

**MAKING A CASE FOR THE ESTABLISHMENT OF
SPECIALISED ENVIRONMENTAL COURTS
IN SOUTH AFRICA**

By

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DECLARATION

I, Abimbola Olowa, declare that this thesis: Making a case for the establishment of specialised environmental courts in South Africa, is my own work and that all sources that I have used or quoted have been indicated and acknowledged using complete and proper references.

DEDICATION

This thesis is lovingly dedicated to the cherished memory of my father, Professor David Maloma Akinnusi. Thank you, Daddy, for your unwavering belief in me.

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LIST OF ABBREVIATIONS

ADR	Alternative Dispute Resolution
BAC	Business Against Crime
CAM	Court Annexed Mediation
CCMA	Commission for Conciliation, Mediation and Arbitration
CONNEPP	Consultative National Environmental Policy Process
DFFE	Department of Forestry, Fisheries, and the Environment
DOJCD	Department of Justice and Constitutional Development
ECA	Environment Conservation Act
ECTs	Environmental Court and Tribunals
ELC	Environmental and Land Court
ELCA	Environment and Land Court Act
EMCA	Environmental Management and Co-ordination Act
EMI	Environmental Management Inspectors
EMPR	Environmental Management Programme
JSC	Judicial Service Commission
LCC	Land Claims Court
LEC	Land and Environment Court
LECA	Land and Environment Court Act
LRA	Labour Relations Act
MATTSO	Ministerial Advisory Task Team on the Adjudication of Sexual Offences Matters

NDP	National Development Plan
NDPP	National Director of Public Prosecutions
NECER	National Environmental Compliance and Enforcement Report
NEDLAC	National Economic Development and Labour Council
NEMA	National Environmental Management Act
NEMA	National Environmental Management Authority (Kenya)
NET	National Environmental Tribunal
NGO	Non-Governmental Organisation
NPA	National Prosecuting Authority
NSW	New South Wales
OECD	Organisation for Economic Cooperation and Development
PAJA	Promotion of Administrative Justice Act
PEC	Planning and Environment Court (Queensland)
RMA	Resource Management Act (New Zealand)
SA	South Africa
SAHRC	South African Human Rights Commission
SCA	Supreme Court of Appeal
SCCC	Specialised Commercial Crimes Court
SEMA	Specific Environmental Management Act
SLAPP	Strategic Lawsuits Against Public Participation
SOC	Sexual Offences Court
SOCA	Sexual Offences and Community Affairs

UN

United Nations

UNEP

United Nations Environment Programme

SUMMARY

Given the fact that the general courts are often overburdened with general civil and criminal cases and, as such, environmental cases are not prioritised and given the attention they deserve, this thesis seeks to determine the most suitable specialised environmental court model for South Africa which would facilitate swift access to environmental justice and foster the development of environmental jurisprudence.

To do this the thesis considered the role of courts *vis a vis* environmental management and established that courts have a pivotal role to play in developing environmental law jurisprudence, promoting compliance with environmental law, and enforcing environmental law and the constitutional environmental right. The concern was raised that environmental law jurisprudence has not developed as it should, despite South Africa having entrenched the right to an environment in its Constitution and promulgated a plethora of environmental legislation.

The thesis considered the benefits of specialised courts and determined that the benefits of a specialised court, particularly in an area of law such as environmental law, which is scientific and technical, has several advantages. The thesis analysed the functioning of four existing specialised courts in South Africa – the Labour Court, the Land Claims Court, the Sexual Offences Court, and the Specialised Commercial Crimes Court, and also undertook a comparative analysis of two specialised environmental courts in New South Wales and Kenya to extrapolate useful attributes and best practices that can be adopted in the proposed specialised environmental court in South Africa.

Using Pring and Pring's twelve design blocks to determine the best model specialised environmental court for South Africa, two court models were established as being suitable for South Africa – the independent judicial court and the green court. Recommendations were made for the rollout of the green court model on a pilot basis in Gauteng. Recommendations were further made for new legislation and legislative amendments to current legislation required to establish the two models.

TABLE OF CONTENTS

DECLARATION.....	II
DEDICATION.....	III
ACKNOWLEDGEMENTS	IV
LIST OF ABBREVIATIONS	VI
SUMMARY	IX
CHAPTER 1.....	1
AN INTRODUCTION TO THE STUDY	1
1.1 Introduction	1
1.2 Problem statement	9
1.3 Research objective.....	14
1.4 Rationale.....	14
1.5 Research methodology	15
1.6 Research questions	17
1.7 Chapter outline	18
CHAPTER 2.....	19
THE JUDICIARY, ENVIRONMENTAL LITIGATION, AND SPECIALISED ENVIRONMENTAL COURTS: A CONCEPTUAL FRAMEWORK	19
2.1 Introduction	19
2.2 Brief history of environmental legislation in South Africa.....	20
2.3 The judiciary and environmental law	25
2.4 Environmental litigation.....	41
2.5 Specialised environmental courts.....	43
2.6 Key benefits of specialised environmental courts.....	45

2.7	Models of environmental courts.....	52
2.8	Conclusion.....	59
CHAPTER 3.....		62
AN OVERVIEW OF SPECIALISED COURTS IN SOUTH AFRICA		62
3.1	Introduction	62
3.2	Rationale for court specialisation	63
3.3	Benefits of court specialisation	66
3.4	Specialised courts in South Africa	70
3.4.1	The Labour Court	72
3.4.2	The Land Claims Court	79
3.4.3	Sexual Offences Court	89
3.4.4	The Specialised Commercial Crimes Court	101
3.5	The Hermanus Environmental Court	106
3.6	Summary of reflections	114
3.7	Conclusion.....	117
CHAPTER 4.....		118
A COMPARATIVE ANALYSIS OF SPECIALISED ENVIRONMENTAL COURTS IN NEW SOUTH WALES, AUSTRALIA, AND KENYA		118
4.1	Introduction	118
4.2	The Land and Environment Court of New South Wales, Australia.....	119
4.3	The Environment and Land Court of Kenya	137
4.4	Comparative analysis findings	148
4.5	Conclusion.....	152

CHAPTER 5.....	153
PROPOSALS FOR A SPECIALISED ENVIRONMENTAL COURT FOR SOUTH AFRICA.....	153
5.1 Introduction	153
5.2 Decisional Step One: legal structure, political situation, socio-economic conditions and environmental goals	155
5.2.1 Legal structure.....	155
5.3 Summary of factors under decisional step one.....	167
5.4 Decisional Step Two: the twelve design decisions	168
5.5 Additional Components.....	196
5.6 Proposals for a Specialised Environment Court for South Africa	199
5.7 Conclusion.....	201
CHAPTER 6.....	203
CONCLUSION AND RECOMMENDATIONS.....	203
6.1 Introduction	203
6.2 Summary of findings.....	203
6.3 Recommendations	210
6.4 Suggestions for future research	219
6.5 Concluding remarks	220
BIBLIOGRAPHY	222

LIST OF TABLES

Table 1 Environmental criminal convictions	41
Table 2 Characteristics of the five specialised courts	114
Table 3 Jurisdiction of NSW LEC	125
Table 4 Features of the proposed Independent Judicial Court model.....	210
Table 5 Features of the proposed Designated Green Court model	214
Table 6 Independent Judicial Court: proposed legislation/legislative amendments.....	216
Table 7 Designated Green Court: proposed legislative amendments	218

CHAPTER 1

AN INTRODUCTION TO THE STUDY

1.1 Introduction

Environmental legislation puts provisions in place that seek to conserve and protect the environment¹ from the negative impacts of the activities of human beings. The enforcement of such legislation is just as important as the provisions in the legislation. This is because a law that cannot be enforced would be disregarded with impunity by the public which it seeks to regulate. Kadish clearly articulates this when he indicates that the total absence of enforcement (of a law) would contradict the moral message communicated by the law, as the public would see the conduct condemned in words, but would also see, by the dramatic absence of prosecutions, that it is not condemned in deed.² This, Kadish further explains, will “breed a cynicism and an indifference to the criminal-law processes, which augment tendencies toward disrespect for those who make and enforce the law.”³ Benjamin underscores that laws are enacted so that they may be enforced – including through judicial means – when violated.⁴

Ensuring compliance through enforcement is, therefore, crucial for any environmental legislation, especially in safeguarding the right to the environment as enshrined in section 24 of the Constitution of the Republic of South Africa, 1996 (the SA Constitution).⁵ The courts, specifically, bear the responsibility of holding both government entities and private individuals accountable and serve as the ultimate arbiters of right or wrong in cases of violations of the law.⁶

¹ The word ‘environment’ is used here in the broadest sense to include air, water, land, flora, and fauna.

² SH Kadish ‘The crisis of overcriminalization’ (1967) *The Annals of the American Academy of Political and Social Science* 160.

³ Kadish (n 2 above) 160.

⁴ AH Benjamin ‘We, the judges, and the environment’ (2012) 29 *Pace Environmental Law Review* 586.

⁵ Sec 24 provides that “Everyone has the right— (a) to an environment that is not harmful to their health or wellbeing; and (b) to have the environment protected, for the benefit of present and future generations, through reasonable legislative and other measures that— (i) prevent pollution and ecological degradation; (ii) promote conservation; and (iii) secure ecologically sustainable development and use of natural resources while promoting justifiable economic and social development.”

⁶ CB Soyapi ‘A multijurisdictional assessment of the judiciary’s role in advancing environmental protection in Africa’ (2020) *Hague Journal on the Rule of Law* 309 citing A Cox ‘The independence of the judiciary: history and purposes’ (1996) *University of Dayton Law Review* 565; CM Larkins ‘Judicial independence and democratization: a theoretical and conceptual analysis’ (1996) 44 *American Journal of Comparative Law* 606.

In South Africa, the primary enforcement of environmental legislation is carried out by environmental authorities,⁷ who are duly empowered to enforce various environmental laws,⁸ along with the general courts.⁹ The courts are the final resort when administrative enforcement mechanisms outlined in legislation prove ineffective in achieving compliance, or where criminal sanction is the only logical measure to address the non-compliance.¹⁰ However, due to the courts' extensive caseloads and South Africa's criminal justice system already strained by what is often considered to be more 'serious' criminal cases,¹¹ environmental crimes often do not receive the required attention.

The courts are also responsible for resolving civil environmental disputes¹² and the ability to do so quickly, peacefully, and efficiently in a manner that is cost-effective, is key to the successful implementation of environmental law.¹³ However, quick resolution of environmental disputes does not always take place. The delays in environmental litigation within the judicial system can sometimes be attributed to the technical complexity and volume of the subject matter involved. Such environmental cases demand more time compared to other types of legal proceedings, particularly when judges lack specialised expertise in this area of the law.¹⁴ For instance, in the case of *South Durban Community Environmental Alliance v MEC for Economic Development, Tourism and Environmental Affairs: Kwazulu-Natal Provincial Government & Another (South Durban Community Environmental Alliance)*,¹⁵

⁷ These are the national department responsible for environmental affairs, the national department responsible for mineral resources, provincial departments responsible for environmental affairs, the national department of water and sanitation as well as local authorities.

⁸ Provisions in various pieces of environmental legislation empower competent authorities responsible for environmental affairs (national and provincial level); mineral resources (national level) and water affairs (national and local level) to direct offenders to take a number of steps to remedy harm to the environment through the use of Directives and Compliance Notices. See sec 31A of the Environment Conservation Act, 1989 (Act 73 of 1989); sec 19(3) of the National Water Act, 1998 (Act 36 of 1998); sec 45(1) of the Mineral and Petroleum Resources Development Act, 2002 (Act 28 of 2002); sec 28 and sec 31L of the National Environmental Management Act, 1998 (Act 107 of 1998).

⁹ These are the Magistrates' Courts and High Court with appeals to the Supreme Court of Appeal and ultimately the Constitutional Court.

¹⁰ This especially applies to biodiversity-related offences where there is no possibility of remediating the harm that has taken place. For instance, where a protected species has been killed, issuing a directive or compliance notice is not a suitable or logical remedy.

¹¹ M Fourie 'How civil and administrative penalties can change the face of environmental compliance in South Africa' (2009) *South African Journal of Environmental Law and Policy* 95.

¹² These are the High Court and appeals to the Supreme Court of Appeal and the Constitutional Court.

¹³ United Nations Environmental Programme (UNEP) *Environmental rule of law first global report* (2019) 183.

¹⁴ SC Whitney 'The case for creating a special environmental court system' (1973) *William and Mary Law Review* 504 <https://scholarship.law.wm.edu/wmlr/vol14/iss3/2> (accessed 13 March 2022).

¹⁵ [2020] ZASCA 39 (17 April 2020).

Vahed J highlighted the complexities of the case before him and the workload of the division as factors which led to the delay in delivering judgment.¹⁶

A credible, efficient, and capable judiciary is, therefore, crucial to the enforcement of environmental law as well as the quick and efficient resolution of environmental disputes. This is because in certain specific situations, such as a refusal of access to inspectors, emergency conditions, or persistent intransigence by violators, strong and swift judicial action is essential to the integrity of both the enforcement situation and the overall programme for compliance with environmental law.¹⁷ Further, the environment is not static and over time the circumstances of a dispute can change, potentially making the resolution obsolete and academic.¹⁸ In some cases, the damage to the environment may be irreversible.

Specialised courts and tribunals are not new concepts.¹⁹ In ancient times there was the *Praetor Urbanus* which adjudicated disputes between Roman citizens, and the *Praetor Peregrinus* which adjudicated disputes between foreigners and Roman citizens.²⁰ Similarly, in modern times, there are workmen's compensation tribunals, landlord-tenant tribunals, tax courts, commercial courts, labour tribunals, anti-discrimination commissions, tribunals dealing with compensation for victims of crime, planning commissions, and electricity tribunals.²¹

Some of the specialised courts and tribunals in South Africa include the Land Claims Court,²² Labour Court,²³ Labour Appeal Court,²⁴ the Electoral Court,²⁵ Competition Appeal Court,²⁶ and the Water Tribunal.²⁷ Within the Magistrates' Court and High Court system are specialised courts that have to deal with certain types of matters such as the Children's Court,²⁸ the Sexual

¹⁶ The case was heard on 13 December 2017 and the judgment was delivered on 19 December 2018 while the review application was launched in July 2016. The Supreme Court of Appeal (SCA) when considering the application for leave to appeal to the Supreme Court of Appeal raised the concern of delay in the delivery of the judgment in the High Court (n 14 above) para 52.

¹⁷ ME Mulkey 'Judges and other lawmakers: critical contributions to environmental law enforcement' (2004) *Sustainable Development Law and Policy* 9.

¹⁸ JP van den Berg 'Environmental dispute resolution in South Africa - towards sustainable development' (1998) *South African Journal of Environmental Law and Policy* 74.

¹⁹ G Pring and C Pring *Greening justice: creating and improving environmental courts and tribunals* (2009) xi.

²⁰ Pring and Pring (2009) (n 19 above) xi.

²¹ Pring and Pring (2009) (n 19 above) xi.

²² Land Restitution Act 22 of 1994 sec 22.

²³ Labour Relations Act 66 of 1995 sec 151.

²⁴ Labour Relations Act 66 of 1995 sec 167.

²⁵ Electoral Commissions Act 51 of 1996 sec 18.

²⁶ Competition Act 89 of 1998 sec 36.

²⁷ Water Act 36 of 1998 sec 146.

²⁸ Children's Act 38 of 2005 sec 42 - every Magistrate's court is a Children's Court.

Offences Court,²⁹ the Equality Court,³⁰ and the Specialised Commercial Crimes Court.³¹ It is noteworthy to highlight that the Sexual Offences Court was re-established following the report of the Ministerial Advisory Task Team on the Adjudication of Sexual Offences Matters (MATTSO Report), in which the Task Team recommended that the Sexual Offences Court be re-established through enabling legislation.³² The basis for this recommendation was that South Africa still needs the Sexual Offences Court, as the courts were found to be ‘successful in the establishment of a victim-centred criminal justice system, reduction of secondary victimisation, improvement of skills of court personnel, reduction of the cycle time in the finalisation of sexual offences cases, and have generally contributed to the efficient prosecution and adjudication of these cases’.³³ It is submitted that the establishment of specialised environmental courts will also have a similar positive impact as has been seen with the re-establishment of the Sexual Offences Court. The specialised environmental courts will contribute significantly to the protection of the environment as research shows that such courts will improve the skills of court personnel, reduce the cycle time in the finalisation of cases, and generally contribute to the efficient prosecution of environmental criminal cases and adjudication of environmental disputes.³⁴

Those who advocate for specialisation of courts have put forward four advantages.³⁵ First, it allows for greater efficiency because with specialised procedures, as well as staff and judges who are experienced in these cases, operations are streamlined and processed more

²⁹ Sec 55A of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007 empowers the Minister of Justice and Constitutional Development to designate any Division of the High Court or the main seat or any local seat of a Division or Magistrate’s Court as defined in sec 11 of the Superior Courts Act 10 of 2013 as a sexual offences court.

³⁰ Sec 16(1)(a) of the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000 provides that every Magistrate’s court and every High Court is an equality court in its area of jurisdiction. The Court was established to deal with complaints that are about unfair discrimination, hate speech or harassment and cases in this court can be brought by anyone even if he or she does not have a direct involvement in the matter.

³¹ Established in 1999 with the establishment of the Specialised Commercial Crime Unit in the National Prosecuting Authority.

³² Ministerial Advisory Task Team on the Adjudication of Sexual Offence Matters *Report on the Re-Establishment of Sexual Offences Courts* (MATTSO Report) (2013) 98 <https://www.justice.gov.za/reportfiles/other/2013-sxo-courts-report-aug2013.pdf> (accessed 1 March 2022).

³³ MATTSO Report (n 32 above) 96.

³⁴ BJ Preston ‘Benefits of judicial specialization in environmental law: the Land and Environment Court of New South Wales as a case study’ (2012) *Pace Environmental Law Review* 436 <https://digitalcommons.pace.edu/pelr/vol29/iss2/2> (accessed 9 September 2022).

³⁵ Additional arguments for and against the establishment of special environmental courts will be more fully discussed in chapter 3.

efficiently.³⁶ Second, by diverting a class of cases to specialised courts, the caseloads in the regular courts will be reduced which would also positively impact the court operations.³⁷ Third, there would be better and higher-quality decisions and better outcomes for litigants.³⁸ Fourth, specialised courts would improve the uniformity of decisions, contribute to greater predictability and confidence in the courts, and possibly reduce the number of appeals.³⁹

However, those who do not generally support specialisation have opined that even though specialisation may increase efficiency and possibly improve decisions, the impact on the broader development issue that led to the establishment of the specialised court might not be achieved.⁴⁰ For instance, in 1999 a commercial court was established in Tanzania, aimed at improving the efficiency and fairness of commercial dispute resolution – the idea was that if commercial cases were speedily and reliably dealt with, this would in turn facilitate private sector development and improve investor confidence.⁴¹ However, this aim was not achieved as the commercial court did not have any positive impact on business decision-making or the investment climate, because businesses hardly used the court, as they did not consider courts to be important to their decision-making.⁴²

Another argument against court specialisation has been that establishing and running a new system of courts can be costly because it would entail employing new court personnel, including renting new premises, which cost is likely to be borne by taxpayers, a majority of which are not likely to use the court.⁴³ The same writer put out a counter-argument, which is that some of the operational costs can be funded by the fees to be paid by people who make use of the specialised courts.⁴⁴

³⁶ H Gramckow and B Walsh *Developing Specialized Court Services: International Experiences and Lessons Learned* Justice and Development Working Paper Series No 24 (2013) 6 <https://openknowledge.worldbank.org/handle/10986/1667> (accessed 1 March 2022).

³⁷ Gramckow and Walsh (n 36 above) 6.

³⁸ Ibid.

³⁹ Ibid.

⁴⁰ Ibid.

⁴¹ Gramckow and Walsh (n 36 above) 6 citing DL Finnegan ‘Observations on Tanzania’s Commercial Court: a case study’ (2005) (Paper for the World Bank Conference on Empowerment, Security and Opportunity through Law and Justice).

⁴² Gramckow and Walsh (n 36 above) 7 citing Finnegan (n 41 above).

⁴³ VC Perez ‘Specialisation trends: water courts’ (2019) *Environmental Law* 595 https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3253349 (accessed 17 March 2022).

⁴⁴ Perez (n 43 above) 595.

Further arguments against the proposal, are that specialisation can have some negative effects as it could limit the resources available for general courts, lead to the perception of preferential treatment for cases and litigants, increase the risk of exposing the judges to the greater influence of specialised lawyers, and lead to judges developing a rather narrow view of the matters the court focuses on.⁴⁵ Zimmer also highlights that judges in specialised courts run the risk of developing a “narrow, even one-sided view of the issues” leading to a compromise of their objectivity, and also “run the risk of developing a professional bias” towards a core group of highly experienced and expert level lawyers, leading to the court’s neutrality being compromised which would result in a captured court.⁴⁶ In the case of specialised environmental courts, this translates to judges who are not impartial when delivering judgments and may be advocates and biased in favour of environmental protection, as opposed to a balanced and comprehensive analysis which is aligned to the principles of sustainable development.⁴⁷ A solution to this is offered by Zimmer who suggests that cases should be heard by a panel of at least three judges based on a rotation system.⁴⁸ He further suggests that decisions of specialised courts should be subject to review by courts of second instance or appellate general courts.⁴⁹ Apart from the solutions suggested by Zimmer to counter the partiality and capture arguments, it must be pointed out that the environmental sector is a highly regulated sector and science-based, such that it will be difficult for any judge to consistently interpret the law in a biased manner, which favours the environment to the detriment of sustainable development and *vice versa*. However, it will be important that, when appointing judges to serve on the specialised environmental courts, such judges are carefully selected with care taken to select judges who have a balanced view on protecting the environment while at the same time ensuring sustainable development.

At this stage, it is important to indicate that South Africa previously established an environmental court in Hermanus, Western Cape. The court, known as the Hermanus Environmental Court (the Hermanus Court), was regarded as a priority court established in March 2004 to provide for the effective and speedy prosecution of poaching syndicates and to

⁴⁵ Gramckow and Walsh (n 36 above) 8.

⁴⁶ MB Zimmer ‘Overview of specialized courts’ (2009) *International Journal for Court Administration* 1.

⁴⁷ Pring and Pring (2009) (n 19 above) 15 refer to this as judicial bias.

⁴⁸ Zimmer (n 46 above).

⁴⁹ Zimmer (n 46 above).

fast-track the trials of criminal offenders, particularly abalone poachers,⁵⁰ although cases relating to other environmental issues such as the illegal trade in rhinoceros horns, water pollution, and other marine offences were also heard.⁵¹

Unfortunately, the Hermanus Court, which was originally meant to be a permanent institution, was closed down in 2007 following a high-level political decision that was taken to close a number of specialised courts that lacked legislative mandates.⁵² Specifically, in the case of the Hermanus Court, the DOJCD was reluctant to “continue to provide extra personnel and facilities for a specialised court that was not mandated by specific legislation”.⁵³

The need for specialised environmental courts, however, remained on the agenda because in 2009 the then Minister for Environmental Affairs mooted the possibility of establishing an environmental court in South Africa.⁵⁴ In the fiscal year 2010/11, the Department of Environmental Affairs reported on a key performance indicator - establishment of environmental court / dedicated prosecutors with a target of ‘pilot courts operational / dedicated prosecutor identified’.⁵⁵ However, the target was not achieved because the feasibility study that was conducted indicated that environmental courts are not an appropriate mechanism to pursue and that “other mechanisms to be explored in 2011/12 (financial year) and considered for implementation”.⁵⁶ However, no such mechanisms were explored.

⁵⁰ The Department of Justice and Constitutional Development (DOJCD) ‘Annual Report’ (2003/2004) 27, 71; A second environmental court was established in Port Elizabeth (now Gqeberha) in 2005 (and closed in 2007) to prosecute environmental cases (mainly poaching) in addition to general crimes. The court was also successful in prosecuting environmental crimes as it had a 90% conviction rate – G Rogers ‘Prosecutors in appeal for environmental circuit court’ (2005) http://www.lawlibrary.co.za/notice/earthairandwater/2005/2005_03_30.htm#press_prosecutors (accessed 13 March 2022); Department of Justice and Constitutional Development (DOJCD) ‘Annual Report’ (2004/2005) 48.

⁵¹ PJ Snijman and M Phil ‘Hermanus’ environmental court: does it protect the environment?’ (2005) *News and Views for Magistrates* 3.

⁵² K Rosencrans ‘Environmental courts prove to be effective’ *Stop Illegal Fishing Case Study 02* (2011) <https://stopillegalfishing.com/publications/environmental-courts/> (accessed 5 March 2022). Parliamentary Monitoring Group *Hearing on the report of the Auditor-General on a performance audit of the handling of confiscated abalone by Department of Environmental Affairs and Tourism* 6 October 2009 <http://www.pmg.org.za/report/20091007-hearing-report-auditor-general-performance-audit-handlingconfiscated> (accessed 12 April 2022).

⁵³ F Craigie, P Snijman and M Fourie ‘Environmental Compliance and Enforcement Institutions’ in A Paterson and LJ Kotzé (eds) *Environmental Compliance and Enforcement in South Africa: Legal Perspectives* (2009) 98; LJ Kotzé and A du Plessis ‘Some brief observations on fifteen years of environmental rights jurisprudence in South Africa’ (2010) *Journal of Court Innovation* 162.

⁵⁴ E Iannucci ‘SA to reinstate specialised courts to deal with environmental crimes’ (2009) <https://www.engineeringnews.co.za/article/sa-to-reinstate-specialised-courts-to-deal-with-environmental-crimes-sonjica-2009-06-22> (accessed 6 March 2022); See also N Gabara ‘Sonjica talks tough on illegal dumping’ (2009) <https://www.sanews.gov.za/south-africa/sonjica-talks-tough-illegal-dumping> (6 March 2022).

⁵⁵ Department of Environmental Affairs (DEA) ‘Annual Report 2010/2011’ 21.

⁵⁶ DEA Annual Report (n 55 above) 21.

Again in 2020, at an Environmental Affairs, Forestry, and Fisheries Portfolio workshop, the Department of Forestry, Fisheries, and the Environment (DFFE) was questioned on specialised environmental courts.⁵⁷ The DFFE responded that there had been engagements with the DOJCD in 2010 on whether it would make sense to establish courts similar to the one that had existed at Hermanus, to deal with abalone poaching and although the Department of Justice and Constitutional Development was not in favour of dedicated courts due to the complex logistics which would be involved, it might now be time to look at the issue again.⁵⁸

The latter explanation clarifies the results of the ‘feasibility study’ that was conducted – the DOJCD was still not convinced of the need to establish a specialised environmental court. The reference to ‘complex logistics’ is not clear and does not align with the reason given for closing the Hermanus Court in 2007, which is that the court was not mandated by legislation.

In 2009, there were about 354 Environmental Courts and Tribunals (ECTs) across 41 countries.⁵⁹ This number had increased to 1200 ECTs existing across 44 countries in 2016,⁶⁰ in 2018 there were 1500 ECTs,⁶¹ and by 2021 there were 2115 operational ECTs in 67 countries.⁶² This shows that ECTs have gained momentum over the years and that countries all over the world see the benefit of establishing ECTs to ensure access to environmental justice and protection of the environment. South Africa has been lauded for including the right to an environment in its Constitution.⁶³ However, South Africa needs to go a step further and objectively evaluate the importance and advantages of establishing specialised environmental

⁵⁷ Parliamentary Working Group Environment, Forestry and Fisheries Portfolio Committee Workshop ‘Environment, Forestry and Fisheries Legislation and Policy Meeting Summary’ (2020) 3 <https://pmg.org.za/committee-meeting/30899/> (accessed 1 April 2022).

⁵⁸ Ibid.

⁵⁹ Pring and Pring (2009) (n 19 above) 1.

⁶⁰ G Pring and C Pring *Environmental Courts and Tribunals; A Guide for Policymakers* United Nations Environmental Programme (2016) 1.

⁶¹ CS de Windt and L Brown ‘Symposium on “Judiciary and the Environment: Adjudicating our Future”: A historic global gathering of U.S. and international judges held August 2018 at the Organization of American States in Washington D.C.’ (2018) <https://www.iucn.org/news/world-commission-environmental-law/201810/symposium-judiciary-and-environment-adjudicating-our-future-a-historic-global-gathering-us-and-international-judges-held-august-2018-organization> (accessed 6 March 2022).

⁶² LY Sulistiawati et al, *Environmental Courts and Tribunals - 2021: A Guide for Policymakers* United Nations Environmental Programme (2022) 11.

⁶³ In the South African Constitution Act 200 of 1993, section 29 provided for the right to an environment. It stated that ‘[e]very person shall have the right to an environment which is not detrimental to his or her well-being.’; The right to an environment was further expanded in the 1996 Constitution to include (b) which extended the protection of the environment for the benefit of present and future generations and placed a duty on government to protect the environment through reasonable legislative and other measures.

courts to ensure the protection of the environmental rights that is enshrined in section 24 of its Constitution.

1.2 Problem statement

General courts particularly the criminal courts are already overburdened and as such environmental criminal cases are invariably not prioritised and given the attention they deserve.⁶⁴ Over the years the convictions reported in the National Environmental Compliance and Enforcement Report (NECER) are relatively low compared with the number of cases handed over to the National Prosecuting Authority (NPA) for prosecution.⁶⁵ In contrast, the DOJCD reports a high conviction rate for general crimes that are prosecuted in the High Court⁶⁶ and Regional Magistrates' court,⁶⁷ and specifically in the Specialised Commercial Crimes Court - a conviction rate of 87.1%.⁶⁸

It is of concern that the rate of conviction of environmental criminal matters handed over to the NPA is low, particularly because the right to an environment which is not harmful to health or wellbeing is entrenched in the SA Constitution, and it is important that this right is protected. Without a doubt, and as Fourie highlights, the low conviction rate of environmental crimes has a demoralising effect on environmental authorities because it discourages environmental authorities from pursuing prosecution in the first place.⁶⁹ While section 33 of the National Environmental Management Act, 1998 (NEMA)⁷⁰ makes provision for private prosecution,

⁶⁴ Parliamentary Monitoring Group 'Media briefing by Minister of Water and Environmental Affairs, Ms Buyelwa Sonjica' (2009) <https://pmg.org.za/briefing/18714/> 17 June 2009 (accessed 14 July 2024); See also Rosencrans (n 52 above) and Iannucci (n 54 above).

⁶⁵ In the latest National Environmental Crimes Report (NECER) for the 2022/2023 financial year, it is reported that there were 90 convictions which seems to be an improvement in the number of convictions reported in the NECER 2021/2022 financial year which was 58 convictions. However, if this is compared to the number of finalised criminal investigations handed over to the NPA in the two years under consideration (391 cases in 2021/2022 and 359 in 2022/2023) it will be seen that the conviction rate achieved is 15% and 25% respectively - NECER (2022/2023) 12.

⁶⁶ Department of Justice and Constitutional Development (DOJCD) 'Annual Report' (2022/2023) 112. A conviction rate of 89.2% was reported against a planned target of 87%.

⁶⁷ DOJCD Annual Report (n 66 above) 113. A conviction rate of 82.6% was reported against a planned target of 74%.

⁶⁸ DOJCD Annual Report (n 66 above) 113.

⁶⁹ Fourie (n 11 above) 95.

⁷⁰ Act 107 of 1998.

there has been only one successful private prosecution instituted in terms of section 33 of the NEMA.⁷¹

It is notable that the DOJCD reports on the conviction rates in the courts that are specially designated courts, such as the Sexual Offences Courts and Specialised Commercial Crimes Courts.⁷² In addition, the NPA specifically reports on and provides statistics for the prosecution of serious and violent crimes and organised crime⁷³ but no specific reporting is provided for the prosecution of those environmental crimes that are handed over by environmental authorities to the NPA for prosecution. Currently, only rhino poaching, which is categorised as a serious environmental crime, is specifically reported in the NPA Annual Report albeit under the category of organised crime.⁷⁴ However, it must be pointed out that rhino poaching does not form part of the environmental crimes handed over to the NPA by environmental authorities which are reported in the NECER and is only but one of the many other environmental crimes that occur in South Africa. It is apparent that where there is a special focus on prosecuting a specific crime, the conviction rate for such a crime is higher. For instance, in a report by the Department of Forestry, Fisheries, and Environment on rhino poaching in 2020, the significant increase in the number of convictions and verdict cases finalised was attributed to the special focus placed by the National Prosecuting Authority on the prosecution of rhino and related matters, in order to curb this increasing international problem.⁷⁵

It can, therefore, be argued that an intentional focus on environmental crimes with specific reporting targets and categorisation as a serious crime will not only see an improvement in the enforcement of environmental crimes but will also see more resources deployed towards upskilling prosecutors who prosecute environmental crimes. This focus, it is submitted, can be achieved through the establishment of specialised environmental courts in South Africa as this will compel the DOJCD and NPA to set targets on the prosecution of environmental crimes

⁷¹ *Uzani Environmental Advocacy CC v BP Southern Africa (Pty) Ltd* (CC82/2017) [2019] ZAGPPHC 86; [2019] 2 All SA 881 (GP); 2019 (5) SA 275 (GP) (1 April 2019). The case was instituted on 29 June 2017 when the private prosecutor was granted leave to institute a private prosecution against BP Southern Africa and finalised in April 2019.

⁷² DOJCD Annual Report (n 66 above) 96 – 98. Both types of crimes are prosecuted in specialised courts.

⁷³ National Prosecuting Authority ‘Annual Report’ (2020/2021) 63.

⁷⁴ NPA Annual Report (n 73 above) 55 – 56.

⁷⁵ Department of Environment, Forestry and Fisheries ‘Report back on Rhino Poaching in South Africa in 2020’ 1 February 2021 <https://www.gov.za/speeches/environment-forestry-and-fisheries-rhino-poaching-south-africa-2020-1-feb-2021-0000> (accessed 17 May 2022).

(apart from the rhino poaching crime currently reported on under ‘organised crime’) and also put reporting mechanisms in place in these specialised environmental courts.

Another issue of concern is that the development of environmental jurisprudence in South Africa remains in its infancy, despite the various pieces of environmental legislation that has been enacted in the country. Most often the courts have reviewed environmental cases under the lens of just administrative action. The courts have not necessarily delved into the substantive merits of cases that are brought before them preferring to undertake a judicial review as opposed to a merit review. In a judicial review, the focus is on determining if the environmental authority’s decision complies with the procedural aspects that constitute just administrative action.⁷⁶ Conversely, a merit review involves the consideration of all of the evidence with the purpose of making a decision on what the correct outcome is.⁷⁷ Often, once it is established that procedural aspects have not been complied with, the courts do not go further to pronounce on the merits of the case but rather refer the matter back to the relevant environmental authority for reconsideration.⁷⁸ For instance, in *Earthlife Africa (Cape Town) v Director-General: Department of Environmental Affairs and Tourism and Another*,⁷⁹ (*Earthlife Cape Town*) the court focused its decision on administrative law considerations. It held that the applicant had not been afforded an opportunity to make representations on new facts that pertained to the final environmental impact report that the Department had considered when issuing the environmental authorisation to Eskom⁸⁰ and in view of this, the Director-General’s decision “was fatally flawed and fell to be set aside, and that the matter had to be remitted to him with directions to afford the applicant and other interested parties an opportunity to submit further representations to him and that he then consider those submissions before making a decision anew on the environmental authorisation application.”⁸¹ The court, however, did not deem it “necessary to deal with the two subsidiary review grounds, namely, that the (Director General) failed properly to address the problems posed by nuclear

⁷⁶ The right to just administrative action is provided for in sec 33 of the SA Constitution: “(1) Everyone has the right to administrative action that is lawful, reasonable, and procedurally fair. (2) Everyone whose rights have been adversely affected by administrative action has the right to be given written reasons.”

⁷⁷ Pring and Pring (2016) (n 60 above) 45.

⁷⁸ LM Warren ‘Working towards an environmental jurisprudence’ Environmental Law and Ecology http://www.ceja.org.mx/IMG/pdf/Dra._Warren_ingles_.pdf (accessed 13 March 2022).

⁷⁹ 2005 (3) SA 156.

⁸⁰ *Earthlife* (n 79 above) para 69.

⁸¹ *Earthlife* (n 79 above) para 70.

waste at the proposed PBMR, and that the (Director General) abdicated his responsibility properly to consider safety issues by deferring to the National Nuclear Regulator.”⁸²

Similarly in the unreported case of *Mfolozi Community Environmental Justice Organisation & others v Minister of Minerals and Energy & others (Mfolozi)*,⁸³ the applicants sought to have three decisions reviewed and set aside - the awarding of mining rights by the Director General to the fourth respondent, Tendele; the approval of the Environmental Management Programme (EMPR) by the Regional Manager; and the appeal decision by the Minister of Minerals and Energy dismissing the applicants’ internal appeal respectively.⁸⁴ They contended that their constitutionally guaranteed rights to an environment that is not harmful to their health or well-being and not to be deprived of property had been undermined.⁸⁵ The High Court, in making its decision, did not consider the contention relating to the infringement of the applicants’ right to an environment that is not harmful to their health or well-being, but rather focused on the right to property aspect, highlighting the fact that “without informed consent the objective aimed at by our Constitution of communities deciding what happens to their land in which they have an interest, is undermined.”⁸⁶ It was on this basis that it declared the Director General’s decision in awarding the mining right and the Regional Manager’s decision in approving the EMPR invalid and set aside the appeal decision, remitting the matter back to the Minister for reconsideration.⁸⁷

Merit review powers allow a court to establish principles from cases before them which principles can then be applied by the administrative body in future decision-making, thus enhancing the quality of administrative decision-making and contributing to the development of environmental jurisprudence.⁸⁸

This is, however, not to say that the courts have not been giving any consideration to protecting the section 24 right to an environment that is not harmful to health or well-being in cases brought before them. For instance, in the case of the *Trustees for the time being of Groundwork Trust & Another v The Minister of Environmental Affairs & Others (Groundwork)*,⁸⁹ the

⁸² *Earthlife* (n 79 above) para 79.

⁸³ Unreported High Court judgment Gauteng Division Pretoria Case No: 82865/18 delivered on 4 May 2022.

⁸⁴ *Mfolozi* (n 83 above) para 1.

⁸⁵ *Mfolozi* (n 83 above) para 1.

⁸⁶ *Mfolozi* (n 83 above) para 70.

⁸⁷ *Mfolozi* (n 83 above) para 84.

⁸⁸ BJ Preston ‘Characteristics of Successful Environmental Courts and Tribunals’ (2014) *Journal of Environmental Law* 391.

⁸⁹ 2022 JDR 1012 (GP) judgment delivered on 18 March 2022.

applicant sought declaratory and mandatory relief concerning the extent of government's obligations regarding air pollution in the Highveld Priority area. The court held that the poor air quality in the Highveld Priority area was in breach of section 24(a) of the South African Constitution and further declared that the first respondent has a legal duty to prescribe regulations under section 20 of the National Environmental Management: Air Quality Act 39 of 2004, to implement and enforce the Highveld Priority Area Air Quality Management Plan.⁹⁰ Similarly, in the case of *South African Human Rights Commission v Msunduzi Local Municipality and others (SAHRC)*,⁹¹ the South African Human Rights Commission was successful in its application to the High Court for a declaratory order and structural interdict against the Msunduzi Municipality to bring the Municipality into compliance with its constitutional obligations relating to a landfill site under the Municipality's management and legislative obligations in *inter alia*, the National Environmental Management: Waste Act, 2008⁹² and the National Environmental Management: Air Quality Act, 2004.⁹³ The court, in its judgment stated that the declaratory relief would serve to inform the citizens of Pietermaritzburg that the Municipality's operation of the landfill site has violated their rights as enshrined in section 24 of the SA Constitution and as such, the declaratory relief would serve a lawful and useful purpose.⁹⁴

However, the fact remains that the cases in which the courts have fully considered section 24 of the SA Constitution are few and far between for a country which has the right to an environment entrenched in its Constitution for over 27 years. It is submitted that judicial reviews by general courts will not achieve the purpose of protecting the environment and developing environmental jurisprudence as they are limited in scope and usually focused on determining and establishing compliance with procedural aspects of an environmental authority's decision. Specialised environmental courts with criminal and civil jurisdiction which have wide powers of judicial and merit reviews would be of benefit and ensure better protection for the environment, including the development of environmental jurisprudence.

⁹⁰ *Groundwork* (n 89 above) para 241.

⁹¹ [2021] ZAKZPHC 35.

⁹² Act 59 of 2008.

⁹³ Act 39 of 2004.

⁹⁴ *SAHRC* (n 91 above) para 101.

1.3 Research objective

The purpose of this research is to explore and provide justification for the establishment of specialised environmental courts in South Africa given the important role that courts need to play in the enforcement and development of environmental law. To do this, the research will firstly assess the role of courts *vis a vis* environmental law. Specifically, the study will seek to establish that courts play a key role in the interpretation and enforcement of environmental law as well as the development of environmental jurisprudence.⁹⁵ The important role of the courts in the development of environmental jurisprudence has been highlighted in international declarations and has formed the basis for the establishment of specialised environmental courts in different countries in the world.

Secondly, the study will deliberate on the benefits of specialised courts and how the use of specialised environmental courts would achieve better access to environmental justice.⁹⁶

Thirdly, the study will analyse best practices and attributes of established specialised courts in South Africa as well as specialised environmental courts in New South Wales (Australia) and Kenya. It will also consider the various models of specialised environmental courts to determine the most feasible specialised environmental court model for South Africa.

1.4 Rationale

Glinski states that administrative law is ‘central to the pursuit of environmental justice, as conflicts around natural resources invariably entail the exercise of administrative decision-

⁹⁵ R Kruger ‘The Silent Right: Environmental Rights in the Constitutional Court of South Africa’ (2019) *Constitutional Court Review* 477 <https://doi.org/10.2989/CCR/2019.0018> (accessed 26 February 2022).

⁹⁶ There are three types of legal actions that make up access to environmental justice: firstly, actions to challenge denial of access rights, secondly, actions to prevent or remedy environmentally harmful activities, and thirdly, actions to enforce environmental laws - Pring and Pring (2009) (n 19 above) 7. According to Shelton and Kiss, ‘environmental justice seeks to ensure that authorities fairly allocate and regulate scarce resources so that the benefits of environmental resources, the costs associated with protecting them, and any degradation that occurs (i.e., all the benefits and burdens) are equitably shared by all members of society’ and not just the poor or minority groups. They go on to point out that environmental justice goes beyond traditional environmental protection objectives (minimise waste, use resources wisely, conserve biodiversity) to focus on the equitable distribution of pollution, particularly, the often disproportionate burden borne by the poor and minority groups in respect to environmental harm – D Shelton and A Kiss *Judicial Handbook on Environmental Law* (2005) 23; Sec 2(4)(c) of the National Environmental Management Act, 1998 provides for environmental justice as one of the principles that apply throughout the Republic to the actions of all organs of state that may significantly affect the environment. It states that “environmental justice must be pursued so that adverse environmental impacts shall not be distributed in such a manner as to unfairly discriminate against any person, particularly vulnerable and disadvantaged persons.”

making power.’⁹⁷ However, while it is important to ensure that actions taken by the relevant environmental authorities are in line with the right to just administrative action,⁹⁸ it is equally important for the courts to go further and delve into the specific merits of each environmental case that is before them. This approach will not only contribute to safeguarding the environmental right, but also foster the development of environmental jurisprudence in South Africa. It should be noted, however, that the courts alone cannot be blamed for the lack of environmental jurisprudence. Environmental litigants often focus their sought-after remedies on procedural aspects, which are considered easier to prove in court. This tendency results in litigants prevailing against environmental authorities, even though the substantive merit of the decision taken by environmental authority has not been fully evaluated.

