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Public participation as an essential requirement of the environmental rule of law: Reflections on South Africa's approach in policy and practice

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Summary: *The need for public participation to be embedded in environmental governance has for several decades been accepted in international law. There are many reasons for this, including the fact that public participation facilitates better informed and credible decisions that affect the environment and the people who live in it. However, while acceptance of the need for public participation is widespread, approaches to giving effect to it in practice lie on a spectrum. At one end of the spectrum lie 'weak' methods that arguably pay lip service to the principle rather than providing opportunities for meaningful engagement and change. On the other lie 'strong' methods that embrace the full underlying ethos of public participation and provide real potential for those often marginalised from the core of power to*

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influence outcomes and secure environmentally-just decisions. South Africa's approach provides an opportunity to examine both ends of the public participation spectrum. Post-democracy its approach has moved from a limited, exclusive and mechanistic one to an approach that in environmental policy and legislation in many ways exemplifies the upper rungs of Arnstein's well-known ladder of public participation. Nevertheless, a survey of judgments emphasises that legislative efforts aimed at ensuring 'strong' participation methods can become diluted where officials do not consistently embrace the full value and intended purpose of public participation in their decisions. In such instances the courts can play a valuable role in steering practice back to the intended path.

Key words: *environmental rule of law; constitutional rights; public participation; environmental policy and law reform; public interest litigation*

1 Introduction

Public participation in environmental governance is an essential component of any country's democratic architecture and of realising the environmental rule of law.[1] When conducted meaningfully it gives people an opportunity to influence government decisions and facilitates informed and credible decisions by government as the decision maker has access to a range of relevant information and inputs.[2] In this way it offers those who are often removed from the seats of power the potential to engage with discourses about the environment that may have direct consequences for them and to ensure that environmental burdens and benefits are distributed equally.[3] International acceptance of the importance of public participation is recognised in a range of instruments, including those that provide roadmaps for managing the environment such as principle 10 of the 1992 Rio Declaration on Environment and Development and, more recently, in goal 16 of the Sustainable Development Goals (SDGs) where one of the targets, goal 16.7, is to '[e]nsure responsive, inclusive, participatory and representative

1 See in this regard A du Plessis 'Public participation, good environmental governance and fulfilment of environmental rights' (2008) 2 *Potchefstroom Electronic Journal* 1; UNEP *Environmental rule of law: First global assessment report* (2019) 138.

2 ND King and others (eds) *Environmental management in South Africa* (2018) 142.

3 See S Arnstein 'A ladder of citizen participation' (1969) 35 *Journal of the American Planning Association* 216-224 who writes about public participation in a broader context.

decision making at all levels'.[4] However, practices for giving effect to public participation rights vary and lie on a spectrum ranging from the employment of weak mechanisms to those that are strong. Arnstein provides a useful and well-cited mapping of eight typologies of participation on a ladder linked to associated outcomes that range from 'empty ritual' to 'real power needed to affect outcomes'.[5]

South Africa provides an opportunity to examine both ends of Arnstein's ladder. Despite international recognition of the value of public participation in environmental governance, before South Africa's transition to democracy in 1994, the country's approach to governance generally was characterised by secrecy and exclusion. This pervasive culture extended to environmental decision making in which conservation issues were prioritised over, and often at the expense of, the environmental realities experienced by many South Africans. While there were formal opportunities for commenting on draft legislation, interactive dialogue was not common and participation in decision making was almost non-existent. In addition, the public had limited ability to challenge decisions in the courts because of significant obstacles such as the very narrow way in which legal standing (*locus standi)* was implemented.[6]

Transitioning to democracy, therefore, involved far more than extending the vote to all citizens. It required fundamental changes in policy and the way in which government interacted with the public. This article traces the emergence of public participation as part of environmental policy, law and practice in South Africa since 1994. It begins with a brief background on the context that existed before 1994 with the aim of providing some insight into the dynamics that were at play and which underpinned many of the discussions on the approach to public participation after 1994. That part is followed by a discussion on the approaches to, and outcomes of, the environmental policy processes that took place in the mid to late-1990s. The extent to which the outcome of these and other processes have been taken up in legislation is explained in the next part, after which a brief discussion of the court's adjudication of public participation in environmental disputes is provided. The discussion concludes with some tentative observations about the effectiveness of the codification of public participation.

4 The same is true of the ancillary right to information that is required to be fulfilled in order to enable meaningful participation.
5 Arnstein (n 3) 216.
6 With regard to *locus standi,* see A Rabie & C Eckard '*Locus standi*: The administration's shield and the environmentalist's shackle' (1976) 9 *CILSA* 141.

2 Setting the stage for change

As noted above, apartheid influenced all aspects of South African life, and environmental policy and legislation were no exception. The country's approach to environmental governance was informed by limited public input, which Rossouw and Wiseman describe as follows:[7]

> During the apartheid era, environmental policy-making processes were technocratically driven and broader civil society was excluded from policy deliberations. Stakeholder engagement was restricted to small groups of technical experts. Public participation, if it occurred at all, was limited to information distribution and occasional consultation with selected interest groups, such as conservation lobby organisations.

Steyn's 'Popular environmental struggles in South Africa, 1972-1992' provides a detailed analysis of the context before the transition to democracy.[8] She notes that, typical of the isolated and isolationist apartheid state that existed at the time, changing dynamics in the approach to environmental matters that led to the United Nations (UN) Conference on the Human Environment in 1972 were largely ignored by South Africans involved in the environment. In addition, their focus was not on pollution and waste and the impact of this on socio-economic circumstances or the health and well-being of the majority of South Africans, but rather on the preservation of specific species and 'natural' areas.[9] Steyn's explanation of the context is supported by many others who provide detailed analyses of the different environmental effects and consequences of the apartheid mindset. As illustrative examples, Carruthers's seminal article on the history of the Kruger Park and Cock and Fig's work on conservation areas illustrate how the prioritisation of conservation, coupled with the apartheid policy of forced removals, impacted on many people. Changing perspective, Klugman discusses the major environmental problems that were created by the apartheid forced-removals policy where the balance between natural resources and population were destroyed.[10] The environmental impacts of apartheid policies of

7 N Rossouw & K Wiseman 'South Africa - Learning from the implementation of environmental public policy instruments after the first ten years of democracy in South Africa' (2004) 22 *Impact Assessment and Project Appraisal* 131.

8 P Steyn 'Popular environmental struggles in South Africa, 1972-1992' (2002) 47 *Historia* 125.

9 Steyn (n 8) 126.

10 J Carruthers 'Dissecting the myth: Paul Kruger and the Kruger National Park' (1994) 20 *Journal of Southern African Studies* 263-283; J Cock & D Fig 'From colonial to community-based conservation: Environmental justice and the national parks of South Africa' (2000) 31 *Society in Transition* 22-35; B Klugman 'Victims or villains? Overpopulation and environmental degradation' in J Cock & E Koch (eds) *Going green: People, politics, and the environment in South Africa* (1991) 66-77.

course were not confined to rural areas as the statistics show the marked unevenness in access to basic services that was present at the time.[11]

