

Judicial Mandate in Safeguarding Environmental Rights from the Adverse Effects of Mining Activities in Zambia



C Mulenga*

P·E·R

Pioneer in peer-reviewed,
open access online law publications

Author

Chipasha Mulenga

Affiliation

University of Lusaka, Zambia

Email

mulenga.chipasha@gmail.com

Date Submission

2 August 2018

Date Revised

13 February 2019

Date Accepted

20 February 2019

Date published

23 April 2019

Editor Prof O Fuo

How to cite this article

Mulenga C "Judicial Mandate in Safeguarding Environmental Rights from the Adverse Effects of Mining Activities in Zambia" *PER / PELJ* 2019(22) - DOI <http://dx.doi.org/10.17159/1727-3781/2019/v22i0a5414>

Copyright



DOI

<http://dx.doi.org/10.17159/1727-3781/2019/v22i0a5414>

Abstract

The protection of the environment from the effects of mining activities, though cardinal, has been a daunting task in Zambia. A polluted environment affects the rights of those who depend on a clean one for their survival. In remedying the pollution caused by mining activities, numerous legislative and policy frameworks have been put in place and institutions responsible for ensuring compliance operationalised. Notwithstanding such interventions, the problem of pollution emanating from mining activities has persisted. This has led individuals and spirited non-governmental organisations to bring legal actions firstly against erring mining companies for their failure to comply with environmental regulations, and secondly against the government for its failure to ensure compliance by the mining companies. The courts before whom such matters have been brought have seemingly prioritised the supposed development brought by investment in the mining sector over the environmental rights of those whose livelihood is anchored in a clean environment. The article underscores the mandate of the courts in safeguarding the environmental rights of persons whose survival is dependent on a clean environment. In doing so the article critically examines the cases which have come before the courts and how these cases have been dealt with in relation to the protection of the environment and ultimately an individual's environmental rights.

Keywords

Environment; environmental rights; pollution; mining; Zambia

.....

1 Introduction

Mining in Zambia has been the fulcrum of the country's economic survival. The sector accounts for 70% of the country's Gross Domestic Product and employs over 300 000 people.¹ Given the abundance of mineral resources yet to be explored, the mining sector in Zambia has in recent times received massive large-scale investment, predominantly from foreign companies.² The significance of the sector is undoubted and the government, in a bid to effectively harness mineral resources as well as to ensure that the country benefits, has enacted protective legislation such as the *Environmental Management Act* of 2011, which is the principal legislation on environmental protection, and the *Mines and Minerals Development Act* of 2015, which is aimed at ensuring the sustainable extraction of minerals.

The *Environmental Management Act* of 2011³ establishes the Zambia Environmental Management Agency (ZEMA), which is mandated in section 9(1) to do "all such things as are necessary to ensure the sustainable management of natural resources and protection of the environment, and the prevention and control of pollution". As seen from its mandate, the role of the ZEMA is administrative, that is to say, to ensure the protection of the environment. Notwithstanding this obligation, ensuring that mining companies comply with the regulations has proved to be a daunting assignment for the Agency. This has led spirited non-governmental organisations, by themselves, to bring suits against erring mining companies before the courts of law.⁴ The courts receiving such matters have an overarching responsibility, as given to them under the *Constitution*, to ensure that mining activities do not pose a threat to the livelihoods of the communities located in areas where mines operate.⁵ Thus, the courts are required to issue orders with specific implementation requirements that not only remedy cases at hand but also set new trends of practice in

* Chipasha Mulenga. LL.D (UP) Lecturer at the University of Lusaka, Zambia and Advocate of the High Court for Zambia (AHCZ). E-mail: mulenga.chipasha@gmail.com.

¹ World Bank 2016 <http://www.worldbank.org/en/news/feature/2016/07/18/how-can-zambia-benefit-more-from-mining>.

² ZDA 2014 <http://www.zda.org.zm/?q=ja/download/file/fid/57>.

³ *Environmental Management Act* 12 of 2011 (the EMA).

⁴ In particular, non-governmental organisations such as Citizens for a Better Environment have taken legal action on several occasions against erring mining companies.

⁵ This could be seen from the provisions of the EMA and the *Mines and Minerals Development Act* 11 of 2015 (the MMDA). The two legislations allow a person, where environmental regulations have been breached, to seek a remedy from the courts of law.

environmental protection with widespread implications for the communities, mining companies and regulatory agencies.

In this article the central issue is to critically assess the role of the court in ensuring a balance between development brought by investment in the mining sector and the undisputed need for a clean and healthy environment. In attempting to achieve this, the article is divided into three main parts: environmental rights; the judicial mandate in environmental governance; and the attainment of a balancing act.

2 Environmental rights – A new phenomenon?

The environment is necessary for the survival of man. In fact, a clean environment serves as a basis for man's full attainment of his livelihood. It is for this reason that the protection of the environment has gained prominence in recent years. Although man has interacted with the environment since time immemorial, the formal recognition that man is entitled to a clean environment came only at the Stockholm Conference of 1972. The Conference led to a declaration (the *Stockholm Declaration*) which observes that man is at the centre of the environment.⁶ Whether the environment was made by man or nature, it is essential to man's wellbeing, as it facilitates the enjoyment of basic rights including the right to life. The Declaration connected a sound or healthy environment with the right to life. In other words, a healthy environment was viewed as a precondition for the enjoyment of the right to life.

Since that time, the formal recognition has been made in several international instruments such as the *Universal Declaration on Human Rights* and the *Convention on the Rights of the Child*, which have attempted to develop environmental issues in the human rights discourse. It has also been modified in domestic legislation, leading to a general consensus that a clean environment is a right of every person. There has, however, been considerable debate on whether a healthy environment qualifies as a human right. Hayward posits "as a moral proposition, the claim that all human beings have the fundamental right to an environment adequate for

⁶ Principle 1 of the *Stockholm Declaration* states: "Man is both creature and moulder of his environment, which gives him physical sustenance and affords him the opportunity for intellectual, moral, social and spiritual growth ... Both aspects of man's environment, the natural and the man-made, are essential to his well-being and to the enjoyment of basic human rights - even the right to life itself". See *Stockholm Declaration of the United Nations Conference on the Human Environment* UN Doc A/CONF.48/14/Rev.1 (1973) 3.

their health and well-being is ... unimpeachable".⁷ Shue asserts that "unpolluted air, unpolluted water, adequate food" are among the basic human rights.⁸ In a similar exposition, Birnie and Boyle state that constitutional recognition of the right to a healthy environment "would recognize the vital character of the environment as a basic condition of life, indispensable to the promotion of human dignity and welfare, and to the fulfilment of other rights".⁹

The assertions of these scholars would suggest that there is a correlation between environmental protection and human rights. This is so in that both fields strive to produce better conditions for life on earth. It is argued that while environmental law seeks to protect nature for itself and man, human rights allow individuals and groups to claim their rights. The enjoyment of universally accepted human rights hinges on a sound environment's thus forming a fundamental part of modern human rights dogma. Thus, where these media are polluted or contaminated, it is impossible for a human being to enjoy their use. The interaction between the environment and human rights is what has commonly come to be known as the "environmental right". This is in spite of the use of expressions such as "decent", "viable", "healthy", or "sustainable" environment that are frequently used when referring to environmental rights. Churchill broadly defined the right as one relating to "a decent environment; and more specifically, such rights as the right to be free from excessive pollution ... the right to enjoy unspoiled nature, and the right to enjoy biological diversity".¹⁰

This description, though broad, simply depicts the relationship that exists between the environment and human rights – they cannot exist in isolation, one from the other. Although the connection is undoubted, there is no prescribed level below which the threshold of environmental quality must sink before a violation of human rights can be said to have occurred. This presents a dilemma regarding the content, nature and scope of the environmental right. Boyd asserts that the precise level of environmental quality that is to be protected is unclear, as this would depend in part on the specific language of the right, or the economic, ecological, social, and political circumstances of a particular nation.¹¹ This implies that the content of the right must be specified and the standards, sources, and acceptance

⁷ Hayward 2000 *Political Studies* 568.

⁸ Shue *Basic Rights* 23.

⁹ Birnie and Boyle *International Law and the Environment* 255.

¹⁰ Churchill "Environmental Rights in Existing Human Rights Treaties" 89.

¹¹ Boyd *Environmental Rights Revolution* 40.

of rules examined.¹² The need for standards goes to the root of the enforcement of the right. This explains the necessity for an environmental dimension in human rights debates.¹³ The concern raised, on the one hand, is the practical effects of acknowledging the relationship between the fields of human rights and environmental protection. Sands asserts that addressing this particular concern requires an assessment of a distinction that has been made between civil and political rights on the one hand, and economic and social rights on the other.¹⁴ Economic and social rights define the basic rights that a person is entitled to, and such an entitlement includes the threshold below which environmental set standards must fall if they are to be unlawful. It is only when there is a violation of these rights that the connection with environmental degradation is made.

