANDA.
IN THE HIGH COURT OF UGANDA AT KAMPALA
CIVIL APPEAL NO.3 OF 1996**

DR. BWOGI RICHARD KANYEREZI} ::::::::::::::::::::::::::::::: APPELLANT

VERSUS

**THE MANAGEMENT COMMITTEE
RUBAGA GIRLS SCHOOL }::::::::::::::::::::::::::::: RESPONDENT**

BEFORE: THE HON. JUSTICE E.S. LUGAYIZI

JUDGMENT

This is an appeal. The appellant (Dr. Bwogi Richard Kanyerezi) having been dissatisfied with the judgment and decree of His Worship Aweri Opio dated 7th December, 1995, appealed to this Honorable Court and prayed for the following remedies,

1. That this appeal be allowed and the Decree of the Chief Magistrate's Court be set aside with costs.
2. That a permanent injunction be granted against the respondent preventing it from using the 12 VIP latrines situate on the lower end of its school premises.

The background to this appeal is briefly as follows. The appellant a medical doctor who has been residing at plot No. 170 Mugwanya Road Rubaga since 1972, filed Mengo Civil Suit No. 218 of 1994, against the respondent which is running Rubaga Girls School. His main complaint was that the respondent was constructing 12 VIP latrines at the lower boundary of its school which directly adjoins the plaintiff's home. And this would by reason of the attendant bad smell constitute a nuisance by unreasonably interfering with and diminishing the appellant's ordinary use and enjoyment of his home. The respondent denied the above, claim. When the case came up for hearing, the appellant called four witnesses. Those witnesses told court three important facts. First of all, that the appellant's home was very close to the 12 VIP toilets in issue. Secondly, those VIP toilets by nature emit smelly gases through their vent. Thirdly, that the toilets in issue which were being used by over 600 students constantly emitted smelly gases; and those gases went directly into the appellant's house, thus making life very uncomfortable for its inhabitants. According to the appellant those gases constituted a nuisance in law. In the circumstances he needed a permanent injunction to restrain the respondent from using the said toilets.

On the other hand, the respondent's side called two witnesses who basically told court two things. First of all that the appellant's home was quite far away from the respondent's VIP, toilets. Secondly, that VIP toilet did not emit smelly gases. Such gases would immediately be diluted by air or get oxidized the moment they came out of the VIP toilets' vent. As a result the respondent's side submitted that no injunction should issue against it.

The respondent also argued that even where the trial court found against it on the merits of the case, since the VIP toilets' Programme was a Government Programme again court would be prevented by *S.15* of the Government Proceedings Act (Cap 69) from issuing an injunction against it. The respondent's side therefore called upon the trial Magistrate to dismiss the appellant's action.

After the trial Magistrate had apparently visited the locus he agreed with the respondent's side on all the above facts. As a result he dismissed the appellant's action with costs.

It is against that background that the appellant appealed to this Honorable Court. While the appellant was represented by Mr. Kanyerezi Sewanyana. Mr. Bwengye represented the respondent in this appeal. The Memorandum of appeal consisted of three grounds. The first two were consolidated and argued as one ground at the time of hearing this appeal.

However, because I sincerely believe that the substance of this appeal revolves around the issues below. I will simply concentrate on those issues which are as follows:

1. Whether the VIP toilets in issue emitted smelly gases which reached the appellant's home?
2. In case they did, whether such gases constituted a private nuisance, which is actionable in law?
3. The proper remedies in this appeal?

I will deal with the above issues in relation to the evidence on record in the order in which they occur.

As far as the first issue is concerned, PW4 a former K.C.C. health Inspector told the lower court that VIP toilets by nature emitted smelly gases; and that is why they were always located on the leeward side of other premises. He further pointed out that in the instant case the respondent's VIP toilets were built on the wind ward side of the appellant's house and their vent was below that house. He then argued that the above being the case, the smelly gases from those toilets were likely to flow straight into the appellant's double storied house on the opposite side.

That aside, PW1, PW2 and PW3 also told the lower court that the VIP toilets in issue constantly emitted smelly gases, which reached the appellant's house.

That evidence was neither shaken nor contradicted by anyone, let alone DWI (the Headmistress of the defendant's school) who could not confirm or deny it. To me therefore, after considering all the above, I am satisfied that the appellant had on a balance of probabilities proved in the lower court that the respondent's VIP toilets emitted smelly gases which reached his home. One wonders why the trial Magistrate decided to overlook all the above evidence and consequently come to the wrong conclusion. Be that as it may, the first issue is answered in the affirmative.

Concerning the second issue, according to Winfield on Tort Eighth Edition pages 353 – 367, a

nuisance is private where it exclusively affects a private person and not a sizeable number of the community where it occurs. The learned authors of the said book described a nuisance as an unlawful interference with a person's use or enjoyment of land. Such interference in essence being either of a continuous or recurrent nature and usually stenches and smoke would qualify under that description. Despite that, however, the said writers continued to say that whether a nuisance is actionable or not will depend upon a variety of considerations especially the character of the defendant's conduct and a balancing of conflicting interests (i.e. the right of the defendant to enjoy his property as he wishes as against the right of his neighbors to enjoy theirs without interference etc, etc.). Where the defendant has acted reasonably, irrespective of the fact that his actions may lead to a nuisance, such a nuisance would not be actionable, otherwise it would be. Lastly, the mere fact that the action or process or business giving rise to the nuisance complained of is useful to the public generally is not a good defence.

According to PWI's and DWI's evidence, it is only PWI who has been complaining of the to a nuisance, such a nuisance would not be actionable, otherwise, it would be. Lastly, the mere fact that the action or process or business giving rise to the nuisance complained of is useful to the public generally, is not a good defense.

According to PWI 's evidence, it is only PWI who has been complaining of the smelly gases in issue. Actually PWI appears to be the only close neighbors to the respondent on his side of the locality. As a result it is, in my view, reasonable to say that those gases almost exclusively affect the appellant in the locality under consideration. As far as PW3 was concerned, the said gases were most smelly in the evenings. And that caused the appellant's, family to close the windows of the sitting room and dining room at that time, but even then the bad smell would filter into the house.

The above evidence which was not shaken or contradicted clearly shows that by their interference with the appellant's enjoyment of his residence those smelly gases caused the plaintiff's family great inconvenience and discomfort. That in my view constituted a private nuisance to the plaintiff.

In addition to the above, PWI also told the lower court that when the respondent was on structing the said toilets, he tried to negotiate with it. That was done with a view to having it change its mind in respect of the location of those toilets. However, the respondent did not agree. That was despite the fact that it had other alternative spots on its land where it could locate the said toilets. Further to the above, the said toilets were built on the wind ward side of the appellant's house; and according to PW4 that meant that the smelly gases from them would go straight into the appellant's house.

All the above evidence was also not shaken. To me, it, at least, shows unreasonableness on the part of the respondent. It would appear the respondent did not care whether the appellant was inconvenienced or not at his residence by .The smelly which was hound to come from those toilets that were to be very frequently used every singly day by such a big number of people (i.e.

over 600 people).

For the above reason therefore the private nuisance in issue is, in my view, actionable in law. The fact that the respondent's school benefits society does not justify the existence of the said nuisance. In the circumstances, the second issue is answered in the affirmative.

Concerning the third issue, first of all it was argued by counsel for the respondent's side (Mr. Bwengye) that even where the appellant sued in respect of the first two issues, court was prevented by section 15 of the Government Proceedings Act (Cap. 69) from issuing an injunction against the respondent in this matter. According to Mr. Bwengye, to issue an injunction against the respondent was the same thing as issuing it against Government. That was so, since the VIP toilets' programme was a Government programme.

For the sake of clarity, I will reproduce below, the provisions of section 15 of the Government Proceedings Act (Cap. 69). They read as follows,

"15 (1) In any civil proceedings by or against the Government the court shall, subject to the provisions of this Act, have power to make all such orders as it has power to make in proceedings between private persons, and otherwise to give such appropriate relief as the case may require. Provided that

- (a) where in any proceedings against the Government any such relief is sought as might in proceedings between private person be granted by way of injunction the court shall not grant an injunction but may in lieu thereof make an order declaratory of the rights of the parties and;
- (b).....

(2) The court shall not in any civil proceedings grant any injunction against an officer of Government if the effect of granting the injunction would be to give any relief against the Government which could not have been obtained in proceedings against Government".

While in subsection (1) above the prohibition is in respect of any proceedings against Government, "that in subsection (2) above is in respect of an officer of Government" in any civil proceedings if the effect of granting the injunction, etc. would be to give any relief against Government which could not have been obtained in proceedings against Government.

It is quite obvious that we do not have the above scenario in this matter. The suit in issue was neither against Government nor was any order against any officer of Government sought under it. In fact the said suit was against a private respondent which is the exclusive owner of the VIP toilets in issue. One therefore wonders why Mr. Bwengye held the above erroneous view!

Be that as it may, since the appellant succeeded in respect the two issues he must also succeed in respect of the third one. All in all therefore this appeal has succeeded. And as a result the

following orders are made,

1. This appeal is allowed and the decree of the Chief Magistrate's court is hereby set aside.
2. A permanent injunction preventing the respondent from using the 12 VIP toilets situate on the lower end of the respondents school premise is here granted.
3. To allow the respondents time to relocate the above toilets or to make alternative arrangements in respect of the above permanent injunction shall not take effect immediately but after 90 days from the date of this judgment
4. Costs of this appeal and of the suit in the lower court shall be paid by the respondent.

E.S. LUGAYIZI
JUDGE.

17/2/98

Read at 9.45 before:

Mr. Sekatawa for Applicant
Mr. Tibesigwa for Respondent
Mr. Mulindwa court

E.S. LUGAYIZI
JUDGE.
17/2/98

**THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT KAMPALA
MISC. APPLIC. No. 85 OF 1993**

- 1. DR. JAMES W. RWANYARARE**
 - 2. HAJI BADRU K. WEGULO**
 - 3. MACARIOUS BONSE ASUBO..... APPLICANTS**
- VERSUS**

THE ATTORNEY GENERAL..... RESPONDENT

BEFORE: THE HON. MR. JUSTICE F.M.S EGONDA - NTENDE

*Constitutional law: Enforcement of rights under Article 22 of the Constitution.
Whether a statutory notice can be dispensed with in human rights cases.*

Constitutional law: Public interest cases under Article 50(2)

Constitutional law: Whether Article 50 excuses non-compliance with procedural requirements under civil procedure

This application was brought by Notice of Motion under Article 22(1) of the constitution seeking declaratory orders on grounds of infringement of fundamental rights and freedoms. When the matter came up for hearing, counsel for the respondent raised a preliminary objection that the application was in contravention Section 1 Act 20 of 1969 (the Government Proceedings Act) which required the applicants to give government statutory notice of 60 days.

HELD:

1. The purpose of a notice under Section 1 Act 20 of 1969 is to give government an opportunity to investigate a claim and settle it out of court.
2. The applicants issued a notice which they served upon the Attorney General informing him that implementation of Rules of the Constituent Assembly Bill of 1992 was likely to infringe their rights under the constitution.
3. The statutory notice served upon the Attorney General on 25th November 1992 by the applicants was good and valid.
4. In matters concerning enforcement of human rights, no statutory notice is required because to do so would condone the violation of the right and deny the applicant a remedy.

Preliminary objection dismissed with costs.

Editorial notes: Important to note is that this ruling was made before the 1995 constitution. The constitution upheld this position by enactment of Article 50.

Ogwal & 2 Ors. -vs- D.A of Mbale & 3 Ors. He prayed that this application should be dismissed with costs.

In reply, learned counsel for the applicants, Mr. Ben Wacha and Mr. Okumu Wengi addressed court in succession. Mr. Ben Wacha submitted that the Statutory Notice dated 25th November 1992 and served upon the respondents on 26th November 1992 complied with Section 1 of Act 20 of 1969. He submitted that the substance of the Bill especially those aspects complained of in the Statutory Notice were the same in substance and also word as in the Constituent Assembly Statute and the Election Rules. He submitted that the present application is based upon the same contentions as those in the Statutory Notice.

Learned counsel further submitted that the applicants complained that the implementation of certain rules contained in the Bill would contravene the applicants' various fundamental rights and freedoms and the passing of the Bill to the Statute. He submitted that what was important is that the cause of action, or the facts complained of in the Notice must be substantially the same as those contained in the suit. He contended that the notice dated 25th November 1992 adequately informed the Respondents of the action to be taken against them. He referred this court to cases as *Rajabi -vs- State* AIR/1973/Bombay 59 and *DUTT -vs- East Punjab Province* AIR/1958 (Punjab) 351 which considered the objects and sufficiency of a Notice similar to the one required under Section 1 of the Act 20 of 1969. He also referred this Court to *Das -vs- Union of India & Another* AIR [1989] S.C 674 and *Singh -vs- Union of India* AIR SCR 78t which is quoted therein. He prayed that this court finds the notice valid and dismisses the preliminary objection accordingly.

Mr. Okumu Wengi submitted that it was enough for the notice to provide sufficient facts. The notice did not expire unless the suit was barred as a result of time running out after the Notice. He referred to the cases of *Rwakosoro -vs- Attorney General* [1979] HCB 24.

Mr. Okumu Wengi further submitted that the implementation of the Bill consisted of 3 parts. (1) Legislature (2) Executive Action and (3) The administrative/quasi Judicial implementation of the Statute by the Commission. This, he submitted, was the gist of the cause of action, which is a continuing cause of action in the form of a Constitutional Tort. The enactment of the Law could not abate the cause of the action but on the contrary matured the cause of action. He concluded that the present cause of action appeared futuristic but was a gift of the Constitution itself. He prayed for the dismissal of the preliminary objection.

At the close of submissions I drew the attention of Mr. Tumwesige to the provision of Articles 22(1) and 22(5) of the Constitution and sought to hear counsel's view as to whether section 1 of the Civil Procedure and Limitation (Misc. Provisions) Act was consistent with the aforesaid provisions. Mr. Tumwesige replied that Parliament should have enacted a different law under Article 22(5) of the Constitution but in absence of a different law we must go by what Parliament has made which is Act 20 of 1969.

It may be useful to set out part 2 of the Statutory Notice which formed the crux of this preliminary objection. It states:

"(2). The facts constituting the cause of action which arose on the 16th day of October 1992 are as follows:

On the 16th day of October 1992 the National Resistance Movement NRM Government

published a Bill entitled "The Constituent Assembly Bill, 1992 meant to regulate elections to, and the operation of the Constituent Assembly. Clause 4 (3) of the Bill established the Constituent Assembly (Election Rules).

Under Section 11(1) of the said rules it is provided that "Elections for delegates shall be non - partisan and every candidate for election as a delegate within an electoral area shall stand and be voted for by voters upon personal merit and Section 11(2) of the rules & provides that "Any person who uses or attempts to use any Political Party... as a basis for such a person's candidature or election as a delegate commits an offence."

Section 12(1) of the Rules also provides that "For each electoral area the Returning Office shall prepare and conduct a programme to be known as can "dates meetings" and Section 12(10) of the rules provides that public rallies and any form of public demonstration in support of or against, any candidate shall not be permitted and any person who organizes or participates in any such rally or demonstration commits an offence.

The applicants will invoke the provisions of Article 22(1) of the Constitution of the Republic of Uganda in that the implementation of sections 11(1), 11(2), 12(1) and 12(10) schedule III of the Constituent Assembly Bill 1992 is likely to contravene their rights under Articles 8(2)(b), 18(1) and 20(1) of the Constitution of the Republic of Uganda and will seek a declaratory order that the said sections of the said schedule are unconstitutional. "

The present application seeks declaratory orders, inter alia, to the effect that the implementation of the Constituent Assembly (Election Rules); Rules 11(a), 11(2), 12(1) and 12(10) is likely to contravene the applicants right as provided under Articles 8(2)(b), 17(1), 18(1) and 20(1) of the Constitution. The substance of the rules set out in the schedule to the Constituent Assembly Bill is the same as the Constituent Assembly Election Rules attached to the Statute.

The question before me is whether the notice referred to above amounts to a notice of the subsequent application. Put differently is the cause of the action set out in the Statutory Notice the same as the one set out in the application now before this Court.

Before I resolve the said issue let me start by considering the objects of a notice under Section 1 of the Civil Procedure and Limitation (Miscellaneous Provisions) Act and what must constitute a valid notice. Asthana J, in the case of *Rwakosoro and 5 Ors -vs- The Attorney General* [1982] HCB 40, opined that the period of 60 days prescribed under the Act is intended for the purpose that the Government may investigate the claim and if possible settle it out of Court.

In the Indian case of *Rajabai -vs- State* AIR [1973] BOM 61, the court considered the object of a notice under section 8 of the Civil Procedure Code which has been said to be in pari materia as Section 1 of Act 20 of 1969. The Court stated:

... in *Chandulal-vs- Government of the province of Bombay* AIR 1943 BOM. 138 a division bench of this court had considered the object of giving notice. Beaumont CJ delivering the Judgment of the Division Bench observed as follows:

"The cause of action which is to be stated in the notice, is the bundle of facts which go to make

up the right in respect of which the plaintiff proposes to sue and it is obvious that before the suit can be brought, it may be that the bundle of facts will be added to or subtracted from and I do not myself think that the notice is invalidated because it refers to a possible additional claim, consequential upon the cause of action specified therein and states that if such additional claim arises, the plaintiff will sue also in respect of it.

If therefore a consequential claim arises as stated in the notice and the suit is filed after the consequential claim materialises although the same had not materialised at the date of the notice, the notice does not become invalid. The learned judges also observed in regard to the object of section 80 as follows:

"The object of Section 80 is to give the Secretary of State for India an opportunity of settling the claim, if so advised, without litigation, or, to enable him to have an opportunity to investigate the alleged cause of complaint and to make amends; if he thought fit, before he was impleaded in the suit."

Similar are the observations of a Division Bench of the Punjab High Court in Dutt -vs – East Punjab Province AIR 1958 Puni.: 351. It observed as follows:

"The object is sufficiently satisfied if the notice informs the defendant generally of the nature of the suit intended to be filed and the relief sought to be claimed."

As can be gathered from the above cases, the object of a notice under Section 1 of Act 20 of 1969 is to give an opportunity to Government to investigate the claim intended to be filed against it and if possible settle it out of court. The notice should therefore contain the facts giving rise to the plaintiffs intended claim against government. The facts given in the notice should establish generally the rights of the intending plaintiff in relation to which he wishes to bring a suit against government. There are instances where the acts complained of occurred in one single transaction which was completed. There may be instances where the acts complained of had not occurred but were in process and would involve the happening of several other matters. In such a case an intending plaintiff would still be entitled to give notice even before the process is completed as was case in this matter.

The applicants issued a notice, which they served upon the Attorney General. It informed the Attorney General that the implementation of Rules 11(1), 11(2), 12(1) and 12(10) schedule III of the Constituent Assembly Bill 1992 was likely to contravene the applicants rights under Articles 8(2)(b), 18(1) and 20(1) of the Constitution of Uganda. Secondly, the applicants informed the Attorney General that they will seek a declaratory order that the said schedule is unconstitutional. The applicants thus brought to the attention of the Attorney General their rights which they perceive to be threatened by the legislative process which was to culminate in the enactment of the Bill into a Statute and the implementation of the Statute itself. The applicants notified the Attorney General of the relief, which they intended to seek.

In the present application, the applicants complain that their fundamental rights and freedoms as provided by Article 8(1)(b), 17(1), 18(1) and 20(1) are threatened by the Election Rules attached to the Constituent Assembly Statute. The Rules complained of are the same rules as are found in the Bill and the notice served upon the Attorney General.

In my view, the Attorney General was informed in the notice served upon him of the facts constituting the present application. The mere fact that at the time there was a Constituent

Assembly Bill and now the Bill has been enacted into a Statute does not change the cause of action at all. The rights alleged to have been or likely to be threatened or infringed upon by the implementation of the Bill as stated in the applicants notice are the same rights complained of in the present application. There is therefore no change of cause of action as argued by Mr. Tumwesige.

I do hold therefore, that the Statutory Notice dated 25th November 1992 served by the applicants upon the Attorney General was good and valid notice which satisfied the objects of a notice under Section] of Act 20 of]969 in relation to the present application. In spite of this, I do not think that such a notice was at all necessary in the present proceedings.

In my view, I wish to state that in action founded on Article 22 of the Constitution, there is no need at all for the Applicant to serve a notice upon the Attorney General under Section 1 of Act 20 of 1969 because the jurisdiction granted to the High Court under Article 22 of the Constitution is exclusive. Article 22 states:

"1. Subject to the provisions of clause (5) of this Article if any person alleges that any of the provisions of Article 8 to 20 inclusive has been is being or is likely to be contravened in relation to him, the, without prejudice to any other action with respect to the same matter that is lawfully available, that person may apply to High Court for redress.

2. The High Court shall have original jurisdiction to hear and determine any application made by person in pursuance of clause (1) of this Article, and may make such orders issue such writs and give such directions as it may consider appropriate for the purpose of enforcing or securing the enforcement of any provisions of the said Articles 8 to 20 inclusive to the protection of which the person is entitled.

Provided that the High Court shall not exercise its powers under this clause if it is satisfied that adequate means of redress for the contravention alleged are or have been available to the person concerned under any other law.

3.

4

5. Parliament may make provision, or may authorise the making of provision with respect to the practice and procedure of any Court for the purpose of this Article and may confer upon that Court such powers, or may authorise the conferment thereon of such powers, in addition to those conferred by this Article as may appear to be necessary or desirable for the purpose of enabling that Court more effectively to exercise the jurisdiction conferred upon it by this Article. "

The jurisdiction granted to this Court under Article 22 (1) is subject only to the provision of Article 22(5) which provides for the enactment of law to provide the practice and procedure of a court in relation to the jurisdiction granted by Article 22(1) of the constitution. As Mr. Tumwesige conceded Act 20 of 1969 was not made in fulfillment of Article 22(5) of the Constitution. In fact it does not purport to lay down the procedure and practice of this court in relation to enforcement of the fundamental rights and freedoms. This is very clear from the preamble to the Act which states:

"An act to provide for the giving notice before certain suits are instituted; for the limitation of

certain actions; for the protection against actions of persons acting in the execution of public duties and for purposes incidental to a connected with the matter aforesaid. "

The matters referred to are not the matters envisioned by Article 22(5) of the Constitution. Act 20 does not enable the Court

"More effectively to exercise the jurisdiction conferred upon it" by Article 22(1). "

On the contrary, if Section 1 of Act 20 of 1969 was held to be applicable it would be a hindrance to persons seeking the protection of their fundamental rights and freedoms by barring such persons from applying to Court for redress immediately the provisions of Article 8 to 20 of the Constitution are contravened or even when they are just likely to be contravened. It would act as a hindrance as it would impose a sixty days waiting period before seeking redress which was intended to be provided to the persons applying for it with the utmost dispatch by this Court.

The practice and procedure of this Court in relation to the jurisdiction granted to this Court by Article 22 is now contained in the Fundamental Rights and Freedoms (Enforcement procedure) Rules 1992 S.I. No. 26 of 1992 made under Section 20 of the Judicature Act 1967. Section 20 thereof states:

"1. The Chief Justice may, by Statutory Instrument, makes Rules of Court regulating the practice and procedure of the High court for the purpose of Article 32 of the Constitution.

Rules of Court made under the provision of the preceding subsection may confer on the High Court such powers, in addition to those conferred by the provisions of Article 32 of the Constitution, as may appear to the Chief Justice to be necessary or desirable for the purpose of enabling the High Court more effectively to exercise the jurisdiction conferred upon it by that Article.

3....."

The present Article 22 of our Constitution is the same as Article 32 in the 1966 Constitution, which is referred to in Section 20 of the Judicature Act. Even before the 1967 Constitution came into force, Parliament had authorised under Section 20 of the Judicature Act, the Chief Justice to make the Rules of procedure and practice for this Court in relation to the enforcement of Article 8 to 20 of the Constitution. The Chief Justice promulgated the Rules of procedure under S.I No. 26 of 1992. Rules 2 provides:

"In these rules, unless the context otherwise requires "application" means an application to the High Court under clause (1) of Article 22 of the Constitution for redress in relation to the fundamental rights and freedoms referred to in Articles 8 to 20 of the Constitution. "

Rule 3 provides for the procedure in making the application. Rule 8 applies, subject to S.I No. 26 of 1992, the Civil Procedure Act and Rules made thereunder to the proceedings under S.I No. 26 of 1992.

In my view, the Constitution under Articles 22(1) created jurisdiction, which was subjected to only the provisions of Article 22(5). The provisions authorised the making of rules, which have been made. Those provisions are exclusive and an intending applicant need not look at other

legislation as far as procedure is concerned except that made under Article 22(5) of the Constitution. In arriving at this conclusion I draw fortitude from the decision of the Court of Appeal for East Africa in the case of National Insurance Corporation -vs- Kafeero [1974] E.A 477. In that case the respondent sued the appellant as nominal defendant in respect of injuries caused by unidentified vehicle. He had given the notice required by the Traffic and Road Safety Act 1970, S.44 (2) but not that required by the Civil Procedure and Limitation (Miscellaneous Provisions) Act, 1969 S.I. The High Court held that the notice under the latter Act was not required. Nyamunchoncho J, (as he then was) stated:

"I am inclined to the view that when the nominal defendant is sued a notice pursuant to section 44 of the Traffic Act is all that is required. If I am mistaken in this, I would still hold that a notice given under Section 44 to the nominal defendant satisfies the requirement of Section 1 of Act 20 of 1969 by virtue 44 of the Interpretation Act. "

The Court of Appeal arrived at the same conclusion. SPRY Ag. P at page 478 provided the following explanation, which was substantially echoed by the opinions of Mustafa and Musoke, J.J.A:

I see the matter in a somewhat different light. Sections 40 to 48 of the Traffic Act create rights of action and also contain and also contain procedural provisions, including provisions for notice clearly intended to give the appellant corporation reasonable opportunity to investigate claims while the evidence is fresh. It seems to me that the legislature enacted what amounts in a small way, to a code, and that its provisions including as they do both substantive and procedural law were intended or must be deemed, so far as they extend to be exclusive."

Mustafa J.A put it thus:

"... because the Traffic Act has special provisions granting certain substantive rights as well as laying down a reasonably comprehensive set of rules of procedure for enforcing such rights. A litigant suing under the provisions of the Traffic Act has to comply with provisions of the Traffic Act..."

The nature of jurisdiction granted under a similar Article to Article 22 of our Constitution was considered by Privy Council in the case of Jaundoo -vs- Attorney General of Guyana [1971] Ac. 972 on appeal from the Court of Appeal for Guyana. At the time the Parliament of Guyana had not made provisions for the practice and procedure of the High Court in the enforcement of similar fundamental rights and freedoms. Lord Diplock while delivering the opinion of the Privy Council stated at page 983:

"That right is expressed to be subject only to the provisions of paragraph (6). So long as nothing has been done by Parliament or by the rule making authority of the Supreme Court of Judicature ordinance, to regulate the practice of procedure upon such applications, the right to apply to the High Court under paragraph 1 remains in their Lordships view unqualified. To "apply to the High Court for redress" was not a term of art at the time the Constitution was made. It was an expression, which was first used in the Constitution of 1961 and was not descriptive of any procedure, which then existed under rules of Court for enforcing any legal right. It was a newly created right of access to the High Court to invoke a jurisdiction which was itself newly created by Article 13(2) of the 1961 Constitution now replaced by Article 19(2). These words in their

Lordships view are wide enough to cover the use by an applicant of any form of procedure by which the High Court can be approached to invoke the exercise of any of its powers. They are not confined to the procedure appropriate to an ordinary civil action, although they would include that procedure until other provision was made under Article 19(6). The clear contention of the Constitution is that a person who alleges that his fundamental rights are threatened should have unhindered access to the High Court is not to be defeated by any failure of Parliament or the rule making authority to make specific provision as to how that access is to be gained. "

My understanding of the above opinion of the Privy Council is two fold. In the first instance that the jurisdiction created by Guyana's Article 19(2) equivalent to our Article 22(1) is that such jurisdiction is subject to only the equivalent of our Article 22(5) of the Constitution beyond which it is unqualified. No law made by Parliament dealing with ordinary Civil Actions against Government, as in our case, the Civil Procedure and Limitation (Miscellaneous Provision) Act, 1969 would regulate applications under Article 22(1) of our Constitution. The law to regulate such applications must be made pursuant to and in conformity with Article 22(5) of the Constitution. The Civil Procedure and Limitation (Miscellaneous Provisions) Act is definitely not made pursuant to or in fulfillment of the provisions of Article 22(5) of our Constitution.

Secondly, that the intention of the Constitution under Article 22(1) was to create new jurisdiction for the High Court (it did not exist until 1962 Constitution) so that a person who alleges that his fundamental rights are threatened should have unhindered access to the High Court. Act 20 of 1969, if it were held to apply to such applications as the present one, would be restricting access to the High Court which is not the intention of the Constitution.

The above opinion of the Privy Council was referred to with approval by the Court of Appeal of Guyana in the case of Attorney General-vs- All & 4 Ors [1989] LRC (Const) 474 which was considering an application under the equivalent of our Article 22(1) of the Constitution. Harper JA stated at page 526:

"In my view, a citizen whose constitutional rights are allegedly trampled upon must not be turned away from the Court by procedural hiccups. Once a complaint is arguable a way must be found to accommodate him so that other citizens become knowledgeable of their rights. "

The present preliminary objection is no doubt a procedural hiccup intended to stop this application from being heard. However, for the reason given above, I am not inclined to allow that to happen. I would hold that Section 1 of the Civil Procedure (Miscellaneous Provisions) Act, 1969 does not apply to the application made to this Court under Article 22 (1) of the Constitution of Uganda. I would dismiss the preliminary objection with costs.

Signed

F.M.S. EGONDA-NTENDE
JUDGE

2/ 12/ 1993

THE REPUBLIC OF UGANDA

IN THE SUPREME COURT OF UGANDA AT KAMPALA
ELECTION PETITION No. 1 OF 2001

COL (RTD) DR. BESIGYE KIZZA..... PETITIONER

VERSUS

1. MUSEVENI YOWERI KAGUTA

2. ELECTORAL COMMISSION.....RESPONDENTS

(CORAM: ODOKI, CJ; ODER, JSC; TSEKOKO, JSC; KAROKORA, JSC; AND
MULENGA, JSC)

Civil Procedure:

Costs in Public Interest Litigation suits.

Judge's decision as to who should pay costs in court

Factors to be considered when awarding costs

Civil Procedure:

Whether petitions including hearsay to be accepted in court

This was an election petition challenging the results of the Presidential Election held on 12th March 2001. The second respondent organised the elections and declared the first respondent the winner. The petitioner sought to declare that the election invalid and that it should be annulled. When the matter came up for hearing, several objections were raised that various affidavits were defective and should be struck out, statutory declarations were not registered with the registrar of documents, affidavits were inadmissible and that some offended O. 17 R. 3 of the Civil Procedure Rules.

HELD:

1. Failure to register the statutory declaration in Uganda as required by the Act did not go to substantive justice. It seems to be a requirement designed to raise revenue and it was not too late to register and pay the fees.
2. A petitioner cannot avoid including hearsay matters in the affidavit accompanying his petition. The proper thing to do is to consider the petition and affidavit accompanying it, and finally sever any matters contained in such affidavit that are offensive.
3. The judge has discretion to decide who should pay costs which discretion must be exercised judiciously.
4. Petitioners are not to be penalized for assisting in development of legal, historical and constitutional development of the country.

Petition dismissed, parties to bear their own costs

Editorial Notes: It's not almost a rule of practice that no costs are ordered in a public interest suit. The detailed judgments could not be reproduced as they are too bulky.

THE REPUBLIC OF UGANDA

IN THE SUPREME COURT OF UGANDA AT MENGO
CONSTITUTIONAL APPEAL No. 1 OF 2000

1. PAUL.K SSEMWOGERERE
2. ZACHARY OLUM..... APPELANTS

VERSUS

ATTORNEY GENERAL..... RESPONDENT

(CORAM: WAMBUZI CJ, ODER, TSEKOKO, KAROKORA, MULENGA, AND
KANYEIHAMBA. AND MUKASA KIKONYOGO JJ.S.C)

- Constitutional Law:* -Determination of quorum- inconsistency with constitutional provisions, question not of enforcement but of interpretation
-Whether Cap 249 and Rule 171 are inconsistent with Articles 79, 88, and 94 of the Constitution
- Constitutional Law:* -Whether failure to follow constitutional procedure for amending legislation renders legislation null and void.
- Constitutional Law:* -Whether courts can adjudicate on legislation that has become dormant.

This petition was brought under Article 137(3) of the Constitution to challenge the validity of the referendum (political systems) Act, 2000. It sought declarations that the Act be declared null and void. Accordingly the Act which was discussed on 7th June 2000 by the National Assembly of Uganda was to make provision for the holding of the referendum required to be held under Article 127 of the Constitution to determine the political system of the people of Uganda would wish to adopt. On 9th June 2000, the Act received presidential assent. Section 2 of the Act provided that the Act would be deemed to have come into force on 2nd July 1999.

HELD:

1. Parliament had no authority to pass the referendum (political systems) Act, 2000 after the expiry of the period stated in Article 271(2) without first amending that provision of the constitution.
2. An order that the petition be remitted to the Constitutional Court for hearing on merit.
3. Appellants are allowed costs of the appeal.

Appeal allowed.

Editorial Notes: The detailed judgments could not be reproduced as they are too bulky.

THE REPUBLIC OF KENYA

**IN THE HIGH COURT OF KENYA AT MOMBASA
CIVIL CASE NO. 97 OF 2001**

**RODGERS MUEMA NZIOKA & 2 OTHERS..... PLAINTIFF
VERSUS
TIOMIN KENYA LIMITED..... DEFENDANT**

BEFORE: THE HON. JUDGE MR. A.I. HAYANGA

Civil Procedure: Temporary injunctions, what amounts to a balance of convenience in a public interest matter.

Environmental Law: Whether the project at had carried out any Environmental Impact Assessment. – Environmental Management Coordination Act no. 8 of 1999 S.2, 3, 11, 58,138.

Mining Act Cap 306 -Land Control Act Cap 302 S.22 and 26.

The plaintiffs in this case filed an application by way of chamber summons with two main prayers first that;

1. an injunction is issued to restrain the defendants from carrying out acts of mining in any part of land in Kwale district;
2. That it should be declared that the mining being carried out is illegal.

They also argued that the excavation of Titanium was likely to trigger multifarious environmental and health problems as provided by research and that they had also not submitted appropriate Environmental Impact Assessment plans nor a license.

HELD:

1. When deciding on environmental cases, court has to take into consideration failure of the decision makers to take environmental factors into account.
2. As for balance of convenience, it is admitted that environmental degradation is not necessarily an individual concern, but a public loss and thus any form of feared degradation and pollution will be caused to the detriment of the population.
3. Costs should be paid by the respondents to the applicants.

Injunction granted

THE REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MOMBASA

CIVIL CASE NO. 97 OF 2001

RODGERS MUEMA NZIOKA & 2 OTHERS... .. PLAINTIFFS

VERSUS

TIOMIN KENYA LIMITED DEFENDANTS

RULING

From the affidavit of the second plaintiff FRANK MUTUA NGUATU sworn on 8.11.2001 is an annexure entitled "Final Report" which is an Environmental Impact Assessment of Titanium Mining in Kwale District May 2000 prepared by named scientists organised by a coalition of Non-Governmental and Community Organisations interested in the project to mine titanium in K wale.

The report says in part, KWALE is an administrative district of Kenya lying on the South Coast of the country between longitude 38°. 31 and 39°. 31 East, and latitudes between latitudes 3.30 and 4.45 South. It borders on the Republic of Tanzania on the North East of that country and adjoins Mombasa Town. It is 8322 Km. in area and 62 Km. About (0.73%) of its area is covered with either fresh or salty water and from its waters fish and drinking water for humans and animals depend. On its Coastline runs 3 to 5 Km. Of Living coral reef and a Coastline with mangrove swamps.

It says on page 6 thus: -

"In the Vumbu-Maumba area the Titanium ore deposits constitute about 5.7% of the Magarini sediments the concentration reduces southwards to 3% Nguluku area. The Titanium deposits mainly occur in aliments and retile with specific gravity of 4.72 and 4.2 to 4.3 respectively. The Zirconium containing mineral in this case is Zircon, which has a specific gravity of 3.9 to 4.7. The specific gravity shows that these are heavy minerals and hence are deposited at similar sites through sedimentation in riverine, laccestric and marine water.

"The Msambweni complex of mineral deposits has about 2.8 million tonnes of limenite. 1.0 million tonnes of tutile and 0.6 million tonnes of Zircon. They occupy an area, which is about 3 Km. Long, 2 Km. Wide and are generally 25 to 40 m deep. First the limenite contains up to 47.90/0 titanium oxide. Iron contents is also high being about 51.1 % and there are low levels of Calcium, Magnesium and Manganese. Secondly the native is a high grade source of Titanium containing about 96.20/0 of the metal, finally Zircon in Msambweni contains about 66.0% of Zirconium."

TIOMIN KENYA LTD. the defendant here is a local company, incorporated in Kenya and is a fully owned subsidiary of the Canadian Company called TIOMIN RESOURCES INCORPORATED of Canada it has taken up licenses to prospect for the above mineral and now is poised to mine. It is at this stage that the local inhabitants the majority of whom are the plaintiffs have filed a case against the said mining company in a representative capacity.

The substantial case has two main prayers, first, an injunction to restrain the plaintiffs from carrying out acts of mining in any part of land in Kwale District and secondly a declaratory order that the mining being carried in Kwale is illegal and thirdly for General Damages. The-suit was filed on 27.2.2001 and this was filed simultaneously with a Chamber Summons of same date for injunction under Order 39 IT (1)(2) of Civil Procedure Rules for order that the court do restrain the defendant from undertaking any action of mining on any land in Kwale District. Supporting affidavits are by Rodgers Muema Nzioka sworn on 27.2.2001, Frank Mutua sworn on 27.2.2001, further affidavit by Rodgers M. Nzioka sworn on 19.3.2001 and lastly by Munyalo Sombi and some other supplementary affidavits. They state that they act on behalf of other plaintiffs who are mere ordinary rural farming inhabitants of the area of Kwale now designated for mining. From there they say they have eked a living enabling them to support themselves and that they have boreholes there from where they draw water, that when titanium was discovered there the plaintiff mining company promised a reasonable compensation to land owners on giving their land, that the inhabitants would be relocated to some other place and that there would be no acquisition until Land Control Board had consented. It is the concern of the applicant that notwithstanding the understanding the Defendants have arm twisted the inhabitants and caused them to accept very low compensatory rate of Ksh. 9000/= per acre for re-allocation and Ksh. 2000/= per acre per year in rent. The applicants are sorely apprehensive that the excavation of Titanium is likely to trigger multifarious environmental and health problems. They have relied on the researched report rendered by scientists from the Kenyatta University which is annexed to their affidavit of support.

In his arguments the Counsel for the Plaintiffs says his clients are not opposed to the mining but want their environment and health to be secure.

They want the Mining Company to give them reasonable compensation and to settle them in a new place to build schools and hospitals there and to be resettled like it was done by the Japanese Electric Development Project in Sondu Miriu River in Nyanza, Kenya.

Counsel argued ;

- that the Defendant is operating illegally in various ways, that Tiomin Resources Inc. of Canada is the prospecting licence holder yet it is Tiomin Kenya Limited doing the prospecting and or mining.
- That in their drafted Environmental Impact Assessment Report (para 29 CF 170) the area of activity is said to be 5 sq. km. Yet the area is actually 56 sq. km.
- That the Respondents have started using the land before obtaining consent of the owners and also consent for change of user under Section 26 of the Land Control Act Cap 302, that the foreign company Tiomin Corporation of Canada fully owns Tiomin Kenya Limited and therefore any land transaction involving such a foreign company being controlled transaction ought to get Presidential exemption. (He referred to Sections 22 & 26 of Land Control Act Cap 302). That the Defendant has not drawn a comprehensive resettlement plan, nor shown that plan it has put into place to avoid the effects of exposed titanium, to redress radioactivity, or Sulphur dioxide pollution, or dust pollution.
- That the defendant Company has not submitted appropriate Environmental Impact Assessment Plan and has not been licensed under Section 58 of E.M.C. Cap 8 of 1999 and therefore its activities are illegal.

The applicants quoted several authorities from the COMPENDIUM OF JUDICIAL DECISIONS ON MATTERS RELATED TO ENVIRONMENT UNEP/UNDP and discussed the provisions of EMC Act No.8 of 1999.

From these arguments the applicant relies on the principle of *GIELLA VS CASSMAN BROWN*

CO. LTD. 1978 EA 358 to show that they have a prima facie case with probability of success and that the environmental damage likely to be occasioned cannot be adequately compensated in damages but if court is in doubt to decide then matter on a balance of convenience.

Mr. Ochwa learned counsel for the Defendant assisted by Mr. Ogola and Mr. Mogaka opposed this application relying on 4 affidavits of COLLIN FORBES and 322-annex files. The affidavits are sworn variously on 6.3.2001, 16.3.2001, and 23.4.2001. The case for the Defendant from the affidavits and arguments of Counsel is that they are not mining but in fact are merely prospecting and that the terms "mining" and "prospecting" are distinct in meaning within the Mining Act Cap 306 of the Kenya Laws and that the Commissioner of Mines and Geology has in fact issued special licences No. 157, 158, 170 and 173 to the Defendant. That the licences can be assigned to a Nominee. Referring extensively to the licence C.F.3 Counsel argued that the defendant has duly complied with the terms of the licence given to it under the Mining Act Cap 306 and that there is nothing that it has done which is not authorised by the provisions of that Act. That Tiomin Kenya Limited the Defendant Company is agent of Tiomin Resources Inc. of Canada and so licences Numbers B/7295/9025 are being assigned to Tiomin Kenya Limited and in any case Mining Act Cap 306 allows prospector to act through an agent. The defendant says that the special licence contains all the conditions a prospector licensee is required to observe and there is no alleged breach of those conditions and in fact a Government Provincial Administration Officers have been supervising its operations.

The defendant says that the application is premature because what is being done so far is merely testing compliance with prospecting terms of the licence yet applicants say that they are mining. With regards to the ill effects of titanium the defendant claims that there is no evidence that harmful effects have been so far experienced and that defendant has not even as yet obtained mining licence. The defendant demonstrated how it has met all the time with the local provincial administration officers and the local people affected and discussed the relevant issues like that of compensation and the issuance of Title Deeds and explaining to the local people the company's initiatives in those meetings. Of land owners who in fact had signed their consent, he said they ought to be stopped from being party to this suit and from disclaiming the amount they had accepted in compensation through written contracts of transfer with knowledge of valuation done by Fairlane Valuers Limited. The defendant argued that the plaintiffs are mere squatters and lack proprietary interest and should be none-suited. The defendant has already prepared and submitted Impact assessment report to the Government using all available material.

I have been referred to several authorities on this matter by Counsel for the parties who both argued this case with erudition and circumspection and the court is obligated to them for their thoroughness.

The application is for prohibitive injunction and normally in exercise of its general jurisdiction the court goes by the traditional principles enunciated by the Court of Appeal per Spry Ag. J .A. in ***GIELLA VS CASSMAN BROWN & CO. LTD. (1973) EA 358.***

First the position is that granting of interim injunction is an exercise of Judicial Discretion and in East Africa those conditions for granting of interlocutory injunction are now settled as I have stated above.

The question may well be asked if legal cases based on environment are to be resolved on-any distinct principles-but the-answer is that if there is distinct law of Environment it is not exclusive, and most environmental disputes are resolved by application of principles of Common Law like law of tort, property, injunctions and those principles of administrative law, but the applicable law is the statute law which in this case is THE ENVIRONMENTAL MANAGEMENT AND CO-ORDINATION ACT NO.8 OF 1999 (thereinafter referred to EM C). It is imperative to resort

to this statute to decide whether the claimant not only has entitlement to an action but a case for injunction with probability of success.

Section 3 (1) of the EMC Act provides:

"3. (1) Every person in Kenya is entitled to a clean and healthy environment and has the duty to safeguard and enhance the environment.

(2) The entitlement to a clean and healthy environment under subsection (1) includes the access by any person in Kenya to the various public elements on segments of the environment for recreational, education, health, spiritual and cultural purposes.

(3) If a person alleges that the entitlement conferred under subsection (1) has been, is being or is likely to be contravened in relation to him, then without prejudice to any other action with respect to the same matter which is lawfully available, that person may apply to the High Court for redress and the High Court may make such orders, issue such writs or give such directions as it may deem appropriate to:-

(a) prevent, stop or discontinue any act or omission deleterious to the environment;

(b) compel any public officer to take measures to prevent or discontinue any act or omission deleterious to the environment;

(c) require that any on going activity be subjected to an environment audit in accordance with the provisions of this Act;

(d) compel the persons responsible for the environmental degradation to restore the degraded environment as far as practicable to its immediate condition prior to the damage; and

(e) provide compensation for any victim of pollution and the cost of beneficial uses lost as a result of an act of pollution and other losses that are connected with or incidental to the foregoing.

(4) A person proceeding under subsection (3) of this section shall have the capacity to bring an action notwithstanding that such a person cannot show that the defendant's act or omission has caused or is likely to cause him any personal loss or injury provided that such action :-

(a) is not frivolous or vexatious; or

(b) is not an abuse of the court process.

(5) In exercising the jurisdiction conferred upon it under subsection (3), the High Court shall be guided by the following principles of sustainable development;

(a) the principle of public participation in the development of policies, plans and processes for the management of the environment

(b) the cultural and social principles traditionally applied by any community in Kenya for the management of the environment or natural resources in so far as the same are relevant and are not repugnant to justice and morality or inconsistent with any written law;

(c) the principle of international co-operation in the management of environmental resources shared by two or more states;

(d) the principles of intra-generational and intergenerational equity;

(e) the polluter-pays principle; and

(f) the pre-cautionary principle.

The provisions show that this court is empowered by the section quoted to adjudicate on the matter and has wide powers to effect, redress, but the complainants ought to show that his rights or any of them reserved in Section 3(1) of the EMC Act Cap 8 of 1999 is contravened.

That entitlement is stated as follows:

Every person in Kenya is entitled to a clean and healthy environment and has the duty to safe guard and enhance the environment.

3(2) The entitlement to a clean and healthy environment under subsection (1) includes the access

by any person in Kenya to the various public elements or segments of the environment for recreational, educational, health, spiritual and cultural purposes.

And "element" is described in Section-2 of the same Act as:

"any of the principal constituent parts of the environment including water atmosphere, soil, vegetation climate sound, adour aesthetics fish and wildlife. "

It means that anybody who is entitled to these elements have a right to prosecute his cause in court. It would therefore not support the argument that some of the plaintiffs do not have sufficient entitlement to bring the case to court or that they have no Title Deeds or that they are squatters. More Section 11(2) of EMC says that plaintiff does not need to-show that he has a ' right or interest in the property environment or land alleged to be invaded. That seems to be the law.

After observing these preliminary matters the main issue I see in this case is that for the applicants to show a prima facie case they ought to show that what the Defendants are proposing to do is unlawful. Injunction cannot be applied to restrain what is lawful.

The Defendants have shown that whatever they have done has been under licence properly issued in accordance with the provisions of Mining Act Cap 306 of the Kenya Laws and when they came to do what is yet not done they will likewise have to be licenced and there is no evidence that they are threatening to act outside the law. They have also submitted researched professional Environmental Impact Assessment Report under Section 58 of the Environmental Management Co-ordination Act No.8 of 1999 under that Act.

Everybody that intends to do anything under second schedule to the Act inclusive of mining, quarrying and open cast extraction of precious metals, gemstones, metalliferous ores, coal, limestone, dolomite, stone and slate, aggregate sand and gravel, clay, exploration for the production of petroleum in any form and extracting alluvial gold, with use of mercury and processing of minerals reduction of ores and minerals, smelting and refining of ores and mineral etc. before such undertaking submit a project report to the National Environment Management Authority in the prescribed form then the proponent of the project is to submit an environmental Impact Assessment study and report to-enable the authority to determine the effect and impact of the project on the environment. It is an offence punishable with 24 months imprisonment per Section 138 of the EMC Act No.8 of 1999 not to do so.

It is the Defendants case that it has prepared and submitted its contents to the authority but the authority has not replied. Under Section 58(9) if Director General fails to reply in 3 months then the applicant may start his undertaking notwithstanding but this may need circumspection.

The Defendants/Respondents have not shown that they have submitted their project report and their Environmental Impact Assessment report. They displayed the EIAR but no evidence of Project Report, which does appear to be prerequisite to the submission of the assessment report. It may be the reason why the defendant has not taken up the liberty under Section 58(9) to proceed with the project unilaterally.

If the Defendant has not fulfilled the requirements of Section 58 of EMC Act 8 of 1999 then it is immaterial that it is licensed under Mining Act Cap 306 because Section 58 of the same EMC Act Cap 8 of 1999 provides that:

"58(1) Notwithstanding any approval, permit or licence granted under this Act or any other law in force in Kenya, any person, being a proponent of a project, shall, before financing, commencing, proceeding with, carrying out, executing or conducting or

causing to be financed, commenced, proceeded with, carried out, executed or conducted by another person any undertaking specified in the Second Schedule to this Act, submit a project report to the Authority, in the prescribed form, giving the prescribed information and which shall be accompanied by the prescribed fee.

Proponent must comply with Section 58 of EMC Act. But even had this not been provided, I would hold it as a matter of statutory interpretation that the EMC Act No.8 of 1999 being a more recent Act must be construed as repealing the old Act where there is inconsistency.

If the Defendant has obeyed the terms of the Mining Act Cap 306 as it appears can his acts be avoided by the later Act? In this case the Defendant has in effect acted as though on the later Act but has equally complied with the old Mining Act Cap 306 but where it conflicts with EMC Act 8 of 1999 I think EMC Act 8 should prevail. Two judicial pronouncements (one local English) strengthen my view here:

"that where the provision of one statute are so inconsistent with the provisions of a similar but later one, which does not expressly repeal the earlier Act, the courts admit an implied repeal."

It is not possible to read compliance in the old Mining Act Cap 306 when it is an offence in the later EMC Act No.8 of 1999 to fail to submit approved Impact assessment report. The two Acts cannot stand together unless the sections of the later Act are made to prevail over those sections of Cap 306 that are parallel to the new Act. Those that sanction what the new Act condemns are to be regarded as repealed.

In the Kenyan decision of *Harris J. in KARANJA MATHERI V. KANJI [1976] KLR* 140 the Judge after finding that Land Control Act (Cap 302) was passed on 11.12.1967 and came into operation on 12.12.1967 and that Limitation Act (Cap 27) was passed on 19.4.1968 and by Section 1 was deemed to have come into operation retrospectively on 1.12.1967 said;

"Accordingly, the later of the two Acts came into operation first a factor which must in the application of the principle of interpretation that in the case of conflict, the later two statutes in date of enactment may be regarded as constituting an amendment of the earlier..."

I think the position now with regards to the interpretation of the entire Cap 306 is that where it is inconsistent with Act No.8 of 1999 the later Act must prevail.

Section 58(2) of EMC Act 8 of 1999 states:

"The proponent of a project shall undertake or cause to be undertaken at his own expense an environmental impact assessment study and prepare a report thereof where the authority being satisfied after studying the project report submitted under sub-section 1, that the intending project mayor is likely to have or will have a significant impact on the environment so directs."

(3) The environmental impact assessment study report prepared under the sub-section shall be submitted to the authority in the prescribed form giving the prescribed information and shall be accompanied by the prescribed fee."

Section 59 provides that the authority after being satisfied as to the adequacy of an environmental impact assessment study evaluation or review report, issues- an-environmental- impact assessment licence on such terms and conditions as may be appropriate and necessary to facilitate

sustainable development and sound environmental management.

It is imperative that a project like the Kwale project where the effect of uranium and titanium a radioactive mineral whose effects to environment does affect not only environment but health ought to pass through evaluation stated in EIA is stated elsewhere as

"The EIA is a structured process for gathering information about the potential impacts on the environment of a proposed project and using the information, along side other consideration to decide whether the project should or should not proceed, either as proposed or modifications."

(See Confirmation of Judicial decisions on matters related to environment National Decision Vol.1 PP 78)

The EMC Act describes it as follows:

Section 2

"environmental impact assessment" means a systematic examination conducted to determine whether or not a programme, activity or project will have any adverse impacts on the environment;"

Section 58(5)

"Environmental impact assessment studies and reports required under this Act shall be conducted or prepared respectively by individual experts or a firm of experts authorised in that behalf by the Authority. The Authority shall maintain a register of all individual experts or firms of all experts duly authorized by it to conduct or prepare environmental impact assessment studies and reports respectively. The register shall be a public document and may be inspected at reasonable hours by any person on the payment of a prescribed fee."

Although the Respondents say they had submitted EIA this is not clear because if they had then they would have started the project after 3 months of DG failing to respond (see Sections 58, SS. 8 and 9 of EMC Act No.8 of 1999) but this can only be done if they had submitted "a project report." Their failure to take advantage of the action granted in the Act creates a reasonable presumption that they have not submitted the correct Report in time.

Submission of both Project Report and Environmental Impact Assessment is crucial and failure to do so is a criminal offence under Section 138 of the Act. Without delivery of these studies any project that affects environment like the present mining project cannot be assessed. Its potential danger can be as vast and as gruesome as can be imagined nor can it be positively contained within principle of sustainable development. In fact without these assessments the project is against that principle of sustainable development as it was argued that this project is an investment and is beneficial, but this is not near to saying that no changes can be made on environment. Yet sustainable principle in the law of environment means not having less economic development, or preserving the environment at all cost but, what is required is as it was as stated by LEESON in "Environmental Law" a Text Book, that:

"What it does require is that decisions throughout society are taken with proper regard to their environmental impact."

The writer further states that conservation of natural resources extends beyond the immediate environment to global issues so that principles to be observed such as

- (a) Decision to be based on the best possible scientific information and analysis of risk.
- (b) Where there is uncertainty and potentially serious risks exist, precautionary measures may be

necessary.

(c) Ecological impacts must be considered, particularly where resources are non-renewable or effects may be irreversible

(d) Cost implication should be brought home directly to the people responsible in the polluter pays principle, are considered in the Report because such assessment and interrelation of a range of disparate factors require the evidence from EIA to support a sound judgment.

A case based on facts that support any project without that assessment cannot be able to qualify in *Giella vs. Cassman Brown Ltd.* test.

The issue of Damages compensating anyone does not arise because environmental damage is not only an individual loss but intrinsic in the globe. Although the principle of polluter pays may be argued in aid of the second principle of *Giella versus Cassman Brown Ltd.* but again without EIA it cannot be assessed.

The implication of the phrase is that the cost of preventing pollution or of minimising environmental damage due to pollution should be borne by those responsible for the pollution, but that does not guarantee that payment will be adequate. There are some environmental damages that are irreversible, again you need EIA to make a determination on that.

But environmental cases arise from disparate problems and sources. They are unique and in most cases novel, there are no recognized general principles of application, except that with time this will logically follow with sophistication of application, but for now courts must apply what is provided for under Section 3 of EMC Act 8 of 1999 and although elements of the common law are of application such as injunction laws tort and criminal law, the environmental statute has provided certain statements of principles which I believe in a purely environmental case like this one needs to be considered for application if necessary in conjunction or if appropriate in exclusion of old principles. Here I rely on the old principles in conjunction with the statutory principles I am enjoined to take into consideration.

Those general principles described in the Act fall into two categories without being distinct. On the book of ENVIRONMENTAL LAW by John Leeson [talking of a similar English statute] page 34 the writer states: -

"On the one hand there is the predominantly environment centered view where remedying the pollution or preventing its occurrence is the primary aim. This category includes the concepts (like) "the polluter pays" and sustainable development. The second approach is centered more on the economic and/or technical practicality of any remedy. Within this category are to be found "best practicable means, and best available techniques not entailing excessive cost."

So regarding the first principle of polluter pays, it is necessary to use the term to cover obligation on any person to conduct their affairs in an environmentally sympathetic fashion.. anyone conducting activity ought to be aware of and accept responsibility for the environmental consequences of that activity, with regards to sustainable development. Constructive view of the phrase should be development that meets the needs of the present without compromising the ability of future generation to meet their own needs (hence intergenerational equity and intragenerational equity).

For the best practicable-means one would like to consider whether one has or can do what is practicable in terms of prevention or reduction where the Defendant has discharged the obligation bestowed on him the nuisance or pollution may be allowed to continue."

Again LEESON adds in the same book,

"The application of this principle to existing activities precludes cessation of the business or process because of its environmental impact. The definition and interpretation of the phrase is therefore important in determining the extent of the obligation to remedy and the consequent degree of pollution permitted in a particular situation. "

On consideration of these principles in an environmental case it is not advisable exclusively to apply simply the old principles of injunction because whereas activity may be objectionable and ought to be stopped by injunction yet applying the principle in the statute of best practicable means, it would be still a defence under the Law of Environment that the defendant has done what he can practically do to prevent and or reduce the nuisance or pollution and may still continue with the activity in a manner not resulting in cessation of the objectionable activities- because of its environmental impact.

In my judgement I would say that the breaches of Environmental statute should be looked at without exclusive trappings of equity in applying the law of injunction under Environmental Management and Co-ordination Act No.8 of 1999 but to apply them with close adherence to what the Statute Law prescribes. Section 3 prescribes general principles of application by the court in adjudicating over this kind of case. First the court is given wide discretion to make such orders by issuing such writs or give such directions as it may deem appropriate including an order to restore the degraded environment.

In normal traditional consideration for injunction the *Giella Vs Cassman Brown & Co. Ltd.* (1978) EA 358 one has to prove that his legal rights has been unlawfully invaded. Here he does not need to show all that, because under the EMC such person whose rights would be prejudiced, under Section 3 of Act 8 of 1999

“Anyone shall have the capacity to bring an action notwithstanding that such a person cannot show that the defendants acts or omission has caused or is likely to cause him any personal loss or injury provided that such action is not frivolous or vexatious, or is not an abuse of courts process.”

That is a departure from the application of *Giella Vs Cassman Brown* because here he may not be having any material legal right."

Here the court is to be guided by principles of public participation, cultural and social principles and principles of international co-operation, principles of intergenerational and intragenerational equity, Polluter pays principle and precautionary principles.

Environmental Impact Assessment report is a requirement of law under Section 58 of EMC and is important. The establishment of any undertaking or works that interrupts nature in any way always possesses certain inevitable forms of impact on its surrounding so it is by studying the report when it is possible to assess their effect and therefore determine whether the project should be determined, allowed or stopped or be raised. The purpose of E.I.A. is to enable resolution to be made on known facts regarding environmental consequences.

In **USA** the Supreme Court there has adopted the approach, which what is to be proved is mere breach of the statute. In the case of *ATCHISON TOPEKA & SANTA FE SAIL WAY CO. V. CALLAWAY* 392 F. Supp. 610 (DDC 1974) 420 US 908, 95 Sup ct 826 (1975).

The court has approved granting of an injunction without a balancing of the equities in order to give effect to declared policy of Congress embodied in legislation.

And in the case in the United States District Court for the District of Columbia Civil Action No. 75 – 1040 **Sierra Club National Audubon Society: Friends of the Earth Inc. International**

Association of game fish and Conservation Commissioners vs WilliamT. Coleman Jr. Norbert Tiemann.

The court said:

"A number of courts have previously considered the requirement for a preliminary injunction in the case of an alleged deficiency in compliance with **NATIONAL ENVIRONMENTAL POLICY ACT (NEPA) 42 USC** para 4321 which is equivalent to our (Environmental Management and Coordination Act No.8 of 1999)

The court said:

"That this court agrees that when federal statutes have been violated it has been a long standing rule that a court should not inquire into the traditional requirement for equitable relief."

In this USA case the court found that the Defendant (developer) (Federal Highway administration) had made 3 breaches In complying with NEPA requirements. [Similar to our EMC]

The court found that they started building Highway before decision is taken on statement were began when such ought to have been made only after decision makers had fully adverted to the environmental consequences of the action.

In this case the Defendant has started work without submitting a project report to the authority. Secondly it has not presented to the satisfaction of the authority an Environmental Impact assessment report against Section 58 of the EM & C.

So the question to be asked is what environmental factors has the proponent of the project taken into account? None.

This is crucial because in making a decision on environmental case as herein the court is to be concerned. NOT so strictly with harm to the environment but rather the failure of decision makers to take environmental factors into account in the way Environmental Management and Coordination Act No.8 of 1999 prescribes. (Particularly that Environmental Impact Assessment Report.) Therefore even if one relied on the principle of *Giella vs. Cassman Brown* a case would still be made out.

As for balance of convenience it is admitted that environmental degradation is not necessarily individual concern or loss but public loss so in a matter of this kind the convenience not only of the parties to the suit, but also of the public at large is to be considered so that if the injunction is not issued it means that any form of feared degradation, danger to health and pollution will be caused to the detriment of the population, whereas if I do not **REFUSE** injunction only the investor will be kept at bay but life will continue for the population safely without risk.

It is better to choose the latter other than the former.

A court has in applying the principle of balance of convenience to take into account consideration of the convenience **NOT** only of the parties but also of the public at large.

At this stage not all the facts are in and [mal decisions cannot be made, but on the balance of probabilities I think the applicants have made a case for injunction which I hereby grant with cost to them.

Delivered this 21st day of September 2001.

A.I. HAYANGA
JUDGE

THE REPUBLIC OF KENYA

**IN THE HIGH COURT OF KENYA AT NAIROBI
CIVIL CASE NO. 706 OF 1997**

NAIROBI GOLF HOTELS (KENYA) LTD..... APPLICANT

VERSUS

**PELICAN ENGINEERING AND CONSTRUCTION
CO. LTD..... RESPONDENT**

BEFORE: THE HON. JUDGE MR. E.M. GITHINJI

*Civil Procedure: Locus stand - whether the ownership of water is vested in government.
Whether there is a cause of action against the respondent.*
Environmental Law: Who determines the utilization of water?

On 24th March 1997, the plaintiff filed a suit against the defendant claiming damages and a permanent injunction to restrain the defendant from constructing a dam on or across Gathani River and from trespassing on the plaintiff's land. On the same day, the plaintiff filed an interlocutory injunction restraining the defendant from diverting the river water on the land because it was interfering with his riparian rights causing the grass on his golf course and vegetation to wither. When the matter came up for hearing, the defendants denied all the allegations and instead raised a preliminary objection to the plaintiff's application namely;

1. that water is vested in the government and plaintiff has no *locus standi*;
2. that it's the water appointment board that determined utilisation of water;
3. that the plaintiff can only seek judicial review after all the administrative machinery under the water act are exhausted;
4. That since the defendant had leased the land to Valentine Growers; the plaintiff had no cause of action against him.

HELD:

1. The government controls the use of water by requiring that permits be obtained for extra ordinary use of water short of which constitutes an offence.
2. The objection that the plaintiff should have exhausted the machinery prescribed in the Water Act would be valid if the defendant had said that it applied for the permit from the board and that the plaintiff failed to file an objection which is not the case.
3. The plaintiff by being a riparian owner can apply for an injunction under common law to restrain the non-riparian for extra ordinary use of water for irrigation purposes.
4. The defendant has by the lease authorised to Valentine Growers to utilize the land in the manner complained of by the plaintiff which may cause permanent damage to the plaintiff's investment, therefore the plaintiff has a cause of action against the head lessee.

5. Application should proceed to hearing on merit.

Preliminary objection overruled with costs to the plaintiff

**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CIVIL CASE NO.706 OF 1997**

**NAIROBI GOLF HOTELS (KENYA) LTD =====PLAINTIFF
VERSUS.
PELICAN ENGINEERING AND CONSTRUCTION CO. LTD. ===DEFENDANT**

RULING

This is a preliminary objection raised against the plaintiff's application for an order of injunction dated 24.3.97.

Plaintiff filed a suit on 24.3.97 against the defendant claiming damages and a permanent injunction to restrain the defendant from constructing a dam on or across Gatharaini River and from trespassing on the plaintiff's land. On the same day, plaintiff filed an application for interlocutory injunction to restrain the defendant from constructing a dam on Gatharaini River and from diverting the River water and from trespassing on the plaintiffs' land.

On the same day, an *ex parte* interlocutory injunction as prayed be granted by Khamoni J. that *ex parte* injunction is still in existence.

When the application came for hearing *inter parties*, Mr. Owino for the defendant raised a preliminary objection to the application.

The basis of the plaintiffs suit and the interlocutory injunction is in summary that:

1. Plaintiff owns land reference No.14883 on which it has erected a prestigious and unique five star resort hotel/club, conference facilities and an 18 hole golf club of international repute known as "Windsor Golf and Country Club" unparalleled else where in Kenya;
2. With a view to conserving nature, plaintiff has natured, maintained and preserved indigenous trees on the golf course;
3. The boundary of the land is the center line of Gatharaini River which flows from west to east and that with the permission, *inter alia*, of Water Apportionment Board, it has erected a dam (Windsor Dam) from which it derives water for the maintenance of the Golf course, the trees and grass on the premises;
4. Further plaintiff is a riparian owner with natural rights "*Ex jure naturae*" to the use of the water from the river;
5. Defendant is the owner of the land reference number 15153 curved from Kiambu Forest Reserve which land does not border the Gatharaini River and is separated from the river by a portion of the forest.

From February 1997, defendant contrary to the Water Act, erected a concrete reinforced wall across the river up stream, erected a temporary water reservoir pending construction of a dam, installing a water pump and diverting large quantities of water from the river via the reservoir to its land for irrigated floricultural and horticultural farming and water storage reservoirs thereby

extinguishing the natural flow down stream of Gatharaini River. Defendants' actions are crippling the plaintiffs user of the Windsor dam and water rights causing the grass on the Golf course and vegetation to wither. Those are of course allegations as the application and suit has been heard.

Mr. Mike Maina the managing director of the defendant has sworn a replying affidavit. The defendant has also filed a defence. The defence is a mere denial of all the allegations in the plaint except that defendant admits that it is the owner of the land referred to by the plaintiff. All what Mr. Maina states in the replying affidavit is that defendant has leased the land to Valentine Growers and therefore defendant is wrongly sued. The other thing Mr. Mike Maina is the plaintiff has come to court with unclean hands as it has unlawfully and without permission blocked the flow of waters of the river thereby obstructing and diverting the waters of the river to waste.

Defendant has raised four preliminary objections to the application namely:

- (i) As by section 3 of the water Act, water is vested in the Government, plaintiff has no locus standi to bring the suit.
- (ii) That it is the Water Appointment Board that determines the utilisation of Water and therefore plaintiff should have lodged a complaint with the Water Appointment Board.
- (iii) That plaintiff can only come to court for Judicial Review after all the administrative machinery under the Water Act are exhausted.
- (iv) That as the defendant has leased the land to Valentine Growers- a firm, plaintiff can only sue Valentine Growers and not the defendant.

Mr. Muturi Kigano for the plaintiff has replied the preliminary objection.

He contends inter alia, that High Court has Original unlimited jurisdiction, that plaintiff has permission from Water Board; that defendant has not traversed the various breaches complained of; that the release was hurriedly registered on 3/4/97 and in any case the lease is invalid in law ; that the same Mike Maina M.D of defendant is the representative of Valentine Growers; that riparian rights lie against the offending land owner and riparian owner can obtain an injunction to restrain the diversion even without proof of damages.

Dealing with the first, second and the third objections together, it is true that everybody of water in Kenya is vested in the Government but that is as section 3 of the Water Act provides subject to any rights of user to any person granted under the Act or recognized as being vested in any other person. As Mr. Kigano states, the Government is a trustee for the public. As the Government is the people, the body logically belongs to the people but the Government has to preserve it, control it and apportion it for the general good of the people. It is aptly said that Water is life and doubt that water is very valuable Natural Resource. The Government controls the use of water by requiring that permits be obtained for extra ordinary use of water. Such cases where permits are required are one specified in section 35 of the Water Act and include cases of use of water for irrigation. But by S.38 of the Act, a permit is not required for abstraction or use of water from anybody of water for domestic purposes by any persons having lawful access to water and if such abstraction is made without employment of works. This natural right to use water for domestic purposes is subject to section 50 and 74 of the Act. By section 60 of the Act a person cannot construct a well within 100 yards or any body of surface water or construct a well within half a mile of another well. By section 74 of the Act, the Government can declare any areas a conservation area and refuse the extraction of water. A riparian owner is a person who owns land on a bank of a river, or along a river or bordering a river or contiguous to a river. Under the common law and as permitted by section 38 of the Water Act, he has a right to take a reasonable amount account of water from a natural river as it flows past his land for ordinary purposes such as domestic use which includes such things as watering his animals, his garden. He can even

construct a dam so long as it is not within 100 yards of surface water-It may be that the wider right or riparian owner under common law are limited by the Water Act but it is clear that a riparian owner has the natural right to use the water adjacent to his land for normal use.

For cases where a permit is required, it is an offence to use the water without the permit (section 36 of the Act). For the use of water where a permit is required to apply to the Water Appointment Board for a permit and anybody objecting to the issuing of a license is required to file an objection. I can find no provision in the Water Act which gives any member of public a right to complain to either the Water Appointment Board or to Water Resources Authority for use of water by anybody in the absence of an application for a permit. The objection that the plaintiff should have exhausted the machinery prescribed in the Water Act would be valid if the defendant had said that it applied for a permit from the Water Appointment Board and that plaintiff failed to file an objection or appeal. As the pleadings and affidavits stand, the defendant has not said that such a permit was duly granted.

If it is true, as plaintiff pleads, that the defendant has not obtained a permit and if it is true that it has committed the acts complained of, then it would have committed an offence under S.36 (2) of the Water Act. If such is the case, then the Minister of Water Resources Authority or the Water Appointment Board has power to prosecute the defendant or take any civil proceedings against the defendant (Section 181). But as section 180(2) of the Act provides, the payment of any such penalty does not affect the right of any person to bring any action or take proceedings against the defendant for alleged illegal construction of the dam and alleged diversion of water. Plaintiff is such a person and comes to court against the defendants for the alleged illegal works and also as a riparian owner. He has a right of action under S.180 (2) of the Act.

Further, plaintiff by virtue of being riparian owner who alleges that defendant is not riparian owner can apply for injunction under the common law to restrain the non- riparian for extra ordinary use of water for irrigation purposes. Halisburys Laws of England vol.24 page 574 para 1028.As for the objection that the suit and application cannot be maintained against the defendant has leased the land to Valentine Growers, I note that the defendant has been granted a 99 year lease from April, 1991. If the lease to Valentine Growers is valid. (I am not going to decide on its validity) it is for 10 years from 1.11.96 after which it will revert to the defendant for use for over 80 years. One of the acts complained of by the plaintiff are of permanent nature. It is my view that if the defendant has by the lease authorized Valentine Growers to utilize the land in the manner complained of by the plaintiff and if the utilization of the land in that manner is going to cause permanent damage to the plaintiffs investment, the plaintiff has a cause of action against the head lessee now without waiting for the estate to fall in possession of the defendant in future.

In any case, it is not clear as to who is dealing with defendant's land as Mr. Mike Maina is involved both in the defendant and in Valentine Growers and seems to wear two hats. If Valentine Grower feel that they have an interest to protect it as a firm, it has a right to apply to be joined as a defendant to protect those interests.

For those reasons the preliminary objection has no merit and is over ruled with costs to the plaintiff. I order that the application do proceed to hearing on merits.

E.M.GITHINJI
JUDGE
8.5.97

Mr. Owino present

Mr. Kigano present

Mr. Owino: We wish to appeal against the ruling because you seem to have decided the issue of facts. There is a pending application for injunction. We need your directions. We can exhaust the application for the injunction and hear it next week after which the appeal can go on.

E.M.GITHINJI
JUDGE

Mr. Kigano: I agree with that cause –to deal with application for injunction and if it is against them, then proceed to appeal on the whole matter.

E.M. GITHINJI
JUDGE

Mr. Kigano: I apply for leave to join Mike Maina as a party under order 1 rule 10 CP Rules.
Mr. Owino: We will be objecting to that.

E.M.GITHINJI
JUDGE

Order: The intended application to join Mike Mwangi as a party to be made by a formal application.

E.M.GITHINJI
JUDGE

Mr. Owino: The pending application for injunction can be fixed for hearing on 9.6.97 together with the intended application to join Mike Maina.

Mr. Kigano: It is all right. Extend interim orders.

Order: By consent hearing of the application for injunction on 9.6.97 at 11 a.m. Interim orders extended to 9.6.97.

E.M. GITHINJI
JUDGE.

THE REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MOMBASA

CIVIL SUIT No. 423 OF 1996

**NIAZ MOHAMED JAN MOHAMED..... PLAINTIFF
VERSUS**

- 1. COMMISSIONER OF LANDS**
- 2. MUNICIPAL COUNCIL OF MOMBASA**
- 3. NANDLAL JIVRAJ SHAH**
- 4. VIMAL NANDLAL SHAH TIA JIVACO AGENCIES**
- 5. MEHUL N. SHAH..... DEFENDANTS**

BEFORE: THE HON. JUDGE MR. P. N. WAKI

*Civil Procedure: Whether the applicant has a prima facie case with a probability of success
Whether compulsorily acquired land by government can be put to private use government officials.
Local Governments Act, Cap 265. Land Acquisition Act*

During the construction of the new Nyali Road Bridge in 1979, a new access road was constructed which traversed Plot No. 32 belonging to the applicant. The land was compulsorily acquired by government and the road was constructed. The applicant thereafter enjoyed the frontage and direct access to the road until November 1995 when the Commissioner for lands created a new leasehold title from a small portion which remained uncovered by the tarmac road and allocated it to JIVACO Agencies. The applicant filed a suit and a chamber summons seeking a temporary order that JIVACO is restrained from developing, or any way dealing in Plot No.9665.Sec 1MN until the suit is determined on grounds that they interfered with his easement rights of access.

HELD:

1. there is no compulsory acquisition of land by the government for purposes other than those provided in the constitution of Kenya under S. 75
2. The land must be used subsequent to the acquisition for a lawful purpose for which it was acquired which is construction of a public road.
3. The applicant was entitled to assume that the unutilised portion would remain a road reserve and that he would continue to enjoy all the rights of a frontager to the road and thus ought to be protected until this case is determined.

The application is granted with costs.

**THE REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA
CIVIL SUIT No. 423 OF 1996**

NIAZ MOHAMED JAN MOHAMED===== PLAINTIFF

VERSUS

1. COMMISSIONER OF LANDS

2. MUNICIPAL COUNCIL OF MOMBASA

3. NANDLAL JIVRAJ SHAH

4. VI MAL NANDLAL SHAH T / A JIVACO AGENCIES)

5. MEHUL N. SHAH =====DEFENDANTS

RULING

NIAZ MOHAMED JAN MOHAMED (hereinafter referred to as NIAZ) has at all times material to this suit been the Registered Proprietor of all that freehold property measuring approximately 3.63 Acres known as Plot No. 32 Section I Mainland North in Kisauni/Nyali area within Mombasa Municipality.

During the construction of the New Nyali Bridge in 1979, it became necessary to construct a new access road to Kisauni and Nyali Estate. When that road was surveyed it traversed Plot No. 32 as it must have, other plots, and therefore the Land Acquisition Act had to be invoked to acquire the areas traversed by that road. As respects Plot No. 32, it was considered that the road would cover an area of approximately 0.37 of an Acre and therefore machinery was put in place to acquire that portion.

The Acquisition was carried out through the Commissioner of Lands who published Kenya Gazette Notices on 18.5. 1979. On 13.12.1979, he registered against the Title a "Notice of taking possession and vesting of land in the Government" under Section 19(1) of the Land Acquisition Act and asked Niaz to surrender the documents of Title to the Registrar of Titles Mombasa for rectification. The Notice was copied to amongst others The Municipal Council of Mombasa. The Director of Surveys, the Chief Engineer (Roads) Ministry of Works with a caption that

"Construction of road will start with immediate effect".

And so it did and was completed in due course and handed over by the contractors. It was then opened for use by the public.

Niaz thereafter enjoyed a road frontage and direct access to that road until November 1995 when it is alleged the Commissioner of Lands, with the connivance, consent or knowledge of the Municipal Council of Mombasa created a new leasehold Title from a small portion which remained uncovered by the tarmac road, measuring approximately 0.14 Acres and allocated this to **NANDLAL JIVRA SHAH, VIMAL NANDLAL SHAH and MEHUL SHAH** all Trading as **JIVACO AGENCIES** (hereinafter referred to as **JIVACO**). The Title issued was given LR

No. 9665 Sec.1 MN and Grant No. CR 28028. The 99-year tenure commenced on 1.11.95.

Niaz was piqued about this discovery. He saw not only a deliberate attempt to interfere with his easement rights of access to the new road and its road reserve but also a callous attempt to unlawfully alienate public land to private developers. The threats by the new allottees to commence development or alienate the plot to other persons despite protestations by Niaz compelled him to come to court.

He filed suit on 8.8.96 against the Commissioner of Lands (Commissioner) and **JIVACO**. He also joined the Mombasa Municipal Council (The Council) which is the Local Authority within whose jurisdiction the Kisauni/Nyali Road falls and holds the Road together with the Road reserve thereto in trust for the Public, and must have known about the alienation of the portion of land. He prays for judgment and five orders in that suit:

- (i) A declaration that the creation and grant of allocation by the Commissioner and/or the Council of Title No. LR No. 9665 Sec. 1 MN to Jivaco in 1995 is null and void.
- (ii) A declaration that the lease of 99 years granted to Jivaco by the Commissioner and/or the Council of Title No. 9665 Sec.1 MN is null and void.
- (iii) An order that Jivaco do deliver up the Title No. 9665 to the Commissioner for cancellation.
- (iv) An order that the land comprised in Title No. 9665 Sec.1 MN do remain a road or road reserve.
- (v) An injunction to permanently restrain the defendants jointly and/or severally from selling or developing the said parcel by themselves or their agents or in any other manner from dealing with the land No. 9665 Sec.1 MN.

Contemporaneously with the main suit, Niaz filed a Chamber Summons under Order 39 rule 1.3 & 9 of the Civil Procedure Rules and Section 3A of the Act seeking a temporary order:

"That Jivaco by themselves or by their agents or servants or any person whatsoever acting on their behalf be restrained from developing, erecting structure or structures, selling, assigning or transferring or in any other manner whatsoever dealing in or with or interfering, wasting or alienating plot No. LR No. 9665 Sec.1 MN until the hearing and final determination of this suit or further orders from the court".

This is the application that was argued before me on 19.9.96 and 20.9.96 and was satisfied on the outset that the Commissioner was served with the plaint, summons to enter appearance, chamber summons and affidavit but never bothered to respond thereto or attend court on the hearing date either personally or through the Attorney General. The Council was also served and entered appearance and filed its defense. But it made no response to the application by filing any grounds of opposition or any affidavits in reply. Their Counsel Mr. Iha attended court on the hearing date and was given an opportunity to address the court on any aspect of the application despite the non-filing of grounds of opposition and/or replying affidavit. Counsel declined the opportunity however and stated that he did not wish to make any submissions in respect of the application. He left the courtroom. That left Mr. Asige for Niaz and Mr. Gikandi for Jivaco to battle it out.

As I perceive it. Mr. Asige's case is two-proned: that Niaz has private rights to protect and intertwined with these rights are also public rights, which ought to be protected.

The private rights of Niaz arose because after the acquisition of the land and the construction of the road. Niaz became a frontager to that road and acquired absolute easement rights over the new road. He has a right to remain such frontager, which has its advantages because the portion of his land was not acquired for any other purpose but for construction of a road. He ought to have direct access to the road through this portion but he win not be able to do so since a Title has been created between him and the road and there is no way of knowing what kind of construction or development will be put up there: This may well affect the value of his property. Hence the need to protect these rights the infringement of which will lead to irreparable loss and damage. Intertwined with these rights is a public right which Niaz as a member of the public and in his own right as a user of the road feels he ought to protect. In Mr. Asige's submission, it is clear that the portion now the subject matter of the suit was acquired solely for construction of the new Kisauni/Nyali access road. If the entire stretch of acquired land was not utilized, then any remaining portions still comprised the said Road and its Road - reserve. He cited the Public Roads and Roads of Access Act Cap 399 Section 2(c).

"Public Road means

(a).....

(b).....

(c) all roads and thorough fares hereafter reserved for public use and also the Streets Adoption Act Cap 406 Section 3(I) where 'street' means inter alia

"... a highway... road ... footway... passage or any lands reserved therefor, within the area of Local Authority, used or intended to be used as a means of access to two or more premises or areas of land in different occupation whether the public have a right *of way* over it or not "

On these two premises, submitted Mr. Asige, the area acquired became a Public road or street Under the Local Government Act Cap 265, such areas are under the general control of the local Authority within which they are situated, in this case. The Mombasa Municipal Council, Under Section 182(I) of the Act the Council exercises trusteeship rights and has no right of alienation in breach of that trust. It is the breach of this trust that is intended to be contested in the main suit. It will also be contended that the Commissioner of Lands was part of this larger scheme of alienating road reserves by abusing the provisions of the Land Acquisition Act by compulsorily acquiring land for a specific purpose only to turn round and dish it out to individuals. It will therefore be contended that due to this abuse of the law the allocations made to Jivaco are a nullity abinitio and ought to be so declared by the court. This abuse is even more glaring considering that the new plot created traverses the new tarmac road and according to a survey map annexed to the application two of the beacons stand on the built-up tarmac road. It would mean that in exercise of their new rights Jivaco could build on top of the tarmac road if they wanted to.

In Mr. Asige's submission Niaz has fulfilled all the tests set out in the *Giella Vs Cassman Brown case* including the balance of convenience even if it came to considering the matter on that basis. This is because no development has commenced yet and it would be more convenient to prevent its commencement than to wait until the finalization of the case when it may become necessary to demolish any construction. He invited the court to follow the legal reasoning adopted in **NBI HCCC 688/96. BETH KALIA & Others -Vs- ROBERT MUTISO LELI (UR)** where it was recently held by my brother Mbito J., on the facts of that case, that the President through the

Commissioner of Lands 'could not lawfully alienate suit premises which had been previously alienated and had only been surrendered to the Commissioner to hold in trust for the residents of the area.

Mr. Gikandi relied on the grounds of opposition filed on 29.8.96 and basically contended that the suit did not establish any prima facie case, was frivolous, vexatious and an abuse of the court process the plaintiff can be compensated in damages and that the balance of convenience is not in favor of granting the injunction. He also relied on the affidavit sworn by Mehul Shah for Jivaco and submitted the Jivaco were bona fide purchasers or allottees of the property without notice of any encumbrance. He further submitted that after the compulsory Acquisition as provided for under the Land Acquisition Act the land vested in the Government free from encumbrances. "Vesting" according to the definition provided by Judicial Dictionary, which Mr. Gikandi cited:

"Having a right to immediate or future possession and enjoyment".

The property having vested in the Government therefore 'and there being no challenge to the compulsory acquisition since 1979, there cannot be any challenge now because the land subsequently fell to be dealt with by the Government under the Government Lands Act. This means that after utilizing the acquired portion of 0.36 Acres the remaining portion of 0.14 Acres became "unalienated Government Land" and the Government could deal with it in any way it wished under Section 3 of the Act. The remaining portion in Mr. Gikandi's submission was not a road or a road reserve as alleged. It has now become a Registered parcel of land under the Registration of Titles Act Cap 281 which makes it unchallengeable save for fraud or misrepresentation. Jivaco was not part of this fraud or misrepresentation if any is found to exist.

In his further submission, the Public Roads and Roads of Access Act and the Streets Adoption Act have no application. The Acts are merely for creating Road Boards and providing how one can apply to have a road or street registered or adopted. There is no evidence to show that the Council as a street or road registered the disputed portion and therefore there is no prima facie proof that it fell on a road reserve.

As for the issue of damages Mr. Gikandi says there is an averment in the Affidavit of his client that Niaz had approached Jivaco for sale of the land to him and he must therefore have his own interest and not the Public's in filing this suit That is why he delayed in filing the suit since he found out the new Registration in June 1996 until September 1996 when the suit was filed. Niaz's rights of access have also not been interfered with since there are other approaches to his property. He cannot suffer irreparable loss.

On the allegation that Jivaco 's Title or part of it stands on the tarmaced road. Mr. Gikandi submitted that it was not for Jivaco to ascertain where the beacons were. If any mistakes were made in placing them then these may be explained as human errors. Jivaco does not intend to build on the road. Considering therefore that Jivaco have a Title and now wish to commence development, they should not be stopped from doing so. Finally Mr. Gikandi submitted that Niaz has not even given an undertaking as to damages if the injunction is ultimately found to have been wrongly issued.

On this Mr. Asige submitted that it was for the court to consider whether to require and if so the nature of an undertaking to be given in the event of an injunction being granted and confirmed that his client was ready to adhere to any terms set by the court in that respect.

The parameters within which I must consider this application are clearly set in the Giella Case cited above. I must be satisfied that the applicant has a prima facie case with a probability of

success and that he would suffer irreparable injury which is uncompensable in damages; and if I am in doubt then I have to consider the balance of convenience. In considering the first test I must also bear in mind that at this stage I have not heard any evidence on the case and that I am relying on Affidavit evidence. The matters of conclusive proof shall await evidence at the main hearing.

I have considered the submissions made on both sides and it seems to me that if it can be proved that the disputed portion of land was part of land compulsorily and specifically acquired for the purpose of construction of a Road and still remains as a road reserve then the applicant would be entitled to say that his rights of access to the road through this portion are being interfered with.

There is no right of compulsory acquisition of land by the Government for purposes other than those provided for in the Constitution of Kenya under Section 75:

No property of any description shall be compulsorily taken possession of and no interest in or right over property of any description shall be compulsorily acquired except where the following conditions are satisfied:-

(a) the taking of possession or acquisition is necessary in the interests of defense public safety, public order, public morality, public health town and country planning or the development or utilization of property so as to promote the public benefit and

(b) the necessity therefore is such as to afford reasonable justification for the causing of hardship that may result to any person having an interest in or right over the property,

That spirit is carried forward in the land Acquisition Act itself in Section 6.

"6(I) where the Minister is satisfied that any land is required for the purpose of public body and that-

(a) the acquisition of the land is necessary in the interests of defense, public safety, public order, public morality, public health, town and country planning, or the development or utilization of any property in such manner as to promote the public benefit; and

(b) the necessity therefore is such as to afford reasonable justification for the causing of any hardship that may result to any person interested in the land and so certifies in writing to the Commissioner he may in writing direct the Commissioner to acquire the land compulsorily under this part,"

If it were not so and taken to its logical conclusion, a loophole would be created for any Government which does not mean well for its citizens to compulsorily acquire whole sections of a city or town or other developed property on the pretext of public good compensate the owners of the property acquired' with taxpayers' money and then turn round and dish out those properties to favored citizens of its choice or the enemies of the state: Parliament could not have intended such preposterous consequences,

I am not persuaded by the argument that upon compulsory acquisition of land and the consequent vesting of that land in the Government then the land fails to be used by the Government in any manner it desires, There is plainly no such *Carte Blanche* intended in the provisions of the law cited above, The land must be used subsequent to the acquisition for a lawful purpose and as I see

it, the only lawful purpose is the one for which it was acquired.

I am persuaded that the land in issue was acquired for a specific purpose which is consonant with the Constitution and the land Acquisition Act, namely for the construction of a Public Road. It matters not that the entire portion acquired was not used for that purpose. Unutilized portions in my view would remain as road reserves. And if it was the case that it was found unnecessary after all to have acquired the portions for the expressed purpose does equity not require that the portions be surrendered back to the person or persons from whom the land was compulsorily acquired? The law itself in Section 23 of the land Acquisition Act appears to imply such equity although it relates to withdrawal of acquisition before possession is taken. Perhaps it is a question that may be answered when the matter comes up for full hearing.

I am persuaded by the argument that since the acquisition was done for the purpose of making a Public Road the road thus made remained a Public Road or street and vested in the local Authority. The Municipal Council of Mombasa to hold in trust for the public in accordance with the law. Needless to say this included the portion usually utilized for the tarmac road and the remaining portions which form part of the road reserve.

Finally I am persuaded by the argument that as such trust land neither the local Authority nor the Government could alienate the land under the Government lands Act.

On the above premises, the plaintiff/applicant was entitled to assume that the unutilized portion would remain a road reserve and he would continue to enjoy all the rights and privileges of a frontager to the road and enjoy the resultant easement of direct access to that road, I find on a prima facie basis that the plaintiff had such right and ought to be protected until this case is determined. It is no answer to the prayer sought that the applicant may be compensated in damages. No amount of money can compensate the infringement of such right or atone for transgressions against the law, if this turns out to have been the case. These considerations alone would entitle the applicant to the grant of the orders sought.

But objections were raised on the grounds that the plaintiff has no *locus standi* to protect the public rights he purports to in alleging that a public road was unlawfully alienated. No authority was cited for this proposition. But I suppose allusion was being made to Section 61 of the Civil Procedure Act where in cases of Public Nuisance, it is only the Attorney General or two or more persons having the consent in writing of the Attorney General" who may institute a suit though no special damage has been caused, for a declaration and injunction or other suitable reliefs.

"A Public or common Nuisance is an act which interferes with the enjoyment of a right which all members of the community are entitled to, such as the right to fresh air, to travel on the highways etc. The remedy for a public nuisance is by indictment information or injunction at the suit of the Attorney General" - see Concise Law Dictionary -Osborn.

What if the Attorney General is the cause of the nuisance?

As I said in this courts case **HCCC 1/96 BABU OMAR & OTHERS -Vs- EDWARD MWARANIA & ANOTHER (U.R).**

"There is nothing in the statutes relating to Local Authorities to exclude the courts ordinary jurisdiction to restrain Ultra Vires acts or nuisance or to prevent breaches of trust. No authority has been cited to me to the contrary and I am not aware of one. The applicants are members of the public. They reside and pay their rates to the Mombasa Municipal Council. They would be

entitled to vote here; And they have a right to question the propriety or otherwise of the dealings by the Council of the Public land which the Council holds in trust for the public. They may well be right that the Council is alienating a Public Road Reserve, contrary to the law".

I would apply the same principles here in granting the orders sought even on this limb of the application.

I am satisfied that the first two tests' in *Giella Vs Cassman Brown* case have been satisfied and I need not therefore consider the balance of convenience. If I were to consider it, I would nevertheless hold in favor of the applicant. No evidence has been tendered or submission made that any development of the portion in dispute has commenced. It would obviate heavier losses if the injunction was granted at this stage rather than waiting until the end of the case and after considerable expense has been incurred to order a demolition. Such damage as may be suffered by the Respondents if the injunction ultimately turns out to have been erroneous in law and fact can be sufficiently covered by an order, which I now make, that the applicant do provide and file within the next SEVEN days, an undertaking that he will bear such damages as may be assessed by the court, consequent upon the grant of this injunction.

Subject to this qualification the application is granted with costs.

Dated at Mombasa this 9th day of October 1996.

P.N. Waki .J.

JUDGE

9.10.96

9/10/96

Coram: Waki, J.

C/C - Mutua

Asige for plaintiff/applicant

Gikandi for defendant/respondent

Ruling delivered, signed and dated in open court.

P.N. WAKI.

JUDGE

9.10.9

THE REPUBLIC OF KENYA

**IN THE HIGH COURT OF KENYA AT NAIROBI
CIVIL CASE No. 2059 OF 1996**

**ABDEKADIR SHEIK HASSAN & 4 OTHERS..... APPLICANT
VERSUS
KENYA WILDLIFE SERVICE..... RESPONDENT**

BEFORE: THE HON. JUDGE MR. G.P MBITO

*Constitutional Law: Who owns the flora and fauna in Kenya?
Whether a statutory body such as the respondents had ownership
rights over flora and fauna*

This was an application by private citizens seeking a temporary injunction restraining the defendants from removing an animal called “the Hirola” from its natural habitat in Arwale Tsavo National Park.

The main ground was that, the animal was a gift to the people of the locality and should be left to live in its natural habitat. The defendant argued that, the injunction if issued would be stopping them from carrying their express statutory mandate.

HELD:

1. The constitution of Kenya only excludes minerals and oils from ownership by land owners.
2. Under the customary law, those entitled to use the land are also entitled to the fruits there of which include flora and fauna unless this has been changed by law.
3. The Wildlife Act only entitles the defendant to conserve wild animals in their natural state and not to transfer them.
4. If the animals are conserved at their natural habitat, they would still be available for translocation if the case is to be found misconceived.
5. The respondent would be acting outside its powers if it were to remove any animals from their natural habitat.

Application for injunction granted.

**THE REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CIVIL CASE NO. 2059 OF 1996.**

ABDEKADIR SHEIKH HASSAN & 4 OTHERS===== PLAINTIFFS

VERSUS

KENYA WILDLIFE SERVICE =====DEFENDANT

RULING

By this application filed on 19th August 1996, the plaintiffs seek orders restraining the defendant from removing, dislocating and/or distreslocating or in any other way moving a rare and endangered animal called 'the Hirola' from its natural habitant in Arwale to the Tsavo National Park or any other place or destination on the grounds inter alia that it is a gift to the people of the area and should be left there. The defendant however contends that the injunction should not be granted and/or should be lifted as inter alia the application was seeking to curtail the respondent from carrying out its express statutory mandate.

The principles on which the court acts in such applications are now well settled. According to the case of *Giella vs. Cassman Brown and Co. Ltd.* [1973] EA 358, in dealing with such applications first the applicant should show prima facie case with a likelihood of success. Secondly it should be shown that the applicant is likely to suffer an injury which cannot be adequately compensated by damages if the injunction is not granted. Finally that if there is some doubt the court should act on balance of convenience.

On the first principle on which the court acts it is observed that according to common law and/or customary law of the inhabitants of this country those entitled to the use of the land are also entitled to the fruits thereof which include the fauna and flora unless this has been negated by law. A perusal of the constitution which is the supreme law of this country only shows that minerals and oils are excluded from the ownership of those entitled to use of any given land. See Section 115{1} of the Constitution. A perusal of the wildlife Act as amended by act 16 of 1989 shows that the defendant by virtue of S. 3A and in particular 3A [D] [E] [F] when read together or separately hereby entitle the respondent to conserve the wild animals in their natural state. It does not entitle it to translate them. It would therefore appear that the respondent would be acting outside its powers if it were to move animals or plants away from their natural habitant without the express consent of those entitled to the fruits of the earth on which the animals live. Consequently in this court's view as the respondent is trying to deplete through translocation the applicants heritage of fruits of the land of which they are entitled to through the county council trust they are entitled to maintain this suit and have shown a prima facie case with a likelihood of success.