According to Steyn, by 1974 South Africa's 20 month-old Department of Planning and the Environment spent most of its time on physical planning and 'dividing up the country's empty spaces for future mining and industrial purposes'.[12] During this time, public participation in environmental matters was largely confined to about 50 non-governmental organisations (NGOs) that were apolitical, racially exclusive and conservation-based.[13] The relationship of these organisations with government was collegial, with some even receiving government funding. Indeed, when government requested these NGOs to form a single voice to streamline engagements between civil society and government, they obliged and established the Habitat Council on 5 March 1974.[14] According to Steyn, the Habitat Council significantly weakened the policy influence of individual NGOs as government provided the Council with funding and preferential or exclusive access to and membership of various government committees, boards and commissions. Indeed, Steyn states that government's determination to only deal with the Habitat Council as the 'one voice of the public sector' regarding environmental matters encouraged more organisations to join the Council – which further reduced the diversity of participation. As the *de facto* single conduit for environmental dialogue between government and civil society, the Habitat Council's role grew from that of coordination and liaison to it being a key policy shaper. Steyn notes that the Habitat Council occupied this influential and privileged position until the beginning of 1983 when the Council for the Environment, a statutory body, was established in terms of the Environment Conservation Act 100 of 1982. The Council for Environment in turn steadily diluted the Habitat Council's influence, putting it on a path of terminal decline.[15]

Not content with its convenient and relatively comfortable relationship with the Habitat Council, government's establishment of the Council for the Environment as a statutory body further constrained and controlled public participation under a smokescreen of the good intentions of a formalised public-private engagement

11 See M Kidd 'Environmental justice: A South African perspective' in J Glazewski & G Bradfield (eds) *Environmental justice and the legal process* (1999) 142-162.
12 Steyn (n 8) 126.
13 As above. For a more detailed discussion on South African environmental NGOs at the time, see also Cock & Koch (n 10).
14 Steyn (n 8) 130.
15 Steyn (n 8) 138.

body. Section 5(1)(a) of the Act made the Council for the Environment the principal body for advising the Minister of Environmental Affairs and Tourism on the determination of environmental policy. This new Council 'captured' some of the Habitat Council's leadership as members. According to Steyn, this led to the demise of the Habitat Council's participation in government policy formulation and communication with governmental departments.[16]

Although conservation remained the key focus of mainstream public environmental interest and this interest remained a predominantly white middle-class interest, the late 1980s started seeing challenges to this situation. As Steyn puts it:[17]

> The founding of Earthlife Africa (ELA) in August 1988 marked the beginning of radical changes in the non-governmental sector of the South African environmental movement. ELA, founded upon the theoretical principles of the German Die Grünen political party and organisationally based on the Greenpeace-model, actively advocated a highly politicised environmental agenda. In their view, the environment was not only a political issue, but also a new frontier on which to fight against the injustices of the prevailing apartheid system in the country.

This new environmental movement exemplified by groups such as Earthlife Africa embarked on several campaigns aimed at opposing government and exposing government practices and weaknesses. They became an active part of the broader anti-apartheid movement and an active advocate for democracy and participatory policy making. As part of this broader movement, new alliances and partnerships around social, economic and environmental justice issues started emerging that replaced the conservation-focused narrative with one that was more akin to the progressive global sustainable development narrative and which challenged the double burden of pollution that was experienced by many of the poor.[18]

16 Steyn (n 8) 138.
17 Steyn (n 8) 147.
18 J Cock 'Going green at the grassroots – Environment as a political issue' in Cock & Koch (n 10) 10. 'Environmental justice' entered the South African discourse in 1992 at a conference convened by Earthlife Africa (cf D Hallowes (ed) *Hidden faces: Environment, development, justice: South Africa and the global context* (1993) 4). The essence of its meaning in the South African context was subsequently captured in an Environmental Justice Networking Forum newsletter as follows: 'Environmental justice is about social transformation directed towards meeting basic human needs and enhancing our quality of life – economic quality, health care, housing, human rights, environmental protection, and democracy. In linking environmental and social justice issues the environmental justice approach seeks to challenge the abuse of power which results in poor people having to suffer the effects of environmental damage caused by the greed of others. This includes workers and communities exposed to dangerous chemical pollution, and rural communities without firewood, grazing and water. In recognizing that environmental damage has the greatest impact upon poor people, EJNF seeks to ensure the right of those most affected to participate

The increased momentum created by these groups as well as the reality that apartheid was at its end stage created opportunities for dialogue and debate about future approaches to environmental policy. As one example, from 1991 to 1995 Canada's International Development Research Centre, in partnership with the recently-unbanned African National Congress (ANC), the Congress of South African Trade Unions (COSATU) and the South African National Civic Organisation, conducted a series of missions in South Africa to assist the imminent transition to democracy. One of these was the International Mission on Environmental Policy.[19]

As Rossouw and Wiseman explain:[20]

> When the process of democratisation started, the environmental policy discourse also started to change. Environmental policy debates were broadened to include democratic objectives and social and economic issues. Central to this discourse was the concept of environmental justice. As a result, the environmental policy discourse in the period leading up to, and immediately after, the 1994 elections saw citizens' rights, socio-economic issues and quality of life included in the environmental policy agenda for the first time.

3 New policies, new approaches

The appetite for placing environmental justice on the agenda and making decision making participatory arguably was most visibly demonstrated by the initiation of the Consultative National Environmental Policy Process (CONNEPP) shortly after the first

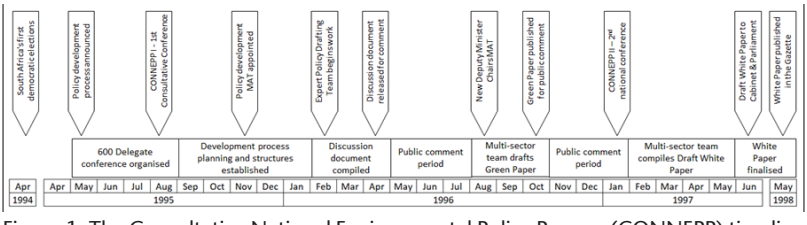

Figure 1: The Consultative National Environmental Policy Process (CONNEPP) timeline

at all levels of environmental decision-making' (*Environmental Justice Networker,* Autumn 1997).

19 The findings of this mission were published as AV Whyte *Building a new South Africa Volume 4: Environment, reconstruction and development* (1995).

20 Rossouw & Wiseman (n 7) 133.

democratic elections.[21] In 1995, after interactions with civil society, the newly-appointed Deputy Minister for Environmental Affairs and Tourism, with the support of the newly-established Committee of Ministers and Members of the Executive Councils: Environment and Nature Conservation (MINMEC), announced a National Consultative Conference to launch the policy development process. The purpose of the process was to develop an environmental policy that laid the basis for a transformative approach to environmental management that aligned with the rights-based approach set out in the interim Constitution and which was representative of all the environmental issues that the country faced.[22] What followed was a process in which public participation featured at each step and in a way that was aimed at ensuring that genuine agency was given to the different sectors of society.

The details of the policy process are explained in the White Paper that emanated from the process in 1998.[23] This started with MINMEC appointing a multi-sectoral technical study team to compile a discussion document for the conference. This document was informed by the output of the International Mission on Environmental Policy referred to above. Then, in August 1995, the first Consultative Conference on National Environmental Policy (CONNEP I) was held in Johannesburg. Six hundred delegates representing all sectors of society attended the conference that was opened by President Nelson Mandela.[24] A participatory process for the development of a new national environmental policy was agreed to, and MINMEC was mandated to appoint a multi-stakeholder Management and Advisory Team (MAT) to guide the process. The MAT was established in November 1995, and it included representatives from business and industry; community-based organisations; environmental NGOs; national government; organised labour; and provincial governments. The Deputy Minister continued to lead the process by chairing the meetings of the multi-stakeholder MAT.

A drafting team of environmental experts, nominated by the MAT, began work on a discussion document in February 1996. The drafting team was assisted by a multi-sectoral reference group, a liaison group comprised of all the national government departments, and input from several international experts. In April 1996 a discussion document titled *Towards a New Environmental Policy for South*

21 The abbreviation is 'CONNEP' when the policy is being referred to and 'CONNEPP' when the policy process is being referred to.
22 Act 200 of 1993.
23 White Paper on Environmental Management Policy for South Africa, GN 749 *GG* 18894 15 May 1998 10-12.
24 White Paper (n 23) 11.