2.1 Environmental rights under the Constitution?

The *Constitution of Zambia*, as amended by Act 2 of 2016, is the supreme law, and "if any other law is inconsistent with it, that other law shall, to the extent of the inconsistency, be void".¹⁵ The State is required under the *Constitution* to put in place mechanisms aimed at reducing waste, promoting relevant environment management systems and tools, and ensuring that the environmental standards that are enforced in Zambia essentially benefit the citizens.¹⁶ The *Constitution* has put in place certain principles that must govern the development and administration of the environment and its natural resources.¹⁷ It is clear from the constitutional provisions that, though the *Constitution* recognises the significance of a sound environment, it does not contain an explicit provision relating to the right to a safe, clean, and healthy environment.

Prior to the amendment in 2016, the *Constitution* (amendment of 1996) contained a provision in which the State committed itself to "provide a clean and healthy environment for all".¹⁸ The question is whether this would qualify as a "right". The wording of article 111 seemed to suggest that it

¹² Alfredsson and Ovsiouk 1991 *Nord J Int'l L* 22.

¹³ Cullet 1995 *NQHR* 25.

¹⁴ Sands *et al Principles of International Environmental Law* 779.

¹⁵ Article 1(1) of the *Constitution of the Republic of Zambia* (as amended by Act 2 of 2016) (the *Constitution*).

¹⁶ Article 257(b)(c)(f) of the *Constitution*.

¹⁷ Article 255 of the *Constitution*.

¹⁸ Article 112(h) of the *Constitution* provided: "... the State shall strive to provide a clean and healthy environment for all". The use of the words "... the State shall strive ..." put an obligation, albeit not a serious one, on the State to ensure that there is a clean and healthy environment for all. It could well be said that the article was simply an aspiration by the State and in no way amounted to an obligation.

qualified as a right, albeit non-justiciable. Article 111 provided that the Directive Principles of State Policy "shall not be justiciable and shall not thereby, by themselves, despite being referred to as rights in certain instances, be legally enforceable in any court ...". This article had two important aspects: *first*, the rights were not justiciable "by themselves", meaning that a right needed to be accompanied by another right under the Bill of Rights; and *secondly*, the rights were not justiciable "despite being referred to as rights". Although this would be the most conceivable interpretation, the court before whom the matter was heard did not accept such reasoning.¹⁹ This meant that the right remained unenforceable, especially as the mechanism provided under article 28 suggests that a person can rely on it only where a right enshrined under the Bill of Rights (articles 11 to 26) has been violated. Thus, "rights" that fell outside the Bill of Rights (like article 111) were not covered by article 28.

There was a gleam of hope under the proposed Bill of Rights, which guaranteed every person the right to clean and safe water.²⁰ Article 44 of the proposed Bill of Rights guaranteed every person "the right to a safe, clean and healthy environment". Despite its lucidity, the flaws in the abandoned provision were threefold. First, it did not define or describe the threshold below which the standard of the water had to fall before it could be said that the right had been violated.²¹ Second, the right lacked specificity. Thus, in the absence of jurisprudence developed on the subject, it is possible that it would cover more than the framers of the proposed Bill of Rights would have envisioned, thereby making the right too broad.²² The

¹⁹ In *Peter Kingaipe and Charles Chookole v Attorney General* [2009] HL 86, counsel for the applicant had argued that the words "by themselves" meant that such a right that falls within the Directive Principles of State Policy could be enforced provided that it was read in conjunction with another right provided for under the Bill of Rights. Judge Muyovwe, rejecting counsel's reasoning, said: "... the Constitution makes it clear in Article 111 that the Directive Principles of State Policy set out in Part IX of the Constitution shall not be justiciable and shall not be legally enforceable by themselves. The petitioners have argued that in this case, the Directives are not relied upon 'by themselves' and that this makes them legally enforceable. I do not agree" - J47.

²⁰ The proposed Bill of Rights, as drafted by the Technical Committee, was subjected to a vote in a Referendum held on 11 August 2016. The law requires that for an amendment to be made to the Bill of Rights, 50% (3 764 046) of the eligible voters (7 528 091) must vote "Yes". However, the threshold was not met, therefore it failed. Electoral Commission 2016 https://www.elections.org.zm/results/2016_referendum.

²¹ This concern could not be addressed by the vague phrasing of the right and led to a presumption that the EMA should prescribe what the right entails. However, it does not do so in its s 4.

²² The Courts in Kenya and Uganda have had an opportunity to interpret what would amount to "clean, safe and healthy environment", but the provisions that were being interpreted were quite dissimilar to those under the EMA. While they may present a

third flaw was the absence of an enforcement mechanism, which lack made the realisation of the right a near impossibility. On enforcement, however, article 45 of the proposed Bill of Rights provided:

- (1) The State shall take reasonable measures for the progressive realisation of economic, social, cultural and environmental rights.
- (2) Where a claim is made against the State on the realisation of an economic, social, cultural or environmental right, it is the responsibility of the State to show that the resources are not available.
- (3) The Constitutional Court shall not interfere with a decision by the State concerning the allocation of available resources for the progressive realisation of economic, social, cultural and environmental rights.

Clearly, article 45(1) required the State to "take reasonable measures" for the progressive realisation of environmental rights. What amounted to reasonable measures was not elaborated and it would be erroneous to assume that this provision included virtually anything that would be considered "a measure". Article 45(1) was narrow as it did not explicitly state the nature of the measures to be undertaken by the State: that is to say, such measures must be outlined in a piece of legislation. The inherent weakness of article 45(1) was embedded in its failure to place an obligation on the State to enact appropriate legislation, as a measure, for the better protection of the right. In this manner, "reasonable measures" purportedly excluded legislative measures, thereby leading to the assumption that the legislation on the environment in the form of the EMA was adequate, needing only "reasonable measures". However, this is not so.

Under article 45(2), where the full enjoyment of the right had not been fully realised the State bore the responsibility of showing that the resources were not available. The Constitutional Court was ousted by article 45(3) from interfering with the State's decision concerning the allocation of available resources. The exclusion limited the full realisation of the right. It meant that any "justification" of the State's failure to provide resources should be accepted by the Court.

2.2 Environmental rights under the Environmental Management Act?

The *Environmental Protection and Pollution Control Act* (EPPCA) Chapter 204 of 1990 was the first piece of legislation enacted to provide for the

starting point, they may not fully address the meaning of "clean, safe and healthy environment". In South Africa, the *Constitution of the Republic of South Africa*, 1996 is quite explicit in describing the rights and the elements thereof. Thus, it is much easier for the Constitutional Court to give full effect to the right.

protection and control of pollution. The Act provided a single and comprehensive national legislative and administrative structure for environmental protection.²³ Notwithstanding, the Act was inadequate in that it lacked the incorporation of international standards in national legislation, made little provision for the involvement of local communities in the implementation and enforcement of related legislation, had weak penalties, lacked intra- and inter-sectoral institutional arrangements, and contained few coordination mechanisms for the effective integration of the legislation. These weaknesses led to its repeal and replacement by the EMA, which is complemented by other pieces of legislation such as the *Workers Compensation Act* 10 of 1999, the *National Heritage Conservation Commission Act* 173 of 1989, the *Zambia Wildlife Act* 14 of 2015, the *Water Resources Management Act* 21 of 2011, the *Public Health Act* 12 of 1930, the *Zambezi River Authority Act* 17 of 1987, the *Lands Act* 29 of 1995, the *Land Acquisition Act* 2 of 1970, the *Local Government Act* 22 of 1995, the *Urban and Regional Planning Act* 3 of 2015, the *Forestry Act* 4 of 2015, the *Fisheries Act* 22 of 2011, and several other statutory instruments.

The EMA is superior, and where any other Act is inconsistent with it the EMA prevails.²⁴ Pursuant to the objectives set out in its preamble, the Act makes provision for integrated environmental management, the safeguarding and preservation of the environment, and the sustainable management and utilisation of non-renewable natural resources. It also provides for atmospheric protection from air pollution and forbids a person without a licence from discharging pollutants into the environment.²⁵ Further, it also affords protection against transboundary waste, water pollution, and the unauthorised production of pesticides and toxic substances.²⁶

In section 4(1) the EMA permits every person to "enjoy the right to a clean, safe and healthy environment". It is clear from section 4(1) that the right has

²³ According to its preamble the objectives of the *Environmental Protection and Pollution Control Act* Chapter 204 of 1990 (EPPCA) were: to provide for the protection of the environment and the control of pollution; to establish the Environmental Council; and to prescribe the functions and powers of the Council. Under Parts VI-IX and XI the Act made provision for offences and penalties for polluters of water, air, noise or chemicals.

²⁴ This is in line with s 3 of the EMA, which provides: "Subject to the Constitution, where there is any inconsistency between the provisions of this Act and the provisions of any other written law relating to environmental protection and management, which is not a specific subjected related to law on a particular environmental element, the provisions of this Act shall prevail to the extent of the inconsistency."