On injury and/or balance of convenience I need not really be labour the point. If the animals are removed to a new habitant which they are not used to it is not known if they are would survive so as to be returned to their natural habitant if the case is successful. On the other hand if they are conserved at their natural habitant until the suit is heard they would still be available for translocation to the proposed new habitant if it is found that the case is misconceived.

In view of the above findings I am satisfied that the applicants have made out a case for grant of an injunction. I therefore hereby grant prayers 4 and 5 of the chamber summons filed herein on

19th August 1996 in so far as they relate to translocation of the Hirolas from their natural habitat of Arwale nature reserve of Garissa district. The costs hereof shall be in the cause.

Orders accordingly.

Dated at Nairobi this 29th day August, 1996.

Signed

G. P. MBITO
JUDGE.

THE REPUBLIC OF KENYA

**IN THE HIGH COURT OF KENYA AT NAIROBI
CIVIL CASE NO. 3063 OF 1996**

PAUL NDERITU AND 2 OTHERS APPLICANT

VERSUS

- 1. PASHITO HOLDINGS LTD**
- 2. SHITAL BHANDARI.....RESPONDENT**

BEFORE: THE HON. JUDGE MR. MBOGHOLI MSAGHA

*Civil Procedure: Whether an injunction can be issued.
 Whether the applicants have a cause of action
 Order 1 Rule 8, 10(2), 12, Order 39 Rule 1 and 3 CPR*

Loresho Estate, a private development was in 1976 subdivided into several parcels of land which were reserved for public utility. By another registry index map, the Commissioner of lands purported to cancel titles reserved for the water reservoir and made out 3 subplots in the names of the second defendant.

The applicants filed a suit seeking orders that an injunction is ordered restraining the defendants from taking possession of these parcels of land.

Alongside the plaint, the applicants filed two applications by way of chamber summons seeking leave to give notice of the institution of the suit to all parties interested as prospective plaintiffs and another order that the suit properties are public utility and that any allocation there of is null and void.

HELD:

1. The plaintiffs have a prima facie case with a probability of success.
2. If the developments proposed by the defendants are carried out, the purpose for which the land was reserved will be defeated.

Injunction granted with costs.

**THE REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CIVIL CASE NO. 3063 OF 1996.**

PAUL NDERITU NDUNGU AND TWO OTHERS=====PLAINTIFF

VERSUS

1. PASHITO HOLDINGS LIMITED=====1ST DEFENDANT
2. SHITAL. BHANDARI=====2ND DEFENDANT

RULING.

At the center of these proceedings are two parcels of land originally known as Nairobi/block 90/229 situated at Loresho within the city of Nairobi. Loresho estate is a private development originally comprising of I.R.No.5952 and 1653. These two parcels of land were sub-divided in or about 1976, as shown in the sub-division scheme dated 30th January, 1976 which was approved by the commissioner of lands on or about 28th November 1977.

In the said sub-division scheme, several parcels of land were reserved for public utility namely:

- A shopping center, a water reservoir, a police station, a nursery school and a water tower. For purposes of these proceedings, only the parcels reserved for a police station and a water reservoir are in issue.
- From the undisputed facts before me, by a registry index map No.148/2 dated 16.12.1993. The commissioner of lands purported to cancel title No. Nairobi/block 90/575 to 580 inclusive. All the said six plots are in the name of the first defendant Pashito Holdings.

By another Registry index Map No. 148/2 and 3 dated 17/1/96.the Commissioner of Lands purported to cancel title number Nairobi/Block 90/229 reserved for the water reservoir and made out three sub-plots now bearing Nos. Nairobi/block 90/586 inclusive. All the three plots are in the name of the second defendant Shital Bhandari.

By dint of a plaint dated and filed on 11th December, 1996. The plaintiffs have moved the court for three dollars as follows:

- A declaration that neither the commissioner of lands nor any other person has a right to alienate public lands or any part thereof to any person for any use other than that which such public lands are reserved and except as provided for in the relevant laws and statutes.
- A declaration that the allocation to the defendants or to any other person to whom the defendants have respectively derived title to all those pieces of land known as Nairobi/block 575 to 580 (inclusive) and Nairobi/block 90/584 to 586 is null an void AB-INITIO.
- A permanent injunction restraining the defendants, whether by themselves, their respective servants and or agents from taking possession of fencing and or in any other way howsoever developing or selling all these pieces or parcels of land known as Nairobi/Block 90/575 to 580 (inclusive) and Nairobi/Block 90/584 to 586 (inclusive).

The defendants are named as Pashito Holdings limited and Shital Bhandari.

Alongside the plaint the named plaintiffs filed two applications by way of chamber summons. The first is under order I Rules 8 10(2) and 12 of the Civil Procedure Rules which sought leave to

give notice of the institution of the suit to all parties interested in the suit as prospective plaintiffs by way of public advertisement or in such other way that the court may direct. The other application was under order 39 rules 1 and 3 rules of the Civil Procedure Rules for order c. above cited.

The summary of the plaintiff's case is contained in the certificate of Urgency that was annexed to the application for an order of injunction. It reads as follows:

- (i) The plaintiff's case is that the defendants have been allocated the suit properties illegally and they are in the process of fencing the same with the view of developing the same.
- (ii) The plaintiffs' claim is that the suit properties are public utility land and that therefore any allocation thereof is null and void AB-INITIO.
- (iii) If the defendants develop the properties permanently the basis of the plaintiff's case would be destroyed. In that case both the suit and the application would be rendered nugatory.

I came to file a representative action as granted by Aluoch J. on 16th December 1996 and there are interim injunction orders in place issued by this court on 18th December 1996.

There is an affidavit in support of the application for injunction sworn by one Paul Nderitu Ndungu on 11th December 1996 paragraphs 22,28 and 30 of the said affidavit are instructive and I deem it necessary to set them out in full herein below.

They read as follows:

1. That I verily believe that the land reserved for the police station and the water reservoir is not government land strictly speaking which the government can allocate to individuals at will. I verily believe the said land having been reserved for specific purposes can only be utilized for those purposes.
2. That I verily believe that neither the commissioner of lands nor any other person has a right to alienate the said reserved pieces of land or any part thereof for any use other than that for which it has been reserved and that therefore any such alienation of public land is void AB INITIO.
3. That I am advised by council on record that if the actions of the commissioner of lands in alienating parts of public land in this specific case are void AB INITIO the defendants cannot claim to have good titles to the pieces of land given to them illegally and thereof unlawfully.
4. That I verily believe that the allocations of the said pieces of land to the defendants or to any person or persons to whom the defendants may respectively have derived title is therefore null and void.

Both defendants have filed grounds of objection and replying affidavits. The plaintiffs are said to have no locus standi to institute the suit. There is no cause of action, they have not satisfied the principles laid down in the Giella case; no order can be made against a party who is not a party to the proceedings and that there is misjoinder of actions.

One Mandip Singh Amrit has sworn an affidavit in his capacity as a Director of the first defendant Company. He states that the first defendant is the legal owner of Nairobi/Block Nos 90/575 to 580 all-inclusive. He has annexed copies of the relevant documents relied upon. He further avers that the first defendant intends to develop residential houses to the tune of over sh.60 million. He concludes by saying that if the injunction is granted the first defendant will

suffer irreparable loss.

In this affidavit the second defendant states that he purchased the three plots on or about 13th February, 1996 from the original allottees; he annexed copies of the transfers. Pursuant to the transfers, titles were issued. He annexed copies thereof; his ownership has not been challenged either by the City Council or Commissioner of Lands. If the injunction is granted, he stands to suffer loss and damage as he intends to put up a development which will be for the benefit of the public.

I must at this stage commend all learned counsel appearing in this matter for his or her very able submissions. I have also gone through all the cited authorities. Up to this point it will be noted, I have not addressed the relationship of the plaintiffs with the subject matter the parcels of land in dispute. This is because the plaintiffs' capacity to sue or locus standi has been challenged. The issue of the locus standi goes to the root of any action and like what the Court of Appeal has said in relation to the jurisdiction of the court to deal with a matter. If I were to find that the plaintiffs have no locus standi to bring these proceedings. I shall lay down my tools and go no further. I shall now turn to that issue.

The learned Counsel for the plaintiffs cited Administrative Law Vol. 1(1) and submitted that what the plaintiffs were required to show was sufficient interest and that this they have. At page 218 paragraph 116 the following statement is made:

‘A pressure group may have sufficient interest whether or not the actual applicant is directly affected.’

And in the same text at page 219 citing RV Thomas Magistrates Court exp. Greenbaum (1957) 55 LGR 129 Denning L J said;

‘Where application is made to (the court) by a party or a person aggrieved it will intervene (it is said) ex debito justitiae, in justice to the applicant. When a stranger makes application it considers whether public interest demands intervention. In either case it is a matter, which rests ultimately in the discretion of the court.’

Paragraphs 4 and 5 of the plaint read as follows:

“ 4 - The plaintiffs bring this suit on their own respective behalf and on behalf of all residents of Loresho Estate, Nairobi. The plaintiffs and the other residents of Nairobi, have a common interest in this suit against both the defendants.

The plaintiffs are the registered proprietors of all those pieces of land known as L.R. Nos 209/8336/86, and Nairobi/Block 90/214 and 209/8336/244 respectively on which they have developed residential houses in which they live.

Further to the foregoing, the plaintiffs have pleaded in paragraph 12 of the plaint that they together with the other residents of Loresho have with the approval and full cooperation of the Commissioner of police resolved to build a full fledged police station on the land reserved for such purpose that is Nairobi/Block 90/307. The plaintiffs and the said other residents have contributed money and put up some structures for a police post which as at July 1996 was housing four policemen. More money is being raised to construct more structures to accommodate up to (12) policemen. It is also their averment that the Nairobi City Council has built a large under ground water reservoir to serve the residents of Nairobi on the plot reserved for such purpose. Significantly the defendants have not disputed those averments.

The provisions of a police station and therefore security and water reservoir can not be divorced

from the personal welfare of the plaintiffs. In addition to personal interest there is the wider public interest to be taken into consideration. The submission that the Attorney General is the only competent authority to institute a suit on behalf of the public is with respect, restrictive and may lead to miscarriage of justice if accepted as such.

On my part accept and subscribe to the proposition that a party is only required to show sufficient interest to acquire the capacity to urge the court for particular orders. This, the plaintiff have and I find they have the locus standi in this matter and their action is properly before the court.

It is true that land can be acquired by direct allocation or by way of purchase. In the instant case, the first defendant was a direct allottee of the six plots referred to earlier while the second defendant purchased the three plots from Maywood Limited, Mitema Holdings limited and Mova Construction Company limited respectively. All these three companies share the same postal addresses that is P. O. Box 1771, Kisumu and the purchase price of one million shillings for each plot.

These are serious discrepancies in the transfers annexed to the affidavit of the second defendant. They are not in the prescribed form as provided for under the R. I. A. cap 300 laws of Kenya. Only one party has signed the same, that signature has not been witnessed and two of the same transfers did not receive the consent of the commissioner of lands. Nevertheless, certificate of lease were issued in respect of each plot be that as it may the real issue is whether or not the commissioner of lands had the authority to alienate the land of the first defendant and to the three companies who subsequently sold the plots to the second defendant.

The two parcels of land in issue were part of the subdivision scheme which were said to have been surrendered to the Commissioner of Lands for the public utility before the development plan could be approved. The surrender of the said parcels does not vest unto the Commissioner of Lands the power or authority to alienate the same to any party. A trust was in the circumstances of the case created and the commissioner of lands could not deal with the land without reference to the plaintiffs. A similar situation arose in High Court Civil Case No. 688 of 1996. *Beth Kalia and others –Vs- Robert Mutiso Leli*, the court observed.

“As regards the Commissioner of Lands, it is clear that he was to hold the land in trust for the adjacent owners who have in fact paid for it. He therefore was under a duty to deal with it with their approval and not otherwise. He therefore did not have the power to alienate the land to the respondent.”

That was a decision of the High Court with concurrent jurisdiction and is not binding on me. However with respect I agree with that holding in its entirety.

In addition to the foregoing the plaintiffs have annexed to the affidavit for injunction a letter addressed to the commissioner of police by the Commissioner of Lands dated 23rd April 1993, which read as follows:

The Commissioner of Lands
Police Headquarters
P. O. Box 30083,
NAIROBI.

LETTER OF RESERVATION FOR PLOT NO. BLOCK 90 307 FOR POLICE STATION AT LORESHO.

I am pleased to inform you that plot no. Nairobi Block 90 307 at Loresho area measuring 2.575 hectares is hereby reserved to your department for construction of the police station. The plot is surveyed and given the above number. Greatest care should be exercised to ensure all the buildings or other works are contained within the boundaries. The plot is shown edged in red on the attached plan.

W.Gachanja
COMMISSIONER OF LANDS.

The said letter was copied to among others; The Director of surveys, the Town clerk, Nairobi and the Director of Physical Planning Department. It is ironic that the Commissioner of Lands did cancel the said number on 16/12/93 by a registry index map no.148/2 of even date. There is no dispute also that the plot reserved for a water reservoir was originally known as Nairobi Block 90/229. So it must also have been surveyed and designated for that particular purpose.

Under the Government Lands Act. Cap 280 laws of Kenya the Commissioner of Lands can only make grants or depositions of any estates, interests or rights in over unalienated Government land see Sec. 3. In the instant case parcels among others had been alienated and designated for particular purposes. It is not open for the Commissioner of Lands to reallocate the same. So the alienation was void ab-initio. I have noted the submission on misjoinder of parties. However my view is that in this particular case it is not necessary to join the Commissioner of Lands as a basis of making such an order. In any case it was also open to the defendants to join any party of these proceedings.

It has been submitted that the second defendant is a purchaser for value without notice and as such he is a daring of equity. I know the law provides that he was not bound to investigate the titles before he purchased the plots. However over the last few years and the recent past dealings in land have become more and more precarious. More than ever before it is incumbent upon any party dealing in land to ascertain its legal status before committing himself. If the second defendant did not take such precautions before parting with substantial sums of money the loss may lie where it has fallen. In the circumstances of this case the face of equity will frown at the transaction.

Having said as much I find that the plaintiffs have presented a prima facie case with a probability of success. Damages may not be adequate compensation in view of both personal and community interests at stake in this matter.

I am not in any doubt about my finding herein above and even if I was I would still find that the balance of convenience tilts in favor of the plaintiffs. If the developments proposed by the defendants were to be carried out. The purpose for which the land was reserved will be defeated. The subject matter has to be preserved. In the end the plaintiffs' injunction hereby proceeds with costs.

Orders accordingly.

Dated and delivered at Nairobi this 18th day of April, 1997.

Signed

A. MBOGHOLI MSAGHA
JUDGE.

**THE REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CIVIL CASE No. 72 OF 1994**

**PROF. WANGARI MAATHAI
PIUS JOHN NJOGU
JOHN F. MAKANGA..... APPLICANTS**

VERSUS

- 1. CITY COUNCIL OF NAIROBI**
- 2. COMMISSIONER OF LANDS**
- 3. MARKET PLAZA LIMITED.....RESPONDENTS**

BEFORE: THE HON. JUDGE MR. OLE KEIWUA

Civil Procedure: Locus standi: Whether the plaintiffs had a unique interest as opposed to that of the general public

The plaintiffs filed a suit against the defendants seeking declarations that;

1. The sub division, sale, transfer of LR 209/1855/2- LR 5727 is irregular and breached special condition on the grant dated 1st/08/ 1982.
2. The issuance of certificate of title by commissioner of lands is irregular and contrary to the law.
3. Revocation of sub division of land Ref 209/1855- LR 2562 together with revocation of sale thereof.
4. An injunction restraining the defendant from selling or carrying out any construction work on LR 209/1855/2.

The defendants denied all allegations and contended that the plaintiffs have no *locus standi* to bring the proceedings before court and that S.23 of the RTA is conclusive evidence that the person named in the Certificate of Title as proprietor of the land is the indefeasible owner thereof and title to that proprietor shall not be subject to challenge.

HELD:

1. Plaintiffs have failed to show that there has been any failure in public duty in which they alone have a unique interest as opposed to that of the public generally.
2. The plaintiffs have no *locus standi* and should not be heard.
3. Plaintiffs shall pay all the defendants costs of this suit.

Suit struck out.

**THE REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI.
CIVIL CASE NO. 72 OF 1994.**

**PROF. WANGARI MAATHAI
PIUS JOHN NJOGU
JOHN F. MAKANGA =====PLAINTIFFS**

VERSUS

**CITY COUNCIL OF NAIROBI
COMMISSIONER OF LANDS
MARKET PLAZA LIMITED =====DEFENDANTS**

RULING.

The plaintiffs sued the defendants and sought these declarations:-

- That the subdivision, sale and transfer of L.R. 209/ 1855/2 – L.R. 5727 is irregular and breached special condition in the grant dated 1.8.1928. It is ultra vires the powers of the first defendant which is Nairobi City Council.
- That the issuance of certificates of the Title by the commissioner of Lands is irregular and contrary to law.
- The revocation of subdivision of land Ref.209/1855 – I.R. 2562 together with revocation of sale thereof.
- An injunction to restrain the 3rd defendant from selling or carrying out any construction work on L.R. 209/1855/2. A chamber summons dated 17.1.1994 has been filed in court and seeks an injunction against the third defendant to restrain it from constructing anything on the plot in question. It is supported by the affidavit of the first plaintiff which swears that the plot is in danger of being alienated. The plaintiff will be obstructed in execution of any decree that they may obtain against the defendants if construction work is permitted to continue unabated.

In its grounds of opposition dated 17.1.1994 the third defendant denies that it is disposing off the plot and says, an injunction will cause hardship to the third defendant because the approval of the building plans by the Nairobi City Council is valid only for a year. The third defendant's title is guaranteed by the provisions of the Registration of Titles Act Cap. 281 under which the title has been issued. An injunction if granted will render the provisions of the Registration of Title Act nugatory.

The third defendant also filed the application dated 17.1.1994 for an injunction against the plaintiffs. The second defendant filed an affidavit in which it is deponed that the Nairobi City Council applied for the subdivision of the plot in question and the approval was given in the normal way.

In their grounds of opposition the plaintiffs said that they do not intend to damage the plot in question save by way of lawful litigation in courts of law. The third defendant alone had filed a defence. It denies breach of the 1928 special condition upon which the suit is based. It denies a sale to it of the plot but claims a lawful allocation thereof which conferred good title. In

paragraph 16 of this defence it is pleaded:-

“This third defendant contends that the plaintiffs herein have no locus standi to bring the proceedings now before the court and shall at the appropriate time move the Honorable Court to strike out this suit.”

There is also paragraph 19 which pleads:-

“The third defendant shall rely on the provisions of section 23 of the Registration of Titles Act Cap 20 which provides inter alia, that the certificate of Title issued by the Registrar to the purchaser of land upon a transfer shall be taken by all courts as conclusive evidence that the person named therein as proprietor of the land is the indefeasible owner thereof ... and the title to that proprietor shall not be subject to challenge.”

There is of course section 24 of the Registration of Titles Act which says that the remedy of a person aggrieved by such registration as that of the 3rd defendant is in damages only.

As pleaded in paragraph 16 of the defence of the third defendant the time to raise the issue of locus standi, came on 27.1.1994 when the point was taken by the third defendant that the plaintiffs had no right to appear and be heard in this case and their suit be struck out. For this proposition of lack of standing Mr. Muigua relied on the House of Lords decision in *GOURRIET AND OTHERS VS. H.M. ATTORNEY GENERAL AND UNION OF POSTS OFFICE ENGINEERING UNION* (sic) (1971) AC 435 at Pages 437 Letter C:

HELD: Allowing the appeals by the defendants and dismissing the plaintiff's appeal.

That save and in so far as the local Government Act 1972 , section 222 gave local authorities a limited power to do so, only the Attorney General could sue on behalf of the public for the purpose of preventing public wrongs and that a private individual could not do so on behalf of the public, though he might be able to do so if he would sustain injury as a result of a public wrong, for the courts had no jurisdiction to entertain such claims by private individuals who had not suffered and would not suffer damage (post pp. 481 A. 494 F.G.) page 481.

But in the present case, the transgression of those limits inflicts no private wrong upon these plaintiffs and although the plaintiffs, in common with the rest of the public might be interested in larger view of the question yet the constitution of the country has wisely entrusted the privilege with a public officer, and has not allowed it to be usurped by private individuals.

“That it is the exclusive right of the Attorney General to represent the public interest even where individuals might be interested in the larger view of the matter it is not technical , not procedural, not fictional. It is constitutional. I agree with Lord Westbury L.C. that it is also wise.”

It was submitted on behalf of the third defendant that the present case should have been brought by way of a relator action if the Attorney General saw it fit to do so. The plaintiffs have not shown that they suffer any private injury if the proposed multi storey car park building is built. The basis of the plaintiff's action is they allege that they are rate payers in the city of Nairobi. The third defendant had submitted that these elements of rate paying are unsupported because no amount of rate is indicated, when paid, in respect of what property the plaintiffs are concerned with. Even rate paying alone does not entitle the plaintiffs to sue unless they show that they stand to suffer injury or damage over and above other rate payers if the building is constructed. As pleaded in paragraph 19 of the 3rd defendants defence Section 23 of the Registration of Titles act

Cap 281 require that a certificate offer shall be taken by all courts as conclusive evidence the indefeasible owner thereof/ and the title to that proprietor shall not be subject to challenge.

This is however subject to encumbrances, easements, restrictions and conditions, contained or endorsed on such certificate. There is the First of August 1928 special condition to which the third defendant says it has not been breached because the present plot L.R. 209/1855/2 I.R. 57271 has always been used as a parking area.

In paragraphs 8 and 10 of the 3rd defendant's defence it is stated that the suit premises were not purchased by the third defendant but allocated to it and made payment of K. Shs. 2 million by way of stand premium as opposed to any purchaser price. In paragraph 9 of this defence fraud on the part of the defendants is denied in that the First defendant, Nairobi City Council acted legally and within its powers when it applied for the subdivision. It is said the third defendant is a stranger to the plaintiff's allegations that the plaintiffs are aggrieved by the said allocation, subdivision and transfer to the third defendant of L.R. No. 209/1855/2. In that connection the third defendant contends that the plaintiffs have no locus standi to bring these proceedings.

On the basis of lack of standing and the provision and the provision of S. 23 of the Registration of Titles Act I was urged to hold that the plaintiffs had no right to sue, no right to appear, no right to be heard in these proceedings.

On the other hand Mr. Khaminwa for the plaintiffs, submitted in relation to the attack and lack of evidence of details of rate paying, that they had intended to call oral evidence of this at the hearing of the application for injunction and present preliminary point has come prematurely and at the wrong time because the 3rd defendant must wait to give the plaintiffs the opportunity to show by oral evidence that the plaintiffs have a standing. Mr. Khaminwa thinks the provision of Section 23 cannot be looked at this stage when dealing with whether the plaintiffs have a right to speak against an owner of a title registered under the Registration of Titles Act.

A number of authorities were cited by Mr. Khaminwa. One of this is the ***INLAND REVENUE COMMISSIONERS VS. NATIONAL FEDERATION OF SELF EMPLOYED*** [1985] AC 617 Page 653.

“Suffice it to refer to the judgment of Lord Parker C.J., in ***REG. vs. Thames Magistrates Court***... “ a cause of certiorari; and to the words of Lord Wilberforce in ***Gouriet Vs. Union of Post Office Workers*** [1978] AC 435, 482 where he stated the modern position in relation to the prerogative orders:

“These are often applied for by individuals and the courts have allowed them liberal access under a generous conception of Locus standi. The one legal principle which is implicit in the case law and accurately reflected in the rule of court, is that in determining the sufficiency of an applicant's interest it is necessary to consider the matter to which the application relates. It is wrong in law, as I understand the cases, for the court to attempt an assessment of sufficiency of an applicant's interest without regard to the matter of his complaint. If he fails to show, when he applies for leave, a prima facie case, or reasonable grounds for believing that there has been a failure of public duty, the court would be in error if it granted leave. The limb represented by the need for an applicant to show, when he seeks leave to apply, that he has such a case is an essential protection against abuse by busy bodies, cranks, and other mischief makers. I do not see any further purpose served by the requirement for leave.”

According to the plaintiff's the matter of their complaint here is the subdivision, allocation and

transfer and registration of the suit premises in the name of the third defendant. The sufficiency of the plaintiffs' interest must be looked at with regard to the kind of premises the suit land is. As already stated that the title issued to the 3rd defendant herein cannot be challenged in the absence of matters set out in Section 23 of the Act. This is the subject matter of the plaintiff's complaint in respect whereof the 3rd defendant has rightly raised a preliminary point that the applicants have no right to be defendant's title. In my considered view, there is no further investigation required to ascertain what the subject of the plaintiff's complaint is. It is there in their plaint, in their chamber summons. At this stage the plaintiffs must show, and they have failed to show, that there has been any failure of any public duty in which they alone have a unique interest as opposed to that of the public generally.

I have been referred to a passage in Wade, Administrative Law which in itself cries for answer. In the Lord Denning book: "The Judge and the Law" I was referred to a passage like that of the Inland Revenue Commissioner's case which deals with: "Exceptions had been made, particularly in applications for certiorari or prohibition, but by and large standing was narrowly construed". The plaintiffs are not before the court on any matter of certiorari or prohibition but by way of an ordinary suit by plaint restricted by the nature of the statute law in Kenya and restricted by their own interest in the subject matter of complaint namely as a rate payers which they have not been able to make out a case.

I am therefore satisfied that the plaintiffs have no locus standi in this case and they should not be heard. Accordingly the plaintiff's suit is struck out as urged in the preliminary objection. The plaintiffs will pay all the defendants costs of this suit.

Delivered this 17th day of March 1994

In the presence of:

Khaminwa for the plaintiffs (absent)

Kinyua for the 1st defendant

Miss Kimani for the 2nd defendant

Mr. Muigua for the 3rd defendant.

Signed

M. OLE KEIWUA.

JUDGE.

THE REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL CASE NO. 6153 OF 1992

MAINA KAMANDA & ANOTHER..... APPLICANT

VERSUS

NAIROBI CITY COUNCIL & ANOTHER.....RESPONDENT

RULING

BEFORE: THE HON. JUDGE MR. M. AKIWUMI

*Civil Procedure: Whether the applicants required permission from the Attorney General before bringing the matter to court.
Whether the applicants had legal standing to file a suit against the respondents.*

The applicants filed this application as Nairobi residents and rate payers against the respondents to restrain the first respondent from permitting the second respondent from continuing to enjoy facilities and perquisites which he had enjoyed while he was the chairman of the Nairobi City Commission.

A preliminary objection was raised by the respondent that the applicants had no *locus standi* to bring the action they had brought, since they had not shown sufficient interest in seeking the relief they were seeking and that they also required permission of the Attorney General to bring the action which they had not sought.

HELD:

1. A rate payer as opposed to a tax payer has sufficient interest as such; to challenge in court the action of a public body to whose expense he contributes.
2. Court will not prevent the applicants from bringing to the notice of this court the improper conduct of the respondents.
3. The applicants have as rate payers' sufficient interest in bringing to the attention of this court any alleged unlawful act being committed by the respondent and to seek its stoppage with or without the Attorney General's consent.

Application allowed

THE REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CIVIL CASE NO. 6153 OF 1992

MAINA KAMANDA & ANOTHER===== PLAINTIFFS

VERSUS

NAIROBI CITY COUNCIL & ANOTHER===== DEFENDANTS

RULING.

The applicants are two Nairobi residents and rate payers. They have instituted the present action against the 1st respondent, the Nairobi City Council and the 2nd respondent, the erstwhile Chairman of the Nairobi City Commission inter alia to restrain the 1st respondent from permitting the 2nd respondent to continue to enjoy certain facilities and perquisites which he had enjoyed when he had been the Chairman of the Nairobi City Commission. These facilities and perquisites are the 1st respondent's house LR No.330/492 Korosho Road (it had been described in the pleadings as LR No.330/493 Korosho Road, but this was subsequently corrected to read LR 330/492 Korosho Road), its office known as the Mayor's Parlour and telephones therein, and its Mercedes Benz motor car registration number KAA 8075.

Upon the filing of the suit, the applicants applied for and obtained ex-parte a temporary injunction which did not apply to the 1st respondent's Korosho Road house because at that time the correction in its description had not yet been made, but which did apply to all the other facilities and perquisites of the 1st respondent already described. At the beginning of the subsequent, inter parties hearing of the related application, a preliminary objection was raised on behalf of the 2nd respondent that the applicants had no locus standi to bring the action they had brought. This same ground was among the grounds of objection filed on behalf of the 1st Defendant. I decided it would be convenient and proper that this ground should be argued first for if it succeeded that would be the end of that matter.

The arguments put forward in support of the objection were that the applicant had no locus standi since they had not shown that they had sufficient interest in seeking the relief they were seeking; that since what they claimed was a matter in the realm of a public wrong, ex relatione, they required the permission of the Attorney General to bring the action which they had not got; that the applicants have improperly brought the action in a representative capacity; and that the applicants are mere busy bodies who seek to abuse the process of the court by instituting the action. But in considering this matter of a mixed question of law and fact, I have to take into consideration its surrounding circumstances. They are simply this:

- that the applicants say among other things;
- that as rate payers, they object to the 1st respondent continuing to extend its facilities and perquisites to the 2nd respondent after he had ceased to be the Chairman of the Nairobi City Commission and;
- that this amounted to a misuse of the funds of the 1st respondent and that as ratepayers, they had sufficient interest to bring the action. I think that it is now well settled that a ratepayer as opposed to a taxpayer has sufficient interest as such, to challenge in court the action of a public body to whose expenses he contributes.

This was eloquently set forth in the following passage from the speech of Lord Diplock in the House of Lords case of *RC vs National Federation of self-employed and Small Business Ltd. (1982) AC 617 at 740 et seq.*:

"For my part I need only refer to *Reg. v. Greater London Council, Ex parte Blackburn* (1976) I. WLR. 550. In that case Mr. Blackburn who lived in London with his wife who was a ratepayer applied successfully for an order of prohibition against the council to stop them acting in breach of their statutory duty to prevent the exhibition or pornographic films within their administrative area. Mrs. Blackburn was also a party to the application.

Lord Denning M.R. and Stephenson L.J. were of opinion that both Mr. and Mrs. Blackburn had *locus standi* to make the application; Mr. Blackburn because he lived within the administrative area of the council and had children who might be harmed by seeing pornographic films and Mrs. Blackburn not only as a parent but also on the additional ground that she was a ratepayer. Bridge L.J. relied only on Mrs. Blackburn's status as a ratepayer, a class of persons to whom for historical reasons the court of King's Bench afforded generous access to control *ultra vires* activities of the public bodies to whose expenses they contributed. But now that local government franchise is not limited to ratepayers, this distinction between the two applicants strikes me as carrying technicality to the limits of absurdity having regard to the subject matter of the application in the Blackburn case. I agree in substance with what Lord Denning M.R. said at P.559 though in language more eloquent than it did would be my normal style to use:

"I regard it as a matter of high constitutional principle that if there is good ground for supposing that a government department or a public authority is transgressing the law. or is about to transgress it, in a way which offends or injures thousands of Her Majesty's subjects, then anyone of those offended or injured can draw it to the attention of the courts of law and seek to have the law enforced and courts in their discretion can grant whatever remedy is appropriate", (The italics in this quotation are my own)".

Lord Diplock concluded his speech with the following penultimate paragraph with which I respectfully also agree and adopt. in my consideration of the matter now before me:

"It would, in my view, be a grave lacuna in our system of public law if a pressure group like the federation, or even a single public-spirited taxpayer, were prevented by outdated technical rules of locus standi from bringing the matter to the attention of the court to vindicate the rule of law and get the unlawful conduct stopped. The Attorney General although he occasionally applies for prerogative orders against public authorities that do not form part of central government in practice never does so against government departments. It is not in my view. a sufficient answer to say that judicial review of the actions of officers or departments of central government is unnecessary because they are accountable to Parliament for the way in which they carry out their functions, They are accountable to Parliament for what they do so far as regards efficiency and policy, and of that Parliament is the only judge; they are responsible to a court of justice for the lawfulness of what they do and of that the court is the only judge",

The matter that the applicants have raised is not a misguided or trivial complaint of an administrative error; it is one that involves a serious allegation of misapplication of public funds by a local authority.

As stated in Constitutional and Administrative Law. ECS Wade and AW Bradley, (10th Edn,

1985 pp660 - 661):

"An injunction may be claimed against a public authority or official to restrain unlawful acts which are threatened or are being threatened, for example to restrain unlawful interference with private rights or to restrain ultra vires action such as improper expenditure of local funds".

This brings me to the issue whether the present suit can be instituted as a relator action without leave of the Attorney General. In the recent case of *Oginga Odinga and 3 others v Zachariah Richard Chesoni and the Attorney General*. Misc. Civil Application No, 602 of 1992, the three Judge Constitutional Bench of the High Court when dealing with the question of relator actions had this to say:

"When it comes to the public interest where a party suffers generally as any other then relator actions lie. These actions fall under as 61 and 62 of the Civil Procedure Act and they are limited to public nuisance and public charity. The Attorney General is the principal aggrieved party but 2 or more private persons having interest in the given action and with the Attorney General's written consent can sue".

That a relator action was required in the specific action concerning a public charity as provided for by the Civil Procedure Act was reiterated in the case of *Wafk Commissioners v Mohamed bin Umeya bin Abdulmajid bin Mwijabu and Ali Mohamed Ali Bashir (1984) 2 KAR.*, Hancox, J.A as he then was had this to say:

"One other final matter remains. The respondents did not initially obtain the Attorney General's consent required under S.62 of the Civil Procedure Act. It was given for the institution of this suit by the then Attorney General on 4th June 1977".

But even if the present action can be said to be a relator action, and I do not think so, I will not prevent the applicants from bringing to the notice of this court the improper conduct of the 1st Respondent. I have already referred to the penultimate paragraph of Lord Diplock speech in the National Federation case supra. Nearer home. Hancox JA as he then was stated in *Njau vs Nairobi City Council (1982-1988) 1 KAR 229 at 239* that:

"Even though that became a relator action, the tenor of Lord Denning's remarks and that of Lord Diplock in the National Federation case. show that the tendency is not to prevent people bringing to the attention of the courts unlawful conduct by public authorities with a view to redress or getting the unlawful conduct stopped",

As to the objection that the Applicants had followed the wrong procedure in bringing a representative suit that has only to been stated to be rejected. It is true that in the plaint and the affidavits in support of the injunction application it is averred that the 2nd respondents' use of the facilities and perquisites of the 1st respondent would give him an unfair advantage over the Applicant and other persons who are like the 2nd respondent, aspirants in the forthcoming civic elections but this passing remark does not make the present suit a representative one. And though I do not think that the political rivalry between the applicants and the 2nd respondent gives the former any cause of action and locus standi, the Applicants as I have already stated, have as rate payers, sufficient interest in bringing to the attention of this court any alleged unlawful act being committed by the 1st respondent and to seek its stoppage.

The issue of locus standi is not a matter to be considered in the abstract and apart from the surrounding circumstances which I have already alluded to there are other relevant matters

revealed in the affidavits filed in support of and in opposition to the injunction application, It seems to me that there is more than meets the eye concerning the circumstances under which the 2nd respondent became a tenant of the 1st respondent. Secondly how did house No. LR 330/493 which had been repaired and lavishly furnished as the official residence of the Mayor of the 1st respondent pass into the hands of another person.

In the result and taking into account all the authorities cited to me in this matter, I rule that the Applicants have locus standi to bring the present suit

Dated and delivered this 8th day of December. 1992.

M. AKIWUMI
JUDGE.

THE REPUBLIC OF TANZANIA

IN THE HIGH COURT OF TANZANIA AT DODOMA
CIVIL CASE NO. 5 OF 1993

REV. CHRISTOPHER MTIKILA PLAINTIFF

VERSUS

THE ATTORNEY GENERAL.....DEFENDANT

BEFORE: THE HON. MR. JUSTICE LUGAKINGIRA, J.

Civil Procedure : *Public Interest litigation, cause of action, locus standi*
Constitutional Law: *Whether there is breach of fundamental human rights.*
Whether the provisions in the laws stated are unconstitutional.

This Petition constituted several petitions in one which ranged from challenges to the validity of diverse laws to the protection of the Constitution and legality. The petitioner, the Rev. Christopher Mtikila, is a Human Rights campaigner-cum-political activist who brought this suit against the Attorney General.

The petition originally raised many diverse issues, mainly involving political in flavor and substance, and this prompted the defendant to raise a litany of preliminary objections which the Court resolved in the early stages of the proceeding. The objectives were grounded in questions of the petitioner's *locus standi*, cause of action and justifiability of some of the issues. At the end of the day a number of matters were struck out and new issues were framed, and these included;

1. Whether the amendments to the Constitution were validly made and, if not, whether they can be declared void pursuant to the provisions of Art. 64(5).
2. Whether provisions of S. 8, 9, 10 and 15 of the Political Parties Act, 1992 (No. 5) which was enacted pursuant to the amendment to Art. 20 inhibit the formation of political parties.
3. Whether Sections 5 (2), 13, 25, and 37- 47 of the Newspapers Act, 1976 (No. 3), infringe the freedom of expression which is guaranteed under the Constitution.
4. The fourth issue deals with the freedom of peaceful assembly and public expression and questions the constitutionality of S. 4, 41, 42 and 43 of the Police Force Ordinance, Cap. 322, as well as s. 11 (1) and (2) of the Political Parties Act.

HELD:

1. In this petition the dispute is over the validity of various laws and this, in my view, constitutes the necessary cause of action.
2. The court as guardian and trustee of the constitution and what it stands for, is under an obligation to rise up to the occasion and grant a public spirited individual seeking its intervention standing.

3. The constitution equips an individual with double standing to sue as an individual and as a member of the community.
4. Every person is entitled by law to institute proceedings for the protection of the Constitution and its legality.
5. In public interest litigation, the notion of personal interest, personal injury or sufficient interest over and above the interest of the general public does not arise as a consideration. In matters of public interest, the courts will not deny standing to a genuine and bona fide litigant even where he has no personal interest in the matter.

That said, however, it is difficult to draw the inference of unconstitutionality, which the Court was called upon to draw, in relation to those appointments. The furthest we can go is to fall back to the words "subject to the other provisions of this Constitution" in Art. 36 (2) and this would lead to the division of union and non-union matter in Art. 4(3).

A breach of the Constitution, however, is such a grave and serious affair that it cannot be arrived at by mere inferences, however attractive, and I apprehend that this would require proof beyond reasonable doubt. I have therefore not found myself in a position to make the declaration sought and I desist from doing so.

THE HIGH COURT OF TANZANIA AT DODOMA.

CIVIL CASE NO. 5 OF 1993.

REV. CHRISTOPHER MTIKILA=====} PLAINTIFF.

VERSUS

THE ATTORNEY GENERAL =====} DEFENDANT.

RULING: LUGAKINGIRA. A. J.

This was an unusual petition. In its content and demands it constitutes several petitions in one, which range from challenge to the validity of diverse laws to the protection of the construction and legality. The petitioner, the Rev. Christopher Mtikila, is a human rights campaigner and political activist and was represented by learned counsel Mr. Dominic Mbani who was assisted by Mr. Richard Rweyongeza. Mr. Kipenka Msemembo Musa, a Senior State Attorney, represented the respondent Attorney General. I wish to commend them all for the industry and brilliance that went into the preparation and presentation of arguments.

The petition originally raised very diverse issues, many of them rather political in flavor and substance, and this prompted Mr. Musa to raise a litany of preliminary objections, which the court resolved in the early stages of the proceeding. The objections were grounded in questions of the petitioner's locus standi, cause of action and justifiability of some of the issues. At the day a number of matters were struck out and issues were then framed for the survivors. In view of the character of the petition, which had to be amended several times, it is better to paraphrase these issues rather than merely list them.

The first issue is a general one and is tied up with the second and fifth issues. It seeks to establish generally whether the fundamental rights guaranteed in part III, chapter one of the constitution of the united republic, 1977 are immutable. The inquiry is prompted by a set of amendment Act, 1992 (no.4). The act amends articles 39,67 and 77 in a manner which appears to infringe the right of participation in national public affairs which is guaranteed by Art .21(1);It also amends Art 20 in a manner that appears to infringe the freedom of association which is guaranteed in sub-art ,(1) there of. To put it differently, the problem posed in the first issue is whether the amendments to the constitution were validly made and, if not ,whether they can be declared void pursuant to the provisions of Art.64 (5).

The second issue on the provisions of ss.8,9,10 and 15 of the Political Parties Act,1992(No.5)which was enacted pursuant to the amendment to Art 20.These provisions are alleged to inhibit the formation of political parties and therefore to infringe the freedom of association. I am called upon to declare them unconstitutional and void. The fifth issues arises from the amendment to Articles 39,67,and 77 as well as 39 of the Local Authorities (Elections)Act ,1979.These amendments render it impossible for independent candidates to contest for Presidential, Parliamentary or local council elections and again called upon to remedy the situation.

In the third issue the petition takes on ss.5 (2),13,25 and 37-47 of the Newspapers Act ,1976 (No.3).Section 5(2) empowers the Minister responsible for the matters relating to newspapers to exclude any newspaper from the operation of any of the provisions relating to the registration of newspapers.

Section 13 empowers the Minister to require any publisher of a newspaper to execute and register a bond in the office of the Registrar of Newspapers. Section 25 empowers the Minister to order cessation of publication of any newspaper. Sections 37-47 are concerned with defamation and the punishment for libel. Finally, the petition takes on para 12 (1) of Government Notice No.166 of 1977 which empowers the Registrar to refuse registration of newspaper. It is contended that all these provisions are arbitrary and liable to abuse and constitution on infringement to the freedom of expression which is guaranteed under Art 18 (1).

The fourth issue turns on the freedom of peaceful assembly and public expression and questions the constitutionality of S.40,41,42 and 43 of the Police Force Ordinance Cap 322, as well as ss.11 (1) and (2) of the Political Parties Act. These provisions make it possible for permits to be obtained in order to hold meetings or organize processions and also provide for police duties in relation thereto. In the sixth and the final issue a declaration is sought on the constitutionality of the appointment of Zanzibaris to non-Union posts on the Mainland.

In my ruling in the preliminary objections I reserved for conservation at this stage the questions of Locus Standi; cause of action and justiciability and I will proceed to do so before considering the matters set above.

Arguing the question of locus standi, no doubt with a mind to the common law orthodox position, Mr. Mussa submitted that the petitioner had to show a sufficient interest in the outcome. He considered this to be implied in Art .30 (3) of the constitution. In his view the petitioner had to demonstrate a greater personal interest than that of the general public, and cited the Nigerian case of *Thomas & Ors. v .Olufosoye* (1986) LRC(const) 639 in support of his argument.

In that case it was held by the Court of Appeal that under ss.6(6) (b) of the 1979 Nigerian Constitution it was necessary for the appellants to establish a sufficient interest in maintaining the action and this should be a personal interest over and above that of the general public. Ademola, J., C.A said ,at p.650:

It is also the law as laid down in the Adesanya Case that, to entitle a person to invoke judicial power, he must show that either his personal interest will immediately be adversely affected by the action or that he has sustained or is in immediate danger of sustaining an injury to himself and which interest or injury is over and above that of the general public.

Basing on this, Mussa went on to assert that the crucial factor was the petitioner himself and not the contents of the petition. Furthermore, he contended that Art. 26(2) of the Constitution did not in itself confer locus standi and appeared to read the provision as if it were not independent in itself.

In response Mr. Mbezi argued that standing was certainly conferred on the petitioner by Art 26(2) and that personal interest (or injury) did not have to be disclosed in that context .He maintained that the alleged illegality of the laws was sufficient to justify the petition under that provision. Mr. Mbezi further stated that the petitioner acquired locus standi under Art 10(3) as well and referred to the dispersal of his meeting under the provisions of the Police Force Ordinance, the refusal to register his party under the provisions of the Political Parties Act and the banning of Michapo and Cheka newspapers (his alleged mouth pieces) as sufficiently demonstrating the petitioner's interest within the contemplation of Art 30(3).Mr. Mbezi further argued that in view of the provisions of Art 64 (5) the Court could be moved into action by any petitioner.

I have given due consideration to the contending arguments and feel called upon to deal with the

subject at some length. The status of the litigant in administrative law is a crucial factor and it has assumed an added dimension in constitutional law in the wake of written constitutions. In the English common law the litigant's locus standi was the handmaid of judicial review of administrative actions. Whenever a private individual challenged the decision of an administrative body the question always arose whether that individual had sufficient interest in the decision to justify the court's intervention. Hence, it is stated in Wade and Phillips, Constitutional Law (1965:672);

“ In administrative law it is necessary for a complaint to have a peculiar grievance which is not suffered in common with the rest of the public. ”

The turning point in England came with the procedural reform in judicial review vide s.31 of the Supreme Court Act, 1983, which was to lead in the course of the 1980s to the recognition of the existence of public law as a distinct sphere from private law. In other parts of the Commonwealth, notably India and Canada, a similar but imperceptible development came to manifest itself in the doctrine of public interest litigation. Traditionally, common law confines standing to litigate in protection of public rights to the Attorney General and this was reaffirmed by the House of Lords in *Guriet v. Union of Post Office Workers* (1978) AC 435, and the Attorney General's discretion in such cases may be exercised at the instance of an individual. But before even the enactment of the Supreme Court Act, a liberal view of standing was already taking shape and a generous approach to the issue was already considered desirable. This is illustrated by these words of Lord Diplock in *IRC vs National Federation of Self-Employed and Small Business Ltd.* (1981) 2 All E.R. 93,107:

It would, in my view, be a grave lacuna in our system of public law if a pressure group, like the federation or even a single spirited taxpayer, were prevented by out-dated technical rules of locus standi from bringing the matter to the attention of the Court to vindicate the rule of law and get the unlawful conduct stopped.

Yet more contemporary developments indicate that in England judges are beginning to acknowledge the possible appearance of apparent “busy-bodies” where public interest litigation is concerned. The late Raymond Blackburn, a lawyer and former Member of Parliament, litigated several public interest questions in which he evidently had no greater interest than the other members of the public. In *R ..vs. Metropolitan Police Commissioner/ ex parte Blackburn*, (1968) 2 QB 118, he challenged police policy is not enforcing the gaming or obscenity laws, and in *Blackburn vs. Attorney General*, (1971) 2 All E.R. 1380, he challenged Government policy in joining the European Community.

The developments in Canada have been no less breathtaking and we there find more generous standing rules applied than elsewhere in the older Commonwealth. The existence of a written constitution and the incorporation of a charter of basic rights have facilitated this. The taxpayer is the central figure in the Canadian approach. In *Thorson Vs. Attorney General of Canada* (1915) 1 SCR 138, a taxpayer was allowed by a majority to challenge the constitutionality of the Official Language Act.

Laskin, J., of speaking for the majority, contemplated “whether a question of constitutionality should be immunised from judicial review by denying standing to anyone to challenge the impugned statute.” It was observed that standing in constitutional cases was a matter for the exercise of judicial discretion. In the case of *Nova Scotia Board of Censors vs. McNeil*, (1976) 2 SRC 265, the Supreme Court again granted standing to taxpayer to challenge the validity of a provincial Act regulating film and theatre shows. This position is also illustrated in *Minister of Justice v. Borowski* (1981) 2 SCR 673 where the majority granted standing to a taxpayer

impugning federal legislation allowing abortion, and ruled:

“...to establish status as a plaintiff in a suit seeking a declaration that the legislation is invalid, if there is a serious issue of invalidity, a person need only to show that he is affected by it directly or that he has a genuine interest as a citizen in the validity of the legislation and that there is no other and effective manner in which the issue may be brought before the Court.

The Canadian Supreme Court has in fact extended the liberalizing effect of these judgments beyond constitutional cases.

Finally, it is important to revisit the Nigerian position. What was said in Thomas was not merely an expression of the seeming inflexibility of S. 6(6) (b) of the 1979 Nigerian Constitution but it was also a product of the colonial heritage. Soon after the attainment of independence Nigerian Courts found themselves having to determine when and what circumstances will litigant be accorded standing to challenge the constitutionality of a statute or to ask for a judicial review.

In *Olawayin Vs. G. of Northern Nigeria* (1961) All N.L.R. 269, the plaintiff had challenged the constitutionality of a law which prohibited children from engaging in political activities. The trial court dismissed the claim on ground that no right of plaintiff was alleged to have been infringed and that it would be contrary to public principle to make the declaration asked for in vacuo. He appealed to the Federal Supreme Court that dismissed the appeal on the same ground of absence of sufficient interest. In a classic restatement of the Orthodox Common Law approach, Unsworth, F.J. said, p. 274:

“There was no suggestion that the appellant was in imminent danger of coming into conflict with the law or that there has been any real or direct interference with his normal business or activities... the appellant failed to show that he had a sufficient interest to sustain a claim...to hold that there was an interest here would amount to saying that a private individual obtains an interest by the mere enactment of law which may in future come in conflict.”

Curiously, the Nigerian courts remained stuck in that position even when the 1979 Constitution suggested a way out with the clause-

Any person who alleges that any of the provisions of this chapter has been, or is likely to be contravened in state in relation to him may apply to a High Court in that State for redress.

It was necessary to treat the subject to this length in order to demonstrate that Mr. Mussa's appreciation of locus standi in the context of constitutional litigation no longer holds goods. The notion of personal interest, personal injury or sufficient interest over and above the interest of the general public has more to do with private law as distinct from public law. In matters of public interest litigation this court will not deny standing to the genuine and bona fide litigant even where he has no personal interest in the matter. This position also accords with the decision in *Banazir Bhutta v. Federation of Pakistan*. PLD 1988 S. 46, where it was held by the Supreme Court that the traditional rule of locus standi can be dispensed with and procedure available in public litigation can be made use of if the petition is brought to the court by a person acting bona fide.

The relevance of public interest litigation in Tanzania cannot be over-emphasized. Having regard to our socio-economic conditions, this development promises more hope to our people than any other strategy currently in place. First of all illiteracy is still rampant. We were recently told that Tanzania is second in Africa in wiping out illiteracy but that is statistical juggling which is not

reflected on the ground. If we were that literate it would have been unnecessary for Iianang District Council to pass bye-laws for compulsory adult education which were recently published as Government Notice No.191 of 1994. By reason of this illiteracy a greater part of the population to unaware of their rights, let alone how the same can be realized.

Secondly, Tanzanians are massively poor. Our ranking in the world on the basis of per capital income has persistently been the source of embarrassment. Public interest litigation is a sophisticated mechanism, which requires professional handling. By reason of limited resources the vast majority of our people cannot afford to engage lawyers even where they were aware of the infringement of their rights and the perversion of the Constitution.

Other factors could be listed but perhaps the most painful of all is that over the years since independence Tanzanians have developed a culture of apathy and silence. This, in large measure, is a product of institutionalized mono-party politics which in its repressive dimension, like detention without trial, suppressed initiative and guts. The people found contentment in being receivers without being seekers. Our leaders very well recognise this, and with the emergence of transparency in governance they have not hesitated to affirm it. When the National Assembly was debating Hon. J. S. Warioba's private motion on the desirability of a referendum before some features of the Constitution were tampered with, Hon. Sukwa Said after two interruptions by his colleagues, continued and said (Parliamentary Debates,26.8.94):

“ Mheshimiwa Spika, nilisema kwamba tatizo la nehi yetu sio wanachi. Bazima tukubali hili kwa kweli, tatizo ni sisi viongozi. Kama sisi viongozi tutakubali ana,wananchi hawana matatizo. Mimi nina hakika Mheshimiwa Spika. Kama viongozi wa Tanzania wote; wa pande zote mbili wa Zanzibar na wa Tanzania Bara, tutakubali kusema kesho Serikali moja, basi itakuwa kesho,na wananohi watafanyi maandamano kuunga mkono. Maana wananchi wetu hawana tatizo. Kwa nini tunawapelekea hili tatizo? Nasema tatizo ni sisi viongozi.”

Given all these and other circumstances, if there should spring up a public-spirited individual and seek the Court's intervention against legislation or actions that pervert the constitution, the Court, as guardian and trustee of the Constitution and what it stands for, is under an obligation to rise up to the occasion and grant him standing.

The present petitioner is such an individual.

These principles find expression in our Constitution. It is apparent from the scheme of Part III, Chapter One of the Constitution that every person in Tanzania is vested with a double capacity: the capacity as an individual and the capacity as a member of the community. In his former capacity he enjoys all the basic rights set out in Art.12 to Art.24 in the latter capacity he is bounden to discharge duties towards the community as indicated in Art .25 to Art.28.This scheme reflects the modern trend in constitutionalism which recognises the pre-eminence of the community in the formulation of the constitution. It is recognized that the rights are correlative with functions: we have them that we may make our contribution to the social end.

Our Constitution goes further to emphasize the two capacities by equipping the individual with a double standing to sue. In the first place he is vested with standing by Art.30 (3) which states:

(3). Where any person alleges that provision of this part of this Chapter or any law involving a basic right or duty has been, is being or is likely to be contravened in relation to him in any part of the United Republic, he may, without prejudice to any other or remedy lawfully available to him in respect of the same matter, institute proceedings for the relief in the High Court.

This provision, in my view, caters for both personal and public interest litigation for at times the two may prove inseparable. A person who sues because he desires to be an independent parliamentary candidate where the system does not so allow necessarily shoulders the burden for the public. It is also important to note that under this provision action lies where a person's right "has been, is likely to be contravened." These are plain and clear words which admit of no controversy. Standing is therefore available under the Constitution even where contravention of a basic right is reasonably apprehended.

The case of Thomas in as much as it was decided in deference to the much criticized decision in Adesanya has no relevance in the context of our Constitution. In the upshot it is not correct to say, as Mr. Mussa suggested that the petitioner has no locus standi because he cannot show that the rights have already been infringed. In my view he is within the purview of Art.30 (3) if there is in existence a law the operation of which is likely to contravene his basic rights.

Standing is additionally conferred by Art.26 (2), and this states:

(2) Every person is entitled; subject to the procedure provided for by the law, to institute proceedings for the protection of the Constitution and legality.

Mr. Mussa suggested that this provision has to be read with Art.30 (3) and cannot be used in lieu of the latter. With respect cannot agree. It is a cardinal rule of statutory and constitutional interpretation that every provision stands independent of the other and has a peculiar function to perform unless the contrary intention appears. There is nothing in Art.26 (2) or else to link it to Art.30 (3). The only linkage is to Art 30 (4) and this is one of the procedure rather than substance.

Clause (4) empowers Parliament to make provision for the procedure relating to institution of proceedings under the article. It has not done so to date but that does not mean that the court is hamstrung. In *D.P.P. v. Daudi Pete*, Criminal Appeal No.28 of 1990 (unreported), the Court of Appeal stated in that "...until the Parliament legislates under sub-article (4) the enforcement of the Basic Rights, Freedoms and Duties may be effected under the procedure and practice that is available in the High Court in the exercise of its original jurisdiction, depending on the nature of the remedy sought." I hold Art .26 (2) to be an independent and additional source of standing which a litigant depending on the nature of his claim can invoke.

Under this provision, too, and having regard to the objective thereof the protection of the Constitution and legality, a proceeding may be instituted to challenge either the validity of a law which appears to be inconsistent with the Constitution or the legality of decision or action that appears contrary to the Constitution or the law of the land. Personal interest is not an ingredient in this provision; it is tailored for the community and falls under the sub-title "Duties to the Society". It occurs to me, therefore, that Art.26 (2) enacts into our Constitution the doctrine of public interest litigation. It is then not in logic or foreign precedent that we have to go for this doctrine; it is already with us in our own Constitution.

I hasten to emphasize, however, that standing will be granted on the basis of public interest litigation where the petition is bona fide and evidently for the public good and where the Court can provide an effective remedy. This point is under scored in *Peoples Union for Democratic Rights v. Minister of Home Affairs*, AIR 1985 Delhi 268, where it was stated that public interest litigation meant nothing more than what it stated, namely; it is a litigation in the interest of the public. It is not the type of litigation which is meant to satisfy the curiosity of the people, but it is a litigation which is instituted with a desire that the court would be able to give effective relief to the whole or a section of the society. It is emphasized in the case that the court should be in a position to give effective and complete relief. If no effective or complete relief can be granted, the

court should not entertain public litigation.

I gave serious consideration to the matters raised in this petition and the prayers connected therewith and I was persuaded that in quite a number of areas the public interest overwhelmed what appeared to be a private factor. I therefore allowed arguments to proceed on the issues reviewed above. But in the light of those arguments and what is stated in this paragraph, it may be necessary to reconsider the position of one issue at appropriate stage later. Meanwhile I will turn to dispose of the question of cause of action.

Cause of action is not a problem in this petition. Mr. Mussa seemed to suggest, but I respectfully disagree, that in order for the cause of action to arise an event injurious to the rights of the petitioner must have taken place. In my view, where the issue is whether a law is unconstitutional the court looks at the law itself but not at how it works. The following passage from Chitaley & Rio, *The Constitution of India* (1970: 686), citing *Prahalad Jen v. State*. AIR 1950 Orissa 157, is to the point:

In order to determine whether a particular law is repugnant or inconsistent with the Fundamental Rights it is the provisions of the Act that must be looked at and not the manner in which the power under the provision is actually exercised. Inconsistency or repugnancy does not depend upon the exercise of the power by virtue of the Act but on the nature of the provisions themselves.

I agree and may not wish to add anything more. In this petition the dispute is over the validity of various laws and this, in my view, constitutes the necessary cause of the action. A situation could certainly arise where the cause of action would depend upon actual exercise of power. Such a situation is exemplified in this petition where the constitutionality of the appointment of Zanzibaris to non-union positions on the Mainland is questioned.

In that context it is the appointments themselves that constitutes the cause of action, but that has to do with the validity of the action rather than law. There now remains the question of justifiability of the claims but since that has more to do with the first of the issues, I will now turn to consider them.

The first issue seeks to determine the immutability of basic rights enacted in the Constitution. This turns on the power of the Parliament to amend the provisions providing for these rights. Specifically, what is at issue are the amendments to Art .20 and Art .39 of the Constitution vide the Eighth Constitutional Amendment Act, 1992. In its original form Art.20 read as follows:

20- (1) Subject to the laws of the land, every person is entitled to freedom of peaceful assembly, association and public expression, that is to say the right to assemble freely and peaceably, to associate with other persons and, in particular to form or belong to organizations or associations formed for the purposes of protecting or furthering his or any other interests.

(2) Subject to the relevant laws of the Land, a person shall not be compelled to belong to any association. And its amendment form clause (1) remains unaffected; hence the rights and freedoms spelt out therein remain as before. Our interest in this petition centers on the freedom of association, which, under the present multi-party system, includes the formation of the political parties. Clause (2) was also unaffected by the amendment save that it now became clause (4). In between there are new clauses (2) and (3), which it is necessary to set out in full. (The translation from Kiswahili is partly my own and partly adapted.)

(2) Without prejudice to subsection no political party shall qualify for registration if by its

Constitution and policy- it aims to advocate or further the interests of any religious belief of group; any tribal, ethnic or racial group; only a specific area within any part of the United Republic; it advocates the breaking up of the Union constitutes the United Republic; it accepts or advocates the use of force or violence as a means of attaining its political objectives. its advocates or aims to carry on its political activities exclusively in one part of the United Republic; or it does not allow periodic and democratic elections of its leadership.

(3) Parliament may enact legislation prescribing conditions which will ensure compliance by political parties with the provisions of sub-section (2) in relation to the people's freedom and right of association and assembly.

Pursuant to clause (3), Parliament enacted the Political Parties Act, 1992 providing for the registration of political parties and other matters. Clause (2) above was lifted in its entirety and re-enacted as S.9 (2) of the Act. In addition S.8 of the Act provided for a two-stage registration- provisional and full registration. Provisional registration is done upon fulfillment of the conditions prescribed in S.9: full registration is affected after fulfillment of the conditions in S.10 that reads:

10 – No political party shall be qualified to be fully registered unless:-it has been provisionally registered; it has obtained not less than two hundred members who are qualified to be registered as voters for the purpose of parliamentary elections from each of at least ten Regions of the United Republic out of which at least two Regions are in Tanzania, Zanzibar being one Region each from Zanzibar and Pemba; and it has submitted the names of the national leadership of the party and such leadership draws its members from both Tanzania Zanzibar and Tanzania Mainland; it has submitted to the Registrar the location of its head office within the United Republic and a postal address to which notices and other communications may be sent.

It is contended by the petitioner that ss.8, 9 and 10 of the Political Parties Act as unconstitutional in the sense that they impose serious conditions on the formation of political parties and thereby inhibiting enjoyment of the freedom of association addressed in Arts 20 (1). It is further contended that Art.20 (2) and (3) Sections derive are for the same reason unconstitutional. I am therefore invited to strike out Art .20 (2) and (3) of the constitution as well as S.8, 9,10 and 15 of the Political Parties Act.

On the other hand, Art 39 previously provided as follows: -

39. "No person shall be eligible or election to the office of the President of the United Republic unless he has attained the age of forty years: and is otherwise qualified for election as a Member of the National Assembly or the (Zanzibar) House of Representatives."

As amended by the Eighth Constitutional Amendment Act, the above paragraphs are retained but re-numbered (b) and (d) respectively.

There is an added new paragraph (a) and (c), which stated (my translation).

- is a citizen of the United Republic by birth;
- is a member of and sponsored by a political party.

The requirement for membership of and sponsorship by a political party is extended to candidacy for the National Assembly in Art .67 and Art 77 as well as for the local councils in S.39 of the Local Authorities (Elections) Act .1979 as amended by the Local Authorities (Elections) (Amendment) Act, 1992 (No. 7), S. 9.The petitioner contends that the requirement for membership of and sponsorship by a political party abridges the right to participate in national public affairs granted by Art .21(1) which states:-

21-(1) Every citizen of the United Republic is entitled to take part in the government of the country either directly or through freely chosen representatives, in accordance with procedure provided by or under law.

I am therefore called upon to strike out para (b) in Art .39 and wherever else the requirement for membership of and sponsorship by a political party occurs.

As stated earlier the issue of immutability turns on Parliament's power to amend the Constitution. In assessing this power it is appropriate to recall, in the first place, that fundamental rights are not gifts from the State. They are in a person by reason of his birth and are therefore to the State and law. In our times one method of judging the character of a government is to look at the extent to which it recognises and protects human rights. The *raison d'être* for any government is its ability to secure the welfare of the governed. Its claim to the allegiance of the governed has to be in terms of what that allegiance is to serve. Allegiance has to be correlative with rights. Modern constitutions like our own have enacted fundamental rights in their provisions. This does not mean that the rights are thereby created; rather it is evidence of their recognition and the intention that they should be enforceable in a court of law. It can therefore be argued that the very decision to translate fundamental rights into a written code is by itself a restraint upon the powers of Parliament to act arbitrarily As aptly observed by the Chief Justice Nassim Hassan Shah in *Muhammad Nawaz Sharif vs. President at Pakistan* .PLD 1993 SC 473,557;

Fundamental Rights in essence are restraints on the arbitrary exercise of power by the State in relation to any activity that an individual can engage. Although Constitutional guarantees are often couched in permissive terminology in essence they impose limitations on the power of State to restrict such activities. Moreover, basic or fundamental rights of individuals that presently stand formally incorporated in the modern constitutional documents derive their lineage from and are traceable to the ancient natural law.

Our Constitution confers on Parliament very wide powers of amendment but these powers are by no means unlimited. These powers are to be found in Art .98 (1) and (2) and it is necessary to set out the relevant parts.

98- (1) Parliament may enact legislation altering any provision of this Constitution.. or of any law include references to the amendment or modification of those provisions, suspension or repeal and replacement of the provisions or the re-enactment or modification in the application of those provisions.

These powers are evidently wide. It has to be accepted, in the first place, that Parliament has power to amend even those provisions providing for basic human rights. Secondly, that power is not confined to a small sphere.

It extends to modification of those provisions, suspension or repeal and replacement of it, re-enactment or modification in the application thereof. Drastic as some of these terms may sound, I still do not believe that they authorize abrogation from the Constitution of these rights. The provision of Art .98 should be read in the light of the claw back clauses in Art .30 (2) and 31.The former reads as follows:

It is hereby declared that no provision contained in this Part of this Constitution, which stipulates the Basic human rights, freedom and duties, shall be construed as invalidating any existing law or prohibiting the enactment of any law or the doing of any lawful act under such law ,making provision for-

a) ensuring that the rights and freedoms of others or the public interest are not prejudiced by the

misuse of the individual rights and freedoms;

b) ensuring the interests of defense, public safety public order, public health, rural and urban development planning, the development and utilization of mineral resources or the development or utilization of any other property in such a manner as to promote the benefit:

(c) ensuring the execution of the judgment or order of a court given or made in any civil or criminal proceeding;

(d) the protection of the reputation rights and freedoms of others or the private lives of persons involved in any court proceedings, prohibiting the disclosure of confidential information, or the safeguarding of the dignity, authority and independence of the courts;

(e) imposing restrictions, supervision and control over the establishment, management and operation of societies and private companies in the country ; or

(f) enabling any other thing to be done which promotes enhances or protects the national interest generally.

Art.31, on other hand, empowers Parliament, notwithstanding the provisions of art.30 (2), to legislate for measures derogating from the provisions of Art.14 (Right to live) and Art.15 (Right to personal freedom) during periods of emergency, or in ordinary times in relation to individuals who are believed to be conducting themselves in a manner that endangers or compromises national security. We may also refer to Art.97 (1), which provides in part- subject to the other provisions of this Constitution, the legislative power of Parliament shall be exercised through the National Assembly....

Reading all these provisions together, it occurs to me that Parliament's power in relation to the amendment of the provisions under Part 111 of chapter One of the Constitution can only be exercised within the limits of Art.30 (2) and Art.31. Hence, even if it is a suspension, or repeal and replacement it must be justifiable within the scope of the two provisions. I have therefore come to a conclusion, and Mr. Mussa concedes, that Parliament's powers of amendment are not unlimited. It should be recognized, on the other hand, that society can never be static. New times bring with them new needs and aspirations. Society's perception of basic human rights is therefore bound to change according to changed circumstances, and that makes it imperative for Parliament to have power to alter every provision of the Constitution. What remains immutable, therefore, is the ethic of human rights but not the letter by which they are expressed.

We turn to consider whether the amendments complained of were not within the constitution limits, beginning with Art.20 (2) and (3). The former does not abrogate or abridge beyond the purview of Art.30 (2) the right of association guaranteed under Art.20 (10). It merely lays down the conditions.

A political party has to fulfill before registration and all these conditions are within the perimeters of Art.30 (2). The conditions are clearly aimed at the promotion and enhancement of the public safety, public order and national cohesion. There cannot be any such thing as absolute or uncontrolled liberty wholly freedom restraint, for that would lead to anarchy and disorder.

Indeed, in a country like our, nothing could be more suicidal than to license parties based on tribe, race or religion. The problem with Art.20 (3) is even less apparent. It is enabling provision giving Parliament power to enact a law for the registration of political parties and for ensuring compliance with Art.20 (2) and (3) were validly enacted. There remains, however, the provisions of the Political Parties which fall for comment under the second issue. Next is Art 39 and allied articles and provisions relating to presidential, parliamentary and local councils candidates.

Once again am unfortunate in having said that these amendments were within the powers of Parliament. They do not abrogate but merely modify the application of Art .21 (1) by providing

that participation in national public affairs shall through political parties. As seen earlier, modification in application is covered under Art.98 (2). I also think that the amendments are within the ambit of Art. (2) If the public order be taken as having supplied the inspiration. These amendments were, therefore, validly made.

It should be understood, however, that I am at this juncture talking of validity in strict legal terms; the amendments are otherwise not free from difficulties, and these are dealt with under the fifth issue.

The Court's power to declare a law void is founded in Art.64 (5).

Having held that the impugned constitutional amendments were validly made, I do not have to consider whether such amendments are "law" within the meaning of the article. I have read in this connection the interesting arguments in the cases of *Golaknath v. State of Punjab* (1967) 2 SCR 762 and *Kesavananda v. State of Kerala* (1973). Supp. SCR, but in view of the decision I have reached am unable to take advantage of them.

The second issue questions the constitutionality of S.8, 9,10, and 15 of the Political Parties Act. Much effort had gone into this matter when I was obliged to admit that the trial of this issue should have been stayed. Last year the petitioner filed at the Dar es Salaam registry of this Court an application for orders of certiorari and mandamus. That was Miscellaneous Civil Cause No.67 of 1993, the applicants being himself and the Democratic Party and the respondents being the Attorney General and the Registrar of the Political Parties. The grounds for the application were that the Registrar was biased in refusing to register the Democratic Party and the Political Parties Act (apparently the whole of it) was unconstitutional and void. He was praying for orders to quash the Registrar's decision and to direct him to reconsider the Democratic Party's application according to law. The application was heard and subsequently dismissed by Maina. J. on 14th December 1993. Two days later the petitioner lodged a notice of appeal. There is now pending before the Court of Appeal a civil appeal No.24 of 1994, in which the first ground of appeal states:-

"The learned judge erred in law in failing to hold that Section 8 and 10 of the Political parties Act, 1992 Act No.5 of 1992 are violations of article 13 (6) of the Constitution of the United Republic of Tanzania and therefore null and void on the ground that they do not provide for fair hearing before the Second respondent's decision to refuse full registration of a Political Party."

The memorandum concludes: -

It is prepared to ask the Court for the following orders:
an order striking out sections 8,10 and 16 of the Political Parties Act, 1992.

In the present petition I am confronted with the same prayer with slight variation, namely, to strike out S.8, 9,10 and 15 of the same Act. In other words a suit in which the matter in issue is substantially in issue in another suit between the same parties is pending in another court in the country. It seems also that the Dar es Salaam suit was instituted earlier because the record of this petition shows that its trial was being put off to await the outcome of the former. In these proceedings we do not have a prescribed procedure but we have invariably invoked and been guided by the provisions of the Civil Procedure Code, 1966. Section 8 of the code provides thus: -

S. 8 - No court shall proceed with the trial of any suit in which the matter in issue is also directly or substantially in issue in a previously instituted suit between the same parties, or between parties under whom they or any of them claim litigating under the same title where such suit is

pending in the same or any other court in Tanganyika having jurisdiction to grant the relief claimed.

This provision is in parimateria with S.10 of the Indian Code of Civil Procedure, 1908. MULLA observes in relation to the latter that the object is to prevent courts of concurrent jurisdiction from simultaneously trying two parallel suits in respect of the same matter in issue. It goes on to claim citing a 1919 observe authority, that section enacts merely a rule of procedure and a decree passed in contravention for it is not a nullity and cannot be disregarded in execution proceedings. I think however that this might be true where the subsequent suit is decided without knowledge of the existence of the existence of the previous suit.

It is the pendency of the previous instituted suit that constitutes a bar to the trial of the subsequent suit. The word "suit" has been held to include "appeal": see *Raj Spinning Mills V. A. G King Ltd.* (1954) A. Punj. 113. The "matter in the issue" in the provision has also been constructed as having reference to the entire subject matter in controversy between the parties and not merely one or more of the several issues: see *Hariram v. Hazi Mohammed (1954) Allahabad 141*. The same position was stated by the court of appeal of eastern Africa in *Jadva Krson V. Hariram Singh Bhogal* (1953) 20 EACA 74 when they were considering S.6 of Kenya civil procedure ordinance which is again in parimateria with our S.8. The case before me is of course a novelty. Like the eye of a butterfly. It is a composite of several petitions wrapped up into one. When considering the expression "matter in issue" one has to consider each issue independently for they have no relationship. There is not one subject matter in controversy between the parties but several. In these circumstances of this case "matter in issue" must be taken to be matter in issue in each of the six issues framed and I am satisfied that the same matter is in issue in the appeal pending before the court of Appeal.

In *Jinnat Bibi v. Howeah Jute Mills Co. Ltd. Air 1932 Cal. 751*, it was held that the provisions of S.10 of the Indian code were mandatory and left no discretion to the courts in respect of the stay of suits when circumstances are such as to invoke the operation of that section. It was further held that one test of the application of the [sic] to a particular case whether on the final decision being reached in the previous suit such decision would operate as res judicata in the subsequent suit. Indian decisions are certainly not binding on this court but they deserve the greatest respect where they expound a provision which was previously our own and which remains in pari materia with our own. .

The Indian code of civil procedure was in application in Tanganyika until 1996 and s.10 thereof is in pari materia with our S.8. it is therefore not only in courtesy but also in common sense that I consider myself entitled to rely on these decisions. In so doing I hold that the provisions of d.8 of our code are mandatory and provide no room for discretion in circumstances where it is invocable in the instant case. Moreover there is no doubt that the final decision in the pending appeal would operate as res judicata in the instant petition. The question is not whether I am in a position to decide the matter ahead of the court of appeal: courts of law are not resources. The point is that I am bound to stop in my tracks and let the previous suit proceed to finality because the decision on the matter in issue would operate as res judicata on the same matter in the suit before me. I will therefore stay the [decision on] the second issue until the outcome of Civil Appeal No.24 of 1994.

In the third issue the court is invited to pronounce on the constitutionality of S.5 (2), 13, 25, 37-47 of the Newspapers Act, 1976 and Para. 12 of G. No. 166 of 1977. I have two observations to make this connection. It must be realized that the constitutionality of a provision or statute is not found in what could happen in its operation but in what it actually provides for. Where a

provision is reasonable and valid the mere possibility of its being abused in actual operation will not make it invalid. *Collector of customs (Madras) v. N. S. Chetty*, AIR 1962 SC 316.) It seems to me with respect that much of what was said against the above provisions reflected generally on what could happen in their operation rather on what they actually provided for was generally referred to the decision of the Court of Appeal in *Kukutia ale pumbum v. Attorney General*, Civil Appeal No.32 of 1992, but I think that case covers a different situation the situation were a person was deprived of his right of his right to sue unless he was permitted to do so by the defendant. The provisions complained of however are administrative and implementation and their constitutionality can only be challenged if they were not with in the power of the legislature to enact them.

Secondly and most importantly, I have unfortunately come to doubt the petitioners standing in this issue. As stated before our constitution confers a double capacity on every person – his personal and his community capacities. Now in what capacity did the petitioner take up these provisions? It can not be in his personal capacity because there is nothing in the provisions or any of them which is shown to have contravened is contravening or is likely to contravene his right to receive or impart information. The contravention has to be read in the provisions themselves. It transpires that the petitioner’s complaint is in fact founded on the banning of the “Michapo” and “cheka” newspapers vide Government Notice No. 8 of 1993. That is improper the use or misuse of the powers granted by S.25, the relevant provision in that connection has nothing to do with the validity of that provision as such. What would be relevant is whether parliament had no power to grant those powers.

As for the misfortunes of “ Michapo” and “Cheka” the doors were open for the option of judicial review but it seems better options were found. Can we alternative that this issue falls under public interest. In other words the general public of interest litigation? I don’t think so either. As seen before, public interest litigation is litigation in the interest of the public. In other words the general public or section thereof must be seen to be aggrieved by the state of the law to be desirous of redress. There could probably be provisions in the Newspaper Act one could consider oppressive, unreasonable and even unconstitutional, but that is beside the point: the point is that there is no evidence of public agitation against the law. And by “public” I do not mean merely newspaper editors but the Tanzanian public generally. Ironically whatever this law may be identified with appear to be overshadowed by the unprecedented upsurge of private newspapers in recent years. As stated in *Sanjeev Coke Manufacturing Co. V. Bhamet Coal Ltd.* Air 1983 SC239, courts are not authorized to make disembodied pronouncements on serious and clouded issues between parties properly ranged on either side and a crossing of the swords. It is inexpedient for the court to delve into problems, which do not arise and express opinion thereon, in the premises I decline to pronounce on the third issue.

The fourth issue brings us to the provisions of the police force ordinance and the Political Parties Act touching on assemblies and processions. Under S.40 of the former a permit is necessary to organize an assembly or procession in public place. The permit is grantable by the District Commissioner. Similarly, political parties require a permit from the district commissioner to hold public meetings pursuant to the provisions of S.11 (1) of the political parties Act section 41 of the ordinance empowers a police officer above the rank of inspector or any magistrate to stop or prevent any assembly or procession of the holding or continuance of it “is imminently likely to cause a breach of the peace or to prejudice the public safety ...” the police officer or magistrate may therefore give orders, including orders for the dispersal of the Assembly or procession, S.42 defines what constitutes unlawful assembly or procession, namely an assembly or procession not authorized by permit, where one is required, or one held in contravention of the conditions thereof or in disregard of orders by the police or magistrate. S.43 is the penal provision for

disobedience etc, These provisions i.e. 41, 42 and 43 are imported into the Political Parties Act vide S.11 (2) thereof. It was argued for the petitioner that these provisions are inconsistent with the freedom of peaceful assembly and public expression that is guaranteed under Art 20(1). Mr. Mussa, on the other hand thought they were all supervisory in character intended to ensure peace and good order to the end that the rights and freedoms may be better enjoyed.

A better approach to these provisions is to distinguish their functions. First of all there is the requirement for a permit grantable by the district commissioner and this falls under S.40 of the ordinance and (1) of the Act. Next there is control of the meetings and processions and this falls under 41 the exercise of that power being vested in the police and magistracy. Finally we have the criminal law provisions in S.42 and in considering the question of constitutionality these distinctions have to be kept in mind: I draw these distinctions also because not all meetings or processions require a permit yet all attract educational, entertainment and sporting assemblies do not require a permit: and by virtue [of] G. N. No.237 of 1962 assemblies convened by municipal or town councils within the areas of their jurisdiction do not require permits either: but all these events attract police and magisterial supervision. Let us now look at the character of three divisions in relation to the constitution.

Section 40(2) provides in part: of (2) any person who is desirous of convening, collecting, forming, or organizing any assembly or procession in any public place shall first make application for a permit in that behalf to the District Commissioner and if the District Commissioner is satisfied having regard to all the circumstances .. that the assembly or procession is not likely to cause a breach of the peace.. he shall subject to the provisions of sub section (3) issue a permit.

Section 11(1) of the Political Parties Act is to the same effect although it does not expressly set out all that is in the above provision. These provisions may then be constructed with the provisions of Art, 20(1) which states in part:-

subject to the laws of the land. Every person is entitled to freedom of peaceful assembly association and public expression that is to say the right to assemble freely and peacefully.

The constitution is the basic or paramount law of the land and cannot be over ridden by any other law. Where as in the above provision, the enjoyment of a constitutional right is subject to the laws of the land. The necessary implication is that those laws must be lawful laws. A law that seeks to make the exercise of those rights subject to the permission of another person can not be consistent with the express provisions of the constitution for it makes the exercise illusory. In this class are S.40 of the police force ordinance and S. 11(1) of the political parties Act. Both provisions hijack the right to peaceful assembly and processions guaranteed under the constitution and place it under the personal disposition of the District Commissioner. It is a right that cannot be enjoyed unless the District Commissioner permits. That is precisely the position that was encountered in ole pumbun where the right to sue the Government could not be exercised with the permission of the Government. The court of Appeal was prompted to say:-

...a law which seeks to limit or derogate from the basic right of the individual grounds of public interest will be saved by Article 30(2) of the constitution only if it satisfies to essential requirements; first such a law should be lawful in the sense that it is not arbitrary, it should make adequate against arbitrary decision and provide effective control against the abuse by those in authority when using the law. Secondly the limitation imposed by such law must not be more than is reasonably necessary to achieve the legitimate object. This is what is also known as the principle of proportionality if the law does not meet these requirements such law is not saved by article 30(2) of the

constitution is null and void. Section 40 does not meet these requirements. It is in the absolute discretion of the District Commissioner to determine the circumstances conducive to the organization of an assembly or procession: there is no adequate or any safeguards against arbitrary exercise of that discretion and there is no mechanism for challenging his decisions, except probably by way of judicial review which is tortuous and unbeneficial for the purpose of assemblies and processions. I have easily come to the conclusion that the requirement for a permit infringes the freedom of peaceful assembly and procession is therefore unconstitutional. It is not irrelevant to add. Either that in the Tanzanian context this freedom is rendered the more illusory by the stark truth that the power to grant permits is vested in cadres of the ruling party.

Coming to S.41, I am of the view that the provision does not operate to take away the right to hold assemblies. It only empowers the police and the magistracy to step in for the preservation of peace and order. The provision is that saved by Art.31(2) (b), it being in furtherance of the states normal functions of ensuring public safety and public order and is reasonably justifiable in a democratic society. As rightly remarked by Mr. Mussa the enjoyment of basic human rights presupposes the existence of law and order. A provision like S.41 is therefore a necessary concomitant to the realization of these rights. Moreover there is inherent in the provision a safeguard against arbitrary use. It comes into play when the holding of an assembly is imminently likely to cause a breach of the peace the public safety of public order or to be used for any unlawful purpose, and therefore meets what is termed the “clear and present danger” test . In Muhammad Nawaz Sharif cited earlier, Saleem Artar, J. said at pp 832-833.

Every restriction must pass the test of reasonableness and overriding public interest. Restriction can be imposed and freedom may be curtailed provided it is justified by the “clear and present danger” test enunciated in Saia vs. New York (1948) 334 US. 558 that the substantive evil must be extremely serious and the degree of imminence extremely high.

Section 41 in my view is conditioned on clear and present danger where the substantive evil is extremely serious and the degree of eminence extremely high,. A situation befitting the application of the provision can be found in the Guyanese case of **C. R. Ramson vs. Lloyd Barker and the Attorney General** (1983) 9 CLB 12 that arose from the dispersal of a political meeting by the police. The plaintiff, an attorney at law was standing near his motor car by the road side discussing with a colleague the methods used by police to disperse the crowd. The police came up held the plaintiff by his arm and asked him what he was doing there, and was told “that is my business.” Other policemen came up and surrounded the plaintiff, who was then jabbed several times in the ribs with a baton by another policeman who ordered him into the car. The plaintiff and his colleague then got into the car unwillingly and drove away. The plaintiff later brought action alleging inter alia. An infringement of his right to freedom of assembly, expression and movement. It was held by the court of appeal that there was directed towards a hindrance of these constitutional freedoms.

These factors apart it is equally apparent that the petitioner admits the legitimate role of the police at assemblies and processions although somehow he does not realize that this role is specially authorized by S.41. Para 19 (h) of the petition states in part:-

The court should also declare that a citizen has right to convene a peaceful assembly or public rally and the right to make a peaceful demonstration without a permit from any body except that he should just inform the police before doing so.

I would not wish to believe that by this prayer it is intended that the police should attend

assembles and processions to applaud the actors and fold their arms in the face of an imminent breakdown in law and order. I am satisfied that S.41 is a valid provision.

Finally S.42 and 43, the former defines an unlawful assembly and the latter punishes the same Art 30(2) (a) and (b) of the Constitution empowers the legislature to enact legislation for ensuring that the rights and freedoms of others or the public interest are not prejudiced by the misuse of individual rights and freedoms and for ensuring public safety and public order. This power in my view includes the power to prescribe penalties for criminal breaches. In other words, the penalties are necessarily concomitant to the effective exercise of police and magisterial powers under the other provisions consider the provisions valid as well.

At this stage I will proceed to show the significance of the distinction I have been making. I have held that the requirement for a permit is unconstitutional but not the police magisterial and penal role. The crucial question now is whether these aspects can be severed. Severance is provided for under Art. 6(5) which states that any other law inconsistent with the provisions of the Constitution ...shall to the extent of the inconsistency be void.” It is therefore established that where the valid portion is severed from the rest that portion will be maintained provided it is sufficient to carry out the purpose of the act. Delivering the judgment of the privy Council in *A.G. of Alberta Vs. A.G. of Canada* (1946) AC503 6, Viscount Simon said:

The real question is whether what remains is so inextricably bound up with the part declared invalid that what remains cannot independently survive or as it has sometimes been put whether on a fair review of the whole matter it can be assumed that the legislature would have enacted what services without enacting the part that is ultra vires at all.

I am in no doubt whatsoever that the permit aspect can be expunged and expelled from the law without prejudicing the rest. This is illustrated by the fact that the supervisory aspects already operate independently where a permit is not required. It is evident therefore that the legislature could have enacted the supervisory aspects without enacting the permit aspect. Having held and repeated that the requirement for a permit is unconstitutional and void I direct the provisions of S.40 of the police force ordinance and S.11(1) (a) of the political parties act and all provisions relating thereto and connected therewith shall henceforth be read as if all reference to a permit were removed. It follows that from this moment it shall be lawful for any person to convene and address an assembly in any public place without first having to obtain a permit from the district commissioner until the legislature makes appropriate arrangements for this purpose, it shall be sufficient for a notice of such assembly to be lodged with the police being delivered a copy to the district commissioner for his information.

In reaching this decision I am aware of the decision cited to me in *Christopher Mtikila and Ors. V. R.* Criminal Appeal No. 90 of 1992, the present petitioner and others were charged before the district court of Dodoma with three counts the 1st which alleged refusing to desist from convening a meeting after being warned not to do so by police officers contrary to Sections 41 and 42 of the police force ordinance. Cap. 322. They were convicted and fined 500/= each. They appealed to this court and it was contended inter alia that S.41 was unconstitutional. Mwalusanya, J. agreed and said “I construe section 41 of the police force ordinance to be void. From now onwards this section is deleted from the statute book I am given to understand that an appeal has been lodged against that decision.

The fact that an appeal is pending naturally restrains me in my comments on that decision. Yet I cannot avoid to show albeit, why I find that decision difficult to go by. The learned judge did not merely hold S.41 to be unconstitutional; he went further and held the entire trial to be a nullity.

He said between pp.23 and 25 of his judgment:

In my judgment I find that the trial magistrate to have access to the documents they required for their defense was a fundamental defect which is not curable. The error is so fundamental that it has rendered the whole trial a nullity.

This is significant indeed. It is established practice that where a matter can be disposed of without recourse to the Constitution, the constitution should not be involved at all. The court will pronounce on the constitutionality of a statute only when it is necessary for the decision of the case to do so: *Wahid Munwar Khan vs. State* AIR 1956 Hyd .22. In that case a passage from Coday's Treatise on Constitutional Limitations was also cited in these terms.

In any case where a constitutional question is raised, though it might be legitimately presented by the record, yet if the record presents some other clear ground the court may rest its judgment on that ground alone, if the other questions are immaterial having regard to the view taken by the court.

The Supreme Court of Zimbabwe expressed the same view in *Minister of Home Affairs –vs- Bickle & Ors* (1985) LRC (Constitution) 755 where Georges. C.J. said (at p. 750):

“Courts will not normally consider a constitutional question unless the existence of a remedy depends upon it; if a remedy is available to an applicant under some other legislative provision or on some other basis, whether legal to factual, a court will usually decline to determine whether there has been, in addition a breach of the Declaration of Rights.”

And here at home the Court of Appeal had this to say in *Attorney General Vs. W.K. Butambala*, Criminal Appeal No. 37 of 1991(unreported).

“We need hardly say that our Constitution is a serious and solemn document. We think that invoking it and knocking down laws or portions of them should be reserved for appropriate and really serious occasions.”

The court continued:

....it is not desirable to reach a situation where we have “ambulance Courts” which go round looking for situations where we can invalidate statutes.

It is evident that the appeal under reference could have been disposed of on the ground that the trial was a nullity without going into the constitutionality of S.41. It is indeed curious that a trial which was adjudged a nullity could still provide the basis for striking down S.41. On these grounds and others, I was unable to benefit from the decision of my learned brother.

The fifth issue takes us back to the amendments to the Constitution and elsewhere which make membership of and sponsorship by a political party mandatory for a person to contest presidential, parliamentary or local authority elections. I hold that the amendments were constitutionally valid but I reserved my position on their practical implication until this stage. It is essential for the purpose of the present exercise, and for case of reference, to set out side by the provisions of Art. 21(1). Art. 20 (40 and Art. 39 (c), the last mentioned being representative of allied amendments elsewhere. Art .21 (1) reads as follows:

“Every citizen of the United Republic is entitled to take part in the governance of the country, either directly or through freely chosen representative, in accordance with procedures provided by or under the law.”

Art 20 (4) states (my translation):

(4) ‘Without prejudice to the relevant laws, no person shall be compelled to belong to any party or organization, or for any political party to be refused registration by reason only of its ideology or philosophy.’

And Art .39 (c) states (my translation):

39: ‘No person shall be eligible for election to the office of the President of the United Republic unless he-

(a)....(b)....

(c) Is a member of and sponsored by a political party.’

As generally understood the citizen’s right to participate in the government of his country implies three considerations:

- the right to the franchise, meaning the right to elect his representatives;
- the right to represent, meaning the right to be elected to law making bodies and ;
- the right to be chosen to a political office.

These three rights are, in my view, epitomized in the provisions of Art.21 (1), subject, of course, to the qualifications which expediency may dictate for the exercise of these rights. e.g. literacy and age. But while accepting the relevance of such qualifications it has to be admitted in the first place that the concept of basic human rights has utilitarian aspect to it: to whom are these rights to be useful? Harold Laski (A Grammar of politics, 1967:92) responds that:

“There is only one possible answer. In state the demands of each citizen for the fulfillment of his best self must be taken as of equal worth: and the utility of a right is therefore its value to all the members of the State. The rights, for instance, of freedom of speech do not mean for those in authority, or for members of some church or class. Freedom of speech is a right either equally applicable to all citizens without distinction or not applicable at all.”

These remarks are no more applicable in political philosophy than they are in human rights jurisprudence. The matter is brought into focus if we substitute the right to participate in the government of one’s country for the freedom of speech. The proposition would then be that the right to participate in the government of one’s country is not reserved for those in authority, or for members some special class or groups, but it is a right either equally applicable to all citizens without distinction or not applicable at all. This utilitarian factor is writ large in Art.21 (1) for it speaks of “every citizen” being entitled to participate in the government of his country. It could easily have said “Every member of a political party....” But it did not, and this could not have been without cause. It would be recalled, indeed that the provision existed in its present terms ever since the one party era. At that time the political activity had to be conducted under the auspices and control of the Chama Cha Mapinduzi and it could have been argued that this left no room for independent candidates. It is certainly this notion which was at the base of Mr. Mussa’s submission to the effect that the amendments did take place away the right for independent candidates for such right never existed before. The argument is no doubt attractive, but, at least with effect from July 1.1992, Art.21 (1) has to be read in a multi-party and non-party context. That is what I can gather from Art.20 (4)- previously Art.20 (2)- which was deliberately rephrased to accommodate (sic) both situations. It is illogical for law to provide that no person

shall be compelled to belong to a political party and in the same breath to provide that no person shall run for office except through a political party. If it were the intention of the Legislature to exclude non-party citizens from participating in the government of their country, it could easily have done so vide the same Eighth Constitutional Amendment Act by removing the generality in Art.21 (1).

The position I see is now this: By virtue of Art .21 (1) every citizen is entitled to participate in the government of the country, and by virtue of the provisions of Art .20 (4) such citizen does not have to be a member of any political party; yet by virtue of Art. 39 (c) and others to that effect, no citizen can run for the office unless he is member of and sponsored by a political party. This is intriguing, I am aware that the exercise of the right under Art.21 (1) has to be “in accordance with the procedure provided by or under the law”, but I think that while participation through a political party is a procedure, the exercise of the right of participation through a political party only is not a procedure but an issue of substance. The message is either you belong to a political party or you have no right to participate. There is additionally the dimension of free elections alluded to in Art .21 (1). In the midst of this unusual dilemma I had to turn to the canons of statutory and constitution.

When the framers of the Constitution declared the fundamental rights in part III of Chapter One thereof, they did not do so in vain, it must have been with the intention that these rights should be exercisable.

It is therefore established that the provisions of the Constitution should always be given a generous and purposive construction. In *A.G of Gambia Vs. JOBE* (1985) LRC (Const) 556,565, Lord Diplock said:

“A Constitution and in particular that part of it which protects and entrenches fundamental rights and freedoms to which all persons in the state are to be entitled, is to be given a generous and purposive construction.”

This echoes what was said earlier in *British Coal Corporation vs. The King* (1935) AC 500,518, to the effect that in interpreting a constituent (sic) or organic status the construction most beneficial to widest possible amplitude of its power must be adopted. And not much later, in *James v. Commonwealth of Australia* (1935) AC 578,614 Lord Wright, M.R. said:

“It is true that a Constitution must not be constructed in any narrow and pedantic sense. The words used are necessarily general, and their full import and true meaning can often be appreciated when considered, as the years go on, in relative to the vicissitudes of fast which from time emerge. It is not that the meaning of the word changes, but the changing circumstances illustrate and illuminate the full import of the meaning.”

This approach is directed principally at revolving difficulties that may be in a single provision. The strategy according to these authorities, is to approach the provision generously and liberally particularly where it enacts a fundamental right. The case before me takes us a stage further. What happens when a provision of the constitution enacting a fundamental right appears to be in conflict with another provision in the Constitution?. In that case the principle of harmonisation has to be called in aid. The principle holds that the entire Constitution has to be read as an integrated whole and no one particular provision destroying (sic) the other but sustaining the otherwise Muhammad Nawaz Sharif (above). P.601. If the balancing act should succeed the court is joined to give effect to all the contending provisions. Otherwise, the court is enjoined to incline to the realization of the fundamental rights and may for that purpose disregard even the clear words of a provision if their application would result in gross injustice. CHITALEY, p. 716,

renders the position.

.... It must be remembered that the operation of any fundamental right may be excluded by any other Article of the Constitution or may be subject to an exception laid down in some other Article. In some cases it is the duty of the court to construe the different articles in the constitution in such a way as to harmonize them and try to give effect to all the articles as far as possible, one of the conflicting articles will have to yield to the other.

These propositions are by no means novel but are well known in common law jurisdictions. They rest above all on the realization that it is the fundamental rights, which are fundamental, and not the restrictions. In the case of *Sturges vs. Crown in Shield* (1819) 4 Law Ed.529,550, Chief Justice Marshall of the Supreme court of the U.S said:

“Although the spirit of an instrument especially a Constitution, is to be respected not the less than its letter, yet the spirit is to be collected chiefly from its words, it would be dangerous in the extreme to infer from extrinsic circumstances that a case for which the words of an instrument expressly provide its operation where words conflict with each other, where the different clauses of an instrument bear upon each other and would be inconsistent unless the natural and words be varied”.

Construction becomes necessary and the departure from the obvious meaning of words is justifiable. But if any case the plain meaning of a provision not contradicted by any other provision in the same instrument to be disregarded, because we believe the framers of that instrument could not intend what they say, it must be one in which the absurdity and injustice of applying the provision to the case would be so monstrous that all mankind would without hesitation, unite in rejecting the application.

For every thing I have endeavored to state and notwithstanding the exclusionary element to that effect in Article 39, 67 and 77 of the Constitution as well as S.39 of the Local Authorities Act I declare and direct that it shall be lawful candidates along with candidates sponsored by political parties to contest Presidential, Parliamentary, and local council elections. This will not apply to the council elections due in a few days.