Africa was released for public comment. According to the White Paper 'summaries of the discussion document in English and seven other official languages were also released'.[25] An indication of the extent to which there was a serious intention to make the process as inclusive as possible is illustrated by the fact that 60 000 copies of these documents were distributed. In addition, provincial multi-stakeholder steering committees were then established to oversee provincial participation processes that 'involved millions of people'. Newsletters were also distributed to keep participants abreast of developments.[26]

All the submitted comments were captured in a database and used as input to the compilation of a Green Paper. In August 1996 a new Deputy Minister took over the process leadership and a new multi-sectoral drafting team, representing the same sectors as those on the MAT, drafted the Green Paper on a New Environmental Policy for South Africa, 1996. The Green Paper was made public in October 1996 and, according to the White Paper, 40 000 copies were distributed for comment.[27] A second national conference (CONNEP II) was held in January 1997. It was attended by 265 sectoral representatives who were invited to make submissions on the Green Paper to the Ministry, provincial ministers and the National Parliamentary Portfolio Committee on Environmental Affairs and Tourism. In the interests of full transparency, 'a verbatim record of conference proceedings was distributed to delegates and others on the CONNEPP mailing list'.[28] The Department of Environmental Affairs and Tourism subsequently took responsibility for developing a White Paper, with the MAT and members of the Green Paper drafting team acting as a reference group.

The draft White Paper was published in the *Government Gazette* for comment in July 1997.[29] The revised final policy that emerged from the process was approved by cabinet and published in the *Government Gazette* in 1998.

In summary, as Wynberg and Swiderska note:[30]

25 White Paper (n 23) 11.
26 As above.
27 White Paper (n 23) 12.
28 White Paper (n 23) 11.
29 Draft White Paper on Environmental Management Policy for South Africa, July 1997 GN 1096, *GG* 18164, 28 July 1997.
30 R Wynberg & K Swiderska *Participation in access and benefit-sharing policy case study no 1: South Africa's experience in developing a policy on biodiversity and access to genetic resource*s (2001) 11.

> [T]he Consultative National Environmental Policy Process … was widely viewed as the 'mother of all policy processes' and represented an exhaustive effort to bring on board voices that had hitherto been ignored. In so doing it was intended to shift environmental perspectives and paradigms in South Africa and develop an environmental policy that was relevant and appropriate to people's needs and priorities.

Not surprisingly, the policy itself was significantly influenced by this consultative process as is evident from the numerous references to participation and participatory governance. As an example, the policy states:[31]

> [T]he Department of Environmental Affairs … undertakes to … develop a National Environmental Strategy and Action Plan (NES&AP) [which] … will focus and prioritise goals and objectives requiring action by government … includ[ing] a commitment to: … develop structures, processes and procedures and implement programmes to ensure effective and appropriate participation in environmental governance.

The concept of participation is also covered in six of the Policy's 23 'principles' as follows:[32]

> Capacity Building and Education – All people must have the opportunity to develop the understanding, skills and capacity for effective participation in achieving sustainable development and sustainable resource use …
>
> Due Process – Due process must be applied in all environmental management activities. This includes adherence to the provisions in the Constitution dealing with just administrative action and public participation in environmental governance …
>
> Environmental Justice – … Policy, legal and institutional frameworks must: … ensure equitable representation and participation of all with particular concern for marginalised groups …
>
> Open Information – To give effect to their constitutional rights, everyone must have access to information to enable them to: … participate effectively in environmental governance.
>
> Participation – Government must encourage the inclusion of all interested and affected parties in environmental governance with the aim of achieving equitable and effective participation …
>
> Good Governance – … The democratically elected government is the legitimate representative of the people. In governing it must meet its obligation to give effect to people's environmental rights in section 24 of the Constitution. This includes: … responding to public needs and encouraging public participation in environmental governance by

31 Ch 2 – Vision, Section – A new vision for environmental policy 13.
32 Ch 3 – Principles 20-24.

> providing for the mutual exchange of views and concerns between government and people.

However, it is the inclusion of 'participation in environmental governance' as one of the policy's seven strategic goals that arguably is the most significant participation policy outcome.[33] This goal – Goal 4 – requires the establishment of mechanisms and processes to ensure effective public participation in environmental governance. To this end the policy describes four supporting objectives. The first relates to participation structures, mechanisms and processes and requires (i) the establishment of multi-sectoral advisory structures in all spheres of government to enable all interested and affected parties to participate in environmental governance; (ii) the development of public participation mechanisms and processes that are fair, transparent and effective, and that promote the participation of marginalised sectors of society; and (iii) the allocation of government resources (financial and human) to build institutional capacity in national, provincial and local government spheres for the effective management of participation in environmental governance.

The second supporting objective relates to communication and participation and requires that communication strategies are put in place in all spheres of government to address public participation needs. The third relates to strategic alliances and requires that alliances between government and interested and affected parties should be encouraged in implementing the policy to ensure environmental sustainability in achieving sustainable development. The fourth and final supporting objective relates to marginalised and special interest groups and encourages and supports the involvement of special interest groups such as women, workers, the unemployed, the disabled, traditional healers, the elderly and others in all structures and programmes of environmental governance.

In culmination, the CONNEP process and its outcomes signalled a clear departure from past approaches and an intention for environmental policy processes to be based on a deeper form of meaningful public participation that resonates with the upper echelons of Arnstein's oft-cited ladder of citizen participation.[34] As Arnstein notes,

> there is a critical difference between 'going through the empty ritual of participation and having the real power needed to affect the outcome of the process … participation without the redistribution of power

33 Ch 4 – Strategic goals and objectives, Section – Strategic goals, Goal 4: Participation in environmental governance 35.
34 Arnstein (n 4) 216.

> is an empty and frustrating process for the powerless. It allows the powerholder holders to claim that all sides were considered, but makes it possible for only some sides to benefit.[35]

The CONNEP outcomes were clearly designed to enable a context where participation processes were not 'empty' by incorporating elements of the 'partnership' and 'delegated control' elements that Arnstein identifies at the upper end of her ladder. These set the tone for other policy processes that were conducted in parallel or which followed. For example, the Integrated Pollution and Waste Management Policy process was also highly participatory.[36] Some, however, were criticised because the processes took an 'expert-driven' approach. For example, in relation to the biodiversity policy Wynberg and Swiderska explain that '[w]hereas CONNEPP was about process and consulting as many people as possible to gain political support and set broad objectives, biodiversity was more about active participation in decision making about technical issues'.[37]

Although the biodiversity policy process was supported by many, civil society organisations regarded it as only 'paying lip service' to participation and as being dominated by 'old guard' conservationists.[38] Wynberg and Swiderska accordingly conclude that 'from the beginning the biodiversity policy process was tarnished, regardless of the final policy outcome'. [39] Indeed, until the release of the expert panel's report on iconic species in 2020, there appears to have been some uncertainty as to whether the biodiversity policy was ever formally finalised.[40] According to the panel's report:[41]

> There is some speculation that, as this policy was developed through a process that was separate to the highly regarded CONNEPP process, it was abandoned for fear of it being branded as being an illegitimate product of a process that did not fully reflect the democratic ethos and commitment to broad-based participatory policy development espoused by the new democratically-elected government at the time.