²⁵ Sections 31 and 32 of the EMA.

²⁶ Sections 44, 46 and 65 of the EMA.

not been clarified; neither has its meaning been given. In fact, any attempt to describe the right may be more of a political than a legal project, but in understanding the right it is pertinent that the words "clean" and "healthy" should be underscored. The term "clean" denotes freedom from dirt, noise, waste and garbage, while "healthy" refers to the complete well-being of a person' physical, mental and social status. Thus, the latitude for the determination of a "healthy environment" includes many factors such as education, housing, agriculture and food, one's employment status and working environment, health care services, water and sanitation, and pollution.²⁷ These are broad areas, and given their lack of specificity it is impossible to say what, precisely, is signified. In its attempt to describe a comprehensive approach to the social and cultural aspect of the right, the Ugandan Court in *Uganda Electricity Transmission Co Ltd v De Samaline Incorporation Ltd* said the following:

I must begin by stating that the right to a clean and healthy environment must not only be regarded as a purely medical matter. It should be regarded as a holistic social-cultural phenomenon because it is concerned with the physical and mental well-being of human beings ... a clean and healthy environment is measured in both ethical and medical context. It is about linkages in human well-being. These may include social injustice, poverty, diminishing self-esteem. And poor access to health services. That right is not restricted to a clinical model.²⁸

The interpretation of the right by the court was not clear, as it merely acknowledged that the right may include social factors. Under section 4(2) the EMA states that the "right to a clean, safe and healthy environment shall include the right of access to the various elements of the environment for recreational, education, health, spiritual, cultural and economic purposes". In construing this provision, it is clear that the constituent elements of the right are not exhaustive. Hence the use of the term "shall include". The right is restricted to a person's right to access to recreational, health, spiritual, cultural and economic facilities. However, the right has neither been defined nor explained. The imprecise nature of the right can be attributed to the fact that it cannot be fitted neatly into the traditional classes or categories or "generations" of human rights. It may well be thought that the formulation of the right under the EMA is anthropocentric while the entitlement is individualistic. Although the right does not place matching duties on the

²⁷ Mohammad 2014 *IJBM* 192.

²⁸ *Uganda Electricity Transmission Co Ltd v De Samaline Incorporation Ltd* Miscellaneous Cause No 181 of 2004 (High Court of Uganda).

holders of the right to preserve and safeguard the environment for its worth, it is inherently connected to the realisation of the other fundamental rights.²⁹

It is argued that the EMA, though primarily concerned with environmental protection, has embraced human rights and created the right to a clean, safe, and healthy environment as stated in section 4. It is argued that the Act contains a provision on environmental rights. The concern, however, is that the *Constitution* does not contain a similar right. This raises questions of whether such a right under the EMA may be enforced just as a right contained in the Bill of Rights may be enforced.³⁰ It is argued that the enforcement of the right created under the EMA is horizontal. This is evident in section 4(4), which lists the remedies that may be obtained: prevention or discontinuance of any activity that harms the environment; compelling a public officer to act; environmental auditing or monitoring; measures for environmental protection; restoration; and compensation. It is not possible that the right created under the EMA can be applied vertically.³¹ This means that the government or a local authority are not liable for their failure to ensure that the right to a clean and healthy environment is attained. Although the *Constitution* contains provisions on the protection of the environment, there is no corresponding duty placed on the government to ensure the attainment of a clean and healthy environment.

3 The judicial mandate in environmental governance

The term "judiciary" is multifaceted and could refer to "a system of courts of law" and "the judges of these courts".³² It also denotes that branch of government which is endowed with the power to interpret and apply the law, adjudicate legal disputes, and administer justice.³³ It can collectively be said to be a branch of government whose responsibility is to interpret the law,

²⁹ Muigua 2015 <http://kmco.co.ke/wp-content/uploads/2018/08/RIGHT-TO-CLEAN-AND-HEALTHY-ENVIRONMENT-IN-KENYA.docx-7th-september-2015.pdf> 9, 12.

³⁰ Under s 4 of the EMA, the right to a clean, safe and healthy environment is described as a "right", but the argument of this author is that for a right to be called such it must be mirrored under the *Constitution*. This position is buttressed by the remedies that a human right attracts under the *Constitution*, which also provides an enforcement mechanism under art 28. In the case of the EMA, the remedies are civil in nature, thereby leading the author to argue that the "right to a clean, safe and healthy environment" is not a legal right in the case of Zambia.

³¹ The "vertical" approach is where constitutionally guaranteed rights apply to protect the individual against violation of those rights only by the State or by public bodies or officers acting under State authority. The "horizontal" approach is where human rights provisions may be enforced against individuals or private parties.

³² Merriam Webster Dictionary 2016 <http://www.merriam-webster.com/dictionary/judiciary>.

³³ Free Dictionary 2016 <http://legal-dictionary.thefreedictionary.com/judiciary>.

resolve disputes and administer justice. The *Constitution* gives authority to a judge to hear, determine, settle, or adjudicate a matter in favour of a party(s).³⁴ This authority is derived from the people and is to be exercised in a manner that promotes accountability.³⁵

The core functions of the judiciary in Zambia are: (a) the administration of justice through the resolution of disputes; (b) the interpretation of the existing law in Zambia; (c) the upholding and safeguarding of democratic principles; (d) the promotion of the rule of law and the maintenance of societal order; and (e) the protection, safeguarding, and enforcement of human rights.³⁶ The performance of such functions serves three primary purposes: first, the settlement of disputes; second, the upholding of the rule of law; and third, the interpretation and application of the law. These functions are rooted in the doctrine of the separation of powers, which does not allow the three arms of government to interfere with one another's operations. In fact, the court may intervene in the operations of the executive or legislature only to the extent of ensuring that the two do not overstep their legal boundaries. In this way, the court patrols the constitutionally delineated borders.³⁷

With regard to environmental governance, the functions of the judiciary are not to rewrite the law but to interpret and apply it in the light of the available legislation and principles. The judiciary is a guarantor of the protective benefits of the environmental law, one of which is to secure the attainment of human rights for both current and future generations. Bosek underscores the importance of an effective judiciary in the protection and advancement of environmental rights by stating that the court has three functions: first, to apply the law in situations where controversial issues arise; second, to integrate human rights values set out in international instruments in environmental matters; and third, to balance generational (or other)

³⁴ Article 266 of the *Constitution*.

³⁵ Article 118(1) of the *Constitution*. In the exercise of such authority, the judge is governed by six principles: (1) justice shall be done to all, without discrimination; (2) justice shall not be delayed; (3) adequate compensation shall be awarded, where payable; (4) alternative forms of dispute resolution are promoted; (5) justice is administered without undue regard to procedural technicalities; and (6) the values and principles of the *Constitution* are protected and promoted. Further, such authority shall be exercised in consonance with the *Constitution* and other applicable laws (art 119(1)).

³⁶ Judiciary of Zambia 2016 <http://www.judiciaryzambia.com/introduction/>.

³⁷ Sakala observes that "Constitutionally and institutionally, the responsibility of balancing the scales of justice between the individual whose fundamental rights are violated and the State or its agents being accused of such violations lies heavily on the judiciary" (Sakala *Role of the Judiciary* 85).

interests.³⁸ Markowitz and Gerardu postulate the pivotal role that the judiciary plays in environmental governance as balancing environmental and developmental considerations in judicial decision-making, providing an impetus to the incorporation of contemporary developments in the field of environmental law, promoting the implementation of global and regional environmental conventions, and strengthening the hand of the executive in enforcing environmental regulations, often in the face of outside and improper influences that could stifle executive action.³⁹ The judiciary, therefore, can and must play a leading role in promoting compliance with and the enforcement of environmental regulations. Where a judiciary is well informed of the rapidly expanding boundaries of environmental law, it becomes more sensitive to its role of promoting the rule of law with regard to development that is environmentally friendly. Notwithstanding, the challenge to the court is how to resolve matters that involve environmental rights.

3.1 Dealing with controversial issues

It is the responsibility of the courts to ensure that issues presented before them are adequately addressed, even when they may be perceived to be "controversial". In any case, controversy or fear of it should not be the basis upon which the court makes a pronouncement. Given that the law requires the judges to act judiciously, their primary concerns should be legal interpretation and not the status of the mining company or those that may have an interest in the matter. In *James Nyasulu v Konkola Copper Mines, Environmental Council of Zambia and Chingola Municipal Council*, it was alleged that on 6 November 2006 one of the first defendants' tailing pipes ruptured, leading to the discharge of effluent which was high in acidic content into the Chingola and Mushishima streams. This consequently led to pollution of the water source that feeds into the Kafue River, which is the plaintiffs source of fresh water. On 8 November 2006 the Environmental Council of Zambia (ECZ) wrote to the first defendant instructing it to cease its operations in its leach plants in view of the pollution of the Kafue River. After consuming the polluted water the plaintiffs, who suffered various illnesses, took legal action against the defendants. In establishing liability, there were two components – civil liability for damages, and criminal sanctions.