We now come to the sixth and final issue. A declaration is sought to the effect that it is unconstitutional for the president to appoint Zanzibaris to head non-Union Ministries and departments on the main land. This matter invites a bit of the union’s history when Tanganyika and Zanzibar united in 1964 and the constitution of the former was adopted as the interim constitution of the United Republic. At the same time the government of Tanganyika was abolished. The Union operated under interim constitutions until the promulgation’s of the 1977 constitution.

Article 4 (30) of the Constitution provides for the division of governmental functions on the basis of the union and non-union matters. Authority in respect of all union matter as well as non- union matters in and for the Mainland is vested in the Union Government by Art.34 (1). Likewise all executive power of the United Republic with respect to Union and non-union matters in and for the Mainland is vested in the President. He may exercise that power either directly or through delegation to other persons holding office in the services of the United Republic. The president is also empowered to constitute and abolish offices and pursuant to the provisions of Art.36 (2), he has power to appoint persons to offices in the public services of the United Republic subject to other provisions of the constitution. In the exercise of the functions of his office the president has unfettered discretion apart from complying with the provisions of the constitution and law.

Article 55(1) additionally empowers the President to appoint Ministers who shall be responsible for such offices as the president may from time to time establish. He also has power to appoint Regional Commissioners for the regions in the Mainland. Zanzibar retains its internal autonomy in respect of non-union matters falling on that side.

It was argued by Mr. Mbezi that the structure of the constitution points to a dual role for Union government, i.e. as a Government responsible for Union matters and non-union matters for and in the Mainland. He also submitted that the division of union from non-union matters could not have been done without a purpose. In his view non-union matters on the Mainland have to be run by Mainlanders, and the fact that they are constitutionally placed under the Union government does not amount to their unionization. He therefore thinks that the appointment of Zanzibaris to run these matters offends Art.4 (3). Mr. Mussa responded by pointing out that no provision in the constitution compelled the President not to appoint Zanzibaris to such positions and should actually be discriminatory if he did not do so. In his view the exercise of the power of appointment was a matter of policy but not one founded on the Constitution.

The issue of Zanzibaris in “Mainland” ministries is presently a matter of considerable interest, and seems to derive more drive from the polarized political situation which culminated in the ill fated parliamentary notion for the government of Tanganyika. But sentiments apart, one would certainly want to know the judicial position of non-union matters in and for the Mainland. This dualism factor asserted by Mr. Mbezi was recognized and articulated by the Court of Appeal in *Haji v. Nungu & Anor* (1987) LRC (Const) 224 where Chief Justice Nyalali further stated (at p.231) *that in the basic structure of the constitution there are matters which concern exclusively that area which before the union constituted what was then known as Tanganyika. He went on to say that these matters under the scheme of the constitution fall under the exclusive dormine government of the united republic.*

Of course that case was concerned with a different matter thus the jurisdiction of the High Court of the United Republic in election petitions yet even with that reference to the exclusive dormine of the government of the United Republic of Tanganyika matters. I can not read a suggestion of the unionization of those matters. There are various types of constitutions that are classified as federal and ours could carry that appellation in the absence of a standard or ideal type of a federal Constitution.

It is not uncommon for such constitutions to enumerate the areas reserved to the federated states leaving the rest to the federal; government. The founders of the spheres could have enumerated, exercised power and left the rest to the union government. In that case the phylosophy *changu ni changu, chako ni chetu* (mine is mine, yours is yours) would have made considerable sense for everything in and for the main land would have then been a union matter but that was carefully avoided. Instead the Constitution enumerates Union matters only and expressly declares the rest to be non-union; and this is so according to art. 4(3), “For the purpose of the more efficient discharge of public affairs....and for the effective division of functions in relation to those affairs...” I think, with respect, there is reason to insist on the significance of the division.

It occurs to me, that the fact of the non-union matters in the Mainland could have the effect of blurring that division.

That said, however, it is difficult to draw the inference of unconstitutionality, which the Court was called upon to draw in relation to those appointments. The provisions to which I have referred, notably Art. 36(2) and Art. 55(1), do not limit the President in his choice of officers or Ministers or in their disposition. The furthest we can go is to fall back to the words “subject to the other provisions of this Constitution” in Art. 36(2) and this would lead to the division Union and

non- union matter in Art. 4(3).

It can then be suggested that to keep the division effective there is an implied invitation to keep Tanganyika matters Tanganyikan. A breach of the Constitution, however, is such a grave and serious affair that it cannot be arrived at by mere inferences, however attractive, and I apprehend that this would require proof beyond reasonable doubt. I have therefore not found myself in a position to make the declaration sought and I desist from doing so.

THE REPUBLIC OF TANZANIA

**IN THE HIGH COURT OF TANZANIA AT DAR ES SALAAM
CIVIL CASE No. 316 OF 2000.**

FELIX JOSEPH MAVIKA & 4 OTHERS PLAINTIFF

VERSUS

- 1. DAR ES SALAAM CITY COMMISSIONER**
- 2. ILALA MUNICIPAL COMMISSION.....DEFENDANTS**

BEFORE: THE HON. JUDGE MR. S IHEMA

*Civil Procedure: Whether individuals can be represented by fellow individuals in public rights actions without consent from the Attorney General.
Whether the applicants had legal standing to bring the matter before court.*

The applicants in this case sought for an interim order to restrain the Respondents, the Dar-es Salaam City Commission and Ilala Municipal Commission, from, inter alia, dumping solid and liquid wastes in a particular area because of pollution of the areas environment as well as endangering the health and lives of the applicants. Furthermore, they also sought an order restraining the respondents from using the abattoir located in the area for slaughtering of animals due to total disrepair as well as due to its vicinity to the dumping site and the use of polluted water from a water hole dug near the dumping site.

The respondents contended that the matter before the court was a public right because the applicants were alleging public nuisance. Where public rights were at issue individuals had no right to represent individuals hence the applicants as individuals would have no *locus standi* in the matter before the court without the consent of the Attorney General because that application would be an attempt to fetter his statutory powers.

HELD:

1. The applicants who are claiming to be affected by the action of the respondents in the dumping of solid wastes and failing to provide a clean and healthy environment have a cause of action.
2. Applicants can be heard on matters raised in their deposition in asserting both a public right and or special damage suffered or likely to be suffered over and beyond the general public.
3. Regarding the prayers for temporary injunction the court defers on making a decision on the prayers until the final determination of the suit is filed.

**IN THE HIGH COURT OF TANZANIA
AT DAR ES SALAAM**

CIVIL CASE NO. 316 OF 2000

**FELIX JOSEPH MAVIKA & 4 OTHERS=====PLAINTIFF
VERSUS**

1. DAR ES SALAAM CITY COMMISSIONER =====1ST DEFENDANT

2. ILALA MUNICIPAL COMMISSION =====2ND DEFENDANT

RULING

This is an application under Sections 68 (c) and (e) and 95 as well as Order XXXVII Rule 1 and 2 of the Civil Procedure Code by Felix Joseph Mavika, Leonard Manyara Massawe, Beatus Paul Duma, and Gaspar Eliheri Maruma and Badi Abdallah Khamisi on behalf of 353 others against Dar-es-Salaam City Council and Ilala Municipal Commission. The application which is accompanied by an affidavit of Felix Joseph Mavika on behalf of the others, herein after to be referred to as applicants, seeks for the following orders:

- (i) an interim order to restrain the Respondents severally and jointly by themselves or through their agents, work persons e.t.c. from dumping solid and liquid wastes in Vingunguti area because of pollution of the area's environment as well as endangering the health and lives of the applicants, their families and other residents pending the determination of an application for temporary injunction;
- (ii) an interim order restraining the Respondents severally and jointly by themselves or through their agents, work persons etc. from using the abattoir located in Vingunguti area for slaughtering of animals due to dilapidation and total disrepair as well as due to its vicinity to the dumping site and the use of polluted waste from a water hole dug near the dumping site pending the determination of an application for temporary injunction; and
- (iii) a temporary injunction to restrain the respondents from dumping solid and liquid wastes in Vingunguti area as well as the use abattoir located in the area pending the determination for the suit.

It is further noted that the applicants/ plaintiffs have filed a substantive suit pleading for a specific remedies and reliefs among which is a prayer for a permanent injunction prohibiting the respondents/defendants from dumping liquid and solid wastes in Vingunguti area.

The applicants are advocated by a team of learned counsel with Rugemeleza Nshala as the lead counsel. The respondents on other hand, are represented by Ma Makuru, learned City Solicitor and Mr. Maganga the legal officer of the Ilala Municipal Commission. The respondents upon being served with the application and the suit filed a counter affidavit, a written statement of defence and a notice of preliminary objection. The essence of the preliminary objection is to challenge the *locus standi* of the applicant, the incompetence of the application as well as the absence or lack of a cause of action on the part of the applicants. In arguing the preliminary objection, M/s. Makuru the learned City Solicitor has contended that the matter before the court is a public right because the applicants are alleging public nuisance, the existence of which if proved would call into play the provisions of Section 66 of the Civil Procedure Code requiring

the consent of the Attorney General. Elaborating further the learned City Solicitor submitted that where public rights are at issue, individuals would have no right to represent individuals hence the applicants as individuals would have no *locus standi* in the matter before the court without the consent of the Attorney General.

In reply to this point, Mr. Nshala learned advocate was of the view that the application was properly before the court in terms of Section 66 (2) of the Civil Procedure which Mr. Nshala contended does not take away any independent right of a suit that may exist. It was also Mr. Nshala's considered view that the applicants' action is based on the respondents' failure to perform a statutory under Act No. 8/1982 and the accompanying regulations there to which require the respondents to ensure that their residents live in a healthy and clean environment. By dumping the liquid and solid wastes at Vingunguti area where the Applicants live, Mr. Nshala submitted that the respondents have failed to perform as required by Section 53, of Act No. 8/82, which in itself gives the applicant a right to bring this matter in court. Mr. Nshala also called in support the doctrine of public interest litigation enshrined in Article 26 of the Constitution of Tanzania upon which the High Court of Tanzania has already given effective reliefs in the cases of ***Joseph Kessy & Others Vs DCC and Festo Balegele & 74 Other Vs Dar es Salaam City Council***. And in conclusion Nshala urged that as the applicants sought leave and were accorded such leave to institute a representative suit, they have a right to bring this action without consent of the Attorney General.

On careful consideration of the respective submissions of both counsel on whether or not the applicants have *locus standi* to bring the matter before this Court, I am, satisfied that the applicants do have a leg to stand on. There is authority in Section 66 (2) of the Civil Procedure Code as well as the doctrine of public interest litigation enshrined in Article 26 (2) of the Constitution applied with approval by this Court in the cases cited above. In the event that this ground of objection fails and is dismissed, this then disposes of the grounds of objection relating to *locus standi* and incompetence of the application.

The respondents have further advanced the ground that the applicants have no cause of action to assert a public right or special damage suffered over and beyond the general public. Arguing this point the learned City Solicitor argued that there is nothing in the application to show that the Attorney General has been asked to perform this public right or refused consent to the applicants. The learned City Solicitor argues strongly that applicants cannot be allowed to circumvent the law to enforce a public right and that, the application is an attempt to fetter the statutory powers of the Attorney General. And with regard to the existence of the dumping site, at Vingunguti the learned City Solicitor informed the Court that the site has a dual purpose, as a dumping site and a reclaimed land.

In reply Mr. Nshala has submitted that the applicants' have ably indicated in the deposition that there are special interests over and beyond public interest. The special interests emanate from pollution, foul and noxious smell due to the dumping of liquid and solid wastes.

I note that from careful analysis of the depositions of the applicants and the respondents as well as the submissions there to show that the grounds of the preliminary objection appeal to be interrelated. The applicants who are claiming to be affected by the action of the respondents in the dumping of liquid and solid wastes as well as failure to provide clean environment have certainly a cause of action against the respondent. Applicants can be heard on the matters raised in their deposition in asserting both a public right and or special damage suffered or likely to be suffered over and beyond the general public. And in conclusion I have no doubt in my mind that the matter is properly before the court for trial of the issue presented.

Having disposed of the preliminary objection raised by the respondents, I will proceed to address the prayers in the chamber application. These are

- (i) to issue an Interim Order restraining the respondents severally and jointly from dumping solid and liquid wastes in Vingunguti area due to pollution and endangering the health and lives of the applicants and other residents;
- (ii) to issue an interim order to restrain the Respondents from using the abattoir located in Vingunguti area,
- (iii) To issue a temporary injunction to do as provided in (1.) and (ii) above.

As it is on record that the parties were allowed to argue the preliminary objection and the chamber application simultaneously the relevant prayers to be addressed at this stage are the temporary injunction pending the determination of the main suit"

I have given due consideration to these prayers for temporary injunction and I have come to the considered view that defer making a decision on the prayers until the final determination of the suit is filed. I have reached this decision partly due to the fact that the applicants / plaintiffs have made similar assertions in paras 3 - 19 both in the affidavit and the plaint, assertions which in my considered view need to be verified at the trial. To this end, interest of justice demands that the suit filed proceed for trial as soon as is expedient.

It is ordered accordingly.

Signed,

S. IHEMA
JUDGE

23/10/2000

THE REPUBLIC OF TANZANIA

IN THE COURT OF APPEAL OF TANZANIA AT DAR ES SALAAM

CIVIL APPEAL No. 31 OF 1994 ARISING FROM MISC. CAUSE NO. 1 OF 1993

**HON. ATTORNEY GENERAL..... APPELLANT
VERSUS**

- 1. LOHAY AKNONAAY**
- 2. JOSEPH LOHAY.....RESPONDENTS**

(CORAM: F.L. NYALALI, C.J., L.M. MAKAME, J.A and R.H. KISANGA. J. A)

Constitutional Law: Whether basic human rights are retrospective.

The respondents instituted a suit in the court of the resident Magistrate for Arusha region for recovery of a piece of land held under customary law and it was successful. An appeal was instituted accordingly. While the appeal was still pending in the High court, a new law was enacted by parliament declaring the extinction of customary rights in land; prohibiting the enforcement of any court decision concerning matters in respect of which jurisdiction was ousted. Aggrieved by this new law, the respondents petitioned against the attorney general in the High Court for a declaration that the new law was unconstitutional and consequently null and void. High court granted the petition and ordered the new law struck off the statute book. The attorney general was aggrieved by the order and appealed.

HELD:

1. Sections which provide for the extinction of customary rights in land but prohibit the payment of compensation with the implicit exception of unexhausted improvements only are unconstitutional and therefore null and void.
2. The customary rights in land in the Arusha region were declared extinct before the provisions of the Constitution which embody the basic human rights became enforceable. This means that since the provisions 'Basic Human Rights' are not retrospective, when the Act was enacted by Parliament, there were no customary rights in any of the listed villages.
3. With regard to the Sections that prohibit access to the courts of tribunal, and enforcement of decisions thereof concerning land disputes falling within the new law (The Regulation of Land Tenure (Established Villages) Act, 1992 Act No. 22), we find the entire Section unconstitutional and therefore null and void as it encroaches upon the sphere of the Judiciary and denies aggrieved parties a remedy before an impartial tribunal.
4. Section 6 is unconstitutional only to the extent that it purports to exclude access to the courts. Other provisions can be read without the proviso relating to the invalidated sections. We therefore reverse the decision of the court below.
5. Denial of a right of action before an impartial tribunal renders the law unconstitutional.

Appeal partly allowed and partly dismissed.

IN THE COURT OF APPEAL OF TANZANIA

AT DAR ES SALAAM

(CORAM: NYALALI, C.J., MAKAME, J.A and KISANGA. J.A.)

CIVIL APPEAL No. 31 OF 1994

HON. ATTORNEY GENERAL.....APPELLANT

VERSUS

1. LOHAY AKNONAA Y

2. JOSEPH LOHAY.....RESPONDENTS

(APPEAL FROM THE JUDGMENT OF THE HIGH COURT OF TANZANIA AT ARUSHA)

(JUSTICE MUNUO)

DATED 21ST OCTOBER, 1993.

IN THE HIGH COURT MISCELLANEOUS CIVIL CAUSE NO. 1 OF 1993

JUDGMENT OF THE COURT

NYALALI, C.J.

This case clearly demonstrates how an understanding of our country's past is crucial to a better understanding of our present, and why it is important while understanding our past, to avoid living in that past. The respondents, namely, Lohay Akonaay and Joseph Lohay are father and son, living in the village of Kambi ya Simba, Mbulumbulu Ward, in Arusha Region. In January 1987 they successfully instituted a suit in the court of the Resident Magistrate for Arusha region for recovery of a piece of land held under customary law. An eviction order was subsequently issued for eviction of the judgement debtors and the respondents were given possession of the piece of land in question.

There is currently an appeal pending in the High Court at Arusha against the judgement of the trial court. This is Arusha High Court Civil Appeal No. 6 of 1991. While this appeal was pending, a new law which came into force on the 28th December 1992, was enacted by the Parliament, declaring the extinction of customary rights in land, prohibiting the payment of compensation for such extinction, ousting the jurisdiction of the courts, terminating proceedings pending in the courts, and prohibiting the enforcement of any court decision or decree concerning matters in respect of which jurisdiction was ousted. The law also established, inter alia, a tribunal with exclusive jurisdiction to deal with the matters taken out of the jurisdiction of the courts. This new law is the Regulation of Land Tenure (Established Villages) Act, 1992, Act No. 22 of 1992, hereinafter called Act No. 22 of 1992.

Aggrieved by this new law, the respondents petitioned against the Attorney General in the High Court, under articles 30 (3) and 26 (2) of the Constitution of the United Republic of Tanzania, for a declaration to the effect that the new law is unconstitutional and consequently null and void. The High Court, Munuo. J. granted the petition and ordered the new law struck off the statute book. The Attorney General was aggrieved by the judgement and order of the High Court, hence he sought and obtained leave to appeal to this Court. Mr. Felix Mrema, the learned Deputy Attorney General, assisted by Mr. Sasi Salula, State Attorney, appealed for the Attorney-General,

whereas Messrs Lobulu and Sang'ka, learned advocates, appealed for the respondents.

From the proceedings in this court and the court below, it is apparent that there is no dispute between the parties that during the colonial days, the respondents acquired a piece of land under customary law. Between 1970 and 1977 there was a countrywide operation undertaken in the rural areas by the Government and the ruling party, to move and settle the majority of the scattered rural population into villages on the mainland of Tanzania. One such village was Kambi ya Simba village, where the residents reside. During this exercise, commonly referred to as Operation Vijiji, there was wide spread reallocation of land between the villagers concerned. Among those affected by the operation were the respondents, who were moved away from the land they had acquired during the colonial days to another piece of land within the same village.

The respondents were apparently not satisfied with this reallocation and it was for the purpose of recovering their original piece of land that they instituted the legal action already mentioned. Before the case was concluded in 1989, subsidiary legislation was made by the appropriate Minister under the Land Development (Specified Areas) Regulations of 1986 read together with the Rural Lands (Planning and Utilization) Act, 1973, Act No. 14 of 1973 extinguishing all customary rights in land in 92 villages listed in a schedule. This is the Extinction of Customary Land Right Order, 1987 published as Government Notice No. 88 of 13th February 1987. The order vested the land concerned in the respective District Councils having jurisdiction over the area where the land is situated. The respondents' village is listed as Number 22 in that schedule. Order, including the respondents' village are in areas within Arusha Region.

The Memorandum of appeal submitted to us for the appellant contains nine grounds of appeal, two of which, that is ground number 8 and 9 were abandoned in the course of hearing the appeal. The remaining seven grounds of appeal read as follows:

1. That the Honourable trial Judge erred in fact and law in holding that a deemed right of occupancy as defined in Section 2 of the Land Ordinance Cap 113 is "property" for the purposes of Article 24(1) of the Constitution of the United Republic of Tanzania 1977 and as such its deprivation is unconstitutional;
2. That the Honourable trial Judge erred in law and fact in holding that Section 4 of the Regulation of Land Tenure (Established Villages) Act, 1992, precludes compensation for unexhausted improvements;
3. That the Honourable trial Judge erred in law and fact in holding that any statutory provision ousting the jurisdiction of the courts is contrary to the Constitution of the United Republic of Tanzania;
4. That the Honourable trial Judge erred in law by holding that the whole of the Regulation of Land Tenure (Established Villages) Act 1992 is unconstitutional;
5. That the Honourable trial Judge erred in law and fact in holding that the Regulation of Land Tenure (Established Villages) Act 1992 did acquire the Respondents land and reallocated the same to other people and in holding that the Act was discriminatory;
6. That having declared the Regulation of Land Tenure (Established Villages) Act 1992 unconstitutional, the Honourable Judge erred in law in proceeding to strike it down;
7. The Honourable trial Judge erred in fact by quoting and considering a wrong and non-existing section of the law.

The respondents on their part submitted two notices before the hearing of the appeal. The first is a Notice of Motion purportedly under Rule 3 of the Tanzania Court of Appeal Rules, 1979, and the second, is a Notice of Grounds for affirming the decision in terms of Rule 93 of the same. The Notice of Motion sought to have the court strike out the grounds of appeal numbers 1, 5, 8 and 9.

After hearing both sides, we were satisfied that the procedure adopted by the respondents was contrary to rules 45 and 55 which require such an application to be made before a single judge. We therefore ordered the Notice of Motion to be struck off the record.

As to the Notice of Grounds for affirming the decision of the High Court, it reads as follows:

1. As the appellant had not pleaded in his reply to the petition facts or points of law showing controversy, the court ought to have held that the petition stands unopposed.
2. Since the Respondents have a court decree in their favour, the Legislature cannot nullify the said decree as it is against public policy, and against the Constitution of Tanzania.
3. As the Respondents have improved the land, they are by that reason alone entitled to compensation in the manner stipulated in the Constitution and that compensation is payable before their rights in land could be extinguished.. .
4. Possession and use of land constitute "property" capable of protection under the Constitution of Tanzania. Act No. 22 is therefore unconstitutional to the extent that it seeks to deny compensation for loss of use; it denies right to be heard before extinction of the right.
5. Operation Vijiji gave no person a right to occupy or use somebody else's land, hence no rights could have been acquired as a result of that "operation"
6. The victims of operation Vijiji are entitled to reparations; The Constitution cannot therefore be interpreted to worsen their plight.
7. The land is the respondents only means to sustain life. Their rights therein cannot therefore be extinguished or acquired in the manner the Legislature seeks to do without violating the
8. Respondents' constitutional right to life.

For purposes of clarity, we are going to deal with the grounds of appeal one by one, and in the process, take into account the grounds submitted by the respondents for affirming the decision wherever they are relevant to our decision.

Ground number one raises an issue which has far reaching consequences to the majority of the people of this country, who depend on land for their livelihood. Article 24 of the Constitution of the United Republic of Tanzania recognizes the right of every person in Tanzania to acquire and own property and to have such property protected. Sub-article (2) of that provision prohibits the forfeiture or expropriation of such property without fair compensation. It is the contention of the Attorney-General, as eloquently articulated before us by Mr. Felix Mrema, Deputy Attorney-General, that a "right of occupancy" which includes customary rights in land as defined under S.2 of the Land Ordinance, Cap 113 of the Revised Laws of Tanzania Mainland, is not property within the meaning of Article 24 of the Constitution and is therefore not protected by the Constitution. The Deputy Attorney General cited a number of authorities, including the case of *AMODU TUAN VS THE SECRETARY SOUTHERN NIGERIA* (1921) 2 A.C. 399 and the case of *MTORO BIN MWAMBA VS THE ATTORNEY GENERAL* (1953) 20 E.A.C.A. 108, the latter arising from our own jurisdiction. The effect of these authorities is that customary rights in land are by their nature not rights of ownership of land, but rights to use or occupy land, the ownership of which is vested in the community or communal authority. The Deputy Attorney General also contended to the effect that the express words of the Constitution under Article 24 makes the right to property, "subject to the relevant laws of the land."

Mr. Lobulu for the respondents has countered Mr. Mrema's contention by submitting to the effect that whatever the nature of customary rights in land, such rights have every characteristic of property, as commonly known and therefore fall within the scope of Article 24 of the Constitution. He cited a number of authorities in support of that position, including the Zimbabwe case of *HEWLETT VS MINISTER OF FINANCE* (1981) ZLR 573, and the cases of *SHAH VS ATTORNEY-GENERAL* (N.2) 1970 EA 523 and the scholarly article by Thomas Allen, lecturer

in Law, University of Newcastle, published in the International and Comparative Law quarterly, Vol. 42, July 1993 on "Commonwealth constitutions and the right not to be deprived of property."

Undoubtedly the learned trial Judge, appears to have been of the view that customary or deemed rights of occupancy are property within the scope of Article 24 of the Constitution when she stated in her judgement:

"I have already noted earlier on that the petitioner legally possess the suit land under customary land tenure under Section 2 of the Land Ordinance Cap 113. They have not in this application sought any special status, rights or privileges and the court has not conferred any on the petitioners. Like all other law abiding citizens of this country, the petitioners are equally entitled to basic human rights including the right to possess the deemed rights of occupancy they lawfully acquired pursuant to Article 24 (1) of the Constitution and Section 2 of the Land Ordinance, Cap 113."

Is the trial judge correct? We have considered this momentous issue with the judicial care it deserves. We realize that if the Deputy Attorney General is correct, then most of the inhabitants of the Tanzania mainland are no better than squatters in their own country. It is a serious proposition. Of course if that is the correct position in law, it is our duty to agree with the Deputy Attorney General, without fear or favour, after closely examining the relevant law and the principles underlying it.

In order to ascertain the correct legal position, we have had to look at the historical background of the written law of land tenure on the mainland of Tanzania, since the establishment of British Rule. This exercise has been most helpful in giving us an understanding of the nature of rights or interests in land on the mainland of Tanzania. This historical background shows that the overriding legal concern of the British authorities, no doubt under the influence of the Mandate of the League of Nations and subsequently of the Trusteeship Council, with regard to land, was to safeguard, protect, and not to derogate from the rights in land of the indigenous inhabitants. This is apparent in the Preamble to what was then known as the Land Tenure Ordinance, Cap 113 which came into force on 26th January, 1923. The Preamble reads:

"Whereas it is expedient that the existing customary rights of the natives of the Tanganyika Territory to use and enjoy the land of the Territory and the natural fruits thereof in sufficient quantity to enable them to provide for the sustenance of themselves their families and their posterity should be assured, protected and preserved;
AND WHEREAS *it is expedient that the rights and obligations of the Government in regard to the whole of the lands within the territory and also the rights and obligations of cultivators or other persons claiming to have an interest in such lands should be defined by law. BE IT THEREFORE ENACTED* **by the Governor and Commander-in-Chief of the Tanganyika Territory as follows. . ."**

It is well known that after a series of minor amendments over a period of time, the Land Tenure Ordinance assumed its present title and form as the Land Ordinance; Cap 113. Its basic features remain the same up to now. One of the basic features is that all land is declared to be public land and is vested in the governing authority on trust for the benefit of the indigenous inhabitants of this country. This appears in Section 3 and 4 of the Ordinance.

The underlying principle of assuring, protecting and preserving customary rights in land is also reflected under Article 8 of the Trusteeship Agreement, under which the mainland of Tanzania was entrusted by the United Nations to the British Government. Article 8 reads:

"In framing laws relating to the holding or transfer of land and natural resources, the

Administering Authority shall take into consideration native laws and customs, and shall respect the rights and safeguard the interests, both present and future, of the native population. No native land or natural resources may be transferred except between natives, save with the previous consent of the competent public authority. No real rights over native land or natural resources in favour of non-natives may be created except with the same consent."

With this background in mind, can it be said that the customary or deemed rights of occupancy recognized under the Land Ordinance are not property qualifying for protection under Article 24 of the Constitution? The Deputy Attorney-General has submitted to the effect that the customary or deemed rights of occupancy, though in ordinary parlance may be regarded as property, are not constitutional property within the scope of Article 24 because they lack the minimum characteristics of property as outlined by Thomas Allen in his article earlier mentioned where he states:

"The precise content of the bundle of rights varies between legal systems, but nonetheless it is applied throughout the Commonwealth. At a minimum, the bundle has been taken to include the right to exclude others from the thing owned, the right to use or receive income from it, and the right to transfer to others. According to the majority of Commonwealth cases, an individual has property once he or she has a sufficient quantity of these rights in a thing. What is 'sufficient' appears to vary from case to case, but it is doubtful that a single strand of the bundle would be considered property on its own."

According to the Deputy Attorney General, customary or deemed rights of occupancy lack two of the three essential characteristics of property. First, the owner of such a right cannot exclude all others since the land is subject to the superior title of the President of the United Republic in whom the land is vested. Second, under Section 4 of the Land Ordinance, the occupant of such land cannot transfer title without the consent of the President.

With due respect to the Deputy Attorney General, we do not think that his contention on both points is correct. As we have already mentioned, the correct interpretation of S.4 and related sections mentioned above is that the President holds public land in trust for the indigenous inhabitants of that land. From this legal position, two important things follow. Firstly, as trustee of public land, the President's power is limited in that he cannot deal with public land in a manner in which he wishes or which is detrimental to the beneficiaries of public land. In the words of S. 6(1) of the Ordinance, the President may deal with public land only "where it appears to him to be in the general interests of Tanganyika." Secondly, as trustee, the President cannot be the beneficiary of public land. In other words, he is excluded from the beneficial interest.

With regard to the requirement of consent for the validity of title to the occupation and use of public lands, we do not think that the requirement applied to the beneficiaries of public land, since such an interpretation would lead to the absurdity of transforming the inhabitants of this country, who have been in occupation of land under customary law from time immemorial, into mass squatters in their own country. Clearly that could not have been the intention of those who enacted the land Ordinance. It is a well known rule of interpretation that a law should not be interpreted to lead to an absurdity. We find support from the provisions of Article 8 of the Trusteeship Agreement which expressly exempted dispositions of land between the indigenous inhabitants from the requirement of prior consent of the governing authority. In our considered opinion, such consent is required only in cases involving disposition of land by indigenous inhabitants or natives to non-natives in order to safeguard the interests of the former. We are satisfied in our minds that the indigenous population of this country is validly in occupation of land as beneficiaries of such land under customary law and any disposition of land between them

under customary law is valid and requires no prior consent from the President.

We are of course aware of the provisions of the land Regulations, 1948 and specifically Regulation 3 which requires every disposition of a Right of Occupancy to be in writing and to be approved by the President. In our considered opinion the land Regulations apply only to a Right of Occupancy granted under s.6 of the Land Ordinance and have no applicability to customary or deemed rights of occupancy, where consent by a public authority is required only in the case of a transfer by a native to a non-native. A contrary interpretation would result in the absurdity we have mentioned earlier.

As to the contention by the Deputy Attorney-General to the effect that the right to property under Article 24 of the Constitution is derogated from by the provision contained therein which subjects it to "the relevant laws of the land," we do not think that, in principle, that expression, which is to be found in other parts of the Constitution, can be interpreted in a manner which subordinates the Constitution to any other law. It is a fundamental principle in any democratic society that the Constitution is supreme to every other law or institution. Bearing this in mind, we are satisfied that the relevant provisions means that what is stated in the particular part of the Constitution is to be exercised in accordance with relevant law. It hardly needs to be said that such regulatory relevant law must not be inconsistent with the Constitution.

For all these reasons therefore we have been led to the conclusion that customary or deemed rights in land, though by their nature are nothing but rights to occupy and use the land, are nevertheless real property protected by the provisions of Article 24 of the Constitution. It follows therefore that deprivation of a customary or deemed right of occupancy without fair compensation is prohibited by the Constitution. The prohibition of course extends to a granted right of occupancy. What is fair compensation depends on the circumstances of each case. In some cases a reallocation of land may be fair compensation. Fair compensation however is not confined to what is known in law as unexhausted improvements. Obviously where there are unexhausted improvements, the constitution as well as the ordinary land law requires fair compensation to be paid for its deprivation.

We are also of the firm view that where there are no unexhausted improvement, but some effort has been put into the land by the occupier, that occupier is entitled to protection under Article 24 (2) and fair compensation is payable for deprivation of property. We are led to this conclusion by the principle, stated by Mwalimu Julius K. Nyerere in 1958 and which appears in his book "*Freedom and Unity*" published by Oxford University Press, 1966. Nyerere states, inter alia:

"When I use my energy and talent to clear a piece of ground for my use it is clear that I am trying to transform this basic gift from God so that it can satisfy a human need. It is true, however, that this land is not mine, but the efforts made by me in clearing the land enable me to lay claim of ownership over the cleared piece of ground. But it is not really the land itself that belongs to me but only the cleared ground, which will remain mine as long as I continue to work on it. By clearing that ground I have actually added to its value and have enabled it to be used to satisfy a human need. Whoever then takes this piece of ground must pay me for adding value to it through clearing it by my own labour."

This in our view deserves to be described as "the Nyerere Doctrine of Land Value" and we fully accept it as correct in law.

We now turn to the second ground of appeal. This one poses no difficulties. The genesis of this ground of appeal is the finding of the trial judge where she states,

"In the light of the provisions of Article 24 (1) and (2) of the Constitution, Section 3 and 4 of Act No. 22 of 1992 violate the Constitution by denying the petitioners the right to go on possessing their deemed rights of occupancy and what is worse, denying the petitioners compensation under section 3 (4) of Act No. 22 of 1992."

Like both sides to this case, we are also of the view that the learned trial judge erred in holding that the provisions of Section 4 of Act. No. 22 of 1992 denied the petitioners or any other occupier compensation for unexhausted improvements. The clear language of that section precludes compensation purely on the basis of extinction of customary rights in land. The section reads:

"No compensation shall be payable only on account of loss of any right or interest in or over land which has been extinguished under section 3 of this Act."

But as we have already said, the correct constitutional position prohibits not only deprivation of unexhausted improvements without fair compensation, but every deprivation where there is value added to the land. We shall consider the constitutionality of Section 4 later in this judgement.

Ground number 3 attacks the finding of the trial judge to the effect that the provisions of Act No. 22 of 1992 which oust the jurisdiction of the Courts from dealing with disputes in matters covered by the Act are unconstitutional. The relevant part of the judgement of the High Court reads as follows:

"The effect of Sections 5 and 6 of Act No. 22 of 1992 is to oust the jurisdiction of the Courts of law in land disputes arising under the controversial Act No. 22 of 1992 and exclusively vesting such jurisdiction in land tribunals. Such ousting of the courts jurisdiction by Section 5 and 6 of Act No. 22/92 violates Articles 30(1), (3), (4) and 108 of the Constitution."

The Deputy Attorney General has submitted to the effect that the Constitution allows, specifically under article 13 (6) (a), for the existence of bodies or institutions other than the courts for adjudication of disputes. Such bodies or institutions include the Land Tribunal vested with exclusive jurisdiction under Section 6 of Act No. 22 of 1992. We are grateful for the interesting submission made by the Deputy Attorney General on this point, but with due respect, we are satisfied that he is only partly right. We agree that the Constitution allows the establishment of quasi-judicial bodies, such as the Land Tribunal. What we do not agree is that the Constitution allows the courts to be ousted of jurisdiction by conferring exclusive jurisdiction on such quasi-judicial bodies. It is the basic structure of a democratic Constitution that state power is divided and distributed between three state pillars. These are the Executive vested with executive power; the Legislature vested with legislative power; and the Judicature vested with judicial powers.

This is clearly so stated under Article 4 of the Constitution. This basic structure is essential to any democratic Constitution and cannot be changed or abridged while retaining the democratic nature of the constitution. It follows therefore that wherever the constitution establishes or permits the establishment of any other institution or body with executive or legislative or judicial power, such institution or body is meant to function not in lieu of or in derogation of these three central pillars of the state, but only in aid of and subordinate to those pillars. It follows therefore that since our Constitution is democratic, any purported ouster of jurisdiction of the ordinary courts to deal with any justiciable dispute is unconstitutional. What can properly be done wherever need arises to confer adjudicative jurisdiction on bodies other than the courts is to provide for finality of adjudication such as by appeal or review to a superior court, such as the High Court or Court of Appeal.

Let us skip over ground number 4 which is the concluding ground of the whole appeal. We shall deal with it later. For now, we turn to ground number 5. This ground relates to that part of the judgement of the learned trial judge, where she states:

"It is reverse discrimination to confiscate the petitioners deemed right of occupancy and reallocate the same to some other needy persons because by doing so the petitioners are deprived of their right to own land upon which they depend for a livelihood which was why they acquired it back in 1943."

There is merit in this ground of appeal. Act No. 22 of 1992 cannot be construed to be discriminatory within the meaning provided by Article 13(5) of the Constitution. Mr. Sangka's valiant attempt to show that the Act is discriminatory in the sense that it deals only with people in the rural areas and not those in the urban areas was correctly answered by the Deputy Attorney General that the Act was enacted to deal with a problem peculiar to rural areas. We also agree with the learned Deputy Attorney General, that the act of extinguishing the relevant customary or deemed rights of occupancy did not amount to acquisition of such rights. As it was stated in the Zimbabwe case of *HEWLETT VS MINISTER OF FINANCE* cited earlier where an extract of a judgement of Viscount Dilhorne is reproduced stating:

"Their Lordships agree that a person may be deprived of his property by mere negative or restrictive provision but it does not follow that such a provision which leads to deprivation also leads to compulsory acquisition or use."

It is apparent that, during Operation Vijiji what happened was that some significant number of people was deprived of their pieces of land which they held under customary law, and were given in exchange other pieces of land in the villages established pursuant to Operation Vijiji. This exercise was undertaken not in accordance with any law but purely as a matter of government policy. It is not apparent why the government chose to act outside the law, when there was legislation which could have allowed the government to act according to law, as it was bound to. We have in mind the Rural Lands (Planning and Utilization) Act, 1973, Act No. 14 of 1973, which empowers the President to declare specified areas to regulate land development and to make regulations to that effect, including regulations extinguishing customary rights in land and providing for compensation for unexhausted improvements, as was done in the case of Rufiji District under Government Notice Nos. 25 of 10th May 1974 and 216 of 30th August 1974. The inexplicable failure to act according to law, predictably led some aggrieved villagers to seek remedies in the courts by claiming recovery of the lands they were dispossessed during the exercise. Not surprisingly most succeeded. To avoid the unraveling of the entire exercise and the imminent danger to law and order, the Land Development (Specified Areas) Regulations, 1986 and the Extinction of Customary Land Rights Order, 1987 were made under Government Notice No. 659 of 12th December 1986 and Government Notice No.88 of 13th February 1987 respectively. As we have already mentioned earlier in this judgement, Government Notice No. 88 of 13th February 1987 extinguished customary land rights in certain villages in Arusha region, including the village of Kambi ya Simba where the respondents come from. We shall consider the legal effect of this Government Notice later in this judgment.

For the moment we must turn to ground number 6 of the appeal. Although the Deputy Attorney General was very forceful in submitting to the effect that the learned trial judge erred in striking down from the statute book those provisions of Act. No. 22 of 1992 which she found to be unconstitutional, he cited no authority and indicated no appropriate practice in countries with jurisdiction similar to what may be described as the authority or force of reason by arguing that the Doctrine of Separation of Powers dictates that only the Legislature has powers to strike out a statute from the statute book. We would agree with the learned Deputy Attorney General in so far

as valid statutes are concerned. We are unable, on the authority of reason, to agree with him in the case of statutes found by a competent court to be null and void. In such a situation, we are satisfied that such court has inherent powers to make a consequential order striking out such invalid statute from the statute book. We are aware that in the recent few weeks some legislative measures have been made by the Parliament concerning this point. Whatever those measures may be, they do not affect this case which was decided by the High Court a year ago.

Ground number 7 is next and it poses no difficult at all. It refers to that part of the High Court's judgement where the learned trial judge states:

"Furthermore section 3(4) of Act No. 22 of 1992 forbids any compensation on account of the loss of any right or interest in or over land which has been extinguished under section 3 of Act No. 22 of 1992."

As both sides agree, the reference to section 3(4) must have been a slip of the pen. There is no such section. The learned trial judge must have been thinking of section 4 and would undoubtedly have corrected the error under the Slip Rule had her attention been drawn to it. We must now return to ground number 4. The genesis of this ground is that part of the judgement of the trial court where it states:

"For reasons demonstrated above the court finds that sections 3, 4,5 and 6 of Act No. 22/92 the Regulation of Land Tenure (Established Villages) Act 1992 violate some provisions of the Constitution thereby contravening Article 64(5) of the Constitution. The unconstitutional Act No. 22 of 1992 is hereby declared null and void and accordingly struck down".

The learned Deputy Attorney-General contends in effect that the learned trial judge, having found only four sections out of twelve to be unconstitutional ought to have confined herself only to striking down the four offending sections and not the entire statute. There is merit in this ground of appeal. There is persuasive authority to the effect that where the unconstitutional provisions of a statute may be severed leaving the remainder of the statute functioning, then the court should uphold the remainder of the statute and invalidate only the offending provisions.

See the case of *Attorney-General of Alberta vs. Attorney-General of Canada (1947) AC 503.*

In the present case, for the reasons we have given earlier, we are satisfied that sections 3 and 4 which provide for the extinction of customary rights in land but prohibit the payment of compensation with the implicit exception of unexhausted improvements only are violative of Article 24(1) of the Constitution and are null and void. Section 4 would be valid if it covered compensation for value added to land within the scope of the Nyerere Doctrine of Land Value.

But as we have pointed out earlier in this judgement, this finding has no affect in the villages of Arusha Region including Kambi ya Simba, which are listed in the schedule to Government Notice No. 88 of 1987. The customary rights in land in those listed villages were declared extinct before the provisions of the Constitution, which embody the Basic Human Rights, became enforceable in 1988 by virtue of the provisions of Section 5(2) of the Constitution (Consequential, Transitional and Temporary Provisions) Act, 1984. This means that since the provisions of Basic Human Rights are not retrospective, when the Act No. 22 of 1992 was enacted by the Parliament, there were no customary rights in land in any of the listed villages of Arusha region. This applies also to other areas, such as Rufiji District where, as we have shown, customary rights in land were extinguished by law in the early 1970s. Bearing in mind that Act No. 22 of 1992, which can correctly be described as a draconian legislation, was prompted by a

situation in some villages in Arusha Region, it is puzzling that a decision to make a new law was made where no new law was needed. A little research by the Attorney-General's Chambers would have laid bare the indisputable fact that customary rights in land in the villages concerned had been extinguished a year before the Bill of Rights came into force.

With due respect to those concerned, we feel that this was unnecessary panic characteristic of people used to living in our past rather than in our present which is governed by a constitution embodying a Bill of Rights. Such behavior does not augur well for good governance.

With regard to section 5(I) and (2) which prohibits access to the courts or tribunal, terminates proceedings pending in court or tribunal and prohibits enforcement of decisions of any court or tribunal concerning land disputes falling within Act No. 22 of 1992, we are satisfied, like the learned trial judge, that the entire section is unconstitutional and therefore null and void, as it encroaches upon the sphere of judicature contrary to Article 4 of the Constitution, and denies an aggrieved party remedy before an impartial tribunal contrary to Article 13(6)(a) of the same constitution.

The position concerning Section 6 is slightly different. That Section reads:

"No proceeding may be instituted under this Act, other than in the Tribunal having jurisdiction over the area in which the dispute arises."

Clearly this Section is unconstitutional only to the extent that it purports to exclude access to the courts. The offending parts may however be severed so that the remainder reads, "Proceedings may be instituted under this Act in Tribunal having jurisdiction over the area in which the dispute arises". This would leave the door open for an aggrieved party to seek a remedy in the courts, although such courts would not normally entertain a matter for which a special forum has been established, unless the aggrieved party can satisfy the court that no appropriate remedy is available in the special forum.

The remainder of the provisions of Act No. 22 of 1992 including Section 7, which could be read without the proviso referring to the invalidated Section 3, can function in respect of the matters stated under S.7 of the Act. To that extent therefore the learned trial judge was wrong in striking down the entire statute. To that extent we hereby reverse the decision of the court below. As neither side is a clear winner in this case, the appeal is partly allowed and partly dismissed. We make no order as to costs.

Dated at DAR ES SALAAM this 21st day of December, 1994.

F. L. NYALALI, C.J.

L. M. MAKAME, J.A

R. H. KISANGA, J.A

I certify that this is a true copy of the original.

Signed,

B. M. LUANDA.

SENIOR DEPUTY REGISTRAR

**THE HIGH COURT OF TANZANIA
AT ARUSHA
MISCELLANEOUS CIVIL APLPLICATION NO. 126/92**

CHRISTOPHER AIKAWO SHAYO=====APPLICANT

VERSUS

1. NATIONAL CHEMICAL INDUSTRIES }

2. PESTICIDES MANUFACTURERS LTD. =====RESPONDENTS

RULING.

BEFORE: M.D. NCHALLA, J.

This ruling is being made following an objection by counsel for the respondents to an application, for adjournment of the hearing of this application that was made to the court by counsel for the applicants.

The application, had been fixed for hearing on the 24th day of July 1992 and the same was clearly so, cause list and both parties appear to have been aware of the said hearing as they have both of them dutifully attended the court and quite punctually. I have used the words “the parties appear to have been served” because the record is some how confusing. The record shows that the application first came before the District Registrar on 4/6/1992, after the same was filed on 25/5/1992. On 4/6/1992 both parties were absent, and the application was fixed for hearing on 24/7/1992, with a direction that notices be served on the parties. Notices for service on the parties were issued on the same day, that is, on 4/6/1992 for service on the parties. However only one notice of hearing appears to have been served on one of the counsel for the applicants, the Law Partners and Associates, Advocates who duly signed the notice whose original was returned to the court and is in the file. With regard to the other parties there is no proof in the record that they were served.

Then on 24/6/1992 the application was called before the Acting District Registrar Mr. S.J., Lawena. On this date the parties were both absent, an order was made that the application be heard oil 2/7/1992 instead of the 24th July 1992 which was fixed initially. The reason for this change of the date of hearing is contained in the order thus: “Hearing on 2/7/1992 as directed by the Hon. Justice. Parties be notified.

Signed,

S.J. Lawena, Ag. D.R

24/6/1992.

The record does not show that notices were issued on the parties in respect of the" hearing" of notices the application on 2/7/1992. There are no copies of notices of hearing for 2/7/1992 in the file.

Indeed, the applications, were before the Acting District Registrar on 2/7/1992 as was scheduled. On this day one of the respondents’ counsel, the Tanzania Legal Corporation appeared. Mr. Maro from TLC appeared for the respondents, while the applicants were absent and were not represented. It is not known how and by what means the TLC became aware that the application had been rescheduled for hearing on the 2/7/1992 instead of the 24/7/1992 which was initially

fixed and about which notices of hearing had been issued.

Be that as it may, on 2/7/1992 Mr. Maro made an application from the bar which application was entertained by the Acting District Registrar, and the same was finally granted. It is of great advantage that I should reproduce the proceedings that were taken before Mr. Lawena, Acting District Registrar, on 2/7/1992, as I strongly feel that those proceedings have a serious bearing on the decision that I am going to make in this matter relating to the objection for adjournment which the respondents have put up. Those proceedings are as follows: -

2/7/1992

Coram:- S.J. Lawena Ag. DR.

Applicants:- Absent

Respondents:- Mr. Maro – TLC – present.

Mr. Maro:- I have a slight application to make. We were only engaged yesterday by the defendants/respondents. Upon perusal of the affidavit, we feel we have to file a counter affidavit. The 1st respondent is based in Dar es Salaam, and thus I would need two to three weeks in order to file my counter affidavit.

Court:- The matter was brought under certificate of urgency and it is for this reason that the Hon. Judge in charge set it for hearing today. Unfortunately he is at Moshi attending the C.J. who has come for official duties.

Mr. Maro:- If you set the hearing on 24/7/1992 I undertake that the factory will not be commissioned on this date i.e. until the finalization of this application.

Order:- Counter affidavit by 22/7/1992. Hearing on 24/7/1992. Applicants to be notified.

Signed,

S. J. Lawena

Ag. District Registrar.

2/7/1992.

The record shows that on 3/7/1992 notices of hearing for 24/7/1992 were issued for service on the applicants' counsel, but none of them was returned to the court as proof that the same were served. The respondents filed their counter affidavit on 22/7/1992 as was ordered by the Acting District Registrar. There is no proof from the record as to the date and time the applicants' counsel were served with the said counter affidavit in order to read it through and prepare themselves to answer it on the 24/7/1992. The applicants' counsel have submitted that they were served with the said counter affidavit late on 23/7/1992, less than a day before the date of hearing. This submission cannot and had not, been refuted in anyway by counsel for the respondents. So this Court takes it as a fact that the applicants' counsel were served with, the respondents' affidavit late on 23/7/1992, less than a day before the date of hearing on 24/7/1992 at 9.00 a.m. This Court is legally duty bound to consider and decide whether the time within which the applicants were served with the counter affidavit was sufficient time to enable the applicants' counsel to read and digest the said counter affidavit, and thereafter prepare themselves to answer the issues raised in, that document during the hearing of the application. To me this is the crux of the matter which is very much tied up to the proceeding and order made on 2/7/1992 by Mr. Lawena the then Acting District Registrar.

Mr. Shayo for the applicants submitted that the respondent counter affidavit is quite involved, and

counter affidavit is quite involved and contains several technical issues which entail research and consultations with experts on these issues. Such consultations will invariably require some time to achieve. Thereafter the applicants' counsel will have to consult between themselves on the legal aspect in respect to the issues raised in the counter affidavit and finally prepare and file a reply which they intend to file to that counter affidavit.

Mr. Shayo also applied that they be supplied with an extra copy of the counter affidavit along with its annexures so that each counsel will have his own copy to work on. Mr. Shayo also applied that during the pendency of this application, the status quo at the factory be maintained that is, the respondents be restrained from commissioning their chemical factory.

In reply Mr. Lobulu, one of the two counsels for the respondents, strongly opposed the application for adjournment of the application. He submitted that the application had been fixed for hearing under a certificate of urgency which was filed by the applicant himself. Mr. Lobulu further submitted that he and his fellow counsel Mr. Mihayo, had to work round the clock in order to prepare for the hearing of the application as fixed and for that reason they had come to the court fully prepared to argue the application. Moreover, Mr. Mihayo, the second counsel for the respondents came all the way from Dar es Salaam for the hearing of the application. Also three principle officers of the defendants traveled to Arusha to this Court to attend the hearing of the application. As a result the respondents towards the hearing of this application as fixed have expounded so much public money.

Further, Mr. Lobulu submitted the reason given by the applicants' counsel that the counter affidavit is replete with technical points is not a good ground for adjourning the hearing of the application because the applicant knew or ought to have known well in hand that such technical points were involved in the matter, and for that reason he ought to have prepared himself long ago before the hearing date. As to the applicant's prayer, that the status quo be maintained at the plant, Mr. Lobulu sharply opposed that prayer, stating that an order granting that prayer will be tantamount to granting that the whole of this application and the main suit before both of them are argued and fully heard. Moreover, it is illogical and unreasonable for the applicant to apply simultaneously for an adjournment of the hearing of the application and for a temporary injunction.

Mr. Lobulu cautioned and referred this Court to para 20 (iv) of their counter affidavit, in which it is averred that the respondents are incurring 6,250 U.S.dollars daily, which is equivalent to 1,881, 250/= for payment of expatriates at the plant. This is the loss the respondents are going to keep on incurring daily as a result of the adjournment of this application. Mr. Lobulu prayed the applicant be ordered to deposit into the court an amount equivalent to the daily loss to be incurred by the respondents at the plant when the application will stand adjourned on account of the applicant's application. Mr. Lobulu cited Order 37 Rule 2 (2) Civil Procedure Code 1966 as empowering the Court to make an order requiring the applicant to make deposit for loss on the respondents due to adjournment of the application he also cited *Snel's principles of Equity, 24th Edition by Megarry and Baker* at P. 591 and *Transgem Trust V. Tanzania Zoisite Corp. LTD* 1968 HCD No. 501.

On the applicant's counsel's application for an extra, copy of the counter affidavit, Mr. Lobulu submitted that so long as there is only one applicant cited in this application the single copy of the counter affidavit which the respondents have filed and served on the applicant is sufficient. If the applicant wants an extra copy of the counter affidavit that is only for his convince and he is bound to pay for it.

Mr. Lobulu lastly prayed that he be granted permission by the Court to argue the preliminary point of objection contained in the counter affidavit to the effect that there is no main suit

properly filed before this Court to sustain this application.

In reply Mr. Shayo reiterated his reasons for adjournment of the application. He stressed that the applicant wishes to file a reply to the counter affidavit and he can do so only if the hearing of the application is adjourned. As to the costs incurred by three principal officers of the defendants in their travel from Dar es Salaam to the Court to attend the hearing of this application Mr. Shayo submitted that that was not necessary because the said office were not summoned to perform any function connected with the hearing and disposal of the application.

Mr. Shayo reiterated his prayer for a temporary injunction to maintain the status quo at the plant. He urged that that the temporary injunction is necessary to restrain the respondent from commissioning their plant, which act if done will defeat the purpose both of this application and the main suit.

With regard to the respondents' prayer that the applicant should deposit with the court an amount equal to the amount the respondents will lose daily as expenditure at the plant in case the hearing of the application was adjourned. Mr. Shayo vehemently objected to that prayer that if the same were granted, it would punish the plaintiffs in the main suit who are poor peasants only. Moreover, Mr. Shayo argued, an order for a deposit to be made into the court by the applicant will be improper and unjust at this stage where the applicant is entitled to apply for leave to file a reply to the counter affidavit. The applicant on behalf of the rest of the plaintiffs in the main suit is seeking for leave of this court to file a reply to the counter affidavit filed by the respondents.

On the question that the applicant is not entitled to two sets of counter affidavits, and in particular the documents annexed thereto, Mr. Shayo urged that, since the applicant is represented by two advocates, each of whom hails from a different firm of Advocates, then each of those advocates is entitled to be served with a separate copy of the counter affidavit. Moreover the applicant represents 627 plaintiffs who are also applicants in this application; this situation alone entitles the applicant to be served with extra copies of the counter affidavit.

I have carefully considered the submissions of Counsel for both parties on the sole question that this Court is called upon to resolve at this stage, that is, whether or not the applicant's application for adjournment of the hearing of the application should be granted.

Before advertising to and resolving this question, I feel I have a legal duty to say a few words on the procedure that were adopted by the Acting District Registrar in calling the record on 24/6/1992 in the absence of the parties, and with any application from anyone of them and fixing another hearing date on 2/7/1992 instead of 24/7/1992 which had been initially fixed. Although an order was made that the parties be notified, yet the record shows that no notice we ever issued and served in that direction. In humble view the Court had intended to change the date of hearing suo mot from 24/7/1992 to 2/7/-1992 it should have first issued note to the parties to appear before it in order to fix the application for hearing on 2/7/1992.

Then there is the error that transpired on 2/7/1992 when the application had been fixed for hearing obviously for hearing before a judge. Instead the application went for hearing before the Acting District Registrar. The applicant was absent and there was no proof he was served. On the other hand the respondents appeared by an advocate Mr. Maro from TLC. It is not clear from the record as earlier pointed out how TLC got the information that the hearing date had been changed from 24/7/1992 to 2/7/1992. All the same the acting District Registrar had an application from Mr. Maro in which he applied for leave and time to file a counter affidavit. The Acting District Registrar heard the application and finally granted it. He made an order the counter affidavit be

filed on 22/7/1992 and hearing of the application on 24/7/1992 and that the applicants be notified.

I have asked myself the following questions:

- (1) was it in order for Mr. Maro to make an application to file a counter affidavit in the absence of the applicant and his advocates?
- (2) Was, the Acting District Registrar empowered under the law to entertain the application, and in particular in the absence of the other party? The questions may at first glance appear to be simple and trivial. However, I am of the humble but considered view that these questions are vital, since they concern judicial acts which the Acting District Registrar performed. And any judicial act can be valid only when the same is done under an enabling section of the law which confers jurisdiction on the judicial officer to perform the act in question.

In resolving these questions which counsel for the parties did not advert to during the hearing of this application preliminary points, I have had recourse to Order XLIII Rules I and 2 which deal with the powers of Registrars and applications respectively. I have not been able to read anything in these rules which empowers an Acting District Registrar or the District Registrar to hear and determine an application of the nature of which Mr. Maro made orally from the bar on 2/7/1992 when the application had been fixed for hearing before a judge.

In my humble but considered view, it was improper for the Acting District Registrar to have entertained Mr. Maro's application which application ought to have been entertained by judge in chambers had been so fixed. Moreover assuming the Acting District Registrar was empowered by law to entertain the said application it was still not proposed for him to have entertained that application in the absence of the other party who had not at all been served.

Now what resultant effect of these errors? Are they curable? The test whether an error in a case is curable or not is whether the said error had occasioned a failure of justice or not. I am of the considered view that these errors did not occasion failure of Justice on the applicant because the applicant who is ably represented by counsel has not complained about these errors. More so the applicant's counsel acted on the order of 2/7/1992 that resulted from those *ex parte* proceedings. So, in the circumstances, I find that the said errors are curable. This means the respondents' counter affidavit is properly before this Court and it is sustained. However, this is far from saying that the procedure which the Acting District Registrar adopted on 2/7/1992 is proper and that the same should take root in this registrar far from it.

Having made my observations and directions on what I consider to be material errors that were perpetrated in this application, I now consider and determine the crucial question of adjournment of this application for hearing on another date for reasons which Mr. Shayo has advanced in his submission.

Indeed, I quite agree with for Shayo, learned counsel for the applicants that the counter affidavit filed in this application by the respondents is quite involved and is full of technical issues which call for concentration and consultation both on the legal aspect and on technical expertise. The counter affidavit contains 41 paragraphs with several documents annexed thereto. As already stated the applicant's counsel did not know that the respondents had filed a counter affidavit in opposition to the chamber application. The applicant's counsel was not notified and was not in court on 2/7/1992 when Mr. Maro applied to file the counter affidavit. Moreover quite extraordinarily the order directed Mr. Maro to file the counter affidavit just a day before the date of hearing. The Acting District Registrar must have acted in oblivion of the law that the counter

affidavit had to be served on the applicant with in sufficient time to enable him to read and understand it and prepare himself to answer the issues raised therein. It is admitted that the said counter affidavit was served on the applicant's counsel on 23/7/1992, less than a day before the date of hearing on 24/7/1992.

It is clear under the circumstances that the said counter affidavit was not served within sufficient time which is required under the law to enable the applicant to prepare himself to answer that counter affidavit. Under court practice where no objection is raised any pleadings and other documents in a suit should be served on the other party not less than seven clear days from the date of hearing.

So, I uphold Mr. Shayo's submission that the counter affidavit was not served to him and his co-advocate within reasonable anticipated sufficient time to enable them to prepare themselves to make a reply either orally or in writing on that counter affidavit on 24/7/1992. That time was absurdly too short for the anticipated reply.

Moreover, I also agree with Mr. Shayo that the applicant is entitled to apply to file a reply to the counter affidavit. The court will invariably grant an application to file a reply to a counter affidavit provided that the application is made to the court without unreasonable delay and before the date of hearing. In this application the applicant was served with the counter affidavit within so short a time that he had no opportunity to file a reply before the date of hearing. So the applicant can not be held to have delayed to make his application to file a reply to the counter affidavit.

These two findings entitle the applicant to be accorded an adjournment firstly to study the counter affidavit and secondly prepare and file a reply thereto.

As to the question of status quo being maintained at the plant, it is clear from the proceedings that were conducted on 2/7/1992 before the Acting District Registrar that Mr. Maro on behalf of the respondents promised that the respondent/ defendants will not commission their plant until this application is disposed of. That undertaking still sustains. The court makes an order in terms with that undertaking that the respondents will not commission their plant before this application is heard and determined. However Mr. Shayo submitted to this court that the respondents bay go on with construction of the plant if they so wish and in case the order for permanent injunction is ultimately lately given. This phenomenon has been prevailing before and after the inception of this matter in court. So the respondents are still at liberty to continue with construction of the plant at their own risk as Mr. Shayo put it.

With regard to the prayer for extra copies of the counter affidavit made by Mr. Shayo, I am of the considered view that in the circumstances of this application whereby only one person represents the other applicants, the respondents are not legally bound to supply an extra copy of the counter affidavit to the applicants counsel. The applicants counsel are at liberty to make Photostat copies from the copy of the counter affidavit which has been served to them so that each one of them gets a copy for their convenience. So I dismiss this prayer or application as unwarranted.

With regard to Mr. Lobulu's prayer for cost of the adjournment of this application which adjournment has been applied for by the applicant's counsel. I find that the applicant is not at fault in applying for the adjournment. It is the court which is to blame for having affected service of the counter affidavit on the applicant's counsel at short notice and for having filed the application for hearing in the absence of the applicant without first ascertaining whether or not he intended to file a reply to counter affidavit in which case each party will bear the costs of today's

adjournment. Consequently Mr. Lobulu's application that the applicant be ordered to deposit an amount equal to the daily loss suffered by the respondents at the plant is not granted.

Then there is the application which Mr. Lobulu made that he should be permitted to argue a preliminary point that there is no substantive suit properly filed before this court to sustain this application. I have seriously considered this application. I have considered that this application, which is seeking for a temporary injunction against the respondents is very keen to the relief sought in the main suit i.e. Civ. Case.No.39/92 which the applicants have filed against the respondents. The relief in that suit is an order for permanent injunction. It is my considered view that if I permit Mr. Lobulu to argue his preliminary point and also hear a reply from the applicants, I will inevitably make a decision which will prejudice and preempt the decision in the main suit. For this specific reason I find in the interest of justice, that I should refrain from hearing Mr. Lobulu's preliminary point of objection.

Lastly, I feel obliged to make an observation and a suggestion just in passing, about how I personally look at this application. I find this application oblique and irregular in the sense that it has been filed under order I rule 8(1) of the C.P.C. 1966. A single person, one Christopher Aikawo Shayo, has filed the application in a representative capacity on behalf of 627 other plaintiffs. I am aware that this same applicant has filed Misc. Civ Application No. 127/92 for leave of this court to permit him to sue or to file a suit in this court on behalf of the other 627 plaintiffs. The said application was filed later that is, after this application had been filed. This application is Misc. Civ. Application No.126/92. The application for leave has been heard but has not yet been granted. In my considered view this application would have been filed only after the application for leave had been filed, heard and granted so that the applicant herein named would then have the *Locus Standi* in this application for a temporary injunction. Although I have not heard my submissions on this point from counsel for the parties yet I tend to think that at the moment that is before the permission. Civ. Application No. 127/92 to represent the other 627 plaintiffs/applicants the applicant in this application has no *Locus Standi*. The legal point tends to militate against this application. Although I have granted the applicants' application for adjournment of the hearing of this application on another date and to file a reply to the counter affidavit yet in the ends of justice, I am duty bound to suggest to the applicants' counsel to withdraw this application and re-file it later when, if at all, the application for leave to represent the other 627 plaintiffs is granted. The position would have been different if this application had been filed after the application for leave was granted. The way I view this application is that it presupposes that Misc. Civ. Application No. 127/92 will be granted as a matter of course.

Having made this observation and suggestion, I grant the application for adjournment of the hearing to another date to be fixed by that District Registrar should the applicant be adamant that this application go to hearing as filed, I hereby give him ten (10) days within which to file his reply to the counter affidavit. This means he should file the reply to the counter affidavit on or before 6th August 1992 on which date the application shall be mentioned before the District Registrar who shall fix a date for hearing.

It is ordered accordingly.

M.D. NCHALLA,
JUDGE.

Court: Ruling delivered in open court at Arusha in the presence of counsel for both parties, this 27th day of July, 1992. Right of appeal explained.

THE REPUBLIC OF TANZANIA

IN THE HIGH COURT OF TANZANIA AT DAR ES SALAAM
CIVIL CASE NO. 29 OF 1998.

JOSEPH D. KESSY AND OTHERS PLAINTIFF
VERSUS
THE CITY COUNCIL OF DAR ES SALAAM.....DEFENDANTS

BEFORE: **THE HON. JUDGE MR. LUGAKINGIRA**

*Waste – garbage disposal – nuisance- final injunction granted – successive stays of execution.
Public authorities – duties thereof – statutory authority of City Council to ensure health of its citizens – limits of discretionary authority – statutory offences – whether impliedly authorised by stay of execution – whether stay of execution was intra vires.
Right to life – Article 14 of the Tanzanian Constitution – court cannot by stay of execution sanction breach.*

The city council of Dar es Salaam applied for extension of time on a stay of execution against judgement obtained by the plaintiffs. The plaintiffs’ original proceedings against the Council concerned a garbage dumpsite in Tabata which was combed by traders for food stuffs which were later sold for human consumption. The High Court of Tanzania in a previous judgement had issued *ex parte* injunction requiring the Council to cease dumping and burning garbage in that area and ordered Council to construct a site at an alternative site. In response Council sought a review of the decisions and applied to have the execution of order stayed. Court granted Council’s request on grounds that an alternative site would be available in 2 years and 3 smaller one in one year. Council sought extension of time a number of times which included the current application to establish an alternative garbage dump near the originally proposed site at Tabata.

HELD:

1. The grant of a stay of execution against the injunction should be quashed because it nullifies the very purpose of the injunction and effectively vacates the original judgement.
2. A public authority has no grounds to seek a remedy from a court to pollute the environment or to endanger people’s lives regardless of the presumed greater good.
3. The Constitution provides for a right to life and to the protection of that life by society. The extension granted by court enabled the dangerous threat to the lives and environment of the residents to continue and was therefore in violation of the Constitution.
4. In exercising their discretionary authority, statutory bodies are not permitted to create a nuisance. The Council’s actions at Tabata constitute a tort and cannot be supported by a court remedy, even one of a procedural character such as stay of execution.
5. The Penal Code makes it an indictable offence for a person to voluntarily pollute the environment. The effect of court’s granting successive stays of execution was implicitly to support the contravention of the criminal law by the Council.
6. An inherent duty of the court is to protect the individual from the excesses of the executive arm of government. On the merits, the application and grant of extension sought is illegal, injudicious and oppressive.

Application dismissed.

JOSEPH D. KESSY AND OTHERS

VERSUS

**THE CITY COUNCIL OF DAR ES SALAAM
HIGH COURT CIVIL CASE NO. 299 OF 1998.**

RULING.

BEFORE : LUGAKINGIRA, J.

This was an application for extension of time on a stay of execution in a local battle that has pitched the City Council of Dar-es-Salaam and the residents of Tabata, a city suburb, since 1988. On 1st September, 1989, the residents of Tabata obtained a judgment from this court in which the City Council was ordered inter alia, to cease using the Tabata area for dumping garbage collected in the city and to construct a dumping ground at site or place where the dumping activity would not pose a danger to life. This judgment was granted ex-parte, the City Council having become dilatory in filing a defense. On the following day the Council, through its solicitor, filed an application for review of the judgment and another application for staying execution of the judgment.

On 7th September the city solicitor followed up these applications by filing a notice of appeal to what was termed "THE COURT OF APPEAL OF TANZANIA".

The applications came up for hearing on 26th September and on that day the application for review and the notice of appeal (which were irreconcilable, any way), were withdrawn. The city solicitor who was then Mr. Joseph Mbuna, was then heard on the application for stay of execution. He informed the court that the council had ear-marked a dumping site at Mbagala since 1984 and that it would be a minimum of two years to move to that site. He further informed the court that in the interim, the council had already commenced establishing three mini-dumps in the three districts of the city and that the exercise would take a minimum of one year. He therefore prayed for execution of judgment to be stayed for one year. The application was hotly contested by Mr. Maira who appeared for the Tabata residents, but in the end it was granted, precisely in appreciation of the promising representations by Mr. Mbuna. The extension was to expire on 31st August 1990. On 28th August, 1990 three days before the extension was to expire,

Mr. Mbuna filed an application for a further extension of one year. This time he told the court that a dumping site had been obtained at Kunduchi Mtongani. He made no further mention of the Mbagala site be it in his affidavit or in his submissions in court apart from the general statement that three dumping sites had been identified but had been found unsuitable after technical evaluation. He went on to say that specialized equipment was needed to prepare the Kunduchi Mtongani site and that this had been ordered from Japan. He produced a proforma invoice to that effect and asserted that the equipment had already been paid for.

He said that it would take six months for the equipment to arrive at Dar-es- Salaam and another six months for the same to be cleared, installed and tested hence the prayer for a one-year extension. This application was similarly resisted by Mr. Maira who also observed that, "There is no law, which supports the application" He did not elaborate.

The court reluctantly granted the extension, to expire on 31st August,1991. On 30th August, 1991 just a day before the extension was to expire the city solicitor now Mr. George Kakoti, filed the present application, this time praying for an extension of three months. At the hearing of the

application three days ago he unilaterally reduced the period of two months. He also had a new story. The development of the Kunduchi Mtongani site had fallen out due to lack of funding by the Central Government and the council's was to disposal experts had fallen back on Mbagala.

On 28th August the council's officials sought to take over a sight at Mbagala Kizuiani but neighboring residents and excavators vehemently obstructed them. At a meeting held the following day with representatives of the residents, it was agreed that the dumping site be shifted to Mbagala Kilungule. Mr. Kakoti said it would require construction of a 1.3 km road to reach the agreed site. He also said that the council had already entered into an agreement with a contractor to do the job. In the premises he prayed for two months extension from 1st September.

Mr. Kaira was again at head to resist the application. Apart from his general observations on merit, he submitted that the application was incompetent and ought to be dismissed on two grounds. First he observed that it was brought under O.95 of the Civil Procedure Code while there were specific provisions for this type of application and he named these as O.21, r.24 and O.39, r.5 of the Code. Secondly he submitted that having regard to the circumstances of this case it was not open for the court to say the operation of the injunction. He argued that the court was in judgment and had no power to vacate it except a higher court of appeal.

Turning to the merits of the application, Mr. Maira observed that these have been inconsistent representations on behalf of the council since 1989, such that it was risky to believe the latest story. He added citing Robert Gwyrafi D.C. (1899) ch.608 that his clients had established that the council was violating that right and submitted that the court was bound to protect his clients against violation, and he thought that the council was being lackadaisical in its efforts to construct the access road for there were several public and private firms which were taking sand from the vicinity of the proposed site and which could be mobilized to work on the road. In so far as I could gather, Mr. Kakoti in reply, touched on the appropriate provisions applicable in these applications but he did volunteer any opinion on jurisdiction of the court to say in injunction. Generally he said that the City Council had a statutory authority to ensure the health of all the residents of Dar-es-salaam and argued that in the exercise of this authority the interests of specific groups had to be subordinated, put limited groups by dumping garbage in there midst rather than leave it to rot all over the city. I took time to consider these arguments some of which are significant in their novelty. I think it is logical to begin with the basic issues raised by Mr. Maira.

Mr. Maira's first argument was that the application was wrongly brought under S.95 of the Civil Procedure code and should have been brought under O.1, rule 24 and O.39, r.5 thereof, indeed in his main submissions and in reply to Mr. Maira, Mr. Kakoti suggested that the application was brought under S.95 and sought to justify that position. I find this slightly perplexing. I say as because the chamber summons drawn and filed by Mr. Kakoti states that the application was being made under S.63 (e), 93, and 95 of the civil procedure code: but judging by his unequivocal submission on the subject. It is more than apparent that he abandoned S.68 (e) and 93.

Is it true that stay of execution and extension of stay are not specifically provided for?, I do not think so. Mr. Maira was certainly incorrect whom he referred to O.21, r.24 and O.39, r.5 simply. The former applies to stay of execution by a court to which a decree has been sent as opposed to the court passing the decree while with the later provisions a distinction has to be made between 5(1) and 5(2). The former applies to stay of execution by an appellate court while the latter is the proper provision of the court which passed the decree. On the other hand, extension of time is indeed provided for under S.93 of the code. The position in law is that inherent jurisdiction under S.93 of the code the position in law is that inherent jurisdiction under S.95 is exercisable subject to the rule that if the code does contain specific provisions which would meet the necessities of

the case in question, such provisions should be followed and the inherent jurisdiction should not be invoked. A court cannot make use of the special provisions of S.95 where the applicant has his remedy provided elsewhere in the code and has neglected to avail himself of it. *Joom V. Bhambia* (1967) EA.326 in that case which ironically was cited to me by Mr. Kakoti this court set aside an order for extension of stay of execution which was made of our S.95. It follows in my view that application before me must similarly fail as it was brought under S.95 while specific provisions governed the matter.

Mr. Maira's other point was that the court had no jurisdiction to stay the injunction. I think with respect that there is merit even in this point and I propose to approach it more broadly. First of the entire injunction in the instant case constituted the judgment and decree. The execution of an injunction such as this is the operation of the injunction itself, therefore to suspend the operation of such an injunction is in effect to raise it. Execution of some injunctions is this different from say, execution of a monetary judgment where the decree holder may seek satisfaction by attachment and sale of some property belonging to the judgment where the decree holder may seek satisfaction by attachment and sale of such property belonging to the judgment debtor.

In the latter case the attachment may be stayed without doing harm to the judgment for payment. It is not so with some injunctions where to stay execution would practically mean to vacate the judgment. I think therefore that there is need for prudence when a court embarks on staying and injunction lest as in the instant case, it should result in licensing the very evils that the judgment is supposed to cure. Secondly, it is noted that in the instant case the court finally disposed of the suit and was no longer seized of any matter therein as of 1 September, 1989, the ruling and the decree based thereon do not leave anything for future settlement but are immediately effective, in other words, the injunction was immediately operative the moment a decree was drawn and signed. In my view the court was from that moment *functus officio* and it was no longer in its power to turn back and suspend the injunction three weeks after the event. An appellate court could only exercise such power. This matter is dealt with in *MULLA* (14th Edn.) where it is said on page 771:

...it is only when the proceeding is still pending and not finally disposed of, that the court has jurisdiction to grant extension of time... so where a final decree terminating the action has been passed the court has no power to extend the period fixed therein. In illustration of this point it is stated that when a decree has been passed directing a tenant to pay arrears of rent, the court passing the decree has thereafter no power to grant extension of time for payment, because the court has become *functus officio* and is no longer seized of the matter. And so it should be on the facts of this case. Once the court drew the decree on September 1st 1989 that was the end of the road. I have therefore to agree with Mr. Maira that even this application is incompetent and I do not find myself privileged to follow the previous examples.

If I am held wrong in therefore going, I still don't see the chances of the application even on merits. I will point out at this juncture that the basis of the suit was not the mere act of dumping garbage at Tabata rather; it was the methodology employed in that activity which methodology was potentially hazardous. Para 4 of the plaint stated and I quote.

“That the continued use of the Tabata area poses real danger to the lives of the plaintiffs and other users of the port access road due to pollution of the air. Heavy smoke blocks the motorists using the road and causes motor accidents. Unscrupulous traders scoop the area and recover grain and other stuff, which is unfit for human consumption.”

What happens as stated in para.3 of the plaint, are those council agents upon tipping the garbage

proceed to set it on fire. Heavy smoke rises there from and drifts across Mandela express way before engulfing the Tabata residential suburb. As sighted at the beginning there was no defense to the suit hence no part of the plaint was controverted. But more specifically the city solicitors have consistently acknowledged before this court as Mr. Kakoti did at the hearing of this application that garbage dumping at Tabata was in deed a health hazard to the neighborhood. The pollution and the dangers posed by the activity are therefore acknowledged. In Mr. Katoti's argument it is a lesser evil to pollute and endanger lives at Tabata than to do so for the whole city hence the supposed rational of the application.

But Mr. Kakoti's argument also seems to proceed on the promise that the council has statutory authority to take all measures as would in duce to public health. In effect he seems to say that an injunction should therefore not issue to restrain the council in the exercise of its statutory authority. The argument is certainly attractive but it is not available as the council did not defend the suit and the injunction is already granted. But if it is necessary to respond to the point where I would observe that Mr. Kakoti did not seek to say and I am aware that the council has no latitude in the exercise of its statutory authority. There is authority for the proposition that where a latitude, a discretion is left to the person clothed with authority that person must not, in exercising it, create a nuisance. In *Metropolitan Asylum District vs. Hill* (1881) 6 app. Cas. 1983, a local authority was given power to erect smallpox hospital the power being facultative and in no way compulsory. The local authority in exercising it created a hospital in a place where the infection constituted a source of danger to their neighborhood. They were restrained by injunction from continuing to use it so as any longer to a source of danger to their neighborhood. They were restrained by injunction from the fact that an injunction will issue to restrain a local authority.

These is another dimension to these propositions, the criminal dimension. What the council has been doing at Tabata does not only constitute a tort but is also criminal. Section 185 of the penal code makes it an offence punishable with imprisonment for any person voluntarily to vitiate the atmosphere in any place so as to make it noxious to the health of person in general dwelling or carrying on ...in the neighborhood or passing along a public way under 239 of the Code could similarly be cited this context. In coming to court seeking to the permitted to continue using the Tabata site the way it has poor doing the council is virtually asking for a license to contravene the law.

I am not aware of any authority and non-was cited on me which authorizes a court of law to sanction criminal activity hold on the contrary that a court can not authorize an offence. In bringing this application it was claimed that the Council was seeking justice. Justice in this case in wholly on the side of Tabata residents and the council in effect came to court to enlist the court assistance in perpetuating an injustice. Ironically the duty of the court is to protect the individual from the excess of executive power and in this duty it should not be seen to fail. In the Roberts case cited earlier this is to say with which I agree:

How's the court to deal with a man who says, "I admit I have no right to do this but I intend to go on doing it all the same"? If he is infringing the plaintiffs it is the duty of the court to protect the plaintiff. I know of no duty of the court, which it is more important to observe than its power of...bodies within their rights. The moment Dobies exceed their rights they do so to the injury and apprehension of private individuals and these persons are entitled to be protected from excesses from such operations of pubic bodies.

In sum, I am led to the inevitable conclusion that even from the point of view of merits it would be injudicious, illegal and oppressive to yield to this application and grant the extension prayed for. It certainly should be worrying to the city further and probably puzzling to others as to what

happens to the city garbage in the light of these pronouncements. I am personally fortunate in being spared of any tribulation. I think we respect that if the council with all the willing contractors at Mbagala can not make up a track of 1.3 km roughly 1300 paces in a day or two, people will have reason to check whether there is a city council; worth the name for all I have endeavored to state I dismiss the application with costs.

K.S.K. LUGAKINGIRA
JUDGE.

DAR ES SALAAM.
9TH SEPTEMBER 1991.

**THE REPUBLIC OF TANZANIA
IN THE HIGH COURT OF TANZANIA AT DAR -ES-SALAAM**

MISC. CIVIL CAUSE NO. 90 OF 1991

**FESTO BALEGELE & 794 OTHERS APPLICANTS
VERSUS
DSM CITY COUNCIL.....RESPONDENTS**

BEFORE: THE HON. JUDGE MR. YAHYA RUBAMA

*Civil Procedure: Whether the applicants had legal standing to bring the matter before court.
 What constitutes standing?*

The Application was brought against the Dar es Salaam City Council seeking the following orders:

1. An order of Certiorari to quash the decision of the Respondents to dump the City's waste and refuse at Kunduchi Mtongani a residential area in Dar es salaam where the applicants reside.
2. An Order to prohibit the Respondent from continuing to use Kunduchi Mtongani as a refuse dumping site.
3. An Order of Mandamus to direct the respondent to discharge its functions according to law by establishing an appropriate refuse dumping site and using it.

The applicants complained that the respondents' actions were causing a nuisance. The respondents argued that the refuse collection and its disposal was one of the respondent's mandatory duties under the Local Government (Urban Authorities) Act.

They also raised a preliminary objection on grounds that the application before court was misconceived and therefore qualified to be dismissed.

HELD:

1. The disposal of refuse and waste at the area in question is *ultra vires* the Local Government (Urban Authorities) Act.
2. The court prohibits the respondent from continuing to carry out its decision of using Kunduchi Mtongani as a refuse dumping site.
3. The court issues an order for mandamus and directs respondent to discharge its functions in accordance with the law by establishing an appropriate refuse dumping site and using it.

Application upheld

**IN THE HIGH COURT OF TANZANIA AT DAR ES SALAAM
MISC. CIVIL CAUSE NO. 90 OF 1991**

**FESTO BALEGELE AND 794 OTHERS===== APPLICANTS
VERSUS.**

DSM CITY COUNCIL ===== RESPONDENT

RULING

RUBAMA, S:

The application by FESTO BALEGELE and 794 others against the Dar es Salaam City Council made under s,2(2) of the Judicature and Application of Laws Ordinance, Cap. 453; the Law Reform (Fatal Accidents and Miscellaneous Provisions) Ordinance, Cap. 560 as amended by the Law Reform (Fatal Accidents and Miscellaneous Provisions) Ordinance (Amendment) Act, 1968 and s. 95 of the Civil Procedure Code, 1966 is for the following orders: '

1. an Order of certiorari to remove to the High Court' and quash the decision of the Respondent to dump the City's waste and refuse at Kunduchi Mtongani;
2. an Order of Prohibition to prohibit the Respondent from continuing to carry out its decision to use Kunduchi - Mtongani as a refuse dumping site.
3. an Order of Mandamus to direct the Respondent to discharge its function properly and according to law by establishing an appropriate refuse dumping site and using it and
4. an Order that the costs of this Application be met by the Respondent.

The application is supported by a thirty three (33) paragraphed affidavit sworn by the said FESTO BALEGELE and opposed by a twenty four (24) paragraphed counter affidavit sworn by ALOYSIUS MUJULIZI SSEFUNKUUMA, a solicitor in the employment of the respondent. In the counter affidavit, the respondent also gave notice that at the hearing of the application by Festo Balegele and 794 others, the respondent was going to raise a preliminary objection on points of law. Paragraph 2 of the counter affidavit detailed the nature of the preliminary objection on points of law to be raised.

This was duly raised on the hearing date. Both Mr. Kakoti and Mr. Mujulizi argued the respondent's case on the raised preliminary objection. Mr. Maikusa replied for the applicants'. Briefly the raised preliminary objection was to the effect that the application before the court was misconceived and thus qualified to be dismissed. I reserved ruling; when I came to give it, it was to the effect that the raised preliminary objection was without merit. I dismissed and undertook to give my reasons for that decision "in the final Order of the Court:'.

In the matter of an Application for Orders of Certiorari. Prohibition and Mandamus by *Abdi Athumani and 9 others Vs. The District Commissioner of Tunduru District. The District Executive Director of Tunduru district. The District Commissioner of Songea District and the District Executive Director of Songea District*, consolidated Miscellaneous Civil Causes No. 2 and 3 of 1987 (Mtwara Registry) unreported), this, Court (Rubama. J.) had addressed itself on the issue that had been raised by the respondent as a preliminary point in the matter now before the

court. I still hold that finding valid and follow it in this application.

In the case of *Abdi Athumani and 9 Others* (supra), the applicants had sought and obtained Orders of Certiorari Prohibition and Mandamus. Some of them had been refused trading licences by the appropriate licencing authorities not in accordance with the Business Licencing Act No. 25 of 1972. Eight of the applicants had been served with Removal Order under the Township (Removal of Undesirable Persons) Ordinance. It stated:

....." In entertaining these applications by the ten applicants, the Court has usurped no powers.

This court has had powers to entertain such applications for ages: see *Northern Tanzania Farmers' Cooperative Society Vs. Shellukindo* 1978 LET n. 36. This court, a creature of statute in entertaining such applications performs for the benefit of the people. As was stated by Brett. L. J. in R. v. Local Government Board (1982) 10 QBD 309 at 321 that:

“wherever the legislature entrusts to any body of persons other than its superior courts. the power of imposing an obligation upon individuals, the courts ought to exercise as widely as they can the power of controlling those bodies.”

It is one of High Court's duties to exercise supervisory powers on bodies other than a superior court that are entrusted by Parliament to take decisions that affect the rights of the people to ensure that these bodies perform within the limits set to them by the Parliament. This ensures consistent application of the country's entrenched principles of freedom and justice by the Government agencies.

The Parliament's decision ensures avoidance of this Republic's duties being executed on people's whims where people are reduced to numbers without any personal regard to hear ship [sic] of the very people said by the official to be serving. These supervisory powers ensure existence of tangible values like justice, truth, consistency within which are embedded elements such as compassion and dedication. The grant by the Parliament of these supervisory powers ensures that expediency or “might is right” forces that are always inconsistent and without permanency are eliminated. In entertaining such applications, the High Court does not set itself to embarrass or belittle the Government or its Agencies in order for itself to look more important in the eyes of the people. As stated the supervisory powers have been granted to the High Court by the Government and common sense dictates that Government would not have put itself in such untenable position.”

The following facts are not in dispute:

- I. that Kunduchi Mtongani is within the area of jurisdiction of the Dar es Salaam City Council;
- II. that Kunduchi - Mtongani is zoned in the respondent's Master Plan as a residential area;
- III. that the applicants reside at Kunduchi Mtongani;
- IV. that the respondent has been dumping the City's collected refuse and waste at Kunduchi Mtongani and instead of at one of the five sites designated in the City's Master Plan for dumping the collected City's refuse and waste effective September, 1991 soon following this Counsel's order in Civil Case-299/88 (Dar es Salaam Registry) in which the respondent was ordered not to dump refuse at Tabata;
- V. that the dumped refuse and waste at Kunduchi Mtongani is presently burning emanating

much smoke covering a wide area;

- VI. That the dumped refuse and waste emanates offensive smell and has attracted swarms of flies.

Mr. Mwaikusa correctly submitted that refuse collection and its disposal was one of the respondent's mandatory duties under the Local Government (Urban Authorities) Act, 1982. He further correctly submitted that the respondent was required by law to perform its statutory duties lawfully. Mr. Mwaikusa submitted however that the respondent in disposing of the collected city's refuse and waste at Kunduchi Mtongani was thereby executing its statutory duty unlawfully. Elaborating on this submission, Mr. Mwaikusa quoted to the court several authorities all of which are of persuasive effect.

He submitted that the action of dumping the City's collected refuse and waste at Kunduchi Mtongani was ultra vires the Act as the Dar es Salaam City Council, the respondent:

- i. had not taken into consideration the relevance in coming to its decision: *Associated Provincial Picture Houses Limited v. Wednesbury Cooperation* (1948) IKB 223. Mr. Mwaikusa argued that the relevant factors that the respondent should have considered in selecting Kunduchi Mtongani as the City's collected refuse and waste dumping area were the general land development plan of the area; that Kunduchi Mtongani was zoned a residential area: that Kunduchi Mtongani was not within one of five sites zoned for garbage disposal;
- ii. choice of the area was without plausible justification. Mr. Mwaikusa pointed out that it was one of the duties of the respondents to enforce as provided by ss.35 and 36 of the Town and Country Planning Ordinance, Cap. 378 land development plan. The counsel submitted that the respondent was dumping refuse at an area marked residential and where in fact people are residing thereby posing a health hazard and nuisance to the residents. By this decision, the counsel went on to submit, the place which is at any rate too small for the requirements of the respondent has been an attraction of swarms of flies and is offensively smelly thereby making life of the residents extremely unbearable. To compound this state, the refuse has been put on fire emanating smoke. Mr. Mwaikusa concluded that Kunduchi Mtongani as a refuse dumping site was too small for the purpose and the methods of the disposal of the refuse primitive [sic].
- iii. the place has been turned into a health hazard and a nuisance to its residents. The decision of the respondent, Mr. Mwaikusa went on to submit. Looked at objectively, was devoid of any plausible justification that could have made any reasonable body of persons reach it: *Bromley London Borough Council Vs. London Council and Another* (1982) I All ER 129, appeared to have reached its decision of the choice of the area through outside dictation.

Mr. Mwaikusa submitted that it appeared the respondent was dictated to by the Central Government on the choice of Kunduchi Mtongani as the City's refuse dumping place. As the enabling Act does not permit the respondent to abdicate its powers in favour or another body. Mr. Mwaikusa argued the act of the respondent was ultra vires the Act. *H. Lavender & Son Ltd. Vs. Minister of Housing and Local Government* (1970) 2 All ER 871.

Mr. Mwaikusa further submitted that the applicants, residents of Kunduchi Mtongani were "aggrieved" and thus with locus standi to apply for the orders of certiorari and prohibition.

Regina Vs. Liverpool Corporation. Exparte Liverpool Taxi Fleet Operators' Association and Another_(1972)2Q.B.299.

Mr. Mwaikusa lastly prayed for an order of Mandamus by requiring of the respondent (i) stoppage of the nuisance it was causing. (ii) compliance with this Court's Order issued in the case of ***Joseph D. Kessy and Others Vs. The City Council of Dar es Salaam*** Civil, Case No. 299 of 1988 (Dar es Salaam Registry) (unreported) (iii) compliance with the land development plan by selecting one of the five sites designated for the City's disposal of collected refuse and waste as shown in the City's Master Plan.

Mr. Kakoti, the respondent's solicitor submitted that the respondent in disposing of refuse at Kunduchi Mtongani is performing a statutory duty lawfully. In land filling the abandoned stone quarries at Kunduchi Mtongani, the respondent are "reconditioning" the land through sanitary land filling. This action was not ultra vires the Act. As for the sought order of Mandamus, by Mr. Kikoti submitted that the applicants had not complied with the conditions precedent for the issue of the Order: ***Lakaru v. Town Director*** (Arusha) (1980 TLR 326 (Maganga, J.)).

On the submission by Mr. Mwaikusa that the respondent appeared to be acting on dictation of the Central Government thereby making its action of dumping garbage at Kunduchi Mtongani ultra vires the Act. Mr. Kakoti submitted that it was the duty of the Treasury of the Republic to provide such funds as were adequate for the provision of public health service. On the order of prohibition, Mr. Mujulizi submitted that it was not the intention of the respondent to dispose of refuse at Kunduchi Mtongani indefinitely. The decision to dispose of refuse at the area was a temporary one while the respondent was looking for an alternative place for the dumping refuse. Mr. Mukulini prayed that the court exercise its discretion in favour of the respondent who would otherwise fail to perform its statutory duty of refuse collection and disposal.

I have dealt with the above issue of court's jurisdiction in entertaining applications for orders of certiorari, Prohibition and mandamus. It is best that I move on to deal with the issue of the locus standi of the applicants as both Mr. Mwaikusa and Mr. Kakoti had touched the subject in their submissions. It is not disputed that the applicants are residents of Kunduchi Mtongani. This taken together with the several facts that I have outlined above as not disputed make the applicants persons "aggrieved by the decision of the respondent. I accept the affidavit of Festo Balegele that the residents Of Kunduchi Mtongani working through its Committee of which the said Festo Balegele was the secretary and through its Member of Parliament had made representations to the respondent, among others, to stop dumping the City's collected refuse and waste at Kunduchi Mtongani but to no avail. Their representations were not taken seriously.

Taking into consideration the submission of Mr. Mwaikusa on this issue. I find that the applicants resort to this court was in order. As what this Court had said in ***Abdi Athumani and others v. The District Commissioner of Tunduru District, The District Executive Director of Tunduru District, The District Commissioner of Songea District and The District Executive Director of Songea District***_(supra) at p. 23 appropriately covers the applicants in the application under consideration, I find it fitting to adopt it here: .

"... applicants in resorting to this Court have done nothing wrong or unconstitutional at all. For the applicants to have come to this Court in search of justice, they have demonstrated their belief in the even handed administration of justice in this Republic. Every citizen has a right when he feels that the Government does not function within the orbit or limits dictated by justice that it-the Government had set on itself to seek redress in courts of law. A move by citizens such as these applicants have taken in search of what they

consider as their rights should not be taken as intended to embarrass the Government or its Agencies. It is in the interest of all people of good will, reason, foresight. Moderation and certainly the Government that one of its institutions clothed with appropriate powers exists to reassure the people that the Republic's admirable objectives and their executions are intact”

On consideration of the affidavit counter affidavits and the very elaborate and able submissions by the three counsel. I am of the view that the respondent's decision of disposing the City's refuse and waste at Kunduchi Mtongani was ultra vires the Local Government (Urban Authorities) Act, 1982 for the reasons submitted by Mr. Mwaikusa which I accept. Further the manner of disposal of the collected refuse and waste terminates any possible claim by Mr. Kakoti that the respondent is in the process of reconditioning the disused stone quarries at Kunduchi Mtongani. By collecting refuse from all over the City to dump it at Kunduchi Mtongani contrary to the City's Master Plan; that Kunduchi Mtongani is by this Master Plan not zoned as one of the five sites for refuse disposal but zoned residential and that there are several people residing there to whom a nuisance has been created. The place has been made intolerably smelly and dirty with flies all over and the deposited refuse burning and emanating smoke. It is a statutory duty of 'the City Council, the respondent; to stop nuisance and not to create it.

The submission by Mr. Kakoti that the respondent was reconditioning the land at Kunduchi Mtongani stands no close examination. What the respondent is doing now is not sanitary land filling as that process is understood but just refuse dumping. The dumped refuse attracts flies and emanates foul smell. The dumped refuse which has been set on fire emanates smoke which could be a source of danger to the residents' health. It is not material in this regard who has set fire to the dumped refuse: it is its after effects that is of concern here, As to Mr. Mujulizi's submission that the respondent intends to use Kunduchi Mtongani dump temporarily to give itself time to look for and locate another site. I only have to state that the respondent has had a long time to sort out this matter.

By the very existence of five sites in its Master Plan for refuse disposal, the question of unpreparedness does not arise. But even if the Master Plan had not provided for the possible sites for refuse dumping. I would still not find merit in the submission of Mr. Mujulizi on the issue of being given time to look for a dumping site. Refuse collection and disposal as one of the statutory duties of the respondent should have been given then priority treatment it deserved. Peoples' health and enjoyment of life are partly dependent on living on healthy surroundings. I would further reject Mr. Mujulizi's submission in this regard for the very reasons stated by Lugakingira. J. in ***Joseph D. Kessy and Others Vs. The City Council*** (supra) at p. 15 to 16 of the hand written ruling:

"I will say at once that I have never heard it anywhere for a public authority, or even an individual. to go to court and confidently seek for permission to pollute the environment and endanger peoples' lives regardless of their number, Such wonders appear to be peculiarly Tanzanian, but I regret to say that it is not given to any court to grant such a prayer. Article. 14 of our Constitution provides that every person has a right to live and to protection of his life by the society. It is therefore a contradiction in terms and a denial of this basic right deliberately to expose anybody's life to danger or what is eminently monstrous to enlist the assistance of the Court in this infringement:'

In view of the findings, this Court brings into court the decision of the respondent of dumping refuse at Kunduchi Mtongani and quashes it. This court further prohibits the Dar es Salaam City Council from continuing to carry out its decision of using Kunduchi Mtongani as a refuse

dumping site. This court lastly issues an order of mandamus and directs the Dar es Salaam City Council to discharge its function properly and in accordance with the law by establishing an appropriate refuse dumping site and using it.