35 As above.
36 White Paper on Integrated Pollution and Waste Management for South Africa GN 227, *GG* 20978, 17 March 2000. A previous process had been initiated by the Department but encountered significant credibility challenges on the basis of it being driven by technical consultants. Post-CONNEP the process started *de novo*.
37 Wynberg & Swiderska (n 30) 23.
38 Wynberg & Swiderska (n 30) 22.
39 Wynberg & Swiderska (n 30) 21.
40 The High-Level Panel of Experts for the Review of Policies, Legislation and Practices on Matters of Elephant, Lion, Leopard and Rhinoceros Management, Breeding, Hunting, Trade and Handling High-Level Panel Report – for submission to the Minister of Environment, Forestry and Fisheries, 15 December 2020, https://www.dffe.gov.za/sites/default/files/reports/2020-12-22_high-levelpanel_report.pdf (accessed 11 April 2022).
41 High-Level Panel (n 40) 61.

In addition, it appears that there were concerns around signs of some dilution of government enthusiasm for having continued participation processes that were as comprehensive as CONNEPP in future policy development. As noted by Wynberg and Swiderska, in 2001 the Department of Environmental Affairs was already adopting a 'fast-track' approach to consultation.[42] However, there were some exceptions to this new approach. For example, in their research that assesses the inclusion of science in policy development, Von der Heyden and others refer to the extensive climate change response policy development process based on the CONNEPP that was initiated in 2005 and completed six years later in 2011.[43]

4 Translating policy into law – The codification of public participation

4.1 The Constitution and constitutionally-mandated legislation

At the same time that the CONNEP process was unfolding, the final Constitution was being negotiated for the country. It was finalised and adopted in the form of the Constitution of the Republic of South Africa, 1996.[44] The Constitution became the supreme source of law and all legislation and conduct must be compatible with it.[45] This is important as it means that the constitutional requirements regarding public participation are binding on all other legislation that is passed as well as all decision making by government. In this regard, there are several provisions in the Constitution indicating that the negotiators were intent on shifting the relationship between government and citizens to being one that reflects accountability, responsiveness and even partnership. As Mureinik states, describing the importance of the Constitution:[46]

> If the new Constitution is a bridge away from a culture of authority, it is clear what it must be a bridge to. It must lead to a culture of justification – a culture in which every exercise of power is expected to be justified; in which the leadership given by government rests on the cogency of the case offered in defence of its decisions; not the

42 Wynberg & Swiderska (n 30) 11.
43 S von der Heyden and others 'Science to policy – Reflections on the South African reality' (2016) *South African Journal of Science* 112.
44 The Act was initially adopted as the Constitution of the Republic of South Africa 108 of 1996. Subsequently it was felt that, because the Constitution is supreme, it should not have the status of an ordinary Act. The Citation of Constitutional Laws Act 5 of 2005 was therefore passed which requires the Constitution to be cited as indicated in the text.
45 Sec 2.
46 E Mureinik 'A bridge to where? Introducing the interim Bill of Rights' (1994) 10 *South African Journal on Human Rights* 31.

> fear inspired by the force at its command. The new order must be a community built on persuasion, not coercion.

This shift is evident in many provisions of the Constitution. For example, the Preamble states that the Constitution is aimed at laying a foundation 'for a democratic and open society in which government is based on the will of the people and every citizen is protected equally by law', as well as the basic values and principles governing public administration that require that the '[p]ublic administration must be accountable' and that '[t]ransparency must be fostered by providing the public with timely, accessible and accurate information'.[47] While these requirements are important elements for creating a climate of public participation, the Constitution also contains more overt provisions. For example, apart from an objective of local government being to 'encourage the involvement of communities and community organisations in the matters of local government',[48] the basic values and principles of public administration also require that '[p]eople's needs must be responded to, and the public must be encouraged to participate in policy making'.[49]

Undoubtedly the most significant provision in the Constitution with respect to public participation is found in the right to administrative justice in the Bill of Rights. The right to administrative justice is contained in section 33 and provides that every person is entitled to lawful, reasonable and procedurally fair administrative action as well as written reasons for decisions that adversely affect them. When the Bill of Rights was adopted, wording was included in the Constitution that required specific legislation be passed to provide more detailed content to the right.[50] The Promotion of Administrative Justice Act 3 of 2000 (PAJA) was accordingly passed to give effect to this obligation.

In a nutshell, PAJA explains what is required to give effect to lawful, procedurally fair and reasonable decision making. With regard to public participation, PAJA deals with two types of procedural fairness situations, namely, those where an individual is involved (section 3) and those where the general public is affected (section 4). Minimum participation requirements are stipulated for both. Because PAJA is a constitutionally-mandated Act, it is a law of general application. This means that the requirements of PAJA must be followed when any 'administrative action' is taken by an environmental government

47 Secs195(1)(f) & (g).
48 Sec 152(1)(e).
49 Sec 195(1)(e).
50 Sec 33(3).

official or politician, unless there are equivalent procedures in the relevant environmental legislation.[51] PAJA, therefore, expressly sets out the minimum rules of public participation that must be complied with.

The Constitution accordingly expanded the approach to public participation. Instead of mechanistically allowing people to comment on draft legislation through a formal publication and written comment process, it reflects an understanding that participation is a critical means of ensuring democracy and that it must be enabled, or even solicited, and encouraged in a meaningful way in respect of policy, legislation and decision making. This represents a substantial change from the limited, almost token, approach that prevailed in the apartheid era.

4.2 The environmental law reform process[52]

Apart from the constitutional negotiations, the environmental policy processes identified many weaknesses with existing environmental legislation. Shortly after the Constitution had been adopted, and by 1997, government therefore began an extensive law reform process to formally overhaul the existing legislative framework. This provided an ideal opportunity to incorporate the call for enhanced public participation into legislation and to make it a legally-binding requirement, along with ancillary provisions such as rights in respect of access to information that need to be in place to create an enabling environment for participation to be meaningful. The law reform process marked the beginning of the incremental codification of public participation into environmental legislation.

The adoption of the new policies signalled the demise of the existing Environment Conservation Act 73 of 1989 (ECA) that was regarded as being too limited to address the approach envisaged by the White Paper. However, while new legislation was being drafted, ECA continued to be a significant piece of environmental legislation. It was, however, primarily framework legislation and required regulations to become fully effective. Since very few regulations had been passed by 1994, significant gaps existed in the regulatory framework. A key example was the gap in environmental impact

51 The meaning of administrative action involves understanding a complicated definition that is contained in sec 1 of the Act – a discussion of which is beyond the scope of this article. Also, in some instances PAJA permits other legislation to prescribe fair but different procedures if they are compatible with the right to administrative justice.

52 Limited portions of this part draw on Hall's PhD thesis.

regulation as a result of the failure of the Minister of Environmental Affairs to utilise the powers contained in sections 21, 22 and 26 regarding the listing of proposed activities that required authorisation, which could only be obtained after conducting an environmental impact assessment (EIA).

Together these sections provided an important environmental management mechanism as they enabled officials to assess all the environmental impacts of an activity before the activity commenced. Addressing this regulatory gap assumed a priority in the law reform process, and in 1997 the Minister published a list of activities and EIA Regulations.[53] The EIA Regulations established the process for ensuring that the potential impacts and mitigation measures of a proposed activity as well as alternatives to the activity were identified and assessed prior to a decision on an application. These were a watershed in environmental law because, unlike other environmental legislation at the time, the EIA Regulations required the public to be consulted as part of the application process. They also required the competent authority to issue a record of decision to the applicant or to any interested party on request. The requirements regarding public participation and transparency of decision making and public participation together with the Bill of Rights increased the potential for the public to both influence and challenge decisions regarding proposed projects that were listed as potentially having a significant environmental impact. In addition, any member of the public (including the applicant) was entitled to appeal the decision on the application to the minister or provincial minister (MEC), as the case may be.[54]

Once the EIA Regulations were finalised, the focus of law reform shifted to the development of overarching framework legislation. After less than a year, Parliament promulgated the National Environmental Management Act 107 of 1998 (NEMA) which repeals ECA on an incremental basis.[55] The objective of NEMA is to provide the general approach to environmental management, protection and enforcement. Although much of the Act was initially dedicated to intergovernmental coordination mechanisms,[56] it contains

53 Regulations regarding Activities Identified under Section 21(1) GNR1182, 1183 and 1184, *GG* 18261, 5 September 1997.

54 Sec 35.

55 Eg, sec 50 states that regulations and notices issued pursuant to secs 21 and 22 are repealed with effect from a date determined by the minister, provided that they have become redundant because similar regulations have been passed in terms of sec 24 of NEMA. Certain sections of ECA currently remain in effect.