It is submitted that specialised environmental courts which focus exclusively on environmental matters and have civil and criminal jurisdiction would assist in improving the enforcement of environmental law, swifter finalisation of cases and development of stronger environmental jurisprudence in South Africa. In addition, environmental offenders would be expeditiously brought to justice when administrative enforcement mechanisms have been exhausted but have failed to achieve the necessary compliance for environmental protection.

This research, thus, explores the feasibility of establishing specialised environmental courts and makes recommendations for the specialised environmental court model that is feasible, taking the uniquely South African situation into cognisance.

1.5 Research methodology

The research methodology applied is a combination of theoretical, comparative analysis, and semi-structured interviews. A general desktop study consisting of a review of relevant legislation, case law, journal articles, books, annual reports, newspaper articles, and media reports was considered. The internet was used to access relevant online material. Statistical information was also collected from the National Department of Forestry, Fisheries and the Environment’s annual National Environment and Compliance Reports, the National Department of Justice and Constitutional Development’s Annual Reports, the Annual Judiciary

⁹⁷ C Glinski ‘Environmental justice in South African law and policy’ (2003) *Law and Politics in Africa, Asia, and Latin America* 67.

⁹⁸ The right to just administrative action is provided for in sec 33 of the SA Constitution and it provides that: “(1) Everyone has the right to administrative action that is lawful, reasonable, and procedurally fair. (2) Everyone whose rights have been adversely affected by administrative action has the right to be given written reasons.”

Reports, and the National Prosecuting Authority's Annual Reports that have been published in the past years to provide relevant statistical comparisons.

Semi-structured interviews with the following three groups of respondents were conducted: Group One – a former prosecutor who worked at the first specialised Environmental Court that was established in Hermanus, Western Cape in 2004, to get an understanding of the workings of the Environmental Court before it was closed; Group Two – three current prosecutors in the NPA who prosecute environmental crimes, to determine their views on whether South Africa would benefit from establishing specialised environmental courts and which specialised court model will be most feasible for South Africa, and Group Three - nine officials who are responsible for environmental criminal investigations in the National Department responsible for environmental affairs, provincial departments responsible for environmental affairs in the Western Cape and Gauteng provinces, in order to obtain their views on whether specialised environmental courts would be of benefit to the work that they do as environmental management inspectors, and to assist in determining which specialised court model will be most feasible for South Africa.

Ethics approval was obtained on 30 October 2022 from the Faculty of Law's Ethics Research Committee.⁹⁹ Formal approval to conduct the interviews was secured from the relevant institutions.¹⁰⁰ The interview process was conducted using approved questionnaires, with verbal interviews conducted and information transcribed from the audio recordings.¹⁰¹ These individuals are treated as anonymous sources. Each of the interviewees was requested to indicate their willingness to participate by completing a participant's information and informed consent form.

A comparative analysis was undertaken focusing on specialised environmental courts in two countries – Australia and Kenya. The rationale for choosing these two countries was firstly, both countries operate the common law system,¹⁰² and secondly, Australia was the first country to establish a specialised environmental court as a superior court in the world in 1980, which

⁹⁹ Research Ethics Committee Approval with Ethics Reference No L016/22 issued to A Olowa on 30 October 2022.

¹⁰⁰ Gauteng Department of Agriculture, Rural Development and Environment (23 November 2022); national Department of Forestry, Fisheries and Environment (28 November 2022); Western Cape Department of Environmental Affairs and Development Planning (6 December 2022) and the National Prosecuting Authority (1 February 2023).

¹⁰¹ Interviews were held between 28 November 2022 and April 2023.

¹⁰² It must be pointed out that although South Africa has a hybrid legal system (Dutch, Common law, and Traditional law), its public law is mainly derived from the English common law system.

it has operated with a high level of efficiency and success,¹⁰³ thirdly, Kenya was the first African country to establish an environment court by entrenching its establishment in the Kenyan Constitution 2010 and this environment court is regarded as one of the outstanding examples of an ECT,¹⁰⁴ and fourthly, Kenya is a developing country with similar socio and economic issues as South Africa. The comparative analysis comprised an in-depth analysis of the fundamental components of the specialised environmental court in these countries with respect to judicial officers, jurisdiction, rules of procedure, accessibility, *locus standi* and appeals. The comparative analysis assisted in identifying best practices and key attributes of well-functioning specialised environmental courts.

The research study also considered the environmental court that was established in Hermanus in the Western Cape Province in 2004 and subsequently closed in 2007.¹⁰⁵ It was important to discuss why the court was closed after a short period of time, even though it was considered highly successful.¹⁰⁶ The rationale provided for its closure were helpful in formulating recommendations for the key characteristics of a specialised environmental court in South Africa.

In summary, this study seeks to make a case for the establishment of a specialised environmental court and identify the most feasible specialised environmental court model for South Africa.

1.6 Research questions

The research study will seek to respond to the following main question: which specialised environmental court model would be most appropriate for South Africa to ensure access to swift environmental justice and encourage the development of environmental jurisprudence? To adequately respond to this main question, the thesis will answer the following sub questions:

- a. What is the role of the court *vis a vis* environmental law?
- b. What are the benefits of specialised courts?

¹⁰³ NA Robinson 'The nature of courts' in C Voigt and Z Makuch (eds) *Courts and the environment* (2018) 30; R Guidone and H Jonas 'A review of environmental courts and tribunals for CSOs and the judiciary' in C Voigt and Z Makuch (eds) *Courts and the Environment* (2018) 370; Pring and Pring (2016) (n 60 above) 21.

¹⁰⁴ OA Angote 'Environmental litigation in Kenya: a call for reforms' (2019) *Journal of Conflict Management and Sustainable Development* 58 <https://journalofcmsd.net/wp-content/uploads/2019/06/Justice-Oscar-Amugo-Angote-Environment-Litigation-and-A-Call-for-Reforms-10th-june-2019.pdf> (accessed 15 March 2022); Pring and Pring (2016) (n 60 above) V.

¹⁰⁵ Rosencrans (n 52 above).

¹⁰⁶ Rosencrans (n 52 above); Kotzé & du Plessis (n 53 above) 161 - 162.

- c. What useful attributes can be extrapolated from existing specialised courts in South Africa?
- d. What best practices and attributes can be extrapolated from the New South Wales' Land and Environment Court and Kenya's Environment and Land Court?

1.7 Chapter outline

This chapter sets the scene for the research by providing the context for the research. It consists of a contextual background for the research, the problem statement, the rationale for the study, the research methodology to be applied, and finally, the chapter structure for the thesis.

Chapter 2 focuses on a conceptual framework for the study by providing an overview of the history of environmental legislation in South Africa, the role of courts *vis a vis* environmental law, a cursory look at specialised environmental courts and key benefits, as well as the various types of specialised environmental court models.

Chapter 3 delves into the two categories of specialised courts that exist in South Africa – the independent specialised court model (Labour Court and Land Claims Court) and the specially designated court model (Sexual Offences Court and Specialised Commercial Crimes Court). Specifically, the following fundamental components of these courts will be discussed - establishment, composition, appointment of judges, jurisdiction, accessibility, *locus standi*, and appeal mechanisms. These components are essential parts of a court system and will help in understanding the structure and functioning of the courts. In addition, the successes of the Hermanus Environmental Court at the time it existed, is discussed focusing on the same components. The discussion on the Hermanus Environmental Court will also include the factors that led to the closure of this court.

Chapter 4 comprises a comparative study of two specialised environmental courts in Australia and Kenya respectively. Discussions will centre around the following key components of the two courts - judicial officers, jurisdiction, rules of procedure, accessibility, *locus standi*, and appeals.

Chapter 5 focuses on identifying the most feasible environment court model(s) for South Africa. Results from the semi-structured interviews will also be included in this chapter.

Chapter 6 provides a summary of the main arguments put forward in previous chapters and recommendations on the unique characteristics of the proposed model(s) of a specialised environmental court, as well as required legislative reform or amendments.

CHAPTER 2

THE JUDICIARY, ENVIRONMENTAL LITIGATION, AND SPECIALISED ENVIRONMENTAL COURTS: A CONCEPTUAL FRAMEWORK

2.1 Introduction

The world is still experiencing a rapid decline in life-supporting ecosystems particularly as human activity continues to severely impact the earth's climate, despite efforts that have been made nationally and globally to protect and conserve the environment.¹ These efforts include the promulgation of various environmental legislation, and the inclusion of the environmental right in constitutions in different countries across the world.² While these efforts are commendable, the joint efforts of key role players in the compliance and enforcement space remain crucial to achieve meaningful environmental protection.³ In particular, the initiatives of the legislator, the practice of administrative authorities or other relevant actors (law in action) and ultimately the interpretation and application of the law by the courts are paramount.⁴ McAuslan highlights the important role of the courts when he says “. . . serious thought (must be) given to the creation of a judicial-type body, an Environmental Court or Tribunal with a wide-ranging jurisdiction, through which it could develop, via its decisions, an environmental jurisprudence, to help us (move) forward into the new era of a more conscious and deliberate balancing of development and environmental protection...”⁵

This chapter comprises the following discussions: a brief history of environmental legislation in South Africa, the role of the judiciary *vis a vis* environmental law in South Africa, the benefits of specialised environmental courts, and the various types of models of specialised

¹ United Nations Environment Programme *Global climate litigation report: 2020 status review* (2021) 9 <https://www.unep.org/resources/report/global-climate-litigation-report-2020-status-review> (accessed 5 March 2024).

² United Nations Environment Programme *Environmental rule of law: tracking progress and charting future directions* (2023) 29, 31 <https://doi.org/10.59117/20.500.11822/43943> (accessed 5 March 2024); United Nations Environment Programme (UNEP) *Environmental rule of law: first global report* (2019) 1, 2 <https://www.unep.org/resources/assessment/environmental-rule-law-first-global-report> (accessed 18 May 2022); L Lavrysen 'The fundamental right to the protection of a healthy environment' in United Nations Environment Programme (UNEP) *Advancing Justice Governance and Law for Environmental Sustainability* (2012) 3 <https://wedocs.unep.org> (accessed 8 September 2022).

³ HT Anker *et al* 'The role of courts in environmental law – a Nordic comparative study' (2009) *Nordic Environmental Law Journal* 10.

⁴ Anker *et al* (n 3 above) 10.

⁵ P McAuslan 'The role of courts and other judicial type bodies in environmental management' (1991) *Journal of Environmental Law* 203.

environmental courts with a discussion of how they operate, including factors that underpin the establishment of specialised environmental courts.

2.2 Brief history of environmental legislation in South Africa

2.2.1 Environmental governance under Apartheid

Environmental governance under the apartheid government focused on certain environmental aspects, such as conservation and water infrastructure, which were mainly formulated within a framework that perpetuated social inequality by benefiting the white minority, and generally disregarding the environment and sustainability.⁶ There was no clear overarching framework for environmental management. Legislation promulgated to manage land, water and mineral resources was mainly aimed at protecting narrow minority interests and government interests in the land, water, and mineral resources sectors.⁷ This inadequate and non-existing legal framework led to the environment suffering at the expense of economic development.⁸ Added to this was the poor enforcement of the policies and environmental legislation that existed.⁹

In an attempt by the government to establish overarching environmental management legislation, the Environment Conservation Act of 1982 (1982 ECA)¹⁰ was enacted. The 1982 ECA was, however, regarded as a feeble attempt at promulgating a broad-ranging environmental legislation.¹¹ This was because the 1982 ECA was more concerned with governance arrangements and did not focus on environmental management *per se*.¹²

⁶ Department of Planning, Monitoring and Evaluation (DPME) *Twenty Year Review 1994 - 2014 - Background Paper: Environment and Sustainable Development* (2014) 119.

⁷ DPME *Twenty Year Review* (n 6 above) 9.

⁸ DPME *Twenty Year Review* (n 6 above) 3.

⁹ DPME *Twenty Year Review* (n 6 above) 3.

¹⁰ Act 100 of 1982. The ECA 1982 was repealed by the ECA 73 of 1989 (see section 42(1) of the ECA read with the Schedule).

¹¹ P Steyn 'The lingering environmental impact of repressive governance: the environmental legacy of the apartheid-era for the new South Africa' (2005) 5 <https://core.ac.uk/download/9049847.pdf> (accessed 4 September 2022).

¹² DPME *Twenty Year Review* (n 6 above) 11.

The Environmental Conservation Act, 1989 (1989 ECA)¹³ was the second attempt at establishing a legislative framework for environmental management following pressure on the then government to improve its environmental management in South Africa.¹⁴

The 1989 ECA, specifically, put substantive provisions in place to regulate disposal sites as well as activities that may have a detrimental impact on the environment, and which would require environmental impact reports to be prepared in order to assess the environmental impacts of certain activities on the environment, followed by a decision granting or denying authorisation to carry out such activities.¹⁵ Section 36 of the 1989 ECA also made provision for judicial reviews. In terms of section 36(2), a person aggrieved by the decision of an administrative body could apply to a division of the Supreme Court having jurisdiction for a review of such a decision.¹⁶

Enforcement within the 1989 ECA was based on a command-and-control approach,¹⁷ with emphasis on criminal sanction as is generally the case in most environmental legislation.¹⁸ The 1989 ECA, amongst other things, made provision for the regulated community to obtain permits and written authorisation to carry out actions that were essentially activities that could have the potential to impact the environment.¹⁹ Failure to comply with the requirements to

¹³ Act 73 of 1989; the ECA came into force on 9 June 1989 but a large part of it has since been repealed (Part II repealed by sec 50 (1) of NEMA (Act 107 of 1998); Part III repealed by sec 90 (1) of NEMLA (Act 57 of 2003) and Part IV repealed by sec 80 (1) of NEMLA (Act 59 of 2008). However, sec 31A and the offences and penalties provisions remain in force.

¹⁴ M van der Linde and L Feris (eds) *Compendium of South African Environmental Legislation* 2nd edition (2010) 5.

¹⁵ Sec 20 of the 1989 ECA related to disposal site permits while sec 21 of the 1989 ECA read with sec 22 made provision for activities that would have a detrimental effect on the environment. The Long Title of the ECA, 1989: the Act 'to provide for the effective protection and controlled utilization of the environment and for matters incidental thereto'. DPME *Twenty Year Review* (n 6 above) 11.

¹⁶ Sec 36(2) of the 1989 ECA. Such application had to be brought within 30 days of receipt of the reasons for the decision or upon the expiry of the 30 days within which such reasons were required to be furnished by the administrative body as stipulated in sec 36(1) of the ECA. Supreme Court here refers to the High Court.

¹⁷ This approach involves commanding the regulated community not to do something or to do something by applying for a permit or licence by promulgating legislation that makes it illegal and by delegating authorities to enforce such law through the imposition of fines or penalty to violators. Elazegui DD 'A law of nature the command-and-control approach' *Economic Issue of the Day* (2002) 1. https://sswm.info/sites/default/files/reference_attachments/PIDS (accessed 10 September 2022).

¹⁸ A Blackman, Z Li, and AA. Liu 'Efficacy of command-and-control and market-based environmental regulation in developing countries' *Annual Review of Resource Economics* (2018) 382 <https://www.annualreviews.org/content/journals/resource/10/> (accessed 12 July 2024); See also A Patterson and LJ Kotzé 'Towards a more effective environmental compliance and enforcement regime for South Africa' in A Paterson and LJ Kotzé (eds) *Environmental Compliance and Enforcement in South Africa: Legal Perspectives* (2009) 375.

¹⁹ For instance, sec 20(1) required a permit to be obtained from the Department of Water Affairs to establish, provide, or operate a disposal site; sec 22(1) required a person to obtain a written authorisation from the Minister,

obtain a permit or written authorisation, or to comply with a condition in the permit or written authorisation, was regarded as an offence for which penalties could be imposed.²⁰ In 1992, the 1989 ECA was amended to introduce what became known as the section 31A directive.²¹ In terms of section 31A(1) of ECA, the Minister or the competent authority, local authority or government institution concerned, could issue a directive to any person who performs any activity or fails to perform any activity as a result of which the environment is or may be seriously damaged, endangered or detrimentally affected, directing such person (a) to cease such activity; or (b) to take such steps as the Minister, competent authority, local authority or government institution, as the case may be, may deem fit, within a period specified in the direction, with a view to eliminating, reducing, or preventing the damage, danger or detrimental effect. Non-compliance with a section 31A (1) directive constitutes a criminal offence, with the penalty of a fine or imprisonment for a period not exceeding three months.²²

In summary, the 1989 ECA relied on final recourse to the court where a person wanted to review an administrative body's decision or there was a failure to comply with its provisions and requirements, emphasising the critical role courts were required to play in its implementation.

2.2.2 Environmental governance post-apartheid

In the early 1990s, as apartheid came to an end, certain new initiatives were put in place to address the gap in the environmental management policy of the new South Africa. The first was the inclusion of the right to an environment in section 29 of the Constitution of the Republic of South Africa, 1993²³ (1993 Constitution) - “every person shall have the right to an environment which is not detrimental to his or her health or well-being.” The second was the

a local authority or an officer designated by the Minister in order to undertake an activity identified in terms of sec 21(1). The activities identified in terms of sec 21(1) were those activities which may have a substantial detrimental effect on the environment, whether in general or in respect of certain areas.

²⁰ Sec 29(4) of the NEMA provides that “Any person who contravenes a provision of sec 20(1), 20(6), 22(1) or 23(2) or a direction issued under section 20(5) or fails to comply with a condition of a permit, permission, authorisation or direction issued or granted under the said provisions shall be guilty of an offence and liable on conviction to a fine not exceeding R100000 or to imprisonment for a period not exceeding 10 years or to both such fine and such imprisonment, and to a fine not exceeding three times the commercial value of anything in respect of which the offence was committed.”

²¹ Environment Conservation Amendment Act 79 of 1992.

²² Section 29(3) of the ECA.

²³ Constitution of the Republic of South Africa Act 200 of 1993.

Consultative National Environmental Policy Process (CONNEPP), which was a process aimed at giving all stakeholders in South Africa the opportunity to contribute to the development of a new environmental policy.²⁴ In 1996 when the 1993 Constitution was repealed by the Constitution of the Republic of South Africa, 1996 (the SA Constitution), the right to an environment remained prominent, albeit in an expanded form providing that:

“[e]veryone has the right— (a) to an environment that is not harmful to their health or wellbeing; and (b) to have the environment protected, for the benefit of present and future generations, through reasonable legislative and other measures that— (i) prevent pollution and ecological degradation; (ii) promote conservation; and (iii) secure ecologically sustainable development and use of natural resources while promoting justifiable economic and social development.”²⁵

In 1998, following the CONNEPP, the White Paper on Environmental Management Policy was formulated and adopted.²⁶ This policy, which laid the basis for sound environmental governance, was anchored in promoting environmental rights²⁷ and was followed by the promulgation of the National Environmental Management Act, 1998 (NEMA).²⁸ The NEMA, therefore, became the national environmental framework legislation in South Africa and one of the ‘reasonable legislative measures’ referred to in section 24 of the Constitution. The NEMA provides for “co-operative environmental governance by establishing principles for decision making on matters affecting the environment, institutions that will promote co-operative governance and procedures for co-ordinating environmental functions exercised by organs of state; to provide for certain aspects of the administration and enforcement of other environmental management laws; and to provide for matters connected therewith.”²⁹

The NEMA provides for a duty of care in section 28(1)³⁰ and empowers competent authorities responsible for environmental affairs, at the national or provincial sphere of government to

²⁴ Department of Environmental Affairs and Tourism (DEAT) *Green paper on an environmental policy for South Africa* https://www.dffe.gov.za/sites/default/files/legislation/2023-09/environmental_policy_0.pdf (1996) 2 (accessed 1 September 2022).

²⁵ Sec 24 of the SA Constitution.

²⁶ GN 749 of 1998.

²⁷ DPME *Twenty-year review* (n 6 above) 10.

²⁸ Act 107 of 1998.

²⁹ Long title of NEMA. The part relating to administration and enforcement of other environmental management laws was included through sec 13 of the NEMA Amendment Act 46 of 2003.

³⁰ Sec 28(4) was amended in 2013 to include the Director-General of the department responsible for mineral resources (sec 12(a) of National Environmental Management Laws Second Amendment Act 30 of 2013).

issue a directive in terms of section 28(4) (section 28 directive) in which offenders will be directed to take a number of steps to remedy harm to environment.³¹ Where the section 28 directive fails to achieve the required compliance the criminal enforcement mechanism kicks in with recourse being made to the courts as failure to comply with a directive is regarded as an offence.³² Thus, the command-and-control approach remained prominent in the NEMA - with the courts being the final recourse to address issues of non-compliance.

In 2005, the NEMA was amended³³ to introduce a new type of administrative enforcement mechanism called the Compliance Notice³⁴ and the establishment of the Environmental Management Inspectorate through the provisions which empower the Ministers responsible for environment, water affairs or mineral resources and Member of the Executive Council responsible for the environment, to designate officials as environmental management inspectors or in the case of mineral resources, environmental mineral and petroleum inspectors.³⁵ Compliance notices are issued to enforce compliance with “a provision of the law for which (an environmental management inspector) has been designated in terms of section 31D; or with a term or condition of a permit, authorisation or other instrument issued in terms of such law.”³⁶ This administrative enforcement mechanism works hand in hand with the criminal enforcement mechanism. The NEMA provides for a whole range of criminal offences which necessarily follows from non-compliance with provisions of the NEMA and the Specific Environmental Management Acts³⁷ (SEMAS). Particularly in terms of section 49A of the

³¹ This power has now been extended to the municipalities through the National Environmental Management Laws Amendment Act 2 of 2022 which is yet to come into force.

³² Sec 49A(1)(g) of the NEMA. Sec 49A was inserted by sec 25 of National Environmental Management Laws Second Amendment Act 30 of 2013.

³³ NEMA Amendment Act 46 of 2003.

³⁴ Sec 49A(1)(g) of the NEMA.

³⁵ Secs 31B, 31BA, 31BB and 31C respectively of the NEMA. Secs 31BA and 31BB were introduced through amendments to the NEMA in 2008 as part of the One Environment System. Prior to this only the Minister for Environmental Affairs and the MEC responsible for the environment in the provinces could designate environmental management inspectors.

³⁶ Sec 31L(1)(a) and (b) of the NEMA. Compliance Notices can only be issued by an environmental inspector who has been designated as a Grade 1 environmental management inspector. ‘Law’ refers to the NEMA and the Specific Environmental Management Acts.

³⁷ In terms of sec 1 of the NEMA, specific Environmental Management Acts refers to (a) the Environment Conservation Act, 1989 (Act 73 of 1989); (b) the National Water Act, 1998 (Act 36 of 1998); (c) the National Environmental Management: Protected Areas Act, 2003 (Act 57 of 2003); (d) the National Environmental Management: Biodiversity Act, 2004 (Act 10 of 2004); (e) the National Environmental Management: Air Quality Act, 2004 (Act 39 of 2004); (f) the National Environmental Management: Integrated Coastal Management Act, 2008 (Act 24 of 2008); (g) the National Environmental Management: Waste Act, 2008 (Act 59 of 2008); or (h) the World Heritage Convention Act, 1999 (Act 49 of 1999), and includes any regulation or other subordinate legislation made in terms of any of those Acts.

NEMA, non-compliance with a compliance notice is regarded as an offence for which an offender could be prosecuted.³⁸

Section 32 of the NEMA makes provision for any person to seek relief in court in respect of any breach or threatened breach of any provision of the NEMA, or of any provision of a SEMA, or of any other statutory provision concerned with the protection of the environment or the use of natural resources.³⁹ A judicial review process is also provided for in terms of section 6 of the Promotion of Administrative Justice Act, 2000 (PAJA)⁴⁰ after the exhaustion of the internal remedies available in terms of the NEMA.⁴¹ The courts continue to be the last resort in the implementation of environmental legislation⁴² where administrative enforcement mechanisms fail to produce the desired compliance. In the instance where any person is dissatisfied with the decision of the relevant administrative decision maker and seeks to review such a decision or seeks relief for any breach or threatened breach of any provision of the NEMA, of any provision of a SEMA, or of any other statutory provision concerned with the protection of the environment or the use of natural resources.

2.3 The judiciary and environmental law

In the Johannesburg Principles on the Role of Law and Sustainable Development adopted at the Global Judges Symposium,⁴³ the judges affirmed that,

³⁸ It must, however, be noted that the prosecution of offenders ultimately lies with the National Prosecuting Authority because the competent authority or the environmental management inspectors cannot directly prosecute an offender.

³⁹ Sec 32(1) of the NEMA.

⁴⁰ Act 3 of 2000; No specific provision is made in the NEMA for judicial reviews, so recourse is made to the PAJA for the review of the Minister or MEC's decision on appeals or objections. Sec 6(1) of the PAJA provides that "Any person may institute proceedings in a court or a tribunal for the judicial review of an administrative action."

⁴¹ Sec 7(2)(a) of the PAJA provides that "subject to paragraph (c), no court or tribunal shall review an administrative action in terms of this Act unless any internal remedy provided for in any other law has first been exhausted." However, the court or tribunal may, in exceptional circumstances and on application by the person concerned, exempt such person from the obligation to exhaust any internal remedy if the court or tribunal deems it in the interest of justice – sec 7(2)(c) of the PAJA.

⁴² Most environmental criminal cases are heard in the Magistrates' Court while civil cases are heard in the High Court with appeals to the Supreme Court of Appeal and ultimately the Constitutional Court – F Craigie, P Snijman and M Fourie 'Environmental Compliance and Enforcement Institutions' in *Environmental compliance and enforcement in South Africa: legal perspectives* AR Paterson and LJ Kotzé (eds) (2009) 99.

⁴³ The Johannesburg Principles on the Role of Law and Sustainable Development adopted at the Global Judges Symposium 2002 <https://www.eufje.org/images/DocDivers/Johannesburg%20Principles.pdf> (accessed 22 November 2022).

“[a]n independent Judiciary and judicial process is vital for the implementation, development and enforcement of environmental law, and that members of the Judiciary, as well as those contributing to the judicial process at the national, regional, and global levels, are crucial partners for promoting compliance with, and the implementation and enforcement of, international and national environmental law.”⁴⁴

The declaration that the judiciary has a key role in the implementation and enforcement of environmental law was reiterated at the World Congress on Justice, Governance and Law for Environmental Sustainability (World Congress), which took place ten years after the adoption of the Johannesburg Principles.⁴⁵ At the World Congress, it was noted that since the 2002 Symposium, “the importance of the Judiciary in environmental matters (has) increased and resulted in a rich corpus of decisions, as well as in the creation of a considerable number of specialised courts and green benches, and a lasting effect on improving social justice, environmental governance and the further development of environmental law, especially in developing countries.”⁴⁶

The judiciary continues to play a vital role in countries seeking to protect the environment and while concurrently developing a robust body of environmental law jurisprudence. In a constitutional democracy like South Africa, the judiciary is tasked with ensuring the protection of human rights enshrined in the Constitution and the various pieces of legislation that are promulgated to protect such human rights. Over the years, the NEMA and other related environmental legislation in South Africa have gone through various key amendments⁴⁷ but one thing that remains constant is the role that the courts are required to play in the enforcement of environmental legislation and invariably upholding the rule of law. They remain the final arbiters of justice in the settlement of disputes between litigants in the environmental law

⁴⁴ United Nations Environmental Programme Executive Director ‘Report of the global judge’s symposium on sustainable development and the role of law’ presented at the 22nd session of the Governing Council/ Global Ministerial Environment Forum UNEP/GC.22/INF/24 (2003) 4 <https://digitallibrary.un.org/record/484610?ln=en> (accessed 8 September 2022).

⁴⁵ Rio+20 Declaration on Justice, Governance, and Law for Environmental Sustainability (Rio+ 20 Declaration) in United Nations Environment Programme *Advancing Justice Governance and Law for Environmental Sustainability* (2012) 3 <https://wedocs.unep.org> (accessed 8 September 2022). The World Congress on Justice, Governance and Law for Environmental Sustainability was a gathering in Rio of more than 150 judges, prosecutors, public auditors, and enforcement agencies from some 60 countries, hosted by the UN Environment Programme.

⁴⁶ Rio+ 20 Declaration (n 45 above) 2.

⁴⁷ NEMA has been amended ten times between 2002 and 2024 (the last amendment was the National Environmental Management Laws Amendment Act 2 of 22 which came into force on 30 June 2023)

sphere. Whether it be disputes instituted by government departments with the objective of enforcing the law against non-complying individuals and organisations, or disputes by environmental nongovernmental organisations determined to ensure that government implements and enforces environmental legislation properly, or whether it be disputes instituted by developers and companies dissatisfied with decisions of government administrators – the final action of approaching the courts to settle disputes and enforce the law may be taken by all these categories of stakeholders.

Collins, in highlighting the vital role that the judiciary has to play in environmental protection states that, “[j]udges have a unique capacity to protect ecosystems (including human and non-human health) through the development, interpretation and enforcement of environmental law principles.”⁴⁸ Kotzé and Du Plessis express a similar sentiment and explain that the essential role of an independent and impartial judiciary is that of interpreting, applying and enforcing the substantive environmental right.⁴⁹ Markowitz and Gerardu also emphasise the leading role that the judiciary can and must play in promoting compliance and enforcement of environmental regulations.⁵⁰ This includes strengthening the executive in enforcing environmental regulations, despite external and improper influences that could stifle executive action.⁵¹ Feris articulates another perspective of the role of the judiciary *vis a vis* the executive. In her view, the judiciary plays an important role in enforcing constitutional rights in a constitutional democracy,⁵² and, therefore, the judiciary must use its powers of judicial review to assess the actions and conduct of the legislature and executive for consistency with the

⁴⁸CB Soyapi ‘A multijurisdictional assessment of the judiciary’s role in advancing environmental protection in Africa’ (2020) *Hague Journal on the Rule of Law* 308 citing L Collins ‘Judging the anthropocene: transformative adjudication in the anthropocene epoch’ in Kotzé LJ (ed) *Environmental law and governance for the Anthropocene* (2017) 9.

⁴⁹ LJ Kotzé and A du Plessis ‘Some brief observations on fifteen years of environmental rights jurisprudence’ (2011) *South Africa Journal of Court Innovation* 158; BJ Preston ‘The role of the judiciary in promoting sustainable development: the experience of Asia and the Pacific’ (2005) *Asia Pacific Journal of Environmental law* 114 quoting D Kaniaru *et al* - “[t]he judiciary plays a critical role in the enhancement and interpretation of environmental law and the vindication of the public interest in a health [sic] and secure environment”; IV Nemesio in ‘Strengthening environmental rule of law: enforcement, combatting corruption, and encouraging citizen suits’ (2015) *Georgetown International Law Review* 325 also states that “[t]he judiciary also plays an important role in implementing the environmental rule of law by providing remedies to environmental harms and upholding constitutional rights to the environment”.

⁵⁰ KJ Markowitz and JJA Gerardu ‘The importance of the judiciary in environmental compliance and enforcement’ (2012) 29 *Pace Environmental Law Review* 544 <https://digitalcommons.pace.edu/pelr/vol29/iss2/5> (accessed 25 September 2022).

⁵¹ Markowitz and Gerardu (n 50 above) 543 – 544.

⁵² L Feris ‘Constitutional environmental rights: an under-utilised resource’ (2008) *South African Journal on Human Rights* 37.

Constitution.⁵³ Anker *et al* also state that environmental law is not only about disputes between individual parties but also involves disputes between individuals and administrative authorities and as such, courts are the final resort for those affected members of the public who want to challenge permits issued by administrative authorities.⁵⁴ Effective access to the court and the decision-making role of the courts is therefore important.⁵⁵ In the words of Amirante, “. . . environmental judges have become essential actors for the implementation of an extraordinary vast corpus of environmental law, which encounters the risk of remaining unapplied.”⁵⁶

The judiciary in South Africa is particularly tasked with promoting sustainable development⁵⁷ by ensuring a balance between protecting the environment and promoting economic and social development. This is encapsulated in section 24 of the Constitution which states,

“[e]veryone has the right— (a) to an environment that is not harmful to their health or wellbeing; and (b) to have the environment protected, for the benefit of present and future generations, **through reasonable legislative and other measures that— (i) prevent pollution and ecological degradation; (ii) promote conservation; and (iii) secure ecologically sustainable development and use of natural resources while promoting justifiable economic and social development.**”⁵⁸ (own emphasis)

Markowitz and Gerardu highlight the following as the number of ways in which the judiciary can participate in realising a sustainable future –

“balancing environmental and developmental considerations in judicial decision-making; providing an impetus to the incorporation of contemporary developments in the field of environmental law for promoting sustainable development, including access to justice, right to information and public participation; promoting the implementation

⁵³ Feris (n 52 above) 37.

⁵⁴ Anker *et al* (n 3 above) 10.

⁵⁵ Anker *et al* (n 3 above) 10.

⁵⁶ D Amirante ‘Environmental courts in comparative perspective: preliminary reflections on the National Green Tribunal of India’ (2012) *Pace Environmental Law Review* 444.

⁵⁷ Sustainable development is defined in section 1 of the NEMA as “sustainable development as the integration of social, economic and environmental factors into planning, implementation and decision-making so as to ensure that development serves present and future generations” According to LJ Kotzé “[s]ustainable development . . . relates to not only the sustainable use and exploitation of natural resources, but also to the enhancement of the quality of peoples’ lives through *inter alia* constitutional governance.” – LJ Kotzé ‘The Constitutional Court’s contribution to sustainable development in South Africa’ (2003) *Potchefstroom Electronic Law Journal* 81 <https://repository.nwu.ac.za/handle/10394/1964> (accessed 1 November 2022).

⁵⁸ Sec 24 of the Constitution of the Republic of South Africa, 1996.

of global and regional environmental conventions; and strengthening the hand of the executive in enforcing environmental regulations, in the face of often outside and improper influences that could stifle executive action.”⁵⁹

They further emphasise that “[t]he judiciary can, and must, play a leading role in promoting compliance and enforcement of environmental regulations.”⁶⁰ Voigt also highlights the important role that courts play as the third pillar of power alongside the legislative and executive functions of the state in “defending, upholding and (for judicial activists) creating an environmental rule of law.”⁶¹ Kotzé states that “[t]he manner, in which the judiciary interprets and adjudicates the fine balance between sustainable development and environmental conservation, may provide guidance to both the executive and the legislative authority when having to facilitate sustainable development on the one hand and protecting the environment on the other.”⁶²

The courts have also weighed in on the important role they need to play in the environmental law arena. For instance, Ngcobo J said in *Fuel Retailers Association of SA (Pty) Ltd v Director General, Environmental Management Mpumalanga and Others (Fuel Retailers)*⁶³ that ‘the role of the courts is especially important in the context of the protection of the environment and giving effect to the principle of sustainable development’.⁶⁴ He continued to state that ‘[i]t is the duty of the court to ensure that [the responsibility to look after the environment] is carried out’ and that ‘the Johannesburg Principles adopted at the Global Judges Symposium underscore the role of the judiciary in the protection of the environment’.⁶⁴ The view of Ngcobo J was reiterated by Seegobin J in the *South African Human Rights Commission v Msunduzi Local Government and Others (SAHRC)*⁶⁵ when he dealt briefly with the role of the courts in environmental litigation of the type that was before him.⁶⁶ In summary, the courts play three key roles in environmental law that, if executed correctly, will advance environmental justice

⁵⁹ Markowitz and Gerardu, (n 49 above) 544.

⁶⁰ Markowitz and Gerardu (n 49 above) 544.

⁶¹ C Voigt and Z Makuch ‘Courts and the environment: an introduction’ in C Voigt and Z Makuch (eds) *Courts and the environment* (2018) xii.

⁶² Kotzé (n 57 above) 82.

⁶³ 2007 ZACC 13 at para 102.

⁶⁴ *Fuel Retailers* (n 63 above) para 102.

⁶⁵ [2021] ZAKZPHC 35.

⁶⁶ *SAHRC* (n 65 above) para 99.

In summary, there are three key roles the courts play in environmental law that, if executed correctly will advance environmental justice:

- a. development of environmental law jurisprudence through the interpretation and application of the substantive environmental right.
- b. promoting compliance with environmental law; and
- c. enforcing environmental law and the constitutional environmental right.

A brief analysis of each of these roles will now be discussed.

2.3.1 Development of environmental law jurisprudence through the interpretation and application of the substantive environmental right

The role that the judiciary has to play in developing a body of environmental jurisprudence, particularly in a developing country such as South Africa which subscribes to the principle of sustainable development,⁶⁷ cannot be gainsaid. In the words of Kaniaru *et al*,

“[t]he judiciary plays a critical role in the enhancement and interpretation of environmental law and the vindication of the public interest in a healthy and secure environment. Judiciaries have and will most certainly continue to play a pivotal role both in the development and implementation of legislative and institutional regimes for sustainable development. A judiciary, well informed on the contemporary developments in the field of international and national imperatives of environmentally friendly development, will be a major force in strengthening national efforts to realise the goals of environmentally friendly development and, in particular, vindicating the rights of individuals substantively and in accessing the judicial process.”⁶⁸

Markowitz and Gerardu, in describing the link between sustainable development and ultimately effective compliance and enforcement, state that “[s]ustainable development depends upon

⁶⁷ Sustainable development refers to development that meets the needs of the present without compromising the ability of future generations to meet their own needs – chapter 2 paragraph 1 of the United Nations *Report of the World Commission on Environment and Development: Our Common Future* (Brundtland Report) (1987) <https://sustainabledevelopment.un.org/content/documents/5987our-common-future.pdf> (accessed 08 May 2023).

⁶⁸ D Kaniaru, L Kurukulasuriya, and C Okidi ‘UNEP Judicial Symposium on the Role of the Judiciary in Promoting Sustainable Development’ in J Gerardu and C Wasserman (eds) *Conference Proceedings Volume 1 of the 5th International Conference on Environmental Compliance and Enforcement in Monterey, California (1998)* 22 <https://wedocs.unep.org/handle/20.500.11822/29972> (accessed 25 September 2022).

good governance; good governance depends upon the rule of law; and the rule of law depends upon effective compliance and enforcement.”⁶⁹ According to Kurukulasuriya “the rule of law is comprised of an intricate chain of fundamental ideas, which include equality before the law; equal treatment before the law for government and the governed; the independence of the judiciary; transparency, consistency, and accountability in the administration of law; and the notions of equity, justice and fairness.”⁷⁰ Characteristics of good governance required to be exhibited by institutions include openness, accountability, predictability, transparency and participatory.⁷¹ The rule of law supports these characteristics by ensuring consistent, efficient and fairness to all including those who govern.⁷² It is, therefore, critical for the judiciary in interpreting the law to ensure that it upholds the principle of the rule of law to guarantee good governance and ultimately the implementation and enforcement of environmental law. This is because good governance and the rule of law are basically intertwined and the judiciary—as the final arbiter—is tasked with the responsibility and duty to make decisions with due regard to the rule of law and the rules of good governance.⁷³ Preston explains that the courts uphold the rule of law through judicial review proceedings, in which they seek to ensure that executive and legislative action is authorised by law and that ECTs with this jurisdiction are able to ensure that government actions and decisions on environmental matters are indeed authorised by law.⁷⁴

However, beyond upholding the rule of law, the judiciary in interpreting and applying environmental law, is expected to uphold the environmental rule of law and good environmental governance. The environmental rule of law is focused on ensuring compliance with, and enforcement of environmental laws,⁷⁵ while environmental governance requires adherence to principles such as transparency, accountability, public participation in decision-

⁶⁹ Markowitz and Gerardu (n 50 above) 540.

⁷⁰ L Kurukulasuriya ‘The role of the judiciary in promoting environmental governance and the rule of law’ Chief Environmental Law Programme UNEP *Global Environmental Governance: The Post-Johannesburg Agenda* Yale Center for Environmental Law and Policy (2003) 4 <https://www.academia.edu/4624916/> (accessed 10 September 2022).

⁷¹ Markowitz and Gerardu (n 50 above) 541.

⁷² Markowitz and Gerardu (n 50 above) 541 citing D Zaelke, M Stilwell and O Young ‘What reason demands: making law work for sustainable development’ in D Zaelke, D Kaniaru, and E Kružiková (eds) *Making law work: environmental compliance and sustainable development* Cameron May Ltd (2005).

⁷³ Kurukulasuriya (n 70 above) 7.

⁷⁴ BJ Preston ‘The role of environmental courts and tribunals in promoting the rule of law and ensuring equal access to justice for all’ paper presented at the International Symposium on Environmental Adjudication in the 21st Century (2017) 4.

⁷⁵ UNEP *First Global Report* (n 2 above) 10.

making and freedom of association.⁷⁶ Feris further highlights that in South Africa, especially, environmental governance should respond to equity and justice concerns given the “deep-seated socio-economic divides that persist in South African society.”⁷⁷ The ultimate goal of the environmental rule of law is to change behaviour and ensure there are systems and structures in place that are aimed at a course toward sustainability by creating an expectation of compliance with environmental law co-ordinated between government, industry, and civil society.⁷⁸

The judiciary, therefore, in considering environmental cases before it, have the responsibility of upholding the environmental rule of law, by balancing competing and compelling interests to ensure sustainable development.⁷⁹ As Kameri-Mbote and Odote quite succinctly put it, “[j]udiciaries the world over balance the interests of society with economic development, environmental sustainability, and the competing interests of persons and entities”.⁸⁰ Similarly, Kurukulasuriya highlights that judges are required to ensure sustainable development by balancing the promotion of the well-being of people and preserving the integrity of the environment in regard to advancing economic development.⁸¹ They go on to state that the judiciary, as an independent arm of the government, holds a unique position of assisting society in implementing appropriate strategies for confronting the various challenges it faces such as increasing poverty, land degradation, and climate change threats amidst a background of corruption and other governance challenges, to be able to ensure sustainable development.⁸² It is, thus, imperative that decisions made by the judiciary in environmental cases are based on the environmental rule of law, taking good environmental governance principles into consideration, which, in turn, will invariably contribute to ensuring sustainable development.

Decisions that are made over time by courts will contribute significantly to the growth of environmental law jurisprudence, imperative for environmental protection.⁸³ As Mulkey in

⁷⁶ LA Feris ‘The role of good environmental governance in the sustainable development of South Africa’ (2010) *Potchefstroom Electronic Law Journal* 75 DOI:10.17159/1727-3781/2010/v13i1a2629 (accessed 28 February 2022).

⁷⁷ Feris (n 76 above) 76.

⁷⁸ Kurukulasuriya (n 70 above) 13.

⁷⁹ Kurukulasuriya (n 70 above) 7.

⁸⁰ P Kameri-Mbote and C Odote ‘Courts as champions of sustainable development: lessons from East Africa’ (2009) *Sustainable Development Law and Policy* 31.

⁸¹ Kurukulasuriya (n 70 above) 7.

⁸² Kameri-Mbote and Odote (n 80 above) 37.

⁸³ PM Muriithi ‘Critiquing the role of courts and tribunals in developing environmental law jurisprudence’ (2020) *Journal of Conflict Management and Sustainable Development* 71.