³⁸ Bosek 2014 *AHRLJ* 500.

³⁹ Markowitz and Gerardu 2012 *Pace Envtl L Rev* 543.

On civil liabilities, reliance was placed on the Mines and Minerals Regulations as well as on the common law duty established in negligence. According to Regulation 23(2)(4) the "holder shall be liable for any harm or damage caused by any mining or mineral processing operation and shall compensate any person to whom harm or damage is caused". This provision establishes the statutory duty of liability for causing harm or damage and compensation to anyone that is affected. The court employed the common law principle of negligence, stating that the first defendant owed a duty to the community around it, breach of which would result in the payment of damages. Relying on the principle established in *Ryland v Fletcher*, the court found that the mining company had seriously failed to attain the required standard in that they had employed an ill-qualified environmental coordinator (a craftsman in survey drafting) who was not schooled in environmental protection. It also found that the company did not add lime to the discharge when it should have, and yet it knew that such an omission would harm human and animal life and aquatic plants.⁴⁰ The reasoning of the court was not based on the provisions of the *Mines and Minerals Development Act, 2015* as it had not yet come into existence, or on its predecessor, the EPPCA, which had no provision that allowed an affected person to take legal action and the remedy the court would give. The only requirement was for the polluter to take remedial action.⁴¹

It was also argued that the mining company had breached sections 22 and 24 of the EPPCA and as such was liable to criminal sanctions. Section 22 provided:

In this Part, unless the context otherwise requires 'aquatic environment' means all surface and ground waters, but does not include water in installations and facilities for industrial effluent sewage collection and treatment ...

while section 24 stated:

No person may discharge or apply any poisonous, toxic, aerotoxic, obnoxious or obstructing matter, radiation or other pollutant or permit any person to dump or discharge such matter or pollutant into the aquatic environment in

⁴⁰ *James Nyasulu v Konkola Copper Mines, Environmental Council of Zambia and Chingola Municipal Council* (2007) HP 1286.

⁴¹ According to s 90(1) of the EPPCA, "... where the Inspectorate establishes that pollution or despoliation is occurring or has occurred, the Inspectorate shall inform the polluter and order him to take appropriate abatement and control measures specified by the Inspectorate under this Act". Further, s 90(2) required that "... where the polluter is unable or unwilling to take the abatement and control measures required under subsection (1), the Council may take the measures and in such case, the cost incurred by the Council, shall be paid by the polluter".

contravention of water pollution control standards established by the Council under this Part.

The two provisions (sections 22 and 24 of the EPPCA) were interpreted by Musonda J, who suggested that while the former defines a pollutant, the latter creates an offence to discharge or apply any pollutant.⁴² The reasoning of the court was correct in that the two provisions when read together create a duty on any person not to discharge pollutants into the environment and at the same time make it an offence if a person does so. In recognition of this fact, the court found the mining company criminally liable for causing pollution.⁴³

The observation of the court was an affirmation of the duty that it had to protect poor communities from the adverse effects emanating from mining activities. In exercising this duty, the court rightly said it was "not too late to prosecute KCM and set an example"; especially as "INDENI was prosecuted in the Ndola Magistrates Court for polluting Kaloko Stream...".⁴⁴ It is clear that the court was aware of the criminal sanctions that ought to have been meted out, but it restrained itself by stating that the "only hypothesis for a powerful multinational to supposedly act with impunity and immunity, is that they thought they were politically correct and connected".⁴⁵ It is argued that, although the court was aware of its responsibility to act judiciously, it could not act for fear that the mining company was politically connected. The reasoning of the court is buttressed by the fact that at the time of the commission of the offence the country had not been doing well economically, and the government was therefore taking a keen interest in whatever was going on with the mines. In fact, the matter even arose in the first session of the Tenth National Assembly of 2006.⁴⁶

In avoiding meting out criminal sanctions, the court decided to award damages. Its hope in awarding damages was that this would deter other persons from polluting the environment. This was a wrong approach. Although the matter had commenced as a civil action in the High Court, the

⁴² *James Nyasulu v Konkola Copper Mines, Environmental Council of Zambia and Chingola Municipal Council* (2007) HP 1286 J21.

⁴³ *James Nyasulu v Konkola Copper Mines, Environmental Council of Zambia and Chingola Municipal Council* (2007) HP 1286 J20.

⁴⁴ *James Nyasulu v Konkola Copper Mines, Environmental Council of Zambia and Chingola Municipal Council* (2007) HP 1286 J22.

⁴⁵ *James Nyasulu v Konkola Copper Mines, Environmental Council of Zambia and Chingola Municipal Council* (2007) HP 1286 J21.

⁴⁶ Parliament of Zambia 2007 http://www.parliament.gov.zm/sites/default/files/documents/committee_reports/REPORT%20OF%20THE%20COMMITTEE%20ON%20ENERGY%202007.pdf 10.

court should have ordered the prosecution of the ECZ. It was improper for the court to shy away from acting judiciously by raising political or other reasons so as to cover its failure to do its duty. The reasoning of Musonda J in the *James Nyasulu* case was noted in *Dominic Liswaniso Lungowe v Vedanta Resources Plc and Konkola Copper Mines Plc*, in which Coulson J said:

There is another aspect of KCM's likely stance which is material. I cannot discount the findings of Mr. Justice Musonda in the Nyasulu litigation that KCM 'was shielded from criminal prosecution by political connections and financial influence'. That is an alarming finding. If in the past KCM has been shielded by political connections and financial influence in Zambia, as the judge found that they were, then that must be another factor relevant to the concerns that I have about the claimants obtaining access to justice in Zambia.⁴⁷

The reasoning of Coulson J buttresses the point raised earlier by this article that the court ought not to have made a mere pronouncement without remedying the problem. The court's reference to political connections as a reason for not prosecuting the mining company was a grave error on its part, demonstrating its inability to prosecute the mining company. One would have expected the court to recognise that the actions of the company were actually in breach of the EPPCA and carried a criminal sanction. Under the EMA there is an attempt to place criminal sanctions on the director of a body corporate rather than on the body corporate directly. Section 126 of the EMA places criminal liability on every director or manager of a body corporate where a body corporate of which they are a part commits an offence under the Act.⁴⁸ This means that the law considers an act by the body corporate as though it was personally done by the directors or managers. The exception is where "the director or manager proves to the satisfaction of the

⁴⁷ *Dominic Liswaniso Lungowe v Vedanta Resources Plc and Konkola Copper Mines Plc* (2016) EWHC 975 (TCC) para 197. The facts of the case are that the claimants were residents of four communities (Shimulala, Hellen, Kakosa and Hippo Pool) in the Chingola. On 31 July 2015, they commenced proceedings against the defendant in the London court alleging personal injury, damage to property, loss of income and loss of amenity and the enjoyment of land arising out of the alleged pollution and environmental damage caused by the defendant's company, Nchanga Copper Mine, from 2005. It is worth noting that the commencement of the action followed the judgment of the Supreme Court in *Konkola Copper Mines (KCM) PLC v James Nyasulu* (Appeal No. 1 of 2012) in which the defendants were dissatisfied with the decision. Their dissatisfaction led them to appeal to the London Court, suing the parent company, Vedanta.

⁴⁸ Section 126 of the EMA provides: "Where an offence under this Act is committed by a body corporate or an unincorporate body, every director or manager of the body corporate or the unincorporate body shall be liable, upon conviction, as if the director or manager had personally committed the offence, unless the director or manager proves to the satisfaction of the court that the act constituting the offence was done without the knowledge, consent or connivance of the director or manager or that the director or manager took reasonable steps to prevent the commission of the offence."

court that the act constituting the offence was done without the knowledge, consent or connivance" or "that the director or manager took reasonable steps to prevent the commission of the offence".

3.2 Integrating human rights values

Integrating human rights values in environmental matters is cardinal. This is because the fields of environmental law and human rights have a common objective – to protect the dignity of a human being. This would mean that where the environment is polluted human rights cannot be enjoyed. In *James Nyasulu* the actions of the mining company were viewed by the court with a sense of outrage, especially that the company had disregarded environmental legislation at a time when there are concerted global efforts to protect the environment. Musonda J aptly stated that the actions of the company "deprived the community in Chingola of the right to life, which is a fundamental right in our Constitution".⁴⁹

The court rightly observed that pollution of the environment militates against the enjoyment of the right to life. It further observed that, internationally, there are concerted efforts to protect the environment. Notwithstanding the fact that international standards require mining companies to carry out sustainable mining practices, the mining company still had not adhered to them. The failure by the company to do so amounted to "gross recklessness" as this was done in disregard of the community, which depended on the water from the stream for its livelihood. The court noted that the protection of the environment is a global concern, and that despite most countries putting in place domestic legislation, there was still room for the courts to deal with issues where there was a breach of environmental legislation. The authority that reposed in the court obliged it to construe statutory provisions with the aim of resolving matters of environmental breach. Although the court had the authority to interpret provisions liberally, it chose to do so restrictively. It is posited that the court was more preoccupied with awarding damages than applying the relevant principles of environmental law that relate to the preservation of the environment.