56 After ten years of implementation, the institutions that were established to facilitate coordination were apparently considered to be ineffective or overly cumbersome by the Department of Environmental Affairs and the relevant

important provisions regarding the role of the public participation in the discharge of the environmental function. The first of these is the inclusion of a set of principles in chapter 1, most of which emanated from CONNEPP. These principles reflect the changes in the approach to public administration, which the public identified as being necessary to address the poor practices of the past. They were included in NEMA to address the public's concern that officials would operate in a business-as-usual manner unless the principles were made legally binding.[57] In addition to listing the principles, NEMA stipulates that the principles apply to all significant public administration activities involving the environment. Decision making on applications, enforcement, the development of policies and strategies and interpretation under any environmental legislation all fall within the scope of application of the principles.[58] The principles accordingly also provide the basis for reviewing the defensibility of officials' decisions.[59]

Public participation features prominently in the list of principles. In this regard, section 2(4)(f) states:

> The participation of all interested and affected parties in environmental governance must be promoted, and all people must have the opportunity to develop the understanding, skills and capacity necessary for achieving equitable and effective participation, and participation by vulnerable and disadvantaged persons must be ensured.

The wording of the principle makes it clear that Parliament's intention not merely is to articulate a right to participation and that affording people an opportunity to participate alone is not sufficient. In order for the participation to be meaningful, people must be empowered to participate, and particular efforts must be taken to ensure that the voices of those who are often marginalised in society, that is, the vulnerable and disadvantaged, are heard. The expansion of the right to participation in this way is important in the context of South African society where there are vast differences between people's social, economic and educational circumstances. As King and others note, the principle means that public participation 'is not to be reserved for only the rich and powerful'.[60]

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provisions of the Act were repealed or amended by the National Environmental Laws Amendment Act 14 of 2009.

57 Personal knowledge of Jenny Hall as member of the Green Paper and NEMA drafting team.

58 Secs 2(1)(b), (c) & (e).

59 Reference to the principles is also made in the sectoral legislation discussed below.

60 King and others (n 3) 142.

The need to empower people to participate effectively and to ensure that participation is broad-based and reflective of all sectors of society is emphasised in other principles. For example, the need to empower people is echoed in section 4(2)(h) which states that '[c]ommunity well-being and empowerment must be promoted through environmental education, the raising of environmental awareness, the sharing of knowledge and experience and other appropriate means'. Similarly, the need to include the historically marginalised is reflected in section 2(4)(q) which states that '[t]he vital role of women and youth in environmental management and development must be recognised and their full participation therein must be promoted'.

In addition, the idea that participation should be embraced as an important component of government decision making and not merely as a formal requirement is emphasised in section 2(4)(g). This principle reminds decision makers that public participation requires decision makers to go beyond the motions of offering an opportunity to comment. It requires serious and careful consideration to be given to any inputs that are made. In this regard, the principle says that '[d]ecisions must take into account the interests, needs and values of all interested and affected parties, and this includes recognising all forms of knowledge, including traditional and ordinary knowledge'.

Principles such as these were supplemented by sections 3 to 6 of the Act that established a National Environmental Advisory Forum and provided for its composition and operation. The Forum was to be comprised of members from different sectors and was intended to advise the minister on environmental matters. In combination, these point to a willingness to give legislative effect to the intention expressed in the CONNEP outcomes of participation being meaningful and capable of genuine influence, that is, a formal departure from the 'empty benefits' approach to which Arnstein refers, which was characteristic of apartheid era legislation.

Apart from the principles, the need for public participation is reflected in other provisions of NEMA, most notably chapter 5 that contains the only substantive regulatory provisions in the Act. The purpose of the chapter is to promote the application of environmental management tools in order to ensure integrated environmental management. Although the scope of the chapter is broader than the EIA provisions in ECA, until recent amendments, the majority of the provisions related to the authorisation of activities on the basis of EIAs. In setting out the requirements and criteria for passing regulations to give detailed effect to the chapter, section 24(2)(d) requires that the procedures for conducting an EIA must 'ensure adequate

and appropriate opportunity for public participation in decisions that may affect the environment'. In addition, section 24(4)(a)(v) requires that every application must include 'public information and participation procedures which provide all interested and affected parties, including all organs of state in all spheres of government that may have jurisdiction over any aspect of the activity, with a reasonable opportunity to participate in those information and participation procedures'.

The EIA Regulations that were passed in terms of ECA were repealed and replaced in 2006 by a new set of regulations and notices of listed activities passed in terms of NEMA. One of the reasons for developing new regulations was the perceived need to improve the provisions regarding public participation.[61] The new regulations contained far more detail and just after they were published, government also released a guideline on conducting public participation.[62]

This continual process of refinement in the legislation illustrates that the quest for incorporating public participation into environmental decision making has not been a once-off static event. This is also evidenced by other changes. NEMA, for example, was amended in 2008 to include a new provision in section 1(5) which emphasises the relationship between the implementation of NEMA and the requirements of PAJA.[63] In this regard, section 1(5) states that '[a]ny administrative process conducted or decision taken in terms of this Act must be conducted or taken in accordance with the Promotion of Administrative Justice Act, 2000 (Act No 3 of 2000), unless otherwise provided for in this Act'.

The subsection probably is unnecessary as the requirements of PAJA are automatically applicable and in many instances the requirements, and often more, are already written into NEMA and the associated regulations. Nevertheless, it does show an ongoing awareness of the need for public participation to be clearly articulated. Unfortunately, there has also been some diminishment of the participatory provisions. Sections 3 to 6 mentioned above,

61 GNR 385, 386 and 387, 21 April 2006. Technically some of these issues did not require legislative intervention. However, they were included in the Regulations because of the inexperience of many officials and the need for certainty. Personal knowledge, drafter of the Regulations.

62 D de Waal and others DEAT, *Guideline 4: Public participation* (2005) Integrated environmental management guideline series, Department of Environmental Affairs and Tourism. The 2006 Regulations have also been amended and replaced on several occasions including in 2010 and 2014. See GNR 543, GNR 544, GNR 545 and GNR 546, *GG* 33306, 18 June 2010 and GNR 982, GNR 983, GNR 984 and GNR 985, *GG* 38282, 4 December 2014.