Judges and Other Lawmakers: Critical Contributions to Environmental Law Enforcement points out, the way in which judges understand and apply existing law serves as a powerful feedback loop to the legislature, executive and competent authorities.⁸⁴ For instance, the *ratio decidendi* of a decision will further clarify for the legislature, executive or competent authority, what the shortcomings of the law or permit is and how these shortcomings should be addressed. Angote highlights that climate change is an emerging issue that impacts humans and as such “the judiciary needs to have a grasp of issues about carbon emissions and environment degradation, in order to resourcefully play a role in mitigating effects through orders and setting proper jurisprudence.”⁸⁵

Despite South Africa being relatively progressive with the inclusion of the right to a healthy environment in its Constitution, it is of concern that this has not led to an increase in environmental law jurisprudence over the years in the courts. Kruger raised the concern that it had been more than a decade since the Constitutional Court engaged with environmental rights in a meaningful manner.⁸⁶ She highlighted the case of *Fuel Retailers* in which the Constitutional Court attempted to flesh out the content of section 24 using the concept of sustainable development. Murcott on her part states that there are only two definitive moments in the Constitutional Court’s jurisprudence concerning the environmental right and this occurred in the *Fuel Retailers* case and *National Society for the Prevention of Cruelty to Animals v Minister of Justice and Constitutional Development & Another* (‘NSPCA CC’).⁸⁷ Both writers point out that this lack of engagement with environmental rights is not because there were no Constitutional Court cases in which environmental rights were relevant, because section 24 could have been applied in a range of cases that came before the Constitutional Court, but were not.⁸⁸ However, as Kruger points out, environmental issues were not reaching

⁸⁴ M Mulkey ‘Judges and other lawmakers: critical contributions to environmental law enforcement’ (2004) *Sustainable Development Law and Policy* 8.

⁸⁵ MO Oruko ‘Kenya to launch exclusive environment court by June, urges Kenyans to use it to fight climate change’ 29 March 2023 <https://www.tuko.co.ke/editorial/analysis/500145-judiciary-launch-environment-court-june-urges-kenyans-platform-fight-climate-change/> (accessed 7 May 2023).

⁸⁶ R Kruger ‘The silent right: environmental rights in the Constitutional Court of South Africa’ (2019) *Constitutional Court Review* 475 <https://doi.org/10.2989/CCR/2019.0018> (accessed 26 February 2022).

⁸⁷ [2016] ZACC 46, 2017 (1) SACR 284 (CC); M Murcott ‘Minding the gap: the Constitutional Court’s Jurisprudence concerning the environmental right’ (2023) *Constitutional Court Review* 152 <https://doi.org/10.2989/CCR.2023.0007> (accessed 5 March 2024).

⁸⁸ Kruger (n 86 above) 475, 477. Kruger cited the following cases to buttress her argument: the case of *Mazibuko and others v City of Johannesburg and others* 2009 ZACC 28 which turned on the right to water in terms of section 27. However the Court did not acknowledge the close link of the right to water to the right to an environment; *Merafong Municipality v AngloGold Ashanti Limited* 2016 ZACC 35 which was about the pricing

the courts because environmental rights are not included in the pleadings of various court cases that relate to Section 24 of the Constitution.⁸⁹ Interestingly, Kidd, in his article *Greening the Judiciary*, also highlighted this as the reason for the failure by judges to consider environmental provisions where he states that “it is probable that the reason why [NEMA] provisions were not considered is that counsel did not bring them to the courts’ attention.”⁹⁰

Another reason highlighted by Kruger is the fact that environmental issues are highly complex, and knowledge of them is quickly evolving, making the courts hesitant to engage with environmental rights.⁹¹ She further draws attention to the fact that environmental issues are closely linked to social issues, and in an environment where there are resource constraints, a court would focus on the social issues.⁹² Feris highlights similar reasons for the lack of cases in which environmental rights have been fully utilised and clearly interpreted - the novelty of the subject matter, a failure by litigating lawyers to raise section 24 of the Constitution, or a lack of judicial familiarity with environmental law.⁹³

Kruger, in considering tools that may be used to encourage greater access to court for environmental rights issues, suggests the creation of a specialised environmental court or tribunal.⁹⁴ She further explains that an environmental court would likely provide a forum for disputes that are clearly related to section 24 of the Constitution, and that some of these disputes might reach the Constitutional Court.⁹⁵ She, however, also emphasises that an environmental court would not assist where cases are heard in other courts, and their environmental

of water yet the relevance of this to the right to an environment was not discussed and *Minister for Environmental Affairs and another v Aquarius Platinum* 2016 ZACC 4, where water was also at the centre of the case but section 24 only received a mere mention and there was no attempt to link it in depth with the case before the court.; Murcott (n 87 above) 155. Murcott cited the following cases to buttress her argument: *MEC: Department of Agriculture, Conservation and Environment & Another v HTF Developers (Pty) Ltd* [2007] ZACC 25, 2008 (2) SA 319 (CC) which involved a challenge to the issue of a directive preventing the clearing of an ecologically sensitive area for a housing development. The Constitutional Court did not delve into the relevance of sec 24 of the Constitution but chose to focus on PAJA and procedural fairness considerations. In a 2020 judgment, in which the environmental right could have been engaged - *Normandien Farms (Pty) Limited v South African Agency for Promotion of Petroleum Exportation and Exploitation SOC Limited and Others* [2020] ZACC 5 - the right to an environment was not canvassed as the Constitutional Court focused on the right to administrative justice.

⁸⁹ Kruger (n 86 above) 477.

⁹⁰ M Kidd ‘Greening the Judiciary’ (2006) *Potchefstroom Electronic Law Journal* 79 <https://repository.nwu.ac.za/handle/10394/1743> (accessed 25 February 2022).

⁹¹ Kruger (n 86 above) 486.

⁹² Kruger (n 86 above) 495.

⁹³ Feris (n 76 above) 38.

⁹⁴ Kruger (n 86 above) 490 – 491.

⁹⁵ Kruger (n 86 above) 492.

ramifications are not identified.⁹⁶ In saying this, it is submitted that Kruger is obviously advocating for an environmental court that is a court of first instance so that environmental issues are canvassed straightaway and adjudicated upon, rather than a specialised environmental court, which hears matters on appeal from the court of first instance. It is submitted that this approach will eliminate a situation where the courts decide to focus on the narrow procedural aspect of administrative action as opposed to focusing on both procedural and the merits of the case before them. In the words of Kidd, the development of a coherent and robust South African environmental jurisprudence depends on judges being able to consider the scientific and technical underpinnings of environmental law when considering environmental cases before them and not just to limit themselves to administrative law principles of procedural fairness.⁹⁷ This, according to Muriithi, is what builds up environmental jurisprudence and significantly contributes to the realisation of the sustainable development agenda.⁹⁸

In South Africa, courts are limited to reviewing decisions without necessarily having to consider the merits of a case before them in civil litigation.⁹⁹ Judicial reviews challenge the way in which a decision has been made, rather than “the rights and wrongs of the conclusion reached”.¹⁰⁰ This means that the administrative body can still make the same decision as long as it is done in a lawful way¹⁰¹ or as is the case in South Africa, it is procedurally fair.¹⁰² In contrast, merit review powers allow a court to establish principles from cases before them which principles can then be applied by the administrative body in future decision-making,

⁹⁶ Ibid.

⁹⁷ M Kidd (n 90 above) 84.

⁹⁸ Muriithi (n 83 above) 76.

⁹⁹ Sec 6(1) of the Promotion of Administrative Justice Act 3 of 2000 provides for the judicial review of administrative action. Administrative action is defined in section 1 of the PAJA as “any decision taken, or any failure to take a decision, by — (a) an organ of state, when — (i) exercising a power in terms of the Constitution or a provincial constitution; or (ii) exercising a public power or performing a public function in terms of any legislation; or (b) a natural or juristic person, other than an organ of state, when exercising a public power or performing a public function in terms of an empowering provision, which adversely affects the rights of any person and which has a direct, external legal effect . . .”

¹⁰⁰ Courts and Tribunals Judiciary ‘Judicial Review’ <https://www.judiciary.uk/you-and-the-judiciary/judicial-review/> (accessed 22 September 2022).

¹⁰¹ Courts and Tribunals Judiciary (above n 100).

¹⁰² Sec 3(1) of the Promotion of Administrative Justice Act, 2000 states that “[a]dministrative action which materially and adversely affects the rights or legitimate expectations of any person must be procedurally fair.” Sec 3(2)(b) outlines what is meant by procedurally fair: (a) adequate notice of the nature and purpose of the proposed administrative action; (b) a reasonable opportunity to make representations; (c) a clear statement of the administrative action; (d) adequate notice of any right of review or internal appeal, where applicable; and (e) adequate notice of the right to request reasons.

thus adding value to administrative decision-making as well as developing environmental jurisprudence.¹⁰³ Furthermore, in a merit review, the court takes the place of the decision maker and undertakes an in-depth scrutiny of the law as well as the scientific and technical issues that underpin the decision.¹⁰⁴ This is of course not to say that judicial reviews should be done away with, because courts can still in the *ratio decidendi* of their judgments highlight environmental issues that need to be considered by the relevant authorities. Additionally, the judicial review role of the courts in ensuring that action taken by relevant authorities is authorised by law, ensures that the rule of law is upheld.¹⁰⁵ As Preston highlights, environmental courts that are superior courts of record can in their supervisory judicial review role ensure that government action and decisions on environmental matters are authorised by law.¹⁰⁶

2.3.2 Promoting compliance with environmental legislation

Judge Weeramantry in his introduction to the *UN Environment Judicial Handbook on Environmental Law* expresses that, “[t]he judiciary is one of the most valued and respected institutions in all societies. The tone that the judiciary sets through the tenor of its decisions influences societal attitudes and reactions towards the matter in question.”¹⁰⁷ He went on further to state that “[j]udicial decisions and attitudes can also play a great part in influencing society’s perception of the environmental danger and of the resources available to society with which to contain it.”¹⁰⁸

According to Fulton and Benjamin, the judiciary’s role as the guarantor of the protective benefits of environmental law is vital, because what judges treat as important, is what a society comes to regard as important.¹⁰⁹ They go on to state that the judiciary’s response to environmental problems serves as a powerful catalyst as it projects to the regulated community ‘the importance of environmental quality and the unacceptability of behaviours that jeopardise

¹⁰³ BJ Preston ‘Characteristics of Successful Environmental Courts and Tribunals’ (2014) *Journal of Environmental Law* 391.

¹⁰⁴ GN Gill ‘The National Green Tribunal of India: decision-making, scientific expertise and uncertainty’ (2017) *Environmental Law and Management* 5; See also GN Gill ‘Precautionary principle, its interpretation and application by the Indian judiciary: ‘When I use a word it means just what I choose it to mean-neither more nor less’ Humpty Dumpty’ (2019) *Environmental Law Review* 296.

¹⁰⁵ Preston (n 74 above) 4.

¹⁰⁶ Preston (n 74 above) 4.

¹⁰⁷ D Shelton and A Kiss *Judicial handbook on environmental law* United Nations Environment Programme (2005) xviii <https://wedocs.unep.org/handle/20.500.11822/8606> (accessed 7 March 2022).

¹⁰⁸ D Shelton and A Kiss (n 107 above).

¹⁰⁹ S Fulton and AH Benjamin ‘Foundations of sustainability’ in United Nations Environmental Programme *Advancing Justice, Governance and Law for Environmental Sustainability* (2012) 21 – 22.

the environment’ thus solidifying the environmental rule of law and the development of an environmental ethic which once it takes hold, can result in a sense of responsibility across all sectors of society and further encourage the regulated community to think and buy green and also motivate businesses to develop a corporate environmental conscience.¹¹⁰

Another way in which the judiciary serves to promote compliance with environmental legislation is when it acts as a check and balance on the executive and the legislature. The courts carry out this role by determining whether the law on paper has been realised in practice, or whether the realisation of the laws on paper is appropriate or sufficient.¹¹¹ Through the powers of judicial review of actions taken by the executive, the court assesses the act and conduct of the executive for consistency with the provisions of the environmental legislation implemented by the executive and the right to an environment as contained in the Constitution.¹¹²

During judicial reviews of administrative actions, courts are able to arbitrate on the decisions made by the relevant executive authority to ensure, among other things, that the executive’s decisions are in line with the stipulations of the specific legislation and where it is not, to remit such decisions back to the executive authority for reconsideration.¹¹³ The judiciary, by upholding “appropriate and well-grounded environmental protection laws and actions to implement them, adds materially to their acceptance by society at large.”¹¹⁴ In the same vein, when the court rejects inappropriate application of environmental laws, trust in the system is increased and the expectation that the environmental law can and will be soundly applied is increased.¹¹⁵ Conversely, if the attitude of the courts is that of ineptitude, corruption, bias, or hostility to legitimate executive action and environmental law, compliance will suffer or even completely collapse.¹¹⁶

Knowing that the courts will take a no-nonsense approach when it comes to environmental protection will send a strong message to the regulated community that any non-compliance will be swiftly dealt with. Similarly, this stance will convey a strong message to administrative

¹¹⁰ Fulton and Benjamin (n 109 above) 21 – 22.

¹¹¹ Soyapi (n 48 above) 322.

¹¹² Ibid.

¹¹³ Ibid.

¹¹⁴ Mulkey (n 84 above) 8.

¹¹⁵ Mulkey (n 84 above) 8.

¹¹⁶ Mulkey (n 84 above) 8 – 9.

authorities that any failure to protect the environment will not be tolerated. When the courts provide coercion to comply with environmental law and at the same time the incentive for compliance, it also provides the guidance and creativity needed for sustainable development.¹¹⁷ This, it is submitted, will have a positive impact on the efforts taken by authorities in the protection of the environment. Similarly, it will ensure that authorities carefully consider decisions they make to ensure such decisions will be able to stand the test of scrutiny in a court of law. It is further submitted that, where environmental cases are considered by specialised environmental courts, it adds more credibility to the judgments as the regulated community and litigants have more confidence in the abilities and expertise of the specialised court judges and would be more willing to defer to their judgments than those of the general court judges. This is because judges in the specialised court system are regarded as having specialised knowledge in the area of law for which the specialised court was established.

2.3.3 Enforcing environmental law and the constitutional right to a healthy environment

The enforcement of environmental law is a significant role played by the judiciary in environmental law because most countries, including South Africa, have adopted the command-and-control approach, with criminal sanctions serving as the primary enforcement mechanisms. When administrative enforcement mechanisms fail, the final resort for administrators is to approach the courts for criminal prosecution in pursuit of the penalty provisions in the environmental legislation.¹¹⁸ Similarly, when members of the public seek to compel the government or other private sector organisations to ensure that their decisions and/or actions further the protection of the environment, they approach the courts seeking suitable civil remedies.¹¹⁹

¹¹⁷ Markowitz and Gerardu (n 50 above) 543.

¹¹⁸ For instance, sec 49A read with section 49B of the NEMA; sec 89 of the NEM: PA; sec 101 read with section 102 of the NEM: BA; sec 67 read with section 68 of the NEM: WA and sec 51 read with sec 52 of the NEM: AQA make provision for offences and penalties in the respective legislation. It must however be noted that the prosecution of offenders in South Africa ultimately lies with the National Prosecuting Authority (NPA) because the competent authority or the environmental management inspectors cannot directly prosecute an offender. See sec 34H which states that (1) Notwithstanding anything to the contrary in any other law, a magistrate's court shall have jurisdiction to impose any penalty prescribed by this Act or any specific Environmental Management Acts; (2) Where a competent authority is of the view that a more severe penalty could be considered than those penalties referred to in section 49B, the competent authority may request the National Prosecuting Authority to institute the criminal proceedings in the High Court. However, the EMIs are empowered to conduct criminal investigations and thereafter hand over the docket to the National Prosecuting Authority. See Craigie *et al* (n 42 above) 98.

¹¹⁹ Sec 32 of the NEMA.

The Johannesburg Principles acknowledge that the fragile state of the global environment requires the judiciary as the guardian of the rule of law to boldly and fearlessly implement and enforce applicable international and national laws.¹²⁰ When there is no enforceability, “governments may evade their responsibility to protect the environment, and affected individuals may be deprived of a remedy for violations of their right to a clean and healthy environment.”¹²¹ The role of the courts is particularly key now that the right to a clean, healthy and sustainable environment is a human right.¹²² Its recognition as a human right on the international front paves the way for “effective integration into international law and stronger implementation domestically”.¹²³ Thus, when the courts uphold the law, they indirectly enforce the law because the executive authority is then given the backing needed to ensure full compliance with the law by the regulated community.¹²⁴ Further, the courts also fulfil the role of protecting environmental rights by identifying breaches and determining the actions to be taken for remedying such breaches to ensure the fulfilment of the environmental rights.¹²⁵

This integral role played by the judiciary in the enforcement of environmental law and ultimately the protection of the environment is evidenced by the fact that in the NEMA and SEMAs, the final ‘enforcer’ of the provisions in these Acts is the court through the offences and penalty provisions.¹²⁶ It is submitted that the independence and impartiality of the judiciary is of paramount importance, irrespective of whether the case is instituted by the authorities seeking to enforce non-compliances or by interested and affected parties seeking to compel the authorities to enforce the law to protect the environment.

¹²⁰ Executive Director ‘Report of the global judge’s symposium (n 44 above) 5.

¹²¹ Soyapi (n 48 above) 326.

¹²² On 8 October 2021, the UN Human Rights Council adopted resolution 48/13 recognising that a clean, healthy, and sustainable environment is a human right - <https://digitallibrary.un.org/record/3945636?ln=en> (accessed 4 March 2024); The United Nations General Assembly adopted the resolution recognising the right to a clean, healthy, and sustainable environment as a human right. Paragraph 1 of Resolution A/76/L.75 adopted on 28 July 2022 <https://digitallibrary.un.org/record/3982508?ln=en> (accessed 4 March 2024).

¹²³ Y Aguila ‘The right to a healthy environment’ <https://www.iucn.org/news/world-commission-environmental-law/202110/right-a-healthy-environment> (accessed 8 March 2024).

¹²⁴ Soyapi (n 48 above) 325 - 326

¹²⁵ Soyapi (n 48 above) 328.

¹²⁶ See n 118 above.

Environmental crimes¹²⁷ have evolved from common law environmental crimes¹²⁸ to statutory environmental crimes.¹²⁹ For instance, in South Africa, environmental crimes have been codified into a regime of environmental laws that have been enacted over the years,¹³⁰ creating what is regarded as statutory crimes.¹³¹ While statutory crimes do not generally require proving the element of *mens rea*, a specialised environmental court with prosecutors who are experienced in environmental law, would be better equipped to deal with statutory environmental crimes. The intrinsic nature of environmental law together with the inherent complexity of environmental crimes, underscores the need for experienced and specialised judges and prosecutors to hear and prosecute environmental cases.¹³² This has been demonstrated in the Hermanus Environmental Court (Hermanus Court) which will be discussed later in this chapter. During the Hermanus Court's first 30 months of existence, it had a high conviction rate of 85% as opposed to when environmental crimes were being dealt with in the general court.¹³³

¹²⁷ Environmental crimes can be generally defined as illegal activities or actions which directly harm the environment – Environmental Investigation Agency (EI Agency) 'Environmental crimes a threat to our future' (2008) 1 <https://globalinitiative.net/wp-content/uploads/2017/12/EIA-Environmental-Crime-A-Threat-to-Our-Future.pdf> (accessed 14 May 2005); White defines environmental crime as "an act committed with intent to harm or with a potential to cause harm to ecological and/or biological systems and for securing business or personal advantage - R White 'Environmental crime and problem-solving courts' (2013) *Crime, Law and Social Change* 273; Clifford and Edwards define it as "an act that violates an environmental protection statute" M Clifford and TD Edwards 'Defining Environmental Crime' in *Environmental Crime: Enforcement and Social Responsibility* M Clifford (ed) (1998) 26. In the Department of Forestry Fisheries and Environment 'National Environmental Compliance and Enforcement Report 2022/2023' (NECER 2022/2023) environmental crime is defined as "the violation of a common law or legislative obligation related to the environment which triggers a criminal sanction - NECER 2022/2023 xii.

¹²⁸ Under the common law, environmental crimes (or offences) include public nuisance, air pollution, injury to land, trespass, and strict liability. Examples of environmental crimes include illegal trade in wildlife, smuggling of ozone-depleting substances (ODS), illicit trade in hazardous waste, illegal, unregulated, and unreported fishing, and illegal logging and trade in stolen timber.

¹²⁹ EI Agency (n 127 above) 1.

¹³⁰ In the NEMA and SEMAs (the Environment Conservation Act, 1989 (Act 73 of 1989); the National Water Act, 1998 (Act 36 of 1998); the National Environmental Management: Protected Areas Act, 2003 (Act 57 of 2003); (d) the National Environmental Management: Biodiversity Act, 2004 (Act 10 of 2004); (e) the National Environmental Management: Air Quality Act, 2004 (Act 39 of 2004); (f) the National Environmental Management: Integrated Coastal Management Act, 2008 (Act 24 of 2008); (g) the National Environmental Management: Waste Act, 2008 (Act 59 of 2008); or (h) the World Heritage Convention Act, 1999 (Act 49 of 1999), and includes any regulation or other subordinate legislation made in terms of any of those Acts).

¹³¹ Statutory crimes are also known as statutory offences.

¹³² F Craigie *et al* (n 42 above) 98; DM Uhlmann 'Environmental crime comes of age: the evolution of criminal enforcement in the environmental regulatory scheme' (2009) *Utah Law Review* 1232.

¹³³ PJ Snijman and M Phil 'Hermanus' environmental court: does it protect the environment?' (2005) *News and Views for Magistrates* 2.

2.4 Environmental litigation

2.4.1 Criminal environmental litigation

Environmental crimes are prosecuted by the NPA in the general courts, mainly the Magistrates Courts and the High Courts.¹³⁴ However, the environmental management inspectors are tasked with conducting criminal investigations and after completing such investigations, handing the investigations to the NPA for prosecution.¹³⁵ Upon completing the criminal investigation, the docket is handed over to the relevant DPP's office for consideration and determination on whether the person should be prosecuted. Where the DPP decides to prosecute, the normal criminal prosecution process in the Regional Magistrates' Court or the High Court then follows.¹³⁶

In South Africa there have been a high number of environmental criminal investigations handed over to the NPA in the past three years by the EMIs for prosecution, but with a poor conviction rate. The table below depicts statistics obtained from the NECER 2022/2023 highlighting the number of convictions over three financial years:¹³⁷

Table 1 Environmental criminal convictions

Description	2020/2021	2021/2022	2022/2023
Criminal investigations handed over to the NPA for prosecution	326	391	359
Convictions	16	58	90
Acquittals	0	5	1
Nolle prosequi	9	17	8

It is evident that the number of convictions *vis a vis* the number of completed criminal investigations handed over to the NPA for prosecution, is poor. This poor conviction rate can

¹³⁴ Sec 34H of the NEMA.

¹³⁵ Environmental Management Inspectors are non-commissioned police officers and are therefore empowered to carry out their own investigation. Sec 31H (5) of the NEMA.

¹³⁶ Personal knowledge of the writer.

¹³⁷ NECER 2022/2023 (n 127 above) 12.

be attributed to various factors. Firstly, the finalisation of prosecutions spans over a couple of years, so some cases handed over in a particular year might not necessarily be finalised in that same year.¹³⁸ Another reason is that some prosecutors are unwilling to prosecute what they consider to be ‘victimless’ and ‘low priority’ crimes.¹³⁹ A third reason is that prosecutors seem to lack the technical skills required to successfully prosecute this specialised crime.¹⁴⁰

By comparison, when the first specialised environmental court was established in Hermanus in 2004 to provide for the effective and speedy prosecution of poaching syndicates and to fast-track the trials of criminal offenders, particularly abalone poachers,¹⁴¹ the court, in its inception year, heard 74 cases and was able to successfully prosecute 51 of the cases.¹⁴² During the Hermanus Environment Court’s first 30 months of existence,¹⁴³ it had a conviction rate of almost 80% with 266 convictions out of a total number of 333 cases that were finalised.¹⁴⁴ During the last twelve months of its operation, the environmental court in Hermanus achieved an 85% conviction rate.¹⁴⁵

An in-depth discussion of the Hermanus Environmental Court will be undertaken in chapter 3, and it will be argued that the closure of the court was premature. Suffice to state here that the court’s achievement during its brief existence shows that it was successful and would have positively complemented the work of the Environmental Management Inspectorate, which was established in 2005.

2.4.2 Civil environmental litigation

In South Africa, civil environmental cases are heard in the High Court. However, there is no specific statistics on environmental cases heard at the High Court because neither the DOJCD

¹³⁸ M Fourie ‘How civil and administrative penalties can change the face of environmental compliance in South Africa’ (2009) *South African Journal of Environmental Law and Policy* 100.

¹³⁹ SM Zehra environmental crime investigations and financial intelligence (2019) <https://www.acamstoday.org/environmental-crime-investigations-and-financial-intelligence> (accessed 21 November 2022).

¹⁴⁰ KO Odeku and SR Gundani ‘Accentuating criminal sanctions for environmental degradation: issues and perspectives’ (2017) *Environmental Economics* 28 DOI:10.21511/ee.08(2).2017.03 (accessed 22 February 2024).

¹⁴¹ The Department of Justice and Constitutional Development (DOJCD) ‘Annual Report 2003/2004’ 28. Cases relating to other environmental issues such as the illegal trade in rhinoceros’ horns, water pollution, and other marine offences were also heard in the Court - Snijman and Phil (n 131 above) 3.

¹⁴² K Rosencrans ‘Environmental courts prove to be effective’ Stop Illegal Fishing Case Study 02 (2011) <https://stopillegalfishing.com/publications/environmental-courts/> (accessed 5 March 2022).

¹⁴³ The Hermanus Environmental Court which was originally meant to be a permanent institution was closed down in 2007 following a high-level political decision that was taken to close a number of specialised courts that lacked legislative mandates, which included the environmental court in Hermanus – K Rosencrans (n 142 above).

¹⁴⁴ Snijman and Phil (n 133 above) 2.

¹⁴⁵ Rosencrans (n 142 above).

Annual Report nor the Judiciary Annual Report filter civil matters filed and finalised in the High Court per area of law. It is notable that in the Judiciary Annual Report, specific indicators are set for cases that are instituted at specialised courts such as the Labour Court, the Land Claims Court, and Electoral Court in the Judiciary Annual Report.¹⁴⁶ It is, therefore, much easier to establish the number of labour cases or land claim cases heard in any given financial year, but not so in the event of environmental cases.

Establishing the number of environmental cases is linked to determining the sufficiency of the caseload required to justify the establishment of a specialised environmental court. This will be further discussed in chapter 5.

2.5 Specialised environmental courts

Specialisation in the judiciary refers to functional specialisation defined in terms of case - generalist judges hear a wide range of cases while specialist judges hear a narrow range of cases linked to a particular area of law.¹⁴⁷ Court specialisation is regarded as an important initiative aimed at advancing the development of a successful judicial system and it is used to address broader development constraints, such as the need for more effective access to contract enforcement, improvements in the investment climate, or more adequate protection of the environment.¹⁴⁸

In the case of specialised environmental courts, these are judicial bodies within the judicial branch of government empowered to specialise in resolving environmental, natural resources, land use development, and related disputes.¹⁴⁹ According to Williams, if constitutional, social and economic rights are to be more than mere statements of aspiration, courts must have some powers to give them content and enforce them.¹⁵⁰ Studies have shown that, particularly in developing or recently developed countries, the current trend has been to create specialised

¹⁴⁶ The Judiciary 'Annual Judiciary Report 2021/2022' 31.

¹⁴⁷ L Baum 'Probing the effect of judicial specialization' (2009) *Duke Law Journal* 1671; H Gramckow and B Walsh *Developing Specialized Court Services: International Experiences and Lessons Learned* Justice and Development Working Paper Series (2013) 3.

¹⁴⁸ Gramckow and Walsh (n 147 above) 1.

¹⁴⁹ G Pring and C Pring 'Specialized environmental courts and tribunals: the explosion of new institutions to adjudicate climate change and other complex environmental issues' (2010) 3 – paper presented at the 2nd Global Conference on Environmental Governance and Democracy; G Pring and C Pring *Greening Justice: Creating and Improving Environmental Courts and Tribunals* (2009) ix.

¹⁵⁰ LA Williams 'The role of courts in the quantitative-implementation of social and economic rights: a comparative study' (2010) *Constitutional Court Review* 141.

courts and tribunals to deal specifically with environmental cases and this is improving access to justice for citizens generally, as well as for civil society, which includes nongovernmental organisations (NGOs) and disadvantaged groups.¹⁵¹ For instance, in Kenya, a landmark case was instituted in the Environment and Land court in Mombasa by a non-governmental organisation, the Centre for Justice Governance and Environmental Action, which sued on their behalf and on behalf of all the residents of Owino-Uhuru Village.¹⁵²

Benjamin states that environmental conflicts require quick action or response, which is incompatible with the slow pace of the general court system which due to its bureaucracy and technical rituals, eventually becomes an obstacle to effective protection of the environment and to economic progress.¹⁵³ Zhang expresses a similar view when he distinguished the role of environmental courts and that of the traditional courts.¹⁵⁴ He explains that apart from dispute resolution, other important functions of environmental courts are that of standardising the scope and basis of environmental justice, handling environmental cases across regions, and protecting ecology in a timely and effective manner.¹⁵⁵ The United Nations Environment Programme (UNEP) highlights the irreversibility of some health impacts and environmental harms pointing out that justice delayed can be justice denied.¹⁵⁶ It went further to state that “environmental law

¹⁵¹ Gramckow and Walsh (n 147 above) 2.

¹⁵² *Kelvin Musyoke and nine others v The Hon Attorney General and seven others* ELC Pet No 1/2016. In this case, Kenya's Environment and Land court in Mombasa gave judgment in favour of the ten Petitioners and declared that the Owino Uhuru community was entitled to their rights to a clean and healthy environment; rights to the highest attainable standard of health and right to clean and safe water guaranteed by Article 43 of the Constitution and right to life as guaranteed by the provisions of Article 26 of the Constitution (para 168). The court also granted the Petitioners compensation to the amount of Kshs.1.3 billion for personal injury and loss of 1 life payable by the Government of Kenya and the two companies whose industrial activities had resulted in lead poisoning which had negatively affected persons and the environment (para 171). Further, the court directed the named liable respondents to within 4 months (120 days) from the date of judgment to clean-up the soil, and water and remove any wastes deposited within the settlement by the 7th respondent. Should the respondents fail to do this then, the sum of Kshs.700,000,000 has to be paid to the 10th petitioner (the Centre For Justice Governance and Environmental Action which sued on their own behalf and on behalf of all the residents of Owino-Uhuru Village) coordinate the soil/environmental clean-up exercise (para 171); See also United Nations Human Rights ‘Court ruling in Kenya: a milestone in environmental justice’ <https://www2.ohchr.org/english/OHCHRreport2020/court-ruling-in-kenya-a-milestone-in-environmental-justice.html> (accessed 18 October 2022).

¹⁵³ AH Benjamin ‘We, the judges, and the environment’ (2012) *Pace Environmental Law Review* 583 – 584.

¹⁵⁴ JD Zhang ‘A thesis on the establishment of specialized environmental and resources courts in China’ (2019) *IOP Conference Series: Earth and Environmental Science* 3 <https://iopscience.iop.org/article/10.1088/1755-1315/354/1/012059> (accessed 1 March 2022).

¹⁵⁵ JD Zhang (n 154 above).

¹⁵⁶ United Nations Environment Programme ‘World congress highlights’ in *Advancing Justice Governance and Law for Environmental Sustainability* (2012) 42 <https://wedocs.unep.org> (accessed 8 September 2022).

enforcement would be greatly advanced if specialised environmental tribunals or benches were established at national and international levels.”¹⁵⁷

2.6 Key benefits of specialised environmental courts

Specialised environmental courts possess certain key benefits. Firstly, they allow for fast-tracking of environmental litigation because they are focused on environmental cases and do not have to adjudicate any other types of cases.¹⁵⁸ This means that environmental cases can be heard much faster than they would be heard in courts of general jurisdiction because specialised environmental courts are under public scrutiny to adjudicate the cases quickly, effectively, and fairly.¹⁵⁹ For instance, in the case of *City of Ekurhuleni Metropolitan Municipality v New Star Technology cc & another*¹⁶⁰ the City of Ekurhuleni sought an interdict to stop the continued operation of a waste recycling facility that was operating without the requisite Atmospheric Emission Licence (AEL) and Waste Management Licence (WML) – the interdict proceedings was instituted in February 2021 and the interdict was only granted in September 2022 – a period of 19 months during which time the defendant continued to conduct activities which pollute the environment. However, when one considers the average time that it takes for a decision to be made in, for instance, the New South Wales environment court, the obvious benefit of having environmental cases heard by a specialised court is seen. In *Sader v Elgammal*¹⁶¹ which was a civil enforcement matter, the court heard the matter in June 2022 and a decision was made in August 2022 – a period of two months. It must, however, be highlighted that the reduction in the length of time taken to hear and finalise matters involved the adoption of three initiatives – differential case management, adoption of the International Framework for Court Excellence, and adoption of new technology.¹⁶² These initiatives will be further discussed in chapter 4 when a comparative analysis of the New South Wales Environment Court will be undertaken.

¹⁵⁷ World congress highlights in *Advancing Justice* (n 156 above) 42.

¹⁵⁸ Pring and Pring (2009) (n 149 above) 14; Gramckow and Walsh (n 147 above) 6; SC Whitney ‘The case for creating a special environmental court system’ (1973) *William and Mary Law Review* 476.

¹⁵⁹ Pring and Pring (2010) (n 149 above) 10.

¹⁶⁰ [2022] ZAGPJHC 769; 2023 (3) SA 579 (GJ) (23 September 2022). The interdict was awarded on 22 September 2022.

¹⁶¹ [2022] NSWLEC 107.

¹⁶² BJ Preston ‘The Land and Environment Court of New South Wales: a very short history of an environmental court in action’ (2020) 94 *Australian Law Journal* 635.

According to Preston, the centralisation of environmental issues also help to ensure there is a 'critical mass' of cases coming before the court which is important for the efficient administration of the court because 'it can result in economies of scale that are often not achieved through 'dissipation of environmental matters throughout different courts and tribunals'.¹⁶³ The use of specialised environmental courts also improves data flows and transparency in environmental decision-making, as it allows the court to be 'both the collector and disseminator of judicial information, rather than a government agency, which is often a party to the court proceedings and in a somewhat conflicted position'.¹⁶⁴ Judges in the specialised environmental courts develop the expertise to decide disputes more efficiently and expeditiously when compared to the judges in the general courts.¹⁶⁵ This has the positive spin off that judges in the general courts no longer have to spend the effort to remain current on environmental law, allowing them to increase their research efficiency in the other fields of law that is brought before them.¹⁶⁶

Secondly, specialised environmental courts encourage integrated jurisdiction over relevant laws. An "integrated" environmental and land use planning court, with civil (non-criminal), administrative (government review), and criminal jurisdiction, with enforcement powers adequate to the task, represents the jurisdictional scope that best provides comprehensive access to environmental justice.¹⁶⁷ Among other things, this allows a specialised environmental court judge to evaluate the environmental aspects of other decisions relating to land use, natural resources, climate change and the land development aspects of environmental decisions, as well as to consolidate cases arising under different technical causes of action.¹⁶⁸

Thirdly, judges in specialised environmental courts become experts in environmental law issues and, therefore, do not need to be educated by counsel who appear before them, which in turn reduces the scope of the records to only those vital issues that need to be considered.¹⁶⁹ In the words of Guidone and Jonas, "they are equipped to deal with environmental cases and less time is wasted on attempting to educate them on the complex evidence presented in

¹⁶³ Preston (n 103 above) 376.

¹⁶⁴ E Hamman R Walters and R Maguire 'Environmental crime and specialist courts: the case for one-stop (judicial) shop in Queensland' (2015) *Current Issues in Criminal Justice* 62.

¹⁶⁵ MB Zimmer 'Overview of Specialized Courts' (2009) *International Journal for Court Administration* 1.

¹⁶⁶ Zimmer (n 165 above) 1.

¹⁶⁷ Pring and Pring (2009) (n 149 above) 28.

¹⁶⁸ Pring and Pring (2010) (n 149 above) 10 -11.

¹⁶⁹ Zimmer (n 165 above) 1 – 2.

proceedings”.¹⁷⁰ This in turn saves cost and reduces the period of time in which matters are heard and decided upon.¹⁷¹ This is perhaps one of the most important advantages that specialised environmental courts have over general jurisdiction courts or tribunals.¹⁷² Judges and decision makers are chosen specifically because they have experience, expertise, and continuing interest in environmental law. In the Land and Environment Court of New South Wales, the judges are judges of a superior court of record or lawyers of at least seven years standing, preferably with knowledge and expertise in environmental law or otherwise who would have developed such knowledge and expertise.¹⁷³ Further, judges in specialised environmental courts are likely to “produce higher-quality decisions from which no appeal can or need to be taken” when compared to their counterparts in the general courts.¹⁷⁴ Judges in specialised environmental courts can participate in regular training, workshops, conferences, and other learning initiatives to broaden their knowledge and share perspectives on environmental jurisprudence.¹⁷⁵ Judges who are experts in environmental law ‘add a necessary level of sophistication and ecological insight to the court's decision’ and also give the ‘adjudication of environmental issues a level of academic credibility’. They also serve to improve consistency in judicial decision-making in all matters relating to the environment¹⁷⁶ with the added advantage that the ‘proceedings commence from a position of higher ecological insight’.¹⁷⁷ People are more likely to respect a decision made by a person who has expertise in the specific field being adjudicated upon depending of course on the breadth of the person’s expertise.

Fourthly, a well-resourced specialised environmental court has the ability to manage scientific and technical expert evidence through internal (court’s) experts and managing external (parties’) experts, thus enabling the court to have access to the best and most unbiased evidence

¹⁷⁰ R Guidone and H Jonas ‘A review of environmental courts and tribunals for CSOs and the judiciary’ in C Voigt and Z Makuch (eds) *Courts and the environment* (2018) 384.

¹⁷¹ Zimmer (n 165 above) 2.

¹⁷² Pring and Pring (2009) (n 149 above) 72-75; DJ Goetz ‘China's environmental problems: is a specialized court the solution?’ (2009) *Pacific Rim Law and Policy Journal* 184 <https://digitalcommons.law.uw.edu/wilj/vol18/iss1/6> (accessed 19 September 2022).

¹⁷³ Sec 8(2) of the *Land and Environment Court Act 1979* (NSW); BJ Preston ‘Operating an environment court: the experience of the Land and Environment Court of New South Wales’ (2008) *Environmental and Planning Law Journal* 388.

¹⁷⁴ Zimmer (n 165 above) 2.

¹⁷⁵ Pring and Pring 2010 (n 149 above) 11 – 12.

¹⁷⁶ Goetz (n 172 above) 185.

¹⁷⁷ Hamman *et al* (n 164 above) 61.

available.¹⁷⁸ These tools are often not available or used by the general courts. Some of these tools include the use of expert scientific-technical decision makers who serve as co-judges or commissioners,¹⁷⁹ appointment of expert-and-lay commissioners who are also responsible for ensuring compliance with a court order,¹⁸⁰ directing the experts appointed by the parties that their duty is to the court and not to the parties,¹⁸¹ requiring the experts appointed by the parties to meet in advance so as to indicate which evidence will be submitted and to determine areas of agreement and disagreement so that the arguments are focused, thus reducing the time spent on expert evidence and testimony.¹⁸² Sometimes the courts engage experts directly by soliciting *amicus curiae* from unaffiliated experts or research/academic institutes.¹⁸³

Fifthly, most specialised environmental courts allow for the *locus standi* to be expanded through the development of special *locus standi* rules which will allow for greater access to justice in environmental law or related cases.¹⁸⁴

Sixthly, specialised environmental courts allow for the adoption of flexible rules of procedure. Establishing an ECT permits the rethinking of the judicial process and putting in place more flexible, streamlined, and effective rules.¹⁸⁵ For instance, in the New South Wales Environmental Court, special rules for alternative dispute resolution (ADR), evidence, directions hearings and timetables, expert testimony, the hearing process, and enforcement remedies have been developed and this greatly assists with the environmental court's effectiveness and efficiency.¹⁸⁶

Another benefit is that specialised environmental courts encourage consistency of decisions.¹⁸⁷ This is particularly important because, in as much as the regulated community as well as authorities need predictable, reliable rules in order to manage such complex matters as environment and climate change, consistency in decision-making provides an element of fairness that is essential to maintaining the rule of law.¹⁸⁸ Appreciating the nature of

¹⁷⁸ Pring and Pring (2009) (n 149 above) 14.

¹⁷⁹ Preston (n 103 above) 377 - 378.

¹⁸⁰ Pring and Pring (2010) (n 149 above) 13.

¹⁸¹ Pring and Pring (2010) (n 149 above) 14.

¹⁸² Pring and Pring (2010) (n 149 above) 14.

¹⁸³ Pring and Pring (2010) (n 149 above) 14.

¹⁸⁴ Pring and Pring (2010) (n 149 above) 15.

¹⁸⁵ Pring and Pring (2009) (n 149 above) 61-72, 76-87.

¹⁸⁶ Pring and Pring (2010) (n 149 above) 16.

¹⁸⁷ Gramckow and Walsh (n 147 above) 3; SC Whitney (n 158 above) 476.

¹⁸⁸ Pring and Pring (2010) (n 149 above) 16.

environmental crime and environmental law can help to deliver consistency in sentencing and a fairer result for all involved – most importantly, for the ecosystem which has been damaged by the conduct. In fact, it has been demonstrated empirically that when ECTs hear matters relating to environmental crime, 'there is greater likelihood of both prosecution of offenders and greater use of appropriate sanctions'.¹⁸⁹ Consistency in decision-making also reduces the need for litigation and reduces the likelihood that prospective parties will find legal grounds for taking a dispute to court, thus building the confidence of legal representatives and the regulated community in the court system.¹⁹⁰

The ability to apply a problem-solving approach to adjudication distinguishes specialised environmental courts from general courts. This problem-solving approach looks to positive outcomes for cases which go beyond the routine application of the laws' technicalities.¹⁹¹ The problem-solving approach is perhaps most evident in the extensive use of ADR such as conciliation, facilitated negotiation, mediation, collaboration, early neutral evaluation, restorative justice, and arbitration.¹⁹² The positive aspect of these solutions that are agreed upon by the parties, is that they are often environmentally superior to those contemplated in the legislation and achieve an innovative solution to the problem. Moreover, when these solutions are incorporated in an enforceable court order, such agreements can be considerably better at balancing values and achieving sustainable development than those strictly legal rulings will achieve and, therefore, constitute a win-win resolution which ensures better protection for the environment.¹⁹³

General courts often de-emphasise the harm caused to the environment and because the moral content of the prohibited action is not as well established as it is in general crimes, there is a misunderstanding of the importance of environmental crime when compared to other types of crimes heard by the same court.¹⁹⁴ Environmental crimes often rank low on the law enforcement priority list, because it is seen as a victimless and incidental crime, which is why authorities usually prefer to make use of administrative sanctions to enforce them.¹⁹⁵ A

¹⁸⁹ White (n 127 above) 269; Hamman *et al* (n 163 above) 63.