The respondent is to bear the costs of this application. Lastly I wish to highlight two points that this Court is not here concerned with the wisdom or, indeed, the fairness of the respondent's decision of selecting Kunduchi Mtongani as the City's dumping place of the collected refuse and waste. All I am concerned with is the legality of that decision; was it within the powers that the Republic's Parliament has, conferred by legislation to the Dar es Salaam City Council? Secondly,

I wish to emphatically state that I have not come to the above decision lightly. I bear in mind that only on 9th September 1991, the respondent was ordered by this Court to stop disposal of the City's refuse at Tabata Dump. I take judicial notice of the disorientation that order had caused to the respondent. but I can do nothing. in this regard than to express understanding of the feeling and then to apply the law. I can do no better than adopt the poetic and extremely illustrative language of MAKAME, J. (as he then was) in the case of *Republic v. Aines Doris Liundi* (1980) TLR 38, 44, to express my view of how my hands are tied:

"... This necessary finding causes. me personal anguish. but my powers and my interpretation role are circumscribed by the law. I have to take-the law as it is, not as I might personally wish it to be. I have my legal training and professional ethics to be true to my oath of office to be faithful to. and at the end of the day my conscience to live with. As William Shakespeare puts it.

"So does conscience make cowards of us all."

YAHYA RUBAMA
JUDGE
3/1191

Coram. RUBAMA. J.

Mr. Maikusa assisted by Mr. Naasoro (or the applicants, Mr. Kaketi assisted by MT Mujulizi (or the respondents.

Ruling delivered.

YAHYA RUBAMA
JUDGE
3.1.91

SIERRA CLUB ===== PETITIONER.

VERSUS

ROGERS C.B. MORTON, INDIVIDUALLY, AND AS SECRETARY

OF THE INTERIOR OF THE UNITED STATES, ET AL=====RESPONDENTS.

No.70-34

Argued Nov. 17, 1971

Decided April 19TH 1972.

Action by Membership Corporation for declaratory judgement that construction ski resort and recreation area in national game refuge and forest would contravene federal laws and preliminary and permanent injunctions restraining federal officials from approving or issuing permits for the project. The United States District Court for the Northern District of California granted a preliminary injunction and the defendants appealed.

The United States Court of Appeals, Ninth Circuit, 433 F.2d 24, vacated the injunction and remanded the case with directions, and certiorari was granted. The Supreme Court, Mr. Justice Stewart, held that, in absence of allegation that corporation or its members would be affected in any of their activities or pastimes by the proposed project, the corporation, which claimed special interest in conservation of natural game refuges and forests, lacked standing under Administrative Procedure Act to maintain the action.

Affirmed:

Mr. Justice Douglas, Mr. Justice Brennan and Mr. Justice Blackmun filed dissenting opinions. Mr. Justice Powell and Mr. Justice Rehnquist took no part in consideration or decision of the case.

1. Action-13

“Standing to sue” means that the party has sufficient stake in an otherwise justiciable controversy to obtain judicial resolution of that controversy.

See Publication Words and Phrases for other judicial constructions and definitions.

2. Action-13

Where party does not rely on any specific statute authorizing invocation of judicial process, question of his standing to sue depends upon whether he has alleged such personal stake in the outcome of the controversy as to ensure that dispute sought to be adjudicated will be presented in an adversary context and in a form historically viewed as capable of judicial resolution.

3. Administrative Law and Procedure-65

Where Congress has authorized public officials to perform certain functions according to law and has provided by statute the judicial review of those actions under certain circumstances, inquiry as to standing must begin with determination of whether statute in question authorizes review at behest of the plaintiff.

4. Constitutional Law-55, 56

Congress may not confer jurisdiction on Federal Courts to render advisory opinions, to entertain friendly suits or to resolve political questions, because suits of that character are inconsistent with judicial function under the Constitution, but where dispute is otherwise justiciable, question whether litigant is proper party to request an adjudication of particular issue is one within power of Congress to determine. U.S.C.A.Const.art.3 & 1 et seq.

4. Administrative Law and Procedure-668

“Injury in fact” test for standing to sue under Administrative Procedure Act requires more than injury to cognizable interest and requires that party seeking review be himself among the injured. 5.U.S.C.A. & 702.

5. Administrative Law and Procedure-668

Fact of economic injury is what gives a person standing to seek judicial review under a statute authorizing review of federal agency action, but once review is properly invoked, that person may argue the public interest in support of his claim that agency has failed to comply with its statutory mandate.

7. Administrative Law and Procedure-665

Organization may represent its injured members in proceeding for judicial review.

8. Administrative Law and Procedure-668

Organization’s mere interest in a problem, no matter how long standing the interest and no matter how qualified the organization is in evaluating the problem, is not sufficient by itself to render the organization “adversely affected” or “aggrieved” with Administrative Procedure Act providing judicial review for person who suffers legal wrong because of agency action, or who is adversely affected or aggrieved by agency action. 5 U.S.C.A. & 702. See publication Words and Phrases for other judicial constructions and definitions.

9. Administrative Law and Procedure-668

Requirement that party seeking judicial review of administrative agency’s action must allege facts showing that he himself adversely affected does not insulate executive action from judicial review, nor does it prevent any public interests from being protected through judicial process, but serves as a rough attempt to put decision as to whether review will be sought in the hands of those who have a direct stake in the outcome. 5 U.S.C.A. & 702.

10. Administrative Law and Procedure-668

Organizations or individuals are not entitled to vindicate their own value preferences through judicial process.

11. Administrative Law and Procedure-668

Declaratory Judgement-292

In absence of allegation that membership corporation or its members would be affected in any of their activities or pastimes by proposed ski resort and recreation area in national game and refuge

and forest, the corporation, which claimed special interest in conservation of natural game refuges and forests, lacked standing under Administrative Procedure Act to maintain action for injunctive relief and declaratory judgement that proposed development would contravene federal laws. 5 U.S.C.A. 1, 41, 43,45c 497,688; Fed. Rules Civ. Proc. Rule 15,28 U.S.C.A

*Syllabus**

Petitioner, a membership corporation with “a special interest in the conservation and sound maintenance of the national parks, game refuges, and forests of the country”, brought this suit for a declaratory judgement and injunction to restrain federal officials from approving an extensive skiing development in the Mineral King Valley in the Sequoia National Forest. Petitioner relies on S 10 of the Administrative Procedure Act, which accords judicial review to a “person suffering legal wrong and because of agency action, or [who is] adversely affected or agency action within the meaning of a relevant statute”. On the theory that this was a “public” action involving questions as to the use of natural resources. The Courts of Appeals reversed, holding that the club lacked standing and not shown irreparable injury.

- The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States v. Detroit Timber & Lumber Co.*, 200 U.S.321, 337,26 S.Ct.282, and 287,50 L.Ed.499.
Leland R.Selna, Jr., San Francisco, Cal., for the petitioner.

Sol. Gen. Erwin N. Griswold, for respondents.

Mr. Justice STEWART delivered the opinion of the court.

The Mineral King Valley is a great area of natural beauty nestled in the Sierra Nevada Mountains in Tulare County, California, adjacent to the Sequoia National Park. It has been part of the Sequoia National Forest since 1926, and is designated as a national game refuge by special Act of Congress.¹

Though once the site of extensive mining activity, Mineral King is now used exclusively for recreational purposes. Its relative inaccessibility and lack of development have limited the number of visitors each year, and at the same time they have preserved of the valley’s quality as a quasi-wilderness area largely uncluttered by products of civilization.

The United States Forest Service, which is entrusted with the maintenance and administration of national forests, began in the late 1940’s to give consideration to Mineral King as a potential site for recreational development.

Prodded by a rapidly increasing demand for skiing facilities, the Forest Service published a prospectus in 1965, inviting bids from private developers for the construction and operation of a ski resort that would also serve as a summer recreation area. The proposal of Walt Disney Enterprises, Inc. was chosen from those of six bidders, and Disney received a three-year permit to conduct surveys and explorations in the valley in connection with its preparation of a complete master plan for the resort.

The final Disney plan, approved by the Forest Service in January 1969, outlines a \$35 million complex of motels, restaurants, swimming pools, parking lots, and other structures designed to accommodate 14,000 visitors daily. This complex is to be built on 80 acres of valley floor under a

¹ Act of July 3,1926 s 6,44 stat.821, 16 U.S.C.s 688.

30-year use permit from the Forest Service. Other facilities, including ski lifts, ski trails, a cog-assisted railway, and utility installations are to be constructed on the mountain slopes and other parts of the valley under a revocable special-use permit. To provide access to the resort, the State of California proposes to construct a highway 20 miles in length. A section of this road would traverse Sequoia National Park, as would a proposed high-voltage power line needed to provide electricity to the resort. Both the highway and the power line require the approval of the Department of the Interior, which is entrusted with the preservation and maintenance of the national parks.

Representatives of the Sierra club, who favor maintaining Mineral King largely in its present state, followed the progress of recreational planning for the valley with close attention and increasing dismay. They unsuccessfully sought a public hearing on the proposed development in 1965, and in subsequent correspondence with the officials of the Forest Service and Department of the interior, they expressed the Club's objections to Disney's plan as a whole and to particular features included in it. In June 1969 the club filed the present suit in United States District of California, seeking a declaratory judgement that various aspects of the proposed development contravene federal laws and regulations governing the preservations of national parks, forests, game refuges² and also seeking preliminary and permanent injunctions restraining the federal officials involved from granting their approval or issuing permits in connection with the Mineral King project. The petitioner Sierra Club sued as a membership corporation with "a special interest in the conservation and the sound maintenance of the national parks, game refuges and forests of the country," and invoked the judicial-review provisions of the Administrative Procedure Act, 5 U.S.C. ss 701 et seq.

After two days of hearings, the District Court granted the requested preliminary injunction. It rejected the respondent's challenge to the Sierra Club's standing to sue, and determined that the hearing had raised questions "concerning possible excess of statutory authority, sufficiently substantial and serious to justify a preliminary injunction..." The respondents appealed, and the court of Appeals for the Ninth Circuit reversed. 433 F.2d 24. With respect to the petitioner's standing, the court noted that there was "no allegation in the complaint that members of the State in Sierra Club would be affected by the actions of [the respondents] other than the fact that the actions are personally displeasing or distasteful to them", id, at 33, and concluded:

"We do not believe such club concern without showing of more direct interest can constitute standing in the legal sense sufficient to challenge the exercise of responsibilities on behalf of all citizens by two cabinet level officials of the government acting under Congressional and Constitutional authority." Id., at 30.

Alternatively, the Court of Appeals held that the Sierra Club had not made an adequate Showing of irreparable injury and likelihood of success on the merits to justify issuance of a preliminary

² As analyzed by the District Court, the complain alleged violations of law falling into four categories. First, it claimed that special –use permits for construction of the resort exceeded the maximum-acreage limitation placed upon such permits by 16 U.S.C. ss 497, and that the issuance of a "revocable" use permit beyond the authority of Forest Service. Second, it challenged the proposed permit for the highway through Sequoia National Park on the grounds that the highway would not serve any of the purposes of the park, in alleged violation of 16 U.S.C.ss 1, and that it would destroy timber and other natural resources protected by 16 U.S.C.ss 41 and 43. Third, it claimed that the Forest Service and the Department of the Interior had violated their own regulations by failing to hold adequate public hearings on the proposed project. Finally, the complaint asserted that 16 U.S.C.s 45c requires specific congressional authorization of a permit for construction of a power transmission line within the limits of a national park.

injunction. The Court thus vacated the injunction. The Sierra Club filed a petition for a writ of certiorari, which we granted, 401 U.S.907.91 federal law present.

[1-4] The first question presented is whether the Sierra Club has alleged facts that entitle it to obtain judicial review of the challenged action. Whether a party has a sufficient stake in an otherwise justiciable controversy to obtain judicial resolution of that controversy is what has traditionally been referred to as the question of standing to sue. Where the party does not rely on any specific statute authorizing invocation of the judicial process, the question of standing depends upon whether the party has alleged such a “personal stake in the outcome of the controversy,” Baker v. Carr, 369 U.S.186, 204,82 S.Ct. 691, 703, 7 L.Ed.2d 633, as to ensure that the “dispute sought to be adjudicated will be presented in an adversary context and in a form historically viewed as capable of judicial resolution.” Flast v. Cohen, 392 U.S.83, 101,88,S.Ct.2942, 1953, 20,L.Ed.2d 947. Where, however, Congress has authorized public officials to perform certain functions according to law, and has provided by statute for judicial review of those actions under certain circumstances, the inquiry as to the standing must begin with a determination of whether the statute in question authorizes review at the behest of the plaintiff.³

The Sierra Club relies upon ss 10 of the Administrative Procedure Act (APA), 5 U.S.C.702, which provides:

“A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof.”

Early decisions under this statute interpreted the language as adopting the various formulations of “legal interest” and “legal wrong” then prevailing as constitutional requirements of standing.⁴ But, in *Association of Data Processing Service Organizations, Inc. v. Camp*, 397 U.S.150, 90 S.Ct. 832,25 L.Ed.2d 192, decided the same day, we held more broadly that persons had standing to obtain judicial review of federal agency action under ss 10 of the APA where they had alleged that the challenged action had caused them “injury was to an interest” arguably within the zone

³ Congress may not confer jurisdiction on Art. III federal courts to render advisory opinions. *Muskrat v. United States*, 219 U.S.346.31 S.Ct. 450,55, L.Ed. 246, or to entertain “friendly” suits. *United States v. Johnson*, 319 U.S.306,63 S.Ct.1075,87 L.Ed.1413,or to resolve “political questions”, *Luther v. Borden*. 7 How, 1,12 L.Ed.581, because suites of this character are inconsistent with the judicial function under Art. III. But where a dispute is otherwise justiciable, whether the litigant is a “proper party to request an adjudication of a particular issue” *Flast v. Cohen*, 392 U.S.83, 100,88, S.Ct.1942, 1952, 20 L. Ed.2d 947, is one within the power of Congress to determine. C. f . *FCCC v. Sanders Bros. Radio Station*, 309. U.S.470, 477,60 S.Ct. 693, 698,84 L.Ed.869: *Flast v. Cohen*, supra, 392 U.S., at 120,88 s. Ct., at the 1963 (Harlan, J., dissenting); *Associated industries of New York State v. Ickes*, 2 Cir., 134 F2d 694,704. See generally *Berger, Standing to Sue in Public Actions: Is it a Constitutional Requirement?*, 78 Yale L .J 816,827 et seq. (1969) ; *Jaffe, The Citizen as Litigant in Public Actions: The Non-Hohfeldian or Ideological Plaintiff*, 116 U.Pa . L. Rev.1033(1968)

⁴ See, e.g., *Kansas City Powder & Light Co.v Mc. Kay*, 96 U.S.App.D.C. 173,281,225 F.2d 924,932: *Ove Gustavsson Contracting Co. Floete*, 2 Cir., 278 F.2d 912,914; *Duba v. Schuetzle*, 8 Cir., 303 F.2d 570,574. The theory of a “legal interest” is expressed in its extreme forming *Alabama Power Co. v. Ickes*,302 U.S . 464,479-481,58 S. Ct .300,303-304,82 L.Ed.374. See also *Tennessee Electric Power Co.v. TVA*, 306 U.S .118,137-139,59 S.Ct .366,369-370,83 L.Ed.543.

of interests to be protected or regulated by the statutes that the agencies were claimed to have violated.⁵

In *Data Processing*, the injury claimed by the petitioners consisted of harm to their competitive position in the computer servicing market through a ruling by the Comptroller of the Currency that National Banks might perform data processing services for their customers. In *Barlow*, the petitioners were tenant farmers who claimed that certain regulations of the Secretary of Agriculture adversely affected their economic position vis-à-vis their landlords. These palpable economic injuries have long been recognized as sufficient to lay the basis for standing, with or without a specific statutory provision for judicial review.⁶ Thus, neither *Data Processing* nor *Barlow* addressed itself to the question, which has arisen with increasing frequency in federal courts in recent years, as to what must be alleged by persons who claim injury of non economic nature to interests that are widely shared.⁷ That question is presented in that case.

[5] The injury alleged by the Sierra Club will be incurred entirely by reason of change in the uses to which Mineral King will put, and the attendant change in the aesthetics and ecology of the area. Thus, in referring to the road to be built through Sequoia National Park, the complaint alleged that the development “would destroy or otherwise adversely affect the scenery, natural and historic objects and wildlife of the park and would impair the enjoyment of the park for future generations”. We do not question that this type of harm may amount to an “injury in fact” sufficient to lay the basis for standing under ss 10 of the APA. Aesthetic and environmental well-being, are important ingredients of the quality of life in our society, and the fact that particular environmental interests are shared by the many rather than the few does not make them less deserving of legal protection through the judicial process. But the “injury in fact” test requires more than an injury to a cognizable interest. It requires that the party seeking review be himself among the injured.

The Club apparently regarded any allegations of individualized injury as superfluous, on the theory that this was a “public” action involving questions as to the use of natural resources, and that the Club’s longstanding concern with and expertise in such matters were sufficient to give it standing as a “representative of public.”⁸ This theory reflects a misunderstanding of our cases involving so-called “public actions” in the area of administrative law.

The origin of the theory advanced by the Sierra Club may be traced to a dictum in *Scripps-Howard Radio v. FCC*, 316 U.S. 4,62 S.Ct. 875,86 L.Ed. 1229, in which the license of a radio station in Cincinnati, Ohio, sought a stay of an order of the FCC allowing another radio station in a nearby city to change its frequency and increase its range. In discussing its power to grant a

⁵ In deciding this case we do not reach any questions concerning the meaning of the “zone of interests” test or its possible application to the facts here presented.

⁶ See, e.g. *Hardin v. Kentucky Utilities Co.*, 390 U.S. 1,7,88,S.Ct.651,655,19L.Ed.2d 787; *Chicago v. Atchison, T. & S.F.R.Co.*, 357 U.S 77,83,78 S.Ct. 1063,1067,2 L.Ed.2d 1174; *FCC v. Sanders Bros. Radio Station*, *supra*,309 U.S., at 477, 60 S.Ct., 698.

⁷ No question of standing was raised in *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S.402,91 S.Ct. 814,28 L.Ed.2d 136. The complaint in that case alleged that the organizational plaintiff represented members who were “residents of Memphis, Tennessee who use Overton Park as a park land and recreation area and who have been active since 1964 in efforts to preserve and protect Overton Park as park land and recreation area.

⁸ This approach to the question of standing was adopted by the Court Of Appeals for the second Circuit in *Citizens Committee for Hudson Valley v. Volpe*. 425 F.2d 97,105:

stay, the Court noted that “these private litigants having standing only as representatives of the public interest”. *Id.*, at 14, 62 S.Ct., at 882. But the observation did not describe the basis upon which the appellant was allowed to obtain judicial review as a “person aggrieved” within the meaning of the statute involved in that case,⁹ since *Scripps-Howard* was clearly “aggrieved” by reason of the economic injury that it would suffer as a result of the Commission’s action.¹⁰ The Court’s statement was rather, directed to the theory upon which Congress had authorized judicial review of the Commission’s actions. That theory had been described earlier in *FCC v. Sanders Bros. Radio Station*, 309 U.S.470, 477, 60 S.Ct.693, and 698, 84 L.Ed. 869, as follows.

“Congress had some purpose in enacting section 402 (b) 2. It may have been of opinion that one likely to be financially injured by the issue of license would be the only person having a sufficient interest to bring to the attention of the appellate court errors of law in the action of the Commission in granting the license. It is within the power of Congress to confer such standing to prosecute an appeal.”

[6] Taken together, *Sanders and Scripps-Howard* thus established a dual proposition: the fact of economic injury is what gives a person standing to seek judicial review under the statute, but once review is properly provoked, that the person may argue the public interest in support of his claim that the agency has failed to comply with its statutory mandate.¹¹ It was in the latter sense that the “standing” of the appellant in *Scripps-Howard* existed only as a “representative of the public interest”. It is in similar sense that we have used the phrase “private attorney general” to describe the function performed by persons upon whom Congress has conferred the right to seek judicial review of agency action. See *Data Processing*, supra, 397 U.S., at 154,90 S.C., at 830.

The trend of cases arising under the APA and other statutes authorizing judicial review of federal agency action has been toward recognizing that injuries other than economic harm are sufficient to bring a person within the meaning of statutory language, and toward discarding the notion that injury that is widely shared is *ipso facto* not injury sufficient to provide the basis for judicial review.¹² We noted this development with approval in *Data Processing*, 397 U.S., at 154,90 S.C., at 830, in saying that the interest alleged to have been injured ‘ may reflect ‘aesthetic, conservational, and recreational’. As well as economic values.” But broadening the categories of

⁹ The statute involved was 402(b) of the Communications Act of 1934,48 Stat.1093.

¹⁰ This much is clear from the *Scripps-Howard* Court’s citation of *FCC v. Sanders Bros. Radio Station*, 309 U.S.470, 60 S.Ct. 693, 84 L.Ed.869, in which the basis for standing was the competitive injury that the appellee would have suffered by the licensing of another radio station in its listening area.

¹¹ The distinction between standing to initiate a review proceeding, and standing to assert the rights of the public or of the third persons once the proceeding is properly initiated, is discussed in 3 K .Davis, *Administrative Law Treatise* ss 22.05-22.07 (1958).

¹² See, e.g., *Environmental defense Fund, Inc.c.v.Hardin*,138 U.S. App. D.C.391, 395,428 F.2d 1093, 1097 (interest in health affected by decision of Secretary of Agriculture refusing to suspend registration of certain pesticides containing DDT) ; *Office of Communication of United Church OF Christ v. FCC*, 123 U.S.App.D.C.328,339,359 F.2d 994,1005 (interest of television viewers in the programming of a local station community planning licensed by FCC); *Scenic Hudson Preservation Conf.v. FPC*, 2 Cir., 354 F2d 608, 615-616(interests in sesthesia, recreation, and orderly community planning affected by FPC licensing of a hydro-electric project); *Reade v. Ewing*, 2Cir., 205 F.2d 630,631-632 (interest of consumers of oleomargarine in fair labeling of product regulated by Federal Security Administration); *Crowther v.Seaborg*, D.C.,312 F.Supp.1205,1212(interest in health and safety of persons residing near the site of a proposed atomic blast).

injury that may be alleged in support of standing is different matter from abandoning the requirement that the party seeking review must himself have suffered an injury.

[7, 8] Some courts have indicated a willingness to take this latter step by conferring standing upon organizations that have demonstrated “an organizational interest in the problem” of environmental or consumer protection. *Environmental Defense Fund, Inc. Hardin*, and 138 U.S. App.D.C. 391,395,428 F.2d 1093, 1097.¹³ It is clear that an organization whose members are injured may represent those members in a proceeding for judicial review. See, e.g., *NAACP v. Button*, 371 U.S.415, 428, 83 S.Ct. 328,335,9 L.Ed 405. But a mere “interest in a problem” no matter how longstanding the interest and no matter how qualified the organization is in evaluating the problem, is not sufficient by itself to render the organization “adversely affected” or “aggrieved” within the meaning of APA. The Sierra Club is a large and long establishment to the cause of protecting our Nation’s natural heritage from man’s depredations. But if a “special interest” in this subject were enough to entitle the Sierra Club to commence this litigation, there would appear to be no objective basis upon which disallow a suit by any other bona fide “special interest” could initiate such litigation, it is difficult to perceive why any individual citizen with the same bona fide special interest would not also be entitled to do so.

[9,10] The requirement that a party seeking review must allege facts showing that he himself adversely affected does not insulate executive action from judicial review, nor does it prevent any public interests from being protected through the judicial process.¹⁴ It does give as at least a rough attempt to put a decision as to whether review will be sought in the hands of those who have direct stake in the outcome. That goal could be undermined were we are to construe the APA to authorize judicial review at the behest of organizations or individuals who seek to do more than

¹³ See *Citizens Committee for Hudson Valley v. Volpe*, n. 9, *supra*; *Environmental Defense Fund, Inc. v. Corps of Engineers*, D.C.325 F.Supp. 728, 734-736; *Izaak Walton League of America v. St.Clair*, D.C. 313 F. Supp. 1312,1317. See also *Scenic Hudson Preservation Conf. V.FPC. Supra*, 354 F.2d, at 616.

“ In order to insure that the Federal Power Commission will adequately protect the public in the aesthetic, conservational, and recreational aspects of power development, those who by their activities and conduct have exhibited a special areas, must be held to be included in the class of the “aggrieved” parties under ss 313(b) [of the federal Power Act]”.

In most,if not all, of these cases, at least one party to the proceeding did assert an individualized injury to itself or, in the case of an organization, to its members.

¹⁴ In its reply brief, after noting the fact that it might have chosen to assert individualized injury to itself or to its members as a basis for standing the Sierra Club states:

“ The Government seeks to create a ‘reads I win, tails you lose’ situation in which either the courthouse door is barred for lack of assertion of a private, unique injury or a preliminary injunction is denied on the ground that the litigant has advanced private injury which does not warrant an injunction adverse to competing public interest. Counsel have...aped their case to avoid this trap.”

The short answer to this contention is that the trap does not exist. The test injury in fact goes only to the question of standing to obtain judicial review. Once this standing is established, the party may assert the interest of general public in support of his claims for equitable relief. See n.12 and accompanying text, *supra*.

indicate their own value preferences through judicial process.¹⁵ The principle that the Sierra Club would...us establish in this case would do...that.

[11] As we conclude that the Court of Appeals was correct in its holding, the Sierra Club lacked standing to contain this action, we do not reach...other questions presented in the pe... and we intimate no view on the.... It's of the complaint. The judgement affirmed....

Mr. Justice POWELL and **Mr. Justice REHNQUIST** took no part in the consideration of decision of this case.

Mr. Justice DOUGLAS, dissenting.

I share the views of my brother BLACKMUN and would reverse the judgement below. The critical question of “standing”¹⁶ would be simplified and also put neatly into focus if we fashioned a federal rule that allowed environmental issues to be litigated before federal agencies or federal courts in the name of the inanimate object about to be despoiled, defaced, or invaded by roads and bulldozers and where injury is the subject of public outrage. Contemporary public concern for protecting nature’s ecological equilibrium should lead to the conferral of standing upon environmental objects to sue for their own preservation. See, *Should Trees Have Standing? Toward Legal Rights for Natural Objects*, 45 S.Cal.L.Rev.450 (1972). This suit would therefore be more properly labeled as *Mineral King v. Morton*.

Inanimate objects are sometimes parties in litigation. A ship has a legal personality, a fiction found useful for maritime purposes.¹⁷ The corporation sole- a creature of ecclesiastical law- is an

¹⁵ Every school boy may be familiar with...exis deToequerville’s famous observation, written in the 1830’s, that “scarce-...any political question arises in the United States that is not resolved., sooner, or later, into judicial question.” 1 Democracy in America280 (1945). Less familiar, however, is De Toequerville’s further observation that judicial review is effective largely because it is not available simply at the beherest of a partisan faction, but is exercised only to remedy a particular, concrete injury.

“ It will be seen, also, that by leaving it to the private to censure the law, and by intimately uniting the trial of the law with the trial of an individual, legislation is protected from wanton assault and from the daily aggressions of the party spirit. The errors of the legislator are exposed only to meet a real want; and it is always a positive and appreciable fact that must serve as basis of a prosecution.” Id., at 102.

¹⁶ See generally *Association of data processing Serving Organizations, Inc. v. Camp*, 397 U.S. 150,90 S.Ct. 827,25 L.Ed.2d 184 (1970); *Barlow v. Collins*,397 U.S.159,90,S.Ct.832,25 L.Ed.2d192 (1970); *Flast v. Cohen*,392 U.S.83,88 S.Ct.1942, 20 L.Ed.2d 947 (1968).See also Mr.Justice Brennan’s separate opinion in *Barlow v. Collins*, *supra*, 397 U.S., at 167,90 S.C.t., at 838. The issue of statutory standing aside, no doubt exists that “ injury in fact” to “aesthetic” and “conservational” interests is here sufficiently threatened to satisfy the cease-or-controversy clause. *Association of Data Processing Service Organizations, Inc. v. Camp*, *supra*, 397 U.S., at 1564, 90 S.Ct., 830.

¹⁷ In *rem* actions brought to adjudicate libelants ‘interests in vessels are well known in admiralty.G.Gilmore & C. Black, *The Law of Admiralty* 31 (1957). But admiralty also permits a salvage action to be brought in the name of rescuing vessel. *The Camanche*, 8 Wall.448, 476,19 L.Ed. 397 (1869). And, in collision, Litigation, the first libeled ship may counterclaim in its own name. *The Gylfe v. The Trujillo*, 209.F2d 386 (CA2 1954). Our case law has personalized vessels:

“A ship is born when she is launched, and lives so long as her identity is preserved. Prior to her launching she is a mere congeries of wood and iron...In the baptism of launching she receives her name, and from the

accepted adversary and large fortune ride on its cases.¹⁸ The ordinary corporation is a “person” for purposes of the adjudicatory processes, whether it represents proprietary, spiritual, aesthetic, or charitable causes.¹⁹

Mineral King is doubtless like other wonders of the Sierra Nevada such as Tuolumne Meadows and the John Muir Trail. Those who hike it, fish it, hunt it, camp in it, frequent it, or visit it merely to sit in solitude and wonderment are legitimate spokesmen for it, whether they may be few or many. Those who have that intimate relation with the inanimate object about to be injured polluted, or otherwise despoiled are its legitimate spokesmen.

The Solicitor General, whose views on this subject are in the Appendix to this opinion, takes a wholly different approach. He considers the problem in terms of “government by the Judiciary”. With all respect, the problem is to make certain that the inanimate objects, which are the very core of America’s beauty, have spokesmen before they are destroyed. It is of course, true that most of them are under the control of a federal or state agency.

The standards given those agencies are usually expressed in terms of the “public interest”. Yet “public interest” has so many differing shades of meaning as to be quite meaningless on the environmental front. Congress accordingly has adopted ecological standards in the National Environmental Policy Act of 1969, Pub.L.91-90, 83 Stat. 852, 42 U.S.C. ss 4321 et seq., and guidelines for agency action have been provided by the Council on Environmental Quality of which Russell E. Train is Chairman. See 36 Fed. Reg.7724.

Yet the pressures on agencies for favorable action one way or the other are enormous. The suggestion that Congress can stop action which undesirable is true in theory; yet even Congress is too remote to give meaningful direction and its machinery is too ponderous to use very often. The federal agencies of which I speak are not venal or corrupt. But they are notoriously under the control of powerful interests who manipulate them through advisory committees, or friendly working relations, or who have that natural affinity with the agency which in time develops between the regulator and the regulated.²⁰ As early as 1894, Attorney General Olney predicted

moment her keel touches the water she is transformed....She acquires a personality of her own” Tucker v.Alexandroff,183 U.S.424,438, 22 S.Ct.195, 201,46 L.Ed.264.

¹⁸ At common law, an officeholder, such as a priest or king, and his successors constituted, a corporation sole, a legal entity distinct from the personality which managed it. Rights and duties were deemed to adhere to this device rather than to the officeholder in order to provide continuity after the latter retired. American Courts occasionally revive the notion. E.g., Reid V. Barry, 93 Fla. 849,112 So.846 (1927), discussed in recent cases, 12 Minn.L.Rev.295(1928); and in note, 26 Mich .L.Rev.545 (1928); see generally 1 W.Fletcher, Cyclopedia of the Law of Private Corporation ss 50-53(1963) ; 1 P.Potter, Law of Corporations 27 (1881)

¹⁹ Early jurists considered the Corporation to be a highly artificial entity. Lord Coke opined that a corporation’s creation “rests only in intendment and consideration of law” Case of Sutton’s Hospital. 77 Eng. Rep.937, 97.. (K.B.1612). Mr.Chief Justice Marshall added that the device is “an artificial being, invisible, intangible, and existing only in contemplation of law.” Trustees of Dartmouth College v. Woodward, Whate, 518, 4 L.Ed. 629 (1819). Today, suits in the names of corporations are taken for granted.

²⁰ The federal budget annually includes about \$ 75 million for underwriting about 1,500 advisory committees attached to various regulatory agencies. These groups are almost exclusively composed of industry representatives appointed by the President or by the Cabinet members. Although public members may be on these committees, they are rarely asked to serve. Senator Lee Metcalf warn; “Industry advisory

that regulatory agencies might become “industry- minded,” as illustrated by his forecast concerning the Interstate Commerce Commission.

“The Commission is, or can be made, of great use to the rail roads, it satisfies the popular clamor for a government supervision of railroads, at the same time that that supervision is almost entirely nominal. Further, the older such a commission gets to be, the more inclined it will be found to take the business and railroad view of the things.” M .Josephs on. *The Politicos* 525 (1938).”

Years later a court of appeals observed, “the recurring question which has plagued public regulation of industry [is] whether the regulatory agency is unduly oriented toward the interest of the industry it is designed to regulate, rather than the public interest it is designed to protect.” *Moss v. CAB*, 139 U.S.App.D.C.150, and 152,430 f.2D 891, 893.

The voice of the inanimate object, therefore, should not be stilled. That does not mean that the judiciary takes over the managerial functions from the federal agency. It merely means that before these priceless bits of Americana (such as a valley, an alpine meadow, or a lake) are forever lost or are so transformed as to be reduced to the eventual rubble of our urban environment, the voice of the existing beneficiaries of these environmental wonders should be heard.

Perhaps they will not win. Perhaps the bulldozers of “progress” will plow under all the aesthetic wonders of this beautiful land that is not the present question. The sole question is who has standing to be heard?

APPENDIX TO OPINION OF DOUGLAS J.,

DISSENTING

Extract From Oral Argument of The Solicitor General.

“As far as I know, no case has yet been decided which holds that a plaintiff which merely asserts that, to quote from the complaint here, its interest would be widely affected and that ‘it would be aggrieved’ by the acts of the defendant, has standing to raise legal questions in court.

“But why not? Do not the courts exist to decide legal questions? And are they not the most impartial and learned agencies that we have in our governmental system? Are there not many questions that must be decided by the courts? Why should not the courts decide any question that any citizen wants to raise?

committees exist inside most important federal agencies, even have offices in some. Legally, their function is purely as kibitzer, but in practice many have become internal lobbies- printing industry handouts in the Government Printing Office with taxpayers’ money, and even influencing policies.

Industry committee performs the dual function of stopping government from finding out about corporations while at the same time helping corporations get inside information about what government is doing. Sometimes, the same company that an advisory council that obstructs or turns down a government questionnaire is precisely the company which is withholding information the government needs in order to enforce a law.” Metcalf, *The Vested Oracles: How Industry Regulates Government*, 3 *The Washington Monthly*, July 1971,p.45. For proceeding conducted by Senator Metcalf exposing these relationships, see Hearings on S.3067 before the Subcommittee on the Intergovernmental Relations of the Senate Committee on Government Operations, 91st Cong.,2d Sess.(1970); Hearings on S.1637, S.1964, and S.2064 before the Subcommittee on Intergovernmental Relations of the Senate Committee on Government Operations, 92d Cong., 1st Sess.(1971).

“As the tenor of my argument indicates this raises, I think, a true question, perhaps a somewhat novel question, in separation of power...

“Ours is not a government but the Judiciary. It is a government of three branches, each of which was intended to have broad and effective powers subject to checks and balances. In litigable cases, the courts have great authority. But the Founders also intended that the congress should have wide powers, and that the Executive Branch should have wide powers. All these officers have great responsibilities. They are not less sworn that are the members of this Court to uphold the Constitution of the United States.

“This, I submit, is what really lies behind the standing doctrine, embodied in those cryptic words ‘case’ and ‘controversy’ in Article III of the constitution.

“Analytically one could have a system of government in which every legal question arising in the core of government would be decided by the courts. It would not be, I submit a good system.

“More important, it is not the system which was ordained and established in our Constitution, as it has been understood for nearly 200 years.

“Over the past 20 or 25 years, there has been a great shift in the decision of legal questions in our governmental operations in the courts. This has been the result of continuous whittling away of the numerous doctrines which have been established over the years, designed to minimize the number of governmental questions which it was the responsibility of the courts to consider.

“I have already mentioned the most ancient of all: case or controversy, which was early, relied on to prevent the presentation of feigned issues to the court.

“But there are many other doctrines, which I cannot go into detail: review-ability, justiciability, and sovereign immunity, mootness in various aspects, statutes of limitations in laches, jurisdictional amount, real party in interest, and various questions in relation to joinder.

“Under all of these headings, limitations which previously existed to minimize the number of questions decided in courts, have broken down in varying degrees.

“I might also mention the explosion development of class actions, which has thrown more and more issues into the courts.

“If there is standing in this case, I find it very difficult to think of any legal issue arising in government which will not have to await one or more decisions of the Court before the Administrator, sworn to uphold the law, can take any action. I’m not sure that it’s good for the courts. I do find myself more and more sure that it is not the kind of allocation of governmental powers in our tripartite constitutional system that was contemplated by the Founders.

“I do not suggest that the administrators can act at their whim and without any check at all. On the contrary, in this area they are subject to continuous check by the Congress. Congress can stop this development any time it wants to”.

Mr. Justice BRENNAN, Dissenting.

I agree that the Sierra Club has standing for the reasons stated by my Brother BLACKBURN in Alternative No.2 of his dissent. I therefore would reach the merits. Since the Court does not do so, however, I simply note agreement with my Brother BLACKBURN that the merits are substantial.

Rather than pursue the Court has chosen to take by its affirmance of the judgement of the Court of Appeals, I would adopt one of two alternatives:

1. I would reverse that judgement and, instead, approve the judgement of the District Court, which recognized standing in the Sierra Club and granted preliminary relief. I would be willing to do this on condition that the Sierra Club forthwith amends its complaint to meet the specifications the Court prescribes for standing. If Sierra Club fails or refuses to take the step, so be it; the case will then collapse. But if it does amend, the merits will be before the trial court once again. As the court, *ante*, at 1364 n.2, so clearly reveals the issues on the merits are substantial and deserve resolution. They assay new ground. They are crucial to the future of Mineral King. They raise important ramifications for the quality of the country's public land management. They pose the propriety of the "dual permit" device as a means of avoiding the 80-acre "recreation and resort" limitation imposed by Congress in 16 U.S.C. ss 497, an issue that apparently has never been litigated, and is clearly substantial in light of the congressional expansion of the limitation in 1956 arguably to put teeth into the old, unrealistic five acre limitation. In fact, they concern the propriety of 80-acre permit itself and the consistency of the entire, enormous development with the statutory purposes of the Sequoia Game Refuge, of which the Valley is a part. In the context of this particular development, substantial questions are raised about the use of a national park area for Disney purposes for a new high-speed road and 66,000-volt power line to serve the complex. Lack of compliance with existing administrative regulations is also charged. These issues are not shallow or perfunctory.
2. Alternatively, I would permit an imaginative expansion of our traditional concepts of standing in order to enable an organization such as the Sierra Club, possessed, as it is, of pertinent, bona fide, and well-recognized attributes and purposes in the area of environment, to litigate environmental issues. This incursion upon tradition need not be very extensive. Certainly, it should be no cause for alarm. It is no more progressive than was the decision in *Data Processing* itself. It need only recognize the interest of one who has a provable, sincere, dedicated, and established status. We need not fear that Pandora's box will be opened or that there will be no limit to the number of those who desire to participate in environmental litigation. The courts will exercise appropriate restraints just as they have exercised them in the past. Who would have suspected 20 years ago that the concepts of standing enunciated in *Data Processing* and *Barlow* would be the measure for today? And Mr. Justice DOUGLAS, in his eloquent opinion, has imaginatively suggested another means and one, in its own way, with obvious, appropriate, and self-imposed limitations as to standing. As I read what he has written, he makes only one addition to the customary criteria (the existence of a genuine dispute; the assurance of adversariness; and a conviction that the party whose standing is challenged will adequately represent the interest he asserts), that is, that the litigant be one who speaks knowingly for the environmental values he asserts.

I make two passing references:

1. The first relates to the Disney figures presented to use. The complex, the Court notes, will accommodate 14,000 visitors a day (3,100 overnight; some 800 employees; 10 restaurants; 20 ski lifts). The State of California has proposed to build a new road from Hammond to Mineral King. That road, to the extent of 9.2 miles, is to traverse Sequoia National Park. It will have only two lanes, with occasional passing areas, but it will be capable, it is said, of accommodating 700-800 vehicles per hour and peak of 1,200 per hour. We are told that the State has agreed not to seek any further improvement in road access through the park.

If we assume that the 14,000 daily visitors come by automobile (rather than by helicopter or bus or other known or unknown means) and that each visiting automobile carries four passengers (an assumption, I am sure that is far too optimistic), those 14,000 visitors will move in 3,500 vehicles. If we confine their movement (as I think we properly may for this mountain area) to 12 hours out of the daily 24, the 3,500 automobiles will pass any given point on the two-lane road at the rate of about 300 per hour. This amounts to five vehicles per minute, or an average of one every 12 seconds. This frequency is further increased to one every six seconds when the necessary return traffic along that same two-lane road is considered. And this does not include service vehicles and employees' cars. Is this the way we perpetuate the wilderness and its beauty, solitude, and quiet?

2. The second relates to the fairly obvious fact that any resident of the Mineral King area- the real "user" – is an unlikely adversary for this Disney-governmental project. He naturally will be inclined to regard the situation as one that should benefit him economically.

THE UNITED STATES OF AMERICA

**THE UNITED STATES COURT OF APPEAL FOR THE DISTRICT OF COLUMBIA
CIRCUIT 449 F.2d 1109 (1971)**

**CALVERT CLIFFS' COORDINATING
COMMITTEE INC., ET ALPETITIONER
VERSUS
ATOMIC ENERGY COMMISSION.....RESPONDENTS**

In 1969 the United States passed the National Environmental Policy Act (NEPA) to protect natural resources which was signed by President Nixon. Section 101 of the Act required the federal government to “use all practicable means and measures” to protect the environment, and to consider environmental costs and benefits in governmental decisions. Calvert Cliffs’ Coordinating Committee brought this action against the Atomic Energy Commission alleging that it’s recently adopted procedural rules, failed to satisfy the demands of NEPA and that this commission should give consideration to environmental factors.

HELD:

1. The Atomic Energy Commission’s procedural rules do not comply with Congressional Policy enunciated in NEPA. These cases are remanded for further rule making consistent with this opinion.
2. NEPA makes environmental protection a part of the mandate of every federal agency and department which must “consider” environmental issues just as they consider other matters within their mandates.
3. Section 102(2) (A) and (B) require a balancing process between environmental amenities and economic and technical considerations. Section 102 (2) (C) requires responsible officials to prepare a detailed statement covering the environmental impact of major federal project, and to develop appropriate alternatives. These procedural duties must be performed “to the fullest extent possible”.
4. If a decision was reached procedurally without individualised consideration and balancing of environmental factor, it’s the court’s responsibility to reverse.
5. The commission’s rules make a mockery of NEPA’s procedural requirements. Environmental factors must be considered through the agency review processes, and not merely accompany other records through the federal bureaucracy. In uncontested hearings the Atomic Safety and Licensing Board need not necessarily go over the same ground covered in its staff’s statements, but it must determine if review by the staff has been adequate.

**CALVERT CLIFFS' COORDINATING COMMITTEE, INC., ET AL. == PETITIONERS,
VERSUS
UNITED STATES ATOMIC ENERGY COMMISSION
AND UNITED STATES OF AMERICA, =====RESPONDENTS,
BALTIMORE GAS AND ELECTRIC COMPANY, INTERVENOR
Nos. 24839, 24871**

**UNITED STATES COURT OF APPEAL FOR THE DISTRICT OF COLUMBIA
CIRCUIT**

**146 U.S. App. D.C. 33; 449 F.2d 1109; 1971 U.S. App. LEXIS 8779; 2 ERC (BNA) 1779; 17
AL.R. Fed. 1; 1 ELR 20346**

**April 16, 1971, Argued
July 23, 1971, Decided**

DISPOSITION:

Remanded for Proceedings Consistent with this Opinion.

CORE TERMS: environmental, license, certification, fullest, water quality, balancing, staff, detailed statement, alteration, environmental quality, operating license, federal government, water, environmental protection, environmental impact, practicable, recommendation, federal agencies, proposed action, effective date, abdication, guidelines, accompany, environmental damage, national policy, review process, appendix, insure, federal action, regulations

JUDGES: Wright, Tamm and Robinson, Circuit Judges,

OPINION BY: WRIGHT

OPINION: J. SKELLY WRIGHT, Circuit Judge:

These cases are only the beginning of what promises to become a flood of new litigation-litigation seeking judicial assistance in protecting-g our natural environment. Several recently enacted statutes attest to the commitment of the Government to control, at long last, the destructive engine of material "progress."¹ But it remains to be seen whether the promise of this legislation will become a reality. Therein lies the judicial role. In these cases, we must for the first time interpret the broadest and perhaps most important of the recent statutes: the National Environmental Policy Act of 1969 (NEPA).² We must assess claims that one of the agencies charged with its administration has failed to live up to the congressional mandate. Our duty, in short, is to see that important legislative purposes, heralded in the halls of Congress, are not lost or misdirected in the vast hallways of the federal bureaucracy.

¹ Environmental Quality Improvement Act of 1970, 42 D.S.C.A. §§ 4371-4374 (1971 Pocket Part); Water and Environmental Quality Improvement Act of 1970, Pub. L. 91-224, 91st Cong., 2d Sess. (1970), 84 Stat. 91.

² 42 U.S.C.A. § 4321 et seq. (1971 Pocket Part).

NEPA, like so much other reform legislation of the last 40 years, is cast in terms of a general mandate and broad delegation of authority to new and old administrative agencies. It takes the major step of requiring all federal agencies to consider values of environmental preservation in their spheres of activity, and it prescribes certain procedural measures to ensure that those values are in fact fully respected. Petitioners argue that rules recently adopted by the Atomic Energy Commission to govern consideration of environmental matters fail to satisfy the rigor demanded by NEPA. The Commission, on the other hand, contends that the vagueness of the NEPA mandate and delegation leaves much room for discretion and that the rules challenged by petitioners fall well within the broad scope of the Act. We find the policies embodied in NEPA to be a good deal clearer and more demanding than does the Commission. We conclude that the Commission's procedural rules do not comply with the congressional policy. Hence we remand these cases for further rule making.

We begin our analysis with an examination of NEPA's structure and approach and of the Atomic Energy Commission rules which are said to conflict with the requirements of the Act. The relevant portion of NEPA is Title I, consisting of five sections³

Section 101 sets forth the Act's basic substantive policy: that the Federal Government "uses all practicable means and measures" to protect environmental values. Congress did not establish environmental protection as an exclusive goal; rather, it desired a reordering of priorities, so that environmental costs and benefits will assume their proper place along with other considerations. In Section 101(b), imposing an explicit duty on Federal officials, the Act provides that "it is the continuing responsibility of the Federal Government to use all practicable means, consistent with other essential considerations of national policy," to avoid environmental degradation, preserve "historic, cultural, and natural" resources and promote "the widest range of beneficial uses of the environment without undesirable and unintended consequences."

Thus the general substantive policy of the Act is a flexible one. It leaves room for a responsible exercise of discretion and may not require particular substantive results in particular problematic instances. However, the Act also contains very important "procedural" provisions-provisions which are designed to see that all federal agencies do in fact exercise the substantive discretion given them. These provisions are not highly flexible. Indeed, they establish a strict standard of compliance.

NEPA, first of all, makes environmental protection a part of the mandate of every federal agency and department. The Atomic Energy Commission, for example, had continually asserted, prior to NEPA, that it had no statutory authority to concern itself with the adverse environmental effects of its actions.⁴ Now, however, its hands are no longer tied. It is not only permitted, but compelled, to take environmental values into account. Perhaps the greatest importance of NEPA is to require the Atomic Energy Commission and other agencies to consider environmental issues just as they consider other matters within their mandates. This compulsion is most plainly stated in Section 102. There, "Congress authorizes and directs that, to the fullest extent possible: (1) the policies, regulations, and public laws of the United States shall be interpreted and administered in

³ The full text of Title I is printed as an appendix to this opinion.

⁴ Before the enactment of NEPA, the Commission did recognize its separate statutory mandate to consider the specific radiological hazards caused by its actions; but it argued that it could not consider broader environmental impacts. Its position was upheld in *State of New Hampshire v. Atomic Energy Commission*, 1 Cir., 406 F.2d 170, cert. denied, 395 U.S. 962, 89 S. Ct. 2100, 23 L. Ed. 2d 748 (1969).

accordance with the policies set forth in this Act." Congress also "authorizes and directs" that "(2) all agencies of the Federal Government shall" follow certain rigorous procedures in considering environmental values.⁵ Senator Jackson, [*1113] NEPA's principal sponsor, stated that "no agency will [now] be able to maintain that it has no mandate or no requirement to consider the environmental consequences of its actions."⁶ He characterized the requirements of Section 102 as "action-forcing" and stated that "otherwise, these lofty declarations [in Section 101] are nothing more than that."⁷

The sort of consideration of environmental values which NEPA compels is clarified in Section 102(2) (A) and (B). In general, all agencies must use a "systematic, interdisciplinary approach" to environmental planning and evaluation "in decision-making which may have an impact on man's environment" In order to include all possible environmental factors in the decisional equation, agencies must "identify and develop methods and procedures * * * which will insure that presently unquantified environmental amenities and values may be given appropriate consideration in decision-making along with economic and technical considerations."⁸ "Environmental amenities" will often be in conflict with "economic and technical

⁵ Only once-in § 102(2) (B)-does the Act state, in terms, that Federal agencies must give full "consideration" to environmental impact as part of their decision making processes. However, a requirement of consideration is clearly implicit in the substantive mandate of § 10 I, in the requirement of § 102(1) that all laws and regulations be "interpreted and administered" in accord with that mandate, and in the other specific procedural measures compelled by § 102(2). The only circuit to interpret NEPA to date has said that "this Act essentially states that every federal agency shall consider ecological factors when dealing with activities which may have an impact on man's environment." Zabel v. Tabb, 5 Cir., 430 F.2d 199,211 (1970). Thus a purely mechanical compliance with the particular measures required in § 102 (2) (C) & (D) will not satisfy the Act if they do not amount to full good faith consideration of the environment. See text at page 1116 infra. The requirements of § 102(2) must not be read so narrowly as to erase the general import of §§ 101, 102(1) and 102(2) (A) & (B).

On April 23, 1971, the Council on Environmental Quality-established by NEPA-issued guidelines for federal agencies on compliance with the Act. 36 Fed. Reg. 7723 (April 23, 1971). The Council stated that "the objective of section 102(2) (C) of the Act and of these guidelines is to build into the agency decision making process an appropriate and careful consideration of the environmental aspects of proposed action * * *." Id. at 7724.

⁶ Hearings on S. 1075, S. 237 and S. 1752 Before Senate Committee on Interior and Insular Affairs, 91st Cong., 1st Sess. 206 (1969). Just before the Senate finally approved NEPA, Senator Jackson said on the floor that the Act "directs all agencies to assure consideration of the environmental impact of their actions in decision making." 115 Cong.Rec. (Part 30) 40416 (1969).

⁷ Hearings on S. 1075, supra Note 6, at 116. Again, the Senator reemphasized his point on the floor of the Senate, saying: "To insure that the policies and goals defined in this act are infused into the ongoing programs and actions of the Federal Government, the act also established some important 'action-forcing' procedures." 115 Cong.Rec. (Part 30) at 40416. The Senate Committee on Interior and Insular Affairs Committee Report on NEPA also stressed the importance of the "action-forcing" provisions which require full and rigorous consideration of environmental

⁸ The word "appropriate" in § 102(2) (B) cannot be interpreted to blunt the thrust of the whole Act or to give agencies broad discretion to downplay environmental factors in their decision making processes. The Act requires consideration "appropriate" to the problem of protecting our threatened environment, not consideration "appropriate" to the whims habits or other particular concerns of federal agencies. See Note 5 supra.

considerations." To "consider" the former "along with" the latter must involve a balancing process. In some instances environmental costs may outweigh economic and technical benefits and in other instances they may not. But NEPA mandates a rather finely tuned and "systematic" balancing analysis in each instance.⁹

To ensure that the balancing analysis is carried out and given full effect, Section 102(2) (C) requires that responsible officials of all agencies prepare a "detailed statement" covering the impact of particular actions on the environment, the environmental costs which might be avoided, and alternative measures which might alter the cost benefit equation. The apparent purpose of the "detailed statement" is to aid in the agencies' own decision-making process and to advise other interested agencies and the public of the environmental consequences of planned federal action. Beyond the "detailed statement," Section 102(2) (D) requires all agencies specifically to "study, develop, and describe appropriate alternatives to recommended courses of action in any proposal which involves unresolved conflicts concerning alternative uses of available resources." This requirement, like the "detailed statement" requirement, seeks to ensure that each agency decision maker has before him and takes into proper account all possible approaches to a particular project (including total abandonment of the project) which would alter the environmental impact and the cost benefit balance. Only in that fashion is it likely that the most intelligent, optimally beneficial decision will ultimately be made. Moreover, by compelling a formal "detailed statement" and a description of alternatives, NEPA provides evidence that the mandated decision making process has in fact taken place and, most importantly, allows those removed from the initial process to evaluate and balance the factors on their own.

Of course, all of these Section 102 duties are qualified by the phrase "to the fullest extent possible." We must stress as forcefully as possible that this language does not provide an escape hatch for foot-dragging agencies; it does not make NEPA's procedural requirements somehow "discretionary." Congress did not intend the Act to be such a paper tiger. Indeed, the requirement of environmental consideration "to the fullest extent possible" sets a high standard for the agencies, a standard which must be rigorously enforced by the reviewing courts.

Unlike the substantive duties of Section 101 (h), which require agencies to "use all practicable means consistent with other essential considerations," the procedural duties of Section 102 must be fulfilled to the "fullest extent possible."¹⁰ This contrast, in itself, is revealing. But the dispositive factor in our interpretation is the expressed views of the Senate and House conferees who wrote the "fullest extent possible" language into NEPA.

⁹ Senator Jackson specifically recognized the requirement of a balancing judgment. He said on the floor of the Senate: "Subsection 102 (b) requires the development of procedures designed to insure that all relevant environmental values and amenities are considered in the calculus of project development and decision-making. Subsection 102(c) establishes a procedure designed to insure that in instances where a proposed major Federal action would have a significant impact on the environment that the impact has in fact been considered, that any adverse effects which cannot be avoided are justified by some other stated consideration of national policy, that short-term uses are consistent with long-term productivity, and that any irreversible and irretrievable commitments of resources are warranted." 115 Cong.Rec. (Part 21) 29055 (1969).

¹⁰ The Commission, arguing before this court, has mistakenly confused the two standards using the § 101(b) language to suggest that it has broad discretion in performance of § 102 procedural duties. We stress the necessity to separate the two, substantive and procedural, standards. See text at page 1128 *infra*.

They stated:¹¹

"The purpose of the new language is to make it clear that each agency of the Federal Government shall comply with the directives set out in [Section 102(2)] unless the existing law applicable to such agency's operations expressly prohibits or makes full compliance with one of the directives impossible. Thus, it is the intent of the conferees that the provision 'to the fullest extent possible' shall not be used by any Federal agency as a means of avoiding compliance with the directives set out in section 102. Rather, the language in section 102 is intended to assure that all agencies of the Federal Government shall comply with the directives set out in said section 'to the fullest extent possible' under their statutory authorizations and that no agency shall utilize an excessively narrow construction of its existing statutory authorizations to avoid compliance."

Thus the Section 102 duties are not inherently flexible. They must be complied with to the fullest extent, unless there is a clear conflict of statutory authority.¹² Considerations of administrative difficulty, delay or economic, cost will not suffice to strip the section of its fundamental importance.

We conclude, then, that Section 102 of NEPA mandates a particular sort of careful and informed decision-making process and creates judicially enforceable duties. The reviewing courts probably cannot reverse a substantive decision on its merits, under Section 101, unless it be shown that the actual balance of costs and benefits that was struck was arbitrary or clearly gave insufficient weight to environmental values. But if the decision was reached procedurally without individualized consideration and balancing of environmental factors conducted fully and in good faith-it is the responsibility of the courts to reverse. As one District Court has said of Section 102 requirements:

"It is hard to imagine a clearer or stronger mandate to the Courts."¹³

¹¹ The Senators' views are contained in "Major Changes in S.1075 as passed by the Senate", 115 Cong.Rec.(Part 30) at 40418. The Representatives' views are contained in a separate filed statement filed with the Conference Report, 115 Cong.Rec.(Part 29) 39703 (1969).

¹² Section 104 of NEPA provides that the Act does not eliminate any duties already imposed by other "specific statutory obligations." Only when such specific obligations conflict with NEPA do agencies have a right under § 104 and the "fullest extent possible" language to dilute their compliance with the full letter and spirit of the Act. See text at page 1123 *infra*. Sections 103 and 105 also support the general interpretation that the "fullest extent possible" language exempts agencies from full compliance only when there is a conflict of statutory obligations. Section 103 provides for agency review of existing obligations in order to discover and, if possible, correct any conflicts. See text at pages 1020-1021 *infra*. And § 105 provides that "the policies and goals set forth in this Act are supplementary to those set forth in existing authorizations of Federal agencies. "The report of the House conferees states that § 105 "does not obviate the requirement that the Federal agencies conduct their activities in accordance with the provisions of this bill unless to do so would clearly violate their existing statutory obligations." 115 Cong.Rev. (Part 29) at 39703. The section-by-section analysis by the Senate conferees makes exactly the same point in slightly different language. 115 Cong.Rec. (Part 30) at 40418. The guidelines published by the Council on Environmental Quality state that "the phrase 'to the fullest extent possible' is meant to make clear that each agency of the Federal Government shall comply with the requirement unless existing law applicable to the agency's operations expressly prohibits or makes compliance impossible." 36 Fed.Reg at 7724.

¹³ Texas Committee on Natural Resources v. United States, W.D.Tex., I Envir. Rpts-Cas. 1303, 1304 (1970). A few of the courts, which have considered NEPA to date, have made statements stressing the

In the cases before us now, we do not have to review a particular decision by the Atomic Energy Commission granting a construction permit or an operating license. Rather, we must review the Commission's recently promulgated rules which govern consideration of environmental values in all such individual decisions.¹⁴The rules were devised strictly in order to comply with the NEPA procedural requirements-but petitioners argue that they fall far short of the congressional mandate.

The period of the rules gestation does not indicate over enthusiasm on the Commission's part. NEPA went into effect on January 1, 1970. On April 2, 1970-three months later-the Commission issued its first, short policy statement on implementation of the Act's procedural provisions.¹⁵ After another span of two months, the Commission published a notice of proposed rule making in the Federal Register.¹⁶ Petitioners submitted substantial comments critical of the proposed rules. Finally, on December 3, 1970, the Commission terminated its long rule making proceeding by issuing a formal amendment, labeled Appendix D, to its governing regulations.¹⁷ Appendix D is a somewhat revised version of the earlier proposal and, at last, commits the Commission to consider environmental impact in its decision making process.

The procedure for environmental study and consideration set up by the Appendix D rules is as follows: Each applicant for an initial construction permit must submit to the Commission his own "environmental report," presenting his assessment of the environmental impact of the planned facility and possible alternatives, which would alter the impact. When construction is completed and the applicant applies for a license to operate the new facility, he must again submit an "environmental report" noting any factors which have changed since the original report. At each

discretionary aspects of the Act. See, e.g., *Pennsylvania Environmental Council v. Bartlett*, M.D.Pa., 315 F. Supp. 238 (1970); *Bucklein v. Volpe*, N.D.Cal., 2 *Envir. Rpts-Cas.* 1082, 1083 (1970). The Commission and intervenors rely upon these statements quite heavily. However, their reliance is misplaced, since the courts in question were not referring to the procedural duties created by NEPA. Rather, they were concerned with the Act's substantive goals or with such peripheral matters as retroactive application of the Act.

The general interpretation of NEPA, which we outline in text at page 1112 *supra*, is fully supported by the scholarly commentary. See, e.g., *Donovan*, *The Federal Government and Environmental Control: Administrative Reform on the Executive Level*, 12 *B.C.Ind. & Com.LRev.* 541 (1971); *Hanks & Hanks*, *An Environmental Bill of Rights: The Citizen Suit and the National Environmental Policy Act of 1969*, 24 *Rutg. Rev.* 231 (1970); *Sive*, *Some Thoughts of an Environmental Lawyer in the Wilderness of Administrative Law*, 70 *Colum. LRev.* 612, 643-650 (1970); *Peterson*, *An Analysis of Title I of the National Environmental Policy Act of 1969*, 1 *Envir.LRptr.* 50035 (1971); *Yannacone*, *National Environmental Policy Act of 1969*, 1 *Envir.Law* 8 (1970); *Note*, *The National Environmental Policy Act: A Sheep in Wolf's Clothing?*, 37 *Brooklyn LRev.* 139 (1970).

¹⁴ In Case No. 24,871, petitioners attack four aspects of the Commission's rules, which are outlined in text. In Case No. 24,839, they challenge a particular application of the rules in the granting of a particular construction permit-that for the Calvert Cliffs Nuclear Power Plant. However, their challenge consists largely of an attack on the substance of one aspect of the rules also attacked in Case No. 24,871. Thus we are able to resolve both cases together, and our remand to the Commission for further rule making includes a remand for further consideration relating to the Calvert Cliffs Plant in Case No. 24,839. See Part V of this opinion, *infra*.

¹⁵ 35 Fed.Reg. 5463 (April 2, 1970).

¹⁶ 35 Fed.Reg. 8594 (June 3, 1970).

¹⁷ 35 Fed.Reg. 18469 (December 4, 1970). The version of the rules finally adopted is now printed in 10 C.F.R. § 50, App. D, pp. 246-250 (1971).

stage, the Commission's regulatory staff must take the applicant's report and prepare its own "detailed statement" of environmental costs, benefits and alternatives. The statement will then be circulated to other interested and responsible agencies and made available to the public. After comments are received from those sources, the staff must prepare a final "detailed statement" and make a final recommendation on the application for a construction permit or operating license.

Up to this point in the Appendix D rules petitioners have raised no challenge. However, they do attack four other, specific parts of the rules, which, they say, violate the requirements of Section 102 of NEPA. Each of these parts in some way limits full consideration and individualized balancing of environmental values in the Commission's decision making process. (1) Although environmental factors must be considered by the agency's regulatory staff under the rules, such factors need not be considered by the hearing board conducting an independent review of staff recommendations, unless affirmatively raised by outside parties or staff members. (2) Another part of the procedural rules prohibits any such party from raising no radiological environmental issues at any hearing if the notice for that hearing appeared in the Federal Register before March 4, 1971. (3) Moreover, the hearing board is prohibited from conducting an independent evaluation and balancing of certain environmental factors if other responsible agencies have already certified that their own environmental standards are satisfied by the proposed federal action. (4) Finally, the Commission's rules provide that when a construction permit for a facility has been issued before NEPA compliance was required and when an operating license has yet to be [** 19] issued, the agency will not formally consider environmental factors or require modifications in the proposed facility until the time of the issuance of the operating license. Each of these parts of the Commission's rules will be described at greater length and evaluated under NEPA in the following sections of this opinion.

NEPA makes only one specific reference to consideration of environmental values in agency review processes. Section 102(2) (C) provides that copies of the staff's "detailed statement" and comments thereon "shall accompany the proposal through the existing agency review processes." The Atomic Energy Commission's rules may seem in technical compliance with the letter of that provision. They state:

"12. If any party to a proceeding * * * raises any [environmental] issue the Applicant's Environmental Report and the Detailed Statement will be offered in evidence. The atomic safety and licensing board will make findings of fact on, and resolve the matters in controversy among the parties with regard to those issues. Depending on the resolution of those issues, the permit or license may be granted, denied, or appropriately conditioned to protect environmental values.

"13. When no party to a proceeding * * * raises any [environmental] issue such issues will not be considered by the atomic safety and licensing board. Under such circumstances, although the Applicant's Environmental Report, comments thereon, and the Detailed Statement will accompany the application through the Commission's review processes, they will not be received in evidence, and the Commission's responsibilities under the National Environmental Policy Act of 1969 will be carried out in toto outside the hearing process."¹⁸

The question here is whether the Commission is correct in thinking that its NEPA responsibilities may "be carried out in toto outside the hearing process" whether it is enough that environmental data and evaluations merely "accompany" an application through the review process, but receive no consideration whatever from the hearing board.

¹⁸ IOCF.R. §50, App.D, at 249.

We believe that the Commission's crabbed interpretation of NEPA makes a mockery of the Act. What possible purpose could there be in the Section 102 (2) (C) requirement (that the "detailed statement" accompany proposals through agency review processes) if "accompany" means no more than physical proximity-mandating no more than the physical act of passing certain folders and papers, unopened, to reviewing officials along with other folders and papers? What possible purpose could there be in requiring the "detailed statement" to be before hearing boards, if the boards are free to ignore entirely the contents of the statement? NEPA was meant to do more than regulate the flow of papers in the federal bureaucracy. The word "accompany" in Section 102(2) (C) must not be read so narrowly as to make the Act ludicrous. It must, rather, be read to indicate a congressional intent that environmental factors, as compiled in the "detailed statement," be considered through agency review processes.¹⁹

Beyond Section 102(2) (C), NEPA requires that agencies consider the environmental impact of their actions "to the fullest extent possible." The Act is addressed to agencies as a whole, not only to their professional staffs. Compliance to the "fullest" possible extent would seem to demand that environmental issues be considered at every important stage in the decision making process concerning a particular action-at every stage where an overall balancing of environmental and non-environmental factors is appropriate and where alterations might be made in the proposed action to minimize environmental costs. Of course, consideration, which is entirely duplicative, is not necessarily required. But independent review of staff proposals by hearing boards is hardly a duplicative function. A truly independent review provides a crucial check on the staff's recommendations. The Commission's hearing boards automatically consider non-environmental factors, even though they have been previously studied by the staff. Clearly, the review process is an appropriate stage at which to balance conflicting factors against one another. And, just as clearly, it provides an important opportunity to reject or significantly modify the staff's recommended action. Environmental factors, therefore, should not be singled out and excluded, at this stage, from the proper balance of values envisioned by NEPA.

The Commission's regulations provide that in an uncontested proceeding the hearing board shall on its own "determine whether the application and the "record of the proceeding contain sufficient information, and the review of the application by the Commission's regulatory staff has been adequate, to support affirmative findings on" various non environmental factors.²⁰ NEPA requires at least as much automatic consideration of environmental factors. In uncontested hearings, the board need not necessarily go over the same ground covered in the "detailed statement." But it must at least examine the statement carefully to determine whether "the review * * * by the Commission's regulatory staff has been adequate." And it must independently consider the final balance among conflicting factors that is struck in the staff's recommendation. The rationale of the Commission's limitation of environmental issues to hearings in which parties affirmatively raise those issues may have been one of economy. It may have been supposed that,

¹⁹ The guidelines issued by the Council on Environmental Quality emphasize the importance of consideration of alternatives to staff recommendations during the agency review process: "A rigorous exploration and objective evaluation of alternative actions that might avoid some or all of the adverse environmental effects is essential. Sufficient analysis of such alternatives and their costs and impact on the environment should accompany the proposed action through the agency review process in order not to foreclose prematurely options which might have less detrimental effects" 36 Fed.Reg. at 7725. The Council also states that an objective of its guidelines is "to assist agencies in implementing not only the letter, but the spirit, of the Act" Id. at 7724.

²⁰ 10 C.F.R. § 2.104(b) (2) (1971).

whenever there are serious environmental costs overlooked or uncorrected by the staff, some party will intervene to bring those costs to the hearing board's attention. Of course, independent review of the "detailed statement" and independent balancing of factors in an uncontested hearing will take some time. If it is done properly, it will take a significant amount of time. But all of the NEPA procedures take time. Such administrative costs are not enough to undercut the Act's requirement that environmental protection be considered "to the fullest extent possible," see text at page 1114, *supra*. It is, moreover, unrealistic to assume that there will always be an intervener with the information, energy and money required to challenge a staff recommendation, which ignores environmental costs. NEPA establishes environmental protection as an integral part of the Atomic Energy Commission's basic mandate. The primary responsibility for fulfilling that mandate lies with the Commission. Its responsibility is not simply to sit back, like an umpire, and resolve adversary contentions at the hearing stage. Rather, it must itself take the initiative of considering environmental values at every distinctive and comprehensive stage of the process beyond the staff's evaluation and recommendation.²¹

Congress passed the final version of NEPA in late 1969, and the Act went into full effect on January 1, 1970. Yet the Atomic Energy Commission's rules prohibit any consideration of environmental issues by its hearing boards at proceedings officially noticed before March 4, 1971.²² This is 14 months after the effective date of NEPA. And the hearings affected may go on for as much as a year longer until final action is taken. The result is that the Commission, without full NEPA compliance, may take major federal actions having a significant environmental impact more than two years after the Act's effective date. In view of the importance of environmental consideration during the agency review process, see Part II *supra*, such a time lag is shocking.

The Commission explained that its very long time lag was intended "to provide an orderly period of transition in the conduct of the Commission's regulatory proceedings and to avoid unreasonable delays in the construction and operation of nuclear power plants urgently needed to meet the national requirements for electric power."²³ Before this court, it has claimed authority for its action, arguing that "the statute did not lay down detailed guidelines and inflexible timetables for its implementation; and we find in it no bar to agency provisions which are designed to accommodate transitional implementation problems."²⁴

²¹ In recent years, the courts have become increasingly strict in requiring that federal agencies live up to their mandates to consider the public interest. They have become increasingly impatient with agencies, which attempt to avoid or dilute their statutorily imposed role as protectors of public interest values beyond the narrow concerns of industries being regulated. See, e.g., *Udall v. FPC*, 387 U.S. 428, 87 S. Ct. 1712, 18 L. Ed. 2d 869 (1967); *Environmental Defense Fund, Inc. v. Ruckelshaus*, 142 U.S.App.D.C. 74, 439 F.2d 584 (1971); *Moss v. C. A. B.*, 139 U.S.App.D.C. 150,430 F.2d 891 (1970); *Environmental Defense Fund, Inc. v. U. S. Dept. of H. E. & W.*, 138 U.S.App.D.C. 381, 428 F.2d 1083 (1970). In commenting on the Atomic Energy Commission's pre-NEPA duty to consider health and safety matters, the Supreme Court said "the responsibility for safeguarding that health and safety belongs under the statute to the Commission." *Power Reactor Development Co. v. International Union of Elec., Radio and Mach. Workers*, 367 U.S. 396,404,81 S. Ct. 1529, 1533,6 L. Ed. 2d 924 (1961). The Second Circuit has made the same point regarding the Federal Power Commission: "In this case, as in many others, the Commission has claimed to be the representative of the public interest. This role does not permit it to act as an umpire blandly calling balls and strikes for adversaries appearing before it; the right of the public must receive active and affirmative protection at the hands of the Commission." *Scenic Hudson Preservation Conference v. FPC*, 2 Cir., 354 F.2d 608,620 (1965).

²² 10 C.F.R. § 50, App. D, at 249.

²³ 35 Fed.Reg. 18470 (December 4, 1970).

²⁴ Brief for respondents in No. 24,871 at 49.

Again, the Commission's approach to statutory interpretation is strange indeed—so strange that it seems to reveal a rather thoroughgoing reluctance to meet the NEPA procedural obligations in the agency review process, the stage at which deliberation is most open to public examination and subject to the participation of public interveners. The Act, it is true, lacks an "inflexible timetable" for its implementation. But it does have a clear effective date, consistently enforced [**28] by reviewing courts up to now. Every federal court having faced the issues has held that the procedural requirements of NEPA must be met in order to uphold federal action taken after January 1, 1970.²⁵ The absence of a "timetable" for compliance has never been held sufficient, in itself, to put off the date on which a congressional mandate takes effect. The absence of a "timetable," rather, indicates that compliance is required forthwith.

The only part of the Act which even implies that implementation may be subject, in some cases, to some significant delay is Section 103. There, Congress provided that all agencies must review "their present statutory authority, administrative regulations, and current policies and procedures for the purpose of determining whether there are any deficiencies or inconsistencies therein which prohibit full compliance" with NEPA. Agencies finding some such insuperable difficulty are obliged to "propose to the President not later than July 1, 1971, such measures as may be necessary to bring their authority and policies into conformity with the intent, purposes, and procedures set forth in this Act."

The Commission, however, cannot justify its time lag under these Section 103 provisions. Indeed, it has not attempted to do so; only interveners have raised the argument. Section 103 could support a substantial delay only by an agency, which in fact discovered an insuperable barrier to compliance with the Act and required time to formulate and propose the needed reformatory measures. The actual review of existing statutory authority and regulations cannot be a particularly lengthy process [**30] for experienced counsel of a federal agency. Of course, the Atomic Energy Commission discovered no obstacle to NEPA implementation. Although it did not report its conclusion to the President until October 2, 1970, that nine-month delay (January to October) cannot justify so long a period of noncompliance with the Act. It certainly cannot justify a further delay of compliance until March 4, 1971.

No doubt the process of formulating procedural rules to implement NEPA takes some time. Congress cannot have expected that federal agencies would immediately begin considering environmental issues on January 1, 1970. But the effective date of the Act does set a time for agencies to begin adopting rules and it demands that they strive, "to the fullest extent possible," to be prompt in the process. The Atomic Energy Commission has failed in this regard.²⁶ Consideration of environmental issues in the agency review process, for example, is quite clearly compelled by the Act.²⁷ The Commission cannot justify its 11-month delay in adopting rules *on*

²⁵ In some cases, the courts have had a difficult time determining whether particular federal actions were "taken" before or after January 1, 1970. But they have all started from the basic rule that any action taken after that date must comply with NEPA's procedural requirements. See Note, Retroactive Application of the National Environmental Policy Act of 1969, 69 Mich.L.Rev. 732 (1971), and cases cited therein. Clearly, any hearing held between January 1, 1970 and March 4, 1971 which culminates in the grant of a permit or license is a federal action taken after the Act's effective date.

²⁶ See text at page 1116 *supra*.

²⁷ As early as March 5, 1970, President Nixon stated in an executive order that NEPA requires consideration of environmental factors at public hearings. Executive Order 11514, 35 Fed.Reg. 4247 (March 5, 1970). See also Part II of this opinion.

this point as part of a difficult, discretionary effort to decide whether or not its hearing boards should deal with environmental questions at all.

Even if the long delay had been necessary, however, the Commission would not be relieved of all NEPA responsibility to hold public hearings on the environmental consequences of actions taken between January 1, 1970 and final adoption of the rules. Although the Act's effective date may not require instant compliance, it must at least require that NEPA procedures, once established, be applied to consider prompt alterations in the plans or operations of facilities approved without compliance.²⁸ Yet the Commission's rules contain no such provision. Indeed, they do not even apply to the hearings still being conducted at the time of their adoption on December 3, 1970-Or, for that matter, to hearings [**32] initiated in the following three months.

The delayed compliance date of March 4th 1971, then, cannot be justified by the Commission's long drawn out rule making process.

Strangely, the Commission has principally relied on more pragmatic arguments. It seems an unfortunate affliction of large organizations to resist new procedures and to envision massive roadblocks to their adoption. Hence the Commission's talk of the need for an "orderly transition" to the NEPA procedures. It is difficult to credit the Commission's argument that several months were needed to work the consideration of environmental values into its review process. Before

²⁸ In Part V of this opinion, we hold that the Commission must promptly consider the environmental impact of projects initially approved before January 1, 1970 but not yet granted an operating license. We hold that the Commission may not wait until construction is entirely completed and consider environmental factors only at the operating license hearings; rather, before environmental damage has been irreparably done by full construction of a facility, the Commission must consider alterations in the plans. Much the same principle of making alterations while they still may be made at relatively small expense-applies to projects approved without NEPA compliance after the Act's effective date. A total reversal of the basic decision to construct a particular facility or take a particular action may then be difficult, since substantial resources may already have been committed to the project. Since NEPA must apply to the project in some fashion, however, it is essential that it apply as effectively as possible-requiring alterations in parts of the project to which resources have not yet been inalterably committed at great expense.

One District Court has dealt with the problem of instant compliance with NEPA. It suggested another measure which agencies should take while in the process of developing rules. It said: "The NEPA does not require the impossible. Nor would it require, in effect, a moratorium on all projects, which had an environmental impact while awaiting compliance with § 102(2) (B). It would suffice if the statement pointed out this deficiency. The decision makers could then determine whether any purpose would be served in delaying the project while awaiting the development of such criteria." *Environmental Defense Fund, Inc. v. Corps of Engineers, E.D.Ark.*, 325 F. Supp. 749, 758 (1971). Apparently, the Atomic Energy Commission did not even go this far toward considering the lack of a NEPA public hearing as a basis for delaying projects between the Act's effective date and adoption of the rules.

Of course, on the facts of these cases, we need not express any final view on the legal effect of the Commission's failure to comply with NEPA after the Act's effective date. Mere post hoc alterations in plans may not be enough, especially in view of the Commission's long delay in promulgating rules. Less than a year ago, this court was asked to review a refusal by the Atomic Energy Commission to consider environmental factors in granting a license. We held that the case was not yet ripe for review. But we stated: "If the Commission persists in excluding such evidence, it is courting the possibility that if error is found a court will reverse its final order, condemn its proceeding as so much waste motion, and order that the proceeding be conducted over again in way that realistically permits de novo consideration of the tendered evidence."

Thermal Ecology Must be Preserved v. AEC, 139 U.S.App.D.C. 366, 368, 433 F.2d 524, 526 (1970).

the enactment of NEPA, the Commission already had regulations requiring that hearings include health, safety and radiological matters.²⁹ The introduction of environmental matters cannot have presented a radically unsettling problem. And, in any event, the obvious sense of urgency on the part of Congress should make clear that a transition, however "orderly," must proceed at a pace faster than a funeral procession.

In the end, the Commission's long delay seems based upon what it believes to be a pressing national power crisis. Inclusion of environmental issues in pre-March 4th, 1971 hearings might have held up the licensing of some power plants for a time. But the very purpose of NEPA was to tell federal agencies that environmental protection is as much a part of their responsibility as is protection and promotion of the industries they regulate. Whether or not the spectre of a national power crisis is as real as the Commission apparently believes, it must not be used to create a blackout of environmental consideration in the agency review process. NEPA compels a case-by-case examination and balancing of discrete factors. Perhaps there may be cases in which the need for rapid licensing of a particular facility would justify a strict time limit on a hearing board's review of environmental issues; but a blanket banning of such issues until March 4, 1971 is impermissible under NEPA.

The sweep of NEPA is extraordinarily broad, compelling consideration of any and all types of environmental impact of federal action. However, the Atomic Energy Commission's rules specifically exclude from [**35] full consideration a wide variety of environmental issues. First, they provide that no party may raise and the Commission may not independently examine any problem of water quality—perhaps the most significant impact of nuclear power plants. Rather, the Commission indicates that it will defer totally to water quality standards devised and administered by state agencies and approved by the federal government under the Federal Water Pollution Control Act.³⁰ Secondly, the rules provide for similar abdication of NEPA authority to the standards of other agencies:

"With respect to those aspects of environmental quality for which environmental quality standards and requirements have been established by authorized Federal, State, and regional agencies, proof that the applicant is equipped to observe and agrees to observe such standards and requirements will be considered a satisfactory showing that there will not be a significant, adverse effect on the environment. Certification by the appropriate agency that there is reasonable assurance that the applicant for the permit or license will observe such standards and requirements will be considered dispositive for this purpose."³¹ The most the Commission will do is include a condition in all construction permits and operating licenses requiring compliance with

²⁹ See 10 C.F.R. § 20 (197 I) for the standards which the Commission had developed to deal with radioactive emissions which might pose health or safety problems.

³⁰ 10 C.F.R. § 50, App. D, at 249. Appendix D does require that applicants' environmental reports and the Commission's "detailed statements" include "a discussion of the water quality aspects of the proposed action," *Id.* at 248. But, as is stated in text, it bars independent consideration of those matters by the Commission's reviewing boards at public hearings. It also bars the Commission from requiring—or even considering any water protection measures not already required by the approving state agencies. See Note 31 *infra*.

The section of the Federal Water Pollution Control Act establishing a system of state agency certification is § 21, as amended in the Water Quality Improvement Act of 1970. 33 U.S.c.A. § 1171 (1970). In text below, this section is discussed as part of the Water Quality Improvement Act.

³¹ 10 C.F.R. § 50, App. D, at 249.

the water quality or other standards set by such agencies.³² The upshot is that the NEPA procedures, viewed by the Commission as superfluous, will wither away in disuse, applied only to those environmental issues wholly unregulated by any other federal, state or regional body.

We believe the Commission's rule is in fundamental conflict with the basic purpose of the Act. NEPA mandates a case-by-case balancing judgment on the part of federal agencies. In each individual case, the particular economic and technical benefits of planned action must be assessed and then weighed against the environmental costs; alternatives must be considered which would affect the balance of values. See text at page 1113 supra. The magnitude of possible benefits and possible costs may lie anywhere on a broad spectrum. Much will depend on the particular magnitudes involved in particular cases. In some cases, the benefits will be great enough to justify a certain quantum of environmental costs; in other cases, they will not be so great and the proposed action may have to be abandoned or significantly altered so as to bring the benefits and costs into a proper balance. The point of the individualized balancing analysis is to ensure that, with possible alterations, the optimally beneficial action is finally taken.

Certification by another agency that its own environmental standards are satisfied involves an entirely different kind of judgment. Such agencies, without overall responsibility for the particular federal action in question, attend only to one aspect of the problem: the magnitude of certain environmental costs. They simply determine whether those costs exceed an allowable amount. Their' certification does not mean that they found no environmental damage whatever. In fact, there may be significant environmental damage (e.g., water pollution), but not quite enough to violate applicable (e.g., water quality) standards. Certifying agencies do not attempt to weigh that damage against the opposing benefits. Thus the balancing analysis remains to be done. It may be that the environmental costs, though passing prescribed standards, are nonetheless great enough to outweigh the particular economic and technical benefits involved in the planned action. The only agency in a position to make such a judgment is the agency with overall responsibility for the proposed federal action-the agency to which NEPA is specifically directed.

The Atomic Energy Commission, abdicating entirely to other agencies' certifications, neglects the mandated balancing analysis. Concerned members of the public are thereby precluded from raising a wide range of environmental issues in order to affect particular Commission decisions. And the special purpose of NEPA is subverted.

Arguing before this court, the Commission has made much of the special environmental expertise of the agencies, which set environmental standards. NEPA did not overlook this consideration. Indeed, the Act is quite explicit in describing the attention, which is to be given to the views and standards of other agencies. Section 102 (2) (C) provides:

"Prior to making any detailed statement, the responsible Federal official shall consult with and obtain the comments of any Federal agency which has jurisdiction by law or special expertise with respect to any environmental impact involved. Copies of such statement and the comments and views of the appropriate Federal, State, and local agencies, which are authorized to develop and enforce environmental standards, shall be made available to the President, the Council on Environmental Quality and to the public."

Thus the Congress was surely cognizant of federal, state and local agencies "authorized to develop and enforce environmental standards." But it provided, in Section 102(2) (C), only for

³² Ibid.

full consultation. It most certainly did not authorize a total abdication to those agencies. Nor did it grant a license to disregard the main body of NEPA obligations. Of course, federal agencies such as the Atomic Energy Commission may have specific duties, under acts other than NEPA, to obey particular environmental standards. Section 104 of NEPA makes clear that such duties are not to be ignored:

"Nothing in Section 102 or 103 shall in any way affect the specific statutory obligations of any Federal agency (1) to comply with criteria or standards of environmental quality, (2) to coordinate or consult with any other Federal or State agency, or (3) to act, or refrain from acting contingent upon the recommendations or certification of any other Federal or State agency."

On its face, Section 104 seems quite unextraordinary, intended only to see that the general procedural reforms achieved in NEPA do not wipe out the more specific environmental controls imposed by other statutes. Ironically, however, the Commission argues that Section 104 in fact allows other statutes to wipe out NEPA.

Since the Commission places great reliance on Section 104 to support its abdication to standard setting agencies, we should first note the section's obvious limitation. It deals only with deference to such agencies, which is compelled by "specific statutory obligations." The Commission has brought to our attention one "specific statutory obligation": the Water Quality Improvement Act of 1970 (WQIA).³³ That Act prohibits federal licensing bodies, such as the Atomic Energy Commission, from issuing licenses for facilities which pollute "the navigable waters of the United States" unless they receive a certification from the appropriate agency that compliance with applicable water quality standards is *reasonably* assured. Thus Section 104 applies in some fashion to consideration of water quality matters. But it definitely cannot support—indeed, it is not even relevant to the Commission's wholesale abdication to the standards and certifications of any and all federal, state and local agencies dealing with matters other than water quality.

As to water quality, Section 104 and WQIA clearly *require* obedience to standards set by other agencies. But obedience does not imply total abdication. Certainly, the language of Section 104 does not authorize an abdication. It does not suggest that other "specific statutory obligations" will entirely replace NEPA. Rather, it ensures that three sorts of "obligations" will not be undermined by NEPA: (1) the obligation to "comply" with certain standards, (2) the obligation to "coordinate" or "consult" with certain agencies, and (3) the obligation to "act, or refrain from acting contingent upon" a certification from certain agencies. WQIA imposes the third sort of obligation. It makes the granting of a license by the Commission "contingent upon" a water quality certification. But it does not require the Commission to grant a license *once* a certification has been issued. It does not preclude the Commission from demanding water pollution controls from its licensees which are more strict than those demanded by the applicable water quality standards of the certifying agency.³⁴ It is very important to understand [* 1125] these facts about

³³ The relevant portion is 33 U.S.C.A. § 1171. See Note 30 *supra*.

³⁴ The relevant language in WQIA seems carefully to avoid any such restrictive implication. It provides that "each Federal agency shall insure compliance with applicable water quality standards U.S.C.A. § 1171(a). It also provides that "no license or permit shall be granted until the certification required by this section has been obtained or has been waived. No license or permit shall be granted if certification has been denied." 33 U.S.C.A. § 1171(b) (1). Nowhere does it indicate that certification must be the final and only protection against unjustified water pollution a fully sufficient as well as a necessary condition for issuance of a federal license or permit.

We also take note of § 21 (c) of WQIA, which states: "Nothing in this section shall be construed to limit the authority of any department or agency pursuant to any other provision of law to require compliance with

WQIA, for all that Section 104 [**43] of NEPA does is to reaffirm other "specific statutory obligations." Unless those obligations are plainly mutually exclusive with the requirements of NEPA, the specific mandate of NEPA must remain in force. In other words, Section 104 can operate to relieve an agency of its NEPA duties only if other "specific statutory obligations" clearly preclude performance of those duties.

Obedience to water quality certifications under WQIA is not mutually exclusive with the NEPA procedures. It does not preclude performance of the NEPA duties. Water quality certifications essentially establish a minimum condition for the granting of a license. But they need not end the matter. The Commission can then go on to perform the very different operation of balancing the overall benefits and costs of a particular proposed project, and consider alterations (above and beyond the applicable water quality standards) which would further reduce environmental damage. Because the Commission can still conduct the NEPA balancing analysis, consistent with WQIA, Section 104 does not exempt it from doing so, and it, therefore, must conduct the obligatory analysis under the prescribed procedures.

We believe the above result follows from the plain language of Section 104 of NEPA and WQIA. However, the Commission argues that we should delve beneath the plain language and adopt a significantly different interpretation. It relies entirely upon certain statements made by Senator Jackson and Senator Muskie, the sponsors of NEPA and WQIA respectively.³⁵ Those statements indicate that Section 104 was the product of a compromise intended to eliminate any conflict between the two bills then in the Senate. The overriding purpose was to prevent NEPA from eclipsing obedience to more specific standards under WQIA. Senator Muskie, distrustful of "self-policing by Federal agencies which pollute or license pollution," was particularly concerned that NEPA not undercut the independent role of standard setting agencies.³⁶ Most of his and Senator Jackson's comments stop short of suggesting that NEPA would have no application in water quality matters; their goal was to protect WQIA, not to undercut NEPA. Our interpretation of Section 104 is perfectly consistent with that purpose.

Yet the statements of the two Senators occasionally indicate they were willing to go farther, to permit agencies such as the Atomic Energy Commission to forego at least some NEPA procedures in consideration of water quality. Senator Jackson, for example, said, "The compromise worked out between the bills provides that the licensing agency will not have to make a detailed statement on water quality if the State or other appropriate agency has made a certification pursuant to (WQIA)." ³⁷ (* 1126] Perhaps Senator Jackson would have required

applicable water quality standards. * * * 33 U.S.c.A. § I 171(c).

³⁵ The statements by Senators Jackson and Muskie were made, first, at the time the Senate originally considered WQIA. 115 Cong.Rec. (Part 21) at 29052-29056. Another relevant colloquy between the two Senators occurred when the Senate considered the Conference Report on NEPA. 115 Cong.Rec. (Part 30) at 40415-40425. Senator Muskie made a further statement at the time of final Senate approval of the Conference Report on WQIA. 116 Cong.Rec. (daily ed.) S4401 (March 24, 1970).

³⁶ 115 Cong.Rec. (Part 21) at 29053.

³⁷ Ibid. See also id. at 29056. Senator Jackson appears not to have ascribed major importance to the compromise. He said, "It is my understanding that there was never any conflict between this section [of WQIA] and the provisions of [NEPA]. If both bills were enacted in their present form, there would be a requirement for State certification, as well as a requirement that the licensing agency make environmental findings." Id. at 29053. He added, "The agreed-upon changes mentioned previously would change the language of some of these requirements, but their substance would remain relatively unchanged." Id. at

some consideration and balancing of environmental costs-despite the lack of a formal detailed statement but he did not spell out his views. No Senator, other than Senators Jackson and Muskie, addressed himself specifically to the problem during floor discussion. Nor did any member of the House of Representatives.³⁸ The section-by-section analysis of NEPA submitted to the Senate clearly stated the overriding purpose of Section 104: that "no agency may substitute the procedures outlined in this Act for more restrictive and specific procedures established by law governing its activities."³⁹ The report does not suggest there that NEPA procedures should be entirely abandoned, but rather that they should not be "substituted" for more specific standards. In one rather cryptic sentence, the analysis does muddy the waters somewhat, stating that "it is the intention that where there is no more effective procedure already established, the procedure of this act will be followed."⁴⁰ Notably, however, the sentence does not state that in the presence of "more effective procedures" the NEPA procedure will be abandoned entirely. It seems purposefully vague, quite possibly meaning that obedience to the certifications of standard setting agencies must alter, by supplementing, the normal "procedure of this act."

This rather meager legislative history in our view cannot radically transform the purport of the plain words of Section 104. Had the Senate sponsors fully intended to allow a total abdication of NEPA responsibilities in water quality matters-rather than a supplementing of them by strict obedience to the specific standards of WQIA the language of Section 104 could easily have been changed. As the Supreme Court often has said, the legislative history of a statute (particularly such relatively meager and vague history as we have here) cannot radically affect its interpretation if the language of the statute is clear. See, e.g., *Packard Motor Car Co. v. NLRB*, 330 U.S. 485, 67 S. Ct. 789, 91 L. Ed. 1040 (1947); *Kuehner v. Irving Trust Co.*, 299 U.S. 445, 57 S. Ct. 298, 81 L. Ed. 340 (1937); *Fairport, Painesville & Eastern R. Co. v. Meredith*, 292 U.S. 589, 54 S. Ct. 826, 78 L. Ed. 1446 (1934); *Wilbur v. United States ex rel. Vindicator Consolidated Gold Mining Co.*, 284 U.S. 231, 52 S. Ct. 113, 76 L. Ed. 261 (1931). In a recent case interpreting a veterans' act, the Court set down the principle which must govern our approach to the case before us:

"Having concluded that the provisions of § I are clear and unequivocal on their face, we find no need to resort to the legislative history of the Act. Since the State has placed such heavy reliance upon that history, however, we do deem it appropriate to point out that this history is at best inconclusive. It is true, as the State points out, that Representative Rankin, as Chairman of the Committee handling the bill on the floor of the House, expressed his view during the course of discussion of the bill on the floor that the 1941 Act would not apply to [the sort of case in question]. But such statements, even when they stand alone, have never been regarded as sufficiently compelling to justify deviation from the plain language of a statute. *United States v. Oregon*, 366 U.S. 643, 648, 81 S. Ct. 1278, 1281, 6 L. Ed. 2d 575 (1961). (Footnotes omitted.) It is, after all, the plain language of the statute, which all the members of both houses of Congress must approve or disapprove. The courts should not allow that language to be significantly undercut. In

29055. Senator Muskie seemed to give greater emphasis to the supposed conflict between the two bills. See id at 29053; 115 Cong.Rec. (Part 30) at 40425; 116 Cong.Rec. (daily ed.) at S4401.

³⁸ The Commission has called to our attention remarks made by Congressman Harsha. The Congressman did refer to a statement by Senator Muskie regarding NEPA, but it was a statement regarding application of the Act to established environmental control agencies, not regarding the relationship between NEPA and WQIA. 115 Cong.Rec. (Part 30) at 40927 -40928.

³⁹ Id. at 40420.

⁴⁰ Ibid.

cases such as this one, the most we should do to interpret clear statutory wording is to see that the overriding purpose behind the wording supports its plain meaning. We have done that here. And we conclude that Section 104 of NEPA does not permit the sort of total abdication of responsibility practiced by the Atomic Energy Commission.

Petitioners' final attack is on the Commission's rules governing a particular set of nuclear facilities: those for which construction permits were granted without consideration of environmental issues, but for which operating licenses have yet to be issued. These facilities, still in varying stages of construction, include the one of most immediate concern to one of the petitioners: the Calvert Cliffs nuclear power plant on Chesapeake Bay in Maryland.

The Commission's rules recognize that the granting of a construction permit before NEPA's effective date does not justify bland inattention to environmental consequences until the operating license proceedings, perhaps far in the future. The rules require that measures be taken now for environmental protection. Specifically, the Commission has provided for three such measures during the pre-operating license stage. First, it has required that a condition be added to all construction permits, "whenever issued," which would oblige the holders of the permits to observe all applicable environmental standards imposed by federal or state law. Second, it has required permit holders to submit their own environmental report on the facility under construction. And third, it has initiated procedures for the drafting of its staff's "detailed environmental statement" in advance of operating license proceedings.⁴¹

The one thing the Commission has refused to do is take any independent action based upon the material in the environmental reports and "detailed statements." Whatever environmental damage the reports and statements may reveal, the Commission will allow construction to proceed on the original plans. It will not even consider requiring alterations in those plans (beyond compliance with external standards, which would be binding in any event), though the "detailed statements" must contain an analysis of possible alternatives and may suggest relatively inexpensive but highly beneficial changes. Moreover, the Commission has, as a blanket policy, refused to consider the possibility of temporarily halting construction in particular cases pending a full study of a facility's environmental impact. It has also refused to weigh the pros and cons of "back fitting" for particular facilities (alteration of already constructed portions of the facilities in order to incorporate new technological developments designed to protect the environment). Thus reports and statements will be produced, but nothing will be done with them. Once again, the Commission seems to believe that the mere drafting and filing of papers is enough to satisfy NEPA.