63 Sec 1(5) was inserted by sec 1(s) of the National Environmental Management Amendment Act 62 of 2008.

which established a National Environmental Advisory Forum and provided for its composition and operation, were repealed in 2009 and replaced with a single section 3A that grants the minister a discretion to establish participatory structures.[64]

A final point worth noting about NEMA in relation to the role of the public relates to the state of distrust between the public and government that existed prior to 1994. During CONNEPP the public raised concerns about existing compliance and enforcement practices. NEMA addresses these concerns in chapter 7 which introduced a new and expanded approach to compliance and enforcement. Of relevance to this discussion are the provisions relating to civil enforcement. Section 28 introduces a duty of care to prevent or, where authorised, minimise environmental degradation. Where a person fails to comply with the duty, government may issue a directive indicating steps that must be complied with. Section 28(12) provides a broad cause of action for public interest litigation as it empowers the public to enforce a violation of the duty of care where the state has failed to act. In addition, chapter 7 also seeks to strengthen the watch dog role that the public can play in securing compliance with environmental objectives. It expands *locus standi* and authorises the court not to award costs against a person who initiates legal proceedings with *bona fide* motives.[65]

Although NEMA provided a new framework for environmental management, it lacked sector-specific provisions. Government accordingly developed further legislation to provide for the more focused regulation of waste, air, biodiversity, protected areas and coastal management.[66] Collectively these, and a few other Acts, are known as the specific environmental management Acts or SEMAs.[67]

The SEMAs that regulate pollution and waste issues are less explicit about the need for public participation in decision-making processes. However, as the principles in NEMA apply to the SEMAs, this is not

64 National Environmental Laws Amendment Act 14 of 2009.
65 Sec 32.
66 The development of these Acts took significantly longer. The first, the National Environmental Management: Protected Areas Act, was promulgated in 2003 (Act 57 of 2003). The National Environmental Management: Biodiversity Act (Act 10 of 2004) and National Environmental Management: Air Quality Act (Act 39 of 2004) followed in 2004. In 2008 the National Environmental Management: Integrated Coastal Management Act (Act 24 of 2008) and National Environmental Management: Waste Act (Act 59 of 2008) were promulgated. Collectively these, and a few other Acts, are known as the specific environmental management Acts or SEMAs, a term that is defined in sec 1 of NEMA. These Acts also adopt a framework approach to the different sectors and accordingly require regulations and notices to become fully operationalised.
67 Sec 1 of NEMA sets out a formal definition of the SEMAs that lists the Acts that are deemed to be SEMAs.

necessarily an indication that the appetite for public participation became diluted over time so much as it was not entirely necessary. In addition, the decision-making processes are linked directly, or in practice, to the EIA provisions in NEMA.[68] Like the SEMAs that regulate pollution and waste issues, those that regulate the natural environment are also generally less explicit about the need for public participation in decision-making processes regarding applications for licences and permits. As the decision-making process in these instances often is not linked to the EIA process provided in NEMA, it may well be that these SEMAs reflect a less progressive approach. Nevertheless, the principles in NEMA will also apply to decisions made in terms of these SEMAs, as will the requirements of PAJA.

5 Transformative adjudication – The role of the courts in upholding the right to public participation

Policy and legislation lay the basis for democratic environmental governance, but that is not secured unless it is given effect to. The courts have an important role to play in realising the constitutional requirement for the transformation of society as a whole, an aspect of which includes overseeing how public participation in environmental issues is given effect to in practice. Although it is beyond the scope of this discussion to provide an exhaustive account of how the courts have adjudicated matters involving these disputes, a few preliminary observations are made.

68 One exception to this was the National Water Act 36 of 1998 (NWA), the development of which was initiated by the Department of Water Affairs and Forestry (as it was called at the time) as opposed to the National Environmental Department. In terms of the NWA, a licence is required to carry out a water usage that is listed in sec 21. The licensing procedure is set out in sec 41. As King & Reddell note, although the Preamble to the Act recognises the important role that the public can play in providing input to water-related strategies, sec 41 'failed to provide an enabling platform for robust public participation in water use licensing processes'. (See P King & C Reddell 'Public participation and water use rights' (2015) 18 *Potchefstroom Electronic Journal* 4 954). This is because sec 41 gives the licensing authority a discretion to invite comments from the public and does not make public participation in the applications mandatory. Although this weakness may arguably be surmounted by the application of PAJA to water use licence applications, the approach in the NWA clearly is not optimal as in practice there is a risk that the requirements of PAJA may be overlooked. However, as King & Reddell point out (956), the dilution of the potential for public participation in terms of the NWA to be adequate lies in recent amendments to the Act in the form of sec 41(5) which requires that the licensing process be aligned with the EIA decision-making process in NEMA. In addition, more recently-passed regulations regarding the Procedural Requirements for Licence Applications and Appeals, 2017 contain provisions regarding undertaking public participation processes in licence applications. (See GN 267, *GG* 40713, 24 March 2017. See Regs 17-19).

Not surprisingly, given the explicit requirement to involve the public in EIAs, many of the initial challenges that were brought to the courts based on the new environmental legislation related to EIA decision-making processes. What was perhaps unexpected is that, for a period of time, it frequently was the business community that sought to enforce the right to have their comments considered properly by decision makers. There was a spate of so-called 'filling station cases' in which oil companies, existing filling station owners or the filling station owner's association, attempted to overturn decisions to grant authorisation to build new filling stations.[69]

These cases arguably were an abuse of the newly-expanded public participation provisions. Although the claims may have been based on environmental ones, they in fact mostly were a thinly-veiled attempt to stop competition from entering the market. Nevertheless, in the judgments handed down by the Supreme Court of Appeal and Constitutional Court important jurisprudence emerged.[70] One aspect of this was that the courts accepted the businesses' claim that decisions had to include a consideration of their comments regarding the economic impacts of a new activity on existing facility. Despite the origins of these claims being based on narrow self-interest as opposed to environmental protection, they showed that the public participation provisions that are provided for in legislation can ultimately influence decision-making practice in that this litigation resulted in decision makers being compelled to consider all three of the pillars of sustainable development – society, economy and the environment.

Amidst the filling station litigation, the right to public participation was also considered from the perspective of NGOs in *Earthlife Africa (Cape Town) v Director General Department of Environmental Affairs and Tourism & Another.*[71] In this case Earthlife Africa (Earthlife) had

69 See, eg, *Sasol Oil (Pty) Ltd & Another v Metcalfe NO; BP Southern Africa v MEC for Agriculture, Conservation, Environment and Land Affairs* 2004 (5) SA 124 (T); *All the Best Trading CC t/a Parkville Motors & Others v SN Nyagar Property Development and Construction CC & Others* 2005 (3) SA 396 (T); *Capital Park Motors CC & Another v Shell South Africa Marketing (Pty) Ltd & Others* (T) Case 3016/05 18 March 2007, unreported; *Turnstone Trading CC v Director-General Environmental Management, Department of Agriculture, Conservation and Development and Others* (T) Case 3104/04 11 March 2005, unreported; and *Fuel Retailers Association of Southern Africa (Pty) Ltd v The Director-General Environmental Management, Department of Agriculture, Conservation and Environment for Mpumalanga Province & Others* (T) Case 35064/2002 28 July 2005, unreported.

70 See *MEC for Agriculture, Conservation and Environment v Sasol Oil (Pty) Ltd & Another* 2006 (1) SA 66 (SCA); *Fuel Retailers Association of SA (Pty) Ltd v Director-General, Environmental Management, Mpumalanga & Others* 2007 (2) SA 163 (SCA) and *Fuel Retailers Association of Southern Africa (Pty) Ltd v Director-General: Environmental Management, Mpumalanga & Others* 2007 (6) SA 4 (CC).

