

PUBLIC INTEREST ENVIRONMENTAL LITIGATION: RECENT CASES RAISE POSSIBLE OBSTACLES

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1 Introduction

In an era in which the environment is high on many people's agendas, South Africa is fortunate to have, at least on paper, provisions that are generous in their facilitation of access to courts with the objective of protecting or conserving the environment. As Glazewski¹ states, "the liberalisation of the *locus standi* requirement by the Bill of Rights, coupled with the extension of the circumstances in which one may litigate in the public environmental interests provided in the NEMA [*National Environmental Management Act*], considerably increases the opportunities for public interest litigation in the environmental sphere". These changes, however, appear to be relatively slow in permeating the minds of the judiciary and the profession. This will be highlighted in this article with reference to two recent cases, in which not only *locus standi*, but also the requirements for an interdict are identified as possible procedural impediments to effective public interest environmental litigation. In addition, I will suggest the manner in which these impediments may be avoided.

2 Standing/*locus standi*

In the case of *Tergniet and Toekoms Action Group v Outeniqua Kreosootpale (Pty) Ltd*,² the first applicant is a voluntary association that represents the interests of the residents of Tergniet and Toekoms, residential areas situated close to the site of the respondent's pole treatment facility. Other applicants are residents of or owners of land in the two areas, and more than half of them are also members of the first applicant. The applicants sought, in essence, the termination of the respondent's operations, which consisted of the manufacture of creosote-treated wooden poles.

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1 Glazewski *Environmental Law* (2005) 123.

2 Case 10083/2008 (C) 23 January 2009 (unreported) – hereafter *Tergniet*.

The applicants claimed that the respondent's operations were unlawful owing to conflict with the relevant provisions of the *Atmospheric Pollution Prevention Act*³ and the *Land Use and Planning Ordinance*,⁴ and sought an interdict restraining the respondent from continuing with operations until they were correctly authorised. Details of the unlawfulness are not required for purposes of this discussion.

The first legal issue considered by the court (Van Reenen J), was the applicants' *locus standi*. It was contended by the respondent that the first applicant (the voluntary organisation) lacked *locus standi* in respect of all relief sought and that all of the applicants lacked *locus standi* in respect of the relief claimed in respect of non-compliance with APPA.⁵ It being common cause that the first applicant had a fluid membership and lacked a constitution, it was argued that it lacked "the primary attributes that endow a *universitas personarum* with *locus standi* – in the sense of the capacity to sue – namely, perpetual succession, the capacity of acquiring rights and incurring obligations independently of its members and own property".⁶ The court expressly noted that the respondent's counsel acknowledged that Section 38 of the *Constitution*⁷ and Section 32 of the *National Environmental Management Act*⁸ have broadened the notion of *locus standi*, yet counsel submitted that a group such as the applicant "is nevertheless required to possess a capacity to sue – in the sense of a substantial and sufficient interest in the subject-matter of the particular litigation".⁹ The respondent argued that the applicant lacked this.

It is worth reproducing the court's description of the applicant's argument in this regard in full:

The applicants' counsel whilst accepting that it is not settled in our law that a loose association of people without a constitution, such as the first respondent, possesses *locus standi* ... countered that submission by contending that the provisions of section 38 of the Constitution ... should be amplified with a view to bestowing standing on groups, especially where they are seeking to enforce legislation passed for the purpose of protecting and

3 45 of 1965 – hereafter APPA.

4 15 of 1985 – hereafter LUPO.

5 *Tergniet case* para 16.

6 *Tergniet case* para 16.

7 *Constitution of the Republic of South Africa, 1996* – hereafter *Constitution*.

8 106 of 1998 – hereafter NEMA.

9 *Tergniet case* para 18.

promoting constitutionally entrenched fundamental rights such as an environment that is not harmful to health and wellbeing and needs to be protected for the benefit of present and future generations (subsections 24(a) and (b) of the Constitution). The applicants' counsel argued that as the provisions of the Appa [sic] which the applicants are seeking to enforce by means of these proceedings, fall within that category of legislation, an amplification of the notion of standing so as to encompass also a group such as theirs, would be warranted in these proceedings. Counsel continued by contending that such amplification is not really essential in the instant case as section 32 of Nema [sic] specifically bestows standing on persons or groups of persons to seek appropriate relief in respect of any breach of, *inter alia* 'any statutory provision concerned with the protection of the environment'. And, as the 'environment' is in section 1 of Nema [sic] defined as the surroundings within which humans exist and is made up of, *inter alia*, the atmosphere of the earth, the Appa [sic] is manifestly encompassed in the quoted concept so that that section 32, whilst tracking the provisions of section 38 of the Constitution, deviates therefrom by expanding it as regards the kind of litigant who enjoy [sic] *locus standi* and enumerating the specific grounds on which a would-be-litigant would be bestowed with *locus standi*. They concluded by submitting that as the first applicant is acting 'in the interest of protecting the environment' it and each of the other applicants clearly enjoy standing to sue.¹⁰