The Commission appears to recognize the severe limitation, which its rules impose, on environmental protection. Yet it argues that full NEPA consideration of alternatives and independent action would cause too much delay at the preoperating license stage. It justifies its rules as the most that is "practicable, in the light of environmental needs and other essential considerations of national policy."⁴² It cites, in particular, the "national power crisis" as a consideration of national policy militating against delay in construction of nuclear power facilities.

The Commission relies upon the flexible NEPA mandate to "use all practicable means consistent

⁴¹ 10 C.F.R. § 50, App. D, paras. 1,14.

⁴² Brief for respondents in No. 24,871 at 59.

with other essential considerations of national policy." As we have previously pointed out, however, that mandate applies only to the substantive guidelines set forth in Section 101 of the Act. The procedural duties, the duties to give full consideration to environmental protection, are subject to a much stricter standard of compliance. By now, the applicable principle should be absolutely clear.

NEPA requires that an agency must-to the fullest extent possible under its other statutory obligations--consider alternatives to its actions which would reduce environmental damage. That principle establishes that consideration of environmental matters must be more than a proforma ritual. Clearly, it is pointless to "consider" environmental costs without also seriously considering action to avoid them. Such a full exercise of substantive discretion is required at every important, appropriate and no duplicative stage of an agency's proceedings.

The special importance of the pre-operating license stage is not difficult to fathom. In cases where environmental costs were not considered in granting a construction permit, it is very likely that the planned facility will include some features which do significant damage to the environment and which could not have survived a rigorous balancing of costs and benefits. At the later operating license proceedings, this environmental damage will have to be fully considered. But by that time the situation will have changed radically. Once a facility has been completely constructed, the economic cost of any alteration may be very great. In the language of NEPA, there is likely to be an "irreversible and irretrievable commitment of resources," which will inevitably restrict the Commission's options. Either the licensee will have to undergo a major expense in making alterations in a completed facility or the environmental harm will have to be tolerated. It is all too probable that the latter result would come to pass.

By refusing to consider requirement of alterations until construction is completed, the Commission may effectively foreclose the environmental protection desired by Congress. It may also foreclose rigorous consideration of environmental factors at the eventual operating license proceedings. If "irreversible and irretrievable commitment[s] of resources" have already been made, the license hearing (and any public intervention therein) may become a hollow exercise. This hardly amounts to consideration of environmental values "to the fullest extent possible."

A full NEPA consideration of alterations in the original plans of a facility, then, is both important and appropriate well before the operating license proceedings. It is not duplicative if environmental issues were not considered in granting the construction permit. And it need not be duplicated, absent new information or new developments, at the operating license stage. In order that the pre-operating license review be as effective as possible, the Commission should consider very seriously the requirement of a temporary halt in construction pending its review and the "back fitting" of technological innovations. For no action which might minimize environmental damage may be dismissed out of hand. Of course, final operation of the facility may be delayed thereby. But some delay is inherent whenever the NEPA consideration is conducted-whether before or at the license proceedings. It is far more consistent with the purposes of the Act to delay operation at a stage where real environmental protection may come about than at a stage where corrective action may be so costly as to be impossible.

Thus we conclude that the Commission must go farther than it has in its present rules. It must consider action, as well as file reports and papers, at the pre-operating license stage. As the Commission candidly admits, such consideration does not amount to a retroactive application of NEPA. Although the projects in question may have been commenced and initially approved before January 1, 1970, the Act clearly applies to them since they must still pass muster before going into full operation. All we demand is that the environmental review be as full and fruitful as

possible.

We hold that, in the four respects detailed above, the Commission must revise its rules governing consideration *of* environmental issues. We do not impose a harsh burden on the Commission. For we require only an exercise *of* substantive discretion which will protect the environment "to the fullest extent possible. "No less is required if the grand congressional purposes underlying NEPA are to become a reality.

Remanded *for* proceedings consistent with this opinion.

APPENDIX

Public Law 91-190

91st Congress, S. 1075

January 1, 1970

An Act

To establish a national policy for the environment, to provide for the establishment of a Council on Environmental Quality, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That this Act may be cited as the "National Environmental Policy Act of 1969."

PURPOSE

Sec. 2. The purposes of this Act are: To declare a national policy which will encourage productive and enjoyable harmony between man and his environment; to promote efforts which will prevent or eliminate damage to the environment and biosphere and stimulate the health and welfare of man; to enrich the understanding of the ecological systems and natural resources important to the Nation; and to establish a Council on Environmental Quality.

TITLE I

DECLARATION OF NATIONAL ENVIRONMENTAL POLICY

Sec.101. (a) The Congress, recognizing the profound impact of man's activity on the interrelations of all components of the natural environment, particularly the profound influences of population growth, high-density urbanization, industrial expansion, resource exploitation, and new and expanding technological advances and recognizing further the critical importance of restoring and maintaining environmental quality to the overall welfare and development of man, declares that it is the continuing policy of the Federal Government, in cooperation with State and local governments, and other concerned public and private organizations, to use all practicable means and measures, including financial and technical assistance, in a manner calculated to foster and promote the general welfare, to create and maintain conditions under which man and nature can exist in productive harmony, and fulfill the social, economic, and other requirements of present and future [**60] generations of Americans.

(b) In order to carry out the policy set forth in this Act, it is the continuing responsibility of the Federal Government to use all practicable means, consistent with other essential considerations of national policy, to improve and coordinate Federal plans, functions, programs, and resources to the end that the Nation may:-

- (1) fulfill the responsibilities of each generation as trustee of the environment for succeeding generations;
- (2) assure for all Americans safe; healthful, productive, and esthetically and culturally pleasing surroundings;
- (3) attain the widest range of beneficial uses of the environment without degradation, risk to health or safety, or other undesirable and unintended consequences;
- (4) preserve important historic, cultural, and natural aspects of our national heritage, and maintain, wherever possible, an environment which supports diversity and variety of individual choice;
- (5) achieve a balance between population and resource use which will permit high standards of living and a wide sharing of life's amenities; and
- (6) enhance the quality of renewable resources and approach the maximum attainable recycling of depletable resources.

(c) The Congress recognizes that each person should enjoy a healthful environment and that each person has a responsibility to contribute to the preservation and enhancement of the environment.

Sec. 102. The Congress authorizes and directs that, to the fullest extent possible: (1) the policies, regulations, and public laws of the United States shall be interpreted and administered in accordance with the policies set forth in this Act, and (2) all agencies of the Federal Government shall

(A) utilize a systematic, interdisciplinary approach which will insure the integrated use of the natural and social sciences and the environmental design arts in planning and in decision-making which may have an impact on man's environment;

(B) identify and develop methods and procedures, in consultation with the Council on Environmental Quality established by title II of this Act, which will insure that presently unquantified environmental amenities and values may be given appropriate consideration in decision-making along with economic and technical considerations;

(C) Include in every recommendation or report on proposals for legislation and other major Federal actions [**62] significantly affecting the quality of the human environment, a detailed statement by the responsible official on;

(i) The environmental impact of the proposed action,

(ii) Any adverse environmental effects which cannot be avoided should the proposal be implemented,

(iii) Alternatives to the proposed action,

(iv) The relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity, and

(v) Any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented.

Prior to making any detailed statement, the responsible Federal official shall consult with and obtain the comments of any Federal agency, which has jurisdiction by law or special expertise with respect to any environmental impact involved. Copies of such statement and the comments and views of the appropriate Federal, State, and local agencies, which are authorized to develop and enforce environmental standards, shall be made available to the President, the Council on Environmental Quality and to the public as provided by section 552 of title 5, United States Code, and shall accompany the proposal through the existing agency review processes;

(D) study, develop, and describe appropriate alternatives to recommended courses of action in any proposal which involves unresolved conflicts concerning alternative uses of available resources;

(E) recognize the worldwide and long-range character of environmental problems and, where consistent with the foreign policy of the United States, lend appropriate support to initiatives, resolutions, and programs designed to maximize international cooperation in anticipating and preventing a decline in the quality of mankind's world environment;

(F) make available to States, counties, municipalities, institutions, and individuals, advice and information useful in restoring, maintaining, and enhancing the quality of the environment;

(G) initiate and utilize ecological information in the planning and development of resource-oriented projects; and

(H) assist the Council on Environmental Quality established by title II of this Act.

Sec. 103. All agencies of the Federal Government shall review their present statutory authority, administrative regulations, and current policies and procedures for the [**64] purpose of determining whether there are any deficiencies or inconsistencies therein which prohibit full compliance with the purposes and provisions of this Act and shall propose to the President not later than July 1, 1971, such measures as may be necessary to bring their authority and policies into conformity with the intent, purposes, and procedures set forth in this Act.

Sec.104. Nothing in Section 102 or 103 shall in any way affect the specific statutory obligations of any Federal agency (1) to comply with criteria or standards of environmental quality, (2) to coordinate or consult with any other Federal or State agency, or (3) to act, or refrain from acting contingent upon the recommendations or certification of any other Federal or State agency.

Sec.105. The policies and goals set forth in this Act are supplementary to those set forth in existing authorizations of Federal agencies.

THE COMMONWEALTH OF AUSTRALIA

LAND AND ENVIRONMENT COURT OF NEW SOUTH WALES

LEATCH.....APPELLANT
VERSUS

NATIONAL PARKS,
WILDLIFE SERVICE AND
SHOALHAVEN CITY COUNCIL.....RESPONDENTS

BEFORE: STEIN, J.

Fauna protection – *license to take or kill endangered fauna- road construction – objector appeal against grant of license – fauna impact statement – adequacy – factors to be taken into account – benefits of development to be balanced against likely loss of endangered species.*

This appeal sought to challenge a license issued by the Director General of the National wildlife Service to the Shoal Haven City Council to take or kill protected fauna in the course of carrying out a road development project through the National Park without presenting among others an environmental impact statement.

HELD:

1. A license to take or kill endangered fauna should not in most circumstances be “general” in its coverage of endangered species but should specify the species which it permits to be taken.
2. The period of a license to take or kill endangered fauna should be confined, so far as reasonable, because of possible changes in the physical environment and state of scientific knowledge.
3. The provisions allowing the Director General to seek further information from an applicant is clearly to assist the decision maker in his task to inform the public and enable its participation and to supplement the fauna impact statement.
4. When there is a threat of significant reduction or loss of biodiversity, lack of full scientific certainty should not be used as a reason for postponing measures to avoid such a threat.
5. Application of the precautionary principal appears to be most apt in a situation of a scarcity of scientific knowledge of species population. The state of knowledge is such that one should not grant a license to “take or kill” the species until much more is known.

Appeal allowed and license denied.

LEATCH

VERSUS

**NATIONAL PARKS AND WILDLIFE SERVICE AND SHOALHAVEN CITY COUNCIL
[LAND AND ENVIRONMENT COURT OF NEW SOUTH WALES]**

1st -5th, 23rd November 1993

STEIN, J.

Fauna Protection - Licence to take or kill endangered fauna - Road construction - Objector appeal against grant of licence - Fauna impact statement - Adequacy - Factors to be taken into account - Benefits of development to be balanced against likely loss of endangered species - National Parks and Wildlife Act 1974 (NSW), ss 5, 92, 92A-92D, 99,120.

Section 92 of the *National Parks and Wildlife Act* 1974 (NSW) makes the Director-General of the National Parks and Wildlife Service the authority for the protection and care of fauna. Under s 92A a scientific committee was appointed to review and continue to review Schedule 12 of the Act which provides a list of endangered fauna. Subsections (5) and (6) specify matters which the committee must have regard to in deciding to place species of fauna on the schedule as "threatened" (Pt 1) or "vulnerable and rare" (Pt 2). Section 92B provides that only the Director-General may issue licenses to take or kill endangered fauna. In considering a licence application the Director-General must take into account the fauna impact statement, any submissions received, the factors listed in S. 92A(5) and (6) and any reasons given by the scientific committee under S. 92A(3)(d). The Director-General may require further information and may grant the application unconditionally or subject to conditions or may refuse it. Section 92C provides a right of appeal to the Land and Environment Court by an applicant for a licence to which S. 92A applies or by any person who made a submission under subs (5) thereof. Section 92D sets out the requirements for a fauna impact statement. Section 99 provides substantial penalties for taking or killing endangered fauna without authority of a licence. Section 120 enables licenses to be issued to take or kill any protected fauna in the course of carrying out specified development or activities.

On 25th February 1993, Shoalhaven City Council applied to the Director-General of the National Parks and Wildlife Service for a licence to take or kill endangered fauna.

The need for the licence arose from the granting of development consent by the Council to itself for the construction of a link road through North Nowra to the Princes Highway, including a bridge over Bomaderry Creek. The licence application was supported by a fauna impact statement pursuant to s 92A of the *National Parks and Wildlife Act*. The Director-General granted the licence subject to conditions and an objector who had made a submission appealed, submitting that the fauna impact statement was invalid or legally inadequate as failing to comply with s 92D of the Act. In particular, it was submitted that there had been a failure to include "to the fullest extent reasonably practicable" a description of the fauna affected by the actions and the habitat of the fauna.

HELD:

(1) The same tests of adequacy in relation to environmental impact statements under the *Environmental Planning and Assessment Act* 1979 (NSW) should apply to fauna impact

statements under the *National Parks and Wildlife Act*

Schaffer Corporation Ltd v Hawkesbury City Council (1992) referred to.

(2) Like an environmental impact statement a fauna impact statement is not the decision but rather a tool to be used in the decision making and may be supplemented by further information.

(3) In the circumstances of the present matter the omission to advertise certain further information which had been provided to supplement the fauna impact statement did not cause the fauna impact statement to be legally inadequate, or otherwise fatally flaw the decision making process.

(4) In the present matter the fauna impact statement included a reasonably thorough discussion of the significant issues and likely faunal consequences and was not legally inadequate.

(5) The "precautionary principle", under which, if there are threats of serious or irreversible environmental damage, lack of full scientific certainty should not be used as a reason for postponing measures to prevent environmental damage, is not an extraneous consideration for the purposes of Pt 7 (Fauna) of the *National Parks and Wildlife Act* 1974.

(6) A licence to take or kill endangered fauna should not in most circumstances be "general" in its coverage of endangered species but should specify the species which it permits to be taken.

(7) The period of a licence to take or kill endangered fauna should be confined, so far as reasonable, because of possible changes in the physical environment and state of scientific knowledge.

(8) In the present matter the purely economic analysis of the respective alternative road routes had resulted in a failure to include natural values in the evaluating balance.

(9) Upon examination of all of the evidence the Court could not be satisfied that a licence under S. 120 of the *National Parks and Wildlife Act* 1974 to take or kill endangered fauna should be granted to the Council in the present matter.

APPEAL

"This was an objector appeal under S. 92c of the *National Parks and Wildlife Act* 1974 against the granting of a licence under s 120 of that Act to take or kill endangered fauna. The facts are set out in the judgment.

I J Dodd (solicitor), for the applicant.

B J Preston, for the respondent.

J J Webster, for the second respondent (the Council)

Judgment reserved

23rd November 1993

STEIN J.

INTRODUCTION

Shoalhaven City Council (the Council) applied to the Director-General of the National Parks and Wildlife Service for a licence to take or kill endangered fauna. The Director-General granted a general licence subject to conditions. Any person who made a submission pursuant to s 92B(5) of the *National Parks and Wildlife Act 1974* (NSW) as amended (the Act) may appeal to the Court if dissatisfied with the decision. Ms May Leatch objected by filing the subject Class 1 application in court on 23rd July 1993.

The need for a licence arises from the granting of development consent by the Council to its own proposal to construct a link road through North Nowra to the Princes Highway. The proposed road includes a 60 meter bridge over Bomaderry Creek. In support of its application for a licence the Council submitted a fauna impact statement to the National Parks and Wildlife Service pursuant to s 92B(2) of the Act. The fauna impact statement was advertised in February 1993 and a number of submissions, including one from the applicant, were received by the National Parks and Wildlife Service. After consideration of the licence application the National Parks and Wildlife Service sought further information from the Council. A supplementary submission was provided by the Council on 19 May and on 24 June 1993 the Director-General formally notified the Council that a general licence under s 120 of the Act had been granted for a period of ten years subject to a number of ameliorative conditions. Notice of the issue of the licence was published in the Government Gazette of 2nd July 1993.

THE LEGISLATIVE FRAMEWORK

The *National Parks and Wildlife Act* was extensively amended in terms of its fauna protection provisions by the enactment of the *Endangered Fauna (Interim Protection) Act 1991* (NSW): The amending legislation was in part a response to the decision of the Court in *Corkill vs Forestry Commission* (NSW) (1991) 73 LGRA 126, affirmed in the Court of Appeal in *Forestry Commission (NSW) vs Corkill* (1991) 73 LGRA 247.

It may be useful to attempt a brief summary of the relevant provisions of the Act. Section 92 makes the Director General the authority "for the protection and care of fauna". A scientific committee was appointed pursuant to S. 92A to review and continue to review Schedule 12 of the Act, which provides a list of endangered fauna. Section 92A(5) and S. 92A(6) respectively specify matters which the committee must have regard to in deciding to place species of fauna on the schedule as threatened (pt 1) or vulnerable and rare (Pt 2). Only the Director General may issue a licence to take or kill endangered fauna (S. 92B). Section 5 of the Act defines "take" as follows:

"'take', in relation to any fauna, includes hunt, shoot, poison, net, snare, spear, pursue, capture, disturb, lure or injure, and without limiting the foregoing also includes significant modification of the habitat of the fauna which is likely to adversely affect its essential behavioural patterns;"

It may be seen that the definition includes habitat modification discussed in *Corkill*.

In considering a licence application the Director-General must, pursuant to S.92B(6), take into account the fauna impact statement, any submissions received, the factors listed in S. 92A(5) and S.92A(6) and any reasons given by the scientific committee under s 92A(3)(d). Subsection (6) allows the Director-General to require "further information concerning the proposed action and the environment to be affected from the applicant...". The Director-General may grant the application unconditionally or subject to conditions or refuse the application (s 92B (8)). Section

92D sets out the requirements of a fauna impact statement. Subsection (1) provides:

- (b) be signed by the person who prepared it; and
- (c) include, to the fullest extent reasonably practicable, the following:
 - (i) a full description of the fauna to be affected by the actions and the habitat used by the fauna;
 - (ii) an assessment of the regional and statewide distribution of the species and the habitat to be affected by the actions and any environmental pressures on them;
 - (iii) a description of the actions and how they will modify the environment and affect the essential behavioural patterns of the fauna in the short and long term where long term encompasses the time required to regenerate essential habitat components;
 - (iv) details of the measures to be taken to ameliorate the impacts;
 - (v) details of the qualifications and experience in biological science and fauna management of the person preparing the statement and of any other person who has conducted research or investigations relied upon."

Substantial penalties are provided by s 99 of the Act for taking or killing endangered fauna - imprisonment and/ or a fine. It is a defence if the act was done under or in accordance with a general licence issued under s 120. The latter section permits licenses to be issued to take or kill any protected fauna in the course of carrying out specified development or activities. A general licence may, but need not, specify the species of fauna, which may be taken or killed under its authority.

On any appeal under S.92C the Court must take into account the factors set out in s 92B (6) viz, the fauna impact statement, submissions received by the Director General, the factors set out in S. 92A(5) and S.92A(6) (which include "any other matter which the Committee considers relevant"), any reasons of the committee provided under S.92A(3)(d) and any further information provided under S 92B(6). Section 92C(2) makes it clear that S.92B(6) does not limit S.39 of the *Land and Environment Court Act 1979* (NSW). Relevantly this section provides:

- "(2) In addition to any other functions and discretions that the Court has apart from this subsection, the Court shall, for the purposes of hearing and disposing of an appeal, have all the functions and discretions which the person or body whose decision is the subject of the appeal had in respect of the matter the subject of the appeal.
- (3) An appeal in respect of such a decision shall be by way of rehearing, and fresh evidence or evidence in addition to, or in substitution for, the evidence given on the making of the decision may be given on the appeal;
- (4) In making its decision in respect of an appeal, the Court shall have regard to this or any other relevant Act, any instrument made under any such Act, the circumstances of the case and the public interest.
- (5) The decision of the Court upon an appeal shall, for the purposes of this or any other Act or instrument, be deemed, where appropriate [to be that of the Director General?]

Pursuant to S.17(ea) of the *Land and Environment Court Act* appeals under S.92C of the Act are assigned to class I of the jurisdiction of the Court.

Besides what might be broadly described as the "merit" issues arising on the appeal, the applicant seeks to argue that the fauna impact statement does not comply with the Act, specifically with the requirements of S. 92D(1)(c) and S.92D(2). I will return to this issue later in my reasons.

BACKGROUND

For some years the Council has perceived the need for a new road link across Bomaderry Creek between the expanding residential areas of North Nowra and the Princes Highway. It is said that congestion at the intersection of Illaroo Road and the Princes Highway, just north of the bridge over the Shoalhaven River, is becoming chronic and the intersection approaching finite capacity. A new link will relieve this situation and defer highway upgrading for around five years. I accept Council's position that a new road link is justified. Various options were discussed in a Council Situation Paper issued in December 1990.

Following this paper, in or around August 1991, Council made a development application to itself, as consent authority, to permit the construction of an East/West road and bridge over the Bornaderry creek linking North Nowra to the Princes Highway. The route of the link was *from* the intersection of Pitt Street and Illaroo Road (in the west) to Nerang Road (to the east) and joining the Princes Highway approximately 2 kilometers north of the Shoalhaven River. The bridge crossing of the creek would be located in the vicinity of an existing weir and water pipeline, and the road would approximately follow an electricity transmission line easement. The application was accompanied by a review of environmental factors in two volumes prepared for the Council by consultants, Mitchell McCotter & Associates.

The review of environmental factors discussed four potential alternative routes concluding that the preferred route had clear overall benefits as it provided a necessary level of traffic service, a positive benefit to cost ratio and "acceptable environmental impacts". The document made an assessment of the alternatives on economic, environmental and social or community factors and ranked each option from A to D. For the purposes of this case it is probably sufficient to concentrate on Council's preferred alignment and the northern alternative following West Cambewarra Road from its intersection with Illaroo Road to the Princes Highway (or Moss Vale Road). The review of environmental factors estimated the cost of this route at \$1.1 million and the preferred alternative at \$1.8 million. The cost/ benefit analysis, however, was found to be positive for the preferred route and slightly negative for the northern alternate route. The lengths of each road varied, the proposed route being 1.9 kilometers and the northern alternative 1.6 kilometers.

Flora and fauna impact was assessed at a most favourable A rating for the West Cambewarra Road link compared to a B for flora and C for fauna for the proposed road. Among the various community factors assessed was "traffic flows". In this regard the preferred route was assessed as A and the northern alternative route graded as C. The preferred route was said to provide significant benefits in terms of vehicle travel time and cost savings. The northern option was seen as non-cost effective because traffic would still be attracted to the Illaroo Road route to Nowra Township.

The review of environmental factors described a number of diverse vegetation communities in the area, particularly towards the Bomaderry Creek gorge. A number of rare plant species were identified. For example, the *Eucalyptus langleyi* is occurring immediately to the North of the

creek at the picnic area; *Dampeira rodwayana*, a small shrub occurring in the Scribbly Gum woodland and *Zierla bacuerlenii* (Rutaceae) a rare and endangered plant occurring only in bush land around the Bomaderry Creek. As Dr. Kevin Mills says this means that it is found nowhere else in the world. Already it has been noted that many *Zierla* plants in the area of the proposed road have been vandalised and destroyed. Some *Zierla bacuerlenii* are growing a small distance to the north of the proposed road and are proposed to be fenced off. The Australian Heritage Commission has placed a nearby area of the Bomaderry Creek on the Register of the National Estate because of the occurrence of *Zierla*. In addition, the plant is listed as an endangered species under Schedule I of the *Endangered Species Protection Act 1992* (Cth).

The comment might be made that it is somewhat strange that under State law rare and endangered plants are not accorded similar protection to rare and endangered fauna, especially since flora is important for biological diversity and advances in medical science sometimes involve the application of rare plants.

The review of environmental factors found that diverse fauna communities were expected to be present in the gorge area. Fauna were briefly surveyed. A number of species listed in schedule 12 of the Act were known, or likely, to occur in the study area. However, the review of environmental factors (at 4.12) stated that the impact of the road on fauna "is likely to be negligible". To protect the ecological values of the area the report proposed a number of mitigation measures. An ecological assessment of Dr. Kevin Mills was appended to the review of environmental factors. It examined the vegetation communities, the presence of threatened plant species and fauna of conservation importance. His assessment stated that "the Bomaderry Creek gorge is probably one of the most valuable areas of fauna habitat within the Noowra town limits" (at 13). The report also noted that the Yellow-bellied Glider could be present in the area. In assessing the options, the document concluded that the northern alternative avoided the creek gorge, the dissection of the Bomaderry Creek bush land and also damage to rare plant species. By contrast, the Council's preferred route had potential impacts on rare plants and on the recreational values of the gorge (at 11).

In June 1992 the Council asked the Director-General for a specification for a fauna impact statement and this was provided on 14th July 1992. The three page document required, inter alia, "a full fauna survey" along the proposed route and all feasible alternatives. It mentioned the targeting of endangered species known or likely to occur in the area including the Yellow-bellied Glider, Diamond Python and the Tiger Quoll.

It appears that in October 1992 the Council resolved to approve the development application "subject to the imposition of appropriate conditions of consent, provided recommendations of a fauna impact statement were satisfactory". By letter dated 3rd February 1993, Council applied to the National Parks and Wildlife Service for a licence under S. 120 of the Act to take or kill endangered fauna, enclosing copies of a fauna impact statement prepared in October] 1992 by its consultants Mitchell McCotter & Associates. On 25th February 1993, Council resolved to grant conditional development consent to its road proposal. Condition 2 thereof provides:

"This consent is conditional upon the obtaining of a Licence pursuant to s 120 of the *National Parks and Wildlife Act* [as amended by the Endangered Fauna (Interim Protection) Act] the New South Wales National Parks and Wildlife Service prior to any works commencing."

The fauna impact statement and licence application were advertised by the National Parks and Wildlife Service and a number of public submissions were received, including one from the

present appellant. The fauna impact statement concluded that the site was the habitat of endangered species. However, as it was isolated from other areas of suitable habitat, the long term viability of the species was questionable. Impacts on endangered fauna were not considered sufficient to prevent the construction of the proposed road. Mitigation measures were recommended.

The public submissions drew attention to a number of matters including the rare plant species. The Shoalhaven branch of the Australian Conservation Foundation was critical of the fauna impact statement and drew attention to the likely occurrence of the giant Burrowing Frog which had been added to Schedule 12 by the scientific committee in December 1992, after the fauna impact statement was prepared. The Total Environmental Centre, in a detailed submission, was also critical of aspects of the fauna impact statement and drew attention to the Precautionary Principle.

The fauna impact statement was assessed by the National Parks and Wildlife Service's Natural Resources Coordinator (Southern Region), Ms Liz Dovey. She noted that the Diamond Python, referred to in the specification, had been removed from Schedule 12 in December 1992 but the Giant Burrowing Frog had been added and would need to be assessed. The officer critically examined the fauna impact statement and found it deficient in a number of aspects. As a result the National Parks and Wildlife Service requested further information from the Council (5 May 1993). In response a further report of Mitchell McCotter was provided to the National Parks and Wildlife Service by the Council.

The report referred to the Giant Burrowing Frog but stated that since the gorge area had been substantially degraded it was "not considered prime habitat for the species". The document continued: "... it is considered therefore that the proposed road will not impact upon this species." The further information did not note that Council's consultants, Dr. York and Mr. Daly, had heard the call of the Giant Burrowing Frog in May 1992 when spotlighting for gliders. Although not expressly required, no mention was made of the occurrence in the fauna impact statement. The position where the frog was heard was north of the proposed road alignment (to the west of the gorge) and on the edge of the Grey Gum woodland adjacent to a dry scrub community dominated by White Kunzea Ambigua and Tea-tree. The report concluded that on balance the proposed road best met environmental and economic objectives. The integrity of the gorge could be protected by a range of ameliorative measures, including an extensive buffer conservation zone.

The further information provided was not advertised, although news of it appears to have leaked and further public submissions were received by the National Parks and Wildlife Service. Ms Dovey again assessed the material, concluding much of it to be inadequate. However, the Director determined to grant a general licence subject to conditions.

While the process of the Court on appeal is by way of re-hearing it is useful to examine the decision-making process of the National Parks and Wildlife Service. The decision-making documents (exhibit A, documents 37 and 38) considered that direct impacts of the development would likely result in the killing or injuring of fauna. Indirect impacts of the development included habitat fragmentation and disturbance to individual animals from noise and light. Document 37 contains the following conclusions:

"Overall, it is considered that the additional information provided by Shoalhaven City Council, when combined with the information in the fauna impact statement, is adequate to permit a decision to be made on this licence application. Based on this information, it is considered that the taking or killing of endangered fauna is likely to occur if the road proposal proceeds. This is

especially the case in relation to populations of Yellow-bellied Glider and Tiger Quoll, even though precise estimates cannot be given as to current population distribution and abundances.

It is also considered that the definite need for the road has been demonstrated by Shoal haven City Council and it is noted that development approval under the *Environmental Planning and Assessment Act 1979* has been granted for the construction of the road.

It is also considered that there is uncertainty as to the long-term viability of the local endangered fauna populations which are likely to be affected by this road. Long-term development plans for the locality indicate increasing pressures on existing populations which may become locally extinct irrespective of whether or not the road is constructed. This is especially the case in relation to populations of Yellow bellied Glider and Tiger Quoll.

Generally, the ameliorative prescriptions proposed by Council as described in the fauna impact statement and Council's additional information provide an adequate amelioration of any adverse effects which the road may have on endangered fauna."

THE HEARING

The Director-General, represented by Mr. Preston, tendered the whole of the relevant National Parks and Wildlife Service documentation including the review of environmental factors, the fauna impact statement, the public submissions and further information provided by the Council. No oral evidence was called. The applicant, Mrs. Leatch, represented by Mr. Dodd, tendered reports of Mr. Terence Barratt, an environmental scientist with the Water Board and ex-National Parks and Wildlife Service officer (and a member of the Shoalhaven branch of Australian Conservation Foundation); Mr. Garry Webb, an expert on the giant Burrowing Frog and Dr. Roger Coles, an expert on bats. The Council, represented by Mr. Webster, tendered reports from two of its officers, Messrs Murray and Aber; Dr. Kevin Mills, ecological and environmental consultant; Mitchell McCotter, planning and environmental consultants; Dr. Alan York, a wildlife ecologist with State Forests and Mr. Robert Nairn, a transport planner and economist.

The parties also tendered a number of plans, photographs, background reports and documentation. It may be reasonable to summarise the thrust of the evidence as principally concerning the impact of the road proposal on the Yellow-bellied Gliders living in the vicinity and their habitat and the likely impact of the road on the Giant Burrowing frog. Besides these species it may be concluded that the evidence does not establish that any other species of endangered fauna is likely to be taken or killed in the course of carrying out the development. No licence is therefore required for those animals. The applicant placed emphasis on the perceived lack of exploration of the alternative northern route via West Cambewarra Road as a factor to balance against the application for a licence to take or kill endangered fauna.

THE VALIDITY OF THE FAUNA IMPACT STATEMENT

The applicant submits that the fauna impact statement is invalid or legally inadequate as failing to comply with S.92D (1)(c) of the Act. In particular, it is submitted that there was a failure to include "to the fullest extent reasonably practicable" a description of the fauna affected by the actions and the habitat of the fauna (S.92D (1)(c)(i)). Particular reference is made to the non-inclusion of the Giant Burrowing Frog. Should the fauna impact statement be found to be legally inadequate, the applicant submits that there is no jurisdiction in the Court to embark on the appeal.

Both the Director-General and the Council submit that the fauna impact statement can be amplified by further information sought and provided under S.92B(6) of the Act. They also submit that the standard required for a fauna impact statement is not intended to be as rigorous as that required for an environmental impact statement under the *Environmental Planning and Assessment Act 1979* (NSW).

I am unable to discern any ambiguity in the ordinary meaning of the statutory provisions. Accordingly the extrinsic materials relied on- and contained in the explanatory note and second reading Speech are of no assistance. Even if taken into account they don't take the issue of construction any further. I fail to perceive why any different or lesser standard should be applied to a fauna impact statement as opposed to an environmental impact statement. While the scope and purpose of the two Acts (the *National Parks and Wildlife Act* and *Environmental Planning and Assessment Act*) is different, the purpose of both statements is similar - to assist the decision-maker in its task and to inform the public and enable its participation. A fauna impact statement is a narrower document than an environmental impact statement, confining itself to impacts on endangered fauna. This is made plain by s 92D(4), which provides that if an environmental impact statement, prepared under Pt 4 or Pt 5 of the *Environmental Planning and Assessment Act*, addresses the matters set forth in s 92D(1), no separate fauna impact statement is required.

In my opinion the same tests of adequacy developed in relation to environmental impact statements should apply to fauna impact statements. Nothing in the subject matter, scope and purpose of the *National Parks and Wildlife Act*, particularly the amendments inserted by the *Endangered Fauna (Interim Protection) Act*, lead to a contrary conclusion. Indeed, the reverse is the case. This means that the tests laid down in the authorities, in particular *Prineas v Forestry Commission of New South Wales* (1983) 49 LGRA 402, are relevant.

Mr. Preston (supported by Mr. Webster) submits that the fauna impact statement, together with the supplementary information, is adequate in law to comply with the requirements of the Act and satisfy the twin goals of the exercise. Assuming a deficiency in the fauna impact statement, Mr. Preston says that it would be ridiculous if this could not be overcome by the provision of additional information referred to in the closing words of S.92B(6). While acknowledging that the additional information was not advertised he notes that there is no statutory requirement to advertise such material.

The issue of the jurisdiction of the Court in a class I appeal to consider the validity of an environmental impact statement was exhaustively examined by the Chief Judge of the Court, Pearlman J in *Schaffer Corporation Ltd vs Hawkesbury City Council* (1992) 77 LGRA 21 at 28.30. The decision of the Court of Appeal did not affect her Honour's judgment on the issue. I agree with Pearlman J's analysis of the legal situation and her conclusion:

"But what is in issue in this case is not a question of relief for breach, but a question of whether or not, exercising the functions of a consent authority, the Court would grant consent to the development application. In pursuing that issue, one of the questions for determination is whether or not there is a valid environmental impact statement on which a grant of consent by the Court is (sic) so exercising its functions can be founded."

Mr. Dodd submits that the additional information cannot be relied on to bolster the environmental impact statement. He says that the ability of the Director-General to seek the further information assumes an adequate fauna impact statement. The provision (in a 92B(6)) is merely an enabling one to allow the Director to seek additional information which may not necessarily be included in a fauna impact statement but which would assist him in making a decision on the application.

I reject the submission. The provision allowing the Director-General to seek further information from an applicant is clearly designed to assist the decision-maker and supplement the fauna impact statement in any area specified by the Director in his request. Like an environmental impact statement, a fauna impact statement is not the decision; rather it is a tool to aid the decision-maker in his/her task. The Schedule of endangered species is not static; see S.92A(3) and S.94. Indeed, changes to the listed endangered fauna may be illustrated by this case. When the fauna impact statement was compiled and submitted, the Diamond Python was listed and thus was included in the statement. The Giant Burrowing Frog, however, was not listed and not discussed in the statement. In December 1992, after the fauna impact statement was completed, but before the further information was requested by the Director General, the Diamond Python was removed from the list and the Giant Burrowing Frog added. The additional information forwarded by the Council sought to describe and assess that creature.

In a dynamic situation, such as this, it cannot realistically be suggested that when a new species is added to the list, a new fauna impact statement is required. Such a requirement would make nonsense of the system, render it almost unworkable, overly expensive and subject to unreasonable delays. In my opinion a fauna impact statement can be supplemented by further information required by the Director-General and that information can be taken into account by the Court in assessing the question of the legal adequacy of the process. One aspect, however, is of concern. The failure to advertise the further information may have deprived members of the public of the opportunity to participate. Although not required by the legislation, it would have been preferable for the National Parks and Wildlife Service to have re-advertised especially since a new species was included - the Giant Burrowing Frog. But it is clear that most, if not all, objectors who made written submissions were aware that information had been provided by the Council to the National Parks and Wildlife Service, although not its full content. Further comprehensive public submissions were made to the National Parks and Wildlife Service. This is not a class 4 judicial review proceeding under the *Environmental Planning and Assessment Act* where the discretion inherent in S.124 is applicable, nor is it a proceeding brought under S.176A of the *National Parks and Wildlife Act* alleging a breach of the Act. In my opinion the omission to advertise the further information does not cause the fauna impact statement to be legally inadequate or otherwise fatally flaw the decision-making process.

Mr. Dodd further submits that the fauna impact statement is inadequate in failing to address sufficient species and in sufficient detail. He maintains that the fauna surveys were inadequate and there has been a failure to provide a full description of the affected fauna and their habitat. Moreover, he contends that there is an inadequate description of the actions involved in the proposal. He draws attention to the fauna impact statement not including the development consent conditions, taking account of their import and including an examination of the proposed Illaroo Road deviation. In my opinion the criticisms catalogued by Mr. Dood are insufficient to lead the Court to conclude that the fauna impact statement is legally inadequate. It may not be perfect, but it does not need to be. The fauna impact statement includes a reasonably thorough discussion of the significant issues and likely faunal consequences. It appears to me that the fauna impact statement, read with the further information, satisfies the tests: collected in *Schaffer Corporation vs Hawkesbury City Council Ltd* (at 30-32). In my opinion the fauna impact statement is legally adequate and not in breach of S.92D (1) or S.92D (2) of the Act. Accordingly, the Court may proceed to the merit review of the application.

THE MERITS

Since as far as I am aware, this is the first appeal under S.92C of the *National Parks and Wildlife Act*, it may be useful to examine the Court's role in such proceedings. In determining an appeal

S.92C(2) directs the Court to S.92B(6). It is mandatory for the Court to take these matters into account. They comprise:

- The fauna impact statement.
- Any public submissions received by the National Parks and Wildlife Service.
- The factors set out in S.92A (5) and S.92A (6). These differ between threatened and vulnerable and rare species but in both cases include (e) "any other matter which the Committee [I interpolate the Director-General under S.92B (6) and the Court under S.92C (2)] considers relevant".
- Any reasons of the scientific committee under S.92A (3)(d).
- Any further information provided under S.92B (6).

In addition, S.92C (2) makes it clear that the factors set forth in S. 92B (6) do not limit S.39 of the *Land and Environment Court Act*. As quoted earlier S.39(2) states that in addition to any other functions and discretions that the Court has, it shall have all the functions and discretions of the person whose decision is the subject of the appeal, in this case the Director-General of the National Parks and Wildlife Service. Subsection (3) requires an appeal to be by way of re-hearing and fresh evidence, in addition to or in substitution for the evidence given on the making of the decision, may be given. Of importance to this application are subs (4). It provides that in making its decision on appeal the Court shall have regard to the *Land and Environment Court Act* and any other relevant Act or instrument, "the circumstances of the case and the public interest".

As previously mentioned, at least two submissions raised the question of the application of the "precautionary principle". The question arises whether, if the principle is relevant, it may be raised in the appeal. Mr. Dood asks that it be taken into account, particularly in relation to the Giant Burrowing Frog. On behalf of the Director General, Mr. Preston submits that the principle could be applicable. For example, he says that the Court would not issue a licence to take or kill a particular endangered species if it was uncertain where that species would be present or there was scientific uncertainty as to the effect of the development on the species.

While there has been express references to what is called the "precautionary principle" since the 1970's, international endorsement has occurred only in recent years. Indeed, the principle has been referred to in almost every recent international environmental agreement, including the 1992 Rio Declaration on Environment and Development [Principle 15], the 1992 UN Framework Convention on Climate Change [Art 3(3)], the June 1990 London Amendments to the Montreal Protocol on Substances that Deplete the Ozone Layer [preamble, par 6] and the 1992 Convention on Biological Diversity. This latter convention, which Australia has ratified, is of relevance to the present case. It formulates the Precautionary Principle in the following terms:

"... Where there is a threat of significant reduction or loss of biological diversity, lack of full scientific certainty should not be used as a reason for postponing measures to avoid or minimise such a threat."

Within Australia the Commonwealth has enacted the *Endangered Species Protection Act 1992* which makes provision under S.175 to give effect to international agreements specified in Schedule 4 of the Act. At this point in time, Schedule 4 does not include the 1992 Convention on Biological Diversity. However, the precautionary principle has been incorporated in the Commonwealth strategies on Endangered Species and Biological Diversity and, more generally, in the 1992 Intergovernmental Agreement on the Environment, as well as state legislation such as the *Protection of the Environment Administration Act 1991* (NSW). In this statute the statement of the principle has taken the following form:

"... if there are threats of serious or irreversible environmental damage, lack of full scientific certainty should not be used as a reason for postponing measures to prevent environmental degradation" (S.6(2)(a)).

The 1992 Intergovernmental Agreement on Environment has also utilised this formulation, but expanded it by adding:

"In the application of the precautionary principle public and private decisions should be guided by:

(i) Careful evaluation to avoid, wherever practicable, serious or irreversible damage to the environment; and

(ii) An assessment of the risk weighed consequences of various options."

On behalf of the Director-General, Mr. Preston made submissions on the incorporation of international law into domestic law. It seems to me unnecessary to enter into this debate. In my opinion the precautionary principle is a statement of commonsense and has already been applied by decision-makers in appropriate circumstances prior to the principle being spelt out. It is directed towards the prevention of serious or irreversible harm to the environment in situations of scientific uncertainty. Its premise is that where uncertainty or ignorance exists concerning the nature or scope of environmental harm (whether this follows from policies, decisions or activities), decision-makers should be cautious.

I have earlier referred to the factors the Court must take into account on an appeal under s 92C of the Act. These include the submissions made (S.92B)(6)(b), some of which argued that the precautionary principle was appropriate to the case; any other matter which the Court considers *relevant* (s 92A(6)(e)) and the circumstances of the case and the public interest (s 39(4) of the *Land and Environment Court Act*). The issue then is whether it is relevant to have regard to the precautionary principle or what I refer to as consideration of whether a cautious approach should be adopted in the face of scientific uncertainty and the potential for serious or irreversible harm to the environment.

To test the relevance of these considerations, or the Precautionary Principle, to the endangered fauna provisions of the *National Parks and Wildlife Act*, one needs to examine the subject matter, scope and purpose of the enactment. A consideration will be irrelevant if one is bound by the enactment to ignore it. However, where a matter is not expressly referred to, consideration of it may be relevant if an examination of the subject matter, scope and purpose shows it not to be an extraneous matter: *Minister for Aboriginal Affairs vs Peko- Wallsend Ltd* (1986) 162 CLR

Under Pt 7 of the Act, the Director-General is appointed the authority for "the protection and care of fauna"(S.92). The remainder of Pt 7 establishes a regime requiring consideration and identification of endangered fauna (threatened or vulnerable and rare) (s 92A), licensing where endangered fauna may be taken or killed and the creation of offences involving stringent penalties (including imprisonment) for the taking or killing of protected and, endangered fauna in contravention of the Act (as 98, 99, 103). It is clear that the purpose of these provisions is the protection and care of endangered fauna. To this end the scientific committee (in placing fauna on the endangered list), the Director-General (in determination of a licence) and the Court (on appeal) are to have regard, inter alia, to the population, distribution, habitat destruction and ultimate security of a species; see s 92A(5) and s 2A(6). Similar data or details are to be assessed under the fauna impact statement: see in particular s 92D(c)(ii) and s 92D(c)(iii).

When Pt 7 of the Act is examined it is readily apparent that the precautionary principle, or what I

have stated this may entail, cannot be said to be an extraneous matter. While there is no express provision requiring consideration of the "precautionary principle", consideration of the state of knowledge or uncertainty regarding a species, the potential for serious or irreversible harm to an endangered fauna and the adoption of a cautious approach in protection of endangered fauna is clearly consistent with the subject matter, scope and purpose of the Act.

Upon an examination of the available material relevant to the Giant Burrowing Frog (*Heleioporus australiacus*) and the knowledge of the frog in this particular habitat, one is driven to the conclusion that there is a dearth of knowledge. We know with reasonable certainty that the call of a male frog was heard by Dr. York and Mr. Daly in 1992. We know that it is likely that there is a population of the frogs in the area. Webb, an expert on the frog, says that the amphibian is known to move great distances from breeding areas when foraging for food at night. While its prime habitat appears to be a gorge or creek environment, the Giant Burrowing Frog may forage wider a field into drier areas. It is not surprising therefore that its call was heard in an area some distance from the gorge. Dr. York's statement that the degradation of the gorge habitat leads to the conclusion that it is not prime habitat for the species is open to question and is not self-evident to me. Dr. York does, however, make the point in his report (exhibit MI) that the nature and extent of the population of the Giant Burrowing Frog in the study area are unknown. Notwithstanding, he says that it is possible to make a reasonable assessment of the possible impacts of the road because of the known habitat requirements. Dr. York sees a very small loss of foraging habitat and no loss or interference with access to food or breeding patterns.

Garry Webb disagrees with a number of conclusions of Dr. York. He accepts that the species is notoriously difficult to find but is critical of the limited reptile and amphibian survey, which is certainly inadequate to determine the regional significance of its presence at Bomaderry Creek. Since it is listed as a rare and vulnerable species, Mr. Webb says that its conservation should be given a high priority. I accept his opinion. The frog is known in only a small number of locations in the Shoalhaven region. Apart from the present case, only two sightings have been made - at Jervis Bay and 15 kilometers south-east of Bowral in 1963. Its distribution is obviously patchy and its recent listing by the scientific committee understandable.

In the opinion of Mr. Webb the road would present an insurmountable barrier to the dispersion of frogs at favourable times and divide suitable habitat into small isolates. He doubts the relevance of any of the proposed mitigating factors to frogs and knows of no study which supports the efficacy of underpasses for frogs. (In this regard Mr. Webster handed up a beautifully presented booklet entitled *Amphibienschutz* from BadenWuerttemberg. Its photographs include frogs and highway underpasses. Unfortunately the text is in German, and notwithstanding my ancestry, I am unable to comprehend its import.)

Mr. Webb also opines other potential impacts on the Giant Burrowing Frog. However, he concludes his report by emphasising the inadequacy of the data to quantify the extent and size of the population in the area "nor to assess the potential impact of the proposed road". In his view there has been an inadequate survey, an inadequate assessment of potential habitat and an inadequate assessment of the impact of the development on the survival of the population of the giant Burrowing Frog. Again, I accept and prefer his opinion.

Given that the Giant Burrowing Frog has only recently been added to the schedule of endangered species by the scientific committee as vulnerable and rare, and noting the factors set forth in s 92A(6) to guide the committee's deliberations, caution should be the keystone to the Court's approach. Application of the precautionary principle appears to me to be most apt in a situation of a scarcity of scientific knowledge of species population, habitat and impacts. Indeed, one

permissible approach is to conclude that the state of knowledge is such that one should not grant a licence to "take or kill" the species until much more is known. It should be kept steadily in mind that the definition of "take" in s 5 of the Act includes disturb, injure and a significant modification of habitat which is likely to adversely affect the essential behavioural patterns of a species. In this situation I am left in doubt as to the population, habitat and behavioural patterns of the Giant Burrowing Frog and am unable to conclude with any degree of certainty that a licence to "take or kill" the species should be granted. Accordingly, the licence under s 120, in so far as it seeks a permit to take or kill the Giant Burrowing Frog in the course of carrying out the development, is refused.

The other principal species involved in the licence application is the Yellow-bellied Glider (*Petaurus australis*). There is no doubt about its presence, although the Council's consultants believe that only two small groups inhabit the area. While the gliders are expected to use all the eucalypti species present, the woodland, are another food resource. Mitchell McCotter accept that the road may be a barrier to movement of gliders attempting to utilise food resources. A proposal for the erection of gliding poles to help facilitate movement of the gliders has been made. This is accepted to be a somewhat novel ameliorative strategy which is yet to be the subject of any published research. The efficacy of such a measure is therefore unknown.

The Yellow-bellied Glider has been listed as a fauna of special concern since the *National Parks and Wildlife Act* was passed in 1974. In 1991 it was placed on Pt 2 of Schedule 12 as vulnerable and rare. This status was confirmed by the scientific committee in 1992. There is little doubt that the Grey Gum forested areas of the gorge are likely to represent core areas of favoured habitat for the gliders. It is also likely that the population of Yellowbellied Gliders has been isolated in the study area and cut off from other populations of the species for some years. On the one hand the road will likely split and accordingly further reduce their habitat. On the other hand the Council's case suggests that their long-term survival is threatened in any event by increasing residential development and the possibility of the construction of the Nowra by-pass in fifteen to twenty years time. These prognostications are difficult for the Court to place great store in because they seem to be assuming that the endangered fauna may die out anyway at some future point in time, so why worry about conserving them now.

In the final addresses made to the Court all parties - the applicant, the Director and the Council appeared to accept that the Yellow-bellied Glider was likely to be adversely affected by the proposed road, that is, within the definition of "take" in s 5. This is no doubt why the Council applied for and the Director granted a licence under s 120 of the Act to take or kill the species. I agree that the evidence leads to the inevitable conclusion that the construction of the road and its development is likely to involve the taking or killing of the Yellow-bellied Glider.

The question for the Court is therefore, should the licence be granted, and if so upon what conditions? In this regard I would suggest that a licence should not in most circumstances be "general" in its coverage of endangered species but should specify the species which it permits to be taken. I think this view is shared by the National Parks and Wildlife Service, according to the submission of Mr. Preston. It makes good sense not to grant a licence in relation to all endangered fauna when some species may be later located which were not the subject of a fauna impact statement or added to the schedule by the scientific committee at a date after the issue of a general licence. Further, I note that the licence in question was issued for a period of ten years. The development consent in this case does not lapse if it is physically commenced within five years of its grant. Accordingly, a period of five years or thereabouts would probably be an appropriate period for a licence. The length of a licence should be confined, so far as reasonable, because of possible changes in the physical environment and state of scientific knowledge.

The decision-making process involved in the issue of a licence under S.120 obviously involves a balancing of considerations. This appears to be accepted by all parties and was applied by the National Parks and Wildlife Service in its assessment of the application. Such a balancing of considerations is also part of the Council's case. Can the benefits of the proposed road be balanced against the likely loss of endangered species? The Council says that it can, pointing to the need for the link road because of the growth of North Nowra, the advantages to the public as well as economic arguments. Not surprisingly the applicant takes a different view of the balance. The Director-General, although having determined to grant a licence, remains neutral, drawing attention to his role in the protection and care of fauna.

As I have already stated, I am satisfied that there is a need for a link road between North Nowra and the Princes Highway to reduce the pressure on the Illaroo Road/ Highway intersection. I accept Mr. Webster's point that the public interest includes having the new link as well as the preservation of endangered fauna. Having concluded that the proposal is likely to take or kill endangered fauna, the Court needs to weigh all competing factors in order to determine whether a licence should be granted or refused. In this case one of the critical factors to be balanced is the alternatives, especially where one may involve environmental harm but not another. It is in this area where, to my thinking, the Council's case is deficient.

It seems apparent from the evidence that the northern route via West Cambewarra Road is shorter and cheaper than the preferred route. This was confirmed by the cross-examination of Mr. Nairn. This alternative is unarguably better for the environment, for endangered fauna, rare plants and the recreational values of the Bomaderry Creek gorge. This is because the northern route is situated on the extremity of the area. But, in traditional cost/benefit terms, utilised by the Council, the option is said not to be economically feasible. I have a certain difficulty in accepting this proposition at face value. Quite apart from the narrow purely economic balancing, what appears to be involved in the reasoning is a conclusion that predictable human behaviour will lead to not enough people in North Nowra using the northern route. It is claimed that they will prefer to remain on Illaroo Road which is shorter in distance, notwithstanding that they may experience delays at the intersection with the highway.

It should not necessarily be assumed that the travel time will be more for users of the northern route. Indeed, for the expanding residential areas to the north-west the route would be more convenient. Mr. Nairn is concerned that residents in the Pitt Street precinct and beyond will not be prepared to travel north-east (away from Nowra) before turning south and will therefore prefer to stay on Illaroo Road. One may ask whether people are so committed to the motor vehicle that they are not prepared to spend what might be an extra minute or two (at the most) to preserve an area of natural values and fauna habitat, a resource used by the very same community. A public education campaign by the Council (and the National Parks and Wildlife Service) with appropriate signage, could well help explain a new link route to the north-east in preference to one traversing the Bomaderry Creek gorge.

With respect to the northern route two comments are worth making on Mr. Nairn's reports. First, he states that environmental factors were not included in the cost/ benefit analysis. In this circumstance, the value to the Court of his cost/benefit analysis is limited. Mr. Nairn says that the inclusion of environmental values is not required by the State Treasury and not usual in Australia.

I find the latter comment hard to accept. There are a number of environmental economic models which factor environmental values into cost/benefit analysis. Surely an approach which attempts to integrate economic and environmental factors is preferable. In my opinion the purely economic analysis of the respective alternatives neglected to include natural values the balance. As a result

the northern route via West Canberra Road was screened out too early in the process to be properly considered as a real alternative to the preferred route.

This is made more apparent from Mr. Nairn's evidence in reply, which includes the option of a Pitt Street extension north-east through Crown land to connect with West Cambewarra Road. This proposed extension of Pitt Street is unlikely to pass through any environmentally sensitive land and is well clear of the Bomaderry gorge. If constructed, it will take people from the Pitt Street precinct and beyond well onto the northern option for the link road and, for large numbers of residents, would provide a real alternative to Illaroo Road. It seems to me that insufficient attention has been given to the northern route, especially coupled with the Pitt Street extension canvassed by Mr. Nairn in his report in reply (exhibit K2 - figure 4 alternative I)). The route also needs to be considered in the context of the proposed sports complex in West Cambewarra Road near the intersection with Illaroo Road. In addition, the northern option leaves the Bomaderry Creek gorge area intact rather than split into segments.

CONCLUSION

It is the context of a thorough examination of alternatives, especially ones which have minimal environmental impact, that one must balance the issue of a licence to take or kill endangered fauna. The need for a link road is accepted but I question, when all pertinent factors are weighed in the balance, whether the need is for this particular road. The issue of the best route, taking account of all relevant circumstances, including environmental factors, needs to be carefully assessed. It appears to me that alternatives need to be further explored. I am not satisfied that a licence to take or kill the Yellow-bellied Glider, or any of the other species discussed in the fauna impact statement, is justified. The applicant for such a licence needs to satisfy the Court, on the civil standard on the balance of probabilities, that it is appropriate in all the relevant circumstances to grant the licence. I am not convinced of the strength and validity of the economic arguments presented to the Court by the Council, nor do I take such a predictable view of human behaviour as Mr. Nairn.

Following an examination of the evidence, I am not satisfied that a licence under s 120 of the *National Parks and Wildlife Act* to take or kill endangered fauna should be granted to the Council. However, it should be emphasised that refusal of this licence application should not necessarily be assumed to be an end of the proposal. Further information on endangered fauna and advances in scientific knowledge may mean that a licence could be granted in the future. Also, changes in the proposal and ameliorative measures may lead to a different assessment. This case has been determined, as it must, on the evidence produced to the Court at the hearing and the Court cannot speculate as to the future.

Accordingly the appeal is upheld and the licence refused. The exhibits may be returned. Costs are reserved.

Appeal allowed and licence refused

Solicitors for the applicant: *Bartier Perry & Purcell*.

Solicitors for the respondent: *J A Gibbins* (National Parks and Wildlife Service).

Solicitors for the second respondent (the Council): *Morton & Harris* (Nowra).

TFMN

THE REPUBLIC OF THE PHILIPPINES

SUPREME COURT G.R.NO.101083

JUAN ANTONIO OPOSA AND OTHERS.....APPELLANTS
VERSUS
THE HONOURABLE FULGENCIO,
FACTORAN AND ANOTHER.....RESPONDENTS

This petition was brought by a group of young Filipinos on their own behalf and on behalf of future generations through their parents together with the Philippine Ecological Network Incorporated after the Regional Trial Court had dismissed their suit on grounds of lack of cause of action. They prayed for an order directing the secretary to the Department of Environment and Natural Resources (DENR) to cancel all existing timber licence agreements and cease from accepting or approving new agreements because the country's natural forest cover was being destroyed. They brought their action as a tax payers' class suit claiming that as citizens and tax payers they are entitled to a full benefit, use and enjoyment of the natural resource treasure and that they had a Constitutional right to a balanced and healthful ecology.

HELD:

1. Since the subject matter of the complaint was of common and general interest to all citizens and it was impracticable to bring them all before court, the Petitioner's suit was a valid class action under the revised rules of court.
2. The petitioners had a right to sue on behalf of the succeeding generations because every generation has a responsibility to the next to preserve the rhythm and harmony of nature for the full enjoyment of a balanced and healthful ecology. As a matter of fact, these basic rights need not even be written in the Constitution for they are assumed to exist from the inception of humankind.
3. The petitioner's right to a healthful ecology and the DENR's duty to protect and advance that right are both clear, and give rise to a cause of action as defined by law.

Application allowed

BUGHAW CIELO, CRISANTO, ANNA, DANIEL AND FRANCISCO, all surnamed BIBAL, minors, represented by their parents FRANCISCO, JR. and MILAGROS BIBAL, and THE PHILIPPINE ECOLOGICAL NETWORK, INC. =====PETITIONERS

Present: NARVASA, C.J, CRU FELICIANO, PADILLA, BIDIN, S.GRISO AQUINO, REGADLAD, DAVIDE, JR., ROMERO, NOCON, BELLOSILLO, MELO QUIASON, PUNO, AND VITUG, J.J.

VERSUS.

THE HONORABLE FULGENCIO, FACTORAN, JR., in his capacity as the Secretary of the Department of Environment and Natural Resources, and THE HONORABLE ERIBRTO U. ROSARIO, Presiding Judge of the RTC, Makati, Branch 66=====RESPONDENTS

DECISION

DAVIDE, JR., J.:

In a broader sense, this petition bears upon the right of Filipinos to a balanced and healthful ecology that the petitioners dramatically associate with the twin concepts of “inter-generational responsibility” and “inter-generational justice”. Specifically, it touches on the issue of whether the said petitioners have a cause of action to “prevent the misappropriation or impairment” of Philippine rainforests and “arrest the unabated hemorrhage of the country’s vital life support systems and continued rape of Mother Earth”.

The controversy has its genesis in Civil Case No. 90-777, which was filed before Branch 66 (Makati, Metrol Manila) of the Regional Trial Court (RTC), National Capacity Judicial Region. The principal plaintiffs therein, now the principal petitioners are all minors duly represented and joined by their respective parents. Impleaded as an additional plaintiff is the Philippine Ecological Network, Inc. (PENI), a domestic, non-stock and non-profit corporation organized for the purpose of, inter alia, engaging in concerted action geared for the protection of our environment and natural resources. The original defendant was the Honorable Fulgencio S. Factoran, Jr., then Secretary of the Department of Environment and Natural Resources (DENR). His substitution in this petition by the new Secretary, the Honorable Angel C. Alcala, was subsequently ordered upon proper motion by the petitioners. The complaint was instituted as a taxpayers’ class suite and alleges that the plaintiffs “are all citizens of the Republic of the Philippines, taxpayers, and entitled to the full benefit, use and enjoyment of the natural resources treasure that the country’s virgin tropical rainforests”. The same was filed for themselves and others who are equally concerned about the preservation of said resource but are “so numerous that it is impracticable to bring them all before the Court”. The minors further asseverate that they “represent their generation as well as generations yet unborn”. Consequently, it is prayed for that judgment be rendered:

“x x x ordering defendant, his agents, representatives and other persons acting in his behalf to cancel all existing timber license agreements in the country; cease and desist from receiving, accepting, processing, renewing or approving new timber license agreements.”

And granting the plaintiffs “x x x” such other reliefs just and equitable under the premises.”

The complaint starts off with the general averments that the Philippine archipelago of 7,100

islands has a land area of thirty million (30,000,000) hectares and is endowed with rich, lush and verdant rainforests in which varied, rare and unique species of flora and fauna may be found: these rainforests contain a genetic, biological and chemical pool which is irreplaceable; they are also the habitat of indigenous Philippine culture which have existed, endured and flourished since time immemorial; scientific evidence reveals that in order to maintain a balanced and healthful ecology, the country's land area should be utilized on the basis of the a ratio of the fifty –four per cent (54%) for forest cover and forty-six per (46%) for agricultural, residential, industrial, commercial and other uses; the distortion and disturbance of this balance as a consequence of the deforestation have resulted in a host of environmental tragedies, such as

- (a) water shortages resulting from the drying up of the water table, otherwise known as the “aquifer”, as well as of rivers, brooks and streams,
- (b) Stalination of the water table as a result of intrusion therein of salt water, incontrovertible examples of which may be found in the island of Cebu and Municipality of Racoor, Cavite,
- (c) massive erosion and the consequential loss of soil fertility and agricultural productivity, with the volume of soil eroded estimated at one billion (1,000,000,000) cubic meters per annum-approximately the size of the entire island of Catanduanes,
- (d) the endangering and extinction of the country's unique, rare and varied flora and fauna,
- (e) the disturbance and dislocation of cultural communities , including the disappearance of the Filipino's indigenous cultures,
- (f) the siltation, of rivers and seabed's and consequential destruction of corals and other aquatic life leading to a critical reduction in marine resource productivity,
- (g) recurrent spells of drought as is presently experienced by the entire country,
- (h) increasing velocity of typhoon winds which result from the absence of the windbreakers,
- (i) the flooding of lowlands and agricultural plains arising from the absence of the absorbent mechanism of forests,
- (j) the siltation and shortening of the lifespan of multi-billion peso dams constructed and operated for the purpose of supplying water for domestic uses, irrigation and generation of electric power, and
- (k) the reduction of the earth's capacity to process carbon dioxide gases which has led to perplexing and catastrophic climatic changes such as the phenomenon of global warming, otherwise known as the “greenhouse effect.”

Plaintiffs further assert that the adverse and detrimental consequences of continued deforestation are so capable of unquestionable demonstration that the same may be submitted as a matter of judicial notice. This notwithstanding, they expressed their intention to present expert witnesses as well as documentary, photographic and film evidence in the course of the trial.

As their cause of action, they specifically allege that:

CAUSE OF ACTION

7. Plaintiffs replead “by reference the foregoing allegations”.
8. Twenty-five (25) years ago, the Philippines had some sixteen (16) million hectares of rainforests constituting roughly 53% of the country's land mass.
9. Statellite images taken in 1987 reveal that there remained no more than 1.2 million hectares of said rainforests or four percent (4.0%) of the country's land area.
10. More recent surveys reveal that a mere 850,000 hectares of virgin old-growth rainforests are

left, barely 2.8% of the entire land mass of the Philippines archipelago and about 3.0 million hectares for immature and uneconomical secondary growth forests.

11. Public records reveal that defendant's predecessors have granted timber license agreements ("TLA's") to various corporations to cut the aggregate area of 3.89 million hectares for commercial logging purposes.

A copy of the TLA holders and the corresponding areas covered is hereto attached as Annex.

12. At the present rate of deforestation, i.e. about 200,000 hectares per annum or 25 hectares per hour-nighttime, Saturdays, Sundays and holidays included- the Philippines will be bereft of forest resources after the end of this ensuing decade, if not earlier.

13. The adverse effects, disastrous consequence, serious injury and irreparable damage of this continued trend of deforestation to the plaintiff minors' generation and to the generations yet unborn are evident and incontrovertible. As a matter of fact, the environmental damages enumerated in paragraph 6 hereof are already being felt, experienced and suffered by the generation of plaintiff adults.

14. The continued allowance by defendant of TLA holders to cut deforest the remaining forest stands will work great damage and irreparable injury to plaintiffs-especially plaintiff minors and their successors – who may never see, use, benefit from and enjoy this rare and unique natural resource treasure.

This act of defendant constitutes a misappropriation and/ or impairment of the natural resource property he holds in trust for the benefit of plaintiff minors and succeeding generations.

15. Plaintiffs have a clear and constitutional right to a balanced and healthful ecology and are entitled to protection by the State in its capacity as the *parens patriae*.

16. Plaintiffs have exhausted all administrative remedies with the defendant's office. On March 2nd, 1990, plaintiffs served upon defendant a final demand to cancel all logging permits in the country.

A copy of the plaintiffs' letter dated March, 1, 1990 is hereto attached as Annex "B".

17. The defendant, however, fails and refuses to cancel the existing TLA's, to the continuing serious damage and extreme prejudice of plaintiffs.

18. The continued failure and refusal by defendant to cancel the TLA's is an act violate of the rights of plaintiffs, especially plaintiff minors who may be left with a country that is desertified (sic), bare, barren and devoid of the wonderful flora, fauna and indigenous cultures which the Philippines has been abundantly blessed with.

19. Defendant's refusal to cancel the aforementioned TLA's is manifestly contrary to the public policy enunciated in the Philippine Environmental Policy which, in pertinent part, states that it is the policy of the State-

- to create , develop, maintain and improve conditions under which man and nature can thrive in productive and enjoyable harmony with each other;
- to fulfill the social, economic and other requirements of present and future generations of the Filipinos and;
- to ensure the attainment of an environmental quality that is conducive to a life of dignity and

well-being.(F.D.1151, 6 June 1977)

20. Furthermore, defendant's continued refusal to cancel the aforementioned TLA's is contradictory to the Constitutional policy of the State to:

- effect "a more equitable distribution of opportunities, income and wealth" and "make full and efficient use of natural resources (sic), (section 1 Article XII of the Constitution);
- "protect the nation's marine wealth".(Section 2,Ibid);
- "conserve and promote the nation's cultural heritage and resources (sic)," (Section 14, Article XIV, id.);
- "protect and advance the right of the people to a balanced and healthful ecology in accord with the rhythm and harmony of nature." (Section 16,Article II, id)

21. Finally, defendant's act is contrary to the highest law of humankind- the natural- and violate of plaintiffs' right to self-preservation and perpetuation.

22. There is no other plain, speedy and adequate remedy in law other than the instant action to arrest the unabated hemorrhage of the country's vital life- support systems and continued rape of Mother Earth."

On 22nd June 1990, the original defendant, Secretary Factoran, Jr., filed a Motion to dismiss the complaint based on two (2) grounds, namely :(1) the plaintiffs have no cause of action against him and (2) the issue raised by the plaintiffs is a political question which properly pertains to the legislative or executive branches of Government. In their July 12th 1990 Opposition to the Motion, the petitioners maintains that (1) the complaint shows a clear and unmistakable cause of action, (2) the motion is dilatory and (3) the action presents a justifiable question as it involves the defendant's abuse of discretion.

On 18th July 1991, respondent Judge issued an order granting the aforementioned motion to dismiss.⁸ In the said order, not only was the defendant's claim- that the complaint states no cause of action against him and that it raises a political question – sustained, the respondent Judge further ruled that the granting of the relief's prayed for would result in the impairment of contracts which is prohibited by the fundamental law of the land.

Plaintiffs thus filed the instant special civil action for certiorari under Rule 65 of the Revised Rules of Court and ask this Court to rescind and set aside the dismissal order on the ground that the respondent Judge gravely abused his discretion in dismissing the action. Again, the parents of the plaintiffs-minors not only represent their children, but have also joined the latter in this case.

On 14th May 1992, we resolved to give due course to the petition and required the parties to submit their respective Memoranda after the Office of the Solicitor General (OSG) filed a Comment on behalf of the respondents and the petitioners filed a reply thereto.

Petitioners contended that the complaint clearly and unmistakably states a cause of action as it contains sufficient allegations concerning their right to a sound environment based on the Articles 19,20, and 21 of the Civil Code (Human Relations), Section 4 of the Executive Order (E.O) No.192 creating the DENR, Section 3 of the Presidential decree (P.D) No.1151 Philippine Environmental Policy), Section 16,Article II of the 1987 Constitution recognizing the right of people to a balanced and healthful ecology, the concept of generational genocide in Criminal Law and the concept of man's inalienable right to self-preservation and self-perpetuation embodied in natural law; Petitioners likewise rely on the respondent's correlative obligation, per

Section 4 of EO. No. 192, to save guard the people's right to a healthy environment.

It is further claimed that the issue of the respondent Secretary's alleged grave abuse of discretion in granting Timber License Agreements (TLAs) to cover more areas for logging than what is available involves a judicial question.

About the invocation by the respondent Judge of the Constitution's non-impairment clause; petitioners maintain that the same does not apply in this case because TLAs are not contracts. They likewise submit that even if TLAs may be considered protected by the said clause, it is well settled that they may still be revoked by the State when public interest so requires.

On the other hand, the respondents aver that the petitioners failed to allege in their complaint a specific legal right violated by the respondent Secretary for which any relief is provided by law. They see nothing in the complaint but vague and nebulous allegations concerning an "environmental right" which supposedly entitles the petitioners to the "protection by the state in its capacity as *parens patriae*." Such allegations, according to them, do not reveal a valid cause of action. They then reiterate the theory that the question of whether logging should be permitted in the country is a political question, which should be properly addressed to the executive or legislative branches of Government. They therefore assert that the petitioners' recourse is not to file an action in court, but to lobby before Congress for the passage of a bill that would ban logging totally.

As to the matter of the cancellation of the TLAs, respondents submit that the same cannot be done by the State without due process of law. Once issued, a TLA remains effective for a certain period of time – usually for twenty-five (25) years. During its affectivity, the same can neither be revised nor cancelled unless the holder has been found, after due notice and hearing to have violated the terms of the agreement or other forestry laws and regulations. Petitioners' proposition to have all the TLAs indiscriminately cancelled without the requisite hearing would be violative of the requirements of due process.

Before going any further, we must first focus on some procedural matters. Petitioners instituted Civil Case No. 90-777 as a class suit. The original defendant and the present respondent did not take issue with this matter. Nevertheless, we hereby rule that the said civil case is indeed a class suit. The subject matter of the complaint is of common and general interest not just to several, but to all citizens of the Philippines. Consequently, since the parties are so numerous, it becomes impracticable, if not totally impossible, to bring all of them before the court. We likewise declare that the plaintiffs therein are numerous and representative enough to ensure the full protection of all concerned interests. Hence, all the requisites for the filing of a valid class suit under Section 12, Rule 3 of the Revised Rules of Court are present both in the said civil case and in the instant petition, the latter being but an incident to the former.

This case, however, has a special and novel element. Petitioners minors assert that they represent their generation as well as generations yet unborn. We find no difficulty in ruling that they can, for themselves, for other of their generation and for the succeeding generations, file a class suit. Their personality to use on behalf of the succeeding generations can only be based on the concept of intergenerational responsibility in so far as the right to a balanced and healthy ecology is concerned. Such a right, as hereinafter expounded, considers the "rhythm and harmony of nature". Nature means the created world in its entirety. Such rhythm and harmony indispensably include, inter alia, the judicious disposition, utilization, management, renewal and conservation of the country's forest, mineral, land, waters, fisheries, wildlife, off-shore areas and other natural resources to the end that their exploration, development and utilization be equitably accessible to

the present as well as future generation.

Needless to say, every generation has a responsibility to the next to preserve that rhythm and harmony for the full enjoyment of a balanced and healthy ecology. But a little different, the minors' assertion of their right to a sound environment constitutes, at the same time, the performance of their obligation to ensure the protection of that right for the generations to come.

The locus standi of the petitioners having thus been addressed. We shall now proceed to the merits of the petition.

After a careful perusal of the complaint in question and a meticulous consideration and evaluation of the issues raised and arguments adduced by the parties, we do not hesitate to find for the petitioners and rule "against the respondent Judge's challenged order for having been issued with grave abuse of discretion amounting to lack of jurisdiction. The pertinent portions of the said order read as follow:

"After a careful and circumspect evaluation of the Complaint, the Court cannot help but agree with the defendant. For although we believe that plaintiffs have but the noblest of all intentions, it (sic) fell short of alleging, with sufficient definiteness, a specific legal right they are seeking to enforce and protect, or a specific legal wrong they are seeking to prevent and redress (Sec. 1, Rule 2, RRC). Furthermore, the Court notes that the complaint is replete with vague assumptions and vague conclusions based on unverified data. In fine, plaintiffs fail to state a cause of action in its complaint against the herein defendant, [sic]

Furthermore, the Court firmly believes that the matter before it, being impressed with political color and involving a matter of public policy, may not be taken cognizance of by this Court without doing violence to the sacred principle of "Separation of Powers" of the three (3) co-equal branches of the Government.

The Court is likewise of the impression that it cannot, no matter how we stretch our jurisdiction, grant the relief's prayed for by the plaintiffs, i.e., to cancel all existing timber license agreements in the country and to cease and desist from receiving, accepting, processing renewing or approving new timber license agreements. For to do otherwise would amount to "impairment of contracts" abhorred (sic) by the fundamental law."

We do not agree with the trial court's conclusion that the plaintiffs failed to allege with sufficient definiteness a specific legal wrong committed, and that the complaint is replete with vague assumptions and conclusions based on unverified data. A reading of the complaint itself belies these conclusions.

The complaint focuses on one specific fundamental legal right – the right to a balanced and healthy ecology which, for the first time in our nation's constitutional history, is solemnly incorporate in the fundamental law. Section 16, Article 11 of the 1987 Constitution explicitly provides"

"Sec. 16. The State shall protect and advance the right of the people to a balanced and healthy ecology in accord with the rhythm and harmony of nature"

This right unites with the right to health, which is provided for in the preceding section of the same article.

"Sec. 15. The State shall protect and promote the right to health of the people and instill health consciousness among them."

While the right to a balanced and healthful ecology is to be found under the Declaration of

Principles and State Policies and not under the Bill of Rights, it does not follow that it is less important than any of the civil and political rights enumerated in the latter. Such a right belongs to different category of rights altogether for it concerns nothing less than self-preservation and self-perpetuation – aptly and fittingly stressed by the petitioners – the advancement of which may even be said to predate all governments and constitutions. As a matter of fact, these basic rights need not even be written in the Constitution for they are assumed to exist from the inception of humankind. If they are now explicitly mentioned in the fundamental charter it is because of the well-founded fear of the framers that unless the rights to a balanced and healthful ecology and to health are mandated as state policies by the Constitution itself, thereby highlighting their continuing importance and imposing upon the state a solemn obligation to preserve the first and protect and advance the second, the day would not be too far when all else would be lost not only for the present generation, but also for those to come – generations which stand to inherit nothing but parched earth incapable of sustaining life.

The right to a balanced and healthful ecology carries with it the correlative duty to refrain from impairing the environment. During the debates on this right in one of the plenary sessions of the 1986 Constitutional Commission, the following exchange transpired between Commissioner Wilfrido Villacorta and Commissioner Adolfo Azcuna who sponsored the function in question:

“MR. VILLACORTA:

Does this section mandate the State to provide sanctions against all forms of pollution – air, water and noise pollution?

MR. AZCUNA:

Yes, Madam President. The right to healthful (sic) environment necessarily carries with it the correlative duty of not impairing the same and, therefore, sanctions may be provided for impairment of environmental balance.”

The said right implies, among many other things, the judicious management and conservation of the country’s forests. Without such forests, the ecological or environmental balance would be irreversibly disrupted.

Conformably with the enunciated right to a balanced and healthful ecology and the right to health, as well as the other related provisions of the Constitution concerning the conservation, development and utilization of the country’s natural resources, the President Corazon C. Aquino promulgated on 10 June 1987 E.O. No. 192,15 Section 4 of which expressly mandates that the Department of Environment and Natural Resources “shall be the primary government agency responsible for the conservation, management, development and proper use of the country’s environment and natural resources, specifically forest and grazing lands, mineral resources, including those in reservation and watershed areas, and lands of the public domain, as well as the licensing and regulation of all natural resources as may be provided for by law in order to ensure equitable sharing of the benefits derived therefrom for the welfare of the present and future generations of Filipinos.” Section 3 therefrom makes the following statement of policy:

“Sec. 3. Declaration of Policy. – It is hereby declared the policy of the State to ensure the sustainable use, development, management, renewal and conservation of the country’s forest, mineral, land, off-shore areas and other natural resources, including the protection and enhancement of the quality of the environment, and equitable access of the different segments of the population to the development and use of the country’s natural resources; not only for the present generation but for future generations as well. It is also the policy of the state to recognize and apply a true value system including social and environmental cost implications relative to their utilization, development and conservation of our natural

resources.”

This policy declaration is substantially re-stated in Title XIV, Book IV of the Administrative Code of 1987, specifically in Section 1 thereof which reads:

“Sec. I. Declaration of Policy. – (1) The state shall ensure, for the benefit of the Filipino people, the full exploration and development as well as the judicious disposition, utilization, management, renewal and conservation of the country’s forest, mineral, land, waters, fisheries, wildlife, off-shore areas and other natural resources, consistent with the necessity of maintaining a sound ecological balance and protecting and enhancing the quality of the environment and the objective of making the exploration, development and utilization of such natural resources equitably accessible to the different segments of the present as well as future generations.

2) The State shall likewise recognize and apply a true value system that takes into account social and environmental cost implications relative to the utilization, development and conservation of our natural resources.”

The above provision stresses “the necessity of maintaining a sound ecological balance and protecting and enhancing the quality of the environment”. Section 2 of the same title, on the other hand, specifically speaks of the mandate of the DENR; however, it makes particular reference to the fact of the agency’s being subject to law and higher authority. Said section provides:

“Sec.2, mandate. – (1) The Department of Environment and Natural Resources shall be primarily responsible for the implementation of the foregoing policy.

2) It shall, subject to law and higher authority, be in charge of carrying out the State’s constitutional mandate to control and supervise the exploration, development, utilization and conservation of the country’s natural resources.”

Both E.O. No. 192 and the Administrator Code of 1987 have set the objectives which will serve as he bases for policy formulation, and have defined the powers and functions of the DENR.

It may, however, be recalled that even before the notification of the 1987 Constitution, specific statutes already paid special attention to the “environmental right” of the present and future generations. On 6th June 1977, P.D. No. 1151 (Philippine environmental Policy) and P.D. No. 1152 (Philippine Environment Code) were issued. The former “declared a continuing policy of the State (a) to create, develop, maintain and improve conditions under which man and nature can thrive in productive and enjoyable harmony with each other, (b) to fulfill the social, economic and other requirements of present and future generations of Filipinos, and (c) to ensure the attainment of an environmental quality that is conducive to a life of dignity and well-being.” As its goal, it speaks of the “responsibilities of each generation as trustee and guardian of the environment for succeeding generations.” The latter statute, on the other hand, gave flesh to the said policy:

Thus, the right of the petitioners (and all those they represent) to a balanced and healthful ecology is as clear as the DENR’s duty – under its mandate and by virtue of its powers and functions under E.O. No. 192 and the Administrative Code of 1987 – to protect and advance the said right.

A denial or violation of that right by the other who has the correlative duty or obligation to respect or protect the same gives rise to a cause of action. Petitioners maintain that the granting of the TLAs, which they claim was done with grave abuse of discretion, violated their right to a balanced and healthful ecology; hence, the full protection thereof requires that no further TLAs should be renewed or granted.

A cause of action is defined as:

“x x x an actor or omission of one party in violation of the legal right or rights of the

other; and its essential elements are legal right of the plaintiff, correlative obligation of the defendant, and act or omission of the defendant in violation of said legal right.”

It is settled in this jurisdiction that in a motion to dismiss based on the ground that the complaint fails to state a cause of action, the question submitted to the court for resolution involves the sufficiency of the facts alleged in the complaint itself. No other matter should be considered; furthermore, the truth or falsity of the said allegations is beside the point for the truth thereof is deemed hypothetically admitted. The only issue to be resolved in such a case is: admitting such alleged facts to be true, may the court render a valid judgment in accordance with the prayer in the complaint? In *Militante vs Edrosolano*, this Court laid down the rule that the judiciary should “exercise the utmost care and circumspection in passing upon a motion to dismiss on the ground of the absence hereof [cause of action] lest, by its failure to manifest a correct appreciation of the facts alleged and deemed hypothetically admitted, what the law grants or recognizes is effectively nullified. If that happens, there is a blot on the legal order. The law itself stands in disrepute.”

After a careful examination of the petitioners’ complaint, we find the statements under the introductory affirmative allegations, as well as the specific averments under the sub-heading **CAUSE OF ACTION**, to be adequate enough to show, prima facie, the claimed violation of their rights. On the basis thereof, they may thus be granted, wholly or partly, the reliefs prayed for. It bears stressing, however, that in so far as the cancellation of the TLAs is concerned, there is the need to implead, as party defendants, the grantees thereof for they are indispensable parties.

The foregoing considered, Civil Case No. 90-777 cannot be said to raise a political question. Policy formulation or determination by the executive or legislative branches of Government is not squarely put in issue. What is principally involved is the enforcement of a right vis-a-vis policies already formulated and expressed in legislation. It must, nonetheless, be emphasized that the political question doctrine is no longer the insurmountable obstacle to the exercise of judicial power or the impenetrable shield that protects executive and legislative actions from judicial inquiry or review. The second paragraph of section 1, Article VIII of the Constitution states that: “Judicial power includes the duty of the courts of justice to settle actual controversies involving rights which are legally demandable and enforceable, and to determine whether or not there has been a grave abuse of discretion amounting to lack of excess of jurisdiction on the part of any branch or instrumentality of the Government.”

Commenting on this provision in his book, Philippine Political Law, Mr. Justice Isagani A. Cruz, a distinguished member of this Court, says:

“The first part of the authority represents the traditional concept of judicial power, involving the settlement of conflicting rights as conferred by law. The second part of the authority represents a broadening of judicial power to enable the courts of justice to review what was before forbidden territory, to wit, the discretion of the political departments of the government.”

As worded, the new provision vests in the judiciary, and particularly the Supreme Court, the power to rule upon even the wisdom of the decisions of the executive and the legislature and to declare their acts invalid for lack of excess of jurisdiction because tainted with grave abuse of discretion. The catch, of course, is the meaning of grave abuse of discretion, which is a very elastic phrase that can expand or contract according to the disposition of the judiciary.”

In *Daza vs. Singson*, Mr. Justice Cruz, now speaking for the Court, noted:

“In the case now before us, the jurisdictional objection becomes even less tenable and decisive.

The reason is that, even if we were to assume that the issue presented before us was political in nature, we would still not be precluded from resolving it under the expanded jurisdiction conferred upon us that now covers, in proper cases, even the political question. Article VII, Section 1, of the Constitution clearly provides: x x x."

The last ground invoked by the trial court in dismissing the complaint is the non-impairment of contracts clause found in the Constitution. The court a quo declared that:

"The Court is likewise of the impression that it cannot, no matter how we stretch our jurisdiction, grant the reliefs prayed for by the plaintiffs, i.e., to cancel all existing timber license agreements in the country and to cease and desist from receiving, accepting, processing, renewing or approving new timber license agreements. For to do otherwise would amount to "impairment of contracts" abhorred (sic) by the fundamental law."

We are not persuaded at all; on the contrary, we are amazed, if not shocked, by such a sweeping pronouncement. In the first place, the respondent Secretary did not, for obvious reasons, even invoke in his motion to dismiss the non-impairment clause. If he had done so, he would have acted with utmost infidelity to the Government by providing undue and unwarranted benefits and advantages to the timber license holders because he would have forever bound the Government to strictly respect the said licenses according to their terms and conditions regardless of changes in policy and the demands of public interest and welfare. He was aware that as correctly pointed out by the petitioners, into every timber license must be read Section 20 of the Forestry Reform Code (PD. No. 705) which provides:

"x.x.x provided, That when the national interest so requires, the President may amend, modify, replace or rescind any contract, concession, permit, licenses or any other form of privilege granted herein x x x.

Needless to say, all licenses may thus be revoked or rescinded by executive action. It is not a contract, property or a property right protected by the due process clause of the Constitution. In *Tan vs. Director of Forestry*, this Court held:

" x x x A timber license is an instrument by which the State regulates the utilization and disposition of forest resources to the end that public welfare is promoted. A timber license is not a contract within the purview of the process clause; it is only a license or privilege, which can be validly withdrawn whenever dictated by public interest or public welfare as in this case.

"A license is merely a permit or privilege to do what otherwise would be unlawful, and is not a contract between the authority, federal, state, or municipal, granting it and the person to whom it is granted; neither is it property or a property right, nor does it create a vested right; nor *Taxation* (37 CIJ.168). Thus, this Court held that the granting of license does not create irrevocable rights, neither is it property or property rights (*People vs. Ong.*, 54 O.G. 756). x x x"

We reiterated this pronouncement in *Felipe Yamael, Jr. & Co., Inc. vs. Deputy Executive Secretary*:

"x x x Timber licenses, permits and license agreements are the principal instruments by which the State regulates the utilization and disposition of forest resources to the end that public welfare is promoted. And it can hardly be gainsaid that they merely evidence a privilege granted by the State to qualified entities, and do not vest in the latter a permanent or irrevocable right to the particular concession area and the forest products therein. They may be validly amended, modified, replaced or rescinded by the Chief

Executive when national interests so require, Thus, they are not deemed contracts within the purview of the due process of law clause [See section 3(ee) and 20 of Pres. Decree No. 705, as amended, “Also, Tan vs. Director of Forestry, G.R. No. L-24548, October 27, 1983, 125 SCRA 302].”

Since timber licenses are not contracts, the non-impairment clause, which reads: “SEC. 10, No law impairing the obligation of contracts shall be passed.” cannot be invoked. In the second place, even if it is to be assumed that the same are contracts, the instant case does not involve a law or even an executive issuance declaring the cancellation or modification of existing timber licenses. Hence, the non-impairment clause cannot as yet be invoked. Nevertheless, granting further that a law has actually been passed mandating cancellations or modifications, the same cannot still be stigmatized as a violation of the non-impairment clause. This is because by its very nature and purpose, such a law could have only been passed in the exercise of the police power of the state for the purpose of advancing the right of the people to a balanced and healthful ecology, promoting their health and enhancing the general welfare. In *Aba vs. Foster Wheeler Corp.*, this court stated:

“The freedom of contract, under our system of government, is not meant to be absolute. The same is understood to be subject to reasonable legislative regulation aimed at the promotion of public health, moral, safety and welfare. In other words, the constitutional guaranty of non-impairment of obligations of contract is limited by the exercise of the police power of the State, in the interest of public health, safety, moral and general welfare.”

The reason for this is emphatically set forth in *Nebia vs. New York*, quoted in *Philippine American Life Insurance Co. vs. Auditor General*, to wit:

“Under our form of government the use of property and the making of contracts are normally matters of private and not of public concern. The general rule is that both shall be free of governmental interference. But neither property rights nor contract rights are absolute; for government cannot exist if the citizen may at will use his property to the detriment of his fellows, or exercise his freedom of contract to work them harm. Equally fundamental with the private right is that of the public to regulate it in the common interest.”

In short, the non-impairment clause must yield to the police power of the state.

Finally, it is difficult to imagine, as the trial court did, how the non-impairment clause could apply with respect to the prayer to enjoin the respondent Secretary from receiving, accepting, processing, renewing or approving new timber licenses for, save in cases for renewal, no contract would have as of yet existed in the other instances. Moreover, with respect to renewal, the holder is not entitled to it as a matter of right.

WHEREFORE, being impressed with merit, the instant petition is hereby GRANTED, and the challenged Order of respondent judge of 18 July 1991 dismissing civil case No. 90-777 is hereby set aside. The petitioners may therefore amend their complaint to implead as defendants the holders or grantees of the questioned timber license agreements.

No pronouncement as to costs.

SO ORDERED

CONCUR

(No part: related to one of the parties)

ANDRES R. NARVASA
CHIEF JUSTICE

(Please see separate opinion concurring in the result)

(SAGANI A. CRUZ
Associate Justice

FLORENTINO P. FELICIANO
Associate Justice

TEODORO R. PADILLA
Associate Justice

ABDULWAHID A. BIDIN
Associate Justice

CAROLINA C. GRINO-AQUINO
Associate Justice

FLORENZ D. REGALADO
Associate Justice

FERIDA RUTH P. ROMERO
Associate Justice

RODOLFO A. NOCON
Associate Justice

JOSUE N. BELLOSILLO
Associate Justice

JOSE A.R. MELO
Associate Justice

CAMILO D. QUIASON
deliberations)

DEYWATO S. PUNO (No part in Associate Justice the

Associate Justice

No part. I was not yet with the Court when the case was deliberated upon

JOSE C. VILUG
Associate Justice

CERTIFICATION

Pursuant to Article VIII, Section 13 of the Constitution, it is hereby certified that the conclusions in the above decision were reached in consultation before the case was assigned to the writer of the opinion of the court.

ANDRES R. NARVASA
Chief Justice
CLERK OF COURT

G.R. No. 101083

(Juan Antonio, Anna Rosario and Jose Alfonso, all surnamed Oposa, minors, and represented by their parents **Antonio and Rizalina Oposa, et al. V. The Honourable Fulgencio S. Factoran, JR.** and the Honourable Eriberto U. Rosario.)

Promulgated:

Feliciano, J.: Concurring in the result
July 30 1993

I join in the result reached by my distinguished brother in the Court, Davide, Jr., J. in this case which, to my mind, is one of the most important cases decided by this Court in the last few years.

The seminal principles laid down in this decision are likely to influence profoundly the direction and course of the protection and management of the environment, which of course embraces the utilization of all the natural resources in the territorial base of our polity. I have therefore sought to clarify, basically to myself, what the Court appears to be saying.

The Court explicitly states that petitioners have the locus standi necessary to sustain the bringing and maintenance of this suit (Decision, pp. 11-12). Locus standi is not a function of petitioners' claim that their suit is properly regarded as a class suit. I understand locus standi to refer to the legal interest which a plaintiff must have in the subject matter of the suit, because of the very broadness of the concept of "class" here involved – membership in this "class" appears to embrace everyone living in the country whether now or in the future – it appears to me that everyone who may be expected to benefit from the course of action petitioners seek to require public respondents to take, is vested with the necessary locus standi. The Court may be seen therefore to be recognizing a beneficiaries' right of action in the field of environmental protection, as against both the public administrative agency directly concerned and the private persons or entities operating in the field or sector of activity involved. Whether such a beneficiaries' right of action may be found under any and all circumstances, or whether some failure to act, in the first instance, on the part of the governmental agency concerned must be shown ("prior exhaustion of administrative remedies"), is not discussed in the decision and presumably is left for future determination in an appropriate case.

The Court has also declared that the complaint has alleged and focused upon "one specific fundamental legal right" the right to a balanced and healthful ecology" (Decision, p.14). There is no question that "the right to a balanced and healthful ecology" is "fundamental" and that, accordingly, it has been "constitutionalized." But although it is fundamental in character, I suggest, with every great respect, that it cannot be characterized as "specific," without doing excessive violence to language. It is in fact very difficult to fashion language more comprehensive in scope and generalized in character that a right to " a balanced and healthful ecology." The list of particular claims which can be subsumed under this rubric appears to be entirely open-ended; prevention and control of emission of toxic fumes and smoke from factories and motor vehicles of discharge of oil, chemical effluents, garbage and raw sewage into rivers, inland and coastal waters by vessels, oil rigs, factories, mines and whole communities; of dumping of organic and inorganic wastes on open land, streets and thoroughfares; failure to rehabilitate land after strip-mining or open-pit mining; kaingin or slash-and-burn farming; destruction of fisheries, coral reefs and other living sea resources through the use of dynamite or cyanide and other chemicals; contamination of ground water resources; loss of certain species of fauna and flora; and so on. The other statements pointed out by the court: Section 3, Executive Order No. 192 dated 10th June 1987; Section 1, Title XIV, Book IV of the 1987 Administrative Code; and P.O. No. 1151, dated 6th June 1977 – all appear to be formulations of policy, as general and abstract as the constitutional statements of basic policy in Article II, Section 16 ("the right – to a balanced and healthful ecology") and 15 ("the right to health").

P.O. No. 1152, also dated 6th June 1977, entitled "The Philippine Environment Code," is, upon the other hand, a compendious collection of more "specific environment management policies" and "environment quality standards" (fourth "Whereas" clause, Preamble) relating to an extremely wide range of topics:

air quality management;

- water quality management;
- land use management;
- natural resources management and conservation embracing;

- fisheries and aquatic resources;
- wild life;
- forestry and soil conservation;
- flood control and natural calamities;
- energy development;
- conservation and utilization of surface and ground water;
- mineral resources

Two (2) points are worth making in this connection. Firstly, neither petitioners nor the Court has identified the particular provision or provisions (if any) of the Philippine Environment Code which give rise to a specific legal right which petitioners are seeking to enforce. Secondly, the Philippine Environment Code identifies with notable care the particular government agency charged with the formulation and implementation of guidelines and programs dealing with each of the headings and sub-headings mentioned above. The Philippine Environment Code does not in other words, appear to contemplate action of the part of private persons who are beneficiaries of implementation of that code.

As a matter of logic, by finding petitioners' cause of action as anchored on a legal right comprised in the constitutional statements above noted, the Court is in effect saying that Section 15 (and Section 16) of Article II of the Constitution are self executing and judicially enforceable even in their present form. The implications of this doctrine will have to be explored in future cases; those implications are too large and far-reaching in nature even to be hinted at here.

My suggestion is simply that petitioners must, before the trial court, show a more specific legal right – a right case in language of a significantly lower order of generality than Article II (15) of the Constitution – that is or may be violated by the action, or failures to act, imputed to the public respondent by petitioners so that the trial court can validly render judgment granting all or part of the relief prayed for. To my mind, the court should be understood as simply saying that such a more specific legal right or rights may well exist in our corpus of law, considering the general policy principles found in the Constitution and the existence of the Philippine Environment Code, and that the trial court should have given petitioners an effective opportunity so to demonstrate, instead of aborting the proceedings on a motion to dismiss.

It seems to me important that the legal right which is an essential component of a cause of action be a specific, operable legal right, rather than a constitutional or statutory policy, for at least two (2) reasons. One is that unless the legal right claimed to have been violated or disregarded is given specification in operational terms, defendants may well be unable to defend themselves intelligently and effectively: in other words, there are due process dimensions to this matter.

The second is a broader-gauge consideration – where a specific violation of law or applicable regulation is not alleged or proved, petitioners can be expected to fall back on the expanded conception of judicial power in the second paragraph of Section 1 of Article VIII of the Constitution which reads:

“Section 1.