¹⁹⁰ Zimmer (n 165 above) 2.

¹⁹¹ G Pring and C Pring 'Environmental Courts and Tribunals at the confluence of human rights and the environment' (2009) *Oregon Review of International Law* 320.

¹⁹² Pring and Pring (n 191 above) 320.

¹⁹³ Pring and Pring (2010) (n 149 above) 17.

¹⁹⁴ Hamman *et al* (n 164 above) 62; Uhlmann (n 132 above) 1228.

¹⁹⁵ United Nations Interregional Crime and Justice Research Institute (UNICRI) 'Environmental Crimes' <http://www.unicri.us/topics/environmental/> (accessed 13 November 2022).

specialised environmental court will help the regulated community to better appreciate the seriousness of crimes against the environment and deter would-be offenders as environmental crimes will be dealt with swiftly and efficiently as cases do not have to wait to be placed on the court roll or compete with other general crimes for attention.

However, there are those who do not generally support specialised courts and who have opined that even though specialisation may increase efficiency and possibly improve decisions, the impact on the broader development issue that led to the establishment of the specialised court might not be achieved.¹⁹⁶ Another argument against specialised courts has been that establishing and running a new system of courts can be costly because it would entail employing new court personnel as well as renting of new premises, which cost is likely to be borne by taxpayers, a majority of who are not likely to use the court.¹⁹⁷ The same writer put forward a counter to this argument which is that some of the operating costs can be covered by the fees to be paid by those who make use of the specialised courts.¹⁹⁸ Another counter to the argument of the high cost of establishing a new system of courts is to propose reform from within by starting with a specialised judge and then a green bench, before establishing a stand-alone environmental court.¹⁹⁹

Another argument against specialisation is that it can increase the risk of exposing the judges to the greater influence of specialised lawyers, and lead to judges developing a rather narrow view of the matters the court focuses on.”²⁰⁰ Zimmer highlights the negative effect of this when he emphasises that, if a judge develops a narrow or one sided view of the issues, their objectivity will be compromised and there is a high risk of developing a professional bias towards a core group of highly experienced and expert level lawyers, which could lead to the court’s neutrality being compromised and would result in a captured court.²⁰¹ In the case of specialised environmental courts, this translates to judges who are not impartial when delivering judgments and may be advocates and biased in favour of environmental protection as opposed to a balanced and comprehensive analysis, which is aligned to the principles of

¹⁹⁶ Gramckow and Walsh (n 147 above) 6.

¹⁹⁷ VC Perez ‘Specialisation trends: water courts’ (2019) *Environmental Law* 595 https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3253349 (accessed 17 March 2022).

¹⁹⁸ Perez (n 197 above) 595.

¹⁹⁹ Pring and Pring (2010) (n 149 above) 17.

²⁰⁰ Gramckow and Walsh (n 147 above) 8.

²⁰¹ Zimmer (n 165 above); Gramckow and Walsh (n 147 above) 8.

sustainable development.²⁰² A solution to this challenge is offered by Zimmer when he suggests that cases should be heard by a panel of at least three judges based on a rotation system.²⁰³ He further suggests that decisions of specialised courts should be subject to review by courts of second instance or appellate general courts.²⁰⁴ Apart from the solutions suggested by Zimmer to counter the partiality and capture arguments, it must be pointed out that the environmental sector is a highly regulated sector and science-based, such that it will be difficult for any judge to consistently interpret the law in a biased manner which consistently favours protecting the environment to the detriment of sustainable development and *vice versa*. However, it will be important that, when appointing judges to serve on the specialised environmental courts, such judges are carefully selected with care taken to select judges who have a balanced view on protecting the environment, while at the same time ensuring sustainable development.

Both schools of thought for or against the establishment of specialised environmental courts have good arguments in support of their respective positions but as Pring and Pring point out, the way in which the general, non-specialised court systems handle environmental and land use issues affecting development and future sustainability have accelerated or increased the need for the creation of ECTs.²⁰⁵ Factors which limit access to environmental justice and continue to do so include limited accessibility to courts, insufficient legal and technical expertise, high litigation costs, delay, concerns about the quality of decisions, inadequate public information and participation, and diminished public trust.²⁰⁶ According to Pring and Pring, ECTs provide a visible, measurable and powerful entity for governments and the public to turn to when faced with environmental issues, which increases public confidence and demonstrates government's commitment to environmental issues.²⁰⁷ An efficient ECT ensures increased access to environmental justice, from the time proceedings are initiated, through efficient litigation to accessing fair remedies and enforcement.²⁰⁸

²⁰² Pring and Pring refer to this as judicial bias - G Pring and C Pring *Environmental Courts and Tribunals; A Guide for Policymakers* United Nations Environmental Programme (2016) 15.

²⁰³ Zimmer (n 165 above).

²⁰⁴ Zimmer (n 165 above)

²⁰⁵ Pring and Pring (2009) (n 149 above) 1.

²⁰⁶ Pring and Pring (2009) (n 149 above) 1.

²⁰⁷ Pring and Pring (2009) (n 149 above) 15 – 16.

²⁰⁸ Guidone and Jonas (n 170 above) 388.

2.7 Models of environmental courts

The first Environmental Courts were created in response to the 1972 Stockholm Declaration of the UN Conference on the Human Environment, which underscored the importance of the right to a healthy environment.²⁰⁹ However, exponential Environment Court development did not begin until after the 1992 Rio Declaration when Principle 10 identified the need for increased access to environmental information and justice, recognising good environmental governance as fundamental to the achievement of sustainable development.²¹⁰ Between 2009 and 2021, environmental courts had increased from 354 to 2115.²¹¹ It is submitted that this is evidence of the increasing momentum for the establishment of environmental courts and tribunals over the years and also shows that countries all over the world see the benefit of establishing environmental courts (and tribunals) as a tool to ensure access to environmental justice and protection of the environment.

South Africa has been lauded for including the right to an environment which is not harmful to (people's) health or wellbeing in its Constitution.²¹² It should not rest on its laurels but should objectively consider the importance of establishing specialised environmental courts to ensure the protection of this right that is enshrined in its Constitution. Environmental courts are regarded as viable, specialised alternatives to generalist courts 'for the simple reason that they offer a pragmatic solution to the problem that environmental law gives rise to a diverse range of legal disputes in relation to complex environmental issues'.²¹³

Pring and Pring are careful to point out that "there is no one 'best model' or 'one-size-fits-all' structure – for an environmental court or tribunal, because the best model for each jurisdiction is the unique combination of elements which results in a relevant, efficient environmental

²⁰⁹ Guidone and Jonas (n 170 above) 371 – 372.

²¹⁰ Guidone and Jonas (n 170 above) 372.

²¹¹ Pring and Pring (2009) (n 149 above) 1. This number includes environmental tribunals. LY Sulistiawati *et al* *Environmental Courts and Tribunals - 2021: A Guide for Policymakers* United Nations Environmental Programme (2022) 11.

²¹² In the South African Constitution Act 200 of 1993, sec 29 provided for the right to an environment. It stated that '[e]very person shall have the right to an environment which is not detrimental to his or her well-being.'; The right to an environment was further expanded in the 1996 Constitution to include (b) which extended the protection of the environment for the benefit of present and future generations and also placed a duty on government to protect the environment through reasonable legislative and other measures.

²¹³ Guidone and Jonas (n 170 above) 372 citing Elizabeth Fisher *et al*. *Environmental Law: Text, Cases and Materials* (2013) 396.

dispute resolution process with access to justice for all affected interests”.²¹⁴ Every jurisdiction is different and as Pring and Pring rightly state, determining which model is best for a specific jurisdiction is based on a consideration of various factors such as the ecological, historical, legal, socioeconomic, religious, cultural, political, and the judicial environment of the relevant jurisdiction and, of course, the advantages and disadvantages would also have to be considered.²¹⁵ This view is echoed by Amirante who explains that specialised environmental courts are easier to establish by new democracies or following a recent or revised constitution as this allows for the legal system to be organised on the basis of a structural involvement or the environment within the constitutional rights or fundamental values.²¹⁶ He further highlights the fact that the different models of courts that deal with environmental matters can co-exist together.²¹⁷ So, for instance, in countries that have a judicial review of laws or a Constitutional Court, there can be some environmental courts at the lower court level and green benches located in the superior courts.²¹⁸ Gramckow and Walsh also caution that specialisation can only achieve so much, and thus the cost and potential drawbacks of establishing a specialised court must be carefully weighed before making a decision to specialise and choose a particular model.²¹⁹

Pring and Pring suggest four decisional steps that will be useful for a jurisdiction wishing to establish an Environment Court.²²⁰ Firstly, the arguments for and against developing a specialised Environment Court based on that jurisdiction’s legal structure, political situation, socio-economic conditions, and environmental goals must be carefully considered.²²¹ Secondly, where it is decided that an Environment Court should be established, an analysis of the options and best practices within each of the 12 design decisions²²² must be carried out to

²¹⁴ Pring and Pring (2009) (n 149 above) 19; Pring and Pring (2016) (n 202 above) 18; Sulistiawati *et al* (n 211 above) 42; Guidone and Jonas (n 170 above) 370.

²¹⁵ Pring and Pring (2009) (n 149 above) 19; Pring and Pring (2016) (n 202 above) 18.

²¹⁶ Amirante (n 55 above) 448.

²¹⁷ *Ibid.*

²¹⁸ *Ibid.*

²¹⁹ Gramckow and Walsh (n 147) 9.

²²⁰ Pring and Pring 2009 (n 149 above) 5.

²²¹ Pring and Pring 2009 (n 149 above) 5.

²²² Pring and Pring 2009 (n 149 above) 20 - 21 highlight the following 12 basic building blocks or design decisions to consider - the type of model (should it be a judicial court or administrative tribunal and what would the level of independence be); the legal jurisdiction of the ECT (what substantive laws, policies, and principles will the ECT have authority over); the decisional level of the ECT (would it be a court of first instance, appeal or court of final review and should it have powers to consider civil, criminal or administrative matters or a combination of all three); the geographic area that the ECT would cover – town, city, state or province (in the case of South Africa

decide which combination of options is best for the jurisdiction's characteristics and goals. Thirdly, the jurisdiction should undergo a strategic planning process which would see all key role players and stakeholders participating to obtain their buy-in, development of relevant legislation, finance, selection and training of judges and the adoption of practice rules and procedures.²²³ Fourthly, the jurisdiction needs to develop a comprehensive and continual evaluation of the Environment Court's procedures and outcomes to assess whether the specialised Environment Court is "effective" in providing access to environmental justice, both procedurally and substantively.²²⁴ Gramckow and Walsh also propose how to choose a model of a specialised court. They state that the model that is chosen should reflect the weight of the underlying problem that the specialised court seeks to address, as well as the local circumstances such as the number of cases and the external demand for special treatment. In their view, the higher the number of cases that require special treatment, the greater the need for such specialisation and the higher its establishment can be justified.²²⁵

Gramckow and Walsh, when pointing out that it is important to first establish that there truly exists a need for specialisation and to consider the impact that specialisation might have on the court and its users, provide certain criteria that outline a four-step decision-making model and conditions for specialisation:²²⁶

1. Complex legal requirements and specialty knowledge;
2. Need for additional services and/or separate processes;
3. Case type volume; and
4. External demand.

They explain that the higher the need to address more than one of these reasons, the more wide-ranging the chosen specialisation choice should be. Therefore, if all four reasons are applicable

– local, regional or provincial); the case workload; locus standi (who can institute an action in the ECT); cost implications for parties and how can costs be reduced; the use of scientific and technical expertise; would it incorporate alternative dispute resolution mechanisms; competency of the ECT judges (this would include their qualifications, training, term of office, remuneration); the enforcement tools that would make the ECTs decision effective (this includes mediation agreements, injunctions, fines, imprisonment and other related tools).

²²³ Pring and Pring (2009) (n 149 above) 5.

²²⁴ Pring and Pring (2009) (n 149 above) 5 – 6. They opine that the Land and Environment Court of New South Wales, Australia, is a leader in developing and applying this kind of methodology.

²²⁵ Gramckow and Walsh (n 147 above) 10.

²²⁶ Gramckow and Walsh (n 147 above) 16.

then consideration should be given to establishing an independent specialised court. They, however, suggest that a pilot test should first be undertaken.²²⁷

Gramckow and Walsh further offer a cascading set of scenarios to guide decision-making on the choice of the most appropriate model of specialisation.²²⁸ First, consideration should be given to whether there is a sufficient volume of cases to justify allocating judges exclusively to a particular case type and if the answer is yes, a special court or division can then be established.²²⁹ However, if the size of the potential case workload and long-term implications and needs are still undetermined or unclear, then a special bench or division model may be preferable, because it provides the option of varying the numbers of judges used over time.²³⁰ Next, if there is uncertainty about the number of judges to be exclusively dedicated to special case types, then the option of developing the capacity of the judges in that specific field to be able to assign individual judges on an occasional basis to handle special cases as they arise, should be considered.²³¹ The specific models that are aligned to each of the scenarios highlighted here, will now be discussed. For the purpose of this study, the focus is on the operationally independent environmental court model,²³² decisionally independent environmental courts,²³³ general court judges assigned to environmental cases,²³⁴ and general court judges trained in environmental law.²³⁵ Environmental tribunals will not be discussed because these are non-judicial bodies, and this thesis focuses only on judicial courts.

2.7.1 Operationally Independent Environmental Courts (Specialised Environmental Courts)

This option is a specialised environmental court created under the judicial arm of government. It is independent of the other two arms of government and as such has its own budget and has

²²⁷ Ibid.

²²⁸ Ibid.

²²⁹ Gramckow and Walsh (n 147 above) 16.

²³⁰ Gramckow and Walsh (n 147 above) 16.

²³¹ Gramckow and Walsh (n 147 above) 16.

²³² Pring and Pring (2016) (n 202 above) 20; Sulistiawati *et al* (n 211 above) 44; in Pring and Pring (2009) (n 149 above) 22 – 23 they were referred to as specialised courts.

²³³ Pring and Pring (2016) (n 202 above) 24; Sulistiawati *et al* (n 211 above) 45; in Pring and Pring (2009) (n 149 above) 23 they were referred to as specialised green chambers.

²³⁴ Pring and Pring (2016) (n 202 above) 29; Sulistiawati *et al* (n 211 above) 6 and 50; in Pring and Pring (2009) (n 149 above) 24 they were referred to as green judges.

²³⁵ Pring and Pring (2016) (n 202 above) 32; Sulistiawati *et al* (n 211 above) 54; in Pring and Pring (2009) (n 149 above) 25 they were referred to as independent tribunals.

legally trained and expert judges.²³⁶ The court hears only environmental cases and is able to make use of non-legal, scientific, or technical experts as judges or commissioners who work with the legally trained judges.²³⁷ The countries that have successfully established this model of specialised environmental courts often have a large environmental caseload to justify the establishment of such a court.²³⁸ Adequate funding for the court is also key.²³⁹ Their decisions are enforceable against government authorities as well as natural or juristic persons.²⁴⁰ Countries that have established this model of specialised environmental court include Australia (New South Wales); New Zealand; Brazil (Amazonas State); and the United States (Vermont)).²⁴¹

Pring and Pring highlight the fact that the independence of specialised environmental courts is a critical factor in access to environmental justice, “as the more independent a court is of the political process and administrative pressure, the more likely its decisions are to be fair, equitable, and unbiased, and perceived as such by government and the public”²⁴². A shortcoming highlighted in the study is that establishing a specialised environmental court can be complicated and costly, because it would require authorising legislation, a separate budget and funding for public awareness campaigns.²⁴³ They go on to discuss a variation of the free standing specialised environmental court model - the Planning and Environment Court (PEC) of the State of Queensland, Australia.²⁴⁴ The court has its own legislated authority and to that extent, it is seen as an independent body. The judges are, however, appointed by the Chief Judge of the District Court on a roster basis as it is located within a regular state trial-level District Court and does not have its own separate administrative staff, but has its own Registrar who is a trained mediator and environmental lawyer.²⁴⁵ This hybrid model is less expensive and provides the opportunity for regular interaction between the presiding judge and the other

²³⁶ Pring and Pring (2009) (n 149 above) 22; Pring and Pring (2016) (n 202 above) 20; Gramckow and Walsh (n 147) 11.

²³⁷ Pring and Pring (2009) (n 149 above) 22; Pring and Pring (2016) (n 202 above) 21.

²³⁸ Pring and Pring (2009) (n 149 above) 22.

²³⁹ Pring and Pring (2009) (n 149 above) 22.

²⁴⁰ Pring and Pring (2009) (n 149 above) 22.

²⁴¹ Pring and Pring (2009) (n 149 above) 22; Sulistiawati *et al* (n 211 above) 44 - 45.

²⁴² Pring and Pring (2009) (n 149 above) 22; Pring and Pring (2016) (n 202 above) 21.

²⁴³ Pring and Pring (2009) (n 149 above) 22 – 23.

²⁴⁴ Pring and Pring (2009) (n 149 above) 23.

²⁴⁵ Ibid.

judges within the District Court.²⁴⁶ It also has the advantage of being able to develop its own rules and practices and can adapt to changes in caseload volume and complexity.²⁴⁷

2.7.2 Decisionally Independent Environmental Courts (Specialised Green Chambers)

Specialised Green Chambers involve the creation of a specialised chamber, bench, panel of judges, or a judge within the general court to hear environmental cases.²⁴⁸ This “green chamber” may be formally established or it may be an *ad hoc* arrangement in which a judge is temporarily assigned to adjudicate over environmental cases.²⁴⁹ The court registrar or a judge has the task of carefully screening and evaluating all cases to ensure the proper assignment of environmental cases to the Green Chambers.²⁵⁰ Advantages are that no special legislation needs to be enacted for its creation, and neither is a separate budget required to run it. Litigants file cases in the general court in which it is located, and the court can manage its caseload in instances where the number and complexity of environmental cases fluctuates, whilst ensuring that the workload of the court is spread evenly among all the judges.²⁵¹ Disadvantages include amongst other factors, that there is no specific requirement for judicial expertise or interest in environmental law, it does not require special community education about what constitutes an environmental case, and it cannot adopt different rules, fees, or court procedures from those used by the general court in which it is located.²⁵² Countries that operate this model include the Supreme Court and Administrative Courts of Thailand, the Supreme Court of India as well as courts in Sweden, the Netherlands, Finland, Belgium, and Greece.²⁵³

2.7.3 General Court Judges Assigned Environmental Cases (Green Judges)

The designation of Green Judges takes place where the caseload, financial or human resources is not sufficient to justify a separate court or a chamber of judges that specialise in environmental law cases.²⁵⁴ Instead of establishing a specialised environmental court or designating a green chamber, a single trial or appellate judge is assigned cases that have

²⁴⁶ Ibid.

²⁴⁷ Ibid.

²⁴⁸ Pring and Pring (2009) (n 149 above) 23; Sulistiawati (n 211) 45 – 46; Gramckow and Walsh (n 147) 10. Also referred to as specially designated courts.

²⁴⁹ Pring and Pring (2009) (n 149 above) 23.

²⁵⁰ Ibid.

²⁵¹ Ibid.

²⁵² Ibid.

²⁵³ Pring and Pring (2009) (n 149 above) 24.

²⁵⁴ Pring and Pring (2009) (n 149 above) 24; Gramckow and Walsh (n 147 above) 11.

environmental law issues in addition to regular cases.²⁵⁵ Countries that make use of this model include Indonesia and the Philippines.²⁵⁶

2.7.4 General court judges trained in environmental law

Countries can opt to train their general court judges in environmental law instead of establishing an independent environmental court. As Kidd points out, most of South Africa's judges received their formal legal education before promulgation of many of its environmental legislation and almost certainly before environmental law was taught at universities.²⁵⁷ For instance, in Indonesia, judges have been trained and certified in environmental law because its policymakers were of the view that establishing an environmental court or tribunal unnecessarily complicates matters, as it would require amendments to the current civil, criminal and administrative codes, and each of the respective procedural codes.²⁵⁸

Another instance in which training of judges in environmental law becomes pertinent is where, even though there is an independent environmental court or tribunal, environmental issues still surface in non-environmental cases that are brought before the general courts.²⁵⁹ This is because the nature of environmental law is intersectional and multi-disciplinary and can arise in issues relating to gender inequality or environmental pollution by private companies.²⁶⁰ It is, therefore, important that the judges understand the evidence thoroughly enough to be able to identify causal links, objects and subjects.²⁶¹ For instance, when calculating environmental damages, certain main environmental elements must be determined - the judgement must properly identify who is responsible for remediation of the harm caused, how the remediation must be undertaken and when the remediation must be implemented.²⁶² The judge must also be able to differentiate between when compensation should be ordered as opposed to remediation.²⁶³ Sulistiawati *et al* highlight that determining these elements is a highly complex procedure even when there are expert members of the court, it is thus important to train as

²⁵⁵ Pring and Pring (2009) (n 149 above) 24; Sulistiawati *et al* (n 211 above) 6 and 51.

²⁵⁶ Pring and Pring (2009) (n 149 above) 24.

²⁵⁷ Kidd (n 90 above) 72.

²⁵⁸ Sulistiawati *et al* (n 211 above) 6.

²⁵⁹ Sulistiawati *et al* (n 211 above) 52.

²⁶⁰ *Ibid.*

²⁶¹ *Ibid.*

²⁶² *Ibid.*

²⁶³ Sulistiawati *et al* (n 211 above) 1.

many general court judges as possible in environmental law, even in situations where the county already has a specialised environmental court or tribunal.²⁶⁴

Another illustration of the importance of training judges in environmental law is in cases of strategic lawsuits against public participation (SLAPPs), which are often instituted in the general courts. SLAPPs can be criminal or civil legal proceedings which, according to Sulistiawati *et al*, are instituted to “intimidate, financially cripple and silence environmental advocates and activists.”²⁶⁵ SLAPPs are used by corporate entities and even governments, to prevent people from raising concerns about their practices and speaking out against abuse, and resultantly having a chilling effect on environmental advocacy.²⁶⁶ If general court judges do not understand environmental issues, they would fail to connect the genuine environmental concerns that the non-environmental case (SLAPP case) seeks to overshadow and this could have dangerous and traumatic consequences for the environmental defenders charged, and also substantially impede environmental justice and protection.²⁶⁷ A judge, therefore, needs to be familiar with environmental law and related cases behind the SLAPP and training judges in environmental law will give them the knowledge and confidence to handle environmental issues even when they are not working within a specialised environmental court.²⁶⁸ Judges are then able to “identify, connect the dots to environmental issues and create environmental law jurisprudence for protection of the people’s justice”.²⁶⁹

2.8 Conclusion

This chapter examined the role of courts *vis a vis* environmental management. It went further to consider the benefits of specialised environmental courts and the various models of specialised environmental courts. The benefits of establishing specialised environmental courts in South Africa outweigh the arguments against having a specialised environmental court, particularly if regard is given to the poor conviction rate reported in the NECER in the past five years, as well as the slow development of environmental jurisprudence. Environmental law is complex and requires speciality knowledge, there is a need for additional services

²⁶⁴ Sulistiawati *et al* (n 211 above) 52.

²⁶⁵ Business and Human Rights Resource Centre ‘SLAPPed but Not Silenced: Defending Human Rights in the Face of Legal Risks’ (2021) 5 https://media.business-humanrights.org/media/documents/2021_SLAPPs_Briefing_EN_v51.pdf. (accessed 30 September 2022).

²⁶⁶ Sulistiawati *et al* (n 211 above) 53.

²⁶⁷ *Ibid*.

²⁶⁸ *Ibid*.

²⁶⁹ Sulistiawati *et al* (n 211 above) 52 - 54.

(experts) and separate processes, (consideration of alternative solutions), criminal investigations handed over to the NPA for prosecution are quite substantial, and lastly, there exists an external demand, nationally and internationally, for environmental protection and environmental justice.

It is submitted that having a specialised environmental court in South Africa is crucial in the fight against environmental crimes because of the wider impact environmental crimes have on the environment as well as on human beings. Environmental crimes have an impact on access to clean water and air, as well as food security.²⁷⁰ These crimes not only endanger wildlife populations or harm biodiversity and ecosystems through damage to the environment, but also affect human health and well-being, which limits development opportunities for current and future generations.²⁷¹ As Feris points out “continued environmental degradation may threaten not only the health, livelihoods and lives of humans, but our continued existence.”²⁷² Therefore, any lengthy delay in addressing environmental impacts has major consequences for the environment as well as members of the community whose lives are being impacted. The court has an essential role to play in ensuring that such environmental crimes are treated as serious and priority crimes, and that effective and adequate sanctions are applied swiftly,²⁷³ which will in turn serve as deterrents to would-be-offenders.

The timely finalisation of environmental disputes can also not be overemphasised as the longer an environmental case takes to be finalised, the more impact it has on health and causes damage to the environment, which is often irreversible.²⁷⁴ It is submitted that the regular court's decision-making process is frequently delayed, which warrants the establishment of specialised environmental courts capable of dealing with environmental matters efficiently and expeditiously. For instance, in the case of *Trustees for the time being of Groundwork Trust and another v Minister of Environmental Affairs and others (#DeadlyAir judgment)*,²⁷⁵ the case commenced in June 2019 and was only finalised in March 2022 – a period of almost three years. Perhaps the case would have been finalised quicker if it were before an environmental

²⁷⁰ M Caparini ‘Organized environmental crime: why it matters for peace operations’ (2022) <https://www.sipri.org/commentary/topical-background/2022/organized-environmental-crime-why-it-matters-peace-operations> (accessed 12 September 2022).

²⁷¹ Caparini (n 270 above).

²⁷² Feris (n 52 above) 33.

²⁷³ World Congress highlights in *Advancing Justice* (n 156 above) page 47.

²⁷⁴ Rio+20 Declaration (n 45 above) 42.

²⁷⁵ 2022 JDR 1012 (GP).

court with judges who have specialised knowledge of environmental law and were being assisted by experts in the field of environmental science.

The rationale for court specialisation will be examined in the next chapter. In addition, an analysis of the fundamental components of each of the four established specialised courts in South Africa will be conducted. This analysis will help in understanding the structure and operations of these courts, including the Hermanus Environmental Court. This discussion seeks to identify and highlight valuable attributes of these existing specialised courts that can provide insights for the establishment and development of a specialised environmental court.

CHAPTER 3

AN OVERVIEW OF SPECIALISED COURTS IN SOUTH AFRICA

3.1 Introduction

Specialised courts are courts that have limited and often exclusive jurisdiction in a particular field of law to which all cases that fall within that jurisdiction are routed.¹ They have also been defined as “courts that possess limited subject matter jurisdiction and are staffed by permanent judges who have substantive expertise in the area”.² It must be highlighted that specialised courts are not new concepts.³ In ancient Roman times, there was the *Praetor Urbanus*, which adjudicated disputes between Roman citizens, and the *Praetor Peregrinus* which adjudicated disputes between foreigners and Romans⁴ and courts that specialised in maritime law in England dating back to the 14th century.⁵ In modern times there are various types of specialised courts and tribunals, such as the workmen’s compensation tribunals, landlord-tenant tribunals, tax courts, commercial courts, labour courts or tribunals, anti-discrimination commissions, tribunals dealing with compensation for victims of crime, planning commission and electricity tribunals.⁶

This chapter will comprise the following: a general outline of the purpose of specialised courts, a discussion of the fundamental components of four specialised courts in South Africa focusing on two different models – the independent specialised court model (the Labour Court and the Land Claims Court) and specially designated court model (the Sexual Offences Court and the Specialised Commercial Crimes Court)⁷ - establishment, composition, appointment of judges,

¹ MB Zimmer ‘Overview of specialized courts’ (2009) *International Journal for Court Administration* 1.

² DB Rottman ‘Does effective therapeutic jurisprudence require specialized courts (and do specialized courts imply specialist judges)?’ *Court Review* (2000) 23 citing I Unah *The courts of international trade: judicial specialization, expertise and bureaucratic policy-making* (1998) 7.

³ G Pring and C Pring *Greening Justice: Creating and Improving Environmental Courts and Tribunals* (2009) xi.

⁴ Pring and Pring (2009) (n 3 above) xi.

⁵ H Gramckow and B Walsh ‘Developing specialized court services: international experiences and lessons learned’ (2013) *Justice and Development Working Paper Series* 3 <https://openknowledge.worldbank.org/handle/10986/1667> (accessed 1 March 2022) citing ‘High Court of Admiralty’ *The National Archives* <http://www.nationalarchives.gov.uk/records/research-guides/high-court-admiralty.htm>.

⁶ Pring and Pring (2009) (n 3 above) xi.

⁷ South Africa has the following independent specialised courts and tribunals - Land Claims Courts, Labour Court, Labour Appeal court, the Electoral Court, Competition Appeal Court and Water Tribunal and courts within the

jurisdiction, accessibility, *locus standi* and appeal mechanisms. Particular attention will be paid to the Hermanus Environmental Court, focusing on the history of the court from its establishment to its closure and the successes of the court. Comments and opinions obtained through interviews with a former prosecutor (Respondent No 1) who worked at the Hermanus Environmental Court before it was shut down, will also form part of the discussions in this chapter. The chapter will then conclude with an outline of useful attributes from the four specialised courts, as well as the Hermanus Environmental Court that can be adapted for the proposed specialised environmental court.

3.2 Rationale for court specialisation

The need for court specialisation may arise from research or policy considerations that identify specific requirements not adequately addressed by the general courts or which explain why certain cases are taking longer than should be the case.⁸ For instance, Sexual Offences courts were initially formed (and then re-established) to create an environment in which specialised skills in the handling of sexual crimes cases are developed, allowing such cases to be processed with greater efficiency.⁹ It may also stem from economic or sociological factors that show a need for reform through specialisation, which requires judges to demonstrate improved expert knowledge and efficiency in specific areas of the law.¹⁰ The particular needs or demands that emanate from external sources and are directed at the courts, fuelled by dissatisfaction with how particular cases are being handled or their progress, can also lead to a policy decision to establish a specialised court.¹¹

Court specialisation can also result from judicial prescription.¹² For instance, the National Green Tribunal was established following various calls for the establishment of environmental

Magistrates' and High Court system that are specially designated to deal with certain types of matters such as the Children's Court which is established to deal with issues affecting children, the Sexual Offences Court which is established to deal with sexual offences and the Equality Court which is established to hear matters relating to unfair discrimination, hate speech and harassment.

⁸ Gramckow and Walsh (n 5 above) 5.

⁹ A Altbecker 'Justice through Specialisation? The case of the Specialised Commercial Crime Court' *Institute for Security Studies Monograph* Issue 76 (2003) 4.

¹⁰ Gramckow and Walsh (n 5 above) 5.

¹¹ G Pring and C Pring 'Specialized environmental courts and tribunals at the confluence of human rights and the environment' (2009) 11 *Oregon Review International Law* 308.

¹² K Raj 'Decentralising environmental justice: debating the National Green Tribunal' *Economic and Political Weekly* (2014) <https://www.epw.in/journal/2014/48/web-exclusives/decentralising-environmental-justice.html> (accessed 22 June 2023).

courts by the Supreme Court of India, in various cases. In *M C Mehta v Union of India*,¹³ the Supreme Court expressed its view that the Government of India should consider setting up regional environmental courts, because cases involving issues of environmental pollution, ecological destruction and conflicts over natural resources were “increasingly coming up for adjudication which involve assessment and evolution of scientific and technical data”.¹⁴ This call for specialised environmental courts was reiterated in *Indian Council for Enviro-Legal Action v Union of India 1996*¹⁵ and *A P Pollution Control Board v MV Nayudu and others*.¹⁶ The Law Commission on Proposals to Constitute Environmental Courts¹⁷ referred to these views by the Supreme Court in its report in which it recommended the establishment of environmental courts.¹⁸

Court specialisation can also emanate from a desire to offer tailored approaches in response to specific challenges, a unique problem, or circumstance in the community or offender population they are intended to serve.¹⁹ Rottman refers to these types of specialised courts as courts that have been established to qualitatively improve outcomes for litigants and society in cases involving individuals with underlying social and emotional problems. He differentiates it from the specialised courts that have been established to address concerns over efficiency and timeliness through the use of differentiated case management techniques to make court cases progress faster.²⁰ Finally, court specialisation can also be a result of constitutional requirements or certain provisions of the law, which is linked to particular aspects of social transformation that necessitates the establishment of specialised court to be established to

¹³ 1986 (2) SCC 176.

¹⁴ Para 11.

¹⁵ 1996 (3) SCC 212 at para 6.

¹⁶ 2001(2) SCC 62 Point 5.

¹⁷ Law Commission of India ‘186th report on proposal to constitute environment courts’ (Law Commission of India 186th Report) (2003) 7 <https://indiankanoon.org/doc/162923904/> (accessed 14 March 2022).

¹⁸ Law Commission of India 186th Report (n 17 above) 164. This Report culminated in the Indian government passing the National Green Tribunal (NGT) Act, 2010 and eventually, the National Green Tribunal was established on 18 October 2010.

¹⁹ British Columbia Ministry of Justice *British Columbia Specialised Courts Strategy* (2016) 6 <https://www2.gov.bc.ca/assets/gov/law-crime-and-justice/about-bc-justice-system/justice-reform-initiatives/specialized-courts-strategy.pdf> (accessed 26 November 2020).

²⁰ Rottman (n 2 above) 22.

ensure the protection of a right entrenched in the country's constitution²¹ or implementation of the relevant legislation.²²

Some specialised courts require significant and ongoing collaboration, as well as the investment of financial and staff resources of various justice system participants, while others simply require a reallocation of existing resources.²³ According to Gramckow and Walsh, court specialisation is useful to address broader development constraints, such as the need for more effective access to contract enforcement, improvements in the investment climate, or more adequate protection of the environment.²⁴ They explain that,

“Court specialisation is commonly considered to be an important reform initiative to advance the development of a successful judicial system. Court specialisation is thought useful even to address broader development constraints, such as the need for more effective access to contract enforcement, improvements in the investment climate, or more adequate protection of the environment. Studies from the United States, Australia, and other countries have shown that specialisation can be helpful in improving the processing of court cases that are more complex or require special expertise beyond the law, such as in bankruptcy, the environmental, or mental health issues or cases that must be handled differently to better reflect the needs of a particular court user group, such as business cases or family matters.”²⁵

Court specialisation generally suggests that judges within that specialised court system have special knowledge of and expertise in a particular area of the law, or that certain types of cases are handled in a different way compared to the way other cases are handled in a general court.²⁶ Zhang clearly articulates this importance in relation to environmental courts when he highlights

²¹ For instance, Kenya's Environment and Land Court is established in terms of Article 162(2)(b) of the Constitution of Kenya, 2010 which specifically provides that “[p]arliament shall establish courts with the status of the High Court to hear and determine disputes relating to - the environment and the use and occupation of, and title to, land” <http://www.kenyalaw.org> (accessed on 15 March 2022).

²² The Land Claims Court was established to facilitate the implementation of land reform in South Africa.

²³ British Columbia Ministry of Justice (above n 19) 6.

²⁴ Gramckow and Walsh (n 5 above) 1.

²⁵ Gramckow and Walsh (n 5 above) 1.

²⁶ Gramckow and Walsh (n 5 above) 3.

that environmental courts play different roles from traditional courts because apart from settling disputes, environmental courts also protect ecosystems.²⁷

3.3 Benefits of court specialisation

Advocates of court specialisation have presented the following advantages. First, it allows for greater efficiency because with specialised procedures, staff and judges become experienced in these cases, operations are streamlined and processed more efficiently.²⁸ Resultantly, with regular application of the law and procedures by the judicial officers (whether the judges or the assessors) the judicial officers become increasingly efficient in their functions because as Preston asserts, ‘practice makes perfect’.²⁹ It is submitted that court efficiency is particularly important when dealing with non-compliance or illegal activities that have an impact on the environment, because often times these impacts cannot easily be reversed. This view was emphasised by Zhang when he states that it is important that environmental courts that are established are able to handle environmental cases across regions in a timely and effective manner to protect the ecology.³⁰ Another positive aspect of efficiency is that specialised court judges better understand the technical issues of the disputes brought before them.³¹ They are more capable of streamlining the legal framework of the dispute before them to the vital issues on which resolution of the case depends and, therefore, do not need to be educated by the legal representatives of the parties.³² This in turn is of benefit for the litigants as the costs of litigation and delay in litigation is reduced because legal representatives do not have to establish a comprehensive record in the court case and extend the case unnecessarily.³³

Second, specialised courts reduce the pending case backlogs in regular courts by shifting select categories of factually and/or legally complex cases to specialised courts that are more capable

²⁷ JD Zhang ‘A thesis on the establishment of specialized environmental and resources courts in China’ (2019) *IOP Conference Series: Earth and Environmental Science* 354 <https://iopscience.iop.org/article/10.1088/1755-1315/354/1/012059> (accessed 1 March 2022).

²⁸ Gramckow and Walsh (n 5 above) 6; DP Wood, ‘Generalist judges in a specialized world’ (1997) 50 *SMU Law Review* 1755 1766; RM Howard ‘Comparing the decision making of specialized courts and general courts: an exploration of tax decisions’ (2005) *The Justice System Journal* 136 citing I Unah ‘Specialised courts of appeals: review of bureaucratic actions and the politics of protectionism’ (1997) 50 *Political Research Quarterly* 851; MJ Kroeze ‘The companies and business court as a specialised court’ <https://www.oecd.org/daf/ca/corporategovernanceprinciples/37188740.pdf> (accessed 16 March 2023).

²⁹ BJ Preston ‘Benefits of judicial specialization in environmental law: The Land and Environment Court of New South Wales as a case study’ (2012) 29 *Pace Environmental Law Review* 425.

³⁰ Zhang (n 27 above) 354.

³¹ *Ibid.*

³² *Ibid.*

³³ Zimmer (n 1 above) 1 – 2.

of dealing with them.³⁴ Diverting a class of cases to specialised courts and reducing the caseloads in the regular courts in turn positively impacts on the operation of the regular courts.³⁵ It is submitted that in the case of specialised environmental courts, the regular courts will be able to focus on general law cases instead of battling with the more complex area of environmental law that require specialist knowledge and expertise. In the same vein, dealing more regularly with environmental law cases will enable the judicial officers in the specialised environmental court to improve in their knowledge and expertise in environmental law and in time they are able to expedite cases that are instituted before them.

Third, specialised courts offer better and higher-quality decisions and better outcomes for litigants.³⁶ Naturally better and higher-quality decisions in specialised courts can only be assured if judges have knowledge and expertise in the specific area of law for which the courts have been established.³⁷ In the case of specialised environmental courts, Zhang posits that, to improve the expertise required in environmental matters, environmental courts usually require a dual professional background in both law and environmental science for judges and court staff.³⁸ He goes on to state that “in terms of personnel composition of environmental courts, judges are first considered for their specialised legal practice” and in some countries, “environmental commissioners with abundant expertise are recruited to participate in trials to ensure that environmental disputes are settled in a professional way”.³⁹ Zhang further highlights that with higher quality decisions come the benefit of fewer appeals, because dissatisfied litigants are more inclined to appeal decisions, as opposed to satisfied litigants.⁴⁰ The issue of expertise of judges in specialised courts is not to be taken lightly and, as Preston highlights, a lack of requisite expertise by judges, whether in specialised environmental courts or general courts, may lead to a risk of adverse consequences for the country’s environmental jurisprudence, because environmental aspects of a case may be overlooked due to a lack of judicial awareness of such environmental aspects.⁴¹

³⁴ SJ Damle ‘Specialize the judge, not the court: a lesson from the German Constitutional Court’ (2005) *Virginia Law Review* 1269 <https://virginialawreview.org/wp-content/uploads/2020/12/1267.pdf> (accessed 26 April 2023).

³⁵ Gramckow and Walsh (n 5 above) 6; Rottman (n 2 above) 24.

³⁶ Gramckow and Walsh (n 5 above) 6.

³⁷ B Preston ‘Characteristics of successful environmental courts and tribunals’ (2014) *Journal of Environmental Law* 376 <https://www.jstor.org/stable/26168843> (accessed 22 March 2023)

³⁸ Zhang (n 27 above) 354.

³⁹ Zhang (n 27 above) 354.

⁴⁰ Zimmer (n 1 above) 2.

⁴¹ Preston (n 37 above) 377.

Fourth, specialised courts would improve uniformity of decisions and contribute to greater predictability and confidence in the courts.⁴² In this regard, Zimmer states that greater uniformity of decisions will lead to consistent case law and over time reduce litigation, while less uniformity of decisions may lead to serious forum-shopping challenges, which undermines public confidence in courts and invariably lead to a weaker jurisprudence.⁴³ Preston explains this benefit further in relation to specialised environmental courts when he states that specialised environmental courts would allow for increased awareness and understanding of environmental law and policy issues by the regulated community, environmental NGOs and government.⁴⁴

Fifth, specialised courts often possess the power to adopt new rules of procedure, evidence, and *locus standi* which are flexible, streamlined and more effective compared to the rules of general courts.⁴⁵ For instance, the New South Wales Land and Environment Court is not bound by the rules of evidence, and may apprise itself on any matter in such manner as it thinks suitable, including, but not limited, to the use of expert evidence.⁴⁶ Similarly in New Zealand, the Environment Court is not bound by the usual procedural and evidentiary formalities of other courts of law in New Zealand.⁴⁷ These flexible rules on, for instance, evidence and *locus standi*, allow for better access to justice particularly for disadvantaged and indigent litigants as they, *inter alia*, remove the need for legal representation, the need to travel to court and reduce the length of proceedings.⁴⁸

Sixth, specialised courts can adopt, what is referred to as a “problem-solving approach.” This is an approach that looks to positive outcomes for cases which go beyond the routine application of the laws’ technicalities or the “simplistic right-or-wrong determination.”⁴⁹ Instead, a concerted effort is made to implement creative options to resolve disputes that will benefit the environment in the long run.⁵⁰ Examples of the problem-solving approach includes

⁴² Gramckow and Walsh (n 5 above) 6; Rottman (n 2 above) 24; Wood (n 28 above) 1766; Howard (n 28 above) 136; Zimmer (n 1 above) 1.

⁴³ Zimmer (n 1 above) 2.

⁴⁴ Preston (n 37 above) 376.

⁴⁵ Pring and Pring (2009) (n 3 above) 15; LY Sulistiawati *et al Environmental Courts and Tribunals: A Guide for Policymakers* United Nations Environment Programme (2022) 30.

⁴⁶ S Smith ‘A review of the Land and Environment Court’ Briefing Paper No 13/01 (2001) 3.

⁴⁷ BC Birdsong ‘Adjudicating sustainability: New Zealand's Environment Court’ (2002) *Ecology Law Quarterly*

⁴⁸ Pring and Pring (2009) (n 3 above) 15; Sulistiawati *et al* (n 45 above) 30 and 34.

⁴⁹ Pring and Pring (2009) (n 3 above) 16.

⁵⁰ Pring and Pring (2009) (n 3 above) 16.

making use of Alternative Dispute Resolution, mediation, conciliation, facilitated negotiation, restorative justice, collaboration, early neutral evaluation, and arbitration.⁵¹ The use of these mechanisms also have the advantage of reducing the number of cases that need to go to full trial.⁵²

Finally, it is submitted that specialised courts will increase the judiciary's responsiveness to the area of law that the specialised court has been established for. This, in turn, sends a strong message to the regulated public that transgressions will not be tolerated. Thus, having a specialised environmental court in South Africa will not only increase and improve responsiveness to environmental law, but it will also show the regulated community that the government is serious about its commitment to protecting the environment and preserving it for future generations.