The court did not immediately address the *locus standi* of the first applicant, but proceeded to the *locus standi* of the remaining applicants (the residents; all natural persons). The court described the manner in which the latter all resided in relatively close proximity to the respondent's site.¹¹ The respondent relied on the test in *Patz v Greene*¹² read with *Roodepoort-Maraisburg Town Council v Eastern Properties (Prop) Ltd*¹³ to argue that the applicants lacked *locus standi* to enforce the provisions of APPA because APPA was promulgated in the interest of the general public and that, consequently, it was incumbent on the applicants to show that they had suffered actual harm.¹⁴ The approach in the *Patz* case has been regarded as the "narrow" approach to the personal interest requirement for *locus standi* (under the common law), in terms of which, if the applicant belonged to a class of people (which could be the general public, or a smaller class) all of whom suffered harm as a result of the alleged illegality, then the applicant, in order to meet the standing requirement,

10 *Tergniet* case para 19, reference to authorities omitted.

11 *Tergniet* case para 20: "Of the 34 applicants who are natural persons 25 reside in Toekoms at distances varying from 20 to 300 metres from the site. The remaining 9 of such applicants reside in Tergniet, a residential area separated from the site by only the old national road and the reserve alongside it".

12 1907 TS 426 – hereafter *Patz*.

13 1933 AD 87.

14 *Tergniet* case para 20.

had to show some "special damage", which would be harm that was greater than that suffered by the rest of the class. Alternatively, there would be a presumption of personal damage if the statutory provision was shown to have been enacted for the benefit of a class of persons of which the applicant formed part.¹⁵

The court in the *Tergniet* case emphasised those aspects of APPA that seek to ensure that the release into the atmosphere of noxious and offensive gases is eliminated or minimised, and concluded that APPA was "promulgated, not in the interest of the general public, but in the interest of persons and communities living in close proximity to any premises where scheduled processes that result in the release of noxious or offensive gasses into the atmosphere, are being performed".¹⁶ The court's conclusion on the *locus standi* of the applicants was:

[L]ocus standi concerns the sufficiency and directness of interest in litigation and that that sufficiency of interest depends on the particular facts of each individual case, I incline to the view that the first applicant as well as the 2nd to 35th applicants have succeeded in proving that they enjoy *locus standi* in respect of any claim for relief flowing from the first respondent's non-compliance with the provisions of the Appa [sic].¹⁷

The court also concluded that the natural person applicants also had *locus standi* to enforce alleged non-compliance with the town-planning requirements on the basis that the standing of township residents to enforce the provisions of the applicable zoning scheme is "generally recognised" in our courts.¹⁸

Although the court reached the "right" decision with regard to the applicants' *locus standi*, the court's approach is anachronistic and unacceptable. This decision could have been made before 1996. Despite the fact that the court acknowledged the applicants' argument as relying on Section 38 of the *Constitution* and Section 32 of NEMA, these provisions are nowhere in the court's reasoning process leading it to decide that the applicants have *locus standi*. The basis of the court's line of reasoning is that the applicants have an interest (at least in respect of the enforcement of APPA) because APPA was enacted in the interests of neighbours of polluting activities. This reasoning, however, does not extend to the first applicant,

15 Hoexter *Administrative Law* 444.

16 *Tergniet* case para 20.

17 *Tergniet* case para 21.

18 *Tergniet* case para 22.

which appeared to have been carried along on the backs of its members in order to satisfy the court as to its *locus standi*.