Judicial power includes the duty of the courts of justice to settle actual controversies involving rights which are legally demandable and enforceable, and to determine whether or not there has been a grave abuse of discretion amounting to lack or excess of jurisdiction on the part of any branch or instrumentality of the Government.” (Emphases supplied)

When substantive standards as general as “the right to a balanced and healthy ecology” and “the

right to health” are combine with remedial standards as broad ranging as “ a grave abuse of discretion amounting to lack or excess of jurisdiction,” the result will be, it is respectfully submitted, to propel courts into the uncharted ocean of social and economic policy making. At least in respect of the vast area of environmental protection and management, our courts have no claim to special technical competence and experience and professional qualification. Where no specific, operable norms and standards are shown to exist, then the policy making department – the legislative and executive departments – must be given a real and effective opportunity to fashion and promulgate those norms and standards, and to implement them before the courts should intervene.

My learned brother Davide, Jr., J. rightly insists that the timber companies, whose concession agreements or TLA’s petitioners demand public respondents should cancel, must be impleaded in the proceedings below. It might be asked that, if petitioners’ entitlement to the relief demanded is not dependent upon proof of breach by the timber companies of one or more of the specific terms and conditions of their concession agreements (and this, petitioners implicitly assume), what will those companies litigate about? The answer I suggest is that they may seek to dispute the existence of the specific legal right petitioners should allege, as well as the reality of the claimed factual nexus between petitioners’ specific legal right and the claimed wrongful acts or failures to act of public respondent administrative agency. They may also controvert the appropriateness of the remedy or remedies demanded by petitioners, under all the circumstances, which exist.

I vote to grant the Petition for Certiorari because the protection of the environment, including the forest cover of our territory, is of extreme importance for the country. The doctrines set out in the Court’s decision issued today should, however, be subjected to closer examination.

Florentino P. Feliciano

THE REPUBLIC OF INDIA

IN THE HIGH COURT OF KERALA AT ERNAKULAM

(CORAM: AG.CJ SRLAR.LAKSHMANAN & JUSTICE SRI. K.NARAYANAKURUP)

K. RAMAKRISHNAN AND OTHERS.....PETITIONERS

VERSUS

STATE OF KERALA AND OTHERS.....RESPONDENTS

BEFORE: NARAYANA KURUP. J.

This petition highlights the public health issues of the dangers of passive smoking and in which prayers were made to declare that smoking of tobacco in any form, in public places was illegal and violated the Constitution of India. The petitioners were seeking an order for mandamus commanding the respondents to take appropriate and immediate measures to prosecute and punish all persons guilty of smoking in public places treating the said act as satisfying the definition of 'public nuisance'.

HELD:

1. Public smoking of tobacco in any form is illegal and unconstitutional and therefore the District Collectors of all districts of the State of Kerala who are joined as additional respondents should promulgate an order prohibiting public smoking within one month and also take appropriate measures to prosecute all persons found smoking in public places by filling a complaint before the competent Magistrate and also through sensitization.
2. Tobacco smoking in public places falls within the mischief of Penal provisions relating to public nuisance as contained in the Penal Code and also air pollution as contained in the statutes dealing with the protection and preservation of the environment in the Air (Prevention and Control of Pollution) Act, 1981
3. The continued omission on the part of the respondents to comply with the Constitutional mandate to protect life and recognise the inviolability of dignity of mankind amounts to a negation of their Constitutional guarantee of decent living provided by the Constitution of India.

Petition allowed

**IN THE HIGH COURT OF KERALA.
AT ERNAKULAM**

**PRESENT: AG. CHIEF JUSTICE SRI. AR. LAKSHMANAN & JUSTICE SRI. K.
NARAYANAKURUP
MONDAY, THE 12TH DAY OF FEBRUARY, 1999**

K. RAMAKRISHNAN AND OTHERS=====PETITIONERS

VERSUS

STATE OF KERALA AND OTHERS =====RESPONDENTS

JUDGMENT

NARAYANA KURUP. J.

1.This is an original petition highlighting the public health issue of the dangers of passive smoking and in which prayers are made to declare that smoking of tobacco in any form, whether in the form of cigarette, cigar, beedies or otherwise in public places is illegal unconstitutional and violative of Article 21 of the Constitution of India issue a writ in the nature of mandamus or such other writ commanding the respondents to take appropriate and immediate measures to prosecute and punish all persons guilty of smoking in public places treating the said act as satisfying the definition of 'public nuisance' as defined under Section 268 of the Indian Penal Code. We heard Mr. P. Deepak, counsel for the petitioners the Advocate General for the State and counsel for other respondents.

2. In the writ petition originally there were only respondents I to 9 viz., State of Kerala, Director of Panchayath, Director General of Police, Commissioners of Police, Thiruvananthapuram Kochi and Kozhikode and Commissioners of Thiruvananthapuram, Kochi and Kozhikode Municipal Corporations. During the pendency of the Original Petition this court suo-motu impleaded additional respondents 10 to 52 on whom service is complete.

3. Before proceeding to discuss the legal issues arising in this original petition, we feel that it is useful to refer to certain facts and figures of startling revelations which has a direct bearing on the dangers of smoking, active and passive, and its horrifying impact on public health.

ON SMOKING GENERALLY

4. One million Indians die every year from tobacco-related diseases. This is more than the number of deaths due to motor accidents, AIDS, alcohol and drug abuse put together say the Indian Medical Association (IMA) and the Indian Academy of Pediatrics (IAP), quoting studies.

5.Cigarette smoking is the major preventable cause of death in America contributing to an estimated 350000 deaths annually. Epidemiological and experimental evidence has identified cigarette smoking as the primary cause of lung cancer and chronic obstructive pulmonary diseases (COPD) and as a major risk factor for coronary heart disease. Smoking has been associated with other cancers, cerebrovascular and peripheral vascular diseases and peptic ulcer disease. Smokers also suffer more acute respiratory illness. Cigarette smoke consisting of particles dispersed in a gas phase. is a complex mixture of thousands of compounds produced by the incomplete combustion of the tobacco leaf. Smoke constituents strongly implicated in causing

disease are nicotine and tar in the particulate phase and carbon monoxide in the gas phase. Smokers have a 70 per cent higher mortality rate than nonsmokers. The risk of dying increases with the amount and duration of smoking and is higher in smokers who inhale. Coronary heart disease is the chief contributor to the excess mortality among cigarette smokers followed by lung cancer and chronic obstructive pulmonary disease (COPD). Life expectancy is significantly shortened by smoking cigarettes. Tobacco smoke also gets dissolved in the saliva and is swallowed exposing the upper gastrointestinal tract to carcinogens.

A strong association between smoking and lung cancer has been demonstrated in multiple prospective and retrospective epidemiological studies and corroborated by autopsy evidence. Lung cancer has been the leading cause of cancer death in men since the 1950s and it surpassed breast cancer as a leading cause of cancer death in women in 1985. Male smokers have a tenfold higher risk of developing lung cancer, and the risk increases with the number of cigarettes smoked. There is also strong evidence that smoking is a major cause of cancers of the larynx oral cavity and esophagus. The risk of these cancers increases with the intensity of exposure to cigarette smoke either active or passive. Epidemiological studies show an association between smoking and cancers of the bladder, pancreas, stomach, and uterine cervix.

6. Cigarette smoking is a major independent risk factor for coronary artery disease. Retrospective and prospective epidemiological studies have demonstrated a strong relationship between smoking and coronary morbidity and mortality in both men and women. The coronary disease death rate in smokers is 70% higher than in nonsmokers, and the risk increases with the amount of cigarette exposure. The risk of sudden death is two to four times higher in smokers. Smoking is also a risk factor for cardiac arrest and severe malignant arrhythmia's. In addition to increased coronary mortality, smokers have a higher risk of nonfatal myocardial infarction or unstable angina. Patients with angina lower their exercise tolerance if they smoke. Women who smoke and use oral contraceptives or post-menopausal estrogen replacement greatly increase their risk of myocardial infarction.

7. Autopsy studies demonstrate more athermanous changes in smoke than nonsmokers. Carbon monoxide in cigarette smoke decreases oxygen delivery to endothelial tissues. In addition, smoking may trigger acute ischemia. Carbon monoxide decreases myocardial oxygen supply while nicotine increases myocardial demand by releasing catecholamine that raises blood pressure heart rate and contractility. Carbon monoxide and nicotine also induce platelet aggregation that may cause occlusion of narrowed vessels. Cigarette smoking is the most important risk factor for peripheral vascular disease. In patients with intermittent claudicating smoking lowers exercise tolerance and may shorten graft survival after vascular surgery. Smokers have more aortic atherosclerosis and an increased risk of dying from a ruptured aortic aneurysm. Smokers under the age of 65 have a higher risk of dying from cerebrovascular disease and women who smoke have a greater risk of subarachnoid hemorrhage, especially if they also use oral contraceptives.

Smoking and Pulmonary Disease:

8. Cigarette smoking is the primary cause of chronic bronchitis and emphysema. Smokers have a higher prevalence of respiratory symptoms than nonsmokers. Studies of pulmonary function indicate that impairment exists in asymptomatic as well as symptomatic smokers. Smokers have a higher risk of acute as well as chronic pulmonary disease. Inhaling cigarette smoke impairs pulmonary clearance mechanisms by paralyzing ciliary transport. This may explain the susceptibility to viral respiratory infections including influenza. Smokers who develop acute respiratory infections have longer and more severe courses with a more prolonged cough.

Other Health Consequences:

9. Smokers have a higher prevalence of peptic ulcer diseases and a higher case-fatality rate. Smoking has been associated with increased osteoporosis in men and post-menopausal women. Female smokers weigh less than nonsmokers and have an earlier age of menopause: both of these factors are associated with osteoporosis and may contribute to the relationship between smoking and osteoporosis. Moreover, smoking depresses serum estrogen levels in post-menopausal women taking estrogen replacement therapy.

ON PASSIVE SMOKING

Passive Smoking (Environmental Smoke Exposure):

10. Nonsmokers involuntarily inhale the smoke of nearby smokers a phenomenon known as passive smoking. Wives, children and friends of smokers are a highly risk-prone group. Inhalation of sidestream smoke by a nonsmoker is definitely more harmful to him than to the actual smoker as he inhales more toxins. This is because sidestream smoke contains three times more nicotine three times more tar and about 50 times more ammonia. Passive smoking (because of smoking by their fathers) could lead to severe complications in babies aged below two. It is pointed out that in India hospital admission rates are 28 per cent higher among the children of smokers. These children have acute lower respiratory infection decreased lung function increased eczema and asthma and increased cot deaths. Also, children of heavy smokers tend to be shorter.

11. Passive smoking is associated with an overall 23 per cent increase in the risk of coronary heart disease (CHD) among men and women who had never smoked. The following data shows just how heavy cigarette smoking's toll on non-smokers is. A new "meta-analysis" of data from 14 studies involving 6, 166 individuals with coronary heart disease (CHD) finds that passive smoking was associated with an overall 23 per cent increase in the risk of CHD among men and women who had never smoked. It is estimated that 35,000 to 40,000 nonsmokers' deaths each year in the United States can be attributed to passive smoking. This underscores the need to eliminate passive smoking as an important strategy to reduce the societal burden of CHD. The United Nations health agency insisted that passive smoking caused lung cancer and that an environmental tobacco smoke poses a positive health hazard. Research on the subject has found an estimated 16 per cent increase in the risk of developing lung cancer among nonsmoking spouses of smokers and an estimated 17 per cent rise in risk for work place exposure. The public is left high and dry over the risks of "second-hand smoke.". For non-smokers the major source of carbon monoxide is from passively inhaled cigarette smoke. Environmental tobacco smoke (ETS) has been shown to reduce lung function in children. Its irritant effect could not be ignored as this is the reason why most people object to being the victims of passive smoking. Patients with asthma find this irritant effect will worsen symptoms. The most remarkable effect of environmental tobacco smoke (ETS) is the development of lung cancer in passively exposed non-smokers as shown by reports from Japan and Greece. Large number of controlled studies have confirmed a relative risk of developing lung cancer in passively exposed subjects. Estimates from the United States have suggested that 3000 to 5000 deaths per year from lung cancer can be attributed to passive smoking.

12. Maternal smoking during pregnancy increases risks to fetus and non-smokers chronically exposed to tobacco smoke will suffer health hazards. Maternal smoking during pregnancy contributes to fetal growth retardation. Infants born to mothers who smoke weigh an average of 200g less but have no shorter gestations than infants of non-smoking mothers. Carbon monoxide

in smoke may decrease oxygen availability to the fetus and account for the growth retardation. Smoking during pregnancy has also been linked with higher rates of spontaneous abortion fetal death and neonatal death. When smoking occurs in enclosed areas with poor ventilation such as in buses, bars and conference rooms high levels of smoke exposure can occur. Acute exposure to smoke-contaminated air decreased exercise capacity in healthy nonsmokers and can worsen symptoms in individuals with angina, chronic obstructive pulmonary disease (COPD) or asthma. Chronic exposure to smoky air occurs in the workplace and in the homes of smokers. Non-smokers in smoky workplaces develop small-airways dysfunction similar to that observed in light smokers. Compared to the children of non-smokers, children whose parents smoke have more respiratory infections throughout childhood, a higher risk of asthma, and alterations in pulmonary function tests. In recent studies of non-smoking women those married to smokers had higher lung cancer rates than those married to non-smokers. Chronic smoke exposure may be associated with increased incidence of cardiopulmonary disease in nonsmokers.

13. Environmental tobacco smoke (ETS) also contributes to respiratory morbidity of children. Increased platelet aggregation also occurs when a nonsmoker smokes or is passively exposed to smoke.

Although environmental tobacco smoke (ETS) differs from "mainstream smoke" in several ways it contains many of the same toxic substances. Infants and toddlers may be especially at risk when exposed to environmental tobacco smoke (ETS). Considering the substantial morbidity and even mortality of acute respiratory illness in childhood, a doubling in risk attributable to passive smoking clearly represents a serious pediatric health problem. Exposure to environmental tobacco smoke (ETS) has been associated with increased asthma-related trips to the emergency room of hospitals. There is now sufficient evidence to conclude that passive smoking is associated with additional episodes and increased severity of asthma in children who already have the disease. Exposure to passive smoking may alter children's intelligence and behavior and passive smoke exposure in childhood may be a risk factor for developing lung cancer as an adult. Environmental tobacco smoke (ETS) contains more than 4000 chemicals and at least 40 known carcinogens.

Nicotine, the addictive drug contained in tobacco leads to acute increase in heart rate and blood pressure. ETS also increases platelet aggregation, or blood clotting. It also damages the endothelium the layer of cells that line all blood vessels, including the coronary arteries. In addition, nonsmokers who have high blood pressure or high blood cholesterol are at even greater risk of developing heart diseases from ETS exposure. An investigation in Bristol has found that the children of smokers have high levels of cotinine, a metabolite of nicotine in their saliva. The results indicated that children who had two smoking parents were breathing in as much nicotine as if they themselves were smoking 80 cigarettes a year. A study published in the "New England Journal of Medicine" found that the children of smoking mothers were less efficient at breathing. A study conducted by the Harvard Medical School in Boston concluded that passive exposure to maternal cigarette smoke may have important effects on the development of pulmonary function in children.

An important discovery is that the cocktail of chemicals in a smoky room may be more lethal than the smoke inhaled by the smoker. The "side stream" smoke contains three times as much benzo(a)pyrene (a virulent cause of cancer) six times as much toluene another carcinogen and more than 50 times as much dimethylnitrosamine. It has been commented by Dale Sandler of the National Institute of Environmental Health Studies in the United States that the potential for damage from passive smoking may be greater than has been previously recognized.

14. Thus, it can safely conclude that the dangers of passive smoking are real broader than once believed and parallel those of direct smoke. It has long been established that smoking harms the health of those who smoke.

Now, new epidemiological studies and reviews are strengthening the evidence that it also harms the health of other people nearby who inhale the toxic fumes generated by the smoker particularly from the burning end of the cigarette. Such indirect or secondhand smoking causes death not only by lung cancer but even more by heart attack the studies show. The studies on passive smoking as it is often called also strengthen the link between parental smoking and respiratory damage in children. According to expert there was little question that passive smoking is a major health hazard. What has swayed many scientists is a remarkable consistency in findings from different types of studies in several countries with improved methods over those used in the first such studies a few years ago.

The new findings confirm and advance the earlier reports from the U.S. Surgeon General who concluded that passive smoking caused lung cancer. According to Dr. Cedric F. Garland, an expert in the epidemiology of smoking at the University of California at San Diego "the links between passive smoking and health problems are now as solid as any finding in epidemiology." The newer understanding of the health hazards of passive smoking were underscored in a report at a world conference on lung health in Boston recently. Dr. Stanton A. Glantz of the University of California at San Francisco estimated that passive smoke killed 50000 Americans a year two-thirds of whom died of heart disease. Passive smoking ranks behind direct smoking and alcohol as the third leading preventable cause of death. Dr. Donald Shopland of the U.S. National Cancer Institute who has helped to prepare the Surgeon General's reports on smoking has said: "there's no question" now that passive smoking is also a cause of heart disease. The new findings on passive smoking parallel recent changes in U.S. laws and rules that limit smoking in public places. In recent Years all but four States (Missouri, North Carolina, Tennessee and Wyoming) have passed comprehensive laws limiting smoking in public place. Only a decade ago many scientists were sceptical about the initial links between passive smoking and lung cancer.

15. "Mainstream smoke" is inhaled and consists of large particles deposited in the larger airways of the lung. "Side stream smoke" is generated from the burning end of cigarettes, cigars and pipes during the smouldering between puffs. It may come from someone else's tobacco or from one's own and is the major source of environmental tobacco smoke (ETS). It is a mixture of irritating gasses and carcinogenic tar particles that reach deeper into the lungs because they are small. According to scientists because of incomplete combustion from the lower temperatures of a smouldering cigarette sidestream smoke is dirtier and chemically different from mainstream smoke. Scientists have found a 30 per cent increase in risk of death from heart attacks among nonsmokers living with smokers due to passive smoking. Researchers have found that passive smoking makes platelets the tiny fragments in the blood that help it clot stickier. Platelets can form clots on plaques in fat-clogged arteries to cause heart attacks and they may also play a role in promoting arteriosclerosis the underlying cause of most heart attacks. Researchers have also shown that passive smoking affects heart function decreasing the ability of people with and without heart disease to exercise. It has been pointed out that passive smoking increases the demand on the heart during exercise and reduces the heart's capacity to speed up. For people with heart disease, the decreased function can precipitate chest pains from angina. The children exposed to passive smoke since birth had increased amounts of cholesterol and lower levels of HDL, a protein in blood that is believed to provide protection against heart attacks. The researchers found that the greater the exposure to passive smoke, the greater was the biochemical changes.

16. A pioneering report linking passive smoking and lung cancer came in 1981 from a 14-year

Japanese study by Dr. Takeshi Hirayama. His research methods were criticized at first. Mr. Lawrence Garfinkel, an epidemiologist who is vice-president of the American Cancer Society said that he was at present sceptical of Dr. Hirayama's report but was convinced from later studies including his own that there was about a 30 per cent increased risk of developing lung cancer from passive smoking. Mr. Garfinkel said a study of 1.2 million Americans now being completed should help clarify the degree of risk from all types of cancer and other diseases. Dr. Glantz estimated that one-third of the 50,000 deaths from passive smoking were from cancer. In addition to lung cancer, researchers have linked cancer of the cervix to both mainstream and side stream smoke. The American Academy of Pediatrics estimates that 9 million to 12 million American children under the age of 5 may be exposed to passive smoke. The newer studies strengthened earlier conclusions that passive smoke increases the risk of serious early childhood respiratory illness particularly bronchitis and pneumonia in infancy. Increased coughing was reported from birth to the mid-teenage years among 13 newer studies of passive smoking and respiratory symptoms. It has also been found that passive smoke can lead to middle ear infections and other conditions in children. Asthmatic children are particularly at risk and the lung problems in childhood can extend to adulthood.

17. In 1962 and 1964 the Royal College of Physicians in London and the Surgeon General of the United States released landmark reports documenting the causal relation between smoking and lung cancer. Thereafter, extensive research has confirmed that smoking affects virtually every organ system. By 1990, the Surgeon General of the United States concluded, "smoking represents the most extensively documented cause of disease ever investigated in the history of biomedical research. "Studies have shown increased risk of lung cancer in non-smoking women whose husbands smoked. Spousal studies on passive smoking showed a positive association between smoking and lung cancer. It has now been shown that involuntary smoking is a cause of disease including lung cancer in healthy non-smokers. Studies in various countries have established a positive association between passive smoking and lung cancer.

The Environmental Protection Agency of U.S. classified environmental tobacco smoke (ETS) as a known human carcinogen to which it attributed 3000 lung cancer deaths annually in American non-smokers. The agency also documented causal associations between exposure to environmental tobacco smoke (ETS) and lower respiratory tract infections such as pneumonia and bronchitis middle ear disease, and exacerbation's of asthma in children. A report on environmental tobacco smoke (ETS) published in December 1998 by the California Environmental Protection Agency affirmed the findings of the US Environmental Protection Agency on the link between environmental tobacco smoke (ETS) and lung cancer and respiratory illness. It also concluded that passive smoking is a cause of heart disease mortality acute and chronic heart disease morbidity retardation of fetal growth, sudden infant death syndrome (SIDS) nasal sinus cancer and induction of asthma in children. Two important studies from the Wolfson Institute of Preventive Medicine in London, published in 1998 show that marriage to a smoker increased the risk of lung cancer by 26%. Studies have also established strong relation between passive smoking and ischaemic heart disease (IHD), The systematic reviews from the Wolfson Institute, the California Environmental Protection Agency and the US Environmental Protection Agency and the various reports released make it clear that exposure to environmental tobacco smoke (ETS) is a cause of lung cancer heart disease and other serious illness. In the United States, alone it is responsible each year for 3000 deaths from lung cancer. 35,000 to 62,000 deaths from ischaemic heart disease (IHD), 150,000 to 300,000 cases of bronchitis or pneumonia in infants and children aged 18 months and younger causing 136 to 212 deaths. 8000 to 26,000 new cases of asthma, exacerbation of asthma in 400,000 to 1 million children, 700,000 to 1.6 million visits to physician offices for middle ear infection. 9700 to 18600 cases of low birth weight and 1900 to 2700 sudden infant deaths. These figures make passive smoking one of the leading

preventable causes of premature death in the United States.

18. Public health action by policy makers to eliminate exposure to environmental tobacco smoke (ETS) is long overdue. A total ban on smoking is preferred on various grounds. Policy makers should pursue all strategies that would help accomplish that goal, including education legislation, Regulation, litigation and enforcement of existing laws.

19. Government of India is a party to 16 or so resolutions adopted by the World Health Organization since the 1970s, particularly the one adopted in 1986, which urged member-countries to formulate a comprehensive national tobacco control strategy.

It was envisaged that the strategy would contain measures:

- (i) to ensure effective protection to non-smokers from involuntary exposure to tobacco smoke;
- (ii) to promote abstention from the use of tobacco to protect children and young people from becoming addicted;
- (iii) to ensure that a good example is set on all health-related premises by all health personnel;
- (iv) to progressively eliminate all incentives which maintain and promote the use of tobacco;
- (v) to prescribe statutory health warnings on cigarette packets and the containers of all types of tobacco products;
- (vi) to establish programmes of education and public information on tobacco and health issues with the active involvement of health professionals and media;
- (vii) to monitor trends in smoking and other *forms* of tobacco use, tobacco-related diseases and effectiveness of national smoking control action;
- (viii) to promote viable economic 'alternatives to tobacco production trade and taxation; and
- (ix) to establish a national focal point to stimulate, support and coordinate all these activities.

Despite the fact that India is a signatory to these resolutions it is saddening to note that no significant follow-up action has been taken except banning smoking in public places and public transport and printing a statutory warning on cigarette packets. Even here, the action has been half-hearted with the ban on smoking in public places confined to Delhi and a few other cities and the statutory warning being followed more as a ritual and printed in such small letters that the consumer hardly notices it. Advertisement in the government controlled mass media has been prohibited, but it continues unabated in the print media and private television channels. The Government's lip-service is reflected in the absence of any mention about the hazards of tobacco in the Health Ministry's Annual Report. Except on the occasion of the "World No Tobacco Day" once a year, there has been no sustained campaign to counter the promotional campaign of tobacco and highlight the toll tobacco use takes.

20. Every year, 1 million tobacco-related deaths take place in India. An estimated 65 per cent of men use tobacco, and in some parts a large proportion of women chew tobacco and bidies. About 33 per cent of all cancers are caused by tobacco, About 50 per cent of all cancers among men and 25 per cent among women are tobacco related. The number of cases of avoidable tobacco-related cancers of the upper alimentary and respiratory tracts, coronary heart disease and chronic obstructive pulmonary disease (COPD) has been estimated at 2,000,000 every year. Many still-births low birth infants and pre-natal mortality have been reported among female chewers.

21. Tobacco kills 50 per cent of its regular users within 40 years. Apart from these direct health implications of tobacco use the hazards faced by those engaged in the plucking and curing of tobacco leaves have been highlighted by researchers of the Ahmedabad-based National Institute of Occupational Health. The hands of the workers get affected by the chemicals in tobacco and sickness is caused when nicotine gets absorbed into the body through the skin. The symptoms are head-ache, nausea and vomiting. All these well-documented findings are available with the State

but if it has not taken any effective action it can only be attributed to the clout which the lethal leaf enjoys in the corridors of power. One of the pet contentions of the protagonists of tobacco is that it makes a significant contribution to the exchequer by way of taxes and hence should not be disturbed, Also a large number of tobacco farmers will be hit if consumption is curbed. Both these have been countered by WHO forcefully, Several studies have brought out that the cost of health care of those affected by tobacco-related ailments, which is met from the Government exchequer. is much more than what the Government garners by way of taxes, Thus, there is a net drain on the government resources. Illness or the premature death of the tobacco-users would cast a heavy economic burden on their families perpetuating the Cycle of poverty. As regards the possible impact of any curb on tobacco use on tobacco farmers studies by the Rajahmundry-based Tobacco Research Institute of the ICAR have brought out equally remunerative alternatives to tobacco cultivation, besides use of tobacco for purposes other than smoking and chewing,

22. Taking note of the alarming scenario as discussed above the question then is what is the relief, which this Court can grant to the petitioners? Can this court direct the legislature to enact a law banning tobacco smoking? In our considered opinion the answer can only be an emphatic 'no'. It is entirely for the executive branch of the Government to decide whether or not to introduce any particular legislation.

The Court certainly cannot mandate the executive or any member of the legislature to initiate legislation, howsoever necessary or desirable the Court may consider it to be... . If the executive is not carrying out any duty laid upon it by the Constitution or the law, the Court. can certainly require the executive to carry out such duty and this is precisely what the Court does when it entertains Public Interest Litigation But at the same time the Court cannot usurp the functions assigned to the executive and the legislature under the Constitution and it cannot even indirectly require the executive to introduce a particular legislation or the legislature to pass it or assume to itself a supervisory role over the law making activities of the executive and the legislature,

Thus, from the above observation of the Supreme Court, it is clear even the Supreme Court found that Himachal Pradesh High Court had exceeded the limits of judicial power in ordering relief in Public Interest Litigation. But then, it has to be borne in mind that this Court acting as the sentinel on the qui vive can certainly' interfere and grant relief by way of mandamus to the Government and its officials including police to enforce the existing laws which is quite sufficient to safeguard the interests of the public against the wisp of environmental tobacco smoke (ETS). When laws are there to deal with nuisance the law has to be enforced by the law-enforcing agency of the State. The question of discretion of tile police in the matter of prosecution of offenders was considered by Lord Denning, saying: "For instance. it is for the Commissioner of Police of the Metropolis, or the chief constable as the case may be, to decide in any particular case whether inquiries should be pursued or whether an arrest should be made, or a prosecution brought. It must be for him to decide on tile disposition of his force and tile concentration of his resources on any particular crime or area. No court can or should give him direction on such a matter. He can also make policy decisions and give effect to them, as, for instance was often done when prosecutions were not brought for attempted suicide, But there are some policy decisions with which. I think, the courts in a case can, if necessary, interfere. Suppose a chief constable were to issue a directive to his men that no person should be prosecuted for stealing any goods less than 100 pounds in value I should have thought that the court could countermand it. He would be failing in his duty to enforce the law. " The discretion possessed by the police in enforcing the law was considered by the Court of Appeal in a case in which the applicant complained merely as a citizen, that the police had adopted a policy of not prosecuting London gaming clubs for illegal forms of gaming. The Commissioner's substantially bore out the complaint being based on the uncertainty of tile law and the expense and manpower required keeping the clubs under observation. But while the

case was pending the law was clarified fresh instructions were issued and the Commissioner undertook to withdraw the former instructions. The court therefore found no occasion to intervene. But they made it clear that the Commissioner was not an entirely free agent as his counsel contended. He had a legal duty to the public to enforce the law and the court could intervene by mandamus if, for example, he made it a rule not to prosecute housebreakers. On the other hand the court would not question his discretion when reasonably exercised e.g. In not prosecuting offenders who for some special reason were not blameworthy in the way contemplated by the Act creating the offence. The court criticized the police policy of suspending observation of gaming clubs as being clearly contrary to Parliament's intentions: and had it not been changed they would have been disposed to intervene.

In 1972 the same public-spirited citizen brought similar proceedings asking the court *to* order the public to take more effective action to enforce the law against the publication and sale of pornography. The Metropolitan Police were given instructions not to institute prosecutions or apply for destruction orders without the approval of the Director of PUBLIC Prosecutions: and it was shown that much pornographic literature was fragrantly offered for sale without interference by the police. The Court of Appeal found that the efforts of the police had been largely ineffective, but that the real cause of the trouble was the feebleness of the Obscene Publications Act 1959. Accordingly it could not be said that the police were failing in their duty and an order of mandamus was refused. It was again made clear that if the police were carrying out their duty to enforce the law, the court would not interfere with their discretion: but that the court would do so in the extreme case where it was shown that they were neglecting their duty. Exactly, that is the factual situation here.

23. The existing law on the subject is embodied in Sections 268 and 278 IPC. Rule 227(I)(d) and 227(5) 22(a) of the Kerala Motor Vehicles Rules 1989 besides the relevant provisions of Cr.PC. Section 268 IPC defines public nuisance.

Section 268:

"Public nuisance -- A person is guilty of a public nuisance who does any act or is guilty of an illegal omission which causes any common injury danger or annoyance to the public or to the people in general who dwell or occupy property in the vicinity or which must necessarily cause injury, obstruction, danger or annoyance to persons who may have occasion to use any public right.

A common nuisance is not excused on the ground that it causes some convenience or advantage."

There can be no doubt that smoking in a public place will vitiate the atmosphere so as to make it noxious to the health *of* persons who happened to be there. Therefore, smoking in a public place is an offence punishable under Section 278 IPC. The punishment for the offence is fine which may extend to Rs.500/- as prescribed under Section 278 IPC. Section 278:]

"Making atmosphere noxious to health.-- Whoever voluntarily vitiates the atmospheres in any place so as to make it noxious to the health *of* persons in general dwelling or carrying on business in the neighborhood or passing along a public way shall be punished with fine which may end to five hundred rupees."

In schedule 1 of Cr.P.C. offence under Section 278 IPC is a non-cognizable offence. Since the offence alleged is non-cognizable the police has no authority to arrest the offender without an order from a Magistrate or without a warrant. But, since the complaint includes the report of a police officer in a non-cognizable case the police can file a complaint before the Magistrate against the offender for the said offence. Since the offence is punishable with fine up to Rs.500/- only, the case comes within the definition of a 'petty case' as per Section 206(2) Cr.PC. However,

it is no necessary that the offence complained of is cognizable to enable the police to file a complaint. A reading of Section 153(2) Cr.P.C. shows that the police can file a complaint to the Magistrate in a noncognizable case. When the complaint is made by a public servant in discharge of his official duty the Magistrate need not follow the procedure under Sections 200 and 202 Cr.PC in which case the Magistrate can straight away issue process to the accused. That apart, if any person who commits the offence refuses to give his name and address, a police officer can arrest him for the purpose of ascertaining his address. Since smoking is a public nuisance, invoking Section LB Cr.PC. Section 133 Cr.PC can more effectively abate it.

"Conditional order for removal of nuisance --(I) Whenever a District Magistrate or a Sub-divisional Magistrate or any other Executive Magistrate specially empowered in this behalf by the State Government on receiving the report of a police officer or other information and on taking such evidence (if any) as he thinks fit considers

- a) that any unlawful obstruction or nuisance should be removed from any public place or from any way, river or channel which is or may be lawfully used by the public; or
- b) that the conduct of any trade or occupation, or the keeping of any goods or merchandise is injurious to the health or physical comfort of the community and that in consequence such trade or occupation should be prohibited or regulated or such goods or merchandise should be removed or the keeping thereof regulated; or
- c) that the construction of any building or the disposal of any substance as is likely to occasion conflagration or explosion should be prevented or stopped; or
- d) that any building tent or structure or any tree is in such a condition that it is likely to fall and thereby cause injury to persons living or carrying on business in the neighborhood or passing by, and that in consequence the removal repair or support of such building tent or structure or the removal or support of such tree is necessary or
- e) that any tank well or excavation adjacent to any such way or public place should be fenced in such manner as to prevent danger arising to the public; or
- f) that any dangerous animal should be destroyed confined or otherwise disposed of such.

Magistrates may make a conditional order requiring the person causing such obstruction or nuisance or carrying on such trade or occupation or keeping any such goods or merchandise or owning possessing or controlling such building tent structure substance tank, well or excavation or owning or possessing such animal or tree, within a time to be fixed in the order –

- i. to remove such obstruction or nuisance; or
- ii. to desist from carrying on, or to remove or regulate in such manner as may be directed such trade or occupation, or to remove such goods or merchandise, or to regulate the keeping thereof in such manner as may be directed; or
- iii. to prevent or stop the construction of such building, or to alter the disposal of such substance: or iv, to remove, repair or support such building tent or structure, or to remove or support such trees; or
- iv. to fence such tank well or excavation; or
- v. to destroy confine or dispose of such dangerous animal in the manner provided in the said over: or, if he objects so to do to appear before himself or some -

I. No order duly made by a Magistrate under this section shall be called in question in any Civil Court,

Explanation,--A "public place" includes also property belonging to the State camping grounds and grounds left unoccupied for sanitary or re-creative purposes."

If such an order is passed by the Executive Magistrate any person who disobeys the order is guilty of the offence punishable under section 188 IPC. Section 188:

"Disobedience to order duly promulgated by public servant. Whoever, knowing that by an order promulgated by a public servant lawfully empowered to promulgate such order, he is directed to abstain from a certain act, or to take certain order with certain property in his possession or under his management, disobeys such direction, shall, if such disobedience causes or tends to cause obstruction annoyance or injury or risk of obstruction, annoyance or injury to any persons lawfully employed be punished with simple imprisonment for a term which may extend to one month or with fine which may extend to two hundred rupees, or with both; and if such disobedience causes or tends to cause danger to human life health or safety or causes or tends to cause a riot or affray shall be punished with imprisonment of either description for a term which may extend to six months. or with fine which may extend to one thousand rupees or with both. "

Explanation: It is not necessary that the offender should intend to produce harm or contemplate his disobedience as likely to produce harm, It is sufficient that he knows of the order which he disobeys, and that his disobedience produces or is likely to produce harm."

Offence under Section 188 IPC is cognizable as per first schedule of Cr.PC. Therefore, after the promulgation of an order under Section 133(a) Cr.PC, if any person is found smoking in a public place the police can arrest him without a warrant. The only condition is that the order is duly promulgated by the Executive Magistrates, The Executive Magistrates have a duty to promulgate such an order.

24. In *Ratlam Municipality vs. Vardhichand Krishna Iyer*, Speaking for the Bench ruled that the imperative tone of Section 133 Cr.P.C. read with the punitive temper of Section 188 IPC make the prohibitory act a mandatory duty. If a complaint is filed under Section 188 IPC, there is an embargo for the Magistrate to take cognizance under Section 195(1) Cr.PC as cognizance can be taken for the offence on the complaint in writing of the public servant concerned or of some other public servant to whom he is administratively subordinate, This embargo will disappear if there is a complaint in writing by the public servant concerned, When there existed a public nuisance this Court could require the executive under Section 133 Cr.PC to abate the nuisance by taking affirmative action on a time bound basis. Otherwise, it will pave the way for a profligate statutory body or pachydermic governmental agency to defy the law by willful inaction, Section 133 Cr.PC is categorical although reads discretionary. Judicial discretion when facts for its exercise are present has a mandatory import.

Therefore, when the MAGISTRATE HAS BEFORE HIM ALL THE INFORMATION AND EVIDENCE WHICH DISCLOSES THE EXISTENCE OF A PUBLIC NUISANCE AND ON THE MATERIALS PLACED, HE CONSIDERS THAT SUCH NUISANCE SHOULD BE REMOVED FROM ANY PUBLIC PLACE WHICH MAY BE LAWFULLY USED BY THE PUBLIC. HE SHALL ACT. Thus, his judicial power shall passing through the procedural barrel fire upon the obstruction or nuisance triggered by the jurisdictional facts, The responsibility of the Magistrate under Section 133 Cr.PC. is to order removal of such nuisance within a time to be fixed in the order.

This is a public duty implicit in the public power to be exercised on behalf of the public and pursuant to a public proceeding. Failure to comply with the direction will be visited with a

punishment contemplated by section 188 IPC. The new social justice orientation imparted by the Constitution of India makes Section 133 Cr.P.C. a remedial weapon of versatile use, Social justice is due to the people and, therefore, the people must be able to trigger off the jurisdiction vested for their benefit in any public functional like a Magistrate under Section 133 Cr.P.C. In the exercise of such power the judicial must be informed by the broader principle of access to justice necessitated by the conditions of developing countries and obligated by the mandate contained in Article 21. Article 38 and Article 51(a) of the Constitution of India, Article 21 of the Constitution of India provides that no person shall be deprived of his life or personal liberty except according to procedure established by law.

The word 'life' in this Article is very significant as it covers every facet of human existence. The word 'life' has not been defined in the Constitution but it does not mean nor can it be restricted only to the vegetative or animal life or mere existence from conception to death, Life does not merely cannot a continued drugery through life. The expression 'life' has a much wider meaning bringing within its sweep some of the finer graces of human civilization, which makes life worth living. Life includes all such amenities and facilities, which a person born in a free country is, entitled to enjoy with dignity legally and constitutionally. The amplitude of the word 'life' is so wide that the danger and encroachment complained of would impinge upon the fundamental rights of citizens as_in the present case. The apex court has interpreted Article 21 giving wide meaning to 'life' which includes the quality of life, adequate nutrition, clothing and shelter and cannot be restricted merely to physical existence. The word 'life' in the Constitution has not been used in a limited manner. A wide meaning should be given to the expression 'life' to enable a man not only to sustain life but also to enjoy it in a full measure. The sweep of right to life conferred by Article 21 of the Constitution is wide and far-reaching so as to bring within its scope the right to pollution free air and the "right to decent environment." Under our Constitutional set UP the dignity of man and subject to law the privacy of whom shall be inviolable. The Constitution through various Articles in Part III and Part IV guarantees the dignity of the individual and also right to life which if permitted to trample upon will result in negation of these rights and dignity of human personality.

25. For the purpose of the present controversy, suffice it to say, that a person is entitled to protection of law from being exposed to hazards of passive smoking. Under the common law a person whose right of easement, property or health is adversely affected by any act or omission of a third person in the neighborhood or at a far off place is entitled to seek an injunction and also claim damages, but the constitutional rights stand at a higher pedestal than the legal rights conferred by law be it the municipal law or the common law. Such a danger as depicted in the earlier paragraphs of this judgment is bound to affect lakhs of people who may suffer from it unknowingly because of lack of awareness, information and education and also because such sufferance is silent and fatal and most of the people who are exposed to the lethal smoke do not know that they are in fact facing any risk or are likely to suffer by such risk. Because of lapses on the part: of the authorities concerned in creating awareness of the dangers of passive smoking innocent people are unwittingly made to inhale noxious environmental tobacco smoke (ETS) and consequently became victims of various deadly diseases. It is therefore time that the authorities should wake up before the matter slips out of their hands since health of large number of people is at stake. Maintenance of health and environment falls within the purview of Article 21 of the Constitution as it adversely affects the life of the citizens by slow and insidious poisoning thereby reducing the very life span itself. EA-posing unsuspecting individuals to environmental tobacco smoke (ETS) with ominous consequences amounts to taking , away their life, not by execution of death sentence but by a slow and gradual process by robbing him of all his, qualities and graces, a process which is much more cruel than sending a man to gallows. The convert human existence into animal existence no doubt amounts to taking away human life, because a man lives not by his

physical existence or by bread alone but by his human existence. *Smokers dig not only their own graves prematurely but also pose a serious threat to the lives of lakhs of innocent nonsmokers who get themselves exposed to ETS thereby violating their right to life guaranteed under Article 21 of the Constitution of India. A healthy body is the very foundation for all human activities. In a welfare State it is the obligation of the State to ensure the creation and the sustaining of conditions congenial to good health.*

In the result, we declare and hold as follows:

- a) Public smoking of tobacco in any forms whether in the form of cigarettes, cigars, and beedies or otherwise is illegal, unconstitutional and violative of Article 21 of the Constitution of India. We direct the District Collectors of all the Districts of the State of Kerala who are suo-motu impleaded as Additional respondents 39 to 52 to promulgate an order under Section 133(a) Cr.P.C. prohibiting public smoking within one month from today and direct the 3rd respondent Director General of Public, Thiruvananthapuram, to issue instructions to his subordinates to take appropriate and immediate measures to prosecute all persons found smoking in public places treating the said act as satisfying the definition of "public nuisance" as defined under Section 268 IPC in the manner indicated in this Judgement by filing a complaint before the competent Magistrate and direct all other respondents to take appropriate action by way of display of 'Smoking Prohibited' boards etc, in their respective offices or campuses.
- b) There will be a further direction to Addl. Respondents 39 to 52 to issue appropriate directions to the respective RT.Os to strictly enforce the provisions contained in Rule 227(1)(d) and 227(5) of the Kerala Motor Vehicles Rules, 1989.
- c) Tobacco smoking in public places falls within the mischief of the penal provisions relating to "public nuisance" as contained in the Indian Penal Code and also the definition of air pollution as contained in the statutes dealing with the protection and preservation of the environment, in particular the Air (Prevention and Control of Pollution) Act, 1981.
- d) The respondents, repositories of wide statutory powers and enjoined by the statute and Rules to enforce the penal provisions therein are duty bound to require that the invidious practice of smoking in public places, a positive nuisance, is discouraged and offenders visited with prosecution and penalty as mandated by law. Accordingly, the respondents are liable to be compelled by positive directions from this Court: to act and take measures to abate the nuisance of public smoking in accordance with law. Directions in the above lines are hereby issued.
- e) The continued omission and inaction on the part: of the respondents to comply with the constitutional mandate to protect life and to recognize the inviolability of dignity of man and their refusal to countenance the baneful consequences of smoking on the public at large has resulted in extreme hardship and injury to the citizens and amounts to a negation of their constitutional guarantee of decent living as provided under Art.21 of the Constitution of India.

26(a) Media, print and electronic will take note of this judgment and caution the public about penal consequences of violation of the ban on public smoking.

27. The petitioners are free to move this Court for further directions as and when deemed

necessary. The Original Petition is allowed as above.

Signed:

A. R. LAKSHANAN. AG. C. J.

K. NARAYANA KURUP. JUDGE.

12th July, 1999

THE REPUBLIC OF PAKISTAN
IN THE PAKISTAN SUPREME COURT
HUMAN RIGHTS CASE NO. 15 –K OF 1992

Ms. SHEHLA ZIA AND OTHERS.....PETITIONERS
VERSUS

WATER AND POWER DEVELOPMENT
AUTHORITY (WAPDA).....RESPONDENTS

BEFORE: SALEEM AKHTAR. J.

*Constitutional Law: Precluding principle, when applicable. Sustainable Development.
Balance development with environmental production.*

The respondent authority was constructing a grid station in a residential area. The petitioners who were residents in the vicinity alleged that the electromagnetic field created by the high voltage transmission lines at the grid station would pose serious health hazards to them which led to this application.

HELD:

1. In order to protect the environment the precautionary approach should be widely applied.
2. Where there is a state of uncertainty, the authorities should observe the rule of prudence and precaution.
3. The court appoints NSPACK as a Commissioner to examine and study the scheme employed by WAPDA (Water and Power Development Authority) and report whether there is any likelihood of any hazard of adverse effect on the health of the residents of the locality as well as ways of minimising it.
4. One cannot ignore that energy is essential for present day life, therefore a method should be devised to strike a balance between economic progresses and to minimise possible hazards. Therefore a policy of sustainable development should be adopted.
5. WAPDA is directed that in future prior to installing any grid station they should issue public notice in news papers, radio, television and to finalise the plan after considering the objections.

PRESENT: NASIM HASAN SHAH,C.J.,

SALEEM AKHTAR AND MANZOOR HUSSAIN SIAL, JJ

MS. SHEHLA ZIA AND OTHERS ===== PETITIONERS
VERSUS
WAPDA ===== RESPONDENT.

HUMAN RIGHTS CASE No. 15-K of 1992,
(HEARD ON 12TH FEBRUARY, 1994.)

(Environmental Pollution- Installation of grid station/cutting of trees)

Constitution of Pakistan (1973)

Arts. 184(3), 9 & 14- Public interest litigation- Human rights- Apprehension of citizens of the area against construction of grid station by authority- Supreme Court, on receipt of letter from citizens in that respect, found that the letter raised two questions namely whether any government agency had a right to endanger the life of citizens by its actions without the latter's consent and whether zoning laws vest rights in citizens which would not be withdrawn or altered without the citizens' consent- Citizens, under Art.9 of the Constitution of Pakistan were entitled to protection of law from being exposed to hazards of electro magnetic field or any other such hazards which may be due to installation and construction of nay grid station, any factory, power station or such like installations- Art.184 of the Constitution , therefore, could be invoked because a large number of citizens throughout the country could not make such representation and may not like to make it due to ignorance, poverty and disability- Considering the gravity of the matter which could not involve and affect the life and health of the citizens at large, notice was issued by Supreme Court to the Authority – Trend of opinion of scientists and scholars was that likelihood of adverse effects of electro magnetic fields to human health could not be ruled out- Subject being highly technical, Supreme Court declined to give definite finding particularly when the experts and technical evidence produced was inconclusive- Supreme Court observed that under such circumstances the balance should be struck between the rights of the citizens and also the plans which were executed by authority for the welfare, economic progress and prosperity of the country and if there were threat of serious damage, effective measures should be taken to control it and it should not be postponed merely on the ground that the scientific research were uncertain and not conclusive- With the consent of both parties Court appointed Commission to examine the plan and the proposals/ schemes of the authority in the light of complaint made by the citizens and submit its report and if necessary to suggest any alteration or addition which may be economically possible for construction and location of the grid station- Supreme Court further directed that government should establish an authority or commission manned by internationally known and recognised scientists having no bias and prejudice, to be members of the commission whose opinion or permission should be obtained before any new grid station was allowed to be constructed- Authority, therefore, was directed by the Supreme Court that in future, it would issue public notice in newspapers, radio and television inviting objections, if any, by affording public hearing to persons filing the objections. Such procedure was directed to be adopted and continued till such time that the government constituted any Commission or Authority as directed by the court.

In the present case, the citizens having apprehension against construction of grid station in residential area sent a letter to the Supreme Court for consideration as a human rights case raising two questions; namely, whether any government agency has a right to endanger the life of citizens by its actions without the latter's consent; and secondly, whether zoning laws vest rights in citizens which cannot be withdrawn or altered without the citizens' consent. Considering the gravity of the matter, which may involve and affect the life and health of the citizens at large, notice was issued to the authority.

So far no definite conclusions have been drawn by the scientists and scholars, but the trend is in support of the fact that there may be likelihood of adverse effects of electromagnetic fields on human health. It is for this reason that in all the developed countries special care is being taken to establish organizations for carrying on further research on the subject. The studies are therefore not certain but internationally there seems to be a consensus that the lurking danger, which in an indefinite manner has been found in individual incidents and studies, cannot be ignored.

In the present-day controversies where every day new avenues are opened, researches are made and new progress is being reported in the electrical fields, it would be advisable for Authority to employ better resources and personnel engaged in research and study to keep themselves up to-date in scientific and technical knowledge and adopt all such measures which are necessary for safety from adverse effects of magnetic and electrical fields.

There is a state of uncertainty and in such a situation the authorities should observe the rules of prudence and precaution. The rule of prudence is to adopt such measure which may avert the so-called danger, if it occurs. The rule of precautionary policy is to first consider the welfare and safety of the human beings and the environment and then to pick up a policy and execute the plan which is more suited to obviate the possible danger or make sure such alternate precautionary measures which may ensure safety. To stick to a particular plan on the basis of old studies or inclusive research cannot be said to be a policy of prudence or precaution.

It is a highly technical subject upon which the Court declined to give a definite finding particularly when the experts and the technical evidence produced is inconclusive. In these circumstances the balance should be struck between the rights of the citizens and also the plan which are executed by the power authorities for welfare, economic progress and prosperity of the country.

If there are threats of serious danger, effective measures should be taken to control it and it should not be postponed merely on the ground that scientific research and studies are uncertain and not conclusive. Prevention is better than cure. Pakistan is a developing country. It cannot afford the researches and studies made in developed countries on specific problems. However, the researches and their conclusions with reference to specific cases are available, the information and knowledge is at hand and Pakistan should take benefit of it.

It is reasonable to take preventive and precautionary measures straightaway instead of maintaining the status quo because there is no conclusive finding on the effect of electromagnetic fields on human life. One should not wait for conclusive findings as it may take ages to find out and, therefore, measures should be taken to avert any possible danger and for that reason one should not go to scrap the entire scheme but could make such adjustments, alterations or additions which may ensure safety and security or at least minimize the possible hazards.

The issue raised involves the welfare and safety of the citizens at large because the network of high-tension wires is spread throughout the country. One cannot ignore that energy is essential for present-day life, industry, commerce and day to day affairs. The more energy is produced and distributed, the more progress and economic development becomes possible. Therefore, a method should be devised to strike balance between economic progress and prosperity and to minimize possible hazards. In fact a policy of sustainable development should be adopted. It will thus require a deep study into the planning and the methods adopted by the Authority for the construction of the grid station. Certain modes can be adopted by which high tension frequency can be decreased. This is a purely scientific approach, which has to be dealt with and decided by the technical and scientific persons involved in it. It is for this reason that both the parties have agreed that NESPAK should be appointed as a Commissioner to examine the plan and the

proposals/schemes of Authority in the light of the complaint made by the citizens and submit its report and If necessary to suggest any alteration or addition which may be economically possible for constructing a grid station. The location should also be examined and report submitted at the earliest possible time.

In all then developed countries great importance is given to energy production. Pakistan's need is greater as it is bound to affect the economic development, but in the quest of economic development, one has to adopt such measures, which may not create hazards to life, destroy the environment and pollute the atmosphere.

While making such a plan, no public hearing is given to the citizens nor any opportunity is afforded to the residents who are likely to be affected by the high-tension wires running near their locality. It is only a one-sided affair with the Authority which prepares and executes the plan. Although the Authority and the government may have been keeping in mind the likely dangers to the citizens' health and property, no due importance is given to seeking opinion from the residents of the locality where the grid station is constructed or from where the high tension wires run.

It would therefore, be proper for the government to establish an Authority or commission manned by internationally known and recognized scientists having no bias and prejudice to the members of such commission whose opinion or permission should be obtained before any new grid station is allowed to be constructed. Such a commission should also examine the existing grid stations and the distribution lines from the point of view of health hazards and environmental pollution. If such a step is taken by the government in time, much of the problem in future can be avoided.

Art.9 of the Constitution provides that no person shall be deprived of life or liberty save in accordance with law. The word "life" is very significant as it covers all facts of human existence. The word "life" has not been defined in the Constitution but it does not mean or can be restricted only to the vegetative or animal life or mere existence from conception to death. Life includes all such amenities and facilities which a person born in a free country is entitled to enjoy with dignity, legally and constitutionally. A person is entitled to protection of the law from being exposed from hazards of electromagnetic fields or any other such hazards which may due to construction of nay grid station, any factory, power station or such like installations.

Under the common law a person whose right of easement, property or health is adversely affected by any act of omission or commission of a third person in the neighborhood or at a far-off place, is entitled to seek an injunction and also claim damages but the constitutional rights are higher than the legal rights conferred by law be it municipal law or the common law. Such a danger as depicted, the possibility of which can not be excluded, is bound to affect a large number of people who may suffer from it unknowingly because such sufferance is silent and fatal and most of the people who would be residing near, under or at a dangerous distance of the grid station or such installation do not know that they are facing any risk or are likely to suffer by such risk. Therefore, Art.184 can be invoked because a large number of citizens throughout the country can not make such representation and may not like to make it due to ignorance, poverty and disability. Only some conscientious citizens aware of their rights and the possibility of danger come forward.

The word "life" in terms of Art.9 of the Constitution is so wide that the danger and encroachment complained of would impinge on the fundamental rights of a citizen. In this view of the matter, the petition under Art. 184(3) of the constitution of Pakistan, 1973 is maintainable.

The word "life" in the constitution has not been used in a limited manner. A wide meaning should be given to enable a man not only to sustain life but enjoy it.

Art.14 provides that the dignity of man and subject to law the privacy of home shall be inviolable. The fundamental right to preserve and protect the dignity for man under aart.14 is unparalleled and could be found only in few constitutions of the world.

Where life of citizens is degraded, the quality of life is adversely affected and health hazards are created affecting a large number of people. The court in exercise of this jurisdiction under Art.184 (3) of the constitution may grant relief to the extent of stopping the functioning of units which create pollution and environmental degradation.

In these circumstances, before passing any final order, with the consent of both the parties a Court appointed Commissioner is to examine and study the scheme, planning device and technique employed by the Authority and report whether there was any likelihood of any hazard or adverse effect on health of the residents of the locality. The Commissioner might also suggest variation in the plan minimizing the alleged danger. Authority was to submit all plans, schemes and relevant information to the Commissioner. The citizens will be at liberty to send to the Commissioner necessary documents and material as they desire. These documents were to reach Commissioners within two weeks. Commissioner was authorized to call for such documents of information from the Authority and the citizens which in its opinion was necessary to complete this report. The report should be submitted within four weeks from receipt of the order after which further proceedings were to be taken. Authority was further directed that in future prior to installing or constructing any grid station and/or transmission line, it would issue public notice in newspapers, radio and television inviting objections and to finalize the plan after considering the objections, if any, by affording public hearing to the persons filing objections. This procedure shall be adopted and continued by Authority till such time as the Government constitutes any Commission or Authority as suggested.

International Agreement

Value International agreement between the nations if signed by any country is always subject to ratification, but same can be enforced as a law only when legislation is made by the country through its Legislature. Without framing a law in terms of the international agreement, the covenants of such agreement cannot be implemented as a law, nor do they bind down any party. Such agreement, however, has a persuasive value and commands respect.

Constitution of Pakistan (1973)

Art. 9. Word “life” in Art. 9 of the constitution covers all facets of human existence. Article 9 of the Constitution provides that no person shall be deprived of life or liberty save in accordance with the law. The word “life” has not been defined in the Constitution but it does not mean nor can it be restricted only to the vegetative or animal life or mere existence from conception to death. Life includes all such amenities and facilities which a person born in a free country is entitled to enjoy with dignity legally and constitutionally.

The word “life” in the Constitution has not been used in a limited manner. A wide meaning should be given to enable a man not only to sustain life, but to enjoy it.

Constitution of Pakistan (1973)

Art. 14 Fundamental right to preserve and protect the dignity of man under Art. 14 is unparalleled and could be found only in a few Constitutions of the World.

Article 14 provides that the dignity of man and subject to law the privacy of home shall be inviolable. The fundamental right to preserve and protect the dignity of man under Art. 14 is

unparalleled and could be found only in few Constitutions of the World.

Constitution of Pakistan (1973)

Art. 184 (3) Public interest litigation, Pollution and environmental degradation. Where life of citizens is degraded, the quality of life is adversely affected and health hazards are created affecting a large number of people. Supreme Court in exercise of its jurisdiction under art. 184(3) of the Constitution of Pakistan may grant relief to the extent of stopping the functioning of such units which create pollution and environmental degradation.

Dr. Parvez Hasan for the Petitioners

Tarik Malik, Project Director, WAPDA for Respondents.

Date of hearing: 12 February, 1994

ORDER

SALEEM AKHTAR, J. – Four residents of Street No. 35, F-6/1, F-6/1, Islamabad. A letter to this effect was written to the Chairman on 15-1-1992 conveying the complaint and apprehensions of the residents in the area in respect of construction of a grid station allegedly located in the green-belt of a residential locality. They pointed out that the electro-magnetic field by the presence of the high voltage transmission lines at the grid station would pose a serious health hazard to the residents of the area, particularly the children, the infirm and the Dhobi-ghat families that live in the immediate vicinity. The presence of electrical installations and transmission lines would also be highly dangerous to the citizens particularly the children who play outside the area. It would damage the green-belt and affect the environment. It was also alleged that it violates the principles of planning in Islamabad where the green-belt are considered an essential component of the city for environmental and aesthetic reasons.

They also referred to the various attempts made by them from July 1991 protesting about the construction of the grid station, but no satisfactory step had been taken. This letter was sent to this Court by Dr. Tariq Banuri of LUCN for consideration as a Human Rights case raising two questions; namely, whether any Government agency has a right to endanger the life of citizens by its actions without the latter's consent; and secondly, whether zoning laws vest rights in citizens which cannot be withdrawn or altered without the citizen's consent.

Considering the gravity of the matter which may involve and affect the life and health of the citizens at large, notice was issued to the respondents who appeared and explained that the site of the grid station was not designated as open space/green area as stated in the layout plan of the area. It was further stated that the site had been earmarked in an incidental space which was previously left unutilized along the bank of Nallah and was not designated as open space or green area. It was about 6-10 feet in depression form the houses located in the vicinity of the grid station site. The grid station site starts at least 40 feet away from the residents in the area and construction of the grid station does not obstruct the view of the residents. It was further stated that the fear of health hazard due to vicinity of high voltage of 132 KV.

Transmission lines and grid station is totally unfounded. Similar 132KV grid stations have been established in the densely area of Rawalpindi, Lahore, Multan and Faisalabad, but no such health hazard has been reported. It was also claimed that not a single complaint has been received even from the people working in these grid stations and living right in the premises of the grid

stations. The installations are made in such a way that the safety of personnel and property is ensured. It was further stated that electromagnetic effects of extra high voltage lines and vegetation is under study in the developed countries, but the reports of results of such studies are controversial. In support of the contentions, CDA submitted extract from the opinion of Dr. M. Mohsin Mubarak, Director, Health services, which reads as follows:-

“ the fears of the residents about the effects of high voltage transmission lines are also not considered dangerous for the nearby residents. Even a small electric point with 220 volts current or a sui Gas installation in the kitchen can prove to be extremely dangerous if specific precautions are not undertaken and maintained. The high-tension wires are not likely to harm the residents if due protection criteria are properly planned and executed. The concept of dangerous and offensive trades and civil defence is not that the candle should not be lit. A candle must be also to remove darkness and make the things more productive but care must also be taken not to let the candle burn everything around.”

The comments of government of Pakistan, Ministry of Water and Power recommending the construction of the grid station were also filed in which the following points were noted on the effect of electrical light and wiring on health of human beings; -

(c) although the studies of effects of electric lines and wiring on the health of human beings are being carried out by different agencies/ institutions of the world, there are no established and conclusive findings about any serious effects of electric lines/ wiring on the health of human beings.

The effects of electricity can be considered on account of its namely the electric field and the magnetic field and in this regard, extracts of section 8.11 and 8.13 of Transmission Line Reference Book of Electric and Magnetic fields on people and animals are enclosed which indicate that there is no restriction on permissible duration of working if the electric field intensity is up to 5KV/m whereas in the case under consideration the electric field intensity would certainly be lesser than 0 KV/m which value as indicated in the said extract is for a location at a distance of 20 m from a 525 KV line.

The nearest present live conductor is only 132 KV and that too would be at a distance of more than 20 m from the nearest house's boundary wall as shown in the enclosed map. This clearly shows that the nearby houses fall in a quite safe zone. As regards the magnetic fields, the intensity of the magnetic field ground level close to transmission line varies from 0.1 to 0.5 gauss which values are less than those in industrial environments especially in proximity to low voltage conductors carrying currents as mentioned in the above extracts. In view of the above details, there should be no concern about the health of residents of nearby houses.

The apprehension that the grid station would generate and transmit excessive heat to houses is unfounded as the main equipment i.e. power transformers are properly cooled by circulation of oil inside transformer tanks and by means of cooling fans.

These opinion of the WAPDA and CDA are base on Transmission Lines Reference Book, 345 KV and above 2nd Edition, extract of which had been filed and relevant parts of which are reproduced as follows:-

“Although health complaints by substation workers in the USSR were reported (40.41), medical examination of linemen in the U.S.A (38.39), in Sweden (19) and Canada (56.58), failed to find health problems ascribable to electric fields. As a result of unclear

findings and research in progress, no rules for electric-field intensity inside and outside the transmission corridor have been universally established. In some cases, design rules have been established to allow construction of EHV transmission lines to proceed with maximum possible guaranteed protection of people from health risks.

Many studies of magnetic-field effects on laboratory items have been performed. A good general review and discussion is offered by Sheppard and Eisenbud (59). Magnetic fields have been reported to affect blood composition, growth, behaviour, immune systems and neural functions. However, at present there is a lack of conclusive evidence, and a very confusing picture results from the wide variation in field strengths, frequency, exposure duration used in indifferent studies.”

WAPDA also submitted extracts from A.B.B. literature regarding insulation and coordination/standard clearances data based on LEC specifications in which minimum clearance for 500KV equipment and installation has been given 1,100 ft. and 1,300 ft. for phase-to- phase air circulation and phase -to- phase earth clearance.

2. The petitioners were also asked to furnish material in support of their claim. They have field news clippings from magazines, research articles, and opinion from scientists to show that electromagnetic radiation is the wave produced by magnetism of an electrical current and that electromagnetic fields can affect human beings. The first item is a clipping from the magazine “The News International, September 18, 1991, entitled “Technotalk”. It refers to a book ‘*Electro-Pollution- How to protect yourself against it*’ by Roger Coghill. It has been observed that “ now researchers are asking whether it is more than coincidence that the increase in diseases like cancer, ME, multiple sclerosis, hyperactivity in children, allergies and even AIDS have occurred alongside enormous growth in the production and use of electricity.” It further states that “the first warning sign came from the USA in 1979 when Dr. Nancy Weheimer and Dr. Ed Leeper found that children living next to overhead electricity lines were more likely to develop leukemia. Since then, further studies have shown links with brain tumours, depression and suicide.”

One US researcher found that electrical utility workers were 13 times more likely to develop brain tumours than the rest of the population. A midlands doctor discovered a higher than average rate of depression and suicide in people living near electric cables.

Photocopy of an article published in Newsweek, July 10, 1989, entitled ‘An Electromagnetic Storm’ has been filed. In this article, the apprehensions and problems considered by the scientists have been discussed and reference has been made to the researchers in this field in which it was concluded as follows:-

The question is whether we know enough to embark on a complete overhaul of the electronic environment. Avoiding electric blankets and sitting at arm’s length from one’s VDT screen (their fields fall off sharply after about two feet) seem only prudent. But drastic steps to reduce people’s involuntary exposures might prove futile. For while research clearly demonstrates that electromagnetic fields can affect such process as bone growth, communication among brain cells, even the activity of white blood cells, it also shows that weak fields sometimes have greater effects than strong ones. Only through painstaking study will anyone begin to know where the real danger lies. On one point, at least, Brodeur and many of those citizens seem to agree: ” we’re not quite sure what we’re up against, we need urgently to find out.”

3. An article published in the magazine ‘Nature’, Volume 349, 14 February 1991 entitled ‘EMF-Cancer Linked Still murky’ refers to a study made by epidemiologist John Peters from the

University of Southern California, who released his preliminary results from a case control study of 232 young Leukemia victims. The results implied that leukemia reasons are co-related to electromagnetic field (EMF) exposures and that they are not dependant on how exposure is estimated.

4. In an article from Electronics world & wireless world, February 1990 entitled 'Killing Fields', the author has discussed and produced a large number of case studies from which it was observed that at least there was a two-fold increase in adult leukemia link to fields that if one accepts a casual link to power line electromagnetic fields as much as 10-15% of all childhood cancer cases might be attributed to such fields. There has been a growing concern and research in the US and seven American states have adopted rights of way, but no such step has been taken in UK . The case studies showed that: -

“Among recent residential studies, GD Dr. Stephen Perry published correlation between the magnetic field exposure of people living in multi-storey blocks (or nine storey or more). Wolverhampton with the incidence of heart disease and depression. Magnetic field strengths measured in all 43 blocks with a sing rising cable showed very significantly higher readings (p.0.0002) in those apartments categorised as 'near' the cable, averaging 0.315T (highest; 0.377T) against 0.161T (lowest : 0.148T) in the 'distant 'apartments. In line with these measures, significantly more '... myocardial infraction, hypertension, isshaemic heart disease and depression...' was reported in those living near the cable.” Other articles in the same magazine were entitled “Killing Fields, the epidemiological evidence” and Killing Fields, the Politics” in which the suggestion was made a moratorium should be placed on all new buildings or routing of power lines which causes 50 Hz fields in houses to exceed every cautiously set limit”.

In an information sent by Mark Chernaik, Environmental Law US to Brig. (Rtd.) Muhammad Yasin, Projects Coordinator, sustainable development Policy Institute (SDPI), it is stated that “when electric current passes through high voltage transmission lines (HVTLs), it produces electric and magnetic fields. Although both can affect biological systems, the greatest concern is the health impacts of magnetic fields. A magnetic field can be either static or fluctuating. Magnetic fields from HVTLs fluctuate because the electric currents within HVTLs are alternating currents 9AC) which reverse direction 50 to 60 times per second (50 to 60 Hz). Magnetic fields pass nearly unimpeded through building materials and earth”. It refers to four recent epidemiological studies which show that the people exposed to relatively strong static and fluctuating magnetic fields have higher rates of leukemia as compared to general population. It gives the figures that the rate of leukemia was higher in over 1,700,000 children who lived within 300metres of HVTLs in Sweden from 1960-85. Children who were exposed to fluctuating magnetic fields greater than 0.20 Ut were 2.7 more times likely to have contracted leukemia and children who were exposed to greater than 0.3Ut were 3.08 times more likely to have contracted leukemia than other children (Reference: Feychting, M.& Anlbon.A (October 1993) “Magnetic Fields and Cancer in children Residing in Swedish Higher Voltage Power Lines”. American Journal of Epidemiology, Bol. 138,p.467).

It also refers to an article “Childhood cancer in Relation to modified Residential wire code Environmental Health perspectives, Vol.10, p.76-80 in which studies were carried out in respect of cancer in children living in Denver area US and it was reported that children living in homes within 20metres of HVTLs or primary distribution lines were 1.9 times more likely to have contracted cancer in general land 2.8 times more likely to have contracted leukemia in particular than children living in homes with relatively moderate or low exposure to magnetic fields.

Likewise reference has been made to the study relating to leukemia in workers who maintain and repair telephone lines in US and the rate of cancer in Norwegian electrical workers who were exposed to magnetic fields. It also states that Power Company challenged the existence of link between leukemia and exposure to magnetic fields on the basis that there is no biological explanation for the link between leukemia and exposure to magnetic fields.” It also suggests methods to reduce magnetic fields from HVTLs.

Dr. Tariq Banuri has also made a statement and given his opinion as an expert on Environmental Economics and a student of Social Management. According to him: -

“(a) The earlier consensus on the limited degree of the harmful effects of radiation does not exist. While at this point the expert evidence is not conclusive, regarding its impact the burden of proof has shifted from individuals to the organisation. As a result, courts in the United States have recommended more stringent safety standards.

(b) Given the absence of proper safeguards and standards in Pakistan’s research, it is unlikely that studies done in Pakistan would help decide the issue. Perforce, we would have to rely on the results of cross-country studies, or on those studies conducted in industrial countries. We should not regard the results in other countries as inappropriate for our purposes. These are the only results we are likely to be able to use in the foreseeable future.

(c) Even in the latter countries, until such time as the matter gets resolved, the profession is likely to place greater weight on the critical and more recent studies than would be warranted by their frequency or number. In other words, a single study showing additional harmful consequences has more weight than hundreds of studies that argue that there is no change.

According to him precautionary principles should be supported and there should be a balance in existing situation, development and the environmental hazards.

The petitioners have also relied on an article entitled “Regulatory and judicial Responses to the possibility of Biological hazards from Electromagnetic fields generated by power lines” by Sherry Young, Assistant Professor of Law, Claude W. Petit, College of Law Ohio Northern University, B. A. Michigan State University, Harvard Law School published in Villanova Law review, Vol.36, p. 129 in 1991. It is an exhaustive and informative article which deals with the current state of knowledge about the biological effect of exposure to electromagnetic fields, the responses of the legal system to the possibility of biological hazards, evaluations and the proposals for regulatory response. It refers to various studies made in USA, Sweden and Canada about ELF exposure and cancer in children and adults. After referring to the various studies and the results arrived at the author has summed up as follows:-

“While the implications of these studies justify additional research, it would be both difficult and futile to base any significant regulation of electric transmission and distribution systems on rather limited data currently available. At best, various experiments have demonstrated that particular cells or animals have shown particular response to ELF fields of particular frequencies and intensities for specific duration. The mechanisms by which those effects occur are not known. It is also unknown whether the changes that have been observed are in fact harmful to the organisms involved, whether they would be harmful if they occurred in humans, or whether exposure to ELF fields results in numerous biological effects that in fact cancel each other out. Additionally, it is unknown whether humans or other animals are able to adapt to exposure, either immediately or after or after some of the experiments demonstrating biological effects, the effects disappeared upon increased, as well as decreased exposure.

Therefore it is impossible to conclude that any given level of exposure is definitely harmful. Consequently, it is impossible at this time to prescribe alterations in electric transmission and distribution systems that are likely to significantly reduce the risks, if any, of the exposure to ELF fields.

At present the scientific evidence regarding the possibility of adverse effects from exposure to power frequency fields, as well as the possibility of reducing or eliminating such effects, is inconclusive. The remaining question is how the legal system, including both the judiciary and the various regulatory agencies, should respond to this scientific uncertainty.”

The research project known as the New York Power Line Projects (NYPLP) was established to investigate independence and without any bias on several projects particularly for considering the implication of Wythmer and Leeper study which suggested association between proximity to power lines and childhood leukemia. The author has summarised the conclusion of this project as follows:-

“The panel concluded that they had documented biological effects of electric and magnetic fields and that several of those findings were worthy of further consideration because of their possible implications for human health. The panel was not able, however, to identify any adverse health effects. Although the replication of the Wythmer and Leeper study basically confirmed the study’s finding of an association between power lines configurations and childhood cancer, the panel was unable to offer any recommendation based on this other epidemiological studies because of methodological difficulties with quantifying magnetic field exposure levels and the lack of any established casual relationship between weak magnetic fields and cancer.”

Finally, the panel recommended that further research in the following areas:

The possible association between cancer and exposure to magnetic fields, and effects of exposure on learning ability.

The possible existence of thresholds for biological effects; and

Methods of power delivery for use would reduce magnetic fields.”

After this report a staff task force was appointed by the Chairman of the New York Public Service Commission to evaluate the report of NYPLP and develop recommendations for consideration by it. The task force noted that “the researchers had not determined whether the effects that had been established would persist at lower field intensities or whether there was a threshold below which the effects disappeared.” Nonetheless the task force found that the results were disturbing enough to require epidemiological studies preferably in New York”. The recommendations made by the NYPLP were endorsed by the task force.

Dr. Mirza Arshad Ali Baig who was at that time Director-General of Planning and Development and Industrialisation of Pakistan Council of scientific and Industrial Research to a query made by Dr. Tariq Banuri has given his opinion as follows: -

“The information that is so far available, with me suggests that transmission lines give rise to magnetic fields which have extremely high intensity compared with naturally occurring fields. This is particularly with sources operating at power frequencies of 50 or 60 Hz where magnetic fields of very high magnitude compared with the natural are common. Any one near the transmission lines is, therefore exposed to excessive magnetic field.

So far there is no direct evidence of effects of exposure to magnetic fields but there are indications that an excess in the incidence of cancer among children and adults associated with very weak (0.1 to 1 mT) 50 or 60 Kg magnetic flux densities such as those directly under high tension wires, welding acres, induction heaters and a number of home appliances. The ill-effects

have just started surfacing up because of availability of some health facilities and institutions where ailments of many kinds are being reported. In Pakistan these effects may easily be attributed to anything other than scientific. Instead of waiting for abnormal cases to be reported in our situation it is perhaps imperative that we go for sustainable development and discourage installation of transmission lines over the residential areas anywhere.”

The opinion of Dr. Muhammed Hanif, Officer in Charge, Environmental Research and Pollution Control of Scientific and Industrial Research , Lahore, dated 10-7-1991, after referring to various studies and research made in USA, concluded as follows: -

“ According to my conclusion, I draw from the literature so far read by me, there is going to be proved ill-health effects on human – beings associated especially with the high voltage transmission. However, for a while setting aside the question of ill-health effects, of energy concentrated electrical waves, there remains a constant concern about the safety factor. The high structures especially to be installed for the transmission of electricity and the high voltage current passing through those transmission lines continue to pose constant danger to the people and the property in the area under their direct hit in case these structures collapse due to any cause.”

A document research paper entitled Electromagnetic (EH) Radiation – A threat to Human health, by Brig. (Rtd.) Muhammed Yasin of Sustain Development Policy Institute has also been relied upon by the Petitioners. The author has referred to some reported research conclusions as follows:

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The risk of dying from acute myeloid leukemia is increased by 2.6 if you work in electrical occupation especially if you are a telecommunications engineer or radio amateur.”

Service personnel exposed to non-ionising radiation are seven times more than unexposed colleagues to develop cancer of the blood forming organs and lymphatic tissues and are likely to develop thyroid tumours. 10 to 15 per cent of all childhood cancer cases might be attributable to power frequency fields found in homes (23/115 V 50-60 Hz). The risk of childhood cancer more than doubles in homes where the average 60 Hz magnetic field is over 300 MT.”

He has also referred to studies in Sweden on effect of high tension power lines on the health of children and detected higher risk of leukemia. This study also indicated that prolonged exposure to electromagnetic fields has links to leukemia in adults. His conclusion and recommendations are to create awareness, to adopt safety standards prescribed by developed countries and undertake studies and research.

From the afore-stated material produced on record which contains up to date studies and research it seems that so far no definite conclusions have been drawn by the scientists and scholars, but the trend is in support of the fact that there may be likelihood of adverse effects of electromagnetic fields on human health. It is for this reason that in all the developed countries special care is being establish organisations for carrying on further research on the subject. The studies are, therefore, not certain, but internationally there seems to be a consensus that the lurking danger which in an indefinite manner has been found in individual incidents and studies cannot be ignored. WAPDA on the other hand insists on executing plan which according to it is completely safe and risk free. The material placed by WAPDA is based on studies carried out two decades back. The other statement is based on their workers who are in grid stations, and further, that from the locality no such complaint has been made as in the present case. The research and opinion relied upon by WAPDA is not the latest one nor from authentic sources because they are merely relying upon old opinions.

In the present-day controversies where every day new avenues are opened new researches are made and new progress is being reported in the electrical fields, it would be advisable for WAPDA to employ better resources and personnel engaged in research and study to keep themselves up-to-date in scientific and technical knowledge and adopt all such measures which are necessary for safety from adverse effects of magnetic and electric fields.

On the other hand the materials placed by the Petitioners are the latest researches carried out to examine the magnetic fields' effect on health and also about the possible dangers that may be caused to human beings. In the absence of any definite conclusion that electromagnetic fields do not cause childhood leukemia and adult cancer and in the presence of studies the subject requires further research and the conclusions drawn earlier in favour of the power company are doubtful-safest course seems to be to adopt a method by which danger, if any, may be avoided. At this stage it is not possible to give a definite finding on the claims of either side. There is a state of uncertainty and in such a situation the authorities should observe the rules of prudence and precaution. The rule of prudence is to adopt such measures which may avert the so-called danger, if it occurs. The rule of precautionary policy is to first consider the welfare and safety of the human-beings and the environment and then to pick up a policy and execute the plan which is more suited to obviate the possible dangers or make such alternate precautionary measures which may ensure safety. To stick to a particular plan on the basis of old studies or inconclusive research cannot be said to be a policy of prudence or precaution.

There are instances in American studies that the power authorities have been asked to alter and mould their programme and planning in such a way that the intensity and the velocity is kept at the lowest level. It is a highly technical subject upon which the Court would not like to give a definite finding particularly when the experts and the technical evidence produced is inconclusive. In these circumstances the balance should be struck between the rights of the citizens and also the plans which are executed by the power authorities for welfare, economic progress and prosperity of the country.

Dr. Parvez Hasan, learned counsel for the Petitioner contended that the Rio Declaration on Environment and Development has recommended the precautionary approach contained in principle No. 15, which reads as follows:-

“Principle 15. – In order to protect the environment, the precautionary approach should be widely applied by States according to their capabilities. Where there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation.”

The concern for protecting environment was first internationally recognised when the declaration of United Nations Conference on the Human Environment was adopted at Stockholm on 16-6-1972. Thereafter it has taken two decades to create awareness and consensus among the countries when in 1992 the Rio Declaration was adopted. Pakistan is a signatory to this declaration and according to Dr. Parvez Hassan although it has not been ratified or enacted, the principle so adopted has its own sanctity and it should be implemented, if not in letter, at least in spirit. An agreement between the nations if signed by any Country is always subject to ratification, but it can be enforced as a law only when legislation is made by the Country through its legislature. Without framing a law in terms of the international agreement the Covenants of such agreements cannot be implemented as a law nor do they bind down any party. This is the legal position of such documents, but the fact remains that they have a persuasive value and command respect.

The Rio Declaration is the product of hectic discussion among the leaders of the nations of the world and it was after negotiations between the developed and the developing countries that an

almost consensus declaration had been sorted out. Environment is an international problem having to frontiers creating trans-boundary effects. In this field, every nation has to co-operate and contribute and for this reason the Rio Declaration would serve as a great binding force and to create discipline among the nations while dealing with environmental problems. Coming back to the present subject, it would not out of place to mention that Principle No.15 envisages rule of precaution and prudence. According to it, if there are threats of serious damage, effective measures should be taken to control it and should not be postponed merely on the ground that scientific research and studies are uncertain and not conclusive. It enshrines the principle that prevention is better than cure. It is a cautious approach to avert a catastrophe at the earliest stage. Pakistan is a developing country. It cannot afford the researches and studies made in developed countries on scientific problems particularly the subject at hand.

However, the researches and their conclusions with reference to specific cases and available, the information and knowledge is at hand and we should take benefit out of it. In this background if we consider the problem faced by us in this case, it seems reasonable to take preventive and precautionary measures straight away instead of maintaining status quo because there is no conclusive finding on the effect of electromagnetic fields on human life. One should not wait for conclusive finding as it may take ages to find out and, therefore, measures should be taken to avert any possible danger and for that reason one should not scrap the entire scheme but could make adjustments, alterations or additions which may ensure safety and security or at least minimise the possible hazards.

10. The issue in this petition involves the welfare and safety of the citizens at large because the network of high tension wires is spread throughout the country. One cannot ignore that energy is essential for present –day life, industry, commerce and day-to day affairs. The more energy is produced and distributed, the more progress and economic development become possible. Therefore, a method should be devised to strike balance between economic progress and prosperity and to minimise possible hazards. In fact a policy of sustainable development should be adopted. It will thus require a deep study into the planning and the methods adopted by WAPDA for construction of the grid station.

The studies in USA referred to above have suggested that certain modes can be adopted by which high tension frequency can be decreased. This is purely scientific approach which has to be dealt with and decided by the technical and scientific persons involved in it. It is for this reason that both the parties have agreed that NESPAK should be appointed as Commissioner to examine the plan and the proposal/schemes of WAPDA in the light of the complaint made by the petitioners and submit its report and if necessary to suggest any alteration or addition which may be economically possible for constructing a grid station. The location should also be examined and report submitted at the earliest possible time.

At this stage it may be pointed out that in all the developed countries great importance has been given to energy production. Our need is greater as it is bound to affect our economic development, but in the quest of economic development one has to adopt such measures which may not create hazards to life, destroy the environment and pollute the atmosphere. From the comments filed by WAPDA it seems that they in consultation with the Ministry of Water and Power have prepared a plan for constructing a grid station for distribution of power.

While making such a plan, no public hearing is given to the citizens nor any opportunity is afforded to the residents who are likely to be affected by the high-tension wires running near their locality. It is only a one-sided affair with the Authority which prepares and executes its plan. Although WAPDA and the Government may have been keeping in mind the likely dangers to the

citizens' health and property, no due importance is given to seek opinions objections of the residents of the locality where the grid station is constructed or from where the high-tension wires run.

In USA Public Service Commission has been appointed for the purpose of regulating and formulating the plan and permission for establishing a grid station. It hears objections and decides them before giving permission to construct such a power station. No such procedure has been adopted in our Country. Being a developing country we will need many such grid stations and lines for transmission of power. It would, therefore, be proper for the Government to establish an Authority or Commission manned by internationally known and recognised scientists having no bias and prejudice to be members of such a Commission whose opinion or permission should be obtained before any new grid station is allowed to be constructed. Such Commission should also examine the existing grid stations and the distribution lines from the point of view of health hazards and environmental pollution. If such a step is taken by the Government in time, much of the problem in future can be avoided.

The learned counsel for the respondent has raised the objection that the facts of the case do not justify intervention under Art. 184 of the Constitution. The main thrust was that the grid station and the transmission line are being constructed after a proper study of the problem taking into consideration the risk factors, the economic factors and also necessity and requirement in a particular area. It is after due consideration that planning is made and is being executed according to rules. After taking such steps, the possibility of health hazards is ruled out and there is no question of affecting property and health of a number of citizens nor any fundamental right is violated which may warrant interference under Art. 184. So far as the first part of the contention regarding health hazards is concerned, sufficient discussion has been made in the earlier part of the judgment and need not be repeated. So far as the fundamental rights are concerned, one has not to go too far to find the reply.

Article 9 of the Constitution provides that no person shall be deprived of life or liberty save in accordance with the law. The word "life" has not been defined in the Constitution but it does not mean nor can it be restricted only to the vegetative or animal life or mere existence from conception to death. Life includes all such amenities and facilities which a person born in a free country is entitled to enjoy with dignity, legally and constitutionally.

For the purposes of present controversy suffice to say that a person is entitled to protection of the law from being exposed to the hazards of electro-magnetic fields or any other hazards which may be due to installation and construction of any grid station, any factory, power station or such like installations.

Under the common law a person whose right of easement, property or health is adversely affected by any act of omission or commission of a third person in the neighbourhood or at a far off place, is entitled to seek an injunction and also claim damages, but the Constitutional rights are higher than the legal rights conferred by law be it municipal law or the common law. Such a danger as depicted, the possibility of which cannot be excluded, is bound to affect a large number of people who may suffer from it unknowingly because of lack of awareness, information and education and also because such sufferance is silent and fatal and most of the people who would be residing near, under or at a dangerous distance of the grid station or such installation do not know that they are facing any risk or are likely to suffer by such risk. Therefore, Art. 184 can be invoked because a large number of citizens throughout the country cannot make such representation and may not like to make it due to ignorance, poverty and disability. Only some conscientious citizens aware of their rights and the possibility of danger come forward and this has happened so in the present case.

According to the Oxford Dictionary, 'life' means "state of all functional activity and continual change peculiar to organised matter and specially to the portion of it constituting an animal or plant before death and animate existence".

In Black's law Dictionary, 'life' means "that state of animals, humans and plants or of an organised being, in which its natural functions and motions are performed or in which its organs are capable of performing their functions. The interval between birth and death. The sum of the forces by which death is resisted 'Life' protected by the Federation Constitution includes all personal rights and their enjoyment of the faculties, acquiring useful knowledge, the right to marry, establish a home and bring up children, freedom of worship, conscience, contract occupation, speech, assembly and press".

The Constitutional Law in America provides an extensive and wide meaning to the word 'life' which includes all such rights which are necessary and essential for leading a free, proper, comfortable and clean life. The requirement of acquiring knowledge, to establish a home and the freedoms as contemplated by the Constitution, the personal rights and their enjoyment are nothing but part of life.

A person is entitled to enjoy his personal rights and to be protected from encroachments on such personal rights, freedoms and liberties. Any action taken which may create hazards of life will be encroaching upon the personal rights of a citizen to enjoy the life according to law. In the present case this is the complaint the petitioners have made. In our view the word 'life' constitutionally is so wide that the danger and encroachment complained of would impinge fundamental rights of a citizen. In this view of the matter the Petition is maintainable.

14. Dr. Parvez Hasan, learned counsel has referred to various judgments of the Indian Supreme Court in which the term 'life' has been explained with reference to public interest litigation. In *Kharak Singh v. State of UP* (AIR 1963 SC 1295) for interpreting the word 'life' used in Article 21 of the Indian Constitution reliance was placed on the judgment of Field, J. in *Munn v Illinois* (1876) 94 US 113 at page 142 where it was observed that 'life' means not merely the right to the continuance of a person's animal existence but a right to the possession of each of his organs – his arms and legs etc." In *Francis Corali v. Union Territory of Delhi* (AIR 1981 SC 746) Bhagwati, J. observed that right to life includes right to live with human dignity and all that goes along with it, namely the bare necessities of life such as adequate nutrition, clothing and shelter and facilities for reading and writing in diverse form". Same view has been expressed in *Olga Tellis and others vs. Bombay Municipal Corporation* (AIR 1986 SC 180) and *State of Himachal Pradesh and another vs. Umed Ram Sharma and Others* (AIR 1986SC 847). In the first case right to life under the Constitution was held to mean right to livelihood. In the latter case the definition has been extended to include the 'quality of life' and not merely physical existence. It was observed that 'for residents of hilly areas, access to roads is access to life itself'. Thus, apart from the wide meaning given by the US Courts, the Indian Supreme Court seems to give a wider meaning which includes the quality of life, adequate nutrition, clothing and shelter and cannot be restricted merely to physical existence.

The word 'life' in the Constitution has not been used in a limited manner. A wide meaning should be given to enable a man not only to sustain life but to enjoy it. Under our constitution, article 14 provides that the dignity of man under article 14 is unparalleled and could be found only in the few constitutions of the world. The constitution guarantees dignity of man and also right to 'life' under article 9 and if both are read together questions will arise whether a person can be said to have dignity of man if his right to life is below bare necessity like without proper food, clothing, shelter, health, education, care, clean and unpolluted environment. Such questions will arise for consideration which can be dilated upon in more detail consideration which can be dilated upon

in more detail in a proper proceeding involving such specific questions.

Dr. Parvez Hasan has also referred to several judgments of the Indian Supreme Court in which issues relating to environment and ecological balance were raised and relief was granted as the industrial activity causing pollution had degraded the quality of life.

In *Rural Litigation and Entitlement, Kendra and others vs. State of UP and others* (AIR 1985 SC 652) mining operation carried out through blasting was stopped and directions were issued to regulate it. The same case came up for further consideration and concern was shown for the preservation and protection of environment and ecology.

However, considering the defence need and for earning foreign exchange some queries were allowed to be operated in a limited manner subject to strict control and regulations. These judgments are reported in AIR 1987 SC 359 and 2426 and AIR 1988 SC 2187 and AIR 1989 SC 594. In *Shri Sachidanand Pandey and another v. The State of West Bengal and Others* (AIR 1987 SC 1109) part of the land of zoological garden was given to Taj Group to build a five-star hotel. This transaction was challenged in the High Court without success. The appeal was dismissed. Taking note of the fact that society's interaction with nature is so extensive that 'environmental question has assumed proportion affecting all humanity', it was observed that: - "Obviously, if the Government is alive to the various considerations requiring thought and deliberation and has arrived at a conscious decision after taking them into account, it may not be for this Court to interfere in the absence of mala fides. On the other hand, if relevant considerations are not borne in mind and irrelevant considerations influence the decision, the Court may interfere in order to prevent a likelihood of prejudice to the public."

In *M.C. Mehta v. Union of India* (AIR 1988 SC 1115) and *M.C. Mehta v. Union of India* (AIR 1988 SC 1037) the Court on Petition filed by a citizen taking note of the fact that the municipal sewage and industrial effluents from tanneries were being thrown into River Ganges whereby it was completely polluted, the tanneries were closed down. These judgments go a long way to show that in cases where life of citizens is degraded, the quality of life is adversely affected and health hazards are created affecting a large number of people, the Court in exercise of its jurisdiction under Article 184(3) of the Constitution may grant relief to the extent of stopping the functioning of factories which create pollution and environmental degradation.

16. In the problem at hand the likelihood of any hazard to life by magnetic fields cannot be ignored. At the same time the need for constructing grid stations which are necessary for industrial and economic development cannot be lost sight of. From the material produced by the parties, it seems that while planning and deciding to construct the grid station WAPDA and the Government Department acted in a routine manner without taking into consideration the latest research and planning in the field nor that any thought seems to have been given to the hazards it may cause to human health. In these circumstances, before passing any final order, with the consent of both parties, we appoint NESPAK as Commissioner to examine and study the scheme, planning, device and technique employed by WAPDA and report whether there is any likelihood of any hazard or adverse effect of health of the residents of the locality. NESPAK may also suggest variation in the plan for minimising the alleged danger. WAPDA shall submit all the plan, schemes and relevant information to NESPAK.

The Petitioners will be at liberty to send NESPAK necessary documents and material as the desire. These documents should reach NESPAK within two weeks. NESPAK is authorised to call for such documents or information from WAPDA or the Petitioners which in their opinion is necessary to complete their report. This report should be submitted within four weeks of the receipt of the Order after which further proceeding shall be taken.

WAPDA is further directed that in future prior to installing or constructing any grid station and/or transmission line, they would issue public notice in newspapers, radio, and television inviting objections and to finalise the plan after considering the objections. This procedure shall be adopted and continued by WAPDA till such time the Government constitutes any authority as suggested above.

THE REPUBLIC OF INDIA

**AIR 1985 SUPREME COURT 652
(P.N. BHAGWATI, AMERENDRA NATH SEN
AND RANGANATH MISRA JJ)**

Writ. Petns. No. 8209 and 8821 of 1983 D. 12- 3-1985

**RURAL LITIGATION AND ENTITLEMENT
KENDRA DEHRADUN & OTHERS.....PETITIONERS**

VERSUS

STATE OF UTTAH PRADESH & OTHERS.....RESPONDENTS

Following a Public Interest petition addressed to the Supreme Court by the rural litigation and entitlement Kendra of Dehra Dun in the State of Uttah Pradesh, the court directed that all fresh quarrying in the Himalayan region of the Dehra Dun District be stopped. Subsequently, acting on the basis of the reports of the Bandyopadhyay Committee and a three man expert committee, both of which were appointed by the court, the court ordered the closure of several mines in the area. Thereafter, the lessees of the mines submitted a scheme for limestone quarrying to the Bandyopadhyay Committee. The Committee rejected the scheme and the lessees challenged the decision of the Committee in the Supreme Court.

HELD:

1. This case brings into sharp focus the conflict between development and conservation and serves to emphasize the need for reconciling the two in the larger interests of the country. The environmental disturbance caused by limestone mining has to be weighed in the balance against the need of limestone quarrying for industrial purposes.
2. Having given careful limestone quarrying for industrial purposes. Having given careful consideration, to these aspects of the case, the court rejected the petition, expressing its approval of the decision of the Bandyopadhyay committee.
3. The court is conscious of the fact as a result of the closure of the mines workmen employed in the mines will be out of work and therefore we direct that immediate steps be taken for reclamation of the areas forming part of such quarries and that the affected workmen be as far as possible and in the shortest possible time, provided employment in the reforestation and soil conservation programmes to be undertaken in the area.

Petition dismissed

**AIR 1985 SUPREME COURT 652
P.N. BHAGWATI, AMERENDRA NATH SEN
AND RANGANATH MISRA JJ**

Writ Petns. Nos. 8209 and 8821 of 1983 D.12-3-1985

**RURAL LITIGATION AND ENTITLEMENT KENDRA DEHRADUN
AND OTHERS ===== PETITIONERS
VERSUS**

STATE OF UTTAH PRADESH AND OTHERS=====RESPONDENTS.

And [a] constitution of India, Art. 32- Writ petition imbalance to ecology and hazard to healthy environment due to working on limestone quarries – Supreme Court ordered their closure [Ecological balance – preservation public health – Hazard to [minor minerals – close down of mining operations on court of public health].

[B] Constitution of India, Art.32- writ petition- Advocates fee- advocate of a party rendering valuable assistance to court in hearing petition- supreme court directed the union Government and state Government respondents to petition to pay him 5000 each as additional remuneration and not in lieu of costs. (I) Supreme Court rules (1996) Sch. 2-(ii) Advocates Act (1961) Ss.29.30. Advocate- Remuneration for rendering valuable assistance to court).

Order: - this case has been argued at great length before us not only because a large number of lessees of lime stone quarries are involved and each of them has painstakingly and exhaustively canvassed his factual as well as legal points of view but also because of this is the first case of its kind in the country involving issues relating to the environment and ecological balance and the questions arising for consideration are of grave moment and significance not only to the people residing in the Mussoorie Hill range forming part of the Himalayas but also in their implications to the welfare of the generality of people living in the country. It brings into sharp focus the conflict between development and conservation and serves to emphasize the need for reconciling the two in the larger interest of the country. But since having regard to the voluminous material placed before the momentous issues and us raised for decision. It is not possible for us to prepare a full and detailed judgment immediately at the same time. On account of interim order made by US. Mining operations carried out through blasting have been stopped and the ends of justice require that the lessees of lime stone quarries should know, with out any unnecessary delay, as top where they stand in regard to their lime stone quarries, we propose to pass our order on the wit petitions. The reasons for the order will be set out in the judgment to follow later.