While the benefits of specialised courts have been lauded, it is important to highlight the arguments that have been proffered against establishing specialised courts. Some writers have opined that even though specialisation may increase efficiency and possibly improve decisions, the impact on the broader development issue that led to the establishment of the specialised court might not be achieved.⁵³ One major concern is the significant costs associated with establishing and operating a specialised court system, which taxpayers often bear.⁵⁴ Solutions to this challenge include covering some of the operating costs from the fees paid by litigants⁵⁵ or starting with a specialised judge, then a green bench, before establishing a stand-alone environmental court.⁵⁶

Gramckow and Walsh also highlight a concern that specialisation can increase the risk of exposing the judges to the greater influence of specialised lawyers, and lead to judges developing a rather narrow view of the matters the court focuses on.⁵⁷ Zimmer explains the negative effect of a judge developing a narrow or one-sided view by stating that, if a judge

⁵¹ G Pring and C Pring 'Specialised Environmental Courts and Tribunals: the explosion of new institutions to adjudicate climate change and other complex environmental issues' Paper presented at the Yale University and UN Institute for Training and Research's 2nd Global Conference on Environmental governance and democracy – on strengthening institutions to address climate change and advance a green economy (2010) 17 – 18.

⁵² Pring and Pring (n 3 above) 15.

⁵³ Gramckow and Walsh (n 5 above) 6.

⁵⁴ VC Perez 'Specialisation trends: water courts' *Environmental Law* (2019) 595 https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3253349 (accessed 17 March 2022).

⁵⁵ Perez (n 54 above) 595.

⁵⁶ Pring and Pring (n 3 above) 17.

⁵⁷ Gramckow and Walsh (n 5 above).

develops such a view of the issues, their objectivity will be compromised.⁵⁸ There also exists a high risk of developing a professional bias towards a core group of highly experienced and expert-level lawyers, leading to the court's neutrality being compromised, ultimately resulting in a captured court.⁵⁹ For specialised environmental courts, this translates to judges who are not impartial when delivering judgments and who may become biased in favour of environmental protection as opposed to a balanced and comprehensive analysis which is aligned to the principles of sustainable development.⁶⁰ A solution to this challenge is offered by Zimmer, when he suggests that cases should be heard by a panel of at least three judges based on a rotation system.⁶¹ He further suggests that decisions of specialised courts should be subject to review by courts of second instance or appellate general courts.⁶² As previously submitted in chapter 2, the environmental sector is a highly regulated sector and also science-based, and as such it will be difficult for any judge to consistently interpret the law in a biased manner which favours the environment, to the detriment of sustainable development and *vice versa*. Furthermore, when appointing judges to serve on specialised environmental courts, care must be taken to ensure that judges who are appointed have a balanced view on protecting the environment while also ensuring sustainable development. It is further submitted that the use of assessors or commissioners (as is the case in the New South Wales' Land and Environment Court)⁶³ will ensure a balanced view of environmental cases that are litigated in the court.

3.4 Specialised courts in South Africa

Chapter 8 of the SA Constitution provides for the 'Courts and Administration of Justice'. In terms of section 166 of the SA Constitution, the following courts constitute South Africa's judicial system: the Constitutional Court,⁶⁴ the Supreme Court of Appeal,⁶⁵ the High Court of South Africa, and any high court of appeal that may be established by an Act of Parliament to hear appeals from any court of a status similar to the High Court of South Africa,⁶⁶ the

⁵⁸ Zimmer (n 1 above) 3.

⁵⁹ Zimmer (n 1 above) 4; Gramckow and Walsh (n 5 above) 8.

⁶⁰ G Pring and C Pring *Environmental Courts and Tribunals; A Guide for Policymakers* United Nations Environmental Programme (2016) 15. Pring and Pring refer to this as judicial bias.

⁶¹ Zimmer (n 1 above) 6.

⁶² Zimmer (n 1 above) 7.

⁶³ Sec 12(1) of the Land and Environment Court Act, 1979.

⁶⁴ Sec 166(a) of the SA Constitution.

⁶⁵ Sec 166(b) of the SA Constitution.

⁶⁶ Sec 166(c) of the SA Constitution.

Magistrates' Court⁶⁷ and any other court established or recognised in terms of an Act of Parliament, including any court of a status similar to either the High Court of South Africa or the Magistrates' Courts.⁶⁸ It is submitted that the courts referred to in section 166(e) of the SA Constitution include specialised courts that are established in terms of legislation and are given status similar to that of the High Court or the Magistrates' court, thus confirming that specialised courts are recognised by the SA Constitution. In South Africa, the following specialised courts exist: the Land Claims Court,⁶⁹ Labour Court,⁷⁰ the Labour Appeal Court,⁷¹ the Electoral Court,⁷² the Competition Appeal Court⁷³ and the Water Tribunal.⁷⁴ Within the Magistrates' and High Court systems are courts that are specially designated to deal with certain types of matters such as the Children's Court, which is established to deal with issues affecting children,⁷⁵ the Sexual Offences Court which is established to deal with sexual offences⁷⁶ and the Equality Court, which is established to hear matters relating to unfair discrimination, hate speech and harassment.⁷⁷

As indicated previously, discussions in this chapter will focus on two independent/stand-alone specialised courts - the Labour Court and Land Claims Court - and two specially designated courts - the Sexual Offences Court and Specialised Commercial Crimes Court. The selection of courts is based on the following:

- a. The Labour Court is the oldest independent/stand-alone specialised court in South Africa's democratic dispensation, having been established in 1995. As will be discussed later, it was established following the recommendations of a Ministerial Legal Task team. It has been in existence for 28 years and will therefore offer useful insights into the positive aspects of an independent/stand-alone specialised court.

⁶⁷ Sec 166(d) of the SA Constitution.

⁶⁸ Sec 166(e) of the SA Constitution.

⁶⁹ Sec 22 of the Restitution of Land Rights Act 22 of 1994.

⁷⁰ Sec 151 of the Labour Relations Act 66 of 1995.

⁷¹ Sec 167 of the Labour Relations Act 66 of 1995.

⁷² Sec 18 of the Electoral Commissions Act 51 of 1996.

⁷³ Sec 36 of the Competition Act 89 of 1998.

⁷⁴ Sec 146 of the Water Act 36 of 1998.

⁷⁵ In South Africa, every Magistrate court is a Children's Court – sec 42(1) of the Children's Act 38 of 2005.

⁷⁶ Sec 55A(1) of the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007 provides that "subject to subsection (2), the Minister may by notice in the *Gazette* designate any - (a) Division of the High Court of South Africa or the main seat or any local seat of a Division referred to in sec 6 of the Superior Courts Act, 2013 (Act 10 of 2013); or (b) Magistrate's Court, as defined in sec 1 of the Superior Courts Act, 2013, at which a sexual offences court must be established."

⁷⁷ In terms of sec 16(1)(a) of the Promotion of Equality and Promotion of Unfair Discrimination Act 2000, every magistrate's court and every High Court is an equality court for the area of its jurisdiction.

- b. The Land Claims Court has jurisdiction in a field of law closely associated with environmental law - land law. The environment is comprised of the air, water, and land in or on which people, animals and plants live.⁷⁸ Although the Land Claims Court was not meant to be a permanent court, it has, due to the nature of land reform issues in South Africa, become a ‘permanent’ feature in the judicial system to the extent that there are plans underway to establish a permanent independent court to be known as the Land Court. The Land Claims Court will thus provide valuable insights into lessons learnt from its current operations, which informed proposed changes for a permanent Land Court.
- c. The Sexual Offences Court operates within the Regional Magistrates’ court system and has undergone cycles of establishment, closure, and subsequent re-establishment. As such it will offer valuable lessons for the proposal to re-establish specialised environmental courts in South Africa. In addition, being a ‘specialised criminal court’ responsible for prosecuting sexual offences, it will provide useful insights into the operation of a specialised environmental court that is designated within the Magistrates’ court system, which specifically prosecutes criminal offences.
- d. The Specialised Commercial Crimes Court is another specialised criminal court established as a pilot project aimed at enhancing the prosecution of commercial related crimes. It has been argued that the success of the court is not solely attributed to the fact that it is a specially designated court, but rather to the investigation-led prosecution system it employs.⁷⁹ Thus, this court will provide valuable insights into the workings of the investigation-led prosecution system and how it can be tailored for a specialised environmental court which has criminal jurisdiction.

3.4.1 The Labour Court

3.4.1.1 Establishment of the Labour Court

⁷⁸ Sec 1(1) of the National Environmental Management Act, 1998 (Act 107 of 1998) defines “environment” as “the surroundings within which humans exist and that are made up of - (i) the land, water and atmosphere of the earth; (ii) micro-organisms, plant and animal life; (iii) any part or combination of (i) and (ii) and the interrelationships among and between them; and (iv) the physical, chemical, aesthetic and cultural properties and conditions of the foregoing that influence human health and well-being.”

⁷⁹ G Wannenburg ‘Putting paid to the untouchables? The effects of dissolving the Directorate of Special Operations and the Specialised Commercial Crime units’ (2008) *SA Crime Quarterly* 19.

In July 1994 the Cabinet approved the appointment of a Ministerial Legal Task Team to overhaul the laws regulating labour relations.⁸⁰ Its brief was to draft a Labour Relations Bill that would, *inter alia*, provide a system of labour courts to determine disputes of rights in a way that would be accessible, speedy, and inexpensive, with only one tier of appeal.⁸¹

At the time that the Ministerial Legal Task Team was established, the Industrial Court was in operation. The Industrial Court had been established in terms of section 17(1)(a) of the Labour Relations Act 1956.⁸² Certain shortcomings of the Industrial Court highlighted in the Explanatory Memorandum of the Labour Relations Bill include the fact that the court had led to costly litigation and the time taken by the court to hand down decisions had also undermined the resolution of disputes.⁸³ It further sought to ensure consistency in the interpretation and application of the law through the creation of a Labour Court within the Department of Justice, with the same status as a division of the Supreme Court and with national jurisdiction. It was further indicated that the Labour Court will have exclusive jurisdiction over labour matters under the Bill.⁸⁴

The Labour Relations Act was promulgated in 1995⁸⁵ and in terms of section 151(1) of the Labour Relations Act, 1995 (the LRA), the Labour Court was established as a “court of law and equity”.⁸⁶ It is a superior court of record equal to the provincial division of the High Court and has authority, inherent powers and standing, in relation to matters under its jurisdiction⁸⁷ specifically matters relating to labour disputes. It is a court of last resort after the process of mediation and arbitration have been completed at the Commission for Conciliation, Mediation and Arbitration (CCMA).⁸⁸

⁸⁰ M Botha and C Mischke ‘A new labour dispensation for South Africa’ (1997) *Journal of African Law* 135.

⁸¹ Explanatory Memorandum on the 1995 Labour Relations Bill RS 36, 1997; [http://jutastat.juta.co.za/nxt/gateway.dll/sall/87/132/387?f=templates\\$fn=default.htm](http://jutastat.juta.co.za/nxt/gateway.dll/sall/87/132/387?f=templates$fn=default.htm) (accessed 28 December 2022).

⁸² Act 28 of 1956 (repealed by sec 212 of the Labour Relations Act 1995).

⁸³ Explanatory memorandum on the Labour Relations Bill (n 81 above).

⁸⁴ Explanatory memorandum on the Labour Relations Bill (n 81 above).

⁸⁵ Labour Relations Act 66 of 1995.

⁸⁶ Similarly, the Long Title to the Labour Relations Act, provides that the Act is “[t]o establish the Labour Court and Labour Appeal court as superior courts, with exclusive jurisdiction to decide matters arising from the Act.”

⁸⁷ Sec 151(2) and (3) of the LRA.

⁸⁸ F Musukubili and A van der Walt ‘Namibian labour dispute resolution system: Some lessons from South Africa’ (2014) *Obiter* 129.

3.4.1.2 Composition and Appointment of Judges

The composition of the Labour Court is provided for in terms of section 152 of the LRA and consists of a Judge President, a Deputy Judge President, and as many judges as the President may consider necessary, acting on the advice of National Economic Development and Labour Council (NEDLAC) and in consultation with the Minister of Justice and the Judge President of the Labour Court.⁸⁹ The Labour Court is constituted before a single judge but can sit in as many separate courts as the available judges allow.⁹⁰

Judges are appointed by the President acting on the advice of NEDLAC and the Judicial Service Commission (JSC)⁹¹ for a period determined by the President.⁹² In the case of a Judge President of the Labour Court, the Minister of Justice must be consulted in addition to NEDLAC and JSC,⁹³ while in the case of the Deputy Judge President, the appointment is made by the President, acting on the advice of NEDLAC and JSC after consultation with the Minister of Justice and the Judge President of the Labour Court.⁹⁴

The Judge President and the Deputy Judge President of the Labour Court must be judges of the Supreme Court and must have knowledge, experience and expertise in labour law.⁹⁵ Other judges must be legal practitioners or judges of the High Court who have knowledge, experience and expertise in labour law as judges of the Labour Court.⁹⁶ The fact that the judges of the Labour Court must be experts in labour law prior to their appointment, supports the notion that in a specialised court, the judges ought to be, or are often experts in the field of law under whose jurisdiction the court falls, so that the decisions are more accurate.⁹⁷

⁸⁹ Sec 152(1) of the LRA.

⁹⁰ Sec 152(2) and (3) of the LRA.

⁹¹ Sec 153(1)(a) of the LRA.

⁹² Sec 154(1) of the LRA.

⁹³ Sec 153(1)(a) of the LRA.

⁹⁴ Sec 153(1)(b) of the LRA.

⁹⁵ Sec 153(2) (a) and (b) of the LRA.

⁹⁶ Sec 153(4) read with sec 153(6) of the LRA. Other judges are appointed by the President, acting on the advice of NEDLAC, the JSC and after consultation with the Minister of Justice and the Judge President of the Labour Court. Acting Judges must also meet the criteria indicated in sec 153(6) of the LRA to be appointed – see sec 153(5) of the LRA.

⁹⁷ HH Bruff ‘Specialized courts in administrative law’ (1991) *Administrative Law Review* 330 <https://scholar.law.colorado.edu/articles/883> (accessed 18 May 2022).

3.4.1.3 Jurisdiction of the Labour Court

The Labour Court is a superior court of record on par with the High Court and has exclusive jurisdiction in respect of all matters that are required to be determined by the Labour Court in terms of the LRA or other legislation.⁹⁸ It, however, has concurrent jurisdiction with the High Court in respect of “any alleged or threatened violation of any fundamental right entrenched in Chapter 2 of the Constitution of the Republic of South Africa, 1996, which arises from (a) employment and from labour relations; (b) any dispute over the constitutionality of any executive or administrative act or conduct, or any threatened executive or administrative act or conduct, by the State in its capacity as an employer; and (c) the application of any law for the administration of which the Minister is responsible.”⁹⁹

In terms of section 157(4)(a), the Labour Court may refuse to determine any dispute, other than an appeal or review before the court, if the court is not satisfied that an attempt has been made to resolve the dispute through conciliation. It is submitted here that this allows for the court to only hear cases for which alternative dispute resolution mechanisms have been deployed, but which were unsuccessful. This allows for the court to be focused on more serious matters as opposed to every type of labour dispute which could have been resolved through the alternative dispute mechanisms provided for in the LRA. As Gathongo explains, the CCMA seeks to provide for conciliation and arbitration on several issues, so that the Labour Court can deal with and resolve more serious and involved issues such as strike action, unfair dismissal, retrenchments, and discriminatory practices in the workplace environment.¹⁰⁰

3.4.1.4 Powers of the Labour Court

Section 158 of the LRA makes provision for the powers of the Labour Court. The Labour Court specifically has the power to grant urgent relief and interdicts;¹⁰¹ remedy wrongs and determine disputes;¹⁰² clarify legal circumstances (declaratory orders);¹⁰³ make orders for an award of

⁹⁸ Section 157(1) of the LRA.

⁹⁹ Section 157(2) of the LRA.

¹⁰⁰ JK Gathongo Labour dispute resolution in Kenya: compliance with international standards and a comparison with South Africa Unpublished PhD thesis Nelson Mandela Metropolitan University (2018) 248; S van Eck ‘The constitutionalisation of labour law: No place for a Superior Labour Appeal court in labour matters (part 1): background to South African Labour Courts and the Constitution’ (2005) *Obiter* 557.

¹⁰¹ Sec 158(1)(a)(i) and (ii) of the LRA.

¹⁰² Sec 158(1)(a)(iii) of the LRA.

¹⁰³ Sec 158(1)(a)(iv) of the LRA.

compensation¹⁰⁴ or damages¹⁰⁵ or costs orders following the finalisation of action;¹⁰⁶ enforce compliance with the provisions of the LRA or any employment law;¹⁰⁷ make arbitration awards or settlement agreements an order of the court;¹⁰⁸ request the CCMA to conduct an investigation for the purpose of assisting the Court;¹⁰⁹ determine a dispute between a registered trade union or registered employers' organisation and any of the union's member or applicant;¹¹⁰ condone the late filing of disputes or late referrals to the court;¹¹¹ review awards and rulings made by the CCMA and the bargaining council arbitrators;¹¹² review decisions made or acts performed by the State¹¹³ and hear and determine any appeal in terms of Section 35 of the Occupational Health and Safety Act, 1993.¹¹⁴ The powers of the Labour Court are quite broad and even include appellate powers in relation to a decision taken by a chief inspector under the Occupational Health and Safety Act 1993.¹¹⁵

It is important to note that the Labour Court does not have any merit appeal powers but only review powers in relation to awards and rulings made by the CCMA and the Bargaining Council arbitrators and decisions made or acts performed by the State. As such, it cannot overturn and substitute a decision of the CCMA or Bargaining Council, or decision or action performed by the State with its own decisions. As is the case with judicial review, the Labour Court can only review such decisions in terms of whether the correct procedure was followed and remit back for the CCMA or the State functionary to reconsider.¹¹⁶

¹⁰⁴ Sec 158(1)(a)(v) of the LRA.

¹⁰⁵ Sec 158(1)(a)(vi) of the LRA.

¹⁰⁶ Sec 158(1)(a)(vii) of the LRA.

¹⁰⁷ Sec 158(1)(b) of the LRA.

¹⁰⁸ Sec 158(1)(c) of the LRA.

¹⁰⁹ Sec 158(1)(d) of the LRA.

¹¹⁰ Sec 158(1)(e) of the LRA. Such disputes must be in relation to an alleged non-compliance with - (i) the constitution of that trade union or employers' organisation (as the case may be); or (ii) section 26(5)(b) – sec 158(1)(e)(i) or (ii).

¹¹¹ Sec 158(1)(f) of the LRA.

¹¹² Sec 158(1)(g) of the LRA.

¹¹³ Sec 158(1)(h) of the LRA.

¹¹⁴ Sec 158(1)(i) of the LRA.

¹¹⁵ Sec 35(3) of the Occupational Health and Safety Act provides that “Any person aggrieved by a decision taken by the chief inspector under subsection (1) or in the exercise of any power under this Act, may appeal against such decision to the Labour Court, and the Labour Court shall inquire into and consider the matter forming the subject of the appeal and confirm, set aside or vary the decision or substitute for such decision any other decision which the chief inspector in the opinion of the Labour Court ought to have taken.”

¹¹⁶ Judicial reviews are a challenge to the way in which a decision has been made, rather than the rights and wrongs of the conclusion reached – Courts and Tribunal Judiciary ‘Judicial Reviews’ <https://www.judiciary.uk/you-and-the-judiciary/judicial-review/> (accessed 22 March 2022).

3.4.1.5 Accessibility of the Labour Court

The Labour Court has jurisdiction in all the provinces of South Africa¹¹⁷ and its functions can be performed at any place in the Republic of South Africa.¹¹⁸ It currently has various seats in Johannesburg and is additionally situated in Cape Town, Port Elizabeth and Durban.¹¹⁹ This makes it easy for litigants to access the court without having to travel long distances to attend the court were it to be located in only one province. This is pivotal, because geographical location has been one of the barriers to vulnerable and historically disadvantaged citizens having access to justice.¹²⁰ It would have been ideal to have the Labour Court sitting in every one of the nine provinces in South Africa, but given the country's limited resources, this may not be possible and perhaps informed the decision to have the Labour Court located only in the major economic hubs of the country.

3.4.1.6 Locus standi in the Labour Court

Parties that may institute actions in the Labour Court are employees, trade unions and employers and, therefore, the *locus standi* is not wide as to include interested and affected parties.¹²¹

3.4.1.7 Appeals from the Labour Court

All appeals against final judgments and final orders of the Labour Court are referred to the Labour Appeal Court, which is a specialised court in labour matters. The Labour Appeal Court is a superior court established in terms of section 167(1) of the LRA and it is the final court of appeal in respect of all judgements and orders made by the Labour Court in respect of the matters within its exclusive jurisdiction,¹²² except when a constitutional issue is involved – in such cases an appeal may be made to the Constitutional Court.¹²³ It is, therefore, equal in status

¹¹⁷ Sec 156(1) of the LRA.

¹¹⁸ Sec 156(3) of the LRA.

¹¹⁹ United Association of South Africa (UASA) The Union 'What is the labour court and what are its functions' <https://www.uasa.co.za/what-is-the-labour-court-and-what-are-its-functions> (accessed 29 December 2022). Disputes that arise in Limpopo, the Northwest, Mpumalanga, and Free State Provinces are heard in the Labour Court in Johannesburg.

¹²⁰ Organisation for Economic Cooperation and Development (OECD) 'Leveraging the SDGs for inclusive growth: delivering access to justice for all' (2016) 7 <https://www.oecd.org/about/secretary-general/leveraging-the-sustainable-development-goals-delivering-access-to-justice-for-all.htm>.

¹²¹ Sec 161 of the LRA.

¹²² Sec 167(2) of the LRA.

¹²³ Gathongo (n 100 above) 23.

to the Supreme Court of Appeal.¹²⁴ It has its seat in Johannesburg but also hears cases in Cape Town, Port Elizabeth and Durban.¹²⁵ Judges are appointed for a fixed term determined by the President.

3.4.1.8 Reflections on the Labour Court

According to Gathango, the introduction of the CCMA and the specialist court sought to protect workers' rights, while at the same time reducing the costs of disputes and the time taken to resolve labour disputes.¹²⁶ Similarly, the policy documents that preceded the enactment of the 1995 LRA suggested that the Act aimed to promote industrial peace by ensuring that dismissal disputes do not trigger strikes.¹²⁷ For this reason, it has been observed that since the enactment of the 1995 LRA and the subsequent establishment of the CCMA, there has been a very substantial decrease in the number of strikes over dismissal and other disputes of right.¹²⁸ However, Musukubili and van der Walt, highlight that the ADR system has failed to resolve labour disputes in the most effective manner without having to resort to the Labour Court,¹²⁹ thus defeating the purpose of the Labour Court as a court of last resort following the ADR process. It is submitted that this does not imply the inherent ineffectiveness of the ADR system, but rather underscores its inadequate implementation. For instance, the New South Wales' Environment and Land Court makes use of a variety of alternative dispute resolution (ADR) mechanisms including adjudication, conciliation, and mediation and in 2018, the court's ADR programme was awarded ADR Group of the Year Award at the Australian Dispute Centre ADR Awards.¹³⁰

The Labour Court has a system in place to ensure that cases are finalised in the event that the term of office of a Judge of the Labour Court or Labour Appeal Court expires. The retired judge may continue to perform the functions of a judge of the court, and will be regarded as such in all respects for the purposes of disposing of any proceedings in which he or she has taken part as a judge of the court and which are still pending upon the expiry of that person's

¹²⁴ Section 167(3) of the LRA.

¹²⁵ Rule 2 of the Labour Court Rules, GN 1665 in GG 17495 of 14 October 1996.

¹²⁶ Gathango (n 100 above) 331.

¹²⁷ Ibid.

¹²⁸ Ibid.

¹²⁹ Musukubili and van der Walt (n 88 above) 135.

¹³⁰ BJ Preston 'The Land and Environment Court of New South Wales: a very short history of an environmental court in action' (2020) *Australian Law Journal* 638 https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3949084 (accessed 15 March 2022).

appointment or which, having been so disposed of before or after the expiry of that person's appointment, have been re-opened and for as long as that person will be necessarily engaged in connection with the disposal of the proceedings so pending or re-opened.¹³¹

The ability of the Labour Court to sit in various provinces underscores the significance of ensuring accessibility for citizens to the court. As Preston explains, there has to be accessibility to the court in practice which means there should be, *inter alia*, geographical accessibility.¹³² He further explains that "geographical accessibility concerns ensuring parties and their legal representatives and witnesses are able to access the court in geographical terms."¹³³ The issue of lack of accessibility has been one of the arguments levelled against court specialisation, which is that the courts are often located in big cities far away from a majority of litigants.¹³⁴ However, this challenge can be overcome. Measures which the Land and Environment Court in New South Wales has implemented to ensure ease of accessibility by litigants will be discussed in chapter 4.

3.4.2 The Land Claims Court

3.4.2.1 Establishment of the Land Claims Court

The Land Claims Court was established in 1996 in terms of section 22(1) of the Restitution of Land Rights Act, 1994¹³⁵ (the Restitution Act) to deal with land restitution cases in the form of referrals from the Commissioner's office or claims that come directly through claimants or affected landowners.¹³⁶ This means that no other court in South Africa can serve or take on the

¹³¹ Sec 154(8) and sec 170(6) of the Labour Relations Act, 1995.

¹³² B J Preston 'The role of environmental courts and tribunals in promoting the rule of law and ensuring equal access to justice for all' Paper presented at the International Symposium on Environmental Adjudication in the 21st Century (2017) 16. Other aspects of accessibility include, language accessibility, access for persons with disabilities, access to help and information and access for unrepresented litigants.

¹³³ Preston (n 132 above) 16.

¹³⁴ N Garoupa, N Jorgensen and P Vazquez, 'Assessing the argument for specialized courts: evidence from Family Courts in Spain, International' (2010) *Journal of Law, Policy, and the Family* <https://scholarship.law.tamu.edu/facscholar/444> (accessed 26 April 2023).

¹³⁵ Sec 22(1) of the Restitution Act provides that "[t]here shall be a court of law to be known as the Land Claims Court which shall have the power, to the exclusion of any court contemplated in section 166 (c), (d) or (e) of the Constitution." The Long Title to the Restitution of Land Rights Act 1994 indicates that the Act was promulgated "[t]o provide for the restitution of rights in land to persons or communities dispossessed of such rights after 19 June 1913 as a result of past racially discriminatory laws or practices; to establish a Commission on Restitution of Land Rights and a Land Claims Court; and to provide for matters connected therewith."

¹³⁶ The court is also the product of the Constitution of the Republic of South Africa, 1993 (the Interim Constitution). Secs 121-123 of the Interim Constitution promised restitution or equitable redress to individuals and communities who were dispossessed of rights in land under racially discriminatory laws in force in South Africa at any time since 1913.

role of the Land Claims Court (LCC). Originally the jurisdiction of the court was limited to claims brought under sections 121-123 of the Interim Constitution and related matters.¹³⁷ However, in 1996 its jurisdiction was extended to deal with security of tenure to labour tenants in terms of the Land Reform (Labour Tenants) Act.¹³⁸

3.4.2.2 Composition and appointment of judges

The LCC consists of a Judge President and as many judges as may be determined by the President,¹³⁹ who are appointed by the President acting on the advice of the Judicial Service Commission in terms of section 22(4) of the Restitution Act. The Restitution Act does not make any specific provision for the skills, experience, or qualification of such judges, other than that they must be judges of the High Court of South Africa.¹⁴⁰ However, because they are judges of the High Court of South Africa, it means that section 174(1) and (2) of the SA Constitution finds application in their appointment. Therefore, the judges are required to be appropriately qualified, fit, and proper persons¹⁴¹ and should reflect the racial and gender composition of South Africa.¹⁴² The Judicial Service Commission has developed a set of criteria that would be considered when appointing judges in the Supreme Court of Appeal High Court including specialist courts.¹⁴³

¹³⁷ M Chaskalson 'The Land Claims Court' *Consultus* (1997) 31. The heading of sec 121 is 'Claims' and provides that "[a]n Act of Parliament shall provide for matters relating to the restitution of land rights, as envisaged in [section 121] and in sections 122 and 123"; sec 122 establishes the Commission on Restitution of Land Rights and sec 123 relates to orders that a court of law could make in relation to the restoration of a right in land and/or compensation.

¹³⁸ M Chaskalson (n 137 above) 31.

¹³⁹ Sec 22(3) of the Restitution Act, 1994. Currently, there are six judges including the Judge President serving on the LCC – The South Africa Judiciary 'Land Claims Court Judges' <https://www.judiciary.org.za/index.php/courts/specialised-courts/land-claims-court/judges-of-the-court> (accessed 27 December 2022).

¹⁴⁰ Sec 22(4) of the Restitution Act .

¹⁴¹ Sec 174(2) of the SA Constitution 1996.

¹⁴² Sec 174(3) of the SA Constitution 1996.

¹⁴³ In 1998 the late Chief Justice Ismail Mohamed introduced additional guidelines for the selection and appointment of judges. These guidelines were agreed to by the JSC and referred to as the Mohamed guideline. These guideline included the following considerations: the applicant had to be a person of integrity; a person with the necessary energy and motivation; a competent person, both technically as a lawyer, and with respect to the capacity and ability to give expression to the values in the constitution; an experienced person, both technically, with the capacity and ability to give expression to the values in the Constitution; a person with appropriate potential, so that any lack of technical experience could be made up by intensive training; and whether the applicant's appointment would be symbolic in sending a message to the community at large. Criteria identical to these guidelines were adopted in 2012. In April 2022, the JSC considered and reviewed: 1.1 the guidelines for questioning candidates for judicial appointment to the Constitutional Court adopted in 1994; and 1.2 the criteria for judicial selection adopted in 2010 and issued a formal document titled 'Summary and explanation of the criteria and guidelines used by the Judicial Service Commission when considering candidates for judicial appointment

In terms of section 22(6) of the Restitution Act, the Judge President and any other judge of the Court is appointed for a fixed term determined by the President at the time of appointment and holds office until the term expires or the judge ceases to be a judge of the High Court or the judge resigns from the LCC by written notice to the President, whichever of the three occurs first.

In addition to the judges, provision is made for the appointment of assessors in terms of section 27(1) of the Restitution Act. The assessors are required to have the skills and knowledge relevant to the work of the court but need not have any legal qualifications.¹⁴⁴ The assessors are members of the LCC and in terms of section 28(4) at least one assessor must assist the court at a contested hearing of any claim which has been referred to the LCC by the Commission,¹⁴⁵ or an application by a government body in respect of land owned by the government body¹⁴⁶ or a claimant who directly approaches the court.¹⁴⁷ The assessors are an integral part of the court process and are regarded as members of the court who make decisions or findings with the judge in matters before the court, other than questions of law or a determination hearing of whether a matter constitutes a question of law or not.¹⁴⁸

3.4.2.3 *Jurisdiction of the Land Claims Court*

The Land Claims Court has the same status as the High Court.¹⁴⁹ It has exclusive jurisdiction throughout the Republic of South Africa over matters under the Restitution Act as if it were a High Court with jurisdiction in civil proceedings at the place where the land in question is situated; the powers of a High Court in relation to any contempt of the Court; all the ancillary powers necessary or reasonably incidental to the performance of its functions, including the power to grant interlocutory orders and interdicts; and the power to decide any issue either in terms of the Act or in terms of any other law, which is not ordinarily within its jurisdiction but

2022' – The South African Judiciary <https://www.judiciary.org.za/index.php/judicial-service-commission/criteria-for-judicial-appointment> (accessed 27 December 2022).

¹⁴⁴ Sec 27(2) of the Restitution Act.

¹⁴⁵ In terms of sec 14 of the Restitution Act.

¹⁴⁶ In terms of sect 34 of the Restitution Act.

¹⁴⁷ Sec 38B(1) which provides that “[n]otwithstanding anything to the contrary contained in this Act, any person who or the representative of any community which is entitled to claim restitution of a right in land and has lodged a claim not later than 30 June 2019 may apply to the Court for restitution of such right: Provided that leave of the Court to lodge such application shall first be obtained if - (a) an order has been made by the Court in terms of section 35 in respect of a right relating to that land; or (b) a notice has been published in the *Gazette* in terms of section 12 (4) or 38D (1) in respect of that land and the period specified in the said notice has expired.”

¹⁴⁸ Sec 28(4), (5) and (6) of the Restitution Act.

¹⁴⁹ Sec 22(2)(a) of the Restitution Act.

is incidental to an issue within its jurisdiction, if the court considers it to be in the interests of justice to do so.¹⁵⁰

It shares jurisdiction over the Extension of Security of Tenure Act, 1997¹⁵¹ with the Magistrates' Courts¹⁵² and the High Court.¹⁵³ Its mandate was extended as an appellate court under the Land Reform (Labour Tenants) Act, 1996¹⁵⁴ and under the Extension of Security of Tenure Act.¹⁵⁵

3.4.2.4 Powers of the Land Claims Court

The main task of the LCC is to adjudicate the legal issues in the cases before it and ensure that land is awarded to those who satisfy the statutory requirements.¹⁵⁶ Specifically, the LCC is established to deal with the following issues:

- “(a) to determine a right to restitution of any right in land in accordance with this Act;
- (b) to determine or approve compensation payable in respect of land owned by or in the possession of a private person upon expropriation or acquisition of such land in terms of this Act;
- (c) to determine the person entitled to title to land contemplated in section 3;
- (cA) at the instance of any interested person and in its discretion, to grant a declaratory order on a question of law relating to section 25(7) of the Constitution or to this Act or to any other law or matter in respect of which the Court has jurisdiction, notwithstanding that such person might not be able to claim any relief consequential upon the granting of such order;
- (cB) to determine whether compensation or any other consideration received by any person at the time of any dispossession of a right in land was just and equitable;

¹⁵⁰ Sec 22(2)(a), (b) and (c) of the Restitution Act.

¹⁵¹ Act 62 of 1997.

¹⁵² Sec 17(1) of the Extension of Security of Tenure Act 62 of 1997.

¹⁵³ Sec 17(2) of the Extension of Security of Tenure Act 62 of 1997.

¹⁵⁴ Appeals from the court that had pending proceedings at the time of the promulgation of the Labour Tenants Act, lie to the Land Claims Court (sec 13(2) of the Land Reform (Labour Tenants) Act, 1996 as amended in 1997.

¹⁵⁵ Sec 19(2) and (3) of the Extension of Security of Tenure Act, 1997.

¹⁵⁶ National Government of South Africa 'Land Claims Court' <https://nationalgovernment.co.za/units/view/56/land-claims-court-lcc> (accessed 15 June 2022).

(cC) to determine any matter involving the interpretation or application of this Act or the Land Reform (Labour Tenants) Act, 1996 (Act No. 3 of 1996), with the exception of matters relating to the definition of “occupier” in section 1(1) of the Extension of Security of Tenure Act, 1997 (Act No. 62 of 1997);

(cD) to decide any constitutional matter in relation to this Act or the Land Reform (Labour Tenants) Act, 1996 (Act No. 3 of 1996);

(cE) to determine any matter involving the validity, enforceability, interpretation, or implementation of an agreement contemplated in section 14(3), unless the agreement provides otherwise;

(d) to determine all other matters which require to be determined in terms of this Act.”¹⁵⁷

The LCC specialises in dealing with disputes that arise out of laws that underpin South Africa's land reform initiatives such as the Restitution of Land Rights Act, 1994, the Land Reform (Labour Tenants) Act, 1996¹⁵⁸ and the Extension of Security of Tenure Act, 1997.¹⁵⁹ However, it has been given wide powers as it has “the power to decide any issue either in terms of the Act or in terms of any other law, which is not ordinarily within its jurisdiction, but is incidental to an issue within its jurisdiction, if the LCC considers it to be in the interests of justice to do so.”¹⁶⁰ The LCC deals with restitution cases in the form of referrals from the Commissioner's office or when they come directly through claimants or affected land owners.¹⁶¹ The main task of the LCC in this regard is, therefore, to adjudicate whatever legal issues are contained in the cases and ensure that land is awarded to those who satisfy the statutory requirements.¹⁶²

¹⁵⁷ Sec 22(1) of the Restitution Act.

¹⁵⁸ Sec 1(cC) of the Restitution Act.

¹⁵⁹ Sec 1(cC) of the Restitution Act.

¹⁶⁰ Sec 22(2)(c) of the Restitution Act.

¹⁶¹ Sec 14 of the Restitution Act.

¹⁶² National Government of South Africa ‘Land Claims Court’ (n 156 above).

3.4.2.5 Accessibility of the Land Claims Court

The LCC has its main seat in Johannesburg,¹⁶³ but it can hold hearings in any part of the Republic of South Africa to make it more accessible to litigants.¹⁶⁴ It can also conduct hearings in an informal way,¹⁶⁵ in various provinces, districts, cities, and towns of the country.¹⁶⁶

Rule 5(1) of the LCC Rules, 1997¹⁶⁷ requires that fees be paid, except where proceedings are initiated by the Commission or by the Director General or if a person is determined to be indigent. A person is determined to be indigent if (a) he or she does not own property to the value of R30 000.00 or more, other than household goods, wearing apparel and tools of trade; and (b) he or she will not be able to provide that amount from his or her income within a reasonable time.¹⁶⁸

3.4.2.6 Locus Standi

The *locus standi* is wide in the sense that any person whose rights may be affected by the relief claimed in a case and who is not a party in the case may, within a reasonable time after he or she becomes aware of the case, apply to the Court for leave to intervene in the case.¹⁶⁹ The state may also intervene as a party in a case.¹⁷⁰ Any person or organisation may be admitted as an *amicus curiae* upon the filing of a written agreement between that person or organisation and all participating parties or upon order of the presiding judge or of the Court on its own accord or upon application by the person or organisation.¹⁷¹

¹⁶³ Land Claims Court Rules GN 300 of 1997 published in GG 17804 of 21 February 1997 (Land Claims Court Rules) <https://www.judiciary.org.za/index.php/courts/specialised-courts/land-claims-court/contact-details> (accessed 15 June 2022).

¹⁶⁴ Sec 28(2) of the Restitution Act.

¹⁶⁵ Land Portal 'The Land Claims Court of South Africa' <https://data.landportal.info/organization/land-claims-court-south-africa> (accessed 15 June 2022).

¹⁶⁶ National Government of South Africa 'Land Claims Court' (n 156 above).

¹⁶⁷ Land Claims Court Rules (n 163 above).

¹⁶⁸ Rule 5(4) of the Land Claims Court Rules (n 163 above).

¹⁶⁹ Rule 13(1) of the Land Claims Court Rules (n 163 above).

¹⁷⁰ Sec 13(3) of the Land Claims Court Rules (n 163 above).

¹⁷¹ Sec 14(1)(a)(b) of the Land Claims Court Rules (n 163 above).

3.4.2.7 Appeals from the Land Claims Court

Appeals against a decision of the LCC lies with the Supreme Court of Appeal,¹⁷² and if necessary, to the Constitutional Court.¹⁷³

3.4.2.8 Proposals for a new Land Court

In 2019, the Expert Advisory Panel on Land Reform and Agriculture which the President had set up to provide independent advice to the Inter-Ministerial Committee (IMC) on Land Reform and consider any existing studies and work towards a uniform policy position in, *inter alia*, the mandate for the institutions for land reform, including the Commission for Restitution of Land Rights, the Land Claims Court and the Department of Rural Development and Land Reform submitted its report.¹⁷⁴ One of the recommendations made by the Panel was that the Land Claims Court be conferred into a new Land Court to adjudicate on all land related matters and not only land restitution matters.¹⁷⁵ This proposal was made because the current Land Claims Court had been established with a limited lifespan to deal with claims for restitution of land,¹⁷⁶ as it was not meant to be a permanent court with permanent judges.¹⁷⁷ However, the restitution process has continued to date, and it was found that the lack of permanency of judges presiding over matters before the LCC and the absence of a permanent seat of the LCC resulted in slow processing of and backlogs in land restitution claims to the dissatisfaction of land claimants.¹⁷⁸

With respect to the appointment of judges to the proposed Land Court, the Panel recommended the appointment of a permanent judge president and four permanent judges to the Land Court so as to strengthen the court's capacity to deal expeditiously with restitution claims and other land matters.¹⁷⁹ In their view "stronger judicial oversight over claims will lead to better

¹⁷² Sec 37(1) of the Restitution Act read with regulation 69 of the Land Claims Court Rules.

¹⁷³ Sec 37(9) of the Restitution Act.

¹⁷⁴ Advisory Panel on Land Reform and Agriculture 'Final report of the Presidential Advisory Panel on Land Reform and Agriculture' (2019) 9 https://www.gov.za/sites/default/files/gcis_document/201907/panelreportlandreform_1.pdf (accessed 15 June 2022).

¹⁷⁵ Advisory Panel on Land Reform and Agriculture (n 174 above) 81.

¹⁷⁶ Advisory Panel on Land Reform and Agriculture (n 174 above) 81.

¹⁷⁷ Para 1.2 of the Memorandum on the Object of the Land Court Bill, Government Gazette No. 44480 of 23 April 2021.

¹⁷⁸ Para 1.2 of the Memorandum on the Object of the Land Court Bill, 2021 (n 177 above).

¹⁷⁹ Advisory Panel on Land Reform and Agriculture (n 174 above) 81.

settlements, reduce the scope for corruption, and avert the bundling of claims into dysfunctional mega-claims that lead to conflict”.¹⁸⁰

The Land Court Act was promulgated in 2023¹⁸¹ and although it has not yet come into force it will be important to consider its provisions and highlight areas of improvement. The Land Court Act, 2023 provides for the establishment of a Land Court with the same status as a High Court in relation to matters arising from the application of the Restitution of Land Rights Act or any other legislation.¹⁸² The Judges are required to, by reason of their training and experience, have expertise in the field of land rights matters.¹⁸³ The Judges hold office until they are discharged from active service in terms of the Judges' Remuneration and Conditions of Employment Act, 2001, or if the judge resigns by giving written notice to the President.¹⁸⁴ The Court may sit with or without assessors, who may not be more than two, to assist the Court.¹⁸⁵ The use of assessors is to facilitate the expeditious disposal of cases and contribute towards the development of appropriate jurisprudence in relation to land matters.¹⁸⁶ This is coupled with the use of the cheaper and speedier alternative dispute resolution mechanism in the form of mediation.¹⁸⁷ Section 6 establishes the seat of the Land Court in Johannesburg, but the Court may hold its sitting for a hearing at a place other than in Johannesburg, where it is expedient to do so or it is in the interest of justice to do so. The court has a wide *locus standi* as it allows for public interest litigation.¹⁸⁸ Its judgments, orders and decisions will be appealable to the Supreme Court of Appeal as opposed to a Land Court of Appeal.¹⁸⁹

¹⁸⁰ Advisory Panel on Land Reform and Agriculture (n 174 above) 81.

¹⁸¹ Act 6 of 2023.

¹⁸² Sec 3(2) of the Land Court Act.

¹⁸³ Sec 8(4) of the Land Court Act.

¹⁸⁴ Sec 9(2) and (3) of the Land Court Act.

¹⁸⁵ Sec 12(1) of the Land Court Act.