3.3 Holding enforcement agencies liable

The EMA requires the ZEMA to enforce the environmental regulations. Under its predecessor (the EPPCA), the mandate to carry out activities aimed at protecting the environment and pollution control was reposed in

⁴⁹ *James Nyasulu v Konkola Copper Mines, Environmental Council of Zambia and Chingola Municipal Council* (2007) HP 1286 J20.

the ECZ. Section 6(1) of the EPPCA placed a duty on the ECZ to protect the environment and control pollution. The purpose of this provision was to safeguard the health and welfare of persons, animals, plants, and the environment.⁵⁰ Despite such an immense obligation placed on the ECZ, the case of *James Nyasulu* has demonstrated that holding a government agency liable is a difficult task.

In the case of *James Nyasulu*, it was that alleged that the agency, the ECZ, had not performed regular inspections of the pipes to ensure that they met the required standards, and that this led to leakage or spillage to the land on which the communities lived. Notwithstanding the court's finding the mining company liable, it exonerated the ECZ. In the court's view, the action that the ECZ took of reducing the period of the mining company's licence from a year to six months was sufficient to show that it had met its statutory obligation.⁵¹ This was not a proper assessment of the statutory obligation placed on the mining company by the EPPCA. Though the plaintiffs' counsel urged the court to make a finding that the ECZ had neglected its duty by failing to prosecute the mining company as required under the EPPCA, the court rejected this view, stating that the Agency though "not insulated from political control, operate[s] and operated under difficult circumstances".⁵² It is clear that the court was reluctant to hold the responsible bodies liable for their failure to act. The fact that the ECZ "operated under difficult circumstances" should not have been the reason for discharging the Agency from its statutory responsibilities. The court's failure to act demonstrates that its decision was clouded by sympathy.

In *Zambia Revenue Authority v Post Newspapers*, the Supreme Court found that the decision of the lower court was purely for convenience and based on sympathetic and moral considerations; hence, outside the legal principles. Mwanamwambwa J held that the courts "should not be swayed by sympathy into making moral judgments ... [which] deviate from the Rule of Law, the principle which ensures consistency, certainty, uniformity, fairness in the delivery of justice".⁵³ While it is possible that a judge can be moved by sympathy, this should not inform their decision making. The

⁵⁰ Section 6(1) of the EPPCA stated: "Subject to the other provisions of this Act the functions of the Council shall be to do all such things as are necessary to protect the environment and control pollution, so as to provide for the health and welfare of persons, animals, plants and the environment."

⁵¹ *James Nyasulu v Konkola Copper Mines, Environmental Council of Zambia and Chingola Municipal Council* (2007) HP 1286 J19.

⁵² *James Nyasulu v Konkola Copper Mines, Environmental Council of Zambia and Chingola Municipal Council* (2007) HP 1286 J22.

⁵³ *Zambia Revenue Authority v Post Newspaper* SCZ Judgment No 18 of 2016 627.

responsibility of the court is to ensure observation and enforcement of the law. Once a person has been appointed as a judge, the oath that they take obliges them to act within the legal ambit without fear, favour, malice or ill-will. In the *James Nyasulu* case, a proper assessment would have been expected from the court, especially where there was a blatant disregard of the environment by the mining company. Taking a firm stance against ECZ would have had the effect of correcting the non-performance of the Agency and deterring the negative political influence in the exercise of its legal mandate.⁵⁴

A similar position (a refusal to hold the ZEMA, formerly the ECZ, liable for its failure to act) was also exhibited by the court in the case of *Doris Chinsambwe v NFC Africa Mining*,⁵⁵ in which the plaintiffs who were farmers and occupiers of land through which the Musakashi stream passes alleged that the defendant, a mining firm operating within their area, had polluted the stream, causing damage to the crops, due to its failure to contain the tailings from its mining activities. In their claim for damages the plaintiffs relied on section 87 of the MMDA, which places strict liability on mine owners who cause damage from their mining or minerals processing operations.

The court's view was that this provision raised a statutory duty of care which is distinct from the duty of care in negligence. In addressing the issue, Maka-Phiri J was of the view that "by causing the plaintiff's gardens to flood with water from its tailings dam, the defendant breached its duty of care" and as such the court was "satisfied that the defendant is liable for ... the consequential damage or loss and should make good the loss".⁵⁶ Besides finding the mining firm liable and ordering compensation, the court also observed that the ZEMA had acknowledged the environmental pollution problems experienced in Musakashi stream caused by the defendant's

⁵⁴ Commenting on the situation, the Parliamentary Committee observed that: "In line with the provisions of EPPCA, ECZ considered various options in dealing with this matter; they could either prosecute KCM or compel the company to clean up the pollution and pay for any damage arising therefrom. Considering that the law provided that the maximum penalty that any court could impose for such a breach was K10.8 million and taking into account the socio-economic implications of a lengthy shut down of KCM operations, ECZ chose not to prosecute KCM. Instead, ECZ instituted regular physical inspections of the lime stock levels at the company and ordered them to undertake the following remedial actions ..." – Parliament of Zambia 2007 http://www.parliament.gov.zm/sites/default/files/documents/committee_reports/REPORT%20OF%20THE%20COMMITTEE%20ON%20ENERGY%202007.pdf 10.

⁵⁵ *Doris Chinsambwe v NFC Africa Mining* (unreported) (2014) HK 374.

⁵⁶ *Doris Chinsambwe v NFC Africa Mining* (unreported) (2014) HK 374, J16.

tailings dam. The considered view of the ZEMA was, however, that the problems could be solved only by developing a new tailings dam by the defendant, who had turned a blind eye to the fact that the local farmers depended on the stream for their livelihood.⁵⁷ It is not in doubt that the ZEMA was aware of the problems that the tailings from mining operations were causing to the environment. Instead of waiting for the mining firm to construct a new tailings dam, something that the firm was not eager to do, enforcement measures under Part IX of the EMA could have been invoked by the ZEMA, but they were not invoked.⁵⁸ It was, therefore, erroneous for the court not to hold the ZEMA liable under the EMA for not taking remedial measures or action against the mining firm.

The actions of the ZEMA in some instances raise questions regarding its independence or autonomy. Section 7(1) of the EMA establishes the ZEMA, but a strict construction of the provision does not seem to suggest that the institution is independent.⁵⁹ The composition of Board of the ZEMA, which comprises of fourteen members, eight of whom are from a government Ministry, also seemingly impedes its autonomy, as such members can only serve the interest of the government.⁶⁰ This view is confirmed by the fact that the President wields considerable power as he/she appoints the Chair and Vice Chairperson of the Water Development, Sanitation and Environmental Protection Board.⁶¹ Notwithstanding, where the Board has issued an order or made a decision contrary to the expectation of the

⁵⁷ *Doris Chinsambwe v NFC Africa Mining* (unreported) (2014) HK 374, J15.

⁵⁸ Part IX of the EMA lists the following enforcement measures: environmental audit, environmental monitoring, prevention order, protection order, environmental restoration order, compliance order, cost order, protection, repair and costs orders, prosecution, and civil action.

⁵⁹ Section 7(1) of the EMA reads thus: "The Environmental Council established under the repealed Act shall continue to exist as a body corporate as if established under this Act and is hereby re-named the Zambia Environmental Management Agency." This provision simply establishes the authority as a corporate body capable of suing or being sued, and does not guarantee its independence in the manner it carries out its mandate.

⁶⁰ Section 11(1) of the EMA provides: "There is hereby constituted a Board of the Agency which shall consist of the following part-time members appointed by the Minister: (a) one representative each from the Ministries responsible for— (i) the environment and natural resources; (ii) health; (iii) mines and minerals development; (iv) local government; (v) agriculture; (vi) energy and water development; and (vii) national planning; (b) a representative of the Attorney-General; (c) a representative of the Zambia Association of Chambers of Commerce and Industry; (d) one person representing non-governmental organisations dealing with environmental management; (e) one person representing an institution involved in scientific and industrial research; and (f) two other persons."

⁶¹ Section 11(2) of the EMA provides: "The Minister shall appoint the Chairperson and the Vice Chairperson of the Board from amongst the members of the Board, except that the Chairperson and the Vice-Chairperson shall not be public officers."