71 2005 (3) SA 156 (C) (*Earthlife*).

participated in the EIA public process in respect of a controversial project to develop nuclear facilities. It argued that the process was flawed as it 'did not have access to crucial information and documents that were required to enable it to make full and proper representations'; it was not given the opportunity to make submissions on the final EIA documentation that was submitted by the consultants to government; and that it was limited to making submissions to the consultants as opposed to the director-general himself, that is, the decision maker.[72]

Although the Court did not address the first ground, it did consider the other two grounds in extensive detail in a judgment that has become a benchmark of the requirements of public participation and which is regularly cited by other courts. With regard to the second point, the director-general had argued that the EIA Regulations did not provide for public comment after the finalisation of the EIA documentation.[73] The Court described the director-general's approach as being 'fundamentally unsound'[74] as, and in an oversimplification, such an approach meant that Earthlife's participation would be limited to the investigation phase of the EIA and it would be excluded from influencing the actual decision-making process. It found this to be procedurally unfair as the final documentation that the consultant had submitted was very different from the draft documentation and this would result in the decision being based on substantially different and new information on which Earthlife had not had an opportunity to comment.[75] The Court also displayed a willingness to interrogate the state of mind and intention of the decision maker. It dismissed government's argument that Earthlife had access to the final documentation and so could have made comments if it had wanted to. It held that because the director-general had clearly adopted an attitude that Earthlife was not entitled to comment on the final documents, comments on the document would have been 'meaningless'.[76]

In more recent judgments, the courts have had the opportunity to engage with what 'meaningful' public participation involves in the EIA process and, by implication, government's acceptance of the processes that have been conducted. In 2021 and 2022 judgments were handed down in respect of proposed, or actual, seismic testing off the coastline of South Africa that provoked significant outrage

72 *Earthlife* (n 71) para 75.
73 *Earthlife* para 172G.
74 *Earthlife* para 172I.
75 *Earthlife* paras 172I-173B.
76 *Earthlife* para 174E.

among many. In *Sustaining the Wild Coast NPC and Six Others v Shell Exploration and Production South Africa BV and Four Others* the Court's findings resonate with the approach to public participation envisaged in CONNEP and the NEMA principles.[77] It held that Shell had a duty to ensure that the public participation process was meaningful in relation to the communities and individuals who would be affected by the seismic survey.[78] In finding that Shell's process was inadequate and 'substantially flawed', the Court was clear that the ability to participate must be facilitated and that the circumstances of affected individuals must be taken into account. It pointed to clear examples where this had not taken place. One was that newspaper notices advising the public of the project only being published in English and Afrikaans, as opposed to isiZulu or isiXhosa, which are the languages predominantly spoken in the area, excluded those who cannot read English and Afrikaans from the process – a finding that emphasises the interrelationship between the right of access to information and effective participation.[79] Another related to the location of public meetings where the Court found that holding public meetings in major centres rather than close to the community resulted in the community being excluded from the process.[80] A third was the way in which the stakeholder database and analysis had been compiled.[81] The importance that the Court attached to the requirement that public participation must not only be undertaken as part of the application process, but that it be meaningful is illustrated by its finding that the awarding of an exploration right that is based on a substantially-flawed consultation process is unlawful and invalid.[82]

A few months later another judgment was handed down in respect of seismic survey testing, this time in the Western Cape. The Court in *Adams & Others v Minister of Mineral Resources and Energy & Others* adopted a similar approach to that reflected in *Sustaining the Wild Coast*.[83] In describing the consultant's mindset as 'worrying', the Court also pointed out the inadequacies in the way that stakeholders had been identified and of not publishing advertisements in isiXhosa. It found that the approach that had been adopted meant that the 'illiterate and the poor were by design of the methodology excluded'.[84] The pro-poor approach that is reflected in these judgments is to be welcomed as it sends a clear signal that

77 Case 3491/2021 Eastern Cape Division of the High Court, 28 December 2021.
78 *Sustaining the Wild Coast* (n 77) para 33.
79 *Sustaining the Wild Coast* para 22. The right of access to information is enshrined in sec 32 specifically of the Constitution.
80 *Sustaining the Wild Coast* (n 77) para 24.
81 *Sustaining the Wild Coast* paras 28 & 29.
82 *Sustaining the Wild Coast* para 34.
83 Case 1306/22, Western Cape High Court, 1 March 2022.
84 *Adams* (n 83) paras 8 & 9.

the underlying ethos of public participation must be embraced and that mechanistic compliance with legislative requirements is not acceptable.

While these judgments provide an insight into the courts' willingness to uphold and develop the right to public participation in decisions on applications for authorisation, in cases involving challenges to legislation the courts have also shown a willingness to require public participation to be taken seriously by government and not be dealt with as a mere formality. Examples of this can be found in three judgments in respect of challenges to biodiversity-related regulations which, like the filling station cases, were initiated by persons with vested business interests. The first judgment, *SA Predator Breeders Association & Others v Minister of Environmental Affairs and Tourism*[85] dealt with the controversial issue of the hunting of lions that have been purposefully reared to be killed for hunting trophies, so-called canned lion hunting. The minister had published the Threatened or Protected Species Regulations in 2007 in terms of the Biodiversity Act together with lists of critically-endangered, endangered, vulnerable and protected species, including lions.[86] During litigation in the court *a quo* the minister amended the regulations to remove lions from the list to ensure that while the challenge in respect of including lions was being considered, the litigation did not affect other listed species. The minister had, however, made it clear that he would make further amendments to the regulations to re-include lions in the future. The appellant argued that the regulations were flawed as the minister had not considered their representations properly. The Supreme Court of Appeal agreed. Noting that the minister had only seen the comments of the Association after the regulations had been substantially finalised and had then published the regulations two weeks later, it held that the minister 'could not and did not apply his mind to the substance of their written representations'.[87]

The second case, *Kruger & Another v The Minister of Water and Environmental Affairs & Another*[88] involved a challenge to the moratorium on trading in rhino horn that the minister had imposed in response to the scourge of rhino poaching that was occurring. The challenge was brought by the biggest rhino breeder in the country, who argued that the minister should have consulted with him personally before imposing the moratorium. The High Court disagreed. However, in looking at the public participation

85 (72/10) [2010] ZASCA 151.
86 GNR152, GNR150 and GNR151, 23 February 2007.
87 *SA Predator Breeders Association* (n 85) para 21.
88 (57221/12) [2015] ZAGPPHC 1018.

requirements in sections 99 and 100 of the Biodiversity Act, it found that the minister had not complied with these because, for example, the draft moratorium had not been published in a newspaper. It also commented that it would have expected the minister to have gone 'beyond the minimum requirement' – an indication that the Court does not support lip service being paid to the public participation requirement. Furthermore, even though there had been interaction and consultation with stakeholders during the process – in a clear signal that the Court will insist on full compliance with procedural fairness provisions – it rejected the minister's argument that this constituted substantial compliance with the requirements. Both the Supreme Court of Appeal and the Constitutional Court denied the minister's request to appeal the decision.

This approach was cited with approval in late 2021 in the judgment of *The Federation of Fly Fishers v The Minister of Environmental Affairs* – a matter that involved a dispute regarding the listing of trout species as alien invasive ones in terms of the Biodiversity Act.[89] In requiring strict adherence to formal procedural requirements, however, the Court also stressed the need for public participation to be meaningful, as required by the Act and as observed in *Kruger*. It noted that sections 99 and 100 of the Biodiversity Act expressly afford a right to participate, and that '[p]articipation can only be meaningful if sufficient information is provided to enable the public to deal with the substance of the subject-matter and not only the fact that the activity of amendment is undertaken'.[90] It expanded on this by stating:[91]

> Public participation in democratic processes is not the exclusive preserve of educated members of society who can read English, or the privileged few who have access to the internet. Participative democracy is one of the foundational values of the Constitution and everyone should be encouraged and enabled to participate. Section 100 gives effect to the notion of participative democracy and should be interpreted in a manner consistent with that notion.