¹⁸⁶ Para 1.3 of the Memorandum on the Object of the Land Court Bill 2021 (n 177 above).

¹⁸⁷ Sec 29 of the Land Court Act.

¹⁸⁸ Sec 13(1) provides for proceedings to be instituted by (a) the Commission on Restitution of Land Rights and Govern; (b) any person acting in their own interest; (c) any person acting on behalf of another person who cannot act in their own name; (d) any person acting as a member of, or in the interests of a group or class of persons; (e) any person acting in the public interest; or (f) any association acting in the interests of its members.

¹⁸⁹ Sec 31(1) of the Land Court Act. Para 1.3 of the Memorandum on the Object of the Land Court Bill 2021 had proposed appeals to a Land Court of Appeal.

3.4.2.9 Reflections on the Land Claims Court

According to Pienaar, the role of the LCC is to assist the Commission on Restitution of Land Rights and the government to keep the restitution process on track.¹⁹⁰ It is also involved in assisting government bodies to determine which land may be removed from the restitution process.¹⁹¹ One of the criticisms levelled against the LCC, is that it is struggling to properly settle the growing backlog of land claims.¹⁹² The reason put forward for this is the lack of permanent judges or sufficient capacity and staff to process land claims efficiently and timeously.¹⁹³ The Land Court Act, 2023 has addressed this by ensuring the judges are permanently appointed to the proposed Land Court. This measure not only aims to alleviate the backlog of land claims, but also promotes the development of case law on land restitution and land rights.¹⁹⁴

The requirement that the judges are to have experience or expertise in land rights matters aims to ensure that the proposed Land Court is a true specialised court.¹⁹⁵ As highlighted in paragraph 2.6 of chapter 2, the expertise and experience possessed by judges in the area of the law for which the specialised court has been established, is one of the advantages of specialised courts, when compared to general courts.

An important innovation in the Act is the emphasis placed on alternative dispute resolution.¹⁹⁶ In terms of section 13(2), the Judge President may decide that a case should rather be resolved through mediation rather than in court. In addition, a judge may suspend a hearing at any time and refer any issue in the case for mediation if the judge is of the view that mediation will be more appropriate towards resolving the case.¹⁹⁷ This, according to AllsopLaw, is intended to

¹⁹⁰ JM Pienaar 'Restitutionary road: reflecting on good governance and the role of the Land Claims Court' (2011) *Potchefstroom Electronic Law Journal* 40 <https://repository.nwu.ac.za/handle/10394/4670> (accessed 15 June 2022).

¹⁹¹ Pienaar (n 190 above) 40.

¹⁹² G AllsopLaw 'New Land Court Bill seeks to address slow processing of land claims' (2021) <https://www.groundup.org.za/article/new-land-court-bill-seeks-address-slow-processing-land-claims> (accessed 15 June 2022).

¹⁹³ Parliament of South Africa 'Report of the High-Level Panel on the Assessment of Key Legislation and the acceleration of Fundamental Change' (2017) 246 https://www.parliament.gov.za/storage/app/media/Pages/2017/october/High_Level_Panel/HLP_Report/HLP_report.pdf (accessed 15 June 2022).

¹⁹⁴ AllsopLaw (n 192 above).

¹⁹⁵ Sec 8(4) of the Land Court Act; Paragraph 1.3 of the Memorandum on the Object of the Land Court Bill (n 174 above).

¹⁹⁶ Sec 13(2) read with Sec 29(1) of the Land Court Act.

¹⁹⁷ Sec 29(1)(a) ad (b) of the Land Court Act.

“provide a cheaper and quicker alternative for cases to be decided outside of the usual court process, which tends to be more costly and adversarial”.¹⁹⁸ On the converse, the Judge President can decide that a case should be heard and decided through the normal court process and not mediation or arbitration, if the outcome of the case would contribute to the development of the law, thus ensuring the development of jurisprudence on land restitution.¹⁹⁹

The Act is particular about making the Land Court accessible to the public. The Act empowers the Minister of Justice, in consultation with the Chief Justice, to designate places for court hearings to be held to make the court more accessible for people located in rural areas.²⁰⁰ As indicated previously, this is notable as it will allow for better access to justice for historically disadvantaged individuals who may not necessarily have the means to travel far distances to seek legal recourse in courts that are located outside their jurisdiction.

The LCC has a wide *locus standi* and the Land Court will also have a wide *locus standi*.²⁰¹ It is submitted that wide *locus standi* is particularly important in public interest litigation. Sulistiwati *et al* highlight that it is a highly recommended best practice to make standing as wide and open as possible, and to open standing to any person to raise an environmental issue, including public interest litigation, citizen suits and class actions.²⁰² They go on to highlight that having a limited definition of what constitutes standing is the most significant barrier to access to justice.²⁰³ It is noteworthy that countries are now putting in place wide *locus standi* provisions to protect the environment. For instance, in China, in terms of the Environmental Protection Law, standing rules have been relaxed to allow more NGOs (referred to as social organisations) to bring environmental public interest litigation.²⁰⁴ In Kenya, which has entrenched the right to a clean and healthy environment in its Constitution,²⁰⁵ any person has

¹⁹⁸ AllsopLaw (n 192 above).

¹⁹⁹ Sec 13(3)(d) of the Land Court Act; AllsopLaw (n 192 above).

²⁰⁰ Sec 7(3) of the Land Court Act; AllsopLaw (n 192 above).

²⁰¹ *Locus standi* is the set of legal rules that determine who can initiate a lawsuit or participate in a government proceeding - Pring and Pring (n 3 above) 33. Before the SA Constitution, 1996, a person had to prove that he or she had a personal interest in a matter to be able to institute a legal action. However with the promulgation of the SA Constitution and particularly the Bill of Rights, section 38 of the Constitution provides for a wide *locus standi* by allowing the following categories of people to approach a court alleging that a right in the Bill of Rights has been infringed or threatened - (a) anyone acting in their own interest; (b) anyone acting on behalf of another person who cannot act in their own name; (c) anyone acting as a member of, or in the interest of, a group or class of persons; (d) anyone acting in the public interest; and (e) an association acting in the interest of its members.

²⁰² Sulistiwati *et al* (n 45 above) 34.

²⁰³ Sulistiwati *et al* (n 45 above) 34.

²⁰⁴ Article 58 of the Environmental Protection Law of the People's Republic of China Order 9 of 2014.

²⁰⁵ Article 42 of the Constitution of the Republic of Kenya, 2010

standing to bring a court action if their environmental human rights are infringed upon, including public interest groups and NGOs.²⁰⁶ In South Africa, section 38 of the Constitution provides for wide standing in relation to enforcing the rights in the Bill of Rights.²⁰⁷

It is notable that the LCC (and the proposed Land Court) makes provision for the use of assessors who are decision-making members of the court (except when they serve in an advisory capacity at the request of the judge).²⁰⁸ These assessors are required to have skills and knowledge relevant to the work of the court, but need not have any legal qualifications.²⁰⁹ The appointment of persons with knowledge and expertise in the area of law for which a specialised court has been established to serve with judges is not new. Assessors are especially valuable in proceedings where specialist knowledge or expertise is required, and where without their assistance recourse to complex and sometimes conflicting evidence would have to be provided by expert evidence or further specialist tribunals created to deal with such matters.²¹⁰ For instance, the Land and Environment Court Act, 1979²¹¹ makes provision for commissioners to be appointed in addition to the judges of the New South Wales' Land and Environment Court.²¹² The role of the Commissioners of the Land and Environment Court will be discussed in more detail in chapter 4. It is submitted that, given the complex and technical nature of environmental law, the proposed specialised environmental court will benefit from the use of assessors or scientific technical experts to support the work of the judges.

3.4.3 Sexual Offences Court

3.4.3.1 History of the Sexual Offences Court

²⁰⁶ Sec 3(3) of the Environmental Management and Coordination Act (EMCA) 8 of 1999; See also Sec 111 of the EMCA which provides that any person can institute proceedings for environmental restoration, and it shall not be necessary for a plaintiff to show that they a right or interest in the property, environment or land alleged to have been or likely to be harmed.

²⁰⁷ Sec 38 of the SA Constitution, 1996.

²⁰⁸ Sec 28(6) of the Restitution Act empowers the court to summon to its assistance no more than two assessors to act in an advisory capacity.

²⁰⁹ Public interest law is the name given to efforts to provide legal representation to interests that historically have been unrepresented or under-represented in legal process - F Kathree 'Public interest law: its continuing role in South Africa' (2002) *Advocate* 33 https://journals.co.za/doi/pdf/10.10520/AJA10128743_259 (accessed 22 April 2023). Also see definition by N Mazumber - Public interest law is defined as anything affecting the well-being, the rights, health, or finances of the public at large, most commonly advocating for those living in poverty or marginalized populations - N Mazumber 'Defining Public Interest Law' <https://careercenter.umich.edu/article/defining-public-interest-law> (accessed 22 April 2023).

²¹⁰ A Dickey 'The Province and functions of assessors in English courts' *The Modern Law Review* (1970) 494.

²¹¹ Act 204 of 1979.

²¹² Sec 12(1) of the Land and Environment Court Act, 1979; Commissioners, were referred to as 'assessors' or 'conciliation and technical assessors' in the Act, before the amendment of the nomenclature in 1998.

The discussion on Sexual Offences Court will start with the history of the first Sexual Offences Court (initial Sexual Offences Court) to provide a contextual background to the current Sexual Offences Court. In 1993, the first Sexual Offences Court was established in Wynberg, South Africa, as an innovative measure for, *inter alia*, improving the prosecution and adjudication of sexual offences following a public outcry at the inefficient handling of some rape cases.²¹³ This court tried sexual offences exclusively and was also equipped with appropriate facilities to address the needs of complainants in these cases.

The personnel component of the court was adjusted to reduce secondary victimisation by assigning two prosecutors to the court instead of the usual one prosecutor per court.²¹⁴ The advantage of this was that the prosecutors could take turns presenting their cases, while out-of-court days gave prosecutors the opportunity to prepare more thoroughly.²¹⁵ During such out-of-court days the prosecutor could research their cases, consult with witnesses, guide the investigation and conduct *in loco* inspections.²¹⁶ The further advantage of this was that “while in other courts more than one prosecutor often dealt with a case, having two prosecutors per court made vertical prosecution possible”.²¹⁷ As a result, the same prosecutor in a specific sexual offence case handled the case from the moment the police docket was received, through the trial stage, up to the completion of the case.²¹⁸ Magistrates were assigned to the court on a rotational basis and they presided in the court for one week in every six weeks.²¹⁹ The court was a success as it maintained a conviction rate of up to 80 percent at the end of its first year -

²¹³ SP Walker The Court for Sexual Offences: perceptions of the parties involved [Unpublished PhD. Department of Psychology, University of the Free State] (2002) 13; HB Kruger and JM Reyneke ‘Sexual Offence Courts: quo vadis’ (2008) *Journal for Juridical Science* 38.

²¹⁴ Kruger and Reyneke (n 213 above) 47.

²¹⁵ Kruger and Reyneke (n 213 above) 47.

²¹⁶ South African Human Rights Commission (SAHRC) *Report on sexual offences against children - does the criminal justice system protect children?* (2002) 26 https://www.sahrc.org.za/home/21/files/Reports/child_sexual_offences_report_april_2002.pdf (accessed 1 March 2023); Kruger and Reyneke (n 213 above) 39.

²¹⁷ Kruger and Reyneke (n 213 above) 78. Vertical prosecution means the same prosecutor, who has specialized training in sensitive crime issues, is assigned to the case from beginning to end. It improves conviction rates, reduces victim trauma, and provides more consistent, appropriate sentencing and is recommended for sexual assault cases – National Sexual Violence Resource Centre Best Practices for Prosecution <https://www.nsvrc.org/best-practices-prosecution> (accessed 27 April 2023).

²¹⁸ Ministerial Advisory Task Team on the Adjudication of Sexual Offence Matters ‘Report on the Re-Establishment of Sexual Offences Court’ (MATTSO Report) (2013) 21 <https://www.justice.gov.za/reportfiles/other/2013-sxo-courts-report-aug2013.pdf> (accessed 1 March 2022).

²¹⁹ Kruger and Reyneke (n 213 above) 38 – 39.

meaning that four out of every five cases that went to the court, resulted in a jail time conviction.²²⁰

The Department of Justice, recognising the value of specialised courts for sexual offences, established the National Sexual Offence Court Task Team in 1998.²²¹ The objectives of this task team included the establishment of Sexual Offences Courts in all regional court districts and the provision of training for the justice personnel and other role-players dealing with sexual offences.²²²

In February 1999, South Africa's second court dealing exclusively with sexual offences was established in Bloemfontein using the Wynberg model.²²³ From 1999, additional Sexual Offences courts were established and, by 2000, Sexual Offences Courts had also been established in Durban, Parow and Grahamstown.²²⁴

In 2002, the Sexual Offences and Community Affairs (SOCA) unit of the NPA developed a Blueprint for Sexual Offences courts and in February 2003, the National Strategy for the Rollout of Specialised Sexual Offences Courts was put in place.²²⁵ The Strategy provided for two types of sexual offences courts – the dedicated sexual offences courts and the blueprint compliant sexual offence courts. The blueprint-compliant courts aimed to provide for the effective prosecution and adjudication of sexual offences, increase the reporting and conviction rates, reduce the cycle time of cases, and reduce secondary victimisation for survivors.²²⁶

In April 2005, the blueprint was revised by the SOCA Unit.²²⁷ In the revised blueprint, the two prosecutor per court-approach was adopted and regional magistrates were required to be

²²⁰ J Thorpe 'The roll out of the first Sexual Offence Courts' <https://rapecrisis.org.za/part-2-the-roll-out-of-the-first-sexual-offences-courts/> (accessed 7 January 2023).

²²¹ J Thorpe (n 220 above).

²²² KD Müller and IA van der Merwe 'The sexual offences prosecutor: A new specialisation' (2004) *Journal for Juridical Science* 136.

²²³ ME Opperman 'Sexual Offences Courts' presentation at the Conference on the Multi-disciplinary Approach to Child Abuse (2003) University of the Free State cited in Kruger and Reyneke (n 213 above) 40. The establishment of this second court was the result of a concerted and integrated effort by role-players such as the South African National Institute for Crime Prevention and the Reintegration of Offenders (NICRO), the Department of Social Development, the Rape Unit of the South African Police Service, and the senior public prosecutor at the magistrate's court in Bloemfontein - Kruger and Reyneke (n 213 above) 39.

²²⁴ T Majokweni 'The future of the multidisciplinary approach in the court system in respect of sexual offences, with particular reference to the sexually abused child' Keynote Address delivered by Adv Thoko Majokweni at the First National Conference of SAPSAC *Child Abuse Research in South Africa* (2000) 6.

²²⁵ MATTSO Report (n 218 above) 20.

²²⁶ MATTSO Report (n 218 above) 21.

²²⁷ MATTSO Report (n 218 above) 21; Kruger and Reyneke (n 213 above) 77.

specifically assigned to Sexual Offences Courts for a period of at least six months, as opposed to rotation of one week per six weeks.²²⁸ The prosecutors were required to be specially employed “based on legal knowledge, as well as skill in, and commitment to, prosecuting sexual offences” with at least three years of criminal litigation experience.²²⁹ The prosecutors and magistrates were required to be dedicated, sensitised and empathic when handling sexual offences cases.²³⁰ As such, the presiding officers assigned to these courts gained specialised experience, which resulted in improved understanding of the dynamics of these cases and greater consistency in judgments and sentencing.²³¹

The number of Sexual Offences Courts continued to increase and at the end of March 2005, there were 53 dedicated Sexual Offences courts.²³² According to the Department of Justice and Constitutional Development (DOJCD) 2004/2005 Annual Report, the conviction rate in the Sexual Offences Courts improved to an average of 64% when compared to the 48% conviction rate for similar cases that were heard in the normal regional magistrates court.²³³ In addition, the turnaround times for the finalisation of cases decreased from an average of 285 days to 142 days.²³⁴

3.4.3.2 Demise of the initial Sexual Offence Court

Despite the success of the initial Sexual Offences Court, certain challenges led to their ultimate demise.²³⁵ The concern that surfaced was that the courts, which were not designated as SOC, were not allocated the same level of resources as the SOC, which meant victims of other crimes were not getting the same services in these other courts, which were regarded unconstitutional.²³⁶ The lack of buy-in and support from other criminal justice system stakeholders,²³⁷ the lack of a dedicated budget to ensure the SOC functioned effectively,²³⁸ as well as the location of the SOC and resource allocation constituted some of the challenges.

²²⁸ MATTSO Report (n 218 above) 22; Kruger and Reyneke (n 213 above) citing the Sexual Offences Court: Blueprint Document (2005) 78 and 106.

²²⁹ Kruger and Reyneke (n 213 above) 78.

²³⁰ Kruger and Reyneke (n 213 above) 78; 105 – 106.

²³¹ MATTSO Report (n 218 above) 22.

²³² Department of Justice and Constitutional Development (DOJCD) ‘Annual Report 2004/2005’ 13.

²³³ DOJCD Annual Report (n 232 above) 13.

²³⁴ DOJCD Annual Report (n 232 above) 13; N Manyathi-Jele ‘Sexual offences courts to be re-established’ (2013) *De Rebus* 10.

²³⁵ MATTSO Report (n 218 above) 22.

²³⁶ MATTSO Report (n 218 above) 22.

²³⁷ MATTSO Report (n 218 above) 22.

²³⁸ MATTSO Report (n 218 above) 22.

Most of the SOCs were located in urban areas, creating inequality between the SOCs and it also led to SOCs in urban areas being allocated more resources than those in the rural or semi-urban areas.²³⁹ The disparity in the SOCs was not limited to resource allocation, as it was also alleged that the training was not uniformly disseminated as not all of the people who worked at SOCs received the same training.²⁴⁰

On the part of the presiding officers, another challenge was the reluctance of the allocated magistrates to preside in a dedicated court. In the NPA Annual Report 2005/2006, it is highlighted that ten Sexual Offences courts were closed due to the “refusal of Regional Court Magistrates to preside in a dedicated court and/or, shortage of presiding officers”.²⁴¹ Added to this, was that the constant rotation of presiding officers resulted in unacceptable case cycle times.²⁴² On the functionality component existed a lack of criteria to monitor and evaluate whether the SOCs were working.²⁴³

In 2005, during her Budget Vote speech, the then Minister of Justice, Bridgette Mabandla, while highlighting that the specialised courts in existence (including the Sexual Offences Court) have “shown significant progress in comparison to the other mainstream courts”²⁴⁴ went on to state that the aim was not to see a “a proliferation of specialised courts that are better resourced than the mainstream courts”.²⁴⁵ She then explained that a process had been initiated to review the impact, effectiveness and sustainability of specialised courts within the judicial legal system.²⁴⁶ This inquiry was seen as placing a moratorium on the establishment of additional sexual offences courts.²⁴⁷ In the end, the rollout of SOCs stopped, and survivors had to seek justice from the ordinary courts.²⁴⁸ By the end of the 2011/12 financial year, the NPA reported that dedicated sexual offences courts “no longer exist”.²⁴⁹

²³⁹ MATTSO Report (n 218 above) 22.

²⁴⁰ MATTSO Report (n 218 above) 22.

²⁴¹ National Prosecuting Authority (NPA) ‘Annual Report 2005/2006’ 26.

²⁴² NPA Annual Report (n 241 above) 26.

²⁴³ NPA Annual Report (n 241 above) 26.

²⁴⁴ Department of Justice and Constitutional Development ‘B Mabandla 2005/2006 Budget Vote Speech’ (2005) 6 <https://www.polity.org.za/article/b-mabandla-justice-dept-budget-vote-20052006-20052005-2005-05-20> (accessed 14 February 2023).

²⁴⁵ Mabandla Budget Vote Speech (n 244 above).

²⁴⁶ Mabandla Budget Vote Speech (n 244 above).

²⁴⁷ MATTSO Report (n 218 above) 98.

²⁴⁸ J Thorpe *Sexual Offence Courts rollout stops and restarts* <https://rapecrisis.org.za/part-3-sexual-offences-courts-rollout-stops-and-restarts/> (accessed 7 January 2023).

²⁴⁹ National Prosecuting Authority (NPA) ‘Annual Report 2011/2012’ 22.

3.4.3.3 Re-establishment of the Sexual Offences Court

However, in 2013, the Ministerial Advisory Task Team on the Adjudication of Sexual Offences Matters (MATTSO) was set up to investigate the viability of the re-establishment of Sexual Offences Courts in South Africa, following the scourge and increase of sexual violence in South Africa.²⁵⁰ Following its investigations, the MATTSO recommended that the Sexual Offence Courts be re-established through enabling legislation by the amendment of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007 (Sexual Offences and Related Matters Act),²⁵¹ to provide an enabling provision for the establishment of Sexual Offences Courts, and for matters related thereto.²⁵² The basis for this recommendation was that South Africa still needed Sexual Offences Courts as the courts were found to be ‘successful in the establishment of a victim-centred criminal justice system, reduction of secondary victimisation, improvement of skills of court personnel, reduction of the cycle time in the finalisation of sexual offences cases, and have generally contributed to the efficient prosecution and adjudication of these cases’.²⁵³ Between August 2013 and 7 February 2020, the Department of Justice and Correctional Services upgraded 106 courts into Sexual Offences Courts in line with the MATTSO Sexual Offences Courts model.²⁵⁴ The courts were dedicated to dealing with sexual offences with the aim of improving the prosecution and adjudication of sexual offences.²⁵⁵

On 31 January 2020, section 55A of the Criminal Law (Sexual Offences and Related Matters) Amendment Act came into force²⁵⁶ and introduced the statutory sexual offences courts (within the High Court or Magistrate’s Court system) that must be established and resourced in line

²⁵⁰ MATTSO Report (n 218 above) i.

²⁵¹ Act 32 of 2007.

²⁵² MATTSO Report (n 218 above) 98; this amendment was effected in 2013 when the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007 was amended to insert sec 55A which provides for the Minister to by notice in the *Gazette* designate any Division of the High Court of South Africa or the main seat or any local seat of a Division referred to in section 6 of the Superior Courts Act, 2013 (Act 10 of 2013); or Magistrate’s Court, as defined in sec 1 of the Superior Courts Act, 2013, at which a sexual offences court must be established. Sec 55A came into force on 31 January 2020.

²⁵³ MATTSO Report (n 218 above) 96.

²⁵⁴ Parliamentary Monitoring Group (PMG) ‘National Assembly question for written reply Parliamentary question no: 924 – Minister of Justice and Correctional Services response’ (March 2022) <https://pmg.org.za/committee-question/18554/> (accessed 28 November 2022); There are currently 116 MATTSO courts with 57 of them being Hybrid MATTSO courts (defined as a regional court dedicated for the adjudication of sexual offences cases in any specified area that is established to give priority to sexual offences cases, whilst permitted to deal with other cases) <https://www.justice.gov.za/vg/sxo-SOC-list.html> (accessed 21 April 2023).

²⁵⁵ SAHRC Report on sexual violence (n 216 above) 25; HB Kruger and JM Reyneke ‘Sexual Offence Courts: better justice for children’ *Journal for Juridical Science* (2006) 76.

²⁵⁶ Proclamation R 5 in GG 42987 of 31 January 2020.

with the regulations relating to Sexual Offences Courts, 2020²⁵⁷ (Sexual Offences Court Regulations). It must be noted that the Sexual Offences Courts envisaged in terms of section 55A of the Sexual Offences and Related Matters Act, are yet to be physically established.²⁵⁸ However, on 31 October 2022, the Minister of Justice and Correctional Services issued a notice designating courts for the regional divisions referred to in all the provinces in South Africa, at which Sexual Offences Courts must be established.²⁵⁹ Nevertheless, the Sexual Offences Courts that were upgraded between 2013 and 2020 continue to function and are generally referred to as the MATTSO SOCs.²⁶⁰

3.4.3.4 Composition and appointment of Presiding Officers

The court where the Sexual Offences Court is established, must be designated in terms of section 55A(1) by the Minister of Justice, in consultation with the Chief Justice, and after consultation with the National Director of Public Prosecutions (NDPP).²⁶¹ As indicated previously, the Sexual Offences Courts envisaged in terms of section 55A of the Sexual Offences and Related Matters Act, are yet to be established, although the Minister has issued a notice designating courts for the regional divisions referred to in all of the provinces, at which sexual offences courts must be established.²⁶² It must be noted that the SOCs that currently operate are within the Magistrates' court system and each court is required to have a Magistrate and two Prosecutors who possess legal knowledge, as well as skill in, and commitment to, prosecuting sexual offences.²⁶³ Unlike the 2005 blueprint which required that the Prosecutor must have at least three years criminal litigation experience, the MATTSO model does not specify the number of years of criminal litigation experience the Prosecutors must have. Regulation 22 of the SOC Regulations seeks to establish the need for efficiency in the SOC by

²⁵⁷ Regulations Relating to Sexual Offences Courts Government Gazette GNR 108 of 7 February 2020.

²⁵⁸ In the 2022/23 financial year the Department of Justice and Constitutional Development planned to establish the first batch of sec 55A SOCs in the form of eighty (80) sexual offences courts. These sec 55A SOCs are to be established in line with the resource specifications of the Regulations relating to Sexual Offences Courts – 'Implementation of the Criminal Law (Sexual Offences Amendment) Act 2007 Annual Reports 2021/2022' (SORMA 2021/2022) 26.

²⁵⁹ Parliamentary Monitoring Group (PMG) 'Question NW2198 to the Minister of Justice and Correctional Services 27 September 2022' <https://pmg.org.za/committee-question/19984/> (accessed 21 April 2023). The list of designated courts was published in 2022 under Government Gazette GN R2690 in GG 47410 of 31 October 2022.

²⁶⁰ SORMA 2021/2022 (n 258 above) 26.

²⁶¹ Section 55A (1) read with section 55A (2) of the Criminal Law (Sexual Offences Amendment) Act 2007.

²⁶² Designation of Courts for the Regional Divisions at which Sexual Offences Courts must be established - GN R2690 in GG 47410 of 31 October 2022.

²⁶³ A Heath *et al* 'Improving case outcomes for sexual offences cases project: pilot study on Sexual Offence Courts' *Gender Health and Justice Research Unit* (2018) 188.

stipulating that “a designated court must ensure that sexual offence cases are finalised expeditiously and that delays are avoided as far as possible.”

The use of assessors is provided for within the Magistrates’ court system. Section 93*ter* of the Magistrates’ Court Act, 1944²⁶⁴ empowers a magistrate to summon one or two assessors to assist at the trial or in the determination of a proper sentence.²⁶⁵ There is no requirement for qualification, experience in the administration of justice or a specialised skill relating to the aspects of the criminal trials on the part of the assessor that the magistrate appoints.²⁶⁶ However, an assessor will be recused, on application by the prosecutor, accused or on the assessor’s own volition, if he or she is found to have any personal interest in the matter or there is likely to be a conflict of interest or bias.²⁶⁷

3.4.3.5 Jurisdiction of the SOC

Each designated SOC has jurisdiction to hear any sexual offences matter that is brought before it. In terms of section 55A(3), the area of jurisdiction of a designated SOC is the area of jurisdiction determined in terms of section 2 of the Magistrate's Courts Act, 1944, in respect of a Magistrate's Court or in terms of section 6(3) of the Superior Courts Act, 2013²⁶⁸, in respect of a Division of the High Court or a seat of the High Court. However, the Minister of Justice and Correctional Services, in consultation with the Chief Justice and after consultation with the

²⁶⁴ Act 32 of 1944.

²⁶⁵ Section 93*ter*(1) provides that “The judicial officer presiding at any trial may, if he deems it expedient for the administration of justice - (a) before any evidence has been led; or (b) in considering a community-based punishment in respect of any person who has been convicted of any offence, summon to his assistance any one or two persons who, in his opinion, may be of assistance at the trial of the case or in the determination of a proper sentence, as the case may be, to sit with him as assessor or assessors: Provided that if an accused is standing trial in the court of a regional division on a charge of murder, whether together with other charges or accused or not, the judicial officer shall at that trial be assisted by two assessors unless such an accused requests that the trial be proceeded with without assessors, whereupon the judicial officer may in his discretion summon one or two assessors to assist him.”

²⁶⁶ B Tshela and MC Marumoagae ‘Lay participation in the South African criminal justice system: An assessment of the assessor system’ *South African Journal of Criminal Justice* (2021) 351.

²⁶⁷ Sec 93*ter*(10)(a) and (b) of the Magistrates’ Court Act 1944 provides that (a) A judicial officer who is assisted by an assessor may, on application by the prosecutor or the accused person, order the recusal of the assessor from the proceedings if the judicial officer is satisfied that - (i) the assessor has a personal interest in the proceedings concerned; (ii) there are reasonable grounds for believing that there is likely to be a conflict of interests as a result of the assessor's participation in the proceedings concerned; or (iii) there are reasonable grounds for believing that there is a likelihood of bias on the part of the assessor; (b) An assessor may recuse himself or herself from the proceedings for the reasons contemplated in paragraph (a).

²⁶⁸ Act 10 of 2013.

National Director of Public Prosecutions, may increase or decrease the area of jurisdiction of any Magistrate's Court designated as a SOC.²⁶⁹

3.4.3.6 Powers of the SOC

In terms of section 12 of the Magistrates' Court Act, 1944, only a regional magistrate can sit in a court of a regional court division.²⁷⁰ The regional magistrate possesses the powers and performs the duties conferred or imposed upon magistrates by any law, for the time-being in force, within the province in which his or her district is situated.²⁷¹ The regional magistrate is also subject to the administrative control of the head of the administrative region, in which his or her district is situated.²⁷²

The SOC has the power to impose sentences ranging from 5 years to 15 years imprisonment or fines to the maximum of R2 million rand, depending on the type of offence, and to both such fine and imprisonment.²⁷³ Where a penalty is not prescribed in respect of an offence in terms of the Sexual Offence Act, a sentence as provided for in section 276 of the Criminal Procedure Act 1977,²⁷⁴ which the court considers appropriate and which is within the court's penal jurisdiction, can be imposed.²⁷⁵

3.4.3.7 Accessibility of the SOC

Magisterial districts are currently aligned with municipal boundaries to ensure that more people receive judicial services in courts that are located close to where they reside and, therefore, save on travelling costs.²⁷⁶ This is intended to improve access to justice by people living in historically disadvantaged areas, who often have to travel long distances to urban areas to access court services.²⁷⁷ The DOJd further explains that "regional courts will be eligible to use a district court, sub-district or branch court as seats of such regional court concerned, so that

²⁶⁹ Sec 55A(4) of the Criminal Law (Sexual Offences Amendment) Act 2007.

²⁷⁰ Section 12(1)(a) of the Magistrates' Court Act 1944.

²⁷¹ Section 12(1)(b) of the Magistrates' Court Act 1944.

²⁷² Section 12(1)(c) of the Magistrates' Court Act 1944.

²⁷³ Section 56A(3) to (8) of the Criminal Law (Sexual Offences Amendment) Act 2007.

²⁷⁴ Act 51 of 1977.

²⁷⁵ Section 56A(i)(b) of the Criminal Law (Sexual Offences Amendment) Act 2007. Section 276 of the Criminal Procedure Act, 1977 provides for a range of punishments that can be imposed on a convicted offender ranging from imprisonment, declaration as a habitual criminal, committal to any institution established by law, a fine, correctional supervision.

²⁷⁶ N Manyathi-Jele 'Rationalisation of magisterial districts bringing justice closer' (2015) *De Rebus* 11.

²⁷⁷ N Manyathi-Jele (n 276 above) 11.

people do not have to travel outside their municipal area to access services of a regional court such as divorce and criminal matters.”²⁷⁸

It is not expected that a designated Sexual Offences Court sits on a daily basis and as such, in terms of Regulation 26(a) and (b) of the Sexual Offences Courts Regulations, (read with section 8(4)(b) of the Superior Courts Act, 2013,²⁷⁹) the relevant Regional Court President or Judge President, can determine how often or on which days such designated court must sit, in instances where the case load of a designated court does not require that the court sits daily, but also ensure that sexual offence cases are heard timeously. This aligns with the recommendation in the MATTSO Report regarding hybrid courts, where non-sexual offences cases are included on the court roll so that where the sexual offences cases do not continue due to non-availability of witnesses, *etcetera*, the non-sexual offences cases are heard.²⁸⁰ Currently a court that has been designated as a Sexual Offences Court can also hear other cases, but must at all times prioritise sexual offences cases that are brought before it.²⁸¹

3.4.3.8 Locus standi

The power to institute criminal proceedings is provided for in section 179 of the Constitution and this power vests in the National Prosecuting Authority, which is the only authority empowered to institute and conduct criminal proceedings on behalf of the state. The Constitutional Court in the case of *Wickham v Magistrate, Stellenbosch and others*,²⁸² emphasised this by stating that “the dominus litis in criminal trials . . . is not the victim but the State”.²⁸³ In practical terms, the Director of Public Prosecutions (DPP) decides whether or not to proffer charges, the nature of the charges to proffer, what plea to accept and on what basis, what evidence to lead and what sentence to suggest to the court.²⁸⁴

3.4.3.9 Appeals

²⁷⁸ Department of Justice and Constitutional Development (22 December 2014) ‘How will the rationalisation of magisterial districts benefit you?’ Facebook <https://www.facebook.com/DoJCD/posts/how-will-the-rationalisation-of-magisterial-districts-benefit-you-every-person-o/799616430084900/> (accessed 21 April 2023).

²⁷⁹ Act 10 of 2013.

²⁸⁰ MATTSO Report (n 218 above) 10.

²⁸¹ MATTSO Report (n 218 above) 13.

²⁸² [2016] ZACC 36.

²⁸³ Para 22.

²⁸⁴ Paragraph 3 of the National Prosecuting Authority (NPA) ‘Prosecution Policy’ 2013 <https://www.npa.gov.za/media/prosecution-policy> (accessed 8 March 2023).

In terms of section 83 of the Magistrates Court Act, 1944, the appeal of a Magistrate's decision is heard by the High Court within its area of jurisdiction, and further appeals can be made to the Supreme Court of Appeal. In instances where the matter under appeal relates to a constitutional matter, an appeal can be made to the Constitutional Court.

3.4.3.10 *Reflections on the SOC*

The re-establishment of these dedicated courts has had a significant impact on prosecuting sexual offences, with conviction rates consistently exceeding 70% over the past three financial years, starting from 2019/20.²⁸⁵ The Sexual Offences Court is a good example of how a court within the general court system can be specially designated to serve as a specialist court in a particular area of law. It is noteworthy that a court located within the Magistrate's court can be adapted to function efficiently and effectively. Further, the hybrid model enables a Sexual Offences Court to hear other types of criminal cases and not just sexual offence cases. It is submitted that this hybrid model could be beneficial in situations where the caseload does not warrant establishing a purely specialised environmental court. In such instances, the court could function as a hybrid model where specific days of the week are dedicated to hearing environmental crime cases while accommodating general crimes on alternate days. However, and as it is with the hybrid Sexual Offences Court, priority would be given to placing environmental crime cases on the court roll.

It is notable that the MATTSO Report recommended that the Sexual Offences Court be established through enabling legislation. This aspect will be crucial to consider when establishing specialised environmental courts in South Africa. It is submitted that specific enabling legislation must be put in place to safeguard the specialised environmental court from facing the same fate as the Hermanus Environmental court or the initial Sexual Offences Court, ensuring they are not subject to the changing policies of the government of the day.

One of the requirements of the SOC is the appointment of two prosecutors per designated court. The benefits of having two prosecutors are twofold. Firstly, and as previously discussed, the same prosecutor can handle the case from receipt of the docket through the trial stage until the completion of the case and secondly, the Prosecutors are better able to plan for their case, as they are not required to be in court every day.

²⁸⁵ Department of Justice and Constitutional Development (DOJCD) 'Annual Report 2021/22' 96.

Although Regulation 22 of the Sexual Offences Courts Regulations provides for sexual offence cases to be finalised expeditiously, it does not specify the number of days within which such cases should be finalised. Perhaps this is due to the nature of criminal prosecution, which is largely dependent on the availability of witnesses, amongst other things, and where it might not be possible to indicate a specific time period within which a case should be finalised.

The use of assessors in the Magistrates' court system and by implication in Sexual Offences Courts, is noteworthy. The Constitutional Court commented on the importance of the role of assessors in the case of *S v Jaipal*²⁸⁶ stating that "the importance of the role of assessors lies not only in their participation in judicial decision-making based on their experience in the administration of justice or their skills in specific matters, which may have to be considered at the trial. The participation of assessors in criminal trials allows for the involvement in the court system of persons other than judges. Assessors do not have to be magistrates or even lawyers. They may be lay persons, as long as they have the required experience and skills, at least in the opinion of the judge. In principle, assessors, if chosen carefully, could represent a significant degree of community involvement in the judicial process".²⁸⁷

It is proposed that consideration be given to ensuring that assessors who participate in sexual offence cases in the SOC's have some experience related to this field of law, such as child psychology or child development, as opposed to the current situation in which assessors appointed in magistrates' courts do not need to have any specific skills or experience.

In the MATTSO report it is recommended that training be prioritised to create specialised positions for sexual offences prosecutors at the dedicated SOC's.²⁸⁸ As such, specialisation remains at the fore of the functioning of the Sexual Offences Court and as part of ensuring that prosecutors acquire the requisite specialisation.²⁸⁹ However, and as Heath *et al* point out, the issue of specialisation remains controversial because there are no clear guidelines or protocols outlining the specific criteria that is needed to designate a court officer as being a specialist.²⁹⁰

Presiding officers are not rotated often as rotation was seen as causing disruption to the court rolls and causing inconsistency for the sexual offences survivors for who specialisation is

²⁸⁶ 2005 (4) SA 581 (CC).

²⁸⁷ Para 36.

²⁸⁸ MATTSO (n 218 above) 90; Heath *et al* (n 263 above) 187.

²⁸⁹ Heath *et al* (n 263 above) 188.

²⁹⁰ Heath *et al* (n 263 above) 188.

supposed to improve their case outcome, rather than delay it or affect it negatively.²⁹¹ Heath *et al* recommend that voluntary rotation must be offered to presiding officers and prosecutors, who ‘specialise’ in sexual offences cases because in the absence of increased human resources and adequate emotional and mental health support, rotation is a short- to medium-term solution to the presiding officer and prosecutors becoming mentally exhausted.²⁹²

3.4.4 The Specialised Commercial Crimes Court

3.4.4.1 Establishment of the Specialised Commercial Crimes Court

The Specialised Commercial Crime Court (SCCC) started operating in November 1999, following the establishment of the Specialised Commercial Crime Unit (SCCU).²⁹³ The SCCU was established as a pilot project in Pretoria to investigate and prosecute commercial crimes and organised commercial crimes.²⁹⁴ Due to its success, it was decided that the SCCU would be rolled out all over South Africa.²⁹⁵ The basic rationale for the establishment of the Specialised Commercial Crime Court, was the view that there was a “need to harness scarce investigative and prosecutorial resources in pursuing commercial criminals, and to manage them in ways that enhance the quality of the cases brought to court”.²⁹⁶ Further, for more immediate justice than might be the case in “courts with more open rolls”.²⁹⁷ Wannenburg explains that the Special Commercial Crime Unit has dedicated on-site courts, which are serviced by co-located police (investigators) and prosecutors, thus enabling the courts to sit much longer hours compared to the general courts.²⁹⁸

3.4.4.2 Composition and appointment of presiding officers in the SCCC

²⁹¹ Heath *et al* (n 263 above) 188.

²⁹² Heath *et al* (n 263 above) 162. It was recommended that rotation take place between 18 – 24 months.

²⁹³ A Albeker ‘A model for justice delivery? The Specialised Commercial Crimes Court’ (2002) *SA Crime Quarterly* 31; other SCCCs have been established by notice in the government gazette issued by the Department of Justice and Constitutional Development (now Department of Justice and Correctional Services). The latest being GN 157 of 2021 in which notice was given of the establishment of Specialised Commercial Crimes Court in Limpopo, Mpumalanga, Northwest, and Northern Cape Provinces. There are currently twenty-two (22) dedicated courts throughout the country with a footprint of dedicated commercial crime courts in all provinces – National Assembly *question nw2296 to the Minister of Justice and Correctional Services* <https://pmg.org.za/committee-question/23242/> (accessed 13 October 2023).

²⁹⁴ Wannenburg (n 79 above) 19.

²⁹⁵ C Jordaan Specialised Commercial Crime unit: an overview [PowerPoint slides] (2008) <https://pmg.org.za/files/docs/080220sccu.ppt> (accessed 26 January 2023).

²⁹⁶ Albeker (n 293 above) 32.

²⁹⁷ Albeker (n 293 above) 32.

²⁹⁸ Wannenburg (n 79 above) 19.

The court operates at a regional court level and is presided over by two magistrates.²⁹⁹ Specialist prosecutors prosecute the cases that are brought to the court.³⁰⁰ The model adopted by the SCCC is that of a seamless criminal justice process, where the investigators, prosecutors and magistrates are entirely dedicated to dealing with cases that fall within the mandate of the Commercial Branch in the jurisdiction of the various Regional Courts in which the SCCC has been set up.³⁰¹ According to Altbeker, “the existence of the court, and, more importantly, the integration of the three main functions of the criminal justice system — investigation, prosecution and adjudication — is regarded by many as one of the best examples of successful criminal justice reform implemented in the past few years”.³⁰²

The National Prosecuting Authority (NPA), in its 2015/2016 Annual Report states that the SCCU’s methodology of prosecutor-guided investigation greatly contributes to the high conviction rate, because the SAPS investigator and the Prosecutor working as a team ensures the effective and efficient investigation and prosecution of cases and plays an important role in the expeditious finalisation of cases.³⁰³ The NPA also highlights that by conducting thorough screening of cases, it avoids placing cases lacking reasonable prospects of success on the court rolls, which then frees the court rolls for cases with reasonable prospects of success.³⁰⁴

Altbeker, after interviews with the staff highlights the advantages of the integration of the three main functions of the criminal justice system as follows: investigations, being the joint responsibility of investigators and prosecutors, are generally better managed and more speedily completed; prosecutors are better prepared when their cases eventually come to trial; and all role-players, magistrates included, understand and appreciate the legal and factual issues at stake in these cases, because of their heightened expertise and experience.³⁰⁵

3.4.4.3 Jurisdiction of the SCCC

The cases heard in the SCCC are all of ‘commercial criminality’, which includes a range of different types of fraud,³⁰⁶ money laundering, some categories of theft, and a variety of

²⁹⁹ Altbeker (n 293 above) 31.

³⁰⁰ Jordaan (n 295 above).

³⁰¹ Altbeker (n 293 above) 33.

³⁰² Altbeker (n 293 above) 31.

³⁰³ National Prosecuting Authority (NPA) ‘Annual Report 2015/2016’ 22.

³⁰⁴ NPA Annual Report 2015/2016 (n 303 above) 22.

³⁰⁵ Altbeker (n 293 above) 33.