What would the approach of the court have been had there been only one applicant – the voluntary organisation? It is clear that *locus standi* consists of two elements: capacity to sue (*legitima persona standi in judicio*)¹⁹ and a sufficient interest in the matter at hand.²⁰ The court in the *Tergniet* case appears to have conflated these two requirements – stating that the first applicant was "required to possess a capacity to sue – in the sense of a substantial and sufficient interest in the subject-matter of the particular litigation".²¹ How might a more pedantic court have dealt with the *locus standi* of the first applicant? What I mean by "pedantic" is that Van Reenen J appears to have (in effect) ignored the considerations relating to *locus standi* of the first applicant that were separate to those relating to the other applicants, who were natural persons possessing capacity to litigate and who had an interest arising from their exposure to the emissions of the respondent's activity.

Is this question merely academic? I would suggest that it is not and that it is likely to be crucially important in many cases. In the event that there had been only one applicant (the voluntary association), the distraction of the residents' interests might not have led the court to decide the way it did. Alternatively, if the applicant were an environmental non-governmental organisation it would seemingly not have had *locus standi* on the basis of the reasoning adopted in the *Tergniet* case. The respondent argued that the first applicant did not have the capacity to sue (in the sense of perpetual succession, the capacity of acquiring rights and incurring obligations independently of its members and own property). The court considered neither the merits of this argument, nor the merits of the applicants' argument (the court's summary of which is reproduced above). I find it difficult to fault the approach of the applicants. Section 38 of the *Constitution* provides that "anyone listed in this section has the right to approach a competent court, alleging that a right in the Bill of Rights has been infringed or threatened, and the court may grant appropriate relief ... [own emphasis]". The "anyones" listed in the section include anyone acting in the public

19 Baxter *Administrative Law* 648.

20 Hoexter *Administrative Law* 434.

21 *Tergniet* case para 18.

interest and an association acting in the interest of its members. The section does not refer to "any person", which might be interpreted as requiring legal personality in the sense argued by the respondent's counsel, but "anyone", which is arguably wider. In any event, as reasoned by Davis J in *McCarthy v Constantia Property Owners' Association*,²² Section 39 of the *Constitution* requires a court when interpreting legislation and when developing the common law or customary law to promote the spirit, purport and object of the Bill of Rights. Davis J relied on this provision and his interpretation of the "spirit, purport and object" of the Bill of Rights as entailing a "generous regime of access to courts",²³ as well as protection of the environment, to broaden the common-law strictures on *locus standi* in that case. These arguments taken together, in my view, require a court to go beyond the unnecessary restrictive requirement of capacity to litigate in cases involving public interest litigation, as envisaged by Sections 38(d) and (e) of the *Constitution*.

There is, of course, also Section 32 of NEMA, which the court mentioned in the *Tergniet* case but completely ignored as to its application. As argued (correctly) by the applicant, Section 32 allows any person or group of persons to seek appropriate relief in respect of any breach of, *inter alia*, "any statutory provision concerned with the protection of the environment", in the public interest and in the interest of the protection of the environment. The section refers to any "group of persons", not any group of persons with perpetual succession, the capacity of acquiring rights and incurring obligations independently of its members and own property. Section 32 is designed to broaden the *locus standi* of persons seeking to vindicate statutory environmental interests in the public interest, which includes the interests of the environment. The requirement of capacity to sue as a component of *locus standi* is a product of an era in which neither the *actio popularis* nor litigation in the interest of the environment was recognised, and the courts should adopt a more generous approach to *locus standi* in light of the requirements in Section 38 of the *Constitution* and Section 32 of NEMA. The second requirement for *locus standi* – a sufficient interest – would be satisfied by the statutory interest in Section 32, whether the applicant were a natural person or an organisation.

22 1999 4 SA 847 (C) – hereafter *McCarthy*.

23 *McCarthy* case para 855C.

The problem with the court's approach in the *Tergniet* case is that it emphasises the pre-constitutional requirements for *locus standi* and relegates the *Constitution* and NEMA to the sidelines. The court appeared to be reluctant to use Section 38 and NEMA. Although this did not result in an impediment for the applicants in this case, it sends an unfortunate message – that these provisions are irrelevant. There is a need for more courts to apply NEMA clearly and correctly in order for a body of environmental jurisprudence to be built, if the interests of the environment are to be adequately promoted. More precedents are needed and the precedent in the *Tergniet* case as regards *locus standi* does not contribute anything useful to the jurisprudence.