Minister, it has raised problems for the Board. For instance, in September 2012 the Board declined an application from Mwembeshi Resources Limited for approval of its Kangaluwi Copper Project in the Lower Zambezi National Park. This led Mwembeshi Resources Limited to appeal to the Minister, who overturned the decision of the Board. In his letter, the Minister decided to approve the project on three grounds: first, employment creation for locals in the area; second, the availability of cost-effective technologies and methods to adequately address all the identified negative impacts that might arise; and third, the enhancement of wildlife management and conservation in the area. In conclusion, the Minister directed the company to liaise with the ZEMA for the issuance of a permit subject to conditions that might be attached to it.⁶²

The Minister's decision was based on section 115 of the EMA, which empowers him/her to receive an appeal from an aggrieved person or entity regarding a decision made by the Board of the ZEMA.⁶³ The application of section 115 is made subject to subsection 2, which requires the Minister, in reviewing such an application, to have regard to the principles governing environmental management, environmental policies, guidelines, standards, and the findings and recommendations of the ZEMA. Section 115(2) is merely procedural and does not compel the Minister to inquire into scientific proof as the basis for his decision. Despite his considerations being outweighed by the actual findings of ZEMA and independent studies, the Minister referred the matter back to the ZEMA with the instruction that the investor "liaise with ZEMA for them to issue a Decision Letter with all the appropriate conditions under which the project will operate". The ZEMA declined to do so due to its initiating a legal suit against the Minister's decision, but the Minister decided to suspend the Board of the ZEMA.⁶⁴

⁶² This was in a letter dated 17 January 2014, addressed to Zambezi Resources Limited. Udoh 2014 <http://www.minesandcommunities.org/article.php?a=12557>.

⁶³ Section 115 of the EMA provides: "(1) The Minister shall, where the Minister receives an appeal or an application for review under any provision of this Act, consider and determine the review application and may— (a) allow the application or appeal wholly or in part; (b) dismiss the application or appeal; or (c) refer the application or appeal back to the Board with a request for consideration or further consideration of some fact or issue. (2) In determining a review application, the Minister— (a) shall have regard to the purpose of this Act and the principles set out in section six; (b) shall have regard to relevant environmental policies, guidelines and standards published by the Agency; (c) shall have regard to, but is not bound by, the findings and recommendations of the person conducting the inquiry. (3) The decision of the Minister on a review application shall be given in a written notice delivered to the applicant and to the Director-General, and shall set out the reasons for the decision."

⁶⁴ Informal discussion with Zambia Environmental Management Agency, Head Office, Friday, 29 May 2015.

In 2013 the ZEMA issued an Environmental Protection Order pursuant to Section 104 of the Act to First Quantum Minerals (FQM) requiring it to stop the illegal activity of constructing the Chisola dam without its approval. The Minister, however, gave FQM conditional permission to continue constructing the dam, which would cover 200 hectares of woodland, despite the Order's being in effect.⁶⁵ Also, in 2014, due to massive pollution, the ZEMA ordered the closure of Mopani Copper Mine's heap leach near Butondo Township, in Mufulira, but the government directed it to be reopened notwithstanding the fact that there were issues that needed to be resolved between the government and the local inhabitants.⁶⁶ These happenings demonstrate that the Minister has the authority to interfere where the Board has made a decision and he/she is not comfortable with. The Minister is not required to justify the decision made.

3.4 *Insistence on locus standi*

In the context of environmental protection, there is no strict requirement that a direct interest in the relationship between the person seeking the relief and the interests of the environmental damage should exist. Where such is the case, the court "should be in a position to give effective and complete relief. If no effective relief can be granted, the court should not entertain public interest litigation".⁶⁷ The courts that hear such matters have, however, in most instances questioned the capacity of litigants, especially that of spirited non-governmental organisations. In *Lafarge Cement Zambia Limited v Peter Sinkamba* the respondent, suing on behalf of CBE, brought an action against the appellant on grounds that its mining activities were causing environmental harm. Despite the respondent's demonstrating the adverse effects that mining activities brought to the area, the court rejected the application on the grounds that the respondent did not possess *locus standi* in the matter. In delivering the judgment, Muyovwe J expressed the view that, had the learned Deputy Registrar and the learned Judge properly scrutinised the claims and the figures endorsed, "they would have both

⁶⁵ Mulenga *Foreign Direct Investment in the Zambian Mining Sector* 184.

⁶⁶ Informal discussion with Green and Justice Organisation, Friday, 3 July 2015.

⁶⁷ *Mtikila v Attorney General* HCCS No 5 of 1993 (Kenyan High Court). Public interest litigation is an action brought before the court, not for the purpose of enforcing the right of one individual against another, as happens in the case of ordinary litigation, but it is intended to promote and vindicate public interest, which demands that violations of the constitutional or legal rights of large numbers of people who are poor, ignorant or in a socially or economically disadvantaged position should not go unnoticed or unredressed – *People's Union for Democratic Rights v Union of India* [1982] 3 SCC 235 240, per Bhagwati J. In Zambia, public interest litigation is not entertained by the court – *Attorney General v Law Association of Zambia* [2008] ZR 21, 27.

arrived at the inescapable conclusion that the respondent had no *locus standi* in this matter and that if anything the action was frivolous and vexatious".⁶⁸ The court erred in its construction of the term "*locus standi*" in the context of the circumstances of the case that was before it, as the decision made was in contumelious disregard to section 123 of the MMDA, which provided thus:

Any person, group of persons or any private or state organisation may bring a claim and seek redress in respect of the breach or threatened breach of any provision relating to damage to the environment, biological diversity, human and animal health or to socio-economic conditions-

- (1) in that persons or group of person's interest;
- (2) in the interest of or on behalf of, a person who is, for practical reasons, unable to institute such proceedings;
- (3) in the interest of, or on behalf of, a group or class of person whose interests are affected;
- (4) in the public interest; and
- (5) in the interest of protecting the environment or biological diversity.

It is clear from the wording of this provision that persons, a private organisation or a state organisation has *locus standi* to bring an action either in that or any other person's or group's interest or on their behalf or in the public interest. The explicitness of the provision entails that a person need not struggle to establish standing, yet the court still denied the existence of *locus standi* by overlooking the respondent's claim that the action was brought due to the historical and current pollution of the environment by the mine, which activities were affecting the public. It is argued that the measure for *locus standi* should be based first on whether the activities of a polluting nature are affecting the public at large; and second, on whether the statute makes provision for such. The appellant' claim hinged on both aspects but the court did not address either. Though the appellant attempted to rely on section 87 of the MMDA as a basis for establishing *locus*, the court did not delve into whether the respondent had sufficient interest, notwithstanding that the requirements under that provision were met. The court chose to rely heavily on the respondent's other argument as a basis for *locus*, i.e. that he should be compensated under the Environmental Protection Fund, to which they declined, thereby contumeliously disregarding section 87. The position

⁶⁸ *Lafarge Cement Zambia Limited v Peter Sinkamba* (2013) ZMSC 31 (Appeal No 169 of 2009) J16.

of the court seems to suggest that the request for *locus standi* was made subservient to the respondent's request for compensation. This demonstrates a narrow view by the court on matters of *locus standi* in environmental protection, and its importance. It is posited that the court was misguided when it formed an opinion that "the respondent had no legal authority to bring this action and, therefore, cannot benefit from his wrongs", and ultimately dismissed the matter in its entirety.

In *Zambia Community Based Natural Resources Management Forum v Attorney General and Mwembeshi Resources Limited*, Mwembeshi Resources Limited applied to the relevant authorities to commence copper mining in the Lower Zambezi National Park. Following a protracted process, the Minister of Lands, Natural Resources and Environmental Protection granted Mwembeshi Resources permission to commence large-scale mining activities in the National Park. Subsequent to the Minister's approval, the appellants appealed to the court. The question of *locus standi* was also raised on one of the three main grounds of appeal. While it reaffirmed that *locus standi* went to the heart of the matter, the court refused to dismiss the matter for minor irregularities or technicalities and instead requested that the application be amended.⁶⁹ Following the amendment, the respondents contended that the appellants did not live in the area where the mine would be located and hence were not affected. This argument was rejected by the court. The rejection was premised on the effect that the project would have on the environment and not on whether the person before the court was the proper one. The court's conclusion shows that the authority to bring an action should be based on the violation of environmental rights and not purely on *locus standi*. The challenge would occur where the dispute was not between two parties. In instances pertaining to the environment, it matters how the issue of standing is resolved. Where there is rigidity and insistence on standing, the decision made could have an adverse effect on the environment, so the court must adopt an expansive approach to standing in relation to environmental issues.

4 Balance required?

It is quite clear from the discussion that the courts in Zambia have not adequately addressed environmental matters. It is also evident that the court's appreciation of environmental rights is also limited. This is evident

⁶⁹ *Zambia Community Based Natural Resources Management Forum, Zambia Institute of Environment Management, Zambia Climate Change Network, Chalimbana River Water Conservation Trust, Green Living Movement, David Ngwenyama v Attorney General and Mwembeshi Resources Limited* (2014) HP/A/006 J9, per Kondolo J.

from its insistence on the supposed development brought by mining investment rather than the protection of the rights of those who depend on a clean and unpolluted environment for their survival. Osei-Hwedie⁷⁰ observes that the dilemma is in terms of the priority accorded to rapid industrial development and Zambia's dependence on the copper industry for its economic livelihood on the one hand, and the need for a clean, healthy environment suitable for human habitation and sustainable development on the other.