³⁰⁶ Such as credit card fraud, advance fee fraud and embezzlement of company funds.

statutory offences arising from around various legislation governing the conduct of business³⁰⁷ in South Africa.³⁰⁸ In summary, the core function of the SCCC revolves around fraud and theft cases that are “too serious to be heard in district courts, but not serious enough to be heard in the high courts”.³⁰⁹

3.4.4.4 Powers of the SCCC

Similar to the Sexual Offences Court, the presiding officer in the SCCC is a regional magistrate.³¹⁰ The magistrate possesses the powers and performs the duties conferred or imposed upon magistrates by any law for the time-being in force within the province in which his or her district is situated.³¹¹ The magistrate is also subject to the administrative control of the head of the administrative region in which his or her district is situated.³¹²

The SCCC has the power to impose sentences indicated in the penalty provisions of statutory offences that are found in the various legislation.³¹³ Where a penalty is not prescribed in respect of an offence, the SCCC can impose a sentence as provided for in section 276 of the Criminal Procedure Act 1977, which the court considers appropriate, and which is within the court’s penal jurisdiction.³¹⁴

3.4.4.5 Accessibility of the SCCC

The SCCC has been established in all the provinces in SA after the Minister of Justice and Correctional Services issued notices in the Government Gazette of the places in which these

³⁰⁷ Such as offences in the Companies Act 71 of 2008. Secs 213 to 215 of the Companies Act 71 of 2008 make provision for various offences and sec 216 makes provision for penalties. Sec 217 specifically indicates that “[d]espite anything to the contrary contained in any other law, a Magistrate’s Court has jurisdiction to impose any penalty provided for in sec 216.”

³⁰⁸ Albeker (n 293 above) 33.

³⁰⁹ Albeker (n 293 above) 33.

³¹⁰ Sec 12(1)(a) of the Magistrates’ Court Act 1944.

³¹¹ Sec 12(1)(b) of the Magistrates’ Court Act 1944.

³¹² Sec 12(1)(c) of the Magistrates’ Court Act 1944.

³¹³ There are about 60 pieces of legislation that create statutory commercial crimes which can be prosecuted by the SCCU. These include the Companies Act, 2008, the Banks Act 94 of 1990 (sec 91 (offences and penalties), Cooperative Banks Act 40 of 2007 (sec 80 (offences), and sec 81 (penalties).

³¹⁴ Act 51 of 1977. Sec 276 of the Criminal Procedure Act, 1977 provides for a range of punishments that can be imposed on a convicted offender ranging from imprisonment, declaration as a habitual criminal, committal to any institution established by law, a fine, correctional supervision.

courts will be located in the respective provinces.³¹⁵ This is to ensure that serious commercial crime and corruption matters are heard expeditiously.³¹⁶

3.4.4.6 *Locus standi in the SCCC*

Similar to the Sexual Offence Court, the power to institute criminal proceedings is provided for in section 179 of the Constitution. This power vests in the National Prosecuting Authority, which is the only authority empowered to institute and conduct criminal proceedings on behalf of the state.

3.4.4.7 *Appeals from the SCCC*

The SCCC is bound by the same rules of precedence binding other Regional Magistrates' courts and as such, appeals from the Specialised Commercial Crimes Court go to the High Court and then to the Supreme Court of Appeal.³¹⁷ Further appeal can be made to the Constitutional Court, subject to the appellant showing that the case concerns a constitutional matter.³¹⁸

3.4.4.8 *Reflections on the SCCC*

The then Minister of Justice, Bridgette Mabandla, lauded the success of the SCCC in her 2005 Budget Vote speech where she states that, "... commercial crime courts have gained business sector support and international acclaim as a best practice model."³¹⁹ In the DOJCD Annual Report 2022/2023, it was reported that the Specialised Commercial Crimes Unit (SCCU) finalised 418 cases with 364 convictions – a conviction rate of 87%.³²⁰

The success of the Specialised Commercial Crimes Court has been attributed to the fact that the investigator and the prosecutor work together from the onset (investigator-led prosecution). According to Wannenburg, this has allowed prosecutors to provide guidance on the prosecution strategy and the type of information that will be necessary, ultimately leading to a higher

³¹⁵ DOJCD Annual Report 2021/2022 (above n 285) 40.

³¹⁶ DOJCD Annual Report 2021/2022 (above n 285) 80.

³¹⁷ Altbeker (n 293 above) 32.

³¹⁸ Constitutional Court website 'How cases reach the Constitutional Court' <https://www.concourt.org.za/index.php/28-role-of-the-constitutional-court/how-cases-reach-the-constitutional-court> (accessed 24 April 2023).

³¹⁹ Mabandla Budget Vote Speech (n 244 above).

³²⁰ Department of Justice and Constitutional Development (DOJCD) 'Annual Report 2022/2023' 118.

prospect of successful prosecution.³²¹ The Bureau of Justice Assistance clarifies that the role of the prosecutor is that of a guiding role in the early stage of the investigation and not one in which the prosecutor literally conducts the investigation.³²² It is notable that the NPA in its Prosecution Policy, asserts that effective co-operation with the police and other investigating agencies from the outset is essential to the efficacy of the prosecution process.³²³ Albeker briefly explains how the investigator-led prosecution works in practice, as follows³²⁴:

- a. The case is allocated to an investigator at the SCCU.
- b. The investigator is required to present a draft investigation plan setting out what evidence is to be collected, and the timeframes within which this will be done.
- c. The draft investigation plan is presented to the allocated prosecutor and once completed, it is affixed to the docket and forms a point of reference and accountability.
- d. The investigator and prosecutor will then be jointly responsible for ensuring that the docket is properly completed. The investigator then completes the investigation and where appropriate, the investigator and the prosecutor may meet to follow-up on progress in the investigation of the case. Where the case involves a complex matter or where new information comes to the fore, a reformulation of the charges or the investigation plan may take place.

Some of the major benefits of an investigator-led prosecution are highlighted by Wannenburg as follows:

- a. The early involvement of prosecutors means that the decision to close cases with no prospect of success, due to a lack of evidence or technical problems, are taken earlier, thereby avoiding wasting resources and court time;
- b. Cases are properly prepared with a higher prospect of successful prosecution; there is better ownership and accountability by the Prosecutors as they deal with one case through its life cycle; and

³²¹ Wannenburg (n 79 above) 19.

³²² NW Myeza 'An analysis of the prosecution-led investigation model in murder cases' [Unpublished PhD Department of Police Science, University of South Africa] (2019) 135 citing Bureau of Justice Assistance Prosecution task force on car-hijacking (2001) 9 https://archive.vera.org/sites/default/files/resources/downloads/Carjacking_final_evaluation.pdf.

³²³ NPA Prosecution policy (n 284 above) paragraph 8.

³²⁴ Albeker (n 293 above) 37.

- c. Prosecutors have time to adequately prepare for cases and during the case preparation they develop relationships with victims which improves information and increases the likelihood of success in a case³²⁵

Altbeker further highlights some external factors that contribute to the success of the SCCC.³²⁶ One major factor is that, compared to many other regional courts, the SCCC has more resources in terms of prosecutors per court, and has also been able to attract and retain high calibre personnel.³²⁷ Another factor has been the commitment of management staff in both the SCCC and the SCCU to co-operate with each other.³²⁸ This relationship, Altbeker points out, is important as a lack of co-operation would have doomed the multi-agency initiative.³²⁹ The management staff, assisted by Business Against Crime (BAC), established structures and systems to manage tensions, and are committed to resolving any tension when they arise.³³⁰

Another factor for the success of the SCCC is that Prosecutors deal with one case through its life cycle, thus obviating the need for a new Prosecutor to ‘start’ the process from the beginning so as to familiarise themselves with the facts of the case.

3.5 The Hermanus Environmental Court

3.5.1 Establishment of the Hermanus Environmental Court

As briefly mentioned in paragraph 1.1 of chapter 1, South Africa once established an environmental court in Hermanus, Western Cape. The court, known as the Hermanus Environmental Court (Hermanus Court), was regarded as a priority court, and established in March 2004 to provide for the effective and speedy prosecution of poaching syndicates and to fast-track the trials of criminal offenders, particularly abalone poachers,³³¹ although cases relating to other environmental issues such as the illegal trade in rhinoceros horns, water

³²⁵ Wannenburg (n 79 above) 19; National Resource and Technical Assistance Center ‘Investigating Violent Crime: The Prosecutor’s Role’ (2018) 3 <https://crimegunintelcenters.org> (accessed 5 February 2023).

³²⁶ Altbeker (n 293 above) 33.

³²⁷ Ibid.

³²⁸ Ibid.

³²⁹ Ibid.

³³⁰ Altbeker (n 293 above) 33: The involvement of BAC is yet another factor explaining the success of the model. Although most of BAC’s role may be described as facilitating or catalytic, it has also assisted in the provision of administrative and operational resources. It has played a particularly important role in securing the services of skilled personnel, many of whom have come out of retirement to assist in the development of staff competencies in the SCCU and Commercial Branch.

³³¹ The Department of Justice and Constitutional Development (DOJCD) ‘Annual Report 2003/2004’ 28; Justice and Correctional Services *South Africa Yearbook* (2005/2006) 430.

pollution and other marine offences were also heard in the court.³³² The challenge with illegal harvesting of abalone and associated criminal activities had been one that existed since the 1960s.³³³ Several key elements contributed to this challenge, notably the high value of the mollusc, the low risk of detection, and weak deterrence due to low fines and penalties as well as poor conviction rates.³³⁴ In addition, the low priority given to environmental cases in general courts combined with prosecutors often not having the expertise needed to successfully prosecute, made the situation even worse.³³⁵ With the conviction rate for environmental crimes in South Africa at around 10%, the Department of Justice and Constitutional Development, the Directorate of Public Prosecution (DPP) in the Western Cape, and the then Department of Environmental Affairs and Tourism's (DEAT) Marine and Coastal Management (MCM) branch, collaborated to establish a dedicated environmental court in the Western Cape.³³⁶ The Hermanus Court received strong support from the Minister responsible for justice and the Minister responsible for environmental affairs, and as such the court was quickly and smoothly established.³³⁷

According to Moolla, the specialist environmental court was established for four main reasons. Firstly, the normal magistrates' courts were overburdened by more "serious" crimes such as murder, rape, and so forth; secondly, environmental crimes were not considered as "important" as other crimes by the overburdened magistracy; thirdly, a specialised environmental crimes court would be able to deal with poaching crimes efficiently and expeditiously and a clear message could be sent to poachers and their bosses and fourthly, the environmental crimes court would be staffed with properly trained judicial and prosecutorial officers who were experts in environmental law.³³⁸ Moolla further explains that the court came into existence after the government put the Territorial User Rights Fishery (TURF) Policy in place.³³⁹ The court

³³² PJ Snijman and M Phil 'Hermanus environmental court: does it protect the environment?' (2005) *News and Views for Magistrates* 3.

³³³ K Rosencrans 'Environmental Courts prove to be effective' *Traffic Stop Illegal Fishing Case Study 2* (2011) <https://stopillegalfishing.com/wp-content/uploads/2016/05/CS2-Environmental-Courts.pdf> (5 March 2022).

³³⁴ Rosencrans (n 333 above).

³³⁵ Rosencrans (n 333 above).

³³⁶ Rosencrans (n 333 above).

³³⁷ Rosencrans (n 333 above).

³³⁸ I Chohan Environmental courts: an analysis of their viability in South Africa with particular reference to the Hermanus environmental court Unpublished LLM School of Law University of Kwa Zulu Natal (2013) 40 – 41 citing S Moolla *Contextualising illegal, unregulated and unreported fishing of marine resources in South African waters* (2008).

³³⁹ Chohan (n 338 above) 40 – 41.

was seen as one of the legal mechanisms required to ensure that the TURF Policy was successfully implemented.³⁴⁰

Similar to the initial Sexual Offences Court and the Specialised Commercial Crimes court which started out as pilot projects, the Hermanus Court was a pilot project for the prosecution of abalone related offences, as well as a pilot model for other jurisdictions.³⁴¹

3.5.2 Composition and appointment of presiding officers

The court functioned at the level of a regional court within the Magistrates court system of the Western Cape division. It had one Magistrate and two dedicated prosecutors.³⁴²

3.5.3 Jurisdiction of the Hermanus Court

Respondent No 1 confirmed that the court had been established to deal with abalone poaching, but its jurisdiction was later extended to include water pollution cases, illegal trade in rhino horns and marine offences.³⁴³

The Hermanus Court had jurisdiction within the regional division of the Western Cape and as such cases could be transferred from other district courts in the Western Cape division to be heard in the Hermanus Court.³⁴⁴ Respondent No 1, during the interview highlighted that there was a need to ensure that the relevant legislation can support the work of the prosecutors. In this regard, the respondent highlighted that the penalty provision in the Marine Living Resources Regulations, 1998 (MLRR)³⁴⁵ was amended to ensure that the fine that could be imposed was increased from a possible twenty thousand rand to eight hundred thousand rand.³⁴⁶ Prior to this, certain lacunae, and uncertainty with respect to the definition of abalone and the offence relating to abalone poaching was addressed. In this regard, Regulation 36 of

³⁴⁰ Chohan (n 338 above) 41; L van Sittert *et al* 'Benchmarking the first decade of post-apartheid fisheries reform in South Africa' *Marine Policy* (2006) 103 <https://www.sciencedirect.com/science/article/abs/pii/S0308597X0500045X> (accessed on 15 March 2023).

³⁴¹ Snijman and Phil (n 332 above) 2.

³⁴² Respondent No 1 Virtual Interview (30 November 2022).

³⁴³ Respondent No 1 Virtual Interview (n 342 above).

³⁴⁴ Snijman and Phil (n 332 above) 2.

³⁴⁵ GNR 1111 of Government Gazette 19205 of 2 September 1998.

³⁴⁶ Regulation 96 states that "[a]ny person who contravenes or fails to comply with any provision of these Regulations, shall be guilty of an offence and liable on conviction to a fine not exceeding R800 000-00 or to imprisonment not exceeding two years."

the MLRR was amended to provide clarity that specific activities relating to abalone, required a permit.³⁴⁷

3.5.4 Powers of the Hermanus Court

In terms of section 12 of the Magistrates' Court Act, 1944, a regional court magistrate sitting in a regional court, shall possess the powers and perform the duties conferred or imposed upon magistrates by any law for the time being in force within the province in which his/her district is situated.³⁴⁸ He or she is also subject to the administrative control of the head of the administrative region in which his or her district is situated.³⁴⁹

The Hermanus Court was a regional court and as such had the power to impose fines or imprisonment or both fine and imprisonment in respect of offences which it prosecuted and which were mainly provided for in the Marine Living Resources Act, 1998³⁵⁰ read with the Marine Living Resources Regulations.³⁵¹ Where a penalty was not prescribed in respect of an offence in terms of the legislation, a sentence as provided for in section 276 of the Criminal Procedure Act 1977³⁵² which the court considers appropriate and which is within the court's penal jurisdiction can be imposed.³⁵³

3.5.5 Accessibility of the Hermanus Court

³⁴⁷ This amendment was effected through GN R1455 of 8 October 2003. Hitherto the Regulation did not clearly indicate an offence that was enforceable. Regulation 36 (prior the amendment) stated that "(1) No person shall during and following fishing or related activities, transport any abalone that is— (a) not in the whole state, except on the authority of a permit; or remove abalone other than with the use of a flat implement of which the front edge is not less than 25 mm wide and not more than 35 mm wide and that has been so rounded as not to cut or damage the foot of an abalone. (2) No person under the age of 12 years shall be entitled to obtain a recreational abalone permit." With the amendment in 2003 the Regulation clearly stipulated a variety of activities that could not be carried out without the authority of a permit - fishing, collecting, disturbing, keeping, controlling, storing, transporting or be in possession of any abalone; transport or be in possession of abalone that is not in the whole state or remove abalone other than with the use of a flat implement of which the front edge is not less than 25 mm wide and not more than 35 mm wide and that has been so rounded.

³⁴⁸ Sec 12(1)(a) of the Magistrates Act 1944.

³⁴⁹ Sec 12(1)(c) of the Magistrates Act 1944.

³⁵⁰ Act 18 of 1998.

³⁵¹ GNR 1111 (n 342 above).

³⁵² Act 51 of 1977.

³⁵³ Sec 276 of the Criminal Procedure Act, 1977 provides for a range of punishments that can be imposed on a convicted offender ranging from imprisonment, declaration as a habitual criminal, committal to any institution established by law, a fine, or correctional supervision.

The court was located in the area where there was a high prevalence of abalone poaching to ensure ease of prosecuting offenders who committed crimes relating to abalone poaching.³⁵⁴ Prosecutors, therefore, did not have to travel long distances to prosecute such cases.

3.5.6 *Locus standi*

Similar to the SOC and SCCC, the power to institute criminal proceedings is provided for in section 179 of the Constitution, and this power vests in the National Prosecuting Authority, which is the only authority empowered to institute and conduct criminal proceedings on behalf of the state. Two prosecutors were assigned to the court to prosecute cases.³⁵⁵

3.5.7 *Appeals*

The Hermanus Court, being a regional magistrates' court, was bound by the same rules of precedence binding other Regional Magistrates' courts, and as such appeals from the court went to the High Court and could go further to the Supreme Court of Appeal.³⁵⁶ Further appeal could be made to the Constitutional Court subject to the appellant showing that the case concerns a constitutional matter.³⁵⁷

3.5.8 *Closure of the Hermanus Court*

Regrettably, the Hermanus Court, initially intended as a pilot project to be rolled out to other provinces was shut down in 2007, following a high-level political decision that was taken to close a number of specialised courts that lacked legislative mandates.³⁵⁸ Specifically, the Department of Justice and Constitutional Development was reluctant to "continue to provide extra personnel and facilities for a specialised court that was not mandated by specific legislation".³⁵⁹ This decision occurred during the period that the then Minister of Justice,

³⁵⁴ Respondent No 1 Virtual Interview (n 342 above).

³⁵⁵ Respondent No 1 Virtual Interview (n 342 above).

³⁵⁶ Sec 83 of the Magistrates Court Act 1944.

³⁵⁷ Constitutional Court website (n 318 above).

³⁵⁸ Rosencrans (n 333 above). Parliamentary Monitoring Group (PMG) 'Hearing on the report of the Auditor-General on a performance audit of the handling of confiscated abalone by Department of Environmental Affairs and Tourism' (2009) <http://www.pmg.org.za/report/20091007-hearing-report-auditor-general-performance-audit-handlingconfiscated> (accessed 12 April 2022).

³⁵⁹ F Craigie, P Snijman and M Fourie 'Environmental compliance and enforcement institutions' in AR Paterson and LJ Kotzé (eds) *Environmental Compliance and Enforcement in South Africa: Legal Perspectives* (2009) 98.

Bridgette Mabandla, had instituted a review of specialist courts that existed at the time to assess “the impact, effectiveness and sustainability of specialised courts within the judicial system”.³⁶⁰

3.5.9 Reflections on the Hermanus Court

The court, in its inception year, heard 74 cases and was able to successfully prosecute 51 thereof.³⁶¹ During the Hermanus Court’s first 30 months of existence, it had a conviction rate of about 80% with 266 convictions out of a total number of 333 cases that were finalised.³⁶² The Court finalised a total of 158 cases in the 2004/2005 financial year, and a total of 98 cases between April 2005 and December 2005, with an 84% conviction rate.³⁶³ During the last 12 months of its operation, the environmental court in Hermanus achieved an 85% conviction rate.³⁶⁴ So, to a large extent the Hermanus Court was successful if one were to take into consideration the conviction rates achieved during its existence.

Information obtained during the interview with Respondent No 1 established the following as factors which contributed to the success of the Hermanus Court:³⁶⁵

- a. There were dedicated investigators at the Hermanus Police Station who investigated environmental crimes and worked closely with the prosecutors. Respondent No1 highlights that from the onset, the investigating officers and the prosecutors worked closely on environmental criminal cases, and this ensured successful prosecution of cases at the Hermanus Environmental Court.³⁶⁶ Respondent No1 further highlights that the relationship and trust between the investigator (at the SAPS) and the prosecutor is key, because a thorough investigation will assist the prosecutor to obtain a conviction.³⁶⁷ The investigator must, therefore, be willing to seek guidance from the prosecutor to ensure that all the evidence required for a successful prosecution is in place.³⁶⁸ The importance of the investigator and prosecution working closely together, cannot be overemphasised. This close working relationship is what has contributed to the success of the Specialised Commercial Crimes court discussed previously.

³⁶⁰ Mabandla Budget Vote Speech (n 244 above).

³⁶¹ Rosencrans (n 333 above).

³⁶² Snijman and Phil (n 332 above) 2.

³⁶³ National Prosecuting Authority (NPA) ‘Annual Report 2005/2006’ 27.

³⁶⁴ Rosencrans (n 333 above).

³⁶⁵ Respondent No 1 (n 342 above).

³⁶⁶ Ibid.

³⁶⁷ Ibid.

³⁶⁸ Ibid.

- b. The prosecutors were dedicated, experienced, and had a passion for the protection of the environment.
- c. The fact that the Hermanus Court was a Regional Magistrate court also contributed to the high success rate of the court, as matters from the surrounding district courts could be heard in the Hermanus court, thus ensuring a good flow of environmental cases.
- d. There was a high conviction rate with most convictions being direct imprisonment without the option of a fine.
- e. Environmental cases were prioritised and placed on the court roll regularly.
- f. With respect to the presiding magistrate, Respondent No 1 opines that expertise in environmental law is not necessarily required. Instead, professionalism and fairness in overseeing cases and correct interpreting and applying the law are essential.³⁶⁹ Respondent No 1 explained that the magistrate presiding at the Hermanus Court was objective and was not afraid to give harsh sentences if there was evidence to support a conviction.³⁷⁰

On the aspect of the closure, Respondent No 1 states that the challenge with keeping the court operational started when the contract of the appointed magistrate ended, and no permanent magistrate was appointed to the court. The magistrates who were required to sit at the court on a temporary basis were not keen to travel to Hermanus.³⁷¹ Respondent No 1, however, expressed the view that the lack of political will to continue operating the court, led to its eventual closure, beyond the fact that the DOJCD consistently states that the closure of the court was as a result of the lack of an enabling legislation.

Even if this were to be the case, it is submitted that perhaps the DOJCD should have gone further to consider what legal processes could be put in place to address this shortcoming, even if it meant putting a long-term plan in place to amend relevant legislation. This is because in 2009, barely two years after the closure of the Hermanus Court, the then Minister for Environmental Affairs mooted the possibility of establishing an environmental court in South Africa.³⁷²

³⁶⁹ Respondent No 1 (n 342 above).

³⁷⁰ Ibid.

³⁷¹ Ibid.

³⁷²E Iannucci 'SA to reinstate specialised courts to deal with environmental crimes' (2009) <https://www.engineeringnews.co.za/article/sa-to-reinstate-specialised-courts-to-deal-with-environmental->

The call for the establishment of an environmental court in South Africa continues to be made in various fora. In the Western Cape Police Ombudsman Annual Report for the 2019/2020 financial year, the Western Cape Police Ombudsman made recommendations that an Environmental court be established in consultation with the National Minister of Justice and Constitutional Development, to address the high incidents of abalone poaching.³⁷³ In 2020, at the Environmental Affairs, Forestry, and Fisheries Portfolio workshop, the national Department of Forestry, Fisheries and Environment (national DFFE) responding to a question about specialised environmental courts, indicated that there had been engagements with the Department of Justice and Constitutional Development in 2010 on whether it would make sense to establish courts similar to the one which has existed at Hermanus, to deal with abalone poaching.³⁷⁴ The national DFFE further indicated that, although the Department of Justice and Constitutional Development was not in favour of dedicated courts due to the complex logistics which would be involved, it might now be time to revisit the issue again.³⁷⁵

It is submitted that the discussion about establishing a special environmental court by the then Minister for Environmental Affairs in 2009, as well as recent discussions in 2020, suggests that the decision to close the Hermanus Environmental Court may have been premature and not thoroughly considered.

Illegal activities relating to the environment, regardless of its nature, impact on vital natural resources such as the atmosphere, water, plant or animal species, and contribute to the depletion of these natural resources.³⁷⁶ The impact is usually long term and the full consequences are often unknown or only evident many years after the actual activities took place.³⁷⁷ As Snijman and Phil opine, “[e]nvironmental crime is sometimes opportunistic and on a small scale, but more often it is very lucrative and highly organised. If the Hermanus Environmental Court

crimes-sonjica-2009-06-22 (accessed 6 March 2022); See also N Gabara ‘Sonjica talks tough on illegal dumping’ (2009) <https://www.sanews.gov.za/south-africa/sonjica-talks-tough-illegal-dumping> (accessed 6 March 2022).

³⁷³ Western Cape Government ‘Western Cape Police Ombudsman Annual Report 2019/2020’ 26 <https://www.westerncape.gov.za/police-ombudsman/documents-and-publications> (accessed 18 May 2022); See also South African Government ‘MEC Albert Fritz escalates Ombudsman’s report in fight against poaching’ (2019) <https://www.gov.za/news/media-statements/mec-albert-fritz-escalates-ombudsman%E2%80%99s-report-fight-against-poaching-13-aug> (accessed 18 May 2022).

³⁷⁴ Parliamentary Working Group Environment, Forestry and Fisheries Portfolio Committee Workshop (Environment Portfolio Committee Workshop) ‘Environment, Forestry and Fisheries Legislation and Policy Meeting Summary’ (2020) 3 <https://pmg.org.za/committee-meeting/30899/> (accessed 1 April 2022).

³⁷⁵ Environment Portfolio Committee Workshop (n 374 above) 3.

³⁷⁶ Snijman and Phil (n 332 above) 3.

³⁷⁷ Snijman and Phil (n 332 above) 3.

made a difference in the fight against abalone poaching, it can make a difference with regard to other types of environmental crime”.³⁷⁸

3.6 Summary of reflections

As this chapter concludes, the table below outlines the essential characteristics of the five specialised courts. These attributes will serve as valuable insights for defining the features of a proposed specialised environmental court.

Table 2 Characteristics of the five specialised courts

Key Attributes	Independent specialised courts		Designated specialised courts		
	Civil Jurisdiction		Criminal Jurisdiction		
	Labour Court	Land Claims Court	Sexual Offences Court	Specialised Commercial Crimes court	Hermanus Environmental Court
Established through enabling legislation	Yes	Yes	Yes	Yes	No
Establishing a specialised court through enabling legislation is a key attribute. Like the Hermanus Court, the demise of the initial Sexual Offences Court was also attributed to the lack of enabling legislation. The MATTSO report was quite emphatic in its recommendation that the new Sexual Offences courts must be established by enabling legislation. This led to the Criminal Law Sexual Offences and related matters Amendment Act 2007 being amended to cater for designation of High Courts and Magistrates courts at which Sexual Offence Courts may be established. All the four specialised courts discussed in this chapter are currently established or designated through legislation. Establishing or designating the proposed specialised environmental court through enabling legislation will be crucial for ensuring its long-term secure operation.					

³⁷⁸ Snijman and Phil (n 332 above) 3.

Appointment of permanent presiding officers	Yes	No	Yes	Yes	Yes
From the discussion on the Land Claims Court, one of the challenges the court faces is the fact that the judges are not permanently appointed to the court. This has led to the inability to process land claims efficiently and timeously. This has been addressed in the Land Court Act 2023 which makes provision for the judges of the Land Court to be permanently appointed. Similarly, the rotation of magistrates in the Sexual Offence Court was one of the challenges that led to the demise of the initial Sexual Offence Court. The Hermanus Court also experienced operational challenges in the absence of a ‘permanent’ magistrate. It is therefore submitted that consideration must be given to the appointment of permanent presiding officers in the proposed specialised environmental court as this will have a positive impact on the operations of the court with respect to the finalisation of cases effectively and efficiently.					
Ease of accessibility / proximity to the non-compliance location	Yes	Yes	Yes	Yes	Yes
Ease of accessibility of courts is essential for upholding the rule of law, ensuring equal access to justice, and fostering trust in the legal system. In the context of a court with criminal jurisdiction, it is submitted that the proximity of a specialised environmental court to the location of the non-compliance or illegal activity is crucial as was the case in the Hermanus Court.					
Makes use of assessors / can make use of assessors	Yes	Yes	Yes	Yes	Yes

Consideration should be given to the use of assessors particularly in areas of law that are technical or scientific in nature such as environmental law. Importantly the assessors should possess expertise and practical experience in the specific area of law for which the court has been established.

Investigator-Prosecutor co-location	Not applicable	Not applicable	No	Yes	Yes
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The advantage of investigator-prosecutor co-location or at the very least involving prosecutors early in environmental criminal cases, cannot be overstated. The success of the Hermanus Court and the Specialised Commercial Crimes Court has been credited to this practice.

Dedicated Prosecutors	Not applicable	Not applicable	Yes	Yes	Yes
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It is submitted that dedicated prosecutors handle cases allocated to them from the start of the trial to the end of the trial to prevent interruptions in the trial process due to the appointment of new prosecutors midway thus jeopardising the timely finalisation of the case. This practice adopted in the Sexual Offences Courts, Specialised Commercial Crimes Court, and Hermanus Court has significantly contributed to the successful prosecution of cases in these courts.

Buy in from relevant stakeholders: DOJCD	Yes	Yes	Yes	Yes	Yes (initially)
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The involvement and support of relevant stakeholders particularly, the Department responsible for the establishment of courts, are crucial to the establishment of a specialised court. Throughout the history of the five specialised courts, it is evident that the Department of Justice and Constitutional Development plays a pivotal role in ensuring their establishment and ongoing operation.

3.7 Conclusion

This chapter has analysed the benefits of court specialisation and considered the fundamental components of four specialised courts – the Labour Court, the Land Claims Court, the Sexual Offences Court, and the Specialised Commercial Crimes Court - alongside the Hermanus Environmental Court, emphasising specific key attributes present in these courts. Chapter 4 will focus on a comparative analysis of two operational specialised environmental courts in New South Wales, Australia, and Kenya. This analysis will provide additional insights for the proposed establishment of a specialised environmental court in South Africa, which will be further discussed in chapter 5.

CHAPTER 4

A COMPARATIVE ANALYSIS OF SPECIALISED ENVIRONMENTAL COURTS IN NEW SOUTH WALES, AUSTRALIA, AND KENYA

4.1 Introduction

According to Pring and Pring, the proliferation of environmental courts is propelled by a growing comprehension of human rights and environmental law, heightened recognition of the threats of climate change, and discontentment with the general court systems.¹ The shift in attitudes is also mirrored in international declarations and resolutions concerning the environment. While the Stockholm Declaration (1972)² highlights principles of conservation, the Rio de Janeiro Declaration (1992) emphasises “effective access to judicial and administrative process” in environmental matters.³ In 2022, the United Nations General Assembly adopted a resolution recognising the right to a clean, healthy and sustainable environment as a human right.⁴ The courts will play a central role in the realisation and protection of this right as now recognised, whether at a national or international level.

This chapter will delve into the specialised environmental courts of two countries: the New South Wales’ Land and Environment Court in Australia, and Kenya’s Environment and Land Court. Discussions will encompass the historical background of these courts, and an overview of their fundamental components and operations which will cover details on judicial officers, jurisdiction, rules of procedure, accessibility, *locus standi*, and appeals. Following this, the

¹ G Pring and C Pring ‘Specialized environmental courts and tribunals: the explosion of new institutions to adjudicate climate change and other complex environmental issues’ (2010) 3 – paper presented at the 2nd Global Conference on Environmental Governance and Democracy.

² United Nations ‘Background to the United Nations Conference on the Human Environment, 5-16 June 1972 Stockholm’ <https://www.un.org/en/conferences/environment/stockholm1972> (accessed 10 February 2024).

³ United Nations ‘Background to the United Nations Conference on Environment and Development, Rio de Janeiro, Brazil, 3-14 June 1992’ <https://www.un.org/en/conferences/environment/rio1992> (accessed 10 February 2024).

⁴ Paragraph 1 of Resolution A/76/L.75 adopted on 28 July 2022 <https://digitallibrary.un.org/record/3982508?ln=en> (accessed 4 March 2024). On 8 October 2021, the UN Human Rights Council adopted resolution 48/13 recognising that a clean, healthy, and sustainable environment is a human right - <https://digitallibrary.un.org/record/3945636?ln=en> (accessed 4 March 2024).

chapter will analyse the findings from the comparative analysis of the fundamental components of these two courts before concluding.

The selection of these courts is premised on the fact that the Land and Environment Court in New South Wales is widely regarded as one of the foremost examples of a specialised environmental court globally and it has, as would be seen in later discussions, evolved over the years. Similarly, Kenya is recognised as the first African nation to establish a court dedicated to environmental and land matters, representing one of Africa's well-functioning and advanced specialised environmental court.⁵ Both courts will, therefore, serve as best practice models for the operation of specialised environmental courts. The discussion will initially centre on the New South Wales' Land and Environment Court followed by an examination of the Kenyan Environment and Land Court.

4.2 The Land and Environment Court of New South Wales, Australia

4.2.1 History of the Land and Environment Court

New South Wales is one of the six states in Australia and is divided by natural features into four distinct geographical sections – the coast, the mountains, the central plains and western plains.⁶ Prior to the establishment of the Land and Environment Court, there was no specific focus on environmental law in New South Wales.⁷ In addition, planning and land matters were dealt with by different tribunals and courts.⁸ Valuation, compulsory acquisition and land matters were dealt with by three judicial bodies - a Land and Valuation Court, Valuation Boards of Review, and the Supreme Court (for title issues); building, subdivision, and development appeals were dealt with by the Local Government Appeals Tribunal in terms of the Local Government Act, 1919 (NSW)⁹; civil (equitable) enforcement and judicial review of both government and tribunal decisions were undertaken by the Supreme Court of New South Wales and criminal enforcement was undertaken in the Local Court and the District Court of New

⁵ LY Sulistiawati *et al Environmental Courts and Tribunals - 2021: A Guide for Policymakers* United Nations Environmental Programme (2022) 11.

⁶ New South Wales Government 'Facts about New South Wales's' <https://www.nsw.gov.au/about-nsw/key-facts-about-nsw#toc-geography-of-nsw> (accessed 15 March 2022).

⁷ United Nations Environmental Programme (UNEP) 'The New South Wales Land and Environment Court' <https://leap.unep.org/node/49> (accessed 15 March 2022).

⁸ UNEP The New South Wales Land and Environment Court (n 7 above).

⁹ Act No 41 of 1919.

South Wales.¹⁰ This plethora of courts and tribunals dealing with different aspects was regarded as irrational and inefficient contributing to inconsistent decision-making and high litigation costs.¹¹

The Land and Environment Court (LEC) was established in 1980 in terms of the Land and Environment Court Act 1979 (LECA) as part of the process of reforming the planning system of New South Wales, embarked upon in 1979.¹² The LEC replaced the Land and Valuation Court and the Local Government Appeals Tribunal.¹³ It is regarded as the first specialist environmental court established as a superior court of record in the world, bringing together a superior court of record and an administrative tribunal in one institution.¹⁴ It is equal in rank and status with the Supreme Court in the hierarchy of courts in New South Wales.¹⁵ It is an independent, specialised environmental court model, and has exclusive jurisdiction over civil and criminal environmental, land planning, building, and mining matters.¹⁶ The objective for establishing the LEC was two-fold: rationalisation - to have a one stop shop to deal with all aspects of planning, environmental or lands disputes,¹⁷ and specialisation – to have a court with a wide exclusive jurisdiction in planning, environmental and land matters.¹⁸ Preston explains that in order to ensure specialisation, persons appointed to the LEC were persons with knowledge and expertise in matters within the jurisdiction (planning, environment and land) of the LEC.¹⁹

¹⁰ UNEP The New South Wales Land and Environment Court (n 7 above); BJ Preston 'The Land and Environment Court of New South Wales: A very short history of an environmental court in action' *Australian Law Journal* (2020) 632 https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3949084 (accessed 15 March 2022).

¹¹ Preston (n 10 above) 632.

¹² Act 204 of 1979; NSW Government NSW legislation <https://legislation.nsw.gov.au/> (accessed 15 March 2022). See also Preston (n 10 above) 631; See also P Lalic and S Neilson 'Review of the Land and Environment Court's jurisdiction: Discussion of issues relating to the Working Party review and reform of the Court' (2001) *Local Government Law Journal* 50.

¹³ ML Pearlman 'The Land and Environment Court of New South Wales: a model for environmental protection' *Water, Air, and Soil Pollution: An International Journal of Environmental Pollution* <https://doi.org/10.1023/A:1005251101945> (2000) 396 (accessed 8 March 2023).

¹⁴ UNEP The New South Wales Land and Environment Court (n 7 above); See also Preston (n 10 above) 631.

¹⁵ Lalic and Neilson (n 12 above) 50.

¹⁶ BJ Preston 'The Land and Environment Court of New South Wales: moving towards a multi-door courthouse' Keynote address to LEADR NSW Chapter annual dinner (2007) 12 <https://ssrn.com/abstract=2346046> (accessed 18 March 2023).

¹⁷ Preston (n 10 above) 635.

¹⁸ Preston (n 10 above) 632.

¹⁹ Preston (n 10 above) 632.

The Land and Environment Court brought together issues of planning, environment and land, mining and other ancillary matters under the jurisdiction of one court.²⁰ Pearlman describes the LEC as a bold experiment that has come to fruition in the LEC's contribution to the development of environmental jurisprudence."²¹ Stein says the LEC is a well-qualified, independently operated specialist court, with exclusive jurisdiction on environmental matters, which offers the best chance of successfully administering environmental law at a judicial level.²²

4.2.2 Overview of the LEC

4.2.2.1 Judicial Officers

The judicial officers of the LEC comprise judges and commissioners (previously known as assessors). Judges are appointed by the Governor of the Province of New South Wales and a person is qualified to be appointed if the person is under the age of 70 years and holds or has held a judicial office of the New South Wales State (or another State or Territory), of the Commonwealth of Australia or who is an Australian lawyer of at least seven years.²³ The judges have the same rank, title and status as a judge of the Supreme Court of New South Wales.²⁴ Seven judges including the Chief Judge are currently serving on the LEC.²⁵

Commissioners are appointed in terms of section 12 of the LECA by the Governor and are required to have special knowledge of, and experience in fields which are related to the areas of jurisdiction of the LEC. In particular, they are required to be persons with special knowledge of and experience in the following areas: administration of local government or town planning, suitable qualifications and experience in town or country planning or environmental planning, special knowledge of and experience in environmental science or matters relating to the protection of the environment and environmental assessment, special knowledge of and experience in the law and practice of land valuation, suitable qualifications and experience in architecture, engineering, surveying or building construction, special knowledge of and

²⁰ Land and Environment Court of NSW 'About us' <https://www.lec.nsw.gov.au/lec/about-us.html> (accessed 15 March 2022).

²¹ Pearlman (n 13 above) 395.

²² PL Stein 'Specialist environmental courts: the Land and Environmental Court of New South Wales, Australia' *Environmental Law Review* (2002) 5.

²³ Sec 8 of the LECA.

²⁴ Sec 9(2) of the LECA.

²⁵ When the LEC was established in 1980, there were three judges, including the Chief Judge - Preston (n 10 above) 633.

experience in the management of natural resources or the administration and management of Crown lands, lands acquired under the Closer Settlement Acts and other lands of the Crown, or suitable knowledge of matters concerning land rights for Aborigines and qualifications and experience suitable for the determination of disputes involving Aborigines, or special knowledge of and experience in urban design or heritage, or if the person is an Australian lawyer.²⁶

The use of persons with technical expertise, such as scientists, engineers, architects, and economists, during the adjudication of environmental cases who offer technical and scientific insights is considered best practice.²⁷ According to Sulistiawati *et al*, this ensures that legal and scientific considerations, both of which are essential for sound decision-making in environmental cases, are considered.²⁸

The initial court model had only nine Commissioners, however, because the full-time Commissioners did not all possess the expertise required in terms of section 12(2) and section 12(2AA) of the LECA, the model was modified to include Acting Commissioners to the court structure.²⁹ There are currently twenty-eight science-technical Commissioners serving at the LEC.³⁰

²⁶ Sec 12(2)(a) to (g) and sec 12(2AA) of the LECA; In terms of sec 12(2AC) of the LECA, a Commissioner may be called a “Commissioner for Mining while exercising the jurisdiction of the Court or any other function under this Act in relation to proceedings in Class 8 of the Court’s jurisdiction”; In terms of sec 12(3) of the LECA, one of the full-time Commissioners may, by the instrument of the Commissioner’s appointment or by a subsequent instrument, be appointed to be Senior Commissioner. The inclusion of the qualification as a commissioner to be an Australian lawyer took place in 2008 when the jurisdiction of the LEC was expanded to include the jurisdiction formerly exercised by the Mining Warden’s Court.

²⁷ Sulistiawati *et al* (n 5 above) 30. The Commissioners also preside over certain matters such as merits appeals or applications, in classes 1 and 2 of the Court’s jurisdiction and Class 3 proceedings (land tenure, valuation, rating, and compensation matters), conciliations, and mediations - Stafford, A ‘The Role of Commissioners in the NSW Land and Environment Court’ Practice and Procedure (2019) <https://www8.austlii.edu.au/au/journals/NSWBarAssocNews/2019/70.pdf> (accessed 21 April 2023).

²⁸ Sulistiawati *et al* (n 5 above) 30; Preston refers to this practice of having both judges and assessors/commissioner adjudicate cases as contributory expertise (this refers to legal expertise comprised of the skills, knowledge and experience needed to contribute to the development of environmental law) and interactional expertise (this refers to the need to interact with other disciplines such as scientific, social and political scientific expertise that relate to the understanding of environmental problems and their resolutions) – BJ Preston ‘The many facets of a cutting edge court: a study of the Land and Environment Court of New South Wales’ in E Fisher and B Preston (eds) *An environmental court in action: function, doctrine and process* (2022) 11.

²⁹ Sec 13 of the LECA.

³⁰ Nine are full time and 19 are Acting Commissioners. Land and Environment Court of NSW ‘Judicial officers and decision makers’ <https://www.lec.nsw.gov.au/about-us/judicial-officers-and-decision-makers.html> (accessed 20 April 2023).

Commissioners hold office for a period of 7 years and are eligible for re-appointment.³¹ Acting Commissioners can also be appointed for a period of 12 months.³² The role of the commissioner is to assist and advise the judge on any matter in the Class 1, 2, 3, or 4 proceedings.³³ Preston explains that such assistance includes providing factual issues of breach of planning or environmental laws, as well as the type of relief to be granted to effectively remedy any such breach.³⁴ However, a commissioner who must be an Australian lawyer may hear and determine proceedings in Class 8 of the LEC's jurisdiction and the decisions taken during such proceedings are regarded as decisions of the court.³⁵

In terms of section 12(2C) of the LECA, a commissioner whose term of appointment has expired may complete or continue to deal with any matters or a conciliation conference relating to proceedings that had been presided over or partly presided over by the commissioner before the expiration of that term. It is seen as a misbehaviour if a part-time commissioner appears as an expert witness or acts as the representative of any party in any proceedings before the LEC while he or she is serving as a part-time commissioner.³⁶

4.2.2.2 Jurisdiction of the LEC

As indicated previously, the LEC has exclusive jurisdiction over civil and criminal environmental, land planning, building, and mining matters that arise out of various environmental and planning legislation.³⁷ No other court or tribunal in NSW can exercise the

³¹ Clause 1(1) of Schedule 1 of the LECA.

³² Land and Environment Court of NSW Judicial officers and decision makers (n 30 above).

³³ Section 37(1) read with sec 37(3) of the LECA; the different classes are more fully described later under the section titled 'Jurisdiction of the LEC'. The original model of the LEC provided for commissioners to advise and assist judges in proceedings that fell within Class 1, 2, or 3 of the Court's jurisdiction but in 2015 this was extended to Class 4 proceedings. Class 4 proceedings relate to Environmental Planning and Protection and Development Contract Civil Enforcement.