3 The requirements for an interdict

A further problem for persons litigating in the interest of the environment is raised in the *Tergniet* case. The court correctly pointed out that the requirements for a final interdict were a clear right, an injury actually committed or reasonably apprehended, and the absence of similar protection by any other ordinary remedy.²⁴ In dealing with the first requirement, the court stated that the "applicants as residents and/or property owners living in close proximity to the first respondent's property have a fundamental right to an environment that is not harmful to their health or well-being and to have the environment protected for the benefit of present and future generations".²⁵ This ought to be sufficient to satisfy this requirement. The court, however, went on to consider the relevant provisions of APPA and concluded that the respondent's operation, without the necessary authorisation in terms of the Act, which would ensure that the emission of noxious or offensive gases is eliminated or reduced, amounted to a violation of the applicants' "clear right" to an environment that is not harmful to their health or well-being.²⁶ This finding by the court was that there had been an infringement of the right, which is part of what the second requirement for an interdict entails.²⁷ The court also had regard to the right that the

24 *Tergniet* case para 36.

25 *Tergniet* case para 38, relying on S 24 of the *Constitution*.

26 *Tergniet* case para 39.

27 See Harms "Interdict" para 398, in which the author states that the term "injury" "should be understood to mean infringement of the right which has been established and resultant prejudice".

residents have in respect of their property value as a result of the proximity to an activity which is regarded as a "noxious trade" for purposes of the LUPO.²⁸

The requirement of an injury and resultant prejudice is the second requirement. In the *Tergniet* case, applicants' counsel argued that there is no need to show that damage has been suffered where the complaint pertains to an ongoing breach of a statutory provision.²⁹ The court characterised this as being part of the rule in the *Patz* case to the effect that harm is not a prerequisite for relief where the statutory prohibition has been enacted for the benefit of a particular person or class of persons. The court had already found that the relevant provisions of APPA were provisions enacted, not for the general public, but for the benefit of neighbours,³⁰ which I am not convinced is correct. The nature of air pollution is such that it is not something that affects just people living in proximity to polluters but people generally (that is, the general public). Nevertheless, the court proceeded to consider whether the applicants had succeeded in showing that they had suffered harm, or that they reasonably apprehended harm. After consideration of certain applicants' allegations that they had suffered adverse health effects owing to their exposure to the emissions from the respondent's activities and the respondent's arguments attempting to call such allegations into question, the court concluded that the applicants had "discharged the onus of showing that their physical well-being as well as the amenities they are entitled to enjoy are adversely affected by the first respondent's unlawful conduct".³¹ Whether this is correct on the facts is not relevant to the present commentary; what is relevant is that, as was the case in considering *locus standi*, the *Constitution* (this time Section 24) played an insignificant role in this conclusion. Despite stating that the applicants enjoyed a "fundamental right to an environment that is not harmful to their health or well-being and to have the environment protected for the benefit of present and future generations"³² the basis of the court's finding was that the applicants had shown harm to their health, which would have been a valid basis for a positive decision even without the constitutional right in Section 24.

28 *Tergniet* case para 40.

29 Relying on *Johannesburg City Council v Knoetze & Sons* 1969 2 SA 148 (W) 155C – hereafter *Knoetze*.

30 *Tergniet* case para 20.

31 *Tergniet* case para 46.

32 *Tergniet* case para 38.

There was a similar approach in *Laskey v Showzone CC*,³³ in which the applicants applied for an interdict requiring the respondent to cease causing a noise nuisance that was prohibited in terms of the relevant noise control regulations. The court (Binns-Ward AJ, who, incidentally, was also counsel for the respondent in the *Tergniet* case) also cited the *Patz* case as requiring the relevant statutory provision to have been enacted in the interest of a particular group of persons in order for any of those persons to be able to enforce it through litigation. Alternatively, the applicant/plaintiff would have to show some special injury or damage different from that suffered by the general public.³⁴ On this point, the court considered the noise regulations to have been enacted in the public interest, not in the interest of a group of persons of whom the applicant formed part. The court concluded (on this point):

It follows that the fact that the respondent has been shown to be in apparent breach of ... the noise control regulations does not, without more, entitle the applicants to interdictory relief. In order for the applicants to obtain such relief it is necessary for them to show that the breach has occasioned them harm, or is likely to do so. I am of the view that in the circumstances of this case the requirement of harm would be established if the conduct of the respondent about which applicants complain gave rise to a private nuisance actionable at their instance.³⁵

This means that, in both the *Tergniet* and *Laskey* cases, the applicants had to show harm to themselves. As Freedman³⁶ posits in respect of the decision in the *Laskey* case, "the common law rules thus rendered the regulations redundant insofar as the applicants were concerned".