The court needs to creatively interpret the law by balancing the development brought by investment against environmental rights. The courts' response could have the effect of "projecting to the regulated community and the public at large the importance of environmental quality and the unacceptability of behaviours that jeopardize the environment".⁷¹ It is recognised that environmental matters often involve complex scientific aspects. The courts must have a firm appreciation of such aspects if they are to make decent findings. For judges to make decisions based on an appreciation of the scientific merits of a case they would have to augment their legal skills with the skills necessary to grasp the essence of the relevant science⁷² and they would need to be guided by counsel's expert arguments. Needless to say, counsel would have to embrace the scientific dimensions of environmental decision-making as well.⁷³

Balancing the development brought by investment against environmental rights requires addressing two major issues: public interest, and dispensing with the requirement to prove harm, as is the case in torts. In addressing the issue of public interest, the question is whether the project is in the public interest. If the answer is "Yes", the next aspect to consider is whether the project should be allowed to proceed, notwithstanding its adverse effect on the environment. In *Martha Kangwa v Environmental Council of Zambia*, which was decided based on provisions of the EPPCA, it was contended that the project should be allowed as it was in the public interest. The second respondent submitted that the project would create more than 300 jobs, provide cheap cement, add to tax revenue, improve the social amenities in the area, and help to reduce poverty levels in Zambia.⁷⁴ Upon due consideration of the argument made, Musonda J ordered the project to

⁷⁰ Osei-Hwedie 1996 *J Soc Dev Afr* 63.

⁷¹ Fulton and Benjamin "Foundations of Sustainability" 21.

⁷² Kidd 2006 *PELJ* 83.

⁷³ Kidd 2006 *PELJ* 83.

⁷⁴ *Martha Muzithe Kangwa v Environmental Council of Zambia, Nasla Cement Limited and Attorney General* (2008) HP 245 J29.

proceed on condition that there was compliance with ECZ "measures to mitigate any environmental degradation".⁷⁵ In the mind of the court, the project could proceed on the grounds that there were measures to mitigate any environmental degradation. Although there would be mitigating measures spelt out in the EIA, there were none that addressed their particular concern about the effect the project on boreholes and egg and milk production.

The court did not apply its mind to this concern as it was preoccupied with the requirement that the appellants prove "demonstrable harm". The consequence of the court's reasoning is that any other interest may be overridden by "public interest". Unfortunately, the court did not attempt to define what was meant by "public interest" besides stating that "you have 300 employees who will lose employment and they have families to look after. The public interest is served by allowing the project". It would be justifiable to infer that in such a context the term "public interest" refers to the benefit that the project would confer on the economy – in this case, the creation of employment and not the interest of those that were likely to be negatively affected by the project. However, this may not be the full meaning of the term "public interest". In fact, defining the term would be an arduous exercise, as its meaning is unclear.

In matters where questions about the meaning of "public interest" have been raised, the courts have struggled to define the term, leading to its being interchanged with "public purpose" or "public use". In the case of *William David Carlisle Wise v Attorney General*, Bwalya J stated that "What constitutes public use frequently and largely depends upon facts surrounding the subject".⁷⁶ In *Nkumbula v Attorney General*, Baron J expressed the opinion that "what is in the public interest or for the public benefit is a question of balance" between the interests of society and those of an individual whose rights or interests are in issue.⁷⁷ Deciphering the two cases, the meaning of "public interest" appears to be subject to a determination based on the facts and circumstances. This would mean that whereas certain actions can be said to be in the public interest, others may not be. However, this requires that a balance be struck between the interest of society at large and that of a particular section of it. In this case, the court's inclination was to privilege the interest of Nasla Cement Limited, and not the interest of the residents of the area where the mine would be located. The

⁷⁵ *Martha Muzithe Kangwa v Environmental Council of Zambia, Nasla Cement Limited and Attorney General* (2008) HP 245 J61.

⁷⁶ *William David Carlisle Wise v Attorney General* (1990-1992) ZR 124 (HC).

⁷⁷ *Nkumbula v Attorney General* (1972) ZR 204.

issue should not have been the 300 people that the project was likely to employ but the others who would be negatively affected by the project.

The second issue for a court to consider in balancing development against environmental protection would be evaluating the harm a project could inflict on the environment. In the *Martha Muzithe Kangwa* case the court was of the view that the action had been prematurely brought before it, when there had been no demonstrable harm. Musonda J concluded that "the plaintiffs lamentably failed to show any demonstrable harm" and thus dismissed the action with costs to be taxed in default of agreement.⁷⁸ The court did not provide the meaning of the phrase "demonstrable harm" or its constituent elements. The natural meaning of the term could be that it is harm which is capable of being proved. Interpreting the term in such a manner would entail that, where harm cannot be proved, an action for damages must fail at law. The plaintiff asserted that the agricultural area was being turned into a mining area without consultation or research on the negative impact that cement production would have on egg and milk production, boreholes, and pollution. The court dismissed the argument on the basis that the harm likely to be suffered was not proved. It is thus posited that the insistence by the court on proving "demonstrable" harm makes it impossible to avoid environmental damage before it occurs, and relies rather on attempting to remedy such damage after it has occurred.

In *Zambia Community Based Natural Resources Management Forum v Attorney General and Mwembeshi Resources Limited*, the issue of "proving demonstrable harm" was raised. In that case, the court noted that damage to the environment is a matter of public concern and interest which affects all people born and unborn. Kondolo J held that the Appellants "do not need to specify or prove exactly how they are affected by the subject project".⁷⁹ The reasoning of the court was motivated by scientific evidence that was submitted in support of the unsustainability of the project. In its analysis the court concluded that the criterion for invoking the court's intervention was a demonstration by the applicants that they are "affected by the subject project". This presents a new dimension of legal reasoning that accommodates prevention rather than remediation. In the context of environmental law, prevention is superior to remediation because some harm is irreparable, and also, clean-up is more costly than prevention. In fact, prevention becomes particularly relevant as it is applicable in situations

⁷⁸ *Martha Muzithe Kangwa v Environmental Council of Zambia, Nasla Cement Limited and Attorney General* (2008) HP 245 J59-60.

⁷⁹ *Martha Muzithe Kangwa v Environmental Council of Zambia, Nasla Cement Limited and Attorney General* (2008) HP 245 J22.

of uncertainty (ie where there is risk or doubt). This allows companies to invest in production methods that are sustainable, which in turn improve environmental performance. It also challenges the dominant ways of thinking. Instead of presuming that development or innovation is always good, we are required to assess risk in explicit detail and to err on the side of caution to protect the environment.⁸⁰

5 Conclusion

The mandate of the court in protecting environmental rights is drawn from the Constitution, which requires it to act judiciously in resolving disputes. While it is expected that the court would be "creating" law in its resolution of disputes, it must not overstep its boundaries by assuming the role of the legislature or indeed the executive. The court should, however, ensure environmental responsibility and accountability while advancing the development of the law through its construction of provisions. Although the "right to a clean, safe and healthy environment" is not a fundamental right, the interpretation of the law by the courts must be in such a manner that meets the aspirations of society, taking into consideration the sustainability of the environment. A challenge to judicial decision-making in the field of environmental law is to determine the appropriate balance between individual entitlements and more general societal concerns. In attaining such a balance, the court must fully appreciate the nature of the field of environmental and human rights law by avoiding rigidity and insistence on a mere technicality to avoid upholding environmental rights. This entails that the courts must embrace public interest litigation for environmental cases. Given that environmental considerations have scientific aspects, it would be burdensome to expect the court to expertly deal with such matters where counsel is not fully abreast with the scientific aspects of a case.

Bibliography

Literature

Alfredsson and Ovsiouk 1991 *Nord J Int'l L*

Alfredsson G and Ovsiouk A "Human Rights and the Environment" 1991 *Nord J Int'l L* 19-27

⁸⁰ McLeod-Kilmurray "Lowering Barriers to Judicial Enforcement" 294-295.