³⁴ Preston (n 10 above) 634.

³⁵ Section 42(1) of the LECA provides that "[w]here proceedings are pending in Class 8 of the Court's jurisdiction, the Chief Judge may, of the Chief Judge's own motion or on the request of a party, direct that the proceedings be heard and disposed of by one or more Commissioners read with section 42(3) of the LECA - The decision of the Commissioner or Commissioners shall be deemed to be the decision of the Court.

³⁶ Sec 12(2B) of the LECA.

³⁷ These legislation include, *inter alia*: Environmental Planning and Assessment Act 1979 (NSW); Local Government Act 1993 (NSW); Protection of the Environment Operations Act 1997 (NSW); Heritage Act 1977 (NSW); Threatened Species Conservation Act 1995 (NSW); Native Vegetation Act 2003 (NSW); Contaminated Land Management Act 1997 (NSW); Roads Act 1993 (NSW); Land Acquisition (Just Terms Compensation) Act 1991 (NSW); Trees (Disputes Between Neighbours) Act 2006 (NSW); Noxious Weeds Act 1993 (NSW); Water Management Act 2000 (NSW); Environmentally Hazardous Chemicals Act 1985 (NSW); Fisheries Management Act 1994 (NSW); Pesticides Act 1999 (NSW); Forestry and National Park Estate Act 1998 (NSW); Pipelines Act 1967 (NSW); National Parks and Wildlife Act 1974 (NSW); Aboriginal Land Rights Act 1983 (NSW); Pearlman

jurisdiction given to the Land and Environment Court.³⁸ Its decisions are subject to review by the civil and criminal appeals courts and the Australian High Court, but its operations and decisions are largely independent.³⁹

When the Land and Environment Court was established, it was given jurisdiction to deal with all the matters formerly dealt with by the various courts and tribunals in Australia.⁴⁰ Specifically, it has five basic functions – merit review function, judicial review function, civil enforcement, criminal enforcement, and appellate function. In its merit review function, it reviews the decisions of government bodies and officials issued in various environmental matters.⁴¹ In its judicial review function, it reviews the decision of the consent authority on administrative grounds to determine if it has, in reaching that decision, acted in accordance with the law and also considers applications for declarations and injunctive relief.⁴² The LEC exercises civil enforcement and summary criminal enforcement in respect of various environmental laws, compensation for compulsory land acquisition, and Aboriginal land claims.⁴³ As an appellate court, it hears appeals against convictions or sentences imposed for environmental offences by the New South Wales Local Court and appeals from decisions of Commissioners of the court that pertain to questions of law.⁴⁴ The LEC's jurisdiction is divided into eight classes of cases as outlined in the table below.⁴⁵

(n 13 above) 396. NSW Young Lawyers *A Practitioner's Guide to the Land and Environment Court of NSW* (2009) 4 – 5.

³⁸ Land and Environment Court 'About us' (n 20 above).

³⁹ UNEP The New South Wales Land and Environment Court (n 7 above).

⁴⁰ Preston (n 10 above) 632.

⁴¹ B Preston 'Characteristics of successful environmental courts and tribunals' *Journal of Environmental Law* (2014) 374 <https://www.jstor.org/stable/26168843> (accessed 22 March 2023) Preston explains that when exercising its merit review function the LEC is operating as a form of administrative tribunal. Smith further explains that under its merit review function, the Land Environment Court rehears evidence which includes any new evidence and determines the development on its merit. The Court can replace the decision of the local council whose decision is under appeal - S Smith *A Review of the Land and Environment Court New South Wales* NSW Parliamentary Research Service (2001) 3.

⁴² A judicial review involves the Court reviewing the decision of the consent authority to determine if the consent authority acted in accordance with the law. It therefore concerns itself with whether the decision maker had any power to make the decision and whether the decision maker followed the correct process when making the decision - Smith (n 41 above) 6.

⁴³ Preston (n 41 above) 374.

⁴⁴ Preston (n 41 above) 374.

⁴⁵ When the Act was promulgated in 1979, the court had jurisdiction over only five classes of matters in terms of section 17 – 21 of the Land and Environment Court Act. These classes have been amended over the years to 8 classes and are provided for in sections 17, 18, 19, 20, 21, 21A, 21B, 21C of the LECA.

Table 3 Jurisdiction of NSW LEC

Section	Class	Description of Jurisdiction
Section 17: Environmental planning and protection appeal	Class 1	Civil Jurisdiction (merits review appeals) These are generally appeals under the Environmental Planning and Assessment Act 1979 against refusals of local councils to grant development consent, but also include appeals under the Protection of the Environment Operations Act 1997, the Waste Minimisation and Management Act 1995, the Threatened Species Conservation Act 1995, the Native Vegetation Conservation Act 1997 and more. May be heard by a judge sitting with a commissioner or a commissioner sitting alone
Section 18: Local government trees and miscellaneous appeals	Class 2	Civil Jurisdiction (merits review appeals) This class includes appeals under various sections of the Local Government Act, as well as other Acts such as the Catchment Management Act 1989 and the Swimming Pools Act 1992. May be heard by a judge sitting with a commissioner or commissioner sitting alone
Section 19: Land tenure, valuation, rating, and compensation matters	Class 3	Civil Jurisdiction (merits review appeals) This class, amongst other things, includes objections to land valuation, rating appeals, and applications for compensation for resumption of land.

		Land valuation cases may be heard by a judge sitting with a commissioner or commissioner sitting alone who has special knowledge and expertise in the valuation of land. Compensation claims are usually heard by a judge, but at times assisted by a commissioner with special knowledge and expertise in valuation of land. Other matters assigned to Class 3, such as Aboriginal land claims, are heard by a judge, assisted by one or more commissioners appointed who have suitable knowledge of matters concerning land rights for Aborigines and qualifications and experience suitable for the determination of disputes involving Aborigines.
Section 20: Environmental planning and protection, development contract and strata renewal plan civil enforcement, including judicial review	Class 4	Civil Jurisdiction (civil enforcement and judicial review) This class includes the judicial review of decisions of consent authorities on administrative grounds, as well as applications for declarations and injunctive relief. Over 20 Acts are covered by this class of the Court, including the EPA&A Act, the National Parks and Wildlife Act 1974, and the Coastal Protection Act 1979. Only judges hear matters under this Class
Section 21:	Class 5	Criminal Jurisdiction (summary criminal enforcement)

Environmental planning and protection summary		The Court exercises summary criminal jurisdiction in the prosecution of pollution offences and various breaches of environmental and planning laws. Proceedings are usually instituted by government authorities prosecuting offences against planning or environmental laws. Class 5 prosecutions are heard by a judge without a jury.
Section 21A Appeals against convictions or sentences relating to environmental offences.	Class 6	Criminal Appeal Jurisdiction (appeals as of right from decisions of the Local Court in prosecutions for environmental offences) Appeals as of right by defendants from convictions relating to environmental offences imposed by magistrates in the Local Court. Only judges hear matters under this Class
Section 21B Appeals against convictions or sentences relating to environmental offences.	Class 7	Criminal Appeal Jurisdiction (appeals requiring leave from decisions of the Local Court in prosecutions for environmental offences) Proceedings in Classes 6 and 7 involve appeals, and applications for leave to appeal, against decisions of the NSW Local Court in proceedings for environmental offences, with respect to: • conviction • sentence • dismissal of proceedings. These types of appeals are ‘as of law’ as they relate to questions of law only. Only judges hear matters under this Class.

Section 21C: Mining matters	Class 8	Civil Jurisdiction Disputes under the Mining Act 1992 and Petroleum (Onshore) Act 1991. It excludes proceedings for an offence under either of those Acts. Class 8 matters may be heard by a Commissioner for Mining (who must be a lawyer) or a judge.
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4.2.2.3 Rules of Procedure

The LEC does not make use of formal pleadings⁴⁶ but rather each application is required to state precisely what relief is being sought and, in cases of judicial review, to highlight briefly the points of claim and defence.⁴⁷ The LEC felt that formal pleadings can complicate, obscure and add unnecessary expense and delay to the finality of litigation and given its technical nature, may in actual fact defeat its real purpose and object – that of identifying and narrowing issues.⁴⁸

The LEC is not bound by the rules of evidence and may inform itself on any matter in such manner as it thinks appropriate, including the use of expert evidence.⁴⁹ In 1991, a number of significant rules of court was introduced for merits review proceedings to streamline hearings, curtail litigation by ambush and ensure prompt decision-making.⁵⁰ For instance, the rules of evidence do not apply to proceedings that fall under classes 1 and 2 - merits review proceedings.⁵¹ Further, a liberal approach is taken to discovery and inspection of documents and to the administration of interrogatories.⁵² Questions of law are identified at the first call-over⁵³ and litigants have to seek the leave of the court if they wish to raise any further or new

⁴⁶ Stein (n 22 above) 13.

⁴⁷ Stein (n 22 above) 8.

⁴⁸ Stein (n 22 above) 13.

⁴⁹ Smith (n 41 above) 3.

⁵⁰ Stein (n 22 above) 8; Pearlman (n 13 above) 406.

⁵¹ Pearlman (n 13 above) 406.

⁵² Stein (n 22 above) 12.

⁵³ A call-over hearing is a final review of the case at hand, commonly held a few weeks before the final hearing. It is an administrative court procedure involving several cases being listed before a judge or registrar and each being given a chance to advise the court of the progress of the case legalkitz ‘directions vs call-over hearing’ <https://legalkitz.com.au/directions-vs-call-over-hearing/> (accessed 1 June 2023).

questions of law.⁵⁴ The LEC imposed strict timetables with respect to the service of issues and expert reports. Litigants can only examine or cross examine experts with the leave of the presiding judge or assessor.⁵⁵

The implementation of these rules reduced the average hearing time and at the same time, encouraged the use of alternative dispute resolution (ADR) mechanisms available at the LEC.⁵⁶ These alternative dispute resolution methods include conciliation, mediation, and neutral evaluation and is referred to as the “multi-door courthouse” approach.⁵⁷ The use of these ADR mechanisms resulted in saving of costs and reduction in delays.⁵⁸

It is important to note, and as Stein points out, that “informal procedures have not been relaxed to the extent of abandoning a traditional court framework and approach to adjudication”.⁵⁹ He explains further that natural justice and procedural fairness require that a degree of formality be observed during legal proceedings.⁶⁰

Sulistiawati *et al* highlight that legislatively, authorising a specialised environmental court or tribunal to develop its own rules, procedures and remedies is best practice.⁶¹ They explain that it gives the specialised environmental court flexibility and frees it from the limitations of the general court system’s rules on standing, evidence, management of expert witnesses, cost awards, orders, penalties and so on, thus allowing it to develop a wider range of “made for purpose” rules that enhance access to justice and effectiveness.⁶² It is submitted that in a field of law such as environmental law, flexibility with respect to rules, procedures and remedies is crucial because as Sulistiawati *et al* explain, it allows the specialised environmental court to be innovative in its approach to the type of evidence that can be allowed, put in place problem-

⁵⁴ Stein (n 22 above) 12.

⁵⁵ Stein (n 22 above) 8.

⁵⁶ BJ Preston ‘Operating an environment court: The experience of the Land and Environment Court of New South Wales’ (2008) *Environmental and Planning Law Journal* 403.

⁵⁷ T Sheahan ‘Use of ADR in New South Wales and in the Land and Environment Court Land and Environment Court’ *NSW ACPECT* (2010) https://lec.nsw.gov.au/documents/speeches-and-papers/sheahan_acpect_adr.pdf (accessed 1 June 2023).

⁵⁸ Stein (n 22 above) 8.

⁵⁹ Stein (n 22 above) 8.

⁶⁰ Stein (n 22 above) 8.

⁶¹ Sulistiawati *et al* (n 5 above) 30.

⁶² Sulistiawati *et al* (n 5 above) 30.

solving initiatives which are more environment focused and not punishment focused to resolve disputes, and it reduce the length of time to finalise a dispute.⁶³

4.2.2.4 Accessibility

The LEC is accessible as it can sit at such places and at such times as the Chief Judge of the LEC directs⁶⁴ and as such, more than one sitting of the Court may be held at the same time.⁶⁵ Although the LEC is located in the city of Sydney, the LEC has adopted a number of measures to extend its reach beyond the metropolitan area and ensure that parties are not denied access to justice due to geolocation and distance of the court to the place of the resident. The LEC has an online registry which enables parties to lodge certain documents online and in addition, some cases can be started online.⁶⁶ Another established measure is that the court documents can be filed at any of the over 150 local courts in New South Wales.⁶⁷ These court documents are then forwarded by the Registrar of the local court to the LEC in Sydney.⁶⁸ A third measure is that directions, hearings and other preliminary court proceedings can be conducted telephonically or through the online court.⁶⁹

4.2.2.5 *Locus standi*

Proceedings in the LEC can be instituted by ‘any person’ as all environmental and planning legislation have open standing provisions.⁷⁰ In addition, public interest litigation is established in New South Wales with third parties being able to commence proceedings in the LEC for the purpose of restraining a breach of any legislation where such breach is likely to cause harm to the environment, thus doing away with the traditional approach of requiring a person instituting

⁶³ Sulistiwati *et al* (n 5 above) 30.

⁶⁴ Sec 29(1) of the LECA.

⁶⁵ Sec 29(2) of the LECA.

⁶⁶ NSW Online Registry ‘Online Registry’ <https://onlineregistry.lawlink.nsw.gov.au/content/> (accessed 20 April 2023)

⁶⁷ Land and Environment Court of NSW ‘Access for people in regional areas’ <https://www.lec.nsw.gov.au/Facilities-and-support/access-for-people-in-regional-areas.html> (accessed 20 April 2023).

⁶⁸ Land and Environment Court of NSW ‘Access for people in regional areas’ (n 67 above). Rule 2.5 of the Land and Environment Court Rules 2007 (LEC Court Rules) (accessed 13 May 2023).

⁶⁹ Land and Environment Court of NSW ‘Access for people in regional areas’ (n 67 above). Rule 2.5 of the LEC Court Rules 2007 (n 68 above).

⁷⁰ Stein (n 22 above) 10. The only requirement for an applicant is that he or she is required to serve the application on the Environment Protection Authority (EPA), which is entitled to become a party in the proceedings.

such actions to have a direct right or interest.⁷¹ Such public interest litigation must, however, be instituted with leave of the court and is dependent on the court being satisfied about the *bona fides* of the proceedings, the likelihood of success and that such proceedings are genuinely in the public interest.⁷² Pearlman states that the open standing provisions has been a key catalyst for the development of environmental law in New South Wales.⁷³

Another barrier to the commencement of *bona fide* proceedings by litigants that was removed is in relation to security and costs. Generally and in line with Rule 3.7(2) of the LEC Rules, the court is not to make an order for the payment of costs in certain proceedings,⁷⁴ unless the court considers that making the order is fair and reasonable under the circumstances.⁷⁵ In terms of Rule 4.2 of the LEC Rules, the court may decide not to make an order for the payment of costs against a party who has brought a *bona fides* proceedings in the public interest where the proceedings are not in favour of such party.⁷⁶ Similarly the court may decide in a public interest proceedings not to make an order requiring an applicant to give security for the respondent's costs.⁷⁷

⁷¹ Pearlman (n 13 above) 398. Sec 25(1) of the Environmental Offences and Penalties Act No 150 of 1989 provides that "Any person may bring proceedings in the Land and Environment Court for an order to restrain a breach (or a threatened or apprehended breach) of this or any other Act, or any statutory rule under an Act, if the breach (or the threatened or apprehended breach) is causing or is likely to cause harm to the environment".

⁷² Sec 25(3) of the Environmental Offences and Penalties Act 1989.

⁷³ Pearlman (n 13 above) 398.

⁷⁴ Rule 3.7 of the LEC Rules, 2007 (n 68 above). These proceedings are the following: (a) all proceedings in Class 1 of the Court's jurisdiction; (b) all proceedings in Class 2 of the Court's jurisdiction; (c) the following proceedings in Class 3 of the Court's jurisdiction— (i) appeals, references or other matters that may be heard and disposed of by the Court under the Crown Lands Act 1989 or Western Lands Act 1901, as referred to in section 19 (a) of the Land and Environment Court Act 1979, (ii) appeals under section 37 (1) of the Valuation of Land Act 1916, (iii) appeals under section 8E of the Rookwood Necropolis Act 1901 or clause 56 (2) of Schedule 8 to the Crown Lands Act 1989, (iv) appeals and applications under section 526 (including section 526 as applied by section 531) or 574 of the Local Government Act 1993, (v) appeals under section 202 of the Fisheries Management Act 1994, (vi) appeals under section 174, and references under section 175, of the Aboriginal Land Rights Act 1983, (vii) any other appeals, references or other matters referred to in section 19 (h) of the Land and Environment Court Act 1979. Appeals under section 56A are excluded from these provisions.

⁷⁵ Rule 3.7 of the LEC Rules, 2007 (n 68 above).

⁷⁶ Rule 4.2 (1) of LEC Rules 2007 (n 68 above). The Court may decide not to make an order for the payment of costs against an unsuccessful applicant in any proceedings if it is satisfied that the proceedings have been brought in the public interest.

⁷⁷ Rule 4.2(2) of the LEC Rules 2007 (n 68 above). The Court may decide not to make an order requiring an applicant in any proceedings to give security for the respondent's costs if it is satisfied that the proceedings have been brought in the public interest.

4.2.2.6 Appeals

Appeals against the LEC's decisions are made to the civil and criminal appeals courts, as well as the Australian High Court.⁷⁸ Generally, appeals from the decisions of judges of the Court, in civil matters, are heard by the Court of Appeal, and in criminal matters, by the Court of Criminal Appeal.⁷⁹

Specifically, the following applies per class of proceedings:

- a. Appeals in Class 1, 2, 3 or 8 proceedings may be made to the Supreme Court against an order or decision (including an interlocutory order or decision) of the Court on a question of law.⁸⁰
- b. In cases where the decision has been made by a commissioner or commissioners in proceedings in Class 1, 2, 3 or 8, an appeal may be made to the LEC against an order or a decision of given by a Commission on a question of law.⁸¹
- c. A party who is dissatisfied with an order or decision made in a Class 4 proceedings may appeal to the Supreme Court against the order or decision.⁸²
- d. Proceedings in Class 5, 6, or 7 of the Court's jurisdiction are final decisions and are not appealable.⁸³

4.2.3 Reflections on the LEC

The Land and Environment Court has been lauded as a model of a successful environment court,⁸⁴ and has been a basis for recommendations for environment courts around the world.⁸⁵ It is submitted that it is multifaceted in its jurisdiction and functions as it exercises both civil and criminal jurisdiction, while at the same time making use of alternative dispute resolutions. While environmental law has been influenced by the British system (planning and local government law) and the American model (environmental impact assessment), the LEC is not

⁷⁸ UNEP The New South Wales Land and Environment Court (n 7 above).

⁷⁹ Pearlman (n 13) 396.

⁸⁰ Sec 57(1) of the LECA.

⁸¹ Sec 56A of the LECA.

⁸² Sec 58 of the LECA.

⁸³ Sec 56(b) of the LECA

⁸⁴ Preston (n 56 above) 409.

⁸⁵ Preston (n 56 above) 409; Pring and Pring (n 1 above) 22.

simply a hybrid of both systems, as it has developed its own unique system and has been engineered to meet the conditions of its local jurisdiction.⁸⁶

The LEC has played an influential role in increasing awareness of environmental law issues in general in government, among industries and the public.⁸⁷ The fact that the court is flexible and innovative has allowed it to achieve a lot.⁸⁸ The judges have been able to become specialist experts,⁸⁹ which not only assists it in better understanding the complex nature of environmental disputes, but also makes it possible to provide a wide variety of dispute resolution mechanisms.⁹⁰ The court has been able to develop vast case law in various aspects of environmental law such as open standing provisions for public interest litigation and the polluter pays principle.⁹¹ It has put many procedural innovations in place and these procedural innovations have become a model for other countries in the establishment of their own environmental specialist courts and their own environmental jurisprudence.⁹²

The LEC's jurisdiction has expanded considerably due to new environmental laws or amendments being passed over the years since the LEC has been in existence.⁹³ In this regard, Preston asserts that the LEC has 'the most comprehensive jurisdiction of any environmental court or tribunal in Australia, perhaps even the world.'⁹⁴

It is notable that the underlying philosophy of the LEC, which finds expression in the LECA and in the LEC Court rules, is to ensure disputes are settled quickly and efficiently but with as little unnecessary formality as possible.⁹⁵ The informal approach has led to a saving of costs and reduction in delays.⁹⁶ For example, in 2019:

⁸⁶ Pearlman (n 13 above) 396.

⁸⁷ UNEP The New South Wales Land and Environment Court (n 7 above).

⁸⁸ Ibid.

⁸⁹ Ibid.

⁹⁰ UNEP The New South Wales Land and Environment Court (n 7 above); Other dispute resolution mechanisms used include conciliation and mediation.

⁹¹ UNEP The New South Wales Land and Environment Court (n 7 above).

⁹² UNEP The New South Wales Land and Environment Court (n 7 above).

⁹³ Preston (n 10 above) 635.

⁹⁴ Preston (n 10 above) 635.

⁹⁵ UNEP The New South Wales Land and Environment Court (n 7 above).

⁹⁶ Stein (n 22 above) 8.

- i. 77% of Class 1 appeals were finalised within 12 months of commencement and 25% were finalised within 6 months of commencement. The median time for completion for all Class 1 appeals is 254 days.⁹⁷
- ii. 93% of Class 2 tree disputes were finalised within 6 months of commencement. The median completion time was 117 days.⁹⁸
- iii. 66% of Class 3 matters were finalised within 12 months of commencement. The median completion time for Class 3 matters was 265 days.⁹⁹
- iv. 85% of Class 4 matters were finalised within 16 months of commencement. The median completion time was 189 days.¹⁰⁰
- v. 80% of Class 5 prosecutions were finalised within 16 months of commencement. The median completion time was 374 days.¹⁰¹ The penalties imposed included fines, orders to pay clean up or investigation costs, publication orders and environmental service orders. Fines ranged from \$500 to \$348,750.¹⁰²
- vi. 75% of Class 6 and 7 appeals were finalised within 8 months of commencement. The median completion time was 169 days.¹⁰³
- vii. the median completion time for class 8 matters was 149 days.¹⁰⁴

Quite notable is the LEC's focus on preventing injustice particularly in litigation that is brought in the public interest by using its wide discretion to put rules in place that do away with costs and security. This is because, and as Stein states, requiring an applicant who is an individual or an NGO to provide security for costs has "the obvious capacity to terminate litigation" and

⁹⁷ Land and Environment Court of NSW 'Class 1: Environmental planning and protection appeals' <https://lec.nsw.gov.au/types-of-cases/class-1---environmental-planning-and-protection-appeals.html> (accessed 1 June 2023).

⁹⁸ Land and Environment Court of NSW 'Class 2: Tree disputes and merit review appeals' <https://lec.nsw.gov.au/types-of-cases/class-2---tree-disputes-and-local-government-appeals.html> (accessed 1 June 2023).

⁹⁹ Land and Environment Court of NSW 'Class 3: valuation, compensation, and Aboriginal land claim cases' <https://lec.nsw.gov.au/types-of-cases/valuation--compensation-and-aboriginal-land-claim-cases.html> (accessed 1 June 2023).

¹⁰⁰ Land and Environment Court of NSW 'Class 4: judicial review and civil enforcement' <https://lec.nsw.gov.au/types-of-cases/judicial-review-and-civil-enforcement.html> (accessed 1 June 2023)

¹⁰¹ Land and Environment Court of NSW 'Class 5 Criminal Proceedings' <https://www.lec.nsw.gov.au/types-of-cases/criminal-proceedings.html> (accessed 1 June 2023).

¹⁰² Land and Environment Court of NSW 'Class 5 Criminal Proceedings' (n 101 above).

¹⁰³ Land and Environment Court of NSW 'Class 6 and 7: criminal appeals from the NSW Local Court' <https://lec.nsw.gov.au/types-of-cases/criminal-appeals-from-the-nsw-local-court.html> (accessed 1 June 2023).

¹⁰⁴ Land and Environment Court of NSW 'Class 8 – Mining' <https://lec.nsw.gov.au/types-of-cases/mining.html> (accessed 1 June 2023).

has “the capacity to stifle public interest litigation, almost before it has been launched”.¹⁰⁵ This point was buttressed by Justice Toohey when he observes that “relaxing the traditional requirements for standing may be of little significance’ because “there was little point in opening the doors of the courts if litigants could not afford to enter, or were scared off by the devastating consequences for an NGO or individual of having to pay the costs of the successful party”.¹⁰⁶ Close scrutiny of applications for security by the court has led to few and rarely successful applications for security.¹⁰⁷

Pearlman highlights that one of the benefits of the LEC is the fact that the judges acquire specialist expertise which has enabled a large body of case law to be developed in various key areas of environmental law, such as the polluter pays, custodial sentencing for serious environmental offences, open standing provisions for public interest litigation, transboundary pollution and principles of ecologically sustainable development, including the precautionary principle.¹⁰⁸ He further points out that “the development of legal principles by the Court is crucial to the evolution of environmental jurisprudence” and that in many instances, the judges have been able to push the boundaries to initiate change over the period of years the LEC has been in existence, thus developing a line of authority in environmental law.¹⁰⁹

Pearlman expresses that awareness of environmental law issues has been raised significantly amongst government, industry and the community in general, due to three factors – the open standing provisions, the public interests considerations and the substantial criminal penalties consistently imposed by the LEC for serious environmental offences.¹¹⁰ He further states that the consistency by the judges in imposing substantial criminal penalties has fostered the public perception that environmental harm is a crime.¹¹¹

A significant innovation is the “multi-door courthouse” approach adopted by the LEC with respect to alternative dispute resolution mechanisms. Preston explains that the concept of the multi-door courthouse is that of a dispute resolution centre, which offers intake services together with various dispute resolution processes under one roof, with the aim of matching

¹⁰⁵ Stein (n 22 above) 11.

¹⁰⁶ Ibid.

¹⁰⁷ Ibid.

¹⁰⁸ Pearlman (n 13 above) 398.

¹⁰⁹ Ibid.

¹¹⁰ Ibid.

¹¹¹ Ibid.

appropriate dispute resolution to the specific dispute.¹¹² In 2019, it was reported that 74% of Class 1 appeals were finalised by alternative dispute resolution processes and negotiated settlement;¹¹³ 11% of Class 2 tree disputes were finalised by alternative dispute resolution processes and negotiated settlement;¹¹⁴ 89% of Class 3 matters were finalised by alternative dispute resolution processes and negotiated settlement,¹¹⁵ and 64% of Class 4 matters were finalised by alternative dispute resolution processes and negotiated settlement.¹¹⁶ It is submitted that the use of the alternative dispute resolution process means that these matters did not have to go to court to be heard, thus reducing the time taken to finalise these matters.

It must be highlighted that not all classes of proceedings generate the same number of caseloads. For instance, in 2019, Class 6 and 7 appeals were 1% of the Court's finalised caseload and 75% of these appeals were finalised within 8 months of commencement¹¹⁷ while Class 8 matters were less than 1% of the Court's finalised caseload, and the average time taken to finalise cases in this class was 149 days.¹¹⁸ However, generally between 2016 to 2019, the caseload has been somewhat constant - with 1332 in 2016; 1408 in 2017; 1486 in 2018; and 1363 in 2019.¹¹⁹

The court 'continues to monitor its performance against the objectives of court administration – equity, efficiency, and effectiveness'.¹²⁰ This allows it to adjust its procedural and substantive goal, as well as its performance and adapt these to meet the environmental challenges of the future.¹²¹

Overall, the Land and Environment Court has been an overwhelming success and according to Pearlman, it has become a model for other States to follow "not least in terms of costs,

¹¹² Preston (n 56 above) 391; See also G Kessler and LJ Finkelstein 'The evolution of a multi-door courthouse' (1988) *Catholic University Law Review* 578.

¹¹³ Land and Environment Court of NSW 'Class 5 Criminal Proceedings' (n 101 above).

¹¹⁴ Land and Environment Court of NSW 'Types of cases' <https://www.lec.nsw.gov.au/types-of-cases/class-2---tree-disputes-and-local-government-appeals.html> (accessed 1 June 2023).

¹¹⁵ Land and Environment Court of NSW Types of cases (n 114 above).

¹¹⁶ Land and Environment Court of NSW Types of cases (n 114 above).

¹¹⁷ Land and Environment Court of NSW Types of cases (n 114 above).

¹¹⁸ Land and Environment Court of NSW Types of cases (n 114 above).

¹¹⁹ Sulistiawati *et al* (n 5 above) 18.

¹²⁰ Preston (n 56 above) 409.

¹²¹ Preston (n 56 above) 409.

efficiency and justice, but spectacularly in terms of the evolution of environmental jurisprudence”.¹²²

4.3 The Environment and Land Court of Kenya

4.3.1 History of the Environment and Land Court

The Republic of Kenya is located in the Eastern Africa region and has diverse natural resources including forests, wildlife, fisheries, minerals, land, rivers, and Lake Victoria, the second largest freshwater lake in the world.¹²³

As part of enhancing environmental litigation and to address various environmental challenges,¹²⁴ Kenya enacted the Environmental Management and Co-ordination Act (EMCA), 1999¹²⁵ which came into force on 14 January 2000.¹²⁶ The EMCA is an overall legislative framework for environmental matters and its Preamble provides that it is an Act “to provide for the establishment of an appropriate legal and institutional framework for the management of the environment and for matters connected therewith and incidental thereto”.¹²⁷ In terms of Section 148, the EMCA prevails over any other law relating to the management of the environment that was in force before the coming into force of the EMCA.¹²⁸ The EMCA

¹²² Pearlman (n 13 above) 406.

¹²³ Ministry of Foreign and Diaspora Affairs ‘Country Profile’ <https://mfa.go.ke/country-profile/> (accessed 7 May 2023); See also P Kamari-Mbote and C Odote. ‘Courts as champions of sustainable development: lessons from East Africa’ *Sustainable Development Law and Policy* (2009) 31.

¹²⁴ These challenges included the fact that the environmental laws were fragmented making regulation difficult; the main branches of public law were not concerned about enforcing environmental law leaving it to private persons to seek redress through the law of contracts and torts; public officials who were empowered to take action did not do so; there was a strict *locus standi* rule in place which made it difficult for individuals to institute legal action seeking to protect the environment; public officials did not want to institute action where government violated environmental law; the law only provided for criminal penalties which were not sufficient to act as a deterrent and also hindered civil litigation as the court could not impose damages on persons who had degraded the environment and there was no provision made for environmental impact assessment of developments so as to put in place mitigation for adverse impacts on the environment OA Angote ‘Environmental litigation in Kenya: a call for reforms’ (2019) *Journal of Conflict Management and Sustainable Development* 55 <https://journalofcmsd.net/wp-content/uploads/2019/06/Justice-Oscar-Amugo-Angote-Environment-Litigation-and-A-Call-for-Reforms-10th-june-2019.pdf>.

¹²⁵ Act 8 of 1999.

¹²⁶ Angote (n 124 above) 56.

¹²⁷ Preamble to EMCA.

¹²⁸ Sec 148 provides that “[a]ny written law by the national and county governments relating to the management of the environment in force immediately before the commencement of this Act shall have effect, subject to such modifications as may be necessary to give effect to this Act, and where the provisions of such law are in conflict with any provisions of this Act, the provisions of this Act shall prevail.” Before the amendment of section 148 in 2015, section 148 read as follows: “any written law, in force immediately before the coming into force of (the) Act, relating to the management of the environment shall have effect subject to the modification as may be

established the National Environmental Management Authority (NEMA) to “exercise general supervision and co-ordination over all matters relating to the environment and to be the principal instrument of Government in the implementation of all policies relating to the environment.”¹²⁹ According to Odote, with the promulgation of the EMCA came the need to address dispute resolution as it was felt that the ordinary courts were not fully able to deal with environmental issues.¹³⁰

Accordingly, the EMCA made provision for the two dispute resolution bodies to complement the ordinary courts and resolve environmental disputes - the National Environmental Complaints Committee and the National Environmental Tribunal.¹³¹ The National Environmental Complaints Committee operated in a similar fashion to an Ombudsman. It was empowered to investigate any allegations or complaints against any person or against the NEMA in relation to the condition of the environment in Kenya, or investigate on its own motion, any suspected case of environmental degradation and make a report of its findings with recommendations to the Cabinet Secretary responsible for matters relating to environment and natural resources; report on its activities periodically, which report forms part of the annual report on the state of the environment; undertake public interest litigation on behalf of the citizens in environmental matters and perform such other function and exercise such powers assigned to it by the Cabinet Secretary.¹³²

The National Environmental Tribunal (NET) on its part was established to consider appeals by any party or a referral by the NEMA on any matter relating to the EMCA and make an award, give directions, or make orders or decisions on such matters.¹³³ The type of matters heard by the NET is provided for in section 129(1) and related to appeals against the grant of a licence or a permit or refusal to grant a licence or permit or the transfer of a licence or permit under

necessary to give effect to this Act, and where the provisions of any such law conflict with any provisions of this Act, the provisions of this Act shall prevail’. With the amendment, reference to written law referred to those written laws promulgated by the national or county governments.

¹²⁹ Section 9(1) of EMCA.

¹³⁰ C Odote ‘Kenya: The New Environment and Land Court’ (2013) *IUCN Academy of Environmental Law E Journal* 172.

¹³¹ The National Environmental Complaints Committee (previously known as the Public Complaints Committee) was established in terms of section 31 of EMCA while the National Environmental Tribunal was established in terms of section 125 of EMCA.

¹³² Sec 32 of the EMCA. Kameri-Mbote and Odote (n 123 above) 34; P Kameri-Mbote ‘Kenya’ in LJ Kotzé and A Paterson (eds) *The role of the judiciary in environmental governance: comparative perspectives* (2009) 461. See also Odote (n 130 above) 173 – 174.

¹³³ Sec 126(2) of the EMCA.

EMCA; the imposition of any condition, limitation or restriction on a person's licence; the revocation, suspension or variation a person's licence; the fees imposed under the Act and the imposition against a person of an environmental restoration order or environmental improvement order by the NEMA.¹³⁴

Mumma explains the reason for the NET and states that “the courts, as the principal avenues for resolving disputes, are not quite prepared to deal with the issues arising from them. Additionally, the court processes tend, typically, to be slow, costly, and complex. Administrative tribunals, on the other hand, are often deliberately designed to be more accessible to the public and are, therefore, less expensive, less complex, and speedier, because the rules allow them a measure of discretion and flexibility in due process.”¹³⁵ According to Kameri-Mbote the NET offers “specialised, expeditious and cheaper justice than ordinary courts of law.”¹³⁶

However, even with the promulgation of the EMCA, which to a large extent addressed some of the environmental challenges¹³⁷ and the establishment of the National Environmental Complaints Committee and the National Environmental Tribunal, environmental litigation remained minimal in Kenya.¹³⁸ Apart from this, and as Odote explains, the general courts had difficulty addressing environmental issues due to the technical nature of most environmental cases, the lack of training in environmental law by members of the judiciary, and *locus standi* limitations.¹³⁹

In 2003, the Commission of Inquiry into the illegal/irregular allocation of public land recommended the establishment of a Land Titles Tribunal to expeditiously handle the large number of land dispute cases instituted in the general courts.¹⁴⁰ However, the Chief Justice

¹³⁴ Sec 129(1) of the EMCA.

¹³⁵ A Mumma ‘The role of administrative dispute resolution institutions and processes in sustainable land use management: The case of the National Environment Tribunal and the Public Complaints Committee of Kenya’ in N Chalifour *et al* (eds) *Land Use Law for Sustainable Development* (2007) 253.

¹³⁶ Kameri-Mbote (n 132 above) 464.

¹³⁷ It put in place a better coordinated legal and institutional framework in environmental governance; provided for the general principles to guide environmental management in the country that were of international standard such as the right to a clean and healthy environment and the application of the principles of sustainable development; lessened the strict *locus standi* rule thus allowing anyone to approach the court to enforce environmental law. Angote (n 124 above) 56.

¹³⁸ Angote (n 124 above) 56.

¹³⁹ Odote (n 130 above) 174.

¹⁴⁰ Kenya Law ‘The Report of the Commission of Inquiry into the illegal/irregular allocation of public land’ (2004) 67, 70 and 188 <http://kenyalaw.org/kl/fileadmin/CommissionReports/> (accessed 21 April 2023).

decided to establish a Land and Environment Division of the High Court in Nairobi to specially deal with land and environmental matters.¹⁴¹ The Notice indicated that all other land and environment matters that were instituted outside Nairobi could continue to be filed in the High Court divisions of those other places.¹⁴² Due to the lack of criteria for the appointment of specialised judges to the Nairobi division, the challenge of caseload and delay particularly in land matters remained.¹⁴³ Despite this attempt to address land and environmental matters, two main challenges affected the general courts in Kenya (inclusive of the High Court), which were corrupt practices that created the perception to civil society that justice was for sale, as well as a huge backlog of unheard cases.¹⁴⁴ Calls for environmental law reform were made during the Constitutional review process, including the need to elevate environmental issues to a constitutional level.¹⁴⁵ The Report of the Constitution of Kenya Review Commission had recommended that ‘the new Constitution must provide for environmental rights and duties as well as conservation and sustainable use of Kenya’s natural resources, as well as intra - and inter-generational equity’.¹⁴⁶

Hence, when the Constitution of Kenya was promulgated in 2010, provision was made for an environmental right in Article 42¹⁴⁷ and for the enforcement of the right in Article 70.¹⁴⁸ In addition to this, provision was made for the establishment of courts with “the status of the High Court to hear and determine disputes relating to – (b) the environment and the use and occupation of, and title to, land”.¹⁴⁹ Pursuant to this provision the Environment and Land Court

¹⁴¹ Government Gazette Notice 301 of 2007 published in Kenyan Government Gazette Vol CIX No 9 (19 January 2007) 30.

¹⁴² Paragraph 2 of Government Gazette Notice 301 of 2007 (n 141 above).

¹⁴³ Kenyan Judiciary ‘The Environment and Land Court’ <https://www.judiciary.go.ke/courts/environment-and-land-court/> (accessed 21 April 2023)

¹⁴⁴ DW Kaniaru ‘Launching a new environment court: challenges and opportunities’ *Pace Environmental Law Review* (2012) 629.

¹⁴⁵ Angote (n 124 above) 56.

¹⁴⁶ Paragraph 17.3.6 (1) of the ‘Final Report of the Constitution of Kenya Review Commission’ (2005) 267 <http://kenyalaw.org/kl/fileadmin/CommissionReports/The-Final-Report-of-the-Constitution-of-Kenya-Review-Commission-2005.pdf> (accessed 15 March 2022).

¹⁴⁷ Article 42 of the Constitution of Kenya, 2010 provides that “Every person has the right to a clean and healthy environment, which includes the right – (a) to have the environment protected for the benefit of present and future generations through legislative and other measures, particularly those contemplated in Article 69; and (b) to have obligations relating to the environment fulfilled under Article 70.” <http://www.kenyalaw.org/8181/exist/kenyalex/> (accessed on 15 March 2022).

¹⁴⁸ Article 70(1) of the Constitution of Kenya, 2010 - If a person alleges that a right to a clean and healthy environment recognised and protected under Article 42 has been, is being, or is likely to be, denied, violated, infringed, or threatened, the person may apply to a court for redress in addition to any other legal remedies that are available in respect to the same matter.

¹⁴⁹ Article 162(2)(b) of the Constitution of Kenya, 2010 (n 147 above).

was formally established in 2011 following the promulgation of the Environment and Land Court Act (ELCA) in 2011.¹⁵⁰ The ELCA was promulgated to:

‘[give effect to Article 162(2)(b) of the Constitution; to establish a superior court to hear and determine disputes relating to the environment and the use and occupation of, and title to, land, and to make provision for its jurisdiction functions and powers, and for connected purposes.’¹⁵¹

According to Soyapi, the Environment and Land Court in Kenya is the most advanced type of environmental court in Africa as it has developed “a robust and progressive jurisprudence” and particularly has been able to hold the government accountable for any failings in carrying out environmental impact assessments and upholding the environmental rule of law.¹⁵² Kaniaru describes the establishment of the Environment and Land Court as Kenya breaking ranks amidst “a sea of ordinary courts and tribunals that exclusively deal with environmental matters in Africa”.¹⁵³ He further states that, with the provision for the environmental court included in the Constitution, frivolous challenges that previously thwarted hearing of environmental issues, will be avoided.¹⁵⁴

4.3.2 Overview of the ELC

4.3.2.1 Judicial Officers

The judicial officers in the ELC are comprised of a Presiding Judge and the number of judges that are determined by the Judicial Service Commission.¹⁵⁵ The Presiding Judge is elected by the appointed Judges and serves in this capacity for a non-renewable term of five years.¹⁵⁶ The qualifications for appointment are set out in section 7(1) and are aligned to the criteria for the appointment of judges of superior courts in terms of Article 166(5) of the Constitution. For the judges of the ELC these are qualifications similar to those of the High Court judges and as such

¹⁵⁰ Act 19 of 2011.

¹⁵¹ Long Title of the Act; the overriding Objective was stated as [t]he principal objective of this Act is to enable the Court to facilitate the just, expeditious, proportionate, and accessible resolution of disputes governed by this Act – article 3 (1) of the ELCA.

¹⁵² CB Soyapi ‘Environmental Protection in Kenya’s Environment and Land Court’ *Journal of Environmental Law* (2019) 151.

¹⁵³ DW Kaniaru ‘Environmental Courts and Tribunals: The Case of Kenya’ *29 Pace Environmental Law Review* (2012) 572 <https://digitalcommons.pace.edu/pelr/vol29/iss2/7> (accessed 18 November 2020).

¹⁵⁴ Kaniaru (n 144 above) 633.

¹⁵⁵ Sec 5 of the ELCA.

¹⁵⁶ Sec 6(1) and (2) of the ELCA.

they are required to possess at least 10 years' experience as a superior court judge, a qualified magistrate, or a distinguished academic or legal practitioner with knowledge and experience in matters relating to environment or land.¹⁵⁷ Section 7(2) empowers the Chief Justice to transfer a judge who meets the qualification of section 7(1) to serve in the court upon the recommendation of the Judicial Service Commission.

When the first judges were appointed in 2012, they included judges who were also serving at the High Court.¹⁵⁸ This led to litigation that sought to establish the jurisdiction of judges appointed to the ELC. In 2017, the matter was settled by the Supreme Court in the case of *Republic v Karisa Chengo and others*¹⁵⁹ where the courts determined that a judge appointed to the ELC can only handle matters in the ELC and cannot serve in another court simultaneously.¹⁶⁰ The judges on the ELC serve until they retire at the age of seventy but may choose to retire from the age of sixty-five.¹⁶¹

4.3.2.2 Jurisdiction of the ELC

The ELC is a superior court of record with the same status as the High Court¹⁶² and has original and appellate jurisdiction throughout Kenya to hear and determine all disputes in accordance with Article 162(2)(b) of the Constitution and with the provisions of the ELCA or any other written law relating to environment and land.¹⁶³ It is an offence for any person to refuse, fail or neglect to obey an order or