The existence of harm to the plaintiff/applicant is not particularly problematic in cases such as *Tergniet* and *Laskey* in which there are natural persons who are able to demonstrate what could be described as a physical "invasion" of a right.³⁷ What, however, would a court's approach be where there are no human applicants and the applicant is a non-governmental organisation seeking to protect the environment? Assume the following scenario. A non-governmental organisation (call it "X") applies

33 2007 2 SA 48 (C) – hereafter *Laskey*.

34 *Laskey* case para 13.

35 *Laskey* case para 18.

36 2009 SAJELP 91.

37 *V & A Waterfront Properties (Pty) Ltd v Helicopter & Marine Services (Pty) Ltd* 2006 1 SA 252 (SCA) para 21 and authorities cited therein – hereafter *V & A Waterfront Properties*.

for a final interdict in order to put a stop to an illegal activity that is detrimental to the environment, where there is no obvious (or direct) physical threat to natural persons. Such a scenario is clearly envisaged by Section 32 of NEMA as one appropriate for a court to hear and in which to grant appropriate relief. Because there is no direct harm suffered by any natural person and no personal interest suffered by X, this would be a case in which X is acting in the public interest or in the interest of protecting the environment.³⁸ Applying Section 32 of NEMA, a court ought to find that X has *locus standi* (provided it is genuinely acting in the public interest or interest of the environment).³⁹

When it comes to the interdict, however, X may have some difficulties, which may not be easily overcome. X would first have to show a "clear right". X is not acting in its own interest, but in the public interest or the interest of the protection of the environment, so whose clear right would be applicable here? It is doubtful that the court would regard the "right" of the environment not to be harmed as meeting this requirement. A possible argument is that everyone has the right in Section 24 of the *Constitution* to an environment that is not harmful to health and well-being. Our scenario is not one in which the right to health is under threat (which was the situation in the *Tergniet* case), so it would be necessary to concentrate on the right to an environment that is not harmful to well-being. There is precious little authority on what this means, but in *HTF Developers (Pty) Ltd v Minister of Environmental Affairs and Tourism*,⁴⁰ Murphy J suggests that the term "well-being" is "open-ended and manifestly ... incapable of precise definition. Nevertheless it is critically important in that it defines for the environmental authorities the constitutional objectives of their task."

He quotes Glazewski (seemingly with approval) as follows:

In the environmental context, the potential ambit of a right to 'well-being' is exciting but potentially limitless. The words nevertheless encompass the essence of environmental concern, namely a sense of environmental integrity; a sense that we ought to utilise the environment in a morally responsible and ethical manner. If we abuse the environment we feel a

38 S 32 NEMA.

39 *Lawyers for Human Rights v Minister of Home Affairs* 2004 4 SA 125 (CC) paras 16–22.

40 2006 JDR 0328 (T) para 18 – hereafter *HTF Developers*.

sense of revulsion akin to the position where a beautiful and unique landscape is destroyed, or an animal is cruelly treated.⁴¹

In light of these statements, it could be argued that X's right to an environment not harmful to well-being is threatened or infringed by the illegal activity that is harming the environment, which would adversely affect the environmental integrity that Glazewski mentions in the passage quoted in the *HTF Developers* case. Alternatively, as X is acting in the public interest, it could be argued that everyone's (that is, every member of the public's) right to an environment not harmful to well-being is affected in this way.

This is in keeping with the approach of the Constitutional Court in *Ferreira v Levin*,⁴² in which the court, after suggesting that the courts in constitutional cases ought to adopt a broad approach to standing,⁴³ indicated that it was not necessary that a litigant's *own* right be under threat, but that he or she fall into any one of the categories of persons regarded as having an interest in terms of the standing provision in the Bill of Rights.⁴⁴

Even if this argument were accepted by the court, X would still have to satisfy the second requirement for an interdict: an injury and resultant prejudice. The only *physical* injury being suffered here is by the environment. In *V & A Waterfront Properties*,⁴⁵ Howie P stated that:

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

In our example, the damage to the environment would more than likely be caused by physical means, but no natural person would be suffering physical consequences. Physical consequences, however, are not necessary; all that needs to be shown is a

41 Glazewski *Environmental Law* (2000) 86. This passage does not appear in the second edition of the author's work (2005), but the overall views expressed are similar.