The lack of substantive compliance with the ethos underpinning the need for public participation clearly was a strong factor in the Court reaching the decision that the notices were invalid and demonstrate a consistency with the thinking of the courts in authorisation-related matters.[92]

89 (62486/2018) [2021] ZAGPPHC 575 (10 September 2021).
90 *Fly Fishers* (n 89 para 45.
91 *Fly Fishers* (n 89) para 66 (references omitted).
92 *Fly Fishers* (n 89 para 67.

A third aspect that the courts have been required to consider in respect of public participation is whether it is legitimate to suppress it. While it was noted above that business has been willing to utilise public participation requirements to pursue its interests, it has also been willing to attempt to thwart attempts by NGOs to do so. In this regard, during the filling station spate of litigation against government, in one case, *Petro Props (Pty) Ltd v Barlow & Another,* a business attempted to silence participation.[93] The Court resisted the attempt. In dismissing an application for an interdict to stop a public campaign against the construction of a filling station in a wetland, it accepted that the campaign's actions 'had been selfless and that their *modus operandi* had been entirely peaceful and geared towards balanced public participation' and that 'no decision-making power or process in terms of the Environment Conservation Act 73 of 1989 could be immune from public debate or the lodging of representations and that it wanted to prevent a situation that would deter people with environmental objections from stepping forward as active citizens'.[94]

Since this judgment, others from the business sector have made attempts to rely on the courts to stifle voices that are in opposition.[95] In the most recent judgment on the issue, *Mineral Sands Resources (Pty) Ltd & Another v Reddell & Others and two related cases* that subsequently was upheld by the Constitutional Court, the Western Cape High Court was required to adjudicate a matter that had all the hallmarks of a SLAPP suit.[96] 'SLAPP' is an abbreviation for a phenomenon known as 'strategic litigation against public participation' in which a corporate entity attempts to silence opposition by claiming large amounts of damages for comments made by members of the public. The Court provided a comprehensive discussion on the origins and consideration of SLAPP suits internationally. It emphasised the chilling effect that these suits can have, not only on those being sued, but also on those who consider speaking out against an action.[97] It also made several firm comments about the importance of public participation and the role that it has in the environmental rule of law. These included findings that

93 2006 (5) SA 160 (W).
94 Du Plessis (n 1) 22.
95 A number of cases that bear the characteristics of SLAPP suits have over the years been heard by the courts. See, eg, *Anglo Platinum Ltd v Spoor* 2006 JDR 0859 (T); *Wraypex (Pty) Ltd v Barnes* 2011 JDR 0084 (GNP) and *Landev (Pty) Ltd v Black Eagle Project Roodekrans In re: Black Eagle Project Roodekrans v MEC Department Agriculture Conservation and Environment Gauteng Provincial Government & Others* (6085/07) [2010] ZAGPJHC 18 (29 March 2010).
96 2021 (4) SA 268 (WCC) and *Mineral Sands Resources (Pty) Ltd & Others v Reddell & Others* 2023 (2) SA 68 (CC).
97 This is evident in the opening quotation used in the judgment as well as other paragraphs such as para 61.

> [p]ublic participation is a key component in environmental activism, and the chilling effect of SLAPP can be detrimental to the enforcement of environmental rights …The social and economic power of large trading corporations renders it critically important that they be open to public scrutiny without the inhibiting risk of crippling liability for defamation. Any legal action aimed at stifling public discourse and impairing public debates should be discouraged.[98]

In finding against the plaintiffs, it noted that '[c]orporations should not be allowed to weaponise our legal system against the ordinary citizen and activists in order to intimidate and silence them'.[99] In this type of litigation the courts, therefore, also seem to have maintained a consistent approach towards protecting the right to public participation in these circumstances.

Business attempts to stifle civil society voices being heard have also been visible in the area of public access to information. In these instances, the courts have been called on to consider the significance of public participation in disputes involving NGOs' calls for access to information in terms of the Promotion of Access to Information Act 2 of 2000 as part of their efforts to exercise their rights to public participation. These are interesting cases because a primary focus is on examining the relationship between people gaining access to information as a necessary precursor for exercising their rights to participate. In its first judgment on the issue involving an environmental dispute, *Trustees for the Time Being of the Biowatch Trust v Registrar, Genetic Resources & Others,* the Constitutional Court emphasised the importance of public participation when it held that 'the protection of environmental rights will not only depend on the diligence of public officials, but on the existence of a lively civil society willing to litigate in the public interest'.[100]

A similarly transformative approach was adopted by the Supreme Court of Appeal in 2014 in its judgment in *Company Secretary of Arcelormittal & Another v Vaal Environmental Justice Alliance*, where the Court cited the *Biowatch* judgment with approval.[101] In this instance the Court also referred to the public participation principle contained in section 2(4)(f) of NEMA, and held that

> [i]t is clear, therefore, in accordance with international trends, and constitutional values and norms, that our legislature has recognised, in the field of environmental protection, inter alia the importance of consultation and interaction with the public. After all, environmental

98 *Mineral Sands Resources* (n 96) paras 62 & 63.
99 *Mineral Sands Resources* (n 96) para 66.
100 (2009) (6) SA 232 CC para 19.
101 (69/2014) [2014] ZASCA 184 (26 November 2014).

> degradation affects us all. One might rightly speak of collaborative governance in relation to the environment.[102]

This reference to 'collaborative governance' adds to the jurisprudence that has developed over the last two decades and, perhaps, is the clearest message yet that the courts are prepared to enforce public input as a vital component of government decision making and that there is an inextricable link between access to information as a precursor to participation. It also resonates with the ethos and outputs of CONNEPP that public participation is an integral part of environmental governance and not somewhat of a tolerated 'add-on'.

6 Conclusion

It is clear that in the run-up to the democratic elections, South African society expressed its views on the importance of their role in environmental governance and continues to do so. It is also clear that the government responded by developing legislation that seeks to give deep effect to the right to public participation. Even though some critics argue that there is room for improvement and government continues to refine the legislation, the current legislative framework undoubtedly provides a strong and robust basis for meaningful public participation that has the potential to give effect to environmental justice through its incorporation of principles on participation that must guide decision making; provisions on access to information; requirements to conduct public participation as part of environmental authorisation application processes; and the ability of the public to initiate legal proceedings.[103]

Legislation alone is only one component of the environmental rule of law and does not ensure that meaningful public participation actually takes place – that requires that its importance be embraced by officials and politicians. In other areas critics have questioned government commitment to public participation in practice.[104] Although there are some indications – such as the repeal of the provisions in respect of the National Environmental Advisory Forum in NEMA – that the enthusiasm for extensive participation has been tempered, it is beyond the scope of this article to be definitive about

102 *Arcelormittal* (n 101) paras 65 & 71 (footnotes omitted).
103 See, eg, King & Reddell (n 67) and T Murombo 'Beyond public participation: The disjuncture between South Africa's environmental impact assessment (EIA) law and sustainable development' (2008) *Potchefstroom Electronic Journal* 3.
104 See, eg, M van Staden 'Have we been underemphasising public participation?' 2017 *De Rebus* 51.

the extent to which officials and politicians in the environmental arena have continued to have the political will to give substantive effect to the legislative right, as opposed to a minimalistic and formal mechanistic approach that is reminiscent of the past. Nevertheless, the brief discussion on disputes that have been brought before the courts indicates that there are clear attempts to dilute meaningful public participation approaches in practice. It therefore is to be welcomed that the courts' approach to these disputes, including recently that of the Constitutional Court, suggests a high degree of consistency in its willingness to safeguard the right for which so many fought. It perhaps is trite that the transformation project envisaged by the Constitution has not been completed. It therefore remains important for civil society to be vigilant and hold those responsible for undertaking public participation processes, or sanctioning them, accountable for doing so in a meaningful way so that any attempt to weaken the right does not take root, resulting in slippage down Arnstein's ladder.