2. We had by an order dated 11th August 1983 appointed a committee consisting of sh. D. N. Bhargav controller General, Indian bureau of mines. Nagpur Shri M.S. Kahlon, Director General of mines safety and Col. P. Mishra. Head of the Indian photo interpretation institute (National Remote Sensing Agency) for the purpose of inspecting the lime stone quarries mentioned in the writ petition as also in the list submitted by the Government of Utta Pradesh. This committee which we shall here in after for the sake of convenience refer to as Bhargav committee, submitted three reports after inspecting most of the lime stone quarries and divided the limestone quarries into three groups. The lime stone quarries comprised in category A were those where in the opinion of the Bhargav committee the adverse impact of mining operations was relatively less pronounced. Category B compromised those lime stone quarries where in the opinion of the Bhargav committee the adverse impact of mining operations was relatively more pronounced and category C covered those lime stone quarries which had been directed to be closed down by the

Bhargav committee under the orders made by us on account of degrading safety and hazards of more serious nature.

3. It seems that the Government of India also appointed a working group on mining of lime stone Quarries in Dehradun area sometime in 1983. The working Group was also headed by the same D.N. Bhargav who was a member of the Bhargav committee appointed by us. There were five other members of the working group along with shri D.N. Bhargav and one of them was Dr. S.Mudgal who was at the relevant time Director in the department of environment. Government of India and who placed the report of the working group before the court along with this affidavit. The working group in its report submitted in September 1983 made a review of lime stone quarry leases for continuance of mining operations and after a detailed consideration of various aspects recommended that the lime stone quarries should be divided into two categories. Namely category 1 and category 2; category 1 comprising lime stone quarries considered suitable for continuance of mining operations and category 2 compromising lime stone quarries which were considered unsuitable for further mining.

4. It is interesting to note that the lime stone quarries comprised in category A of the Bhargav Committee report were the same lime stone quarries which were classified in category I by the working group and the limestone quarries in categories B and C of the Bhargav committee report were classified in category 2 of the report of the working group. It will thus be seen that both the Bhargav committee and working group were unanimous in their view that the limestone quarries classified in category A by the Bhargav committee report and category I by the working group were suitable for continuance of mining operations. So far as the lime stone quarries in category C of the Bhargav committee report are concerned they were regarded by both the Bhargav committee and the working group as unsuitable for continuance of mining operations and both were of the view that they should be closed down. The only difference between the Bhargav committee and the working group was in regard to limestone quarries classified in category B. The Bhargav committee report took the view that this lime stone quarries need not to be closed down. But it did observe that the adverse impact of mining operations in these limestone quarries was more pronounced while the working group definitely took the view that these lime stone quarries were not suitable for further mining.

5. While making this order we are not going into the various ramifications of the arguments advanced before us but we may observe straightway that we do not propose to rely on the report of Prof. K.S. Valdia, who was one of the members of the expert committee appointed by our order dated 2nd September 1983, as modified by the order dated 25th October 1983. This committee consisted of Prof. K. S. Valdia Shri Hukum Singh and Shri D.N.Kaul and it was appointed to enquire and investigate into the question of disturbance of ecology and pollution and affectation of air, water and environment by reason of quarrying operations or stone crushers or lime stone kilns. Shri D.N. Kaul and Shri Hukum Singh submitted a joint report in regard to the various aspects while Prof. K. S. Valdia submitted a separate report. Prof. K. S. Valdia's report was confined largely to the geological aspect and in the report he placed considerable reliance on the main boundary thrust and he took the view that the limestone quarries which were dangerously close to the M.B.T. should be closed down, because they were in this sensitive and vulnerable belt. We shall examine this report in detail when we give our reasons but we may straightway point out that we do not think it safe to direct continuance or discontinuance of mining operations in lime stone quarries on the basis of the M.B.T. We are therefore not basing our conclusions on the report of Prof. K. S. Valdia but while doing so we may add that we do not for a moment wish to express any doubt on the corrections of his report.

6. We shall also examine in detail the question as to whether lime stone deposits act as aquiferous

or not. But there can be no gainsaying that limestone quarrying and evacuation of the lime stone deposits do seem to affect the perennial water springs. The environmental disturbance has however to be weighed in the balance against the need of lime stone quarrying for industrial purposes in the country and we have taken this aspect into account while making this order.

7. We are clearly of the view that so far as the lime stone quarries classified in category C in the Bhargav committee report are concerned which have already been closed down under the directions of the Bhargav Committee should not be allowed to be operated. If the leases of these lime stone quarries have obtained any stay order from any court permitting to continue the mining operations. Such stay order will stand dissolved and if there are any subsisting leases in respect of any of these lime stone quarries they shall stand terminated with out any liability against the state of Uttar Pradesh. If there are any suits of writ petitions for continuance of expired or unexpired leases in respect of any of these lime stone quarries pending, they will stand dismissed.

8. We should also give the same directive in regard to the lime stone quarries in the Sahasradhara Block even though the Bhargav committee places them in category B. So far as these stone quarries in Sahasradhara Block are concerned, we agree with the report made by the working group and we direct these lime stone should not be allowed to be operated and should be closed down forth with. We would also direct agreeing with the report made by the working group that the lime stone quarries placed in category 2 by the working group other than those which are placed in categories B and C by the Bhargav committee should also not be allowed to be operated and should be closed down save and except for the limestone quarries covered by mining leases No. 31, 36 and 37 for which we would give the same direction as we are giving in the succeeding paragraphs in regard to the lime stone quarries classified as category B in the Bhargav committee report. If there are any subsisting leases in respect of any of these lime stone quarries they will forthwith come to an end and if any suits or writ petitions for continuance for expired or unexpired leases in respect of any of these lime stone quarries are pending, they to will stand dismissed.

9. So far as the lime stone quarries classified as category A in the Bhargav committee report and of category A in the working group report are concerned, we would divide them into two classes, one class consisting of these lime stone Quarries which are within the city limits of Missouri and the other consisting of those which are outside the city limits. We take the view that the lime stone quarries falling in category A of the Bhargav committee report and for category A of the working group report and falling out side the city limits of Missouri. Should be allowed to be operated subject of course to the observance of the requirements of the mines act 1952, the Metalliferous Mines regulations. Of course when we say this we must make it clear that we are not holding that if the leases in respect of these lime stone quarries have expired and suits or writ petitions for renewal of the leases are pending in the courts, such leases should be automatically renewed. It will be for the appropriate courts to decide whether such leases should be renewed or not having regard to the law and facts of each case. So far as the limestone quarries classified in category A in the Bhargav committee report and/or category 1 in the working group report and falling within the city limits of Mussorie are concerned. We would give the same direction, which we are giving in the next succeeding paragraph in regard to the lime stone quarries classified as category B in the Bhargav committee report.

10. That takes us to the lime stone quarries classified as category B in the Bhargav committee report and category 2 in the working group report. We do not propose to clear these lime stone quarries for continuance of mining operations for to close them down permanently without further injury. We accordingly appoint a high powered committee consisting of Mr. D. Bandyopadhyay, secretary, Ministry for Rural development as chairman and Shri H. S. Ahuja,

Director General, Mines safety Dhanbad, Bihar, Shri D. N. Bhargav, Controller General, Indian Bureau of Mines, New secretariat Building Nagpur and two experts to be nominated by the department of Environment, Government of India within four weeks from the date of this order.

The lessees of the lime stone quarries classified as category A in the Bhargav committee report and/or category 1 and the working group report and falling within the city limits of Mussoorie as also the lessees of the lime stone quarries classified as category B in the Bhargav committee report will be at liberty to submit a full and detailed scheme for mining their lime stone quarries to this committee there in after called the Bandyopathyay committee and if any such scheme or schemes are submitted the Bandyopathyoy committee will proceed to examine the same with out any unnecessary delay and submit a report to this court whether in its opinion the particular lime stone quarry can be allowed to be operated in accordance with the scheme and if so, subject to what conditions and it can not be allowed to be operated the reasons for taking that view. The Bandyopadhyay committee in making its report will take into account the various aspects which we had directed the Bhargav committee and the Kaul committee to consider while making their respective reports including the circumstances that the particular lime stone quarry may or may not be within the limits of Mussoorie and also give an opportunity to the concerned lessee to be heard, even though it be briefly. The Bandyopadhyay committee will also consider while making its report whether any violations of the provisions of the mines Act 1952, the Metalliferous mines regulations, 1961 and other relevant statutes, rules and regulations were committed by the lessee submitted the scheme or schemes and if so, what were the nature, extent and frequency of such violations and their possible hazards.

The Bandyopadhyay committee will also insist on a broad plan of exploitation coupled with detailed mining management plans to be submitted along with the scheme or schemes and take care to ensure that the lime stone deposits are exploited in a scientific and systematic manner and if necessary, even by law or more leases coming together and combining the areas of the lime stone quarries to be exploited by them. It should also be the concern of the Bandyopadhyay committee while considering the scheme or schemes submitted to it and making its report, to ensure that the lime stone on exploitation, is specifically utilized only in special industries having regard to its quality and is not wasted by being utilized in industries for which high grade lime stone is not required. The necessary funds for the purpose of meeting the expenses that may have to be incurred by the members of the Bandyopadhyay committee will be provided by the state of the Uttar Pradesh including their travelling and other allowances appropriate to their office.

The State of Uttar Pradesh will also provide to the members of the Bandyopadhyay committee necessary transport and other facilities for the purpose of enabling them to discharge their functions under this order. If any notices are to be served by the Bandyopadhyay committee the District Administration of Dehradun will provide the necessary assistance for serving of such notices on the lessees or other interested parties. The Bandyopadhyay committee will also be entitled before expressing its opinion on the scheme or schemes submitted to it, to hear the petitioner, the interventionists in this case and such other persons or organizations as may be interested in maintenance and preservation of healthy environment and ecological balance. The Indian Bureau of Mines will provide secretarial facilities to the Bandyopadhyay committee in which case will be considered by the court and the decision will then be taken whether the lime stone quarry or quarries in respect of which the report has been made should be allowed to be operated or worked and the District Authorities of Dehradun will take prompt and active steps for the purpose of ensuring that these lime stone quarries are not operated or worked and no mining activity is carried on even clandestinely.

This order made by us will supersede any stay or any other interim order obtained by the lessees

of any of these lime stone quarries permitting him to carry on mining operations and not withstanding such stay order or other interim order or subsisting lease, the lessees shall not be entitled to carry on any mining activity whatsoever in any of these lime stone quarries and shall desist from doing so. The lessees of these lime stone quarries will also not in the meanwhile be permitted to rectify the defects pointed out in the orders issued by the district mining authorities but they may include the proposal for such rectification in the scheme or schemes which they may submit to the Bandyopadhyay committee. We may however make it clear that non-rectification of the defects pursuant to the notices issued by the District Mining Authorities shall not be taken advantage of by the state of Uttar Pradesh as a ground for terminating the lease or leases.

11. We may point out that so far as the lime stone quarries at site No.17 to 20 in category B in the Bhargava committee report are concerned we are informed that they have already been closed down and no further direction therefore is necessary to be given in regard to removal of the lime stone, dolomite and marble chips which may already have been mined and which may be lying at the site for which we are giving separate directions in one of the succeeding paragraphs in this order.

12. The consequence of this order made by us would be that the lessees of lime stone quarries which have been directed to be closed down permanently under this order or which may be directed to be closed down permanently after consideration of the report of the Bandyopadhyay committee, would be thrown out of business in which they have invested large sums of money and expended considerable time and effort. This would undoubtedly cause hardship to them, but it is a price that has to be paid for protecting and safeguarding the right of the people to live in healthy environment minimal disturbance of ecological balance and without avoidable hazard to them and their cattle, homes and agricultural land and undue affection of air, water and environment. However, in order to mitigate their hardship, we would direct the Government of India and the state of Uttar Pradesh whenever another area in the state of Uttar Pradesh is thrown upon for grant of lime stone or dolomite quarrying, the lessees who are disciplined as a result of this order shall be afforded priority in grant of lease of such area and intimation that such an area is available for grant of lease shall be given to the lessees who are displaced so that they can apply for grant of lease of such area and on the basis of such application, priority may be given to them subject, of course, to their otherwise being found fit and eligible. We have no doubt that while throwing open new areas for grant of lease for limestone or dolomite quarrying, the Government of India and the state of Uttar Pradesh will take into account the considerations to which we have adverted in this order.

13. We are conscious that as a result of this order made by us, the workmen employed in the limestone quarries which have been directed to be closed down permanently after consideration of the report of the Bandyopadhyay committee will be thrown out of employment and even those workmen who are employed in the limestone quarries which have been directed to be closed down temporarily pending submission of scheme or schemes by the lessees and consideration of such scheme or schemes by the Bandyopadhyay committee will be without work for the time being. But the limestone quarries which have been or which may be directed to be closed down permanently will have to be reclaimed and afforestation and soil conservation program will have to be taken up in respect of such limestone quarries and we would therefore direct that immediate step shall be taken for reclamation of the areas forming part of such limestone quarries with the help of the already available Eco- Task Force of the department of Environment. Government of India and the workmen who are thrown out of employment in consequence of this order shall as far as practicable and in the shortest possible time, be provided employment in the afforestation and soil conservation program to be taken up in this area.

14. There are several applications before us for removing of limestone dolomite and marble chips mined from the quarries and being disposed of by this order. So far as limestone quarries classified as category A in the Bhargav committee Report and/or category A in the working group report and falling outside the city limits Mussoorie are concerned. We have permitted the lessee of these limestone quarries to carry on mining operations and hence they must be allowed to remove whatever minerals are lying at the site of these limestone quarries without any restriction whatsoever save and except those prescribed by any statutes, rules of regulations and subject to payment of royalty. So far as the other limestone quarries are concerned, whether comprised in Category A of Bhargav committee report or category 1 of the working group report and falling within the city limits of Mussoorie or falling within category B or category C of the Bhargav committee report or category 2 of the working group report, there is a serious dispute between the lessees of these limestone quarries on the one hand and the petitioners and the state of Uttar Pradesh on the other as to what is the exact quantity of minerals mined by the lessees and lying at the site. We had made an order on 15th December 1983 requiring the District Magistrate Dehradun to depute some officer either of his department or of the mining department to visit the site of these limestone quarries for the purpose of assessing the exact quantity of limestone lying there and to report in this connection. The District Magistrate Dehradun deputed the sub-divisional magistrates of Mussoorie and Dehradun and Tehsildar Dehradun to inspect the 20 limestone quarries comprised in category C of the Bhargav committee report which had been ordered to be closed down under the directions of the Bhargav committee and an affidavit was filed on behalf of the district magistrate Dehradun by Kedar Singh Arya Tehsildar Dehradun, annexing a chart showing the details of the minerals mined by the lessees of those limestone quarries and lying at the site. When again the case came up for hearing before us on 5th January 1984, we in order to allay any apprehensions on the part of the lessees that the District Authorities had not done their job correctly in assessing the quantity of minerals lying at the site, appointed a committee of two officers, namely, Shri D. Bandopadhyay and director of Geology Lucknow for the purpose of visiting the limestone quarries which had been directed to be closed down and to assess the quantity of minerals lying on the site of those limestone quarries after giving notice to the concerned lessees as also to the district magistrate Dehradun and the representatives of the petitioners. Pursuant to this order made by us, Shri D. Bandopadhyay and the director of Geology, was very much less than what was claimed by the lessees and it does not appear that though these limestone quarries were directed to be closed down, illegal mining was being carried on clandestinely, because otherwise it is difficult to understand how the figures of the quantity of minerals lying at the site as assessed in December 1983 by the district authorities became inflated when Shri D. Bandopadhyay and director of Geology made their assessment in January 1984 and thereafter the figures again got inflated if the quantity now claimed by the lessees as lying on the site is correct. We do not however propose to go into the question as to what was the precise quantity of minerals mined by the lessees of these limestone quarries and lying at the site at the time when these limestone quarries were closed down under the directions of the Bhargav committee. We would permit the lessees to these limestone quarries to remove whatever minerals are found lying at the site or its vicinity provided of course such minerals are covered by their own respective lessees and/or quarry permits. Such removal will be carried out and completed by the lessees within 4 weeks from the date of this order and it shall be done in the presence of an officer not below the rank of deputy collector to be nominated by the district management, Dehradun a gazetted officer from the mines department nominated by the director of mines and public spirit individual in Dehradun other than Mr. Avdesh Kaushal, to be nominated by Shri D. Bandopadhyay. These nominations shall be made within one week from today and they may be changed from time to time depending on the exigencies of the situation. Notice of intended removal of minerals lying at the site shall be given by the lessees to the district magistrate Dehradun and the person nominated by Shri D. Bandopadhyay. No part of the minerals lying at the site shall be removed by the lessees except in the presence of the above mentioned three

persons. The lessees will on the expiry of the period of the period of four weeks submit a report to this court setting out the precise quantities of minerals removed by them from the site pursuant to this order made by us. The lessees shall not be entitled to remove any minerals after the expiration of the period of four weeks.

15. Before we also wish to express our sense of appreciation for the very commendable assistance rendered to us by Shri Pramod Dayal, learned advocate appearing on behalf of some of these lessees. He undertook the responsibility of arranging the various affidavits and written submissions in a proper and systematic manner and we must confess that but for the extremely able assistance rendered by him, it would not have been possible for us to complete the hearing of this case satisfactorily and to pass this order within such a long short time. We would direct that the Government of India and the state of Uttar Pradesh should each pay a sum of Rs.5000/= to Shri Pramod Dayal for the work done by him. We may point out that the payment to Shri Pramod Dayal is not in lieu of costs but is an additional remuneration which we are directing to be paid in recognition of the very valuable assistance rendered by him to the Court.

THE REPUBLIC OF PAKISTAN
IN THE PAKISTAN SUPREME COURT PLD 1994 SC 102

HUMAN RIGHTS CASE NO. 31 –K 92Q.

**IN RE: HUMAN RIGHTS CASE (ENVIRONMENT POLLUTION IN
BALOCHISTAN)**

A news item entitled “*N- Waste to be dumped in Balochistan*” was published in a daily newspaper reporting that certain businessmen were making attempts to purchase coastal areas of Balochistan and convert it into dumping site for waste. The Supreme Court having taken note of the news item issued an order to the Chief Secretary of Balochistan requiring him to provide the court with full information on the allocation or receipt of applications for allocation of coastal land in any area within the territorial waters of Pakistan. Reports revealed that land had been allotted to Pakistan Navy and Maritime Agency for defence purposes like ship breaking and agriculture.

HELD:

1. The Balochistan Development authority should submit to the assistant registrar, Supreme Court, Kerachi a list of persons to whom land on the coastal area of Balochistan have been allotted giving their names and full address along with copies of the letters of allotment, lease or license which may have been issued in their favour.
2. The Government of Balochistan and the Balochistan Development Authority are directed that if any application for allotment of coastal land is pending then full particulars of such applicant shall be supplied to the Assistant Registrar, Supreme Court of Pakistan and Kerachi before making any allotment to any such party.
3. The Government functionaries, particularly the Authorities which are charged with the duty to allot the Land in coastal areas should insert a condition in the allotment letter that the allottee shall not use the land for dumping, treating or burying or destroying any device, waste of any nature including industrial or nuclear waste in any form. The Authority should also obtain similar undertaking from all those to whom allotment have been made for ship breaking, agriculture or any other purpose.

**PLD 1994 SUPREME COURT 102
PRESENT: SALEEM AKHTAR, J**

**IN RE: HUMAN RIGHTS CASE (ENVIRONMENT POLLUTION IN BALOCHISTAN)
HUMAN RIGHTS CASE NO. 31-/K/92 (Q), DECIDED ON
27TH SEPTEMBER, 1992.**

CONSTITUTION OF PAKISTAN (1973).

Art. 184(3) & 9 Public Interest Litigation – Environmental hazard and pollution in Balochistan Supreme Court, having noticed a news item in a daily newspaper that nuclear or industrial waste was to be dumped in Balochistan which was violative of Art.9 of the Constitution, ordered the office to enquire from the Chief Secretary of Balochistan whether Coastal land of Balochistan or any area within the territorial waters of Pakistan had been or was being allotted to any person and if any allotment had been made or applicants had applied for allotment, their full particulars supplied- Plots having been allotted by Balochistan Development Authority, Supreme Court further gave the guidelines for allotment of plots in the area.

ORDER

I have noticed a news item reported by APP published in ‘Dawn’ dated 3-7-1992 entitled “Waste to be dumped in Balochistan.”

In the report apprehension has been expressed that the business tycoons are making attempts to purchase coastal area of Balochistan and convert it into dumping ground for waste material which may be a big hazard to the developing ports of Guwadir, Pasni, Ormara and Jiwani. The coastal land of Balochistan is about 450 miles long. To dump waste materials including nuclear waste from the developed countries would not only be hazard to the health of the people but also to the environment and the marine life in the region.

In my view, if nuclear waste is dumped on the coastal land of Balochistan, it is bound to create environmental hazard and pollution. This act will violate Article 9. It is, therefore, necessary to first enquire from the Chief Secretary, Balochistan whether coastal land of Balochistan or nay other within the territorial water of Pakistan has been or is being allotted to any person. If any allotment has been made or applicants have applied for allotment, ten full particulars should be supplied.

A letter may also be written to the Editor ‘ Dawn’ referring to the news item requesting him to supply further particulars or give the name and address of the reporter of APP from whom necessary information may be obtained.

JUSTICE SALEEM AKHTAR

ORDER

In compliance with the notice issued on 9yh July 1992, the Chief Secretary had made inquiries from various departments, namely, from the Commissioner of Makran, Commissioner of Kalat Division and also from the Board of Revenue who had submitted their reports which were forwarded to this Court. From the reports submitted, it seems that besides the land allotted to the Pakistan Navy and Maritime Agency for defence purposes, 112 ship breaking plots measuring 336 acres in Gadani Beach, Lasbella District have been allotted to ship breakers for ship-breaking purposes by the Balochistan Development Authority. Furthermore, land measuring 29.2.2 acres has been allotted to one Muhammad Anwar son of Qadire Bukhsh for agriculture

purposes. The Chief Secretary while giving details has stated that the allotment of land for ship breaking was made by Balochistan Development Authority while the plot measuring 29.2.2 acres was allotted by the Chief Minister on the recommendation of Balochistan Development Authority.

The officials present have reported that no plot has been allotted to any party for dumping nuclear waste. The Commissioner, Makran Division has pointed out that the law enforcing agencies on the high seas are always on the alert and can locate any vessel from a distance of more than 500 miles.

It may be noted that no one will apply for allotment of land for dumping nuclear or industrial waste. This would be a clandestine act in the garb of a legal and proper business activity. The authorities are therefore not only to be vigilant in checking the vessels but regularly check that the allottees are not engaged in dumping industrial or nuclear waste of any nature on the land or in the sea or destroying it by any device.

It seems that the plots have been allotted by the Balochistan Development Authority and all the relevant terms and conditions will be available with them. In these circumstances, the following interim order is passed:

The Balochistan Development Authority should submit to the Assistant Registrar, Supreme Court, Karachi, a list of persons to whom land on the coastal area of Balochistan have been allotted giving their name and full address along with copies of the letters of allotment, lease or license which may have been issued in their favour.

The Government of Balochistan and the Balochistan Development Authority are directed that if any application for allotment of coastal land is pending or in future any party applies for allotment of coastal land is pending or in future any party applies for allotment of such land then full particulars of such applicants shall be supplied to the Assistant Registrar, Supreme Court of Pakistan, Karachi before making any allotment to any such party.

The Government functionaries, particularly the authorities which are charged with the duty to allot the land on coastal area should insert a condition in the allotment letter/ license/lease that the allottee/tenant shall not use the land for dumping, treating, burying or destroying by any device waste of any nature including industrial or nuclear waste in any form. The Balochistan Development Authority should also obtain similar undertaking from all allottee to whom the allotment has been made for ship breaking, agriculture or any other purpose whatsoever.

Before parting with the order I record my appreciation for the officials present who have shown their interest and keenness in tackling the problem. Such eagerness coupled with public awareness can eliminate much of the problems creating health hazard to the citizens.

A copy of this order be sent to all the officers present and the Balochistan Development Authority, Quetta.

Order accordingly.

THE REPUBLIC OF INDIA

THE SUPREME COURT CASE 647 OF 1996

VELLORE CITIZENS WELFARE FORUM.....PETITIONER

VERSUS

UNION OF INDIA & OTHERS.....RESPONDENTS

BEFORE: KULDIP SINGH, FAIZAN UDDIN AND K. VENKATASWANI, JJ

The petitioner filed this action to stop tanneries in the State of Tamil Nadu from discharging untreated effluent into agricultural fields, waterways and open lands. Among other types of environmental pollution caused by these tanneries, it's estimated that nearly 35,000 hectares of agricultural land in this tanneries belt has become either partially or totally unfit for cultivation, and that the 170 types of chemicals used in the chrome tanning process have severely polluted the local drinking water. The court had passed other orders relating to this case, and had monitored this petition for almost five years.

HELD:

1. Although the leather industry is a major foreign exchange earner for India and provides employment, it does not mean that it has the right to destroy the ecology, degrade the environment or create health hazards.
2. The court directs the Central Government to take immediate action under the provisions of the Environment Protection Act of 1986 to create an authority with powers to control pollution and protection of the environment.
3. The Central Government is ordered to establish an authority to deal with the situation created by the tanneries and other polluting industries in the Tamil Nadu by implementing precautionary principles and compensation to the victims to reverse this environmental damage.
4. If polluters fail to pay compensation, their industries should be closed and the compensation recovered as arrears of land revenue. If an industry sets up the necessary pollution control devices now, it is still liable to pay for the past pollution it had generated.
5. There should be an environment protection fund which will be used to restore the environment and compensate the affected people. No new industries should be set up in prohibited areas.

Matter to be monitored by the Special Bench, -“Green Bench”- of the Madras High Court.

(1996) 5 SUPREME COURT CASES 647

BEFORE: KULDIP SINGH, FAIZAN UDDIN AND K. VENKATASWANI, JJ
VELLORE CITIZEN'S WELFARE FORUM:..... PETITIONER

-VERSUS-

UNION OF INDIA & OTHER S:..... RESPONDENTS

Writ petition © No. 914 of 1991, decided on August 28,1996

- A. Constitution of India – Arts. 32,21,47,48 –B,51-A(g) – Environmental pollution by Tannery Industries- while the industries are vital for country's development, but having regard to pollution caused by them, principle of sustainable development has to be adopted as a balancing concept - precautionary principal and polluter pays Principle acceptable as part of the law of the country and should be implemented- Precautionary environmental measures should be taken by State Govt. and statutory authorities and lack of scientific certainty cannot be a ground for postponing such measures where there are serious threats to ecology- Onus on polluter industries to prove their actions were environmentally benign – polluter industries liable to pay damage – discharge of untreated effluent by tanneries in state of T.N. rendering river water unfit for human consumption, contaminating the subsoil water and spoiling the physico - chemico properties of the soil making it unfit for agricultural purposes- Held: such industries cannot be permitted to continue operation unless they set up pollution control devices- Such industries liable to compensate for the past pollution generated by them- Pollution fine of Rs 10,000 imposed on each tannery- Amount contributed to be deposited in Environment Protection Fund which shall be utilized for compensating the affected persons and restoring the ecological balance- environment (Protection)Act, 1986 – Ecology – Damage to Compensation.
- B. Ecology- Environment (Protection) Act, 1986 - S. 3(3)- Authority under- Directed to be constituted by Central govt. before 30-9-1996-Authority to be headed by a retired High Court Judge – Authority to have all powers necessary to deal with the situation created by polluting industries –Authority also to implement the Precautionary Principle and the principle of Polluter Pays – Authority to compute compensation payable for restoring the damage it caused to the environment- Authority also to frame a scheme in consultation with expert bodies like NEERI , Central Board and state Board for reversing the ecological damage and environmental pollution.
- C. Constitution of India- Arts 32,226 & 21 – PIL –Ecology- Green Bench Environmental pollution caused by tanneries in state of T. N. – suitable directions issued by Supreme Court – However, instead of itself monitoring the matter any further Madras High Court advised to constitute a Green Bench to deal with all the environmental matters- such Green Benches already functioning in some other High Courts.
- D. International Law – Customary International Law- if not contrary to the municipal law, deemed to be incorporated in domestic law
- E. Judicial activism- inaction on the part of the Govt. to set up regulatory/ adjudicatory statutory authorities as directed by Act makes it imperative for he Court to pass suitable necessary directions.

Held:

Though the leather industry is of vital importance to the country as it generates foreign exchange and provides employment avenues it has no right to destroy the ecology, degrade the environment and pose as a health hazard. It cannot be permitted to expand or even to continue with the present productions unless it tackles by itself the problem of pollution created by the said industry. (Para 9)

The traditional concept that development and ecology are opposed to each other is no longer acceptable. “Sustainable Development” is the answer. In the international sphere, Sustainable Development has come to be accepted as a viable concept to eradicate poverty and improve the quality of human life while living within the carrying capacity of the supporting ecosystems. Sustainable Development as defined by the Brundtland Report means “Development that meets the needs of the present without compromising the ability of the future generations to meet their own needs.” Sustainable Development as a balancing concept between ecology and development has been accepted as a part of the customary international law though its salient features have yet to be finalized by the international law jurists. (Para 10).

“The Precautionary Principle” and the “Polluter Pays” are essential features of “Sustainable Development”. The “Precautionary Principle” – in the context of the municipal law- means:

- i) Environmental measures – by the state Government and the statutory authorities- must anticipate, prevent and attack the causes of environmental degradation.
- ii) Where there are threats of serious and irreversible damage, lack of scientific certainty should not be used as a reason for postponing measures to prevent environmental degradation
- iii) the “onus of Proof” is on the actor or the developer/ industrialist to show that his action is environmentally benign

“The Polluter Pays Principle” has been held to be a sound principle. The Polluter Pays Principle” as interpreted by the Supreme Court means that the absolute liability for harm to the environment extends not only to compensate the victims of pollution but also the cost of restoring the environmental degradation. Remediation of the damaged environment is part of a process of “Sustainable Development” and as such the polluter is liable to pay the cost to the individual sufferers as well as the cost of reversing the damaged ecology. Apart from the constitutional mandate to protect and improve the environment there is plenty of post-independence legislation on the subject. In view of the constitutional and statutory provisions it must be held that the Precautionary Principle and the Polluter Pays Principle are part of the environmental law of the country. (Paras 11 to 14)

Indian Council for Enviro-Legal Action Vs. Union of India (1996) 3 SCC 212: JT (1996)2 SC 196, relied on.

Even otherwise, once these principles are accepted, as part of the customary international law there would be no difficulty in accepting them as part of the domestic law. The rules of customary internal law which are not contrary to the municipal law shall be deemed to have been incorporated in the domestic law and shall be followed by the courts of law. (Para 15)

A.D.M. Vs. Shivakant Shukla, (1976) 2 SCC 521: AIR 1976 SC 1207; Jolly George Varghese Vs. Bank of Cochin, (1980) 2 SCC 360: AIR 1980 SC 470; Gramophone Co. of India Ltd. Vs. Birendra Bahadur Pandaey,(1984) 2 SCC 534: 1984 SCC (Cri) 313: AIR 1984 SC 667, relied on.

The constitutional and statutory provisions protect a person's right to fresh air, clean water and pollution-free environment, but the source of the right is the inalienable common law right of clean environment. Our legal system having been founded on the British common law the right of a person to pollution-free environment is a part of the basic jurisprudence of land. (Paras 16 and 17)

(Commentaries on the laws of England of Sir William Blackstone Vol. III Fourth Edn. Published in 1876. Chapter XIII, relied on.)

The Environment Act contains useful provisions for controlling pollution. The main purpose of the Act is to create an authority or authorities under section 3(3) of the Act with adequate powers to control pollution and protect the environment. It is a pity that till date no authority has been constituted by the Central Government. The work which is required to be done by an authority in terms of section 3(3) read with other provisions of the Act is being done by the Supreme Court and other courts in the country. It is high time that the Central Government realizes its responsibility and statutory duty to protect the degrading environment in the country. If the conditions in the five districts of Tamil Nadu, where tanneries are operating, underground waters contaminated, agricultural lands turned barren and residents of the area exposed to serious diseases. It is, therefore it is necessary for the Supreme Court to direct the Central government to take immediate action under the provisions of the Environment Act. (Para 20)

There are more than 900 tanneries operating in the five districts of Tamil Nadu. Some of them may, by now, have installed the necessary pollution control measures; they have been polluting the environment for over a decade and in some cases even for a longer period. The Supreme Court has in various orders indicated that these tanneries are liable to pay pollution fine. The polluters must compensate the affected persons and also pay the cost of restoring the damaged ecology. (Para 21)

The Board has the power under the Environment Act and Rules to lay down standards for emissions or discharge of environmental pollutants. Rule 3(2) of the Rules even permits the Boards to specify more stringent standards from those provided under the Rules. The NEERI having justified the standards stipulated by the Board, it is directed that these standards are to be maintained by the tanneries and other industries in the state of Tamil Nadu. (Para 24)

[Keeping in view the above position the Supreme Court gave specific directions in para 25.]

However, it is not necessary for the Supreme Court to monitor these matters any further. The Madras High Court would be in a better position to monitor these matters hereinafter. Therefore, the Chief Justice of the Madras High Court is directed to constitute a Special Bench- "Green Bench"- to deal with this case and other environmental matters. However, it would be open to the bench to pass any appropriate order/orders keeping in view the directions issued by "Green Benches" already functioning in Calcutta, Madhya Pradesh and some other High Courts.

Advocates who appeared in this case:

R. Mohan, V.A. Bobde, Kapil Sibal, M.R. Sharma, V.C. Mahajan and S.S. Ray, Senior Advocates (K.R.R. Pillai, M.C. Mehta, Ms Seema Midha, V.G. Pradgassam, Vijay Panjwani, S. Sukumaran, Sudhir Walia, Roy Abraham, S.m Baby Krishna, P. Sukumar, Praveen Kumar, Romesh C. Pathak, M.A Krishnamoorthy, V. Krishnamuthi, Ms Anil Katiyar, Ms. Indra Sawhney, Deepak Divan, S.M. Jadhav, A.V. Rangam, Zafarullah Khan, Shahid Rizvi, Shakil Ahmed Syed, Jaideep Gupta and Sanjay Hedge, Advocates, with them) for the appearing parties.

Chronological list of Cases cited

1. (1996) 3 SCC 212 : JT (1996) 2 SC 196, Indian Council for Nevior –Legal Action v. Union of India 658 g-h
2. (1984) 2 SCC 534 : 1984 SCC (Cri) 313: AIR 1984 SC 667, Gramophone Co. of India Ltd. V. Birendra Bahadur Pandey 660e
3. (1976) 2 SCC 521 : AIR 1976 SC 1207, *A.D.M. Vs. Shivakani Shukla* 660 d-e

The Judgment of the court was delivered by KULDIP SINGH, J.

1. This petition – public interest – under Articles 32 of the Constitution of India has been filed by Vellore Citizens’ Welfare Forum and is directed against the pollution which is being caused by enormous discharge of untreated effluent by the tanneries and other industries in the state of Tamil Nadu. It is stated that the tanneries are discharging untreated effluent into agricultural fields, roadsides, waterways and open lands. The untreated effluent is finally discharged in River Palar which is the main source of water supply to the residents of the area. According to the petitioner the entire surface and subsoil water of River Palar has been polluted resulting in non-availability of potable water to the residents of the area. According to the petitioner the entire surface and subsoil water of River Palar has been polluted resulting in non-availability of potable water to the residents of the area.

It is stated that the tanneries in the state of Tamil Nadu have caused environmental degradation in the area. According to the preliminary survey made by the Tamil Nadu Agricultural University Research Center, Vellore nearly 35,000 hectares of agricultural land in the tanneries belt has become either partially or totally unfit for cultivation. It has been further stated in the petition that the tanneries use about 170 types of chemicals in chrome tanning processes. The said chemicals include Sodium Chloride, lime, Sodium Sulphate, Chromium(sic) Sulphate, fat, liquor, ammonia and Sulphuric acid besides dyes which are used in large quantities. Nearly 35 litres of water is used for processing one kilogram of finished leather, resulting in dangerously enormous quantities of toxic effluents being let out in the open by tanning industry. These effluents have spoiled the physico-chemical properties of the soil and have contaminated groundwater by percolation. According to the petitioner an independent survey conducted by Peace members, a Non-Governmental Organisation, covering 13 villages of Didingul and Peddiar Chatram Anchayat Unions reveals that 350 wells out of total of 467 used for drinking and irrigation purposes have been polluted. Women and children have to walk miles to get drinking water. Legal Aid and advice Board of Tamil Nadu requested two lawyers namely, M.R. Ramanan and P.S. Subramaniam to visit the area and submit a report indicating the extent of pollution caused by the tanneries. Relevant part of the report is as under:

“As per the Technical Report dated 28-5-1983 of the hydrological investigations carried out in Solur village near Ambur it was noticed that 176 chemicals including acids were contained in the tannery effluents. If 40 litres of water with chemicals are required for one kilo of leather, with the production of 200 tons of leather per day at present and likely to be increased multifold in the next four to five years with the springing up of more tanneries like mushroom in and around Ambur town, the magnitude of the effluent water used with chemicals and acids let out daily can be shockingly imagined....

The effluents are let out from the tanneries in the nearby lands, then to Goodar and Palar rivers. The lands, the rivulet and the river receive the effluents containing toxic chemicals and acids. The subsoil water is polluted ultimately affecting not only arable land wells used for agriculture but also drinking water wells.”

The entire Ambur town and the villages situated nearby do not have good drinking water. Some of the influential and rich people are able to get drinking water from a far –off place connected by a few pipes. During rainy days and floods, the chemicals deposited into the rivers and lands spread out quickly to other lands. The effluents thus let affect cultivation; either crops do not come up at all or if produced the yield is reduced abnormally too low. The tanners have come to say. The industry is a foreign exchange earner. But one moot point is whether at the cost of the lives of lakhs of people with increasing human population the activities of the tanneries should be encouraged on monetary considerations. We find that the tanners have absolutely no regard for the healthy environment in and around their tanneries. The effluents discharged have been stored like a pond openly in most of the places adjacent to cultivable lands with easy access for the animals and the people. The Ambur Municipality, which can exercise its powers as per the provisions of the Madras District Municipalities Act, 1920 (5 of 1920) more particularly under Sections 226 to 231, 249 to 253 and 338 to 342 seems to be a silent spectator. Probably it does not want to antagonise the highly influential and stupendously rich tanners. The powers given under Section 63 of the Water (Prevention and Control of Pollution) Act, 1974 (6 of 1974) have not been exercised in the case of tanneries in Ambur and the surrounding areas.”

2. Along with the affidavit dated 21-7-1992 filed by Deputy Secretary to Government, Environment and forests Department of Tamil Nadu, a list of villages affected by the tanneries has been attached. The list mentions 59 villages in the three divisions of Thirupathur, Vellore and Ranipet. There is acute shortage of drinking water in these 59 villages and as such alternative arrangements were being made by Government for the supply of drinking water.

3. in the affidavit dated 9-1-1992 filed by Member Secretary, Tamil Nadu Pollution Control Board (the Board), it has been stated as under:

“It is submitted that there are 584 tanneries in North Arcot Ambedkar District vide Annetures ‘A’ and ‘D’, out of which 443 tanneries have applied for consent of the Board. The Government was concerned with the treatment and disposal of effluent from tanneries. The Government gave time up to 31-7-1985 to tanneries to put up Effluent Treatment Plant (ETP). So far 33 tanneries in North Arcot Ambedkar District have put up Effluent Treatment Plants. The Board has stipulated standards for the effluent to be disposed of by the tanneries.”

4. The affidavits filed on behalf of the state of Tamil Nadu and the Board clearly indicate that the tanneries and other polluting industries in the state of Tamil Nadu are being persuaded for the last about 10 years to control the pollution control devices. The Central Government agreed to give substantial subsidy for construction of Common Effluent Treatment Plants (CETPs). It is a pity that till date most of the tanneries operating in the state of Tamil Nadu have not taken any step to control the pollution caused by the discharge of effluent. This Court on 1-5-1995 passed a detailed order. In the said order this Court noticed various earlier orders passed by this Court and finally directed as under:

“Mr. R. Mohan, the learned Senior Counsel for the Tamil Nadu Pollution Control Board, has placed before us a consolidated statement dividing the 553 industries into three parts. The first part in Statement 1 and the second part in Statement 2 relate to those tanneries who have set up effluent Treatment Plants either individually or collectively to the satisfaction of the Tamil Nadu Pollution Control Board. According to the report placed on the record by the record by the Board, these industries in statements 1 and 2 have not achieved the standard or have not started functioning to the satisfaction of the Tamil Nadu Pollution Control Board. According to the report placed on the record by the Board,

these industries in Statements 1 and 2 have not achieved the standard or have not started functioning to the satisfaction of the Board. So far as the industries in Statements 1 and 2 are concerned, we give them three months' notice from today to complete the setting up of Effluent Treatment Plant (either individually or collectively) failing which they shall be liable to pollution fine on the basis of their past working and also liable to be closed. We direct the Tamil Nadu Pollution Control Board to issue individual notices to all these industries within two weeks from today. The Board is also directed to issue a general notice on three consecutive days in a local newspaper, which has circulation in the district concerned.

So far as the 57 tanneries listed in Statement III (including 12 given above) industries who have filed writ petition, numbers of which have been commissioned the Effluent Treatment Plants despite various orders issued by this court from time to time. Mr. R. Mohan, the learned counsel appearing for Tamil Nadu Pollution Control Board, states that the Board has issued separate notices to these units directing them to set up Effluent Treatment Plants. Keeping in view the fact that this Court has been monitoring the matter for the last about four years and various orders have been issued by this court from time to time, there is no justification to grant any further time to these industries. We therefore, direct the 57 industries listed hereunder to be closed with immediate effect. We direct the District Collector and the Senior Superintendent of Police of the district to have our orders complied with immediately. Both these officers shall file a report in this court within one week of the receipt of the order.

We give opportunity to these 57 industries to approach this court as and when any steps towards the setting up of Effluent Treatment Plants and their commissioning have been taken by these industries. If any of the industries wish to be relocated to some other area, they may come out with a proposal in that respect.”

5. On 28-7-1995 this court suspended the closure order in respect of seven industries mentioned therein for a period of eight weeks. It was further observed as under:

“ Mr. G. Ramaswamy, the learned Senior Advocate appearing for some of the tanneries in Madras, states that the setting up of the Effluent Treatment Plants is progressing satisfactorily. According to him several lakhs have already been spent and in a short time it would start operating. Mr. Mohan, the learned counsel for the Tamil Nadu Pollution Control Board, states that the team of the Board will inspect the project and file a report by 3-8-1995.”

6. This Court on 8-9-1994 passed the following order:

“The Tamil Nadu pollution Control Board has filed its report. List No. 1 relates to about 299 industries. It is stated by Mr. G. Ramaswamy, Mr. Kapil Sibal and Mr. G.L. Sanghai, the learned Senior Advocates appearing for these industries that the setting up of the projects is in progress. According to the learned counsel Tamil Nadu, Leather Development Corporation (TALCO) is in charge of the project. The learned counsel state that the project shall be completed in every respect within 3 months from today. The details of these industries and the projects undertaken by TALCO as per List No. 1 are as under. We are of the view that it would be in the interest of justice to give a little more time to these industries to complete the project. Although the industries have asked for three months' time, we give them time till 31-12-1995. We make it clear that in case the projects are completed by that time, the industries shall be liable to be closed forthwith. Apart from that, these industries shall also be liable to pollution fine for the past period during which they had been operating.

We also take this opportunity to direct TALCO to take full interest in these projects and have the projects completed within the time granted by us.

Mr. Kapil Sibal, the learned counsel appearing for the tanneries, stated that council for Indian Finished Leather Manufacturers' Export Association is a body which is collecting 5 per cent on all exports. This body also helps the tanneries in various respects. We issue notice to the Association to be present in this court and assist this court in all the matters pertaining to the leather tanneries in Madras. Mr. Sampath takes notice.

So far as list No. II is concerned, it relates to about 163 tanneries (except M/s Vibgyor Tanners & Co., Kailasagiri Road, Milttalan -635 811. Ambur(via). The Pollution Control Board has inspected all these tanneries and placed its report before us. According to the report most of these tanneries have not even started primary work at the spot. Some of the have not even located the land. The tanneries should have themselves set up the pollution control device right at the time when they started working. They have not done so. They are not even listening to various orders passed by this court from time to time during the last more than 2 years. It is on the record that these tanneries are polluting the area. Even the water around the area where they are operating is not worth drinking. We give no further time to these tanneries. We direct all the following tanneries which are numbering about 162 to be closed with immediate effect.”

It may be mentioned that this court suspended the closure orders in respect of various industries from time to time to enable the said industries to install the pollution control devices.

7. This Court by the order dated 20-10-1995 directed the National Environmental Engineering Research Institute, Nagpur (NEERI) to send a team of experts to examine, in particular, the feasibility of setting up of CETPs for cluster of tanneries situated at different places in the State of Tamil Nadu where the work of setting up of the CETPs has not started and was in progress. NEERI submitted its first report on 9-12-1995 and the second report on 12-2-1996. This court examined the two reports and passed the following order on 9-4-1996:

“Pursuant to this Court’s order dated December 15, 1995, NEERI has submitted Final Examination Report dated February 12th, 1996 regarding CETPs constructed/ under construction by the tanneries in various district of the State of Tamil Nadu. A four member team constituted by the Director, NEERI inspected the CETPs from January 27th, 1996 to February 12, 1996. According to the report, at present, 30 CETP sites have been identified for tannery clusters in five districts of Tamil Nadu viz, North Arcot Ambedkar, Erode Periyar, Dindigul Anna, Trichi and Chengai M.G.R. All the 30 CETPs were inspected by the team. According to the report, only 7 CETPs are under operation, while 10 are under construction and 13 are proposed. The following 7 CETPs are under operation:

1. M/s TALCO Ranipet Tannery Effluent Treatment Co. Ltd., Ranipet, District North Arcot Ambedkar.
2. M/s TALCO Ambur Tannery Effluent Treatment Co. Ltd., Thuthipet Secotr, Ambur, district North Arcot Ambedkar.
3. M/s TALCO Vaniyambadi Tanners Enviro Control Systems Ltd., Vaniyambadi, District North Arcot.
4. M/s Pallavaram Tanners Industrial Effluent Treatment Co., Chrompet Area, District Chengai MGR.
5. M/s Ranipet SIDCO Finished Leather Effluent Treatment Co. Pvt., Ranipet, District Arcot Ambedkar.
6. M/s TALCO Vaniyambadi Tanners Enviro Control Systems Ltd., Udayemdiram, Vaniyambadi, District North Arcot Ambedkar.

7. M/s TALCO Pernambut Tannery Effluent Treatment Co., Ltd., Bakkalapalli., Pernambut, District North Arcot Ambedkar.

The CETPs mentioned at SI. Nos. 5, 6 and 7 were commissioned in January 1996 and were on the date of report passing through stabilization period. The report indicates that so far as the above CETPs are concerned, although there is improvement in the performance, they are still not operating at their optimal level and are not meeting the standards as laid down by the Ministry of Environment and Forests and the Tamil Nadu Pollution Control Board for inland surface water discharge. The NEERI has given various recommendations to be followed by the above mentioned units. We direct the units to comply with the recommendations of NEERI within two months from today. The Tamil Nadu Pollution Control Board shall monitor the directions and have the recommendations of the NEERI complied with. So far as the three units which are under stabilization are concerned, the NEERI Team may inspect the same and place a final report before this Court within the period of two months.

Apart from the tanneries which are connected with the above mentioned 7 units, there are large number of other tanneries operating in the 5 districts mentioned above which have not set up any satisfactory pollution control devices. Mr. Mohan, the Learned Counsel for the Tamil Nadu Pollution Control Board, states that notices were issued to all those tanneries from time to time directing them to set up the necessary pollution control devices. It is mandatory for the tanneries to set up the pollution control devices. Despite notices it has not been done. This Court has been monitoring these matters for the last about 4 years. There is no awakening or realization to control the pollution which is being generated by these tanneries.

The NEERI has indicated the physico-chemical characteristics of ground water from dug wells near tannery clusters. According to the report, water samples show that well waters around the tanneries are unfit for drinking. The report also shows that the quality of water in Palar River downstream from the place where the effluent is discharged is highly polluted. We therefore, direct that all the tanneries in the districts of North Ambedkar, Erode Periyar, Dindigul Anna, Trichi and Chengai M. G. R. which are not connected with the seven CETPs mentioned above, shall be closed with immediate effect. None of these tanneries shall be permitted to operate till the time the CETPs are constructed to the satisfaction of Tamil Nadu Pollution Control Board. We direct the District Magistrate and the Superintendent of Police of the area concerned, to have all these tanneries closed with immediate effect. Mr. Mehta has placed on record the report of Tamil Nadu Pollution Control Board. In Statement I of the Index, there is a list of 30 industries, which have also been connected with the CETPs.

According to report, these industries have not till date set up pollution control devices. We direct the closure of these industries also. List is as under. ... The Tamil Nadu Pollution Control Board has filed another report dated January 18, 1996 pertaining to 51 tanneries. There is a dispute regarding the permissible limit of the quantity of total dissolved solids (TDS). Since the NEERI Team is visiting these tanneries, they may examine the TDS aspect also and advise this Court accordingly. Meanwhile, we do not propose to close any of the tanneries on the ground that it is discharging more than 2001 TDS.

The report indicates that except the 17 units, all other units are non-complaint units in the sense that they are not complying with BOD standards. Excepting these 17 industries, the remaining 134 tanneries listed hereunder are directed to be closed forthwith. ... We direct the District Magistrate and all the Superintendent of Police of the area concerned to have all these tanneries mentioned above closed forthwith. The tanneries in the 5 districts of Tamil Nadu referred to in this order have been operating for a long time.

Some of the tanneries are operating for a period of more than two decades. All this period, these tanneries have been polluting the area. Needless to say that the total environment in the area has been polluted. We issue show-cause notice to these industries through their learned counsel who are present in Court, why they are not subjected to heavy pollution fine. We direct the State of Tamil Nadu through the Industry Ministry, the Tamil Nadu Pollution Control Board and all other authorities concerned and also the Government of India through the Ministry of Environment and Forests not to permit the setting up of further tanneries in the State of Tamil Nadu.

Copy of this order is communicated to the authorities concerned within three days. To come up for further consideration after the relies to the show-cause. There are a large number of tanneries in the state of Tamil Nadu, which have set up individual pollution control devices and which according to the Tamil Nadu Pollution Control Board are operating satisfactorily. The fact, however, remains that all these tanneries are discharging the treated effluents within the factory precincts itself. We direct NEERI Team, which is visiting this area to find out as to whether the discharge of the effluent on the land within the factory premises is permissible environmentally. *M/s Nandeem Tanning Company, Valayampet Vaniyambadi* is one of such industries. Copy of the report submitted by the Tamil Nadu Pollution Control Board is forwarded to NEERI. NEERI may inspect this industry within ten days and file a report in this Court. Copy of this order is communicated to NEERI.

Matters regarding distilleries in the State of Tamil Nadu

The Tamil Nadu Pollution Control Board has placed on record the factual report regarding 6 distilleries mentioned in page 4 of the index of its report dated April 5, 1996. The learned counsel for the Board states that the Board shall issue necessary notices to these industries to set up pollution control devices to the satisfaction of the Board, failing which these distilleries shall be closed. The Pollution Control Board shall place a status report before this court.”

The NEERI submitted two further reports on 1-5-1996 and 11-6-1996 in respect of CETPS set up by various industries. The NEERI reports indicate that the physico-chemical characteristics of ground water from dug wells in Ranipet, Thuthipeth, Valayambattu, Vaniyambadi and various other places do not conform to the limits prescribed for drinking purposes.

8. This Court has been monitoring this petition for almost five years. The NEERI, Board and the Central Pollution Control Board (Central Board) have visited the tanning and other industries in the State of Tamil Nadu several times. These expert bodies have offered all possible assistance to these industries. The NEERI reports indicate that even the seven operational CETPs are not functioning to its satisfaction. NEERI has made several recommendations to be followed by the operational CETPs. Out of the 30 CETP sites, which have been identified for tannery clusters in the five districts of North Arcot Ambedkar, Erode Periyar, Dindigul Anna, Trichi and Chengai M.G.R., 7 are under operation, 10 are under construction and 13 are proposed. There are a large number of tanneries which are not likely to be connected with any CETP and are required to set up pollution control devices on their own. Despite repeated extensions granted by this Court during the last five years and prior to that by the Board the tanneries in the State of Tamil Nadu have miserably failed to control the pollution generated by them.
9. It is no doubt correct that the leather industry in India has become a major foreign exchange earner and at present Tamil Nadu is the leading exporter of finished leather accounting for approximately 80 per cent of the country's export. Though the leather industry is of vital importance to the country as it generates foreign exchange and provides employment

avenues it has no right to destroy the ecology, degrade the environment and pose as a health-hazard. It cannot be permitted to expand or even to continue with the present production unless it tackles by itself the problem of pollution created by the said industry.

10. The traditional concept that development and ecology are opposed to each other is no longer acceptable. “Sustainable Development” is the answer. In the international sphere, “Sustainable Development” as a concept came to be known for the first time in the Stockholm Declaration of 1972. Thereafter, in 1987 the concept was given a definite shape by the World Commission on Environment and Development in its report called “Our Common Future”. The Commission was chaired by the then Prime Minister of Norway, Ms G.H. Brundtland and as such the report is popularly known as “Brundtland Report”. In 1991 the World Conservation Union, United Nations Environment Programme and World Wildlife Fund for Nature, jointly came out with a document called “Caring for the Earth” which is a strategy for sustainable living. Finally, came the Earth Summit held in June 1992 at Rio which saw the largest gathering of world leaders ever in the history – deliberating and chalking out a blueprint for the survival of the planet.

Among the tangible achievements of the Rio Conference was the signing of two conventions, one on biological diversity and another on climate change. These conventions were signed by 153 nations. The delegates also approved by consensus three non-binding documents namely, a Statement on Forestry Principles, a declaration of principles of environmental policy and development initiatives and Agenda 21, a programme of action into the next century in areas like poverty, population and pollution. During the two decades from Stockholm to Rio “Sustainable Development” has come to be accepted as a viable concept to eradicate poverty and improve the quality of human life which living within the carrying capacity of the supporting ecosystems. “Sustainable Development” as defined by the Brundtland Report means “Development that meets the needs of the present without compromising the ability of the future generations to meet their own needs”. We have no hesitation in holding that “Sustainable Development” as a balancing concept between ecology and development has been accepted as a part of the customary international law though its salient features have yet to be finalized by the international law jurists.

11. Some of the salient principles of “Sustainable Development”, as culled out from Brundtland Report and other international documents, are Inter-Generational Equity, Use and Conservation of Natural Resources, Environmental Protection, the Precautionary Principle, Polluter Pays Principle, Obligation to Assist and Cooperate, Eradication of Poverty and Financial Assistance to the developing countries. We are, however, of the view that “The Precautionary Principle” and “The Polluter Pays Principle” are essential features of “Sustainable Development”. The “Precautionary Principle” – in the context of the municipal law – means:
 - i) Environmental measures – by the State Government and the statutory authorities – must anticipate, prevent and attack the causes of environmental degradation.
 - ii) Where there are threats of serious and irreversible damage, lack of scientific certainty should not be used as a reason for postponing measures to prevent environmental degradation.
 - iii) The “onus of proof” is on the actor or the developer/industrialist to show that his action is environmentally benign.
12. “The Polluter Pays Principle” has been held to be a sound principle by this Court in Indian Council for Enviro-Legal Action –Vs- Union of India. The Court observed: (SCC p.246 para

65) "...we are of the opinion that any principle evolved in this behalf should be simple, practical and suited to the conditions obtaining in this country".

The Court ruled that: (SCC p.246, Para 65)

"...once the activity carried on is hazardous or inherently dangerous, the person carrying on such activity is liable to make good the loss caused to any other person by his activity irrespective of the fact whether he took reasonable care while carrying on his activity. The rule is premised upon the very nature of the activity carried on".

Consequently the polluting industries are "absolutely liable to compensate for the harm caused by them to villagers in the affected area, to the soil and to the underground water and hence, they are bound to take all necessary measures to remove sludge and other pollutants lying in the affected areas". The "Polluter Pays principle" as interpreted by this Court means that the absolute liability for harm to the environment extends not only to compensate the victims of pollution but also the cost of restoring the environmental degradation. Remediation of the damaged environment is part of the process of "Sustainable Development" and as such the polluter is liable to pay the cost to the individual sufferers as well as the cost of reversing the damaged ecology.

13. The Precautionary Principle and the Polluter Pays Principle have been accepted as part of the law of the land. Article 21 of the Constitution of India guarantees protection of life and personal liberty. Articles 47, 48-A and 51-A(g) of the Constitution are as under:

"47. Duty of the State to raise the level of nutrition and the standard of living and to improve public health – The state shall regard the raising of the level of nutrition and the standard of living of its people and the improvement of public health as among its primary duties and, in particular, the state shall endeavour to bring about prohibition of the consumption except for medicinal purposes of intoxicating drinks and of drugs which are injurious to health.

48–A. Protection and improvement of environment and safeguarding of forests and wildlife – The State shall endeavour to protect and improve the environment and to safeguard the forests and wildlife of the country.

51- A (g) to protect and improve the natural environment including forests, lakes, rivers and wildlife and to have compassion for living creatures."

A part from the constitutional mandate to protect and improve the environment there are plenty of post-independence legislations on the subject but more relevant enactments for our purpose are: the Water (Prevention and Control of Pollution) Act, 1974 (the Water Act), the Air (Prevention and Control of Pollution) Act, 1981 (the Air Act) and the Environment (Protection) Act, 1986(the Environment Act). The Water Act provides for the constitution of the Central Pollution Control Board by the Central Government and the constitution of the State Pollution Control Boards by various State Governments in the country. The Boards function under the control of the Governments concerned. The Water Act prohibits the use of streams and wells for disposal of polluting matters. It also provides for restrictions on outlets and discharge of effluents without obtaining consent from the Board. Prosecution and penalties have been provided which include sentence of imprisonment.

The Air Act provides that the Central Pollution Control Board and the State Pollution Control Boards constituted under the Water Act shall also perform the powers and functions under the Air Act. The main function of the Boards, under the Air Act, is to improve the quality of the air and to prevent, control and abate air pollution in the country. We shall deal with the Environment Act in the latter part of this judgment.

14. In view of the above-mentioned constituted and statutory provisions we have no hesitation in holding that the Precautionary Principle and the Polluter Pays principle are part to the environmental law of the country.
15. Even otherwise once these, principles are accepted as part of the Customary International Law there would be no difficulty in accepting them as part of the domestic law. It is almost an accepted proposition of law that the rules of Customary International Law which are not contrary to the municipal law shall be deemed to have been incorporated in the domestic law and shall be followed by the courts of law. To support we may refer to Justice H.R. Khanna's opinion in *A.D.M. Vs. Shivakant Shukla, Jolly George Varghese* case and Gramophone Co. case.
16. The constitutional and statutory provisions protect a person's right to fresh air, clean water and pollution-free environment, but the source of the right is the inalienable common law right of clean environment. It would be useful to quote a paragraph from Blackstone's commentaries on the Laws on the Laws of England (Commentaries on the Laws of England of Sir William Blackstone) Vol. III, fourth edition published in 1876. Chapter XIII, "Of Nuisance" depicts the law on the subject in the following words:

"Also, if a person keeps his hogs, or other noisome animals, or allows filth to accumulate on his premises, so near the house of another, that the stench incommodes him and makes the air unwholesome, this is an injurious nuisance, as it tends to deprive him of the use and benefit of his house. A like injury is, if one's neighbour sets up and exercises any offensive trade: as a tanner's a tallow-chandler's, or the like; for though these are lawful and necessary trades, yet they should be exercised in remote places; for the rule is, 'sic utere tuo, ut alienum non leadas'; this therefore is an actionable nuisance. And on a similar principle a constant ringing of bells in one's immediate neighbourhood may be a nuisance. ... With regard to other corporeal hereditaments; it is a nuisance to stop or divert water that used to run to another's meadow or mill; to corrupt or poison a watercourse, by erecting a dye-house or a lime-pit, for the use of trade, in the upper part of the stream; to pollute a pond, from which another is entitled to water his cattle; to obstruct a drain; or in short to do any act in common property, that in its consequences must necessarily tend to the prejudice of one's neighbour. So closely does the law of England enforce that excellent rule of gospel-morality, or 'doing to others, as we would they should do unto ourselves'".

17. Our legal system having been founded on the British common law the right of a person to a pollution-free environment is a part of the basic jurisprudence of the land.
18. The Statement of Objects and Reasons to Environment Act, inter alia, states as under:

"The decline in environmental quality has been evidenced by increasing pollution, loss of vegetal cover and biological diversity, excessive concentrations of harmful chemicals in the ambient atmosphere and in food-chains, growing risks of environmental accidents and threats to life-support systems. The world community's resolve to protect and enhance the environmental quality found expression in the decisions taken at the United Nations Conference on the Human Environment held in Stockholm in June 1972. The Government of India participated in the Conference and strongly voiced the environmental concerns.

While several measures have been taken for environmental protection both before and after the Conference, the need for a general legislation further to implement the decision of the Conference has become increasingly evident.

Existing laws generally focus on specific types of pollution or on specific categories of hazardous substances. Some major areas of environmental hazards are not covered. There also exist uncovered gaps in areas of major environmental hazards. There are inadequate linkages in handling matters of industrial and environmental safety, control mechanisms to guard against slow, insidious build-up of hazardous substances especially new chemicals in the environment, are weak. Because of a multiplicity of regulatory agencies, there is need for an authority which can assume the lead role for studying, planning and implementing, long-term requirements of environmental safety and to give direction to, and coordinate a system of speedy and adequate response to emergency situations threatening the environment.

In view of what has been stated above, there is urgent need for the enactment of a general legislation on environmental protection which inter alia, should enable coordination of activities of the various regulatory agencies, creation of an authority or authorities with adequate powers for environmental protection, regulation of discharge of environmental pollutants and handling of hazardous substances, speedy response in the event of accidents threatening the environment and deterrent punishment to those who endanger human environment, safety and health.”

Sections 3, 4, 5, 7 and 8 of the Environment Act which are relevant are as under:

“3. Power of Central Government to take measures to protect and improve environment –

(1) Subject to the provisions of this Act, the Central Government shall have the power to take all such measures as it deems necessary or expedient for the purpose of protecting and improving the quality of the environment and preventing, controlling and abating environmental pollution.

(2) In particular, and without prejudice to the generality of the provisions of sub-section (1), such measures may include measures with respect to all or any of the following matters, namely –

- i) coordination of actions by the State Governments, officers and other authorities-
 - a) under this Act, or the rules made there under: or
 - b) under any other law for the time being in force which is relatable to the objects of this Act;
- ii) planning and execution of a nation-wide programme for the prevention, control and abatement of environmental pollution;
- iii) laying down standards for the quality of environment in its various aspects;
- iv) laying down standards for emission or discharge of environmental pollutants from various sources whatsoever;
Provided that different standards for emission or discharge may be laid down under this clause from different sources having regard to the quality or composition of the emission or discharge of environmental pollutants from such sources;
- v) restrictions of areas in which any industries, operations or processes or class of industries, operations or processes shall not be carried out or shall be carried out subject to certain safeguards;

- vi) laying down procedures and safeguards for the prevention of accidents which may cause environmental pollution and remedial measures for such accidents;
- vii) laying down procedures and safeguards for the handling of hazardous substances;
- viii) examination of such manufacturing processes, materials and substances as are likely to cause environmental pollution;
- ix) carrying out and sponsoring investigations and research relating to problems of environmental pollution;
- x) inspection of any premises, plant, equipment, machinery, manufacturing or other processes, materials or substances and giving, by order, of such directions to such authorities, officers or persons as it may consider necessary to take steps for the prevention, control and abatement of environmental pollution;
- xi) establishment or recognition of environmental laboratories and institutes to carry out the functions entrusted to such environmental laboratories and institutes under this Act;
- xii) collection and dissemination of information in respect of matters to environmental pollution;
- xiii) preparation of manuals, codes or guides relating to the prevention, control and abatement of environmental pollution;
- xiv) such other matters as the Central Government deems necessary or expedient for the purpose of securing the effective implementation of the provision of this Act.

(3) The Central Government may, if it considers it necessary or expedient so to do for the purposes of this Act, by order, published in the Official Gazette, constitute an authority or authorities by such name or names as may be specified in the order for the purpose of exercising and performing such of the powers and functions (including the power to issue directions under Section 5) of the Central Government under this Act and for taking measures with respect to such of the matters referred to in sub-section (2) as may be mentioned in the order and subject to the supervision and control of the Central Government and the provisions of such order, such authority or authorities may exercise the powers or perform the functions or take the measures so mentioned in the order as if such authority or authorities had been empowered by this Act to exercise those powers or perform those functions or take such measures.

(4). Appointment of officers and their powers and functions –

(1) Without prejudice to the provisions of sub-section (3) of section 3, the Central Government may appoint officers with such designations as it thinks fit for the purpose of this Act and may entrust to them such as the powers and functions under this Act as it may deem fit.

(2) The officers appointed under sub-section (1) shall be subject to the general control and direction of the Central Government or, if so directed by that Government, also of the authority or authorities, if any, constituted under sub-section (3) of Section 3 or of any other authority or officer.

(5) Power to give directions – Notwithstanding anything contained in any other law but subject to the provisions of this Act, the Central Government may, in the exercise of its powers and performance of its functions under this Act, issue directions in writing

to any person, officer or any authority and such person, officer or authority shall be bound to comply with such directions.

Explanation. – For the avoidance of doubts, it is hereby declared that the power to issue directions under this section includes the power to direct

- a) The closure, prohibition or regulation of any industry, operation or process; or
- b) Stoppage or regulation of the supply of electricity or water or any other service.

- (6) Persons carrying on industry, operation, etc., not to allow emission or discharge of environmental pollutants in excess of the standards. – No person carrying on any industry, operation or process shall discharge or emit or permit to be discharged or emitted any environmental pollutant in excess of such standards as may be prescribed.
- (7) Persons handling hazardous substances to comply with procedural safeguards – No person shall handle or cause to be handled any hazardous substances except in accordance with such procedure and after complying with such safeguards as may be prescribed.”

19. Rules 3(1), 3(2) and 5(1) of the Environment (Protection) Rules, 1986 (the Rules) are as under:

“3. Standards for emission or discharge of environmental pollutants. – (1) for the purposes of protecting and improving the quality of the environment and preventing and abating environmental pollution, the standards for emission or discharge of environmental pollutants from the industries, operations or processes shall be as specified in Schedules I to IV.

3. (2) Notwithstanding anything contained in sub-rule (1), the Central Board or a State Board may specify more stringent standards from those provides in Schedules I to IV in respect of any specific industry, operation or process depending upon the quality of the recipient system and after recording depending upon the quality of the recipient system and after recording reasons therefore in writing.

(8). Prohibition and restriction on the location of industries and the carrying on or process and operations in different areas – (1) The Central Government may take into consideration the following factors while prohibiting or restricting the location of industries and carrying on of processes and operations in different areas

- i) Standards for quality of environment in its various aspects laid down for an area.
- ii) The maximum allowable limits of concentration of various environmental pollutants (including noise) for an area.
- iii) The likely emission or discharge of environmental pollutants from an industry, process or operation proposed to be prohibited or restricted.”
- iv) The topographic and climatic features of an area.
- v) The biological diversity of the area which, in the opinion of the Central Government needs to be preserved.
- vi) Environmentally compatible land use
- vii) Net adverse environmental impact likely to be caused by an industry, process or operation proposed to be prohibited or restricted.

- viii) Proximity to a protected area under the Ancient Monuments and Archaeological Sites and Remains Act, 1958 or a sanctuary, National Park, game reserve or closed area notified as such under the Wild Life (Protection) Act, 1972 or places protected under any treaty, agreement or convention with any other country or countries or in pursuance of any decision made in any international conference, association or other body.
- ix) Proximity to human settlements
- x) Any other factor as may be considered by the Central Government to be relevant to the protection of the environment in an area.”

20. It is thus obvious that the Environment Act contains useful provisions for controlling pollution. The main purpose of the Act is to create an authority or authorities under Section 3(3) of the Act with adequate powers to control pollution and protect the environment. It is a pity that till date no authority has been constituted by the Central Government. The work which is required to be done by an authority in terms of Section 3(3) read with other provisions of the Act is being done by this Court and the other courts in the country. It is high time that the Central Government realises its responsibility and statutory duty to protect the degrading environment in the country. If the conditions in the five districts of Tamil Nadu, where tanneries are operating, are permitted to continue then in the near future all rivers/canals shall be polluted, underground waters contaminated, agricultural lands turned barren and the residents of the area exposed to serious diseases. It is, therefore, necessary for this Court to direct the Central Government to take immediate action under the provision of the Environment Act.

21. There are more than 900 tanneries operating in the five districts of Tamil Nadu. Some of them may, by now, have installed the necessary pollution control measures; they have been polluting the environment for over a decade and in some cases even for a longer period. This Court has in various orders indicated that these tanneries are liable to pay pollution fine. The polluters must compensate the affected persons and also pay the cost of restoring the damaged ecology.

22. Mr. M.C. Mehta, the learned Counsel for the petitioner has invited our attention to the notification GOMs. No. 213 dated 30-3-1989 which reads as under:

“In the government order first read above, the Government have ordered, among other things, that no industry causing serious water pollution should be permitted within one kilometer from the embankments of rivers, streams, dams, etc. and that the Tamil Nadu Pollution Control Board should furnish a list of such industries to all local bodies. It has been suggested that it is necessary to have a sharper definition for water sources so that ephemeral water collections like rainwater ponds, drains, sewerage (biodegradable) etc. may be excluded from the purview of the above order. The Chairman, Tamil Nadu Pollution Board has stated that the scope of the government order may be restricted to reservoirs, rivers and public drinking-water sources. He has also stated that there should be a complete ban on location of highly polluting industries within 1 kilometer of certain water sources.

2. The Government has carefully examined the above suggestions. The Government imposes a total ban on the setting up of the highly polluting industries mentioned in Annexure 1 to this order within one kilometer from the embankments of the water sources mentioned in Annexure II to this order.

3. The Government also direct that under any circumstances if any highly polluting industry is proposed to be set up within one kilometer from the embankments of the water sources other than those mentioned in Annexure II to this order, the Tamil Nadu Pollution Control Board should examine the case and obtain the approval of the Government for it.”

Annexure 1 to the notification includes distilleries, tanneries, fertilizer, steel plants and foundries as the highly polluting industries. We have our doubts whether the above-quoted government order is being enforced by the Tamil Nadu Government. The order has been issued to control pollution and protect the environment. We are of the view that the order should be strictly enforced and no industry listed in Annexure 1 to the order should be permitted to be set up in the prohibited area.

23. The learned counsel for the tanneries raised an objection that the standard regarding total dissolved solids (TDS) fixed by the Board was not justified. This court by the order dated 9-4-1996 directed the NEERI to examine this aspect and give its opinion. In this report dated 11-6-1996 NEERI has justified the standards stipulated by the Board. The reasoning of the NEERI given in its report dated 11-6-1996 is as under:

“The total dissolved solids in ambient water have physiological, industrial and economic significance. The consumer’s acceptance of mineralized water decreased in direct proportion to increased mineralization as indicated by Bruvold (1). High total dissolved solids (TDS), including chlorides and sulphates, are objectionable due to possible physiological effects and mineral taste that they impart to water. High levels of total dissolved solids produce laxative/cathartic/purgative effect in consumers. The requirement of soap and other detergents in household and industry is directly related to water hardness as brought out by De Boer and Larsen (2). High concentration of mineral salts, particularly sulphates and chlorides, are also associated with costly corrosion damage in wastewater treatment systems, as detailed by Patterson and Banker (3). Of particular importance is the tendency of scale deposits with high TDS thereby resulting in high fuel consumption in boilers?”

The Ministry of Environment and Forests (MEF) has not categorically laid down standards for inland surface water discharge for total dissolved solids (TDS), sulphates and chlorides. The decision on these standards rests with the respective State Pollution Control Boards as per the requirements based on local site conditions. The standards stipulated by the TNPCB are justified on the afore-referred considerations.

The prescribed standards of the TNPCB for inland surface, water discharge can be met for tannery wastewater’s cost effectively through proper implant control measures in tanning operation, and rationally designed and effectively operated wastewater treatment plants (ETPs) and (CETPs). Tables 3 and 5 depict the quality of ground water in some areas around tanneries during peak summer period (3-6-1996 to 5-6-1996). Table 8 presents the data collected by TNPCB at individual ETPs indicating that TDS, sulphates and chloride concentrations are below the prescribed standards for inland surface water discharge. The quality of ambient waters needs to be maintained through the standards stipulated by TNPCB."

24. The Board has the power under the Environment Act and the Rules to lay down standards for emissions or discharge of environmental pollutants. Rule 3(2) of the Rules even permits the Board to specify more stringent standards from those provided under the Rules. The NEERI

having justified the standards stipulated by the Board, we direct that these standards are to be maintained by the tanneries and other industries in the State of Tamil Nadu.

25. Keeping in view the scenario discussed by us in this judgment, we order and direct as under:
1. The Central Government shall constitute an authority under Section 3(3) of the Environment (Protection) Act, 1986 and shall confer on the said authority all the powers necessary to deal with the situation created by the tanneries and other polluting industries in the State of Tamil Nadu. The authority shall be headed by a retired judge of the High Court and it may have other members – preferably with expertise in the field of pollution control and environment protection – to be appointed by the Central Government. The Central Government shall confer on the said authority the powers to issue direction under Section 5 of the Environment Act and for taking measures with respect to the matters referred to in clauses (v), (vi), (vii), (viii), (ix), (x) and (xii) of sub-section (2) of Section 3. The Central Government shall constitute the authority before September 30th, 1996.
 2. The authority so constituted by the Central Government shall implement the “Precautionary Principle” and the “Polluter Pays principle”. The authority shall, with the help of expert opinion and after giving opportunity to the polluters concerned assess the loss to the ecology/environment in the affected areas and shall also identify the individuals/families who have suffered because of the pollution and shall assess the compensation to be paid to the said individual/families. The authority shall further determine the compensation to be recovered from the polluters as cost of reversing the damaged environment. The authority shall lay down just and fair procedure for completing the exercise.
 3. The authority shall compute the compensation under two heads namely, for reversing the ecology and for payment to individuals. A statement showing the total amount to be recovered, the names of the polluters from whom the amount is to be recovered, the amount to be recovered from each polluter, the persons whom the compensation is to be paid and the amount payable to each of them shall be forwarded to the Collectors/District Magistrates of the area concerned. The Collector/District Magistrates shall recover the amount from the polluters, if necessary, as arrears of land revenue. He shall disburse the compensation awarded by the authority to the affected persons/families.
 4. The authority shall direct the closure of the industry owned/managed by a polluter in case he evades or refuses to pay the compensation awarded against him. This shall be in addition to the recovery from him as arrears of land revenue.
 5. An industry may have set up the necessary pollution, control device at present but it shall be liable to pay for the past pollution generated by the said industry which has resulted in the environmental degradation and suffering to the resident of the area.
 6. We impose pollution fine of Rs 10,000 each on all the tanneries in the districts of North Arcot Ambedkar, Erode Periyar, Dindigul Anna, Trichi and Chorgai M.G.R. The fine shall be paid before October 31st, 1996 in the office of the Collector/District Magistrate concerned. We direct the collector/district magistrates of these districts to recover the fines from the tanneries. The money shall be deposited, along with the compensation amount recovered from the polluters under a separate head called “Environment Protection Fund” and shall be utilized for compensating the affected person as identified

by the authorities and also for restoring the damaged environment. The pollution fine is liable to be recovered as arrears of land revenue. The tanneries which fail to deposit the amount by October 31, 1996 shall be closed forthwith and shall also be liable under the contempt of Courts Act, 1971.

7. The authority, in consultation with expert bodies like NEERI, Central Board, Board shall frame scheme/schemes for reversing the damaged cause to the ecology and environment by pollution in the State of Tamil Nadu. The scheme/schemes so framed shall be executed by the State Government under the supervision of the Central Government. The expenditure shall be met from the "Environment Protection Fund" and from other sources provided by the State Government and the Central Government.
8. We suspend the closure orders in respect of all the tanneries in the five districts of North Arcot Amedkar, Erode Periyar, Dindigul Anna, Trichi and Chengai M.G.R. We direct all the tanneries in the above five districts to set up CETPs of Individual Pollution Control Devices on or before 30, 1996. Those connected with CETPs shall have to install in addition the primary devices in the tanneries. All the tanneries in the above five districts shall obtain the consent of the Board to function and operate with effect from December 15, 1996. The tanneries that are refused consent or who fail to obtain the consent of the Board by December 15, 1996 shall be closed forthwith.
9. We direct the Superintendent of Police and the Collector/District Magistrate/Deputy Commissioner of the district concerned to close all those tanneries with immediate effect who fail to obtain the consent from the Board by the said date. Such tanneries shall not be reopened unless the authority permits them to do so. It would be open to the authority to close such tanneries permanently or to direct their relocation.
10. Government Order No. 213 dated March 30th, 1989 shall be enforced forthwith. No new industry listed in Annexure 1 to the notification shall be permitted to be set up within the prohibited area. The authority shall review the cases of all the industries which are already operating in the prohibited area and it would be open to the authority to direct the relocation of any of such industries.
11. The standards stipulated by the Board regarding total dissolved solids (TDS and approved by the NEERI shall be operative. All the tanneries and other industries in the State of Tamil Nadu shall comply with the said standards. The quality of ambient waters has to be maintained through the standards stipulated by the Board.
26. We have issued comprehensive directions for achieving the end result in this case. It is not necessary for this Court to monitor these matters any further. We are of the view that the Madras High Court would be in a better position to monitor these matters hereinafter. We, therefore, request the Chief Justice of the Madras High Court to constitute a Special Bench "Green Bench" to deal with this case and other environmental matters. We make it clear that it would be open to the Bench to pass any appropriate order/orders keeping in view the directions issued by us. We may mention that "Green Benches" are already functioning in Calcutta, Madhya Pradesh and some other High Courts. We direct the Registry of this Court to send the records to the Registry of the Madras High Court within one week. The High Court shall treat this matter as a petition under Article 226 of the Constitution of India and deal with it in accordance with law and also in terms of the directions issues by us. We give liberty to the parties to approach the High Court as and when necessary.

27. Mr. M.C. Mehta has been assisting this Court to our utmost satisfaction. We place on record our appreciation for Mr. Mehta. We direct the State of Tamil Nadu to pay Rs 50,000 towards legal fees and other out of pocket expenses incurred by Mr. Mehta.

**THE REPUBLIC OF SOUTH AFRICA
IN THE SUPREME COURT OF SOUTH AFRICA CAPE
PROVINCIAL DIVISION 1996 (1) SA 283 (C)**

VAN HUYSSSTEEN & OTHERS.....APPLICANTS

VERSUS

**MINISTER OF ENVIRONMENTAL AFFAIRS
AND TOURISM & OTHERS.....RESPONDENTS**

BEFORE: FARMLAND, J 1995 JUNE 15, 28 CASE NO. 6570/95

***Public Participation:** -proposal to erect steel mill near west coast national park and Lange Baan lagoon – land protected by convention of wetlands of international importance (Ramsar Convention) – expert opinion differing as to environmental consequences of proposed development.*

***Constitutional Law:** -right to information – right to procedurally fair administrative action.*

***Interdict:** -detrimental effect on environment would diminish the value of nearby property.*

The applicant trustees and trust beneficiary sought orders against governmental authorities with respect to the planning decision concerning the construction of a steel mill on land near the West Coast National Park and the Langebaan Lagoon in the South African province of west cape. The respondents argued that, the applicants will not have not established an apprehension of irreparable harm if the order were to be granted. They further contended that the applicants had no infringed right and possibility of irreparable harm and neither was the balance of fairness in their favour.

HELD:

1. The word “shall” in the Environment Act empowers the federal Minister to appoint a board but does not necessarily oblige him to do so. As the applicants could not compel the appointment of a board, they have no right to demand the amplification of the terms of reference of any board that might be appointed.
2. The documentation was “reasonably required” by the applicants in order to exercise their right to object to the rezoning in the event that the development proved to be undesirable. Accordingly, the Federal Minister should pay the costs of the trustees’ application for documentation.
3. If it were shown that the erection and operation of a steel mil would detrimentally affect the Lagoon and its ecosystem, then the value of trust property directly opposite the lagoon would be diminished. Accordingly the rights of applicants would be affected thus the applicants would be affected therefore the applicants have standing.
4. The applicants have a right to a procedurally fair administrative action in respect of the rezoning decision within the meaning of the Constitution.

**VAN HUYSTEEN AND OTHERS
VERSUS
MINISTER OF ENVIRONMENTAL AFFAIRS AND TOURISM
AND OTHERS 1996 (1) SA 283 (C) CAPE PROVINCIAL
DIVISION**

FAR LAM J 1995 June 15, 28 Case No 6570/95

F1ynote: Sleutelwoorde

Constitutional law, human rights Protection of Fundamental rights in terms of chap 3 of Constitution of the Republic of South Africa Act 200 of 1993 Persons who may claim relief, Claim by 'person acting in his or her own interest' in s 7(4)(b)(i), Words 'own interest' wide enough to cover an interest as trustee.

Constitutional law, Human rights, Right of access to State information in terms of s 23 in chap 3 of Constitution of the Republic of South Africa Act 200 of 1993 Section 24(b) must be generously interpreted, does not merely codify existing law of natural justice latter not confined to *audi alteram partem and nemo iudex in sua causa rules*. Test of procedurally fair administrative action under s 24(b) is whether principles and procedures were followed which in particular situation were right, just and fair. Procedurally unfair to owner of nearby residential land for application under land Use Planning Ordinance 15 of 1958(C) for rezoning of farmland as industrial land to be decided before completion of investigation by board of enquiry appointed under S. 15(I) of Environmental Conservation Act 73 of 1989 into proposal to build steel mill on the land to be rezoned Owner entitled to interdict against provincial functionaries from deciding rezoning application pending finalization of enquiry by board.

Environmental law - Environmental policy - compliance in terms of S.3 of Environmental Conservation Act 73 of 1989 with policy determined under S.2 - Effect of on provincial administration functionaries considering rezoning application under land Use Planning Ordinance 15 of 1985 (C) - Functionaries obliged to exercise powers in accordance with policy determined under s 2 of Act.

Environmental law - Board of investigation in terms of s 15 of Environmental Conservation Act 73 of 1989, Minister cannot be compelled to appoint board of investigation in terms of s 15(I) likewise cannot be compelled to amend or amplify an appointed board's terms of reference.

Environmental law, Board of investigation in terms of s 15 of Environmental Conservation Act 73 of 1989. Investigation by board under that section markedly superior to a provincial departmental enquiry because of advantages of evidence under oath, interrogation, publicity and right to subpoena.

Head note: Kopaota

"Section 15 (1) of the Environmental Conservation Act 73 of 1989 empowers but does not obliged the Minister of Environmental Affairs to appoint a board of enquiry to assist him in evaluating a proposed development, and consequently, no one can compel him to do so. It follows too that, where a board has been appointed, no one has the right to demand the amplification or amendment of its terms of reference.

Any Minister or official charged with making a rezoning decision under the Land Use Planning Ordinance 15 of 1985 (C) is obliged, by s 3 of the Environmental Conservation Act 73 of 1989, to exercise the powers conferred on him by the ordinance in accordance with the policy determined under s 2 of that Act.

By reasons of s 24 (b) of the Constitution of the Republic of South Africa Act 200 of 1993, anyone whose rights will be affected by a rezoning decision has the right to procedural fairness in respect of such decision. That section does not merely codify the common law relating to natural justice which in any event is not limited to the *audi alteram partem* and *nemo iudex in sua causa* rules.

A party entitled to procedural fairness, as contemplated in s 24 (b) of the Constitution is entitled to 'the principles and procedures ... which, in any particular situation or set of circumstances are right and just and fair' (as stated by Lord Morris of Borth-y-Gesa in *Wiseman Vs. Borneman* [1971] AC 297 (In.) at 3088-3098 [1969] 3 All ER 271S at 278(E). Even if that statement does not correctly reflect the South African common law, then it is nonetheless the correct test to apply under s 24(b) of the Constitution where the words 'the right to procedurally fair administrative action' must be generously interpreted and austerity of tabulated legalism must be avoided.

An investigation by a board of enquiry appointed under s 15(I) of the Environmental Conservation Act of 1989 is markedly superior to a departmental investigation by a provincial administration in relation to a rezoning application because of the advantages it has in attempting to arrive at the truth in regard to disputed facts and to differing expert opinions, namely testimony on oath. Interrogation, publicity and the right to subpoena any person who in its opinion may give material information and/or who may produce any book document or thing which may have a bearing on the subject of the investigation, to give evidence and can be interrogated and/or to produce the book, document or thing.

The sixth and seventh respondents proposed to build a steel mill on portion of a farm at Saldanha, near the West Coast National Park and the Langebaan Lagoon, and had applied to the Provincial Administration of the Western Cape for the rezoning of the land under the Land Use Planning Ordinance 15 of 1985 (C). The lagoon's wetlands were protected in terms of the Convention on Wetlands of International Importance to which South Africa was a contracting party. Erf 2121 Langebaan was situated opposite the lagoon and was owned by the W Trust, the trustees of which were the first three applicants. The first applicant was joined as fourth applicant in his personal capacity as one of the trust beneficiaries. The trustees intended to build a holiday home or a permanent home on the trust property. Expert opinion was divided on whether the proposed, mill would be environmentally undesirable. The applicants applied in a Provincial Division as a matter of urgency, for a rule *nisi* ordered (a) the first respondent (i) to make available, in terms of s 23 of the Constitution, copies of all documents in his possession relevant to the proposed will (ii) to appoint a board of in terms of s 151(1) of the Environmental Conservation Act 1989 to assist him in the evaluation of proposed mill of certain specified related issues; (b) ordering the second and third respondents (the Premier of the Western Cape Province and the Minister of Agriculture Planning and Tourism of that province) to hold in abeyance the rezoning decision, pending the finalization of the enquiry under 15(1), the latter order to operate as an interim interdict pending the return day of the rule *nisi*. Before the hearing, the first respondent appointed a board of investigation under s 15(1) and offered without admitting that he was obliged to do so, to make the relevant documents available to the applicants. The applicants, accordingly did not pursue the order sought in (a) (i) and (ii) above but did ask for an order calling on the first respondent to amend and/or amplify the B card's terms of reference. The first respondent resisted the latter and further contended that the applicants had not been entitled to the documents they had sought. The

second, third, sixth and seventh respondents opposed the order sought in (b) above.

Held, that the applicants had no right to compel the first respondent to appoint a board of enquiry under s 15(I) of the Environmental Conservation Act 1989 and therefore no right to an order compelling him to amplify or amend the board's terms of reference accordingly, the applications for the order on him to appoint a board and to amend and/or amplify the terms of reference of the board which he did appoint were dismissed with costs.

Held, further, that, applying the interpretation of s 23 of the Constitution laid down in *Nonie and Another v Attorney-General, Cape, and Another* 1995 (2) SA 460 (C) «(1995 (1) SACR 446 (C)), the applicants did reasonably require the document sought for the purpose of protecting their rights to the trust property which was potentially threatened by the proposed mill in order to exercise their rights to object to the rezoning accordingly, the first respondent was ordered to pay the applicant's costs of the application seeking the said documents. . .

Held, further, in regard to the application for an order interdicting the second' and third respondents from making a decision on the rezoning application pending the finalization of the board's investigation, that the words in his or her own interest in s 7(4)(b)(i) of the Constitution were wide enough to cover an interest as a trustee and the first three applicants accordingly had *locus standi* as their rights in respect of the trust property would be threatened if second and third respondents decided the rezoning application in favour of sixth and seventh respondents before the finalisation of the board's investigation; for the trust property clearly had value as the potential site of a holiday home and the Court could take judicial notice of the fact that sites for holiday homes would be more valuable if they were in close proximity to beautiful unspoilt natural areas and less valuable if such areas were polluted or otherwise detrimentally affected.

Held, further, in regard to the interdict sought that s 3 of the Environmental Conservation Act 1989 obliged functionaries charged with the duty of deciding on rezoning applications under the Land Use Planning Ordinance 15 of 1985 (C) to exercise their powers in accordance with the policy determined under s 2 of the Act and that s 24(b) of the Constitution entitled them to procedural fairness in respect of such rezoning decision accordingly, the applicants had a right protectable by interdict.

Held, further, that it would be an infringement of the applicant's rights to procedural fairness if the provincial administration's functionaries decided the rezoning application before the board's enquiry had been completed because an investigation by the board of enquiry would be markedly superior to that which those functionaries could make, by reason of the very considerable advantages of testimony on oath, interrogation, publicity, and the right to subpoena witnesses which the board alone had.

Held, further, that the applicants would suffer irreparable harm if the functionaries so decided because, although their decision could be taken on review, review was a discretionary remedy and there might be factors which could induce the Court to refuse an order which might necessitate the demolition of an expensive steel mill: furthermore, that damages would not be an adequate alternative remedy because they would be extremely difficult to quantify.

Held, further, that, insofar as it was relevant, the balance of convenience or fairness favoured the granting of an interdict and that the Court should exercise its discretion in favour of the applicants. (At 310C-D.) Interdict accordingly granted to applicants with costs, with leave reserved to second and third respondents to set the matter down for argument as to whether the order should be uplifted on the ground that the finalisation of the board's decision was being

unduly delayed.

The following decided cases were cited in the judgment of the Court:

- *Re Davis* (1947) 1"5 CLR 409
- *Harnischfeger Corporation and another v Appleton and another* 1993 (4) SA 479 (W)
- *Jacobs en 'n Ander v Waks en Andere* 1992 (1) SA 521 (A)
- *Marlin v Durban Turf Club and Others* 1942 AD 112
- *Minister of Home Affairs and Another v Collins MacDonald Fisher and Another* (1980} AC 319 (PC) ([1979] 3 All E1t21) .
- *Nonie and Another v Attorney-General Cape and Another* 1995 (2) SA 460 (C) (1995 (1) SACR 446)
- *R v Big M Drug Mart Ltd.* (1985} 18 DLR (4th) 321
- *Russel v Duke of Norfolk and Others* [1949] 1 All ER 109 (CA)
- *S v Leepile and Others* (I) 1986 (2) SA 333 (W)
- *S v Makwanyane and Another* 1995 (3) SA 391 (CC) (1995 (2) SACR 1)
- *S v Zuma and Others* 1995 (2) SA 642 (CC) (1995 (1) SACR 56)
- *Sutter v Scheepers* 1932 AD 165
- *Turnery Jockey Club of South Africa* 1974 (3) SA 633 (A)
- *Wiseman v Borneman* [1971] AC 297 (HL) ([1969] 3 All ER 275).

Case Information

Application for a *mandamus* and an interdict. The facts appear from the reasons for judgement.

D P de Villiers QC (with him *T D Potgieter*) for the applicants.

G D van Schalkwyk SC (with him *R C Hiemstra*) for the first, second and third respondents.

M Helberg SC for the sixth and seventh respondents.

No appearance for the fourth, fifth, eighth and ninth respondents.

Cur adv vult.

Postea (June 28).

JUDGEMENT

Farmland J; On 26 May 1995 Messrs. A M van Huyssteen, H P Venter and J D Coetzee, in their capacities as trustees for the time being of the Witterdrift Trust instituted proceedings by notice of motion against the following respondents:

- (1) The Minister of Environmental Affairs and Tourism of the National- Government as first respondent;
- (2) The Premier of the Western Cape Province, as second respondent;
- (3) The Minister of Agriculture, Planning and Tourism. Western Cape, as third respondent;
- (4) The Interim Council of the West Coast Peninsula (Vredenburg, Saldanha, St Helena Bay and Paternoster), as, fourth respondent;
- (5) The Municipality of Langebaan as fifth respondent;
- (6) Iscor Ltd. as sixth respondent;
- (7) Saldanha Steel (Pty) Ltd (a subsidiary of sixth respondent) as seventh respondent; and
- (8) The National Board as eighth respondent.

Subsequently the Minister of Finance, Nature and Environmental Affairs, Western Cape, was joined as ninth respondent. During the course of the argument I ordered that Mr. Van Huyssteen, in his personal capacity be joined as fourth applicant.

In the original notice of motion first, second and third applicants sought, as a matter of urgency, orders in the following terms:

(a) A rule nisi in terms whereof:

(i) First respondent was to be ordered to make available to the applicants, in terms of s 2.3 of the Constitution of the Republic of South Africa Act 200 of 1993 copies of all documentation in his possession relevant to the proposed steel factory at Vredenburg-Saldanha, including all the correspondence, inter-office and inter departmental memoranda minutes of meetings and discussions, notes, impact studies, reports and disclosures of interest by any person(s) involved in the decision taking process with reference to the proposed development of a steel factory by sixth or seventh respondent at Vredenburg-Saldanha;

(ii) first respondent was to be ordered to appoint a board of enquiry in terms of s 15(I) of the Environmental Conservation Act 73 of 1989 in order to assist him in the evaluation of:

- (A) the proposed development of a steel factory by sixth respondent or seventh respondent at Vredenburg-Saldanha,;
- (B) the probable secondary industrial development resulting therefrom should it proceed;
- (C) the probable development of the Saldanha Bay harbour and/or are quay and in the sur-

rounding bay resulting there from should it proceed; and
(D) the probable impact of the foregoing on the environment and in particular, the Langebaan Lagoon the West Coast National Park and the surrounding environment as also the eco-system which is thereby supported and housed;

(iii) second and third respondents were to be ordered to hold in abeyance the rezoning decision with regard to the land on which it is proposed that the above mentioned development will take place, pending the finalisation of the above mentioned enquiry in terms of s 15(1) of the Environmental Conservation Act 73 of 1989.

(iv) first respondent was to be ordered to pay the costs of the application; and

(v) second and third respondents were to be ordered to pay the costs of the application, jointly and severally with first applicant only should they oppose it.

(b) An interim interdict in terms of (a) (iii) above pending the return day of the rule nisi-sought: and

(c) Further and/or alternative relief on the basis that no relief was to be sought against any party except first, second and third respondents if such party did not oppose the application.

In amplification of the last paragraph it was stated in the notice of motion that the respondents, apart from first, second and third respondents were only joined in so far as it might be necessary because of their interest in the proposed steel development at Vredenburg-Saldanha. but that a costs order would be sought against any of these other respondents should they oppose the application.

Fourth, fifth and eighth respondents do not oppose relief sought and abide the judgment of the Court. Ninth respondent has not given notice of his' intention to oppose the application and he has not participated in any way in the proceedings.

On 7 June 1995 first respondent appointed a board of investigation in terms of s 15(1) of the Environmental Conservation Act 73 of 1989 to consider and report on the environmental consequences of the proposed steel mill development at Saldanha.