42 1996 1 SA 984 (CC) – hereafter *Ferreira*.

43 *Ferreira* case para 165.

44 *Ferreira* case para 168. That case dealt with S 7(4) of the interim Constitution, the precursor to S 38 in the final *Constitution*.

45 Para 21.

right that has been infringed, and if the court were persuaded by the argument in respect of the "clear right" as outlined above, it would be possible to argue successfully that this right would be invaded by allowing the illegality to persist. The principle in the *Knoetze* case,⁴⁶ referred to above, would not be applicable in many cases owing to the difficulty in showing that the relevant environmental provision had been promulgated in the interest of a particular class of persons as opposed to the general public.

On the basis of decisions such as the *Tergniet* case, it is probably overly optimistic to expect that the arguments outlined above would hold much sway in many courts, with the result that X would not satisfy the requirements of an interdict.

4 The appropriateness of restrictive approaches to standing and remedies in the constitutional era

4.1 Standing

Is there still place for the rule in the *Patz* case (that the relevant statutory provision must have been enacted in the interest of a particular group of persons in order for any of those persons to enforce it through litigation, otherwise the applicant/plaintiff would have to show some special injury or damage different from that suffered by the general public in order to have standing) in the constitutional era, particularly where there is a statutory provision, Section 32 of NEMA, that explicitly gives standing to persons to enforce environmental legislation in the public interest or in the interest of the environment? It is worth quoting Section 32 in full:

- (1) Any person or group of persons may seek appropriate relief in respect of any breach or threatened breach of any provision of this Act, including a principle contained in Chapter 1, or of any provision of a specific environmental management Act, or of any other statutory provision concerned with the protection of the environment or the use of natural resources—
 - (a) in that person's or group of person's own interest;

⁴⁶ The principle is that there is no need to show that damage has been suffered in a case in which the complaint pertains to an ongoing breach of a statutory provision, where the statutory prohibition has been enacted for the benefit of a particular person or class of persons.

- (b) in the interest of, or on behalf of, a person who is, for practical reasons, unable to institute such proceedings;
- (c) in the interest of or on behalf of a group or class of persons whose interests are affected;
- (d) in the public interest; and
- (e) in the interest of protecting the environment.

How can this provision be reconciled with the rule in the *Patz* case? In my view, it cannot be. Section 32 provides for *locus standi* in respect of any breach or threatened breach of any statutory provision concerned with the protection of the environment or the use of natural resources. This provision has application in the circumstances of both the *Tergniet* and the *Laskey* cases. Although it was mentioned in the judgment in the former, it played no role in the decision at all, and was completely ignored in the *Laskey* case. Section 32 does not apply only in cases in which the statutory provision was enacted for the benefit of a specific group of persons from which the plaintiff or applicant is drawn. It applies to all statutory provisions mentioned in Section 32. The rule in the *Patz* case, therefore, cannot find simultaneous application with Section 32 of NEMA.

The next question concerns the appropriate place for the rule in the *Patz* case generally, not just in environmental cases. The rule in the *Patz* case was introduced into our law from English law to provide for an exception to the general rule that there was no *locus standi* in the public interest. The person relying on the rule would be *presumed* to have the type of interest required by the common law, even though he or she could not establish that his or her interests were *in fact* affected.⁴⁷ The rule was, therefore, intended to provide some relief from a restrictive requirement of *locus standi*, which is now, at least in any case involving a breach of or threat to a right in the Bill of Rights (in terms of Section 38 of the *Constitution*), no longer part of our law. The aspect of the rule in the *Patz* case that requires a person to show special damage where the statute was enacted in the public interest, an aspect that was highlighted in both the *Tergniet* and *Laskey* cases, is not a special principle. It is no different from the general common-law requirement that a litigant have sufficient, personal and direct interest in the matter. Consequently, in a case in which the common-law rules of *locus standi* have been superseded by the

⁴⁷ Baxter *Administrative Law* 659–660.

Constitution, and in which the litigant's interest is based on a constitutional right, the rule in the *Patz* case is no longer relevant.

Today, in public interest cases, including environmental cases, the norm for determining *locus standi* should be Section 38 of the *Constitution*, which is taken further by Section 32 of NEMA in cases involving environmental legislation. The restrictive common-law rules of standing have no place in such cases. If the courts in the *Tergniet* and *Laskey* cases had applied the appropriate twenty-first century law, the discussion relating to *locus standi* could have been disposed of in a paragraph in both cases and the *Patz* case would have been confined to its proper place in the history books.