Birnie and Boyle *International Law and the Environment*

Birnie P and Boyle A *International Law and the Environment* 2nd ed (Oxford University Press Oxford 2002)

Bosek 2014 *AHRLJ*

Bosek JK "Implementing Environmental Rights in Kenya's New Constitutional Order: Prospects and Potential Challenges" 2014 *AHRLJ* 489-508

Boyd *Environmental Rights Revolution*

Boyd DR *The Environmental Rights Revolution: Constitutions, Human Rights, and the Environment* (PhD-thesis University of British Columbia 2010)

Churchill "Environmental Rights in Existing Human Rights Treaties"

Churchill RR "Environmental Rights in Existing Human Rights Treaties" in Boyle A and Anderson MR *Human Rights Approaches to Environmental Protection* (Oxford Oxford University Press 1996) 89-108

Cullet 1995 *NQHR*

Cullet P "Definition of an Environmental Right in a Human Rights Context" 1995 *NQHR* 25-40

Fulton and Benjamin "Foundations of Sustainability"

Fulton S and Benjamin JA "Foundations of Sustainability" in UNEP *Advancing Justice, Governance and Law for Environmental Sustainability* (UNEP Nairobi 2012) 18-22

Hayward 2000 *Political Studies*

Hayward T "Constitutional Environmental Rights: A Case for Political Analysis" 2000 *Political Studies* 558-572

Kidd 2006 *PELJ*

Kidd M "Greening the Judiciary" 2006 *PELJ* 72-86

Markowitz and Gerardu 2012 *Pace Env'tl L Rev*

Markowitz KJ and Gerardu JJA "The Importance of the Judiciary in Environmental Compliance and Enforcement" 2012 *Pace Env'tl L Rev* 538-554

McLeod-Kilmurray "Lowering Barriers to Judicial Enforcement"

McLeod-Kilmurray H "Lowering Barriers to Judicial Enforcement: Civil Procedure and Environmental Ethics" in Paddock L *et al* (eds) *Compliance*

and Enforcement in Environmental Law: Towards More Effective Implementation (Edward Elgar Cheltenham 2011) ch 12

Mohammad 2014 *IJBM*

Mohammad N "Environmental Rights for Administering Clean and Healthy Environment towards Sustainable Development in Malaysia: A Case Study" 2014 *IJBM* 191-198

Mulenga *Foreign Direct Investment in the Zambian Mining Sector*

Mulenga C *Foreign Direct Investment in the Zambian Mining Sector: The Need for Environmental Protection and Human Rights* Unpublished (LLD-thesis University of Pretoria 2017)

Osei-Hwedie 1996 *J Soc Dev Afr*

Osei-Hwedie BZ "Environmental Protection and Economic Development in Zambia" 1996 *J Soc Dev Afr* 57-72

Sakala *Role of the Judiciary*

Sakala JB *The Role of the Judiciary in the Enforcement of Human Rights in Zambia* (Image Printers Lusaka 2013)

Sands *et al Principles of International Environmental Law*

Sands P *et al Principles of International Environmental Law* 3rd ed (Cambridge University Press Cambridge 2012)

Shue *Basic Rights*

Shue H *Basic Rights: Subsistence, Affluence, and US Foreign Policy* 2nd ed (Princeton University Press Princeton 1996)

Case law

Attorney General v Law Association of Zambia (2008) ZR 21

Dominic Liswaniso Lungowe v Vedanta Resources Plc and Konkola Copper Mines Plc (2016) EWHC 975 (TCC)

Doris Chinsambwe v NFC Africa Mining (unreported) (2014) HK 374

James Nyasulu v Konkola Copper Mines, Environmental Council of Zambia and Chingola Municipal Council (2007) HP 1286

Konkola Copper Mines (KCM) PLC v James Nyasulu (Appeal No. 1 of 2012)

Lafarge Cement Zambia Limited v Peter Sinkamba (2013) ZMSC 31
(Appeal No 169 of 2009)

Martha Muzithe Kangwa v Environmental Council of Zambia, Nasla Cement Limited and Attorney General (2008) HP 245

Mtikila v Attorney General HCCS No 5 of 1993

Nkumbula v Attorney General (1972) ZR 204

People's Union for Democratic Rights v Union of India (1982) 3 SCC 235

Peter Kingaibe and Charles Chookole v Attorney General (2009) HL 86

Uganda Electricity Transmission Co Ltd v De Samaline Incorporation Ltd
Miscellaneous Cause No 181 of 2004 (High Court of Uganda)

William David Carlisle Wise v Attorney General (1990-1992) ZR 124 (HC)

Zambia Community Based Natural Resources Management Forum, Zambia Institute of Environment Management, Zambia Climate Change Network, Chalimbana River Water Conservation Trust, Green Living Movement, David Ngwenyama v Attorney General and Mwembeshi Resources Limited (2014) HP/A/006

Zambia Revenue Authority v Post Newspaper SCZ Judgment No 18 of 2016

Legislation

Constitution of the Republic of Zambia (as amended by Act 2 of 2016)

Environmental Management Act 12 of 2011

Environmental Protection and Pollution Control Act Chapter 204 of 1990

Forestry Act 4 of 2015

Land Acquisition Act 2 of 1970

Lands Act 29 of 1995

Local Government Act 22 of 1995

Mines and Minerals Development Act 11 of 2015

National Heritage Conservation Commission Act 173 of 1989

Public Health Act 12 of 1930

Urban and Regional Planning Act 3 of 2015

Water Resources Management Act 21 of 2011

Workers Compensation Act 10 of 1999

Zambezi River Authority Act 17 of 1987

Zambia Wildlife Act 14 of 2015

International instruments

Stockholm Declaration of the United Nations Conference on the Human Environment UN Doc A/CONF.48/14/Rev.1 (1973)

Informal discussions

Informal discussion with Zambia Environmental Management Agency, Head Office, Friday, 29 May 2015

Informal discussion with Green and Justice Organisation, Friday, 3 July 2015

Internet sources

Electoral Commission 2016 https://www.elections.org.zm/results/2016_referendum

Electoral Commission of Zambia 2016 *Referendum* https://www.elections.org.zm/results/2016_referendum accessed 22 August 2016

Free Dictionary 2016 <http://legal-dictionary.thefreedictionary.com/judiciary>
Free Dictionary 2016 *Judiciary* <http://legal-dictionary.thefreedictionary.com/judiciary> accessed 16 August 2016

Judiciary of Zambia 2016 <http://www.judiciaryzambia.com/introduction/>
Judiciary of Zambia 2016 *Introduction* <http://www.judiciaryzambia.com/introduction/> accessed 17 August 2016

Merriam Webster Dictionary 2016 <http://www.merriam-webster.com/dictionary/judiciary>

Merriam Webster Dictionary 2016 *Judiciary* <http://www.merriam-webster.com/dictionary/judiciary> accessed 16 August 2016

Muigua 2015 <http://kmco.co.ke/wp-content/uploads/2018/08/RIGHT-TO-CLEAN-AND-HEALTHY-ENVIRONMENT-IN-KENYA.docx-7th-september-2015.pdf>

Muigua K 2015 *Reconceptualising the Right to Clean and Healthy Environment in Kenya* <http://kmco.co.ke/wp-content/uploads/2018/08/RIGHT-TO-CLEAN-AND-HEALTHY-ENVIRONMENT-IN-KENYA.docx-7th-september-2015.pdf> accessed 12 March 2018

Parliament of Zambia 2007 http://www.parliament.gov.zm/sites/default/files/documents/committee_reports/REPORT%20OF%20THE%20COMMITTEE%20ON%20ENERGY%202007.pdf

Parliament of Zambia 2007 *Parliamentary Report of the Committee on Energy, Environment, and Tourism for the First Session of the Tenth National Assembly Appointed on 8 November 2006* http://www.parliament.gov.zm/sites/default/files/documents/committee_reports/REPORT%20OF%20THE%20COMMITTEE%20ON%20ENERGY%202007.pdf accessed 5 March 2018

Udoh 2014 <http://www.minesandcommunities.org/article.php?a=12557>

Udoh N 2014 *Zambia: High Court Grants Injunction against Lower Zambezi Mine* <http://www.minesandcommunities.org/article.php?a=12557> accessed 10 December 2014

World Bank 2016 <http://www.worldbank.org/en/news/feature/2016/07/18/how-can-zambia-benefit-more-from-mining>

World Bank 2016 *How Can Zambia Benefit More from Mining?* <http://www.worldbank.org/en/news/feature/2016/07/18/how-can-zambia-benefit-more-from-mining> accessed 11 July 2018

ZDA 2014 <http://www.zda.org.zm/?q=ja/download/file/fid/57>

Zambia Development Agency 2014 *Zambia Mining Sector Profile* <http://www.zda.org.zm/?q=ja/download/file/fid/57> accessed 13 December 2016

List of Abbreviations

AHRLJ	African Human Rights Law Journal
CBE	Citizens for a Better Environment
ECZ	Environmental Council of Zambia
EIA	Environmental Impact Assessment
EMA	Environmental Management Act

EPPCA	Environmental Protection and Pollution Control Act
FQM	First Quantum Minerals
IJBM	International Journal of Business and Management
J Soc Dev Afr	Journal of Social Development in Africa
MMDA	Mines and Mineral Development Act
Nord J Int'l L	Nordic Journal of International Law
NQHR	Netherlands Quarterly of Human Rights
Pace Envtl L Rev	Pace Environmental Law Review
PELJ	Potchefstroom Electronic Law Journal
UNEP	United Nations Environment Programme
ZDA	Zambia Development Agency
ZEMA	Zambia Environmental Management Agency