On 8 June 1995, in an affidavit filed on his behalf, first respondent offered without admitting that he was obliged to do so, to make available to the applicants the relevant documents, subject to suitable- arrangements.

The applicants no longer seek a rule *nisi* and an interim interdict pending the return day inasmuch as those respondents who oppose the application have had the opportunity to the affidavits in support of their opposition.

In view of the fact that the first respondent has appointed a board of investigation under s 15(1) of Act 73 of 1989 and has made the relevant documentation available to them the applicants no longer seek the relief summarized in para (a)(i) and (ii) above. They persist, however, in asking for an order interdicting second and third respondents from proceeding with the rezoning application until after the board appointed by the first respondent has held its investigation and reported thereon. They contend in this regard that if second and third respondents were in the circumstances of this case to decide the rezoning application before the finalisation of the board's investigation, this would amount to an infringement of their right to procedurally fair administrative action which is entrenched in s 24(b) of the Constitution.

They also ask for an order calling upon first respondent to amend and/or amplify in certain respects the terms of reference of the board of investigation appointed by him.

First respondent opposes the relief sought against him and contends:

(i) That applicants are not entitled to an order in respect of the documents because they do not at this stage to exercise or protect any of their rights:

(ii) That the applicants were not entitled to an order compelling him to appoint a board of investigation because the provisions of s 15 (I) of Act 73 of 1989 are directory and/or empowering and not peremptory and

(iii) that they are accordingly not entitled to an order interdicting them from taking the relevant rezoning decision pending the finalisation of the investigation to be conducted by the board appointed by first respondent. They contend that applicants have no right to have the rezoning decision held in abeyance until the board has conducted its investigation and made its findings and/or recommendations because so it is contented there is no obligation on second or third respondent to take such findings or recommendations into account before making a decision on the rezoning application and in the circumstances of this case, it cannot be said that they will be any procedural unfairness if the rezoning decision is made before the board has completed its work.

They contend further that applicants have no well-grounded apprehension of irreparable harm if the interim relief is not granted and that, in any event, applicants have not shown, on the assumption that the interdict sought is of a temporary nature, that the balance of convenience is in their favour. In this latter regard they contend that applicants have not made out a case that it will be legally impossible for them to enforce, by way of review the rights to which they lay claim.

Sixth and seventh respondents oppose the interdict sought against second and third respondents (it being common cause that the granting of such an interdict would adversely affect sixth and seventh respondents) on the following grounds:

(a) That the order sought amounts to a final interdict which should not be granted because:

(i) Applicants do not have the necessary locus standi;

(ii) They have not shown that they have any right, which is being infringed;

(iii) Even if they have shown such a right, they have not shown any infringement thereof: and

(iv) Even if they have shown all the a foregoing, they have an alternative remedy;

(b) Alternatively, if the interdict sought is in essence a temporary interdict, then the application should fail because:

(i) They have shown no *prima facie* right;

(ii) They have failed to indicate any possibility of irreparable harm;

(iii) They have failed to prove that the balance of fairness is in their favour; and

(iv) even if they have shown all the foregoing, the Court in the exercise of its discretion should

still refuse to grant an interdict in this case.

In the following paragraphs I shall endeavor to set out some of the facts which are common cause because the parties.

Sixth respondent intends erecting a steel mill, which will occupy an area of between 40-80 hectares on portions of the farm Yzervarkensrug at Saldanha. The land in question is near the West Coast National Park and the Langebaan Lagoon. In terms of the Convention on Wetlands of International Importance especially as Waterfowl Habitat (Ramsar 1971), to which South Africa is a contracting party, South Africa has undertaken to protect, *inter alia*, the wetlands of the Langebaan Lagoon which are part of a sensitive eco-system of international importance.

Erf 2121, Langebaan (to which I shall hereinafter refer as 'the trust property') is registered in the name of the trustees for the time being of the Witterdrift Trust of which as I have said the first three applicants are the trustees for the time being, Mr. Van Huyssteeen in his personal capacity is one of the beneficiaries of the trust. The intention of the trustees is eventually to build a holiday home or a permanent home on the trust property, which is situated at Meeuklip, Langebaan, right opposite the lagoon.

Sixth respondent has applied to the Provincial Administration of the Western Cape in terms of the provisions of the Land Use Planning, Ordinance 15 of 1985 (C) for the rezoning of the land so that a steel mill may be erected. A difference of opinion has arisen between experts as to whether the steel mill development is desirable in all the circumstances. Some experts support the proposed development while others are opposed to the proposed development at this stage have expressed the view that not enough investigation has been done for a decision to be taken as to whether the proposed development should be allowed to proceed.

Included in the papers are an evaluation of a CSIR environmental impact study on the proposed steel mill project which was drawn up by the Council for the Environment at the request of first respondent and comments on the CSIR environmental impact study prepared by Dr P A Cook, a senior lecturer in Zoology at the University of Cape Town, who is the chairman of the Mariculture Association of Southern African and an internationally recognized authority on shellfish; Dr G A Robinson, the chief executive of the eighth respondent (who made the comment in his personal capacity); Dr Allan Heydorn, a specialist consultant to the Southern African branch of the World Wide Fund for Nature, the world's leading non governmental conservation body; and Mr. M A Sweijid, a lecturer in the Department of Zoology, who is currently engaged in postgraduate research relating to abalone on the South African coast.

Applicants contend that the best way to resolve (in so far as resolution is possible) the serious difference of opinion which has arisen between the, experts regarding the desirability of sixth and seventh respondents' being allowed to proceed with 'the proposed steel mill project in proximity to the sensitive environment in respect of which South Africa has international obligations under the Ramsar Convention, is by way of an investigation under s 15 of Act 73 of 1989.

They say further that a departmental investigation and consideration of the rezoning application by second and third respondents, assisted by the officials and resources of the Provincial Administration of the Western Cape, will, from the nature of things be superficial and no real substitute for the thorough and extensive investigation in depth which will be able to be carried out by the board of investigation in terms of Act 73 of 1989, which, unlike the provincial' procedures, will involve the subpoenaing of witnesses and documents, the interrogation under oath, in public of witnesses with the opportunity given to interested parties, subject to the control

by the chairman of the board of investigation, to present evidence and rebut opposing opinions which are believed to be erroneous. In this regard it is relevant to point out that the Chairman of the board appointed by first respondent is Dr the Honorable J H Steyn a former Judge of this Court.

In an affidavit filed on behalf of second and third respondents. Mr. Vice Hilary Theunissen, a deputy chief planner in the Department of Housing, Local Government and Planning (Land Affairs) of the Provincial Administration of the Western Cape, explains the procedure being followed by second and third respondents in considering the rezoning application. He states that the views of interested parties and experts even those with reservations regarding the desirability of the project, are from time to time obtained and they are given adequate opportunity to bring their views to the attention of second and third respondents. The expertise of the Cape Nature Conservation, a division of the Provincial Administration, is also being utilized so as to ensure that eventually a well considered decision can be made regarding the rezoning application. He referred to a number of meetings, inspections and discussions which have taken place in order to indicate the thoroughness with which second and third respondent and the Western Cape Provincial Administration have been handling the matter. He admits that the Provincial Administration does not have the same statutory powers but denies that second respondent will not be able to make a lawful and considered decision in terms of Order 15 of 1985 without such powers.

Before the submissions of counsel are considered it is desirable to set out the relevant statutory provisions of the Constitution, the Environment Conservation Act 73 of 1989, the general policy determined in terms of s 2(I) thereof, and the Land Use Planning Ordinance 15 of 1985 (Cape).

Section 7 of the Constitution provides as follows:

'(1) The chapter shall bind all legislative and executive organs of state at all levels of government.

(2) This chapter shall apply to all law in force and all administrative decision taken and the period of operation of this Constitution.

(3) Juristic persons shall be entitled to the rights contained in this chapter where, and to the extent that, the nature of the rights permits.

(4) (a) When an infringement of or a threat to any right entrenched in this chapter is alleged any person referred to in para (b) shall be entitled to apply to a competent court of law for appropriate relief, which may include a declaration of rights.

(b) The relief referred to in Para (a) may be sought by:

(i) A person acting on his or her own interest;

Section 23 of the Constitution provides as follows:

'Every person shall have the right to access to all information held by the State or any of its organs at any level of government in so far as such information is required for the exercise or protection of any of his or her rights',

Section 24 of the Constitution read as follows:

'Every person shall have the right to-

- (a) Lawful administrative action where any of his or her rights to interests is affected or threatened;
- (b) Procedurally fair administrative action where any of his or her rights or legitimate expectations is affected or threatened;
- (c) be furnished with reasons in writing for administrative action which affects any of his or her rights or interests unless the reasons for such action have been made public; and
- (d) Administrative action which is justifiable in relation to the reasons given for it where any of affected or threatened.

Section 35(I) and (3) of the Constitution provides as follows:

(1) In interpreting the provisions of this chapter a court of law shall promote the values which underlie an open and democratic society based on freedom and equality and shall, where applicable, have regard to public: international law applicable to the protection of the rights entrenched in this chapter, and may have regard to comparable foreign case law.

(3) In the interpretation of any law and the application and development of the common law and customary law, a court shall have due regard to the spirit, purport and objects of this chapter.'

Sections 2 and 3 of the Environment Conservation Act 73 of 1989, which make up Part 1 of the Act, read as follows:

2 (1) Subject to the provisions of ss (2) the Minister may by notice in the Gazette determine the general policy, including policy with regard to the implementation and application of a convention, treaty or agreement relating to the environment which has been entered into or ratified, or to be entered into or ratified, by the Government of the Republic, to be applied with a view to :

- (a) the protection of ecological processes, natural systems and natural beauty as well as the preservation of biotic diversity in the natural environment:
- (b) the promotion of sustainable utilization of species and ecosystems and the effective application and re- use of natural resources;
- (c) the protection of the environment against disturbance, deterioration, defacement, poisoning, pollution or destruction as a result of man-made structures, installations, processes or products or human activities; and
- (d) The establishment and maintenance of acceptable human living environment in accordance with the environmental values and environmental needs of communities:
- (e) The promotion of the effective management of cultural resources in order to ensure the protection and responsible use thereof;
- (f) The promotion of environmental education in order to establish an environmentally literate

community with a sustainable way of life;

g) The execution and co-ordination of integrated environmental monitoring programmes.

(1) (a) The Minister may, in determining the policy under ss (I), if in the opinion of the Minister it will further the objectives mentioned in ss (I) (a), (b), (c), (d), (e) (f) and (g), determine norms and standards to be complied with.

(2) The policy contemplated in ss (I) shall be determined by the Minister after consultation with:

(a) Each Minister charged with the administration of any law which in the opinion of the Minister relates to a matter affecting the environment;

(b) The Minister of State Expenditure;

(c) The Administrator of each province; and

(d) The council.

(3) The Minister may at any time, subject to the provisions of ss (2), by like notice substitute, withdraw or amend the policy determined in terms of ss (I).

3(1) Each Minister, Administrator, local authority and government institution upon which any power has been conferred or to which any duty which may have an influence on the environment has been assigned by or under any law, shall exercise such power and perform such duty in accordance with the policy referred to in S.2.

(2) The Director General shall ensure that the policy which has been determined under s 2(I), is complied with by each Minister, Administrator, local authority and government institution referred to in ss (I), and may :

(a) Take any steps or make any inquiries he deems fit in order to determine if the said policy is being complied with by any such Minister, Administrator, local authority or government institution: and

(b) If in pursuance of any step taken or inquiry made under Para (a), he is of opinion that the said policy is not being complied with by any such Minister, Administrator, local authority or government institution, take such steps as he deems fit in order to ensure that the policy is complied with by such Minister, Administrator, local authority or government institution.

In Part II of the Act provision is made for the establishment of a Council for the Environment and a Committee for Environmental Co-ordination and the appointment of boards of investigation in terms of s 15, which reads as follows:

(1) The Minister shall from time to time appoint a board of investigation to assist him in the evaluation of any matter or any appeal in terms of the provisions of this Act;

(2) The board of investigation shall consist of:

(a) (i) a Judge or retired-Judge-of the Supreme Court of South Africa;

- (ii) a magistrate or retired magistrate;
 - (iii) any person admitted in terms of the Admission of Advocates Act 74 of 1964 to practice as an advocate: or;
 - (iv) any person admitted in terms of the Attorney's Act 53 of 1979 to practice as an attorney, who in the opinion of the Minister has a knowledge of matters relating to the environment, and is designated by him as chairman; and
- (b) Such number of other persons as the Minister deems necessary and in his opinion have expert knowledge of the matter which the board of investigation has to consider.
- (3) A session of the board of investigation shall take place on the date and at the time and place fixed by the chairman, who shall advise the Minister and the relevant parties in writing thereof.
- (4) The board of investigation may for the purposes of the investigation-
- (a) instruct any person who in its opinion may give material information concerning the subject of the investigation or who it believes has in his possession or custody or under his control any book, document or thing which has any bearing upon the subject of the investigation, to appear before such board;
 - (b) Administer an oath to or accept an affirmation from any person called as a witness at the investigation; and
 - (c) Call any person present at the investigation as a witness and interrogate him and require him to produce any book, document or thing in his possession or custody or under his control.
- (5) An instruction referred to in ss (4)(a) to appear before the board of investigation shall be by way of subpoena signed by the chairman of the board.
- (6) (A) A session of the board of investigation shall be held in public.
- (b) The decision of the board and the reason therefore shall be reduced to writing.
- (7) A member of the board of investigation who is not in the full-time employment of the State may be paid from money appropriated by Parliament for that purpose such remuneration and allowances as the Minister may, with the concurrence of the Minister of State Expenditure, determine either in general or in any particular case. .
- (8) The Director-General shall designate, subject to the provisions of the Public Service Act III of 1984, as many officers and employees of the Department as may be necessary to assist the board in the administrative work connected with the performance of the functions of the board of investigation, provided that with the approval of the Minister such administrative work may be performed by any person other than such officer or employee at the remuneration and allowances which the Minister with the concurrence of the Minister of State Expenditure may determine."

Part V of the Act, as its name indicates, deals with the control of activities which may have a detrimental effect on the environment Sections 21 and 22, which are contained in this Part of the Act, deal with the identification of activities which will probably have a detrimental effect on the environment and the prohibition of the undertaking of identified activities. They read as follows:

21 (I) The Minister may by notice in the *Gazette* identify those activities which in his opinion may have a substantial detrimental effect on the environment, whether in general or in respect of certain areas.

(2) Activities which are identified in terms of ss (1) may include any activity in any of the following categories, but are not limited thereto: land use and transformation;

- (a) Land use and transformation;
- (b) Water use and disposal;
- (c) Resource removal including natural living resources;
- (d) Resource renewal;
- (e) Agricultural processes;
- (f) Industrial processes;
- (g) Transportation;
- (h) Energy generation and distribution;
- (i) Waste and sewage disposal;
- (j) Chemical treatment;
- (k) Recreation

(3) The Minister identifies an activity in terms of ss (I) after consultation with;

- (a) The Minister of each department of State responsible for the execution approval or control of such activity;
- (b) The Minister of State Expenditure; and
- (c) The Administrator of the province concerned.

22(I) No person shall undertake an activity identified in terms of s 21 (I) or cause such an activity to be undertaken except by virtue of a written authorization issued by the Minister or by an Administrator or a local authority or an officer, which Administrator, authority or officer shall be designated by the Minister by notice in the *Gazette*.

(2) The authorization referred to in ss (1) shall only be issued after consideration of reports concerning the impact of the proposed activity and of alternative proposed activities on the environment, which shall be compiled and submitted by such persons and in such a manner as may be prescribed.

(3) The Minister or the Administrator, or a local authority or officer referred to in ss (I), may at his or its discretion refuse or grant the authorization for the proposed activity or an alternative proposed activity on such conditions, if any, as he or it may deem necessary.

(4) If a condition imposed in terms of ss (3) is not being complied with, the Minister, any Administrator or any local authority or officer may withdraw the authorization in respect of which such condition was imposed, after at least 30 days' written notice was given to the person concerned:

Part VII of the Act contains certain general provisions among, which are s 31A (which was inserted by S. 19 of Act 79 of 1992) which deals with the powers of the Minister and Administrator (now a provincial premier), local authorities and government institutions where the environment is damaged, endangered or detrimentally affected and s 34 which deals with compensation for loss. They read as follows:

31 A (I) If, in the opinion, of the Minister or the Administrator, local authority or government institution concerned, any person performs any activity or fails to perform any activity as a result of which the environment is or may be seriously damaged, endangered or detrimentally affected, the Minister, Administrator, local authority or government institution, as the case may be, may in writing direct such person -

(a) To cease such activity; or

(b) To take such steps as the Minister, Administrator, local authority or government institution, as the case maybe, may deem fit, within a period specified in the direction, with a view to eliminating, reducing or preventing the damage, danger or detrimental effect.

(2) The Minister or the Administrator, local authority or government institution concerned may direct the person referred to in ss (1) to perform any activity or function at the expense of such person with a view to rehabilitating any damage caused to the environment as a result of the activity or failure referred to in ss (1), to the satisfaction of the Minister, Administrator, local authority or government institution, as the case may be.

(3) If the person referred to in ss (2) fails to perform the activity or function, the Minister, Administrator, local authority or government institution, depending on who or which issued the direction, may perform such activity or function as if he or it were that person and may authorize any person to take all steps required for that purpose.

(4) Any expenditure incurred by the Minister, an Administrator, a local authority or a government institution in the performance of any function by virtue of the provisions of ss (3), may be recovered from the person concerned.¹

'34 (I) If in terms of the provisions of this Act limitations are placed on the purposes for which land may be used or on activities which may be undertaken on the land, the owner of, and holder of a real right in, such land shall have a right to recover compensation from the Minister or Administrator concerned in respect of actual loss suffered by him consequent upon the application of such limitations.

(2) The amount so recoverable shall be determined by agreement entered into between such owner and holder of the real right and the Minister or Administrator, as the case may be, with the concurrence of the Minister of State Expenditure.

(3) In the absence of such agreement the amount so to be paid shall be determined by a court referred to in s 14 of the Expropriation Ad 63 of 1975 and the provisions of that section and s 15 of that Act shall *mutatis mutandis* apply in determining such amount.

Included in this part of the Act is S.40, which provides for the State including a provincial administration, to be bound by the provisions of the Act.

Acting in terms of s 2(I) of the Act, the then Minister of Environmental Affairs, Mr. A van Wyk issued a notice (No 5 I of 1994, which was published in *Government Gazette* 15428 of 21 January 1994) containing the general policy determined by him thereunder.

The preamble contains the following:

The environmental policy is based on the following premises and principles:

- Every inhabitant of the Republic of South Africa has the right to live, work, and relax in a safe, productive, healthy and aesthetically and culturally acceptable environment and therefore also has a personal responsibility to respect the same right of his fellow man.
- Every generation has an obligation to act as a trustee of its natural environment and cultural heritage in the interest of succeeding generations. In this respect, sobriety, moderation and discipline are necessary to restrict the demand for fulfillment of needs to sustainable levels.
- The State, every person and every legal entity has a responsibility to consider all activity that may have an influence on the environment duly and to take all reasonable steps to promote the protection, maintenance and improvement of both the natural environment and the human living environment.
- The maintenance of natural systems and ecological processes and the protection of all species, diverse habitats and land forms is essential for the survival of all life on earth.
- Renewable resources are part of complex and interlinked ecosystems and must through proper planning and judicious management be maintained for sustainability. Non-renewable natural resources are limited and their utilization must be extended through judicious use and maximum reuse of materials with the object of combating further over-exploitation of these resources.
- The concept of sustainable development is accepted as the guiding principle for environmental management. Development and educational programmes are necessary to promote economic growth, social welfare and environmental awareness, to improve standards of living and to curtail the growth in the human population. Such programmes must be formulated and applied with due regard for environmental considerations.
- A partnership must be established between the State and the community as a whole, the private sector, developers, commerce and industry, agriculture, local community organizations, non-governmental organizations (representing other relevant players) and the" international community so as to pursue environmental goals collectively:

The section on environmental management systems contains the following paragraph:

“Each Minister, Administrator, local authority and government institution upon which any power has been conferred or to which my duty which may have an influence on the environment has been assigned by or under any Act shall exercise such power and

perform such duty with new to promoting the objectives stated 1 as 2 of the Environment Conservation Act 73 of 1989.”

The section on land use and nature conservation reads as follows:

Judicious use of land is an important foundation of environmental management. All government institutions and also private owners and developers must therefore plan all physical activities for example forestry, mining, road building, water storage and supply, agriculture, industrial activities and urban development in such a way as to minimize the harmful impact on the environment and on man and, where necessary, to facilitate rehabilitation. A balance must be maintained between environmental conservation and essential development. Before embarking on any large-scale or high-impact development project a planned analysis must be undertaken in which all interested and affected parties must be involved. In order to attain the sustainable utilization of resources, the principles of integrated environmental management are accepted as one of the management mechanisms.

Particular efforts must be made to conserve valuable high potential agricultural land for agricultural purposes to protect water resources and sites and objects of significant cultural interest: to combat deforestation of indigenous forests, soil erosion, desertification: and to prevent the destruction of wetlands and other environmentally sensitive areas. Among the main attractions South Africa has to offer as a tourist destination are its aesthetic qualities and the scenic beauty of the environment, assets that must also be considered. Scientific conservation principles must be applied in all land-use planning.

Nature Conservation

National nature conservation plan, including the compilation of a complete inventory of and a classification system for protected areas will be developed by the Department of Environmental Affairs to ensure the maintenance of South Africa's biodiversity. The interests and wishes of the local populations must be considered in the establishment of each new protected area. Effective management and control should be established to make possible the sustainable use of economically viable natural resources, for example game, marine resources, Veld and natural forests.

The maintenance of the ecological integrity and natural attractiveness of protected areas must be pursued as a primary objective.

All responsible government institutions must apply appropriate measures based on sound scientific knowledge, to ensure the protection of designated ecologically sensitive and unique area for example wilderness areas fynbos, grasslands, wetlands, islands, mountain catchment area, indigenous forests, deserts, Antarctica and the coastal zone.

Section 16(I) of the land Use Planning Ordinance 15 of 1985, which is to be found in Part II of the ordinance, provides that either the Administrator (now the Premier) or, if authorized thereto by the provisions of a structure plan a council may grant or refuse an application by an owner of land for the rezoning thereof.. (It is common cause in the present matter that sixth respondent's application does not fall to be decided by the relevant council).

Section 36 of the Ordinance provides as follows:

“36(1) Any application under chap II or III shall be refused solely on the basis of a lack of desirability of the contemplated utilization of land concerned including the guideline

proposals included in a relevant structure plan in so far as it relates to desirability, or on the basis of its effect on existing rights concerned (except any alleged right to protection against trade competition).”

It is clear, in my view, that the contentions of the parties in this case raise the following questions for decision:

1. Have the applicants the right to an order compelling first respondent to appoint a board of investigation?

2. Have they the right to ask for an order compelling him to amend and/or amplify the terms of reference of the board appointed by him?

3. Have they the right to have documentation in the possession of the first respondent relating to the proposed steel mill development made available to them?

4. Have the applicant's *locus standi* to claim an order requiring second and third respondents to refrain from deciding the rezoning application before the board appointed in terms of s 15 (I) has finalized its investigation?

5. Have the applicants shown that they have a right, which is going to be infringed?

6. If they have shown that they have such a right, have they shown an actual or threatened infringement?

7. Have the applicants an alternative remedy?

8. Have the applicants shown that they will suffer irreparable harm unless the interdict sought is granted?

9. Have the applicants shown that the balance of fairness is in their favour?

10. Should the Court in the exercise of its discretion grant the interdict sought?

(I) have the applicants the right to compel Jim respondent to appoint a board of investigation?

In support of his submission that the applicants have such a right Mr. *De Villien QC*. Who with Mr. *Potgieter* appeared on behalf of the applicants, relied very strongly.

On the use of the word 'shall' in the English (signed) text of s 15(I) of Act 73 of 1989. (The Afrikaans text merely uses the present tense ('Die Minister stel van tyd tot tyd 'n ondersoekaan.').)

It is however clear as Mr. *Van Schalkwyk SC*, who appeared with Mr. *Hiemstra* on behalf of the first second and third respondents, submitted that the use of the expression 'shall' does not necessarily indicate a legislative intention to impose an obligation: in some cases a provision containing the word 'shall' may be merely directory or empowering. Most of the cases in which the word 'shall' has been construed concerned the question as to whether the failure to do something which the statute in question has said 'shall' be done, visits the transaction concerned with nullity: see *Suter vs Scheepers* 1932 AD 165 and the many cases in which it has been referred to. This is not such a case: here the question to be answered is whether the use of the word indicates an obligation to act as opposed to an empowerment. As Starke J said in the Australian case of *Re Davis* (1974) 75 CLR 409 at 418-19:

The word "shall" does not always impose an absolute and imperative duty to do or omit the act prescribed. The word is facultative: it confers a faculty or power. The word "shall" cannot be construed without reference to its context.

From the context it is clear, in my view, that the Minister is not obliged to appoint a board. The purpose for which a board is appointed is to assist the Minister in evaluating a matter. As Mr. *Van Schaikwyk* contended there is no express provision that the Minister is obliged to follow the advice given, nor is he precluded from making a decision in cases where he has not appointed a board. That this is so is borne out by the use of the expression 'from time to time', which is a clear indication that the appointment of a board is not a prerequisite for the consideration of every matter or appeal. This is clear indication in my view that the provision in question is permissive but not obligatory.

From the fact that the first respondent in my view, is empowered, but not obliged by s. 15(l) of Act 73 of 1989 to appoint a board it must follow as Mr. *Van Schaikwyk* contended, that no-one can compel him to appoint a board.

Consequently the first question arising for decision in this case must be decided against the applicants.

- (2) *Have the applicants the right to an order compelling first respondent to amplify and/or amend to board's terms of reference?*

I think that it must follow, as Mr. *Van Schaikwyk* submitted, that if applicants cannot compel the appointment of

A board they have no right to demand the amplification or amendment of its terms of reference. The Minister is empowered to appoint a board to advise him on matters on which he desires assistance. Applicants have no right to tell him that he should be assisted on some other matter, which he has not set out in the board's terms of reference.

- (3) *Have the applicants the right to have the documentation in the possession of first respondent relating to the steel mill project made available to them?*

Section 23 of the Constitution was considered by the Full Bench of this Court in *Nortje alid Another v Attorney General Cape and Another* 1995 (2) SA 460 (C) (1995 (I) SACR 446) in relation to a claim by accused persons to the statements contained in the police docket relating to their case. At 474F-47SA (4JJJe-j (SACR» Marais J (as he then was). with whom Fagan DIP and Scott J concurred. said:

The right of access to the information of which S.23 is plainly not absolute and unqualified. Apart from potential limitations of the right which might be permissible in terms of s 33(1), 23 contains its own qualification in that the information requested must be required for the exercise or protection of any of the rights of the person concerned. In resisting the applicants' contentions Mr. Slabbert on behalf of the State, submitted that "required" is to be understood as "needs" rather than "desires" and that, in this sense it cannot be said that an accused person requires the witnesses' statements in the police docket. In order to exercise or protect his rights. Such a narrow construction of the word "required" does not seem to me to be justified. I think that the word must be understood as meaning "reasonably required" and I have little doubt that the statements in the police docket of witnesses to be called would ordinarily be reasonably required by an accused person in order to prepare for trial in a criminal prosecution. That it is his or her

right to defend himself or herself is, of course, beyond question. There may be other material in the police docket, which is not reasonably required. The reasonableness of the request must be judged. I think by taking the respective positions of both the accused and the State into account. It cannot be right to view the question solely through the accused's spectacles. One thinks for instance of correspondence between the prosecutor or Attorney General and the investigating officer or communication between the investigation officer and his superior regarding the progress of the investigation or possible leads that could be followed. In the present case however it is only the witnesses' statements that are in issue.'

In the present case no question of a possible limitation in terms of S. 33(I) of the Constitution need be considered because Mr. *Van Schalkwyk* did not suggest that, if the documentation sought by the applicants under s 23 was required by them for the exercise or protection of any of their rights first respondent could refuse to make it available because of any limitation on applicants' right under s 23 of the Constitution arising under s 33 (I) thereof.

In the present case the first second and third applicants. as owners of the trust property, and fourth applicant as a beneficiary under the trust did in my view reasonably require the documentation referred to in the relevant paragraph in the notice of motion for the purpose of protecting their rights to the trust property which was potentially threatened by the proposed steel mill if it was undesirable (so that the rezoning stood to be refused under s 36 of the ordinance) in order to exercise their rights to object to the rezoning, which they had because of their interest therein flowing from the trust property which. it will be remembered, was right opposite the Langebaan lagoon the area which, in view of some at least of the experts who have expressed views on the topic, may well be detrimentally affected by the proposed development. Applicants were also able to protect their right by persuading first respondent to exercise his powers under Act 73 of 1989. It is to be noted that s 23 of the Constitution does not limit in any way the rights for the exercise or protection of which an applicant is entitled to seek access to officially held information, nor is there any limitation or restriction in respect of the manner or form in which such exercise or protection will take place.

I am satisfied therefore that the applicants have made out a case under s 23 of the Constitution in respect of documentation in first respondent's possession relating to the steel mill project. Whether all the documentation sought having been made available without prejudice by first respondent, the only question to be considered at this stage is whether the applicants are entitled to costs.

The application against second and third respondents.

I turn now to consider the applicants' prayer for an order interdicting second and third respondents from making a decision on the rezoning application before the finalisation of the board's investigation. .

(4) *Locus standi*

Here, as appears from the summary I gave of the questions to be considered in this case, the first question to which I must try to find the answer is whether the applicants have *locus standi* to ask for the interdict sought against second and third respondents.

Sixth and seventh respondents take whose counsel the objection of a lack of locus standi, which was not taken by second and third respondents, whose counsel. Mr. *Helberg*, contended relying

on *Jacobs en 'n Ander vs Wak.r en Andere* 1992 (I) SA 521 (A) at 533J-534E that applicants had to show that they had a direct interest in the relief sought and that they had not done so. He contended further relying again on the *Jacobs* case (at 540H), that a person asking for relief cannot lay claim to *locus standi* if his interest in the case is no more and no less than the interest which all citizens have therein.

In developing this submission he referred to the fact that although the papers reveal that the trust property is situated at Meeuklip Langebaan right opposite the lagoon there is no indication as to how far it is from the proposed development.

He referred further to the fact that the applicants referred to the structure plan for the Vredenburg-Saldanha area which had been approved in terms of s 4 of the ordinance and which provided that the area in question i.e. the area where the proposed steel mill was to be built was to be allocated for heavy industry. He pointed to the fact that there was no evidence before the Court that the trust property was in the area for which the structure plan was approved and said that *prima facie* it did not fall in that area: clearly, so he contended, the areas of Vredenburg-Saldanha on the one hand and Langebaan on the other are not in the same municipal area.

He referred further to the fact that first applicant said in his affidavit that "*die beleweis en genot voortspruit uit die eieoarskap vao bierdie eieadom (i.e. the trust property) boa direk verbaad met die beleweois eo genot voortspruitead Bit die strandmeer die aatuur eo die omgewiq aldaar. Die waarde. Van hierdie eieodom hog na my meaiq ook daarmee verband*" and referred to the fact that the applicants do not allege that the value of the property as a result of the development will be prejudicially affected or reduced. In the light of these considerations he submitted the applicants have not succeeded in showing that they have the necessary *locus standi* to bring the application.

Mr. *De Villiers* submitted that Mr. *Helberg's* arguments regarding *locus standi* were refuted by the provisions of s 7(4)(b) of the Constitution which evinced a clear intention to put an end to the previous restrictive approach to *locus standi* adopted by the courts. He submitted further that apart from the fact that Mr. Van Huyssteen in his personal capacity is before the Court as fourth applicant, a purposive approach to interpreting s 7(4)(b) would lead to the conclusion that trustees suing on behalf of the trust would clearly be regarded as falling within the meaning of s 7(4)(b). I agree that the 'own interest' referred to in s 7(4) (b)(i) is wide enough to cover an interest as trustee. As Professor J R L Milton. Professor M G.

Cowling, Dr P G van der Leeuw, Mr. M Francis, Mr. P G Schwikkard and Professor J R Lund point out in the chapter on 'Procedural rights' in Van Wyk *et al* (eds) *Rights and Constitutionalism - The New South African Order* at 421. The Constitution had adopted and entrenched a very liberalised notion of legal standing. This 'more generous approach to legal standing' *op cit* at 422) is applicable as s 7 (4) makes clear in all cases where an infringement of or a threat to any right entrenched in chap 3 of the Constitution is alleged. Applicants rely on a threatened infringement of s 24 (b) of the Constitution which gives them an entrenched right to procedurally fair administrative action where any of their rights or legitimate expectations are affected or threatened. First second and third applicants' rights as trustees in respect of the trust property in my view will be affected or threatened if second and third respondents decide the rezoning application in favour of sixth and seventh respondents before the finalisation of the board's investigation and if such action on their part amounts to procedurally unfair administrative action (a question which I shall consider later in this judgment). I say that their rights in respect of the trust property, which is right opposite the lagoon, must of necessity be diminished by industrial activity which pollutes or otherwise detrimentally affects the natural beauty and

enjoyment associated with being near to the lagoon. One of the purposes for which the trust property may well be used is for the erection of a holiday home and it clearly has value as the potential site of a holiday home. A court can take judicial notice of the fact that the sites for holiday homes will be more valuable if they are in close proximity of beautiful unspoilt natural areas and that they will be much less valuable if such areas are polluted or otherwise detrimentally affected. Whether or not the trust property is in the area earmarked in the Vredenburg Saldanha structure plan for heavy industry takes the matter no further as it is clear from s 5(3) of the ordinance that a structure plan does not confer or take away any right in respect of land' nor does it matter that the papers do not indicate how far the trust property is from the proposed steel mill development. What they indicate is that if the views of those experts who are opposed to the development are right the lagoon will be affected: as I have said if the lagoon is adversely affected it is clear that the trust property, which is right opposite it, will also be adversely affected.

It is also clear that Mr. Van Huyssteen in his person capacity, as fourth applicant, will be affected in his interests as a beneficiary entitled to use and occupy the trust property and the benefits associated with such use and occupation which clearly include those flowing from its proximity to the lagoon.

I am accordingly satisfied that the applicants have *locus standi* to ask for the order sought by them against second and third respondents.

(5) Applicants' right:

The next question to be considered is whether the applicants have the right in the circumstances of this case to the interdict sought.

I have already said that the applicants have the right to procedurally fair administrative action in this case. The question to be considered is whether it would be procedurally unfair for them if second and third respondents were to decide the rezoning application before the board has finalised its investigation. It is accordingly necessary to consider what would amount to procedural fairness or unfairness in the circumstances of this case.

Mr. Van Schalkwyk contended that the applicants have no rights to the order sought by them on this part of the case because there is no provision in the ordinance which requires that the findings and/or recommendations of a board of investigation appointed in terms of S. 15(1) of Act 73 of 1989 (where one has been appointed) must be taken into account before a rezoning decision is made. He also formulated his submission in this regard as follows:

'There is nothing which especially requires the functionary charged with a rezoning decision to take into account the findings and/or recommendation of a board of investigation which has been appointed under other legislation for other purposes.

It may be that when the ordinance was passed there was nothing, which compelled' a functionary charged with making a rezoning decision to take into account findings or recommendations made by boards appointed under other legislation. But since the ordinance was passed in 1985 two important things have happened which will impinge directly on rezoning applications the first was the enactment and coming into operation of the Act 73 of 1989 and the publication of the general policy determined in terms of S. 2 thereof and the second was the enactment and coming into operation of the new Constitution. The direct link between a rezoning application under the ordinance and Act 73 of 1989 is to be found in S. 3 of Act 73 of 1989, which has been quoted above and which clearly obliges second and third respondents to exercise the powers conferred by

the ordinance (which undoubtedly may have an influence on the environment) in accordance with the policy, determined under S. 2 of the Act. That policy (the material provision.. of which have been quoted above) requires:

“All responsible government institutions (which phrase clearly includes second and third respondents) to apply appropriate measures based on sound scientific knowledge to ensure the protection of designated ecologically sensitive and unique areas for example wetlands...”

The wetlands in question have been designated for protection under an international convention to which South Africa is a party.

That there is a direct link between s 24(b) of the Constitution and the duties of a functionary deciding a rezoning application under the ordinance is indisputable, because s 24(b) of the Constitution applies to all administrative action whereby any person's rights or legitimate expectations are affected or threatened, A decision to rezone the property on which sixth and seventh respondents propose to erect a steel mill to allow the erection and operation thereof will undoubtedly affect applicants' right to the trust property if the effect of the operation of the proposed steel mill will be to pollute or otherwise detrimentally affect the lagoon for the reasons I have already given.

It must follow that the applicants have the right to procedural fairness in respect of the rezoning decision,

Mr. Helberg contended that S. 24(b) merely codifies the common law relating to natural justice and that as it is not suggested that second and third respondents will deny the applicants a hearing (and thus fail to comply with the *audi alteram panem* rule) or be biased (and thus fail to comply with the *nemo iudex in sua causa* rule), there can be no breach of natural justice and thus no procedural unfairness in refusing to wait until after the board has completed its investigation.

I cannot agree with this submission.

Apart from the fact that I do not agree that the rules of natural justice in our law are limited to the *audi alteram panem* and the *nemo iudex in sua causa* rules, I do not think that one can regard s 24(b) as codifying the existing law and thus read down, as it were, the wide language of the paragraph unless the existing law was already so wide and flexible that it was covered by the concept of procedural fairness.

It is not entirely clear in England whether natural justice is but a manifestation of a broader concept of fairness or whether 'natural justice' applies to 'judicial decisions' and 'a duty to act fairly' exists in administrative or executive determinations see Craig *Administrative Law* 2nd edn 207, Whichever is the correct formulation everyone appears to accept the correctness of Tucker U's dictum in *Russell v Duke of Norfolk and Others*[1949J I All ER 109 (CA) at 118D-E, which is in the following terms:

'There are, in my view, no words, which are of universal application to every kind of inquiry and every kind of domestic tribunal. The requirements of natural justice must depend on the circumstances of the case, the nature of the inquiry, the roles under which the tribunal is acting, the subject-matter that is being dealt with, and so forth.

(This *dictum* has been quoted with approval from time to time in South African decisions: see for example *Tunter vs Jockey Club of South Africa 19J.J (J) SA 6JJ (AJ at 6-16E.)*

One of the statements cited by *Craig (lac cit)* for the view that natural justice is a manifestation of the broader concept of fairness is the well-known *dictum* of Lord Morris of Borth-y-Gest in ***Wiseman v Borneman* [1971] AC 297 (HL) ([1969] J All ER 275) at JO8H-JO9B (AC) and 278C-£ (All ER) which reads as follows:**

“My Lords, that the competition on natural justice should at all stages guide those who discharge judicial functions is not merely an acceptable but is an essential part of the philosophy of the law. We often speak of the roles of natural justice. But there is nothing rigid or mechanical about them. What they comprehend has been analyzed and described in many authorities. But any analysis must bring into relief rather their spirit and their inspiration than any precision to definition or precision as to application. . We do not search for prescriptions, which will lay down exactly what must in various divergent situations be done. The principles and procedures are to be applied which, in any particular situation or set of circumstances, are right and just and fair natural justice, it has been said, it only "fail" play in action". Nor do we wait for directions from Parliament. The common law has abundant riches; there may we find what Byles J called "the justice of the common law" (*Cooper v Wandsworth Board of Works* (1986) 16 CBNS ISO at 194).”

Whatever the position may be in English law and whatever the best formulation of the English rules on the topic may be, I am of the view that in our law the so-called *audi alteram partem* and *nemo iudex in sua causa* rules are but part of what the Appellate Division described as the 'fundamental principles of fairness' in the leading case of ***Marlin v Durban Turf Club and Others* 1942 AD 112 at 126** where Tindall JA said:

"The expression in question (natural justice), when applied to the procedure of tribunals such as those justice mentioned, seems to me merely a compendious (but somewhat obscure) way of saying that such tribunals must observe certain fundamental principles of fairness which underlie our system of law as well as the English law. Some of these principles were stated, in relation to tribunal created by statute by Innes CJ in *Dabnn. South African Railways* 1920 AD S83 in these terms: "Certain elementary principles speaking generally, they must observe; they must hear the parties concerned; those parties must have due and proper opportunity of producing their evidence and stating their contentions and the statutory duties must be honestly and impartially discharged." It will be noted that the learned Chief Justice avoided using the term "natural justice". And in *Barlin v Licensing Court for the Cape* 1924 AD 472 the phrase used is: "have the fundamental principles of justice been violated?"

It follows from what I have said that even if s 24(b) is to be regarded as merely codifying the previous law on the point, a party entitled to procedural fairness under the paragraph is entitled, in appropriate case, to more than just the application of the *audi alteram partem* and the *nemo iudex in sua causa* rules. What he is entitled to is in my view what Lord Morris of Borth-y-Gest described as 'the principle and procedures ... which in (the) particular situation or set of circumstances are right and just and fair’.

If I am wrong in saying that the test formulated by Lord Morris of Borth-y-Gest is in accordance with our previous law, and then I am satisfied that it is the correct test under s 24(b). I say this because I do not think that the expression 'procedurally fair administrative action' is a term of art which when used in a statute particularly in the Constitution leads to what I have called a reading down of the statutory language. Section 35(1) and (3) of the Constitution enjoin a court

interpreting Chap:3 of the Constitution to promote the values which underlie an open and democratic society based on freedom and equity' and in Interpreting any law and in the application and development of the common. Law to 'have due regard to the spirit, purport and objects of (the) chapter.

The correct interpretation of the meaning of 'the right to procedurally fair administrative action entrenched in s 24(b) of the Constitution must be generous one 'avoiding what has been called the austerity of tabulated legalism", suitable to give to individuals the full measure of the fundamental rights referred to, to adopt the language of Lord Wilberforce in *Minister of Home Affairs and Another v Collins MacDonald Fisher and Another* [(1980] AC 319 (PC) at 328-9 « 1979) 3 AU ER 21 at 25h) an approach which has been approved by the Constitutional Court in *S v Zuma and others* 1995 (2) SA 642 (CC) at 651 A-D (199' (I) SACR 568 at 578c g) and *S v Makwanyan and Another* (case CC1'13194 delivered on 6 June 1995 (per Chaskalson P at para [10] of the unreported judgement)- see also *R v Big M Dru, Mart Ltd* (1985) 18 DLR (4th) 321 at 395-6 (also approved in *S v Zuma* (*supra* at 651E-H (SA) and 57Rb 'The interpretation should be a generous rather than a legalistic one, aimed at fulfilling the purpose of a guarantee and securing for individuals the full benefit of the Charter's protection.'

In my view the interpretation contended for by Mr. *Helberg* is legalistic and it does not secure for individuals the full measure of the fundamental right entrenched in s 24(b).

(6) *Infringement or threatened infringement of applicants' rights:*

The next aspect to be considered is whether it would be unfair for second and third respondents not to wait the finalisation of the investigation by the board appointed by first respondent before making a decision on the rezoning application. Mr. *Van SchaJlcwyk* submitted that this Court could only make a finding on the point if it were clear that the investigation and consideration of the, rezoning application by the, Provincial Administration would be inadequate and in some. Way inferior to the investigation by the board. He- referred to what is said in Mr. Theunissen's affidavit regarding the procedure being followed by the Provincial Administration in this regard and submitted that then: was nothing to show that this procedure would not be as good if not better, than the investigation by the board.

I do not agree. It is clear that there is a vast difference of opinion between the various experts: who have commented upon the desirability, from an environmental view of allowing the development to proceed. When: such differences exist and where they appear as here to be irreconcilable. Then experience shows that there is no better way of getting at the truth than through a hearing where the witnesses who hold and espouse opposing views can testify under oath and in public and where they are subject to interrogation. While *Wigmore's* statements (*Wigmore Evidence*. Vol. 5 at 1361 (Chadbourn rev. 1974) that cross-examination is the greatest legal engine ever invented for the discovery of the truth and Lord Macmillan's assertion (quoted by Richard du Cann QC in *The Art of the Advocate* (1985 cd) at 95-6) that 'properly used cross-examination in lit English court constituted the finest method of eliciting and establishing truth yet devised may contain elements of exaggeration. it is generally recognised that a skilful interrogation: Can expose the inadequacies and fallacies in erroneous evidence in a manner which can seldom if ever be replicated by any other method for establishing the truth. Furthermore the fact that the board will bold its bearings in public is another factor calculated to improve the quality of the testimony given because as in the case of judicial proceedings, publicity makes for trustworthiness and completeness of testimony: see, for example. *Wigmore Evidence* vol. 6 at 1834 (Chadbourn rev. 1976), cited with approval by Ackermann J in *S v Leepile and Others (I)* 1986 (2) SA 333 (W) at 338B-339J.

In addition to the very considerable advantages of testimony on oath and interrogation and publicity must be added the advantages of being able to subpoena any person who in its opinion may give material information and/or who may produce any book, document or thing which may have a bearing on the subject of the investigation to give evidence and be interrogated and/or to produce the book, document or thing.

None of these advantages is available in the Provincial Administration consideration of the application. The advantages enjoyed by the board render its investigation markedly superior to what may be called administrative investigation and make the expressed attitude of second and third respondents that they wish to be able to decide this application, beset as it is with basic and seemingly irreconcilable differences of opinion between the experts, difficult to understand. Willfully to ignore the advantages, which must flow from what, will in my judgment, inevitably be a better investigation far more likely to arrive at an answer based, as the general environmental policy determined in terms of s 2(I) of Act 73 of 1989 requires, on 'sound scientific knowledge' is to adopt a procedure which is unfair to all those persons who may be affected by the decision made.

I wish to emphasize what it is that I am saying in this case and what it is that I am not saying. I am not saying that in every opposed rezoning application a public hearing must be held where the protagonists of the various views and other persons able to give material information can be interrogated and where the production of documents and other things with a bearing on the matter can be compelled. What I am saying is that, in the special circumstances of this case, where such an enquiry is going to be held and the whole matter thoroughly gone into by a board which will enjoy substantial advantages over those engaged on a departmental investigation then there will be procedural unfairness if the departmental investigation is not held in abeyance until the board has finalised its investigation.

There is a further advantage, which will flow from following such a course. If the rezoning application is granted before the board's investigation is finalised and the board thereafter comes to the conclusion that the development should not be allowed to proceed and recommends accordingly, then, even if first respondent accepts the board's recommendation and identifies the operation of sixth and seventh respondent's steel mill in terms of s 21(1) of Act 73 of 1989; as an activity which in his opinion may have a substantial detrimental effect on the environment and refuses to authorise sixth and seventh respondents to operate the mill, unless in itself it constitutes a hazard to the environment, will not be able to be removed. Sixth and seventh respondents will also, in these circumstances, be entitled to compensation in terms of s 34(I) of the Act for the actual loss suffered by them in consequence of the limitation placed by first respondent on the purposes for which the steel mill site may be used. At the moment the site may not be used for the operation of a steel mill. If the rezoning application is granted, sixth and seventh respondents will acquire the right so to use it and a right to compensation if first respondent subsequently takes the right so as to use the land away or imposes restrictions, which cause sixth and seventh respondents loss. As a result a right to compensation may arise, payable out of public revenue, for a loss which in its turn can only be suffered if second and third respondents proceed to consider the rezoning application before the board has finalised its investigation, The aspect to which I have just referred is a further factor relevant in deciding whether what second and third respondents want to do will be procedurally unfair, because respondent may well be deterred from acting under s 21 of the Act and refuse it permit under s 22 thereof if, as a result of the actions of second and third respondents. Sixth and seventh respondents would have a claim to what might well amount to massive compensation.

The fact to which I have just referred (the possibility of sixth and seventh respondents acquiring a

claim, or an enhanced claim, to compensation after rezoning and followed by s 2 I identification) is relevant also in regard to the question as to whether I should exercise my discretion (if I have one) in favour of the applicants and I shall return to it when I consider that question.

I am accordingly satisfied that applicants have shown that an infringement of their right to procedurally fair administrative action is threatened.

Other requirements for an interdict

I now proceed to consider whether the applicants have established the other requirements for an interdict: that they will suffer irreparable harm and have no alternative remedy unless the order sought is granted that the Court should exercise its discretion in their favour and, on the assumption that the relief they seek is of an interim nature and that they have established their right *prima facie* that the balance of convenience is in their favour. I shall assume, without deciding that an applicant for an order prohibiting an infringement of one of his constitutional rights has to show the other essentials for an interdict, although it is not self-evident that this is so. (It may be that factors of the kind I am now to consider would in any event have to be considered, to some extent at least, in deciding the question of unfairness).

7. No irreparable harm and no alternative remedy;

Mr. *Van Schalkwyk* contended that the applicants are not entitled to the order they seek because they have not shown that they will suffer irreparable harm and that they have no alternative remedy.

He contends in this regard that if the rezoning decision is given in favour of sixth and seventh respondents and the applicants are of the view, after finalisation of the board's investigation-, that the rezoning decision is reviewable the 'harm' can be repaired by means of review. The answer to that submission in my view is that a review is a discretionary remedy. If the proposed steel mill site is rezoned and a steel mill erected thereon, the possibility exists that a reviewing Court will be reluctant to make an order the effect of which will be the demolition of an expensive steel mill: cf *Thompson and Another vs Van Dyke and Another* (CPD. case No 7417/93); an as yet unreported decision of this Court, delivered on 9 December 1993, and the cases there cited.

Mr. *Van Schalkwyk* contended further that if the rezoning decision were given in favour of sixth and seventh respondents and the board were to report against the development, and then first respondent could act in terms of the Act so as to stop the operation of the steel mill. Here again the applicants will have no right to demand such action. First respondent has discretion under the section and it is by no means clear that he will exercise it against sixth and seventh respondents.

It is also clear that a claim for damages cannot be an adequate alternative remedy because it will be extremely difficult for applicants to quantify.

I am accordingly satisfied that the applicants have shown that they will suffer irreparable harm and have no alternative remedy.

(8) Balance of convenience and discretion;

In view of my finding that the applicants have a right to procedurally fair administrative action in this matter and that what second and third respondents propose to do amounts to an infringement or threatened infringement of that right. I am not sure that it is necessary for me to express an opinion on the question of the balance of convenience in this matter but in as much as it was

argued and the question of the balance of convenience, or the 'balance of fairness' as Fleming DIP called it in *Harnischfeger Corporation and Another v Appleton* and *Another* 1993 (4) SA 479 (W) at 491C, a case to which Mr. Helberg referred me, has relevance in regard to whether I should exercise my discretion (on the assumption that I have a discretion in a case where constitutional relief is sought). I propose to set out my views on this aspect of the case.

If the order sought is not granted and a decision is given in favour of sixth and seventh respondents and the board reports later that the proposed development is undesirable and is likely to be detrimental to the environment first respondent will have a discretion, as [have said. as to whether he should act in terms of ss 21, 22 and 31 A of the Act. If he does so, the amounts expended by sixth and seventh respondents will be wasted and compensation will be payable to sixth and seventh respondents. It is by no means clear whether first respondent will in those circumstances, where is presented with a potentially expensive fait accompli, exercise his discretion against sixth and seventh respondents.

On the other hand, if the board's investigation leads to a finding that the proposed development cannot be regarded as undesirable in that it will probably not detrimentally impact on the environment or that such impact can be satisfactorily addressed by imposing conditions, then the rezoning application will in all probability be granted, and the applicants will have no reason to fear that their, rights will be adversely affected. Mr. Helberg however contended that the board's investigation will take time: he spoke of as long as two years and he referred to a statement made in the affidavit filed on behalf of sixth and seventh respondents that a delay in giving the decision on the rezoning application may lead to a reconsideration of the whole project.

Mr. De Villiers had a two-fold answer to this contention. Firstly, he said, it is clearly the wish of first respondent that the investigation should be disposed of as speedily as is reasonably possible. Secondly, he said, this Court can deal with this aspect by building into the order a provision for second and third respondents to set the matter down for further hearing (after due notice to the applicants) for further argument on this aspect if they are of the view that the investigation is taking too long.

In my view, there is merit in both of Mr. De Villiers' submissions. It is clear from the provisions of s 15 of Act 73 of 1989 that the investigation does not take the form of a trial, the chairman, who is a retired Judge of great experience, will be in charge. He will be able to put a stop to anything amounting to an attempted filibuster on the part of anyone appearing before the board. He will also be aware of the first respondent's desire for the investigation to be finalised as soon as reasonably possible and I have no doubt will act accordingly. The order I propose to make incorporates Mr. De Villien suggestion regarding a possible re-sets down of the matter if it is believed that undue time is elapsing (which suggestion was first contained in an open offer made by the applicants to second and third respondents before the hearing).

In the circumstances I am satisfied that the balance of convenience or fairness favours the applicants and that [should exercise my discretion in favour of the applicants in respect of the relief sought by them against second and third respondents.

Order

The order I make is the following:

- I. First, second and third applicants' application for an order against first respondent calling upon him to appoint a board of investigation in terms of s 15(I) of Act 73 of 1989 to investigate sixth and seventh respondents' proposed steel factory development at Bredenburg-Saldanha and applicants'

application for an order against first respondent to amend/or amplify the terms of reference of the board of investigation appointed by him in terms of the said s 15(I) are dismissed with costs. Such costs to include those occasioned by the employment of two counsels.

2. Second and third respondents are ordered to hold in abeyance the decision on the rezoning application with reference to the site on which the development of a steel factory by sixth and seventh respondents is envisaged, pending the finalisation of the investigation of the board appointed in terms of s 15(I) of Act 73 of 1989: provided that second and third respondents shall have the right to set the matter down for further argument (on 10 days' notice to the applicants and to sixth and seventh respondents) on the question as to whether the order made in this paragraph should be uplifted on the ground that the finalisation of the said board's investigation is being unduly delayed.
3. The second, third, sixth and seventh respondents are ordered, jointly and severally, to pay the applicants' costs in respect of the application for the order contained in Para 2 above.
4. First respondent is ordered to pay the costs of first, second and third applicants in relation to their claim for documentation *to* be made available to them.

Applicants' Attorneys: *Cloete, Baker & Partners*. First, Second and Third Respondents' Attorney: *State Attorney*. Sixth and Seventh Respondents' Attorneys: *Gildenhuys. Van der Merwe Inc.* Pretoria.

THE REPUBLIC OF SOUTH AFRICA
IN THE SUPREME COURT OF SOUTH AFRICA
(TRANSKEI PROVINCIAL DIVISION)
CASE NO. 1672/1995

WILDLIFE SOCIETY OF SOUTH AFRICA & OTHERS.....APPLICANTS

VERSUS

MINISTER OF ENVIRONMENTAL AFFAIRS
AND TOURISM & OTHERS.....RESPONDENTS

BEFORE: PICKERING, J 1996 JUNE 21, 27

*Civil Proceedings: Whether mandamus could issue.
 Whether the plaintiffs have a right to apply for the enforcement of
 State's statutory duties.*

*Environmental Law: Application for mandamus compelling state to comply with its
 obligations to protect the environment.*

The applicants applied for an order compelling the respondents to enforce the provisions of the law on environmental conservation. It was contended that the respondents had granted rights of occupation and had allocated sites within the coastal conservation area to private individuals. As a result of this encroachment, there was considerable and irreversible environmental degradation of the Transkei wild Coast.

HELD:

1. Where a statute imposed an obligation upon the State to protect the environment in the interest of the public, then a body such as the applicant with its main aim being to promote environmental conservation should have *locus standi* to apply for an order to compel the state to comply with its statutory obligations.
2. Save to the extent that they may be permitted to in terms of law, the respondents are restrained from granting any rights on the land which forms part of the territory that formerly constituted the Republic of Transkei.

Order for mandamus granted, respondents to pay costs.

**IN THE SUPREME COURT OF SOUTH AFRICA
(TRANSKEI PROVINCIAL DIVISION)
CASE NO: 1672/95**

WILDLIFE SOCIETY OF SOUTH AFRICA AND OTHERS

VERSUS

**MINISTER OF ENVIRONMENTAL AFFAIRS AND TOURISM OF THE REPUBLIC OF
SOUTH AFRICA AND OTHERS
TRANSKEI SUPREME COURT**

1996 JUNE 21, 27

BEFORE: PICKERING J.

Environmental law-Environmental conservation-Application for mandamus compelling state to comply with its obligations to protect environment imposed by statute- wildlife society having locus standi to apply for such order by virtue of s 7 of constitution of the republic of South Africa Act 200 of 1993.

Recusal of presiding Judge in civil trial-on grounds of Bias-Application for mandamus compelling state to comply with statutory obligations to protect environment-some of applicants members of wild Coast Cottage owners Association-presiding Judge occupier or owner of cottage on Wild Coast-Judge not member of Association-Fact of occupation not giving rise to reasonable application of bias-Judge not standing to gain from proceedings-Application refused.

Practice-Parties-Locus Standi-Where statute imposing obligation on state to protect Environment-Semble: Body such as wildlife society should have locus standi at common law to apply for order compelling state to comply with its obligations in terms of statute.

The applicants applied for an order compelling the first, second and third respondents to take steps to enforce the provisions of s 39(2) of Decree 9 (Environment Conservation) of July 24 1992 (Tk). The first applicant was the wildlife society of southern Africa and the second applicant its Conservation Director.

The third and fourth applicants were two lawful occupiers of cottages on the wild coast and members of the wild coast cottage association. The first respondent was the Minister of Environmental Affairs of South Africa, the second respondent the premier of the Eastern Cape and the fourth to seventh respondents the chiefs of certain areas in the Eastern Cape.

The applicants contended that the fourth and seventh respondents had granted the rights of occupation and had allocated sites within the coastal conservation area to provide individuals, in each case for a relatively small consideration. Shacks and dwellings had been constructed on those sites, which resulted into environmental degradation, the roads, pathways and tracks had been created through environmentally sensitive areas. It was conceded that considerable irreversible environmental degradation of the Transkei wild coast within the coastal conservation zone had been and was occurring at the time of institution of the proceedings. The applicants contended that despite their efforts at persuading the first to third respondents to comply with the obligation to enforce compliance with the provisions of s 39 of the Decree, the respondents had

not done so. It was a common cause that the administration of s 39 was vested in the first respondent.

At the commencement of the hearing of the application the court was informed that an agreement had been reached between the applicants and the second and third respondents who terminated the litigation between the applicants and those parties. The first respondent applied in limine for the recusal of the presiding Judge on the grounds, that he was the occupier or owner of a cottage on the wild coast. It was contended that this fact could cause the first respondent reasonably to suspect that the presiding Judge would be biased against the first respondent. The presiding Judge refused the application stating that he was neither a member of the cottage owners association nor of the wildlife society. He was of the opinion that were his opinion of the cottage in question illegal of terms of the Decree, the mandamus sought by appellants would obviously be inimical to his own interests. The fact that he was the occupier of the cottage of the wild coast could not in any way give rise to a reasonable apprehension of bias on his part.

After initially contesting the applicants' locus standi the first respondent conceded this issue on the basis that the provisions of s 7(4)(b) read with s 29 of the constitution of the republic of South Africa Act 200 of 1993. The court remarked, obiter that there was much to be said for the view that in circumstances where the locus standi afforded to persons by S.7 of the constitution was not applicable and when a statute imposed an obligation upon the state to take certain measures in order to protect the environment in the interests of the public then a body such as the first applicant with its main objective being to protect environmental conservation in South Africa should have locus standi at common law to apply for an order compelling the state to comply with its obligations in terms of such statute. One of the principle objectives often raised against the adoption of a more flexible approach to the problem of *locus standi* was that the floodgates would thereby be opened giving rise to an uncontrollable torrent of litigation. It was not certain that to afford locus standi to a body such as the first applicant in circumstances such as these would open the floodgates to a torrent of frivolous litigation against by busybodies. Neither was it certain given the exorbitant costs of Supreme Court litigation that should the law be so adapted, cranks and busybodies would flood the courts with frivolous applications against the state. Should they be tempted to do so an appropriate order of costs would soon inhibit their litigation ardour. It might well be that the time has arrived for a re examination of the common law rules of standing in environmental matters involving the state and for an adaptation of such rules to meet the ever changing needs of society.

As regards the merits of the application for a mandamus the first respondent's opposition to the application rested largely upon the fact that there was in existence a task group, which had been established to tackle the issue. The court held however that the task group was a non statutory advisory body of uncertain nature and duration whose actions had in any event fallen short of establishing that the provisions of s 39(2) of the Decree were being enforced by first respondent. The court held accordingly that the applicants were entitled to an order that first respondent enforce the provisions of s 39(2) of the decree.

The following decided cases were referred to in the judgement of the court: ***Bamford v. Minister of community Development and state Auxiliary services*** 1981 (3) SA 1054 ***Bromley London Borough Council v Greater London council and another*** [1982] All ER 129 (CA) BTR ***Industries South Africa limited and others v Metal and Allied Workers' Union and another*** 1992 (3) SA 673 (A). ***Executive Club, Western Cape legislature and Others v President of the Republic of South Africa and others*** 1995 (4) SA 877 (CC) (1995) (10) BCLR 1289).

R vs. Inland Revenue, commissioners: Ex parte National Federation of self employed and small business Ltd. [1982] AC 617. R vs Inspectorate of pollution and another, Ex parte Greenpeace Ltd. (No2) [1994]. All er 329 (QB) sher and others v sadowitz 1970 (193)©. The court considered the following statutes: the constitution of the republic of South Africa Act 200 of 1993, ss7, 126(3), and 229. 235(6): see Juta's statutes of South Africa 1995 vol. 5 at 1-209.

Decree 9 (Environmental Conservation) of 24 July 1992 (TK), s 39:

Application for an order compelling the respondents to enforce the provisions of Decree 9 (Environment Conservation) promulgated by the former government of Transkei on 24 July 1992. The facts appear from the reasons for judgement.

Pickering J:

The four applicants herein, namely the Wildlife society of South Africa, Keith Cooper, the conservation Director of the wildlife society and two lawful occupiers of certain cottages on the Transkei Wild coast seek as first to fourth applicants respectively, an order against the Minister of Environmental Affairs and Tourism of the Republic of South Africa: the premier of the Eastern Cape Province: the member of the executive council for Agriculture and Environmental Planning of the Eastern Cape Province and four chiefs of certain administrative areas in the following terms:

1. That the first, second and third respondents are ordered forthwith to take such steps and to do such things as may be necessary:
 - (a) to enforce the provisions of Decree No 9 promulgated by the former government of Transkei on 24 July 1992 ("the Decree"):
 - (b) to without derogating from the generality of para 1 (a) here of enforce the provisions of s 39 (2) of the decree in the coastal conservation area established in terms of s 39 (1) of the Decree.
2. That it is hereby declared that save to the extent that the environmental conservation act 73 of 1989 and the general policy determined in terms of s 2 of the act on 21 January 1994 and 9 May 1994 conflicts with or contradicts the decree in particular and other legislation of the former government of Transkei in general, the Act and the said General Policy apply to and are enforceable in the territory that formally constituted the republic of Transkei.
3. That subject to para 2 of this order the first, second and third respondents are ordered forthwith to take such steps and to do all such things as may be necessary to:
 - (a) enforce the provisions of the Act:
 - (b) comply with the aforesaid General Policy:
 - (c) Secure compliance with the aforesaid General Policy in the territory that formally constituted the republic of Transkei.
4. That saves to the extent that they may be permitted to in terms of any law, the fourth, fifth, sixth and seventh respondents be and they are hereby restrained and interdicted from granting to grant any rights in land which formed part of the territory that formally constituted the republic of Transkei.
5. That the respondents jointly and severally are ordered to pay the costs of this application.

First applicant, an association incorporated not for gain in terms of s 21 of the companies Act 61 of 1973 was incorporated with its main objective being

‘To promote environmental conservation and environmental education in southern Africa’.

Its aim is to promote public participation in caring for the Earth's vitality and diversity by:

- (a) promoting and participating in environmental education;
- (b) building environmental values and sustainable life styles;
- (c) securing the protection and wise use of natural areas of wildlife;
- (d) generating individual and community action;
- (e) serving as an environmental watchdog;
- (f) influencing policy and decision making;
- (g) operating democratically;

Third and fourth applicants are members of the wild coast cottage owners Association, a voluntary association of persons who are all owners or occupiers of approved sites in designated and recognized resort areas along the Transkei Wild Coast.

It is common cause between the parties that over the past few years certain land use practices have developed along almost the entire Transkeian coast line which have been destructive are destructive and are potentially destructive of the ecological integrity of that coastline and that as such they constitute a very real threat to the environmentally sensitivity of the area in question.

In order fully to understand applicants' complaints in respect of such land use practices it is necessary to set out the provisions of s 39 of Decree 9 referred to in para 1 of the notice of motion. Section 39 provides as follows:

39(1) There is hereby established on the entire length of the sea shore excluding any national park, national wildlife reserve, municipal land, sea side resort, site occupied in terms of Proc 174 of 1921 or Proc 26 of 1936, privately owned land and leasehold land, a coastal conservation area 1000 meters wide measured:-

- (a) in relation to the sea as distinct from a tidal river and tidal lagoon from the high water mark;
- (b) In relation to a tidal river or tidal lagoon, from the highest water-level reached during ordinary storms during the stormiest period of the year, excluding abnormal floods.

(2) Notwithstanding anything in any other law or in any condition of title contained, no person shall with in the coastal conservation area, save under the authority of a permit issued by the department in accordance with the plan for the control of coastal development approved by resolution of the military council:-

- (a) clear any land or remove any sand, soil, stone or vegetation;
- (b) develop any picnic area, caravan park or like amenity;
- (c) erect any building;
- (d) construct any railway, landing strip, slipway, landing stage or jetty;
- (e) build any dam, canal, reservoir, water purification plant, septic tank or sewerage works;
- (f) lay any pipeline or erect any power line or fencing;
- (g) establish any waste disposal site or dump any refuse;
- (h) construct any public or private road or any bridle path or footpath;
- (i) carry on any other activity which disturbs the natural state of the vegetation, the land or any waters or which may be prescribed;

The land practices and other activities with which applicants are concerned are set out in the affidavit of Mr.Cooper as follows:

- (a) the grant of rights of occupation and the allocation of sites within the coastal conservation area by individual chiefs, headmen to private individuals which result in effect to a disposal of the land in question for a relatively small consideration;
- (b) the construction of shacks, dwellings and other structures on such sites aforesaid resulting in environmental degradation and detracting from the aesthetic qualities of the coastal conservation zone;
- (c) the construction of roads, pathways and tracks along cliff edges through forests and other environmentally sensitive areas causing permanent damage to such areas and which again detract from the environmentally aesthetic qualities of the coastal conservation zone;
- (d) the insensitive and unsustainable exploitation of the resources in such areas.

These practices occur along and within almost the entire Transkeian coastal conservation zone established in terms of the Decree. In some instances in return for the allocation of a site to a particular individual, the headman involved was paid an amount in the order of approximately R200 together with a bottle of brandy. Neither chiefs nor headmen have authority to allocate sites.

First respondent admits all these averments.

Applicants have set out in great detail specific instances of such abuses, which have been and are occurring within areas falling within the coastal conservation zones. The abuses are graphically illustrated in the photographs annexed both to the founding affidavit and to the replying affidavit attested to by third applicant, Mr. Mac Robert. The destruction of natural vegetation; of indigenous bush; of coastal dunes and forest; and of mangrove areas, in order to clear the way for construction to take place, is clearly depicted. It is clear therefore and this is not denied by the respondents that considerable and irreversible environmental degradation of the Transkei coast within the coastal conservation zone has been and was occurring at the time of the institution of these proceedings on 7th September 1995 in blatant contravention of the provisions of S. 39 of the decree.

Second applicant avers in his affidavit that he has been both personally and in his capacity as conservation director of first applicant. Closely associated with and interested in the environmental and nature conservation priorities along the wild coast for more than 20 years. He was the chief architect of a report published by first applicant during April 1977 at the request of the Transkei government in which a preliminary survey of the wild coast was undertaken in order to assist that government with its development plans. During 1992 first applicant was retained by then Transkei government to compile a survey of Transkei forests, including all the coastal forests, and second applicant was again involved in the publication thereof.

Because of the concern of the applicants at the unabated environmental degradation observed by them, they together with certain others instructed their attorneys to address a letter on 16th May 1995 to inter alia first, second and third respondents in which attention was drawn to the unlawful practices which were occurring and in which the respondents were requested to take the requisite action in order to put a halt to such practices. On 17th May 1995 fourth applicant, Mr. Taylor and his attorney Mr. Ridl, attended a meeting at Bisho with third respondent, Minister Delpont at which inter alia third respondent indicated that he wished to cooperate with the efforts made by applicants to halt the unlawful practices but that he had no success since taking office in preventing them. It was agreed that Mr. Ridl would prepare a memorandum for third respondent, detailing the law applicable and setting out the steps which could be taken by him. Such a memorandum was duly prepared and delivered to third respondent. Mr. Ridl referred therein specifically to s 39 of the Decree and urged inter alia that criminal prosecutions should be instituted without delay against identified offenders.

Prior to the meeting with third respondent, the third applicant, Mr. Mac Robert had met with second Respondent Premier Mhlaba who had stated in relation to the destructive activities taking place that the applicants should 'stop the vultures'.

Applicants aver that despite all their efforts to persuade first, second and third respondents to comply with the obligation to enforce compliance with the provisions of s 39 of the Decree the respondents have not done so and that they are accordingly obliged to seek the relief set out in the notice of motion.

It is common cause that the administration of Chapter 7 of the Decree with in which falls s 39, is vested in first respondent and only first respondent chose to file an affidavit in opposition to this application. In this affidavit attested to by Mr. Botha a legal administration officer in the employ of first respondent's department it is averred that the applicants have not brought the application in good faith and that the application amounts to an abuse of the process of court in that applicants were aware or should have been aware of the recommendation made by first respondent during May 1995 to the effect that a task group be established to address the concerns of the applicants.

The Eastern Cape Coastal Development Task Group in the formation of which Mr. Botha avers the cottage owners association amongst others was instrumental held its first meeting on 14 August 1995 and the cottage owners association of which third applicant is a member was there represented by fourth applicant. The brief of the task group as set out in Mr. Botha's affidavit is to address inter alia the following issues:

1. Determining and drafting appropriate amendments to the Environment Conservation Act 73 of 1989 to enable it to apply in the former Transkei and Ciskei.
2. Establishing a sub committee to identify and proceed with appropriate action to assign relevant decrees to the Eastern Cape provincial government.
3. Making recommendations regarding the replacement of decrees with relevant sections of the environment conservation act.
4. Assisting the Eastern Cape government to direct a formal request to the department of environmental affairs for the president to assign relevant decrees thereof to the Eastern Cape provincial government.
5. Undertaking a survey of the coast line to determine the number, position, state and ownership of:
 - (j) legal cottages;
 - (ii) Illegal cottages;
 - (iii) Other developments.
6. Preventing data to the relevant authorities with regard to possible legal action against illegal occupants of coastal sites.

Mr. Botha refers further to the fact that certain action has been taken by the first respondent relating to the institution of Criminal proceedings in the Port St. John's magistrate's court against certain persons in respect of alleged contravention of S.39 of the Decree, as well as an application for an interdict brought on 31st October, 1995 to the Transkei provincial Division by first respondent against nine respondents (including the fourth respondent in these proceedings). He states that other applications for interdicts against illegal occupants of other sites along the Wild Coast will soon be launched.

In reply the application deny that they were or should have been aware of the recommendation allegedly made by first respondent during May 1995, in that no public reference to such recommendation was made by the first respondent either in the Parliamentary debate on his department or elsewhere. In this regard it appears from the minutes of the first meeting of the task group that such recommendation was contained in a letter written by first respondents to third respondent. Applicants admit that on 13th July 1995 fourth applicant was invited to be a member of the Task Group, but allege that this was the first intimation any of the applicants had concerning the establishment thereof. They point out that despite their wealth of experience and knowledge of the Transkei Coast line neither first nor second applicants were invited to participate in the affairs of the Task Group. They allege further that the action taken by first respondent in order to enforce compliance with S.39 of the Decree was only taken after institution of these proceedings. They aver that the unlawful development-taking place in the coastal conservation zone has actually increased since the institution of these proceedings and furnish details again supported by photographic evidence of illegal building activities which occurred at various places along the wild coast during the month of October to December 1995 immediately prior to the filing of replying affidavit and in respect of which first respondent has taken no action. They deny therefore that the application constitutes an abuse of the proceedings of the court.

At the commencement of the hearing of the application I was informed that an agreement had been reached between applicants and the second and third respondents, who were concerned that the litigation should be resolved and that proper communication between themselves and applicants should be restored. The terms of that agreement are not relevant to the determination of this application. The application then proceeded against first and fourth to seventh respondents. Although I was informed by both Mr. Gauntlet who with Mr. Vahed appeared for applicants and Mr. Moerane who with Mr. Pakade appeared for the first respondent that fourth to seventh respondent had, to the best of their knowledge not entered an appearance to oppose the application, I have since discovered whilst in the course of preparing this judgement just such a notice not forming part of the indexed papers. Fourth to seventh respondents did not however file any opposing papers nor were they represented at the hearing of the application. In the circumstances it can be taken that they abide by the decision of the court.

Application for Recusal.

Before commencement of argument Mr. Moerane informed me that he had instructions to apply for my Recusal from the case. He stressed that making the application he was acting on the specific instructions of Government Attorney, Mr. Jika, and that the application involved no imputation upon my integrity. After hearing argument in this regard I refused the application for my Recusal and indicated that my reasons for so doing would follow. These then are my reasons:

The law in respect of the test for bias has recently been settled in the case of *BTR Industries South Africa Ltd. and others v Metal and Allied Workers' Union and another* 1992 (3) SA 673 (A). At 694 F-695B Hoexter JA stated:

In *R v Chondi and another* 1933 OPD 267 Krause JP made the following observations (at 271) which in this country are as pertinent now as they were some 60 years ago:

“It is a matter in of the gravest public policy that the impartiality of the courts of justice should not be doubted, or that the fairness of a trial should not be questioned; other wise the only bulwark of the liberty of the subject, in these times of revolutionary tendencies would be undermined.”

It is the right of the public to have their cases decided by persons who are free not only from fear but also from favour in the end the only guarantee of impartiality on the part of the courts is conspicuous impartiality. To insist upon the appearance of a real likelihood of bias would I think cut at the very root of the principle deeply embedded in our law that justice must be seen to be done. It would impede rather than advance the due administration of Justice. It is a hallowed maxim that if a judicial officer has any interest in the out come of the matter before him, he is disqualified no matter how small the interest may be. See in this regard the remarks of Lush J in *Sergeant and others v Dale* (1877) 2 QBD 558 at 567. The law does not seek in such a case to measure the amount of this interest. I venture to suggest that the matter stands no differently with regard to the apprehension of bias by a lay litigant. Provided the suspicion of partiality is one which might reasonably be entertained by a lay litigant a reviewing court cannot so I consider be called upon to measure in a nice balance the precise extent of the apparent risk. If suspicion is reasonably apprehended then that is an end to the matter. I find my self in complete agreement with what was forcibly stated by Edmund Davies LJ in the *Metropolitan properties* case supra at 314C-D:

“With profound respect to those who have propounded the real likelihood test I take the view that the requirement that justice must manifestly be done operates with undiminished force in cases where bias is alleged and that any development which appears to emasculate that requirement should be strongly resisted.’

With these remarks in mind I turn to consider the merits of the application. The relief sought by applicants is inter alia the first respondent to enforce the provisions of the Decree, more especially in relation to the illegal building of cottages and roads in the coastal conservation zone; and (ii) a *declarator* to the effect that the provisions of the Environment Conservation Act 73 of 1989 apply to the area comprising the former Transkei in so far as they are not inconsistent with the provisions of the decree. It is perhaps also relevant to reiterate that third and fourth applicants are lawful occupants of cottages on the wild coast and that both are members of the Cottage Owners Association. I am not now nor have I been a member of the Cottage Owners Association or of the Wildlife Society.

The basis of the application for my Recusal is that I to am the owner of a cottage on the wild coast and that this fact may cause the first respondent reasonably to entertain the suspicion that I will be biased against it. I have deliberately placed the word ‘lawful’ in parenthesis as the gravamen of Mr. Moerane’s submission appears to be that because the legality of the occupation of certain cottages on the Wild Coast is under scrutiny not only by first respondent but also by the well-known Health Commission into unlawful land dealings in the Eastern cape my right title to the cottage which I occupy may well be under threat. In these circumstances a reasonable perception might be created that I could not apply my mind objectively to the issues raised by the application. I do not intent to enter in to a debate as to the legality or otherwise of my occupation of the cottage in question which to the best of my knowledge was constructed more than 60 years prior to the promulgation of the decree although I have no reason to doubt such legality. In my view Mr. Moerane’s argument bears the seeds of its own destruction. Having regard tot the nature of the main relief sought herein namely the enforcement of the provisions of the decree against illegal occupiers and builders of cottages it seems to me that the only parties who could remotely have cause to complain about possible partiality are the applicants. Were my occupation of the cottage to be illegal in terms of the decree the *mandamus* sought by applicants would obviously be inimicable to my own interests.

In any event leaving the argument as to legality aside, I have no doubt what so ever that the mere fact that I am the occupier of a cottage on the Wild Coast in the absence of anything more such as

my membership of the Cottage Owners Association could not in any way in the circumstances of this case give rise to a reasonable apprehension of bias on my part by first respondent. Compare *Bromley London Borough Council v Greater London Council and Another* [1982] 1 ALLER 129 (CA) at 131j-132a.

Accordingly the application falls to be dismissed.

Locus Standi.

The first issue raised and one, which occupied not inconsiderable part of applicant's heads of argument, concerned the question of Locus Standi. Despite the earlier attitude of first respondent as evinced in Mr. Botha's affidavit Mr. Moerane in his heads of argument conceded that applicants had locus Standi. As I understand it this concession was based on the provisions of s 7(4) (b), read with s 29 of the constitution of the Republic of South Africa Act 200 of 1993. See *Van Huysteen and others vs. Minister of Environmental Affairs and Tourism and others* 1996 (1) SA 283 (c).

I may mention that in my opinion there is also much to be said for the view that in circumstances where the Locus Standi afforded persons by s 7 of the constitution is not applicable and where a statute imposes an obligation upon the state to take certain measures in order to protect the environment in the interests of the public then a body such as the first applicant with its main object being to protect the environment in the interests of the public then a body such as the first applicant with its main object being to promote environmental conservation in South Africa should have *Locus Standi* at common law to apply for an order compelling the state to comply with its obligations in terms of such statute.

In a far-sighted article, 'The Ecological Norm in Law or the Jurisprudence of the right against pollution' (1975) 92 SALJ 78 the late professor Barend Van Niekerk stated that the knowledge had then about the nature of environmental pollution and its encroaching dangers to all members of society called urgently for 'a critical re-evaluation of how the existing legal rules concerning Locus Standi should be adapted in order to cope more adequately with the interests of society in general and each member of society in particular'.

(AT 88) He was of the opinion that the most obvious solution to the problem of Locus Standi was 'to regard the environment as being peculiarly of interest to any member of society' and he continued by saying that because the effect of environmental blight will not spare any member of society in the final analysis it did not seem misplaced.

'in terms of existing legal principles to give every member of society the right to protect what amounts to his own interest. An adoption of this line of reasoning will not... erode the basic principle of our law on which Locus Standi to sue is based namely 'that no man can sue in respect of a wrongful act, unless it constitutes the breach of a duty owed to him by the wrong-doer, or unless it causes him some damage in law'.

I am well aware that the English law relating to Locus Standi has developed very differently to the South African law in this regard. Nevertheless the English cases are instructive and it is interesting to note that the requirement in English of law of 'sufficient interest' has been interpreted as being merely a means of protection against 'busy-bodies', cranks and other mischief-makers. *R v Inland Revenue Commissioners: Ex parte National Federation of self employed and small business Ltd.* [1982] AC617 at 653 G H. in the same case at 664C Lord Diplock stated that there would be 'a grave lacuna in our system of law if a pressure group ...or even a single public spirited tax payer were prevented by outdated technical rules of *Locus Standi*

from bringing the matter to the attention of the court to vindicate the rule of law and get the unlawful conduct stopped’.

In *R v Inspectorate of pollution and another, ex parte Greenpeace Ltd.* (No2)[1994] 4 ALLER 329 (QB) the court upheld the Locus Standi of the Greenpeace organization. At 350e-f, Otton J stated that if he were to deny standing to Greenpeace, ‘those it represents might not have an effective way to bring the issues before the court. There would have to be an application either by individual, employee or a near neighbour. In this case it is unlikely that either would be able to command the expertise which is at the disposal of Greenpeace. Consequently less well-informed challenge might be mounted which would stretch unnecessarily the court’s resources and which would not afford the court the assistance it requires in order to do justice between the people.’

One of the principle objections often raised against the adoption of a more flexible approach to the problem of Locus Standi is that floodgates will thereby be opened giving rise to an uncontrollable torrent of litigation it is well however to bear in mind a remark made by Mr. Justice Kirby, president of the New Wales South Court of Appeal in the course of an address at the Tenth Anniversary conference of the Legal Resources Centre namely that it may sometimes be necessary to open the floodgates in order to irrigate the arid ground below them. I am not persuaded by the agreement that to afford Locus Standi to a body such as first applicant in circumstances such as these would be to open the floodgates to a torrent of frivolous litigation against the state by cranks. Neither am I persuaded given the exorbitant costs of Supreme Court litigation that should the law be so adapted cranks would indeed flood the courts with frivolous applications against the state. Should they be tempted to do so I have no doubt that an appropriate order of costs would soon inhibit their litigious ardour.

In any event whilst cranks who attempt to abuse legal process do no doubt exist, I am of the view that lawyers are sometimes unduly apprehensive and pessimistic about the strength of their numbers. The meddlesome crank and busybody with no legal interest in a matter what so ever, mischievously intent on gaining access to the court in order to satisfy some personal caprice or obsession is in my view as has been remarked elsewhere more often a spectral figure than a reality.

Twenty-one years have passed since Professor Van Niekerk’s clarion call for an adaptation of the law relating to Locus Standi in environmental matters. It may well be that the submissions made by him have come of age and that the time has arrived for a re examination of the common law rules of standing in environmental matters involving the state and for an adaptation of such rules to meet the ever changing needs of society. Compare M .M. Corbett ‘Aspects of the role of policy in the evolution of our Common Law’ {1987} 104 SALJ 52.

The Application for a mandamus against first respondent

As will have been seen from the above exposition of the facts the crisp defense raised by the first respondent is that in view of the fact that the task group was to applicants knowledge, addressing the very issues raised by this application and that action has in fact been taken by first respondent in regard to these issues the application is unnecessary and amounts to an abuse of the process of court.

The court has a general inherent power to set aside proceedings on the ground that they are frivolous and that they amount to an abuse of the process of the court. In *Sher and others v Sadowitz* 1970(1) SA 193 Corbett J (as he then was) reiterated that it is clear that the power is one that should be sparingly exercised and only in very exception cases and that the court must be

satisfied before setting aside such a proceeding that it is as a matter of certainty obviously unsustainable. (At 195C-D).

It appears from the minutes of the Task Group on 14 August 1995 that the recommendation for the establishment thereof was contained in a letter from first respondent to third respondent. In these circumstances it is hardly surprising that applicants knew nothing thereof until after its formation. What is relevant however is that fourth applicant was invited to and did attend the meeting of the task group as a representative of the Cottage Owners Association of which third applicant is a member and that the applicants were therefore aware of the existence of the task group prior to the institution of these proceedings. Applicants aver that the task group's role was advisory only and that at no time did the group even suggest that decisive action be taken against illegal land practice users.

They aver further that the fact that the Task Group met only once a month is indicative of the ineffective and totally inappropriate manner in which the urgent problem was being addressed. In my view far from these proceedings being an abuse of the process of the court, a perusal of the minutes of the meeting of the Task Group on 14th August 1995 bears out applicants' averments. It appears therefrom that the main function of the Task Group was 'to advice the various ministers on the appropriate steps to be taken regarding problems in the coastal areas'. (AT para 9.3). That the main function was indeed advisory is borne out by the minutes themselves. At that meeting fourth applicant specifically stated that, whilst there was a need to rationalize legislation, it was essential that urgent action to be taken against offenders immediately so as to prevent the proliferation of illegal cottages estimated as comprising up to 300 units. He pointed out that to wait until the legislation had been rationalized would be disastrous as by then valuable coastal resources would have been irreparably damaged. His speech elicited an expression of appreciation from the chairman. A list of actions' was determined at the conclusion of the meeting in which every action to be taken was accorded a priority ranging from 1 to 5 as well as medium term. Not surprisingly the issue of a press release informing the public of the establishment of the Task Group and of its activities was accorded priority 'number one'. Despite fourth applicant's impassioned plea to take action and not to wait for the rationalization of legislation, such rationalization was accorded priority 'number two'. Only then was priority 'number three' referred to in the following somewhat startling terms:

Determine political support from proposed action against owners of cottages erected illegally.' In this regard the action to be taken was stated to be:

Present proposed "test case" legal action against the owners of 20-sea side residential sites on state land close to the high water mark near Manteku store in the Mtambelala Administrative Area, Lusikisiki district to the Minister of Land Affairs; Eastern Cape Agriculture and Conservation and Environmental Affairs and Tourism to determine support for initiative.

What exactly constituted 'political support' and why such 'political support' had to be determined before action could be taken to stop the blatantly illegal degradation of the coastal conservation zone of the wide coast was not explained, nor has it since been explained by Mr. Botha who participated in the meeting of the task group. It is difficult to understand why in the face of overwhelming evidence of illegal land practice uses, it was considered necessary to determine 'political support' for action to be taken to put a stop there to and why there should have been a remarkable and disturbing reluctance immediately to invoke the provisions of s 39 of the Decree. It is telling that no where in his affidavit does Mr. Botha state why it was necessary to adopt such a 'kidglove' approach nor does he state that first respondent was logistically unable to enforce the provisions of S. 39.

Priority 'number four' in terms of the 'list of actions' was stated as being to 'inform relevant authorities of the illegal activities to stop the issuing of certificates or identification of sites'. The action required in respect thereof was stated as follows:

'Inform via Minister of Environmental Affairs and Tourism the Eastern Cape Premier; Eastern Cape Minister of Agriculture and conservation; Department of Land Affairs; Department of Justice of current problems and request that that all illegal activities perpetuated in the erection of illegal cottages and alienation of land be ceased.'

In these circumstances, where 'political support' for legal action had to be first determined and where persons illegally allocating sites,- sometimes in return for little more than a bottle of brandy were to be requested to stop doing so, applicants' averred sense of frustration at the lack of any concrete action in terms of S. 39 of the Decree becomes palpable. The overwhelming sense to be gained from reading the minutes of the Task Group is that of the slow and inexorable grinding of wheels across a bureaucratic landscape, regardless of the urgency of the situation. My above comments should not be misconstrued. The Task Group may well be performing excellent work in regard to other matters, such as the eventual rationalization of applicable legislation. My comments relate only to its performance in relation to the Task Group is a non-statutory advisory body of uncertain nature and duration, its difficulties in this regard are perhaps understandable. The fact remains however, that first respondent's opposition to this application is based largely upon the existence of the Task Group and its actions and these actions have, in my view, fallen woefully short of establishing that the provisions of S. 39(2) of the Decree were and are being enforced by first respondent.

It is also clear from the papers that it was only after the institution of this application that first respondent took the action referred to by Mr. Botha in his affidavit. In the light of the minutes of the Task Group the inference is inescapable that the launching of the application galvanized first respondent into such action as it eventually took. The action taken by first respondent does not, however, in any way address all the abuses raised by applicants in their papers.

I am satisfied in all the circumstances that applicants were and entitled to approach the court for relief. In granting relief to the applicants the court is not crossing the boundary between what is administration whether good or bad, and what is an unlawful failure to perform a statutory duty by the body or person charged with performance of that duty.

In my view, however, the relief sought by applicants in para 1(a) of the notice of motion is couched in terms that are much too wide and vague. I am therefore not prepared to grant an order in terms of para 1 (a) of the notice of motion. Applicants' case was premised throughout on land practice uses in contravention of s 39 of the Decree. In my view, therefore applicants are entitled only to an order in terms of para 1 (b), namely that first respondent enforce the provisions of s 39(2) of the Decree. Such an order is easily capable of compliance and as I have stated above, no where has first respondent averred that it lacks the logistical means to enforce those provisions.

The application for a declarator

This aspect of the case can, in my view, be very shortly disposed of. It is common cause that before 27th April 1994 Decree 9 applied within the area which comprised the then Republic of Transkei and that the Environment conservation Act 73 of 1989 applied with in the area which then comprised the Republic of South Africa. Mr. Gauntlett submitted, with specific reference to S. 235(6) of the constitution of the Republic of South Africa Act 200 of 1993 that the Environment Conservation Act 73 of 1989 that formally the Republic of Transkei.

In my view however, Mr. Moerane correctly submitted that the relevant section of the constitution Act in this regard was s 229, which provides:

Continuation of existing laws subject to this constitution, all laws, which immediately before the commencement of this constitution were in force in any area, which forms part of the national territory, shall continue in force in such area, subject to any repeal of such laws by a competent authority.

‘Section 229 provides a constitutional foundation for the continuation of the “old laws” after the coming into force of the constitution... the continuity given by S. 229 is applicable only to areas in which such laws were in force prior to the commencement of the constitution.’

Clearly therefore until such time as the Environment Conservation Act 73 of 1989 is applied by a law of competent authority to the whole of the national territory it shall continue to apply only to that part of the national territory in which it was in force immediately before the commencement of the constitution.

Section 235(6), read with s 126(3), relied upon by Mr. Gauntlett, deals with the question of executive authority and does not purport to extend the territorial application of any laws which immediately prior to the commencement of the constitution were in force in any particular area forming part of the national territory.

The application for a declarator in terms of Para 2 of the notice of motion must accordingly fail. I furthermore decline Mr. Gauntlett’s invitation to grant a declarator incorporating certain submissions made by Mr. Botha during the course of this presentation at the first meeting of the Task Group on 14th August 1995. This was not the relief sought by applicants and neither first respondent, nor Mr. Botha in particular was required to apply their minds thereto.

In these circumstances the relief sought by applicants in terms of para 2 and 3 of the notice of motion must be refused.

The interdict sought against fourth to seventh respondents.

As I have stated above, these respondents, despite having entered an appearance to oppose the application filed no papers and did not appear at the hearing. Accordingly they have not denied applicants’ allegations concerning the wrongful and unlawful allocation by them of sites to certain persons. This being so applicants are entitled to an order against them in terms of para 4 of the notice of motion.

Costs

It is clear that the primary focus of the application was the interdictory relief sought against the various respondents in differing respects. The application for a declarator constituted a relatively insubstantial component of the application as a whole. In these circumstances although applicants have failed in their application for a declarator they have nevertheless achieved substantial success in the application as a whole and there is accordingly no reason why they should be deprived of any part of their costs against first respondent. First respondent will pay such costs jointly and severally with second and third respondents who in terms of their agreement with applicants agreed to pay such costs. Counsel was agreed that the costs of two counsels should be allowed.

In so far as fourth to seventh respondents are concerned no order for costs was sought against them nor in my view would any such order be appropriate in the circumstances of this case.

It remains however to deal with the question of the wasted costs incurred in consequence of the postponement of the application on 18th April 1996 which costs were reserved for later decision. It appears from the papers that the Registrar at applicants' request specifically allocated the date of 18th April 1996, which fell during the court recess, after consultation with the judge president. A notice of set down of the matter was then served on the Government Attorney by applicants' attorney on 3rd April 1996.

Mr. Jika the Government Attorney states in an affidavit that the matter was set down for hearing on that date without any prior consultation with himself or first respondent. On receipt of the notice of set down he immediately communicated with his counsel only to be advised that they would not be available as senior counsel was out of the country. He then advised applicants' attorney of record, Mr. Poyser that the date was not suitable. According to Mr. Poyser this letter only came to his attention on 9th April 1996 after Easter weekend. Mr. Jika telephoned Mr. Poyser on 9th April 1996 and reiterated his concern that the matter had been set down during recess without prior consultation with him. According to Mr. Jika to liaise directly with applicants' instructing attorneys so as to avoid unnecessary delays.

Mr. Jika as to whether or not he did so but accordingly to him on 16th April 1996 he again wrote to Mr. Poyser advising him that an application would be made for the postponement of the matter on 18th April 1996. Mr. Poyser replied stating that the application would proceed. On 18th April 1996, Mr. Jika filed a substantive application for postponement after 10:00 am. The lateness of the application, which contained factual averments, which required to be answered, made a postponement unavoidable. In my view the fact that Mr. Moerane was not available to argue the application on 18th April 1996 would not normally have constituted a valid ground on which to seek a postponement. Mr. Jika was also dilatory in failing to launch the substantive application for a postponement on failing to receiving a positive reply to his request therefore on 9th April 1996. On the other hand in requesting the permission of the Judge President for the hearing of the matter during the court recess the applicants were seeking an indulgence to suit the convenience of themselves and their counsel. In these circumstances applicants in my view have consulted with respondents concerning the suitability of the proposed date of hearing.

I am accordingly of the view that the most appropriate and fair order would be that each party pay their own cost in respect of the hearing on 18th April 1996.

The Order.

The following order is therefore made:

1. That the first respondent be and is hereby ordered forthwith to take such steps and to do such things as may be necessary to enforce the provisions of s 39(2) of the Decree 9 promulgated by the former Government of Transkei on 24th July 1992.
2. That save to the extent that they may be permitted to in terms of any law, the fourth, fifth, sixth and seventh respondents be and they are hereby restrained and interdicted from granting to grant any rights in land which formed part of the territory that formerly constituted the Republic of Transkei.
3. That first respondent is ordered to pay the costs of this application jointly and severally with second and third respondents the one paying the others to be absolved. Such costs shall

exclude the reserved costs of the hearing on 18th April 1996 in respect of which each party shall bear their own costs.

Applicants' Attorneys: Ridl-glavovic, Westville; John C Blakeway & Leppan, Inc, Umtata,

First, second and third respondents' attorney: Government Attorney, Umtata.

Environmental Law Institute (ELI) - Washington DC

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Greenwatch is an environmental rights advocacy organization established in 1995 in Kampala with the aim of promoting public participation in the sustainable use, management and protection of the environment and natural resources and in the enforcement of the right to a clean and healthy environment.

At Greenwatch, we advocate for the enforcement of and compliance with environmental laws and principles through training which results in increased environmental awareness. We review and analyse Environment Impact Assessment (EIAs) of development projects with a likelihood of impacting on the environment negatively; a process which aims at influencing policy making for good environmental governance in Uganda.

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