4.2 Requirements for an interdict

In the discussion above on the requirements for an interdict, I have highlighted the problems that may arise in respect of litigants litigating in the public interest or in the interest of the environment. The first possible problem would be showing a clear right. It may be more of a problem to show that there has been an injury and resultant prejudice. This is particularly problematic in cases in which there is no direct injury to a human complainant (for example, in cases involving harm to the environment). Some possible solutions have been outlined above.

Another way to avoid the possible pitfalls of the interdict is to determine whether the same objective could be achieved by utilising another remedy. In essence, a person seeking an interdict is asking the court either to stop an unlawful activity (a prohibitory interdict) or to require an authority to carry out a responsibility it is required to perform (a mandatory interdict). Both the *Tergniet* and *Laskey* cases involved the former. If the objective is to put a stop to an activity that is illegal in terms of environmental legislation, and where Section 32 of NEMA is thus applicable, that section provides that any person or persons may seek *appropriate relief* in the circumstances outlined there.

In *Hichange Investments (Pty) Ltd v Cape Produce Co (Pty) Ltd t/a Pelts Products*,⁴⁸ Leach J considered the issue of "appropriate relief" in terms of Section 32. The first point that the court made was that "there is no reason for the applicant to be limited to relief under s 28(12) [of NEMA] if the facts which are set out justify other 'appropriate relief' being granted under s 32(1)".⁴⁹ Nothing in Section 32 suggests that "appropriate relief" must be in the form of a remedy that has already been recognised in our law, a notion that the dictum in the *Hichange* case appears to support. This is also supported by the Constitutional Court's decision in *Fose v Minister of Safety and Security*,⁵⁰ to which the court referred in the *Hichange* case. In the *Fose* case, the Constitutional Court considered Section 7(4) of the (interim) *Constitution of the Republic of South Africa*,⁵¹ which entitled a court to grant "appropriate relief" upon an infringement of a fundamental right. Leach J observed that:⁵²

The members of the Court appear to have been *ad idem* that, in principle, while a common-law remedy such as damages could constitute 'appropriate relief' as envisaged by that section, the range of remedies from which such relief could be selected was not restricted to existing common-law remedies – see in particular the judgment of Ackermann J⁵³ and Kriegler J.⁵⁴ Importantly Ackermann J went on further to observe:⁵⁵ I have no doubt that this court has a particular duty to ensure that, within the bounds of the Constitution, effective relief be granted for the infringement of any of the rights entrenched in it. In our context an appropriate remedy must mean an effective remedy, for without effective remedies for breach, the values underlying and the rights entrenched in the Constitution cannot properly be upheld or enhanced. Particularly in a country where so few have the means to enforce their rights through the courts, it is essential that on those occasions when the legal process does establish that an infringement of an entrenched right has occurred, it be effectively vindicated. The courts have a particular responsibility in this regard and are obliged to 'forge new tools' and shape innovative remedies, if needs be, to achieve this goal.

There is, however, seemingly a prerequisite for a court to decide on the application of appropriate relief – that the common law, without development in the spirit of

48 2004 2 SA 393 (E) – hereafter *Hichange*.

49 *Hichange* case 408B.

50 1997 3 SA 786 (CC) – hereafter *Fose*.

51 200 of 1993.

52 *Hichange* case 409E–F.

53 *Fose* case 821 para 60.

54 *Fose* case 838 para 104.

55 *Fose* case 826 para 69.

NEMA (in the context of the current discussion), should be shown to be inadequate for the protection of the applicant's rights.⁵⁶ In the *Hichange* case, even though the court was dealing with Section 32 of NEMA, it discussed the extension of the common law in the context of Section 39 of the *Constitution*, but the approach would probably be the same. Leach J stated that:⁵⁷

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

I have argued above that two possible alternative situations might arise: the first is that the court accepts that the general public's right to an environment that is not harmful to well-being is the clear right, and that the harm requirement for an interdict has been satisfied by the continuation of the illegality in question. In that situation, the common law (that is, the interdict) would be adequate. If, however, the court finds that the interdict is not appropriate for use in such circumstances, then the requirement for the first stage in Leach J's approach outlined above has been met. The common law (the remedy of the interdict) would not be regarded as appropriate for the purposes of giving effect to Section 32 of NEMA. That then brings into play the second stage, which concerns the manner in which the law is to be developed.

In the context of Section 32 of NEMA, the relief should be appropriate in that it leads to compliance with the relevant statutory provision, in that person's own interest (in which case he or she would probably have been successful in applying for an interdict) or in the public interest or in the interest of the protection of the environment. In the last two circumstances, where it might not be possible to show an injury and prejudice for purposes of an interdict, alternative relief would be appropriate. If the only requirements for this relief were the requirements of Section 32 itself – a breach or threatened breach of an environmental statute, and that it is in

56 See *Hichange* case para 209H.

57 *Hichange* case paras 209I–210A.

the public interest or interest of the protection of the environment – nobody would be prejudiced nor the court's valuable time wasted. The court could still insist that the case in question be ripe for decision and not academic, and the spectre (probably more apparent than real)⁵⁸ of the vexatious or frivolous litigator would be adequately addressed by means of adverse costs orders. The order to cease the illegal activity would be the remedy.

5 Conclusion

In both the *Laskey* and *Tergniet* cases, the applicants were successful. They would, however, have been successful had they brought these applications during the 1980s. The innovative environmental legislation designed to bring about greater conservation of the environment through the vigilance of the public was conspicuous by its absence in the *rationes* of the judgments. Ignoring the environmental legislation and/or insisting on the application of anachronistic legal principles that have been (or ought to have been) displaced by the new legal principles may well result in environmental litigants being unable to secure relief in the courts in the face of clear illegalities, as was the case in *Verstappen v Port Edward Town Board*,⁵⁹ which was decided shortly before the new constitutional era. In the landmark case of *Director: Mineral Development, Gauteng Region v Save the Vaal Environment*,⁶⁰ the court made the oft-quoted comment that:

Our Constitution, by including environmental rights as fundamental, justiciable human rights, by necessary implication requires that environmental considerations be accorded appropriate recognition and respect in the administrative processes in our country. Together with the change in the ideological climate must also come a change in our legal and administrative approach to environmental concerns.

This is a message that is taking an inordinately long time to filter down into the legal profession because it is certainly not only judges for whom this particular penny has yet to drop. It is fifteen years since the new *Constitution* came into effect and more than ten years since NEMA was enacted, and the jurisprudence relating to litigation

58 See *Wildlife Society of Southern Africa v Minister of Environmental Affairs and Tourism of the Republic of South Africa* 1996 3 SA 1095 (Tk).

59 1994 3 SA 569 (D).

60 1999 2 SA 709 (SCA) para 20.

in the interest of people's environmental rights and the protection of the environment is still very much in its infancy.

There are numerous instances of non-compliance with environmental legislation leading to environmental damage that are coming to light almost daily, whether it is yet another instance of water being contaminated by sewage or mining authorisations being granted in the face of unacceptable environmental impacts. It is in everybody's interest that such illegalities be exposed and corrected, and people need to be encouraged to bring about that result, not made to circumvent procedural obstacles that might have made sense twenty years ago but are completely inappropriate today. This is a challenge for the profession but the legal tools are available. They just need to be used!

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List of abbreviations

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| APPA | Atmospheric Pollution Prevention Act |
| LUPO | Land Use and Planning Ordinance |
| NEMA | National Environmental Management Act |
| SAJELP | South African Journal of Environmental Law and Policy |

PUBLIC INTEREST ENVIRONMENTAL LITIGATION: RECENT CASES RAISE POSSIBLE OBSTACLES

M Kidd*

Summary

Despite the broadening of *locus standi* in environmental cases by both Section 38 of the *Constitution of the Republic of South Africa*, 1996, and Section 32 of the *National Environmental Management Act 107 of 1998*, two recent cases suggest that the pre-constitutional approach to *locus standi* still holds sway in our Courts. Moreover, failure to recognise the environmental right in Section 24 of the Constitution may be an impediment to applicants' ability to bring an interdict application successfully. Correct use of the relevant constitutional provisions ought to obviate such problems, but alternatives are suggested. In the course of the article, it is suggested that the rule in *Patz v Greene* is no longer relevant and should be consigned to the history books.

Keywords

Environment; environmental protection; public interest environmental litigation; *locus standi*; interdict; *Patz v Greene*; environmental right; remedies; Constitution; common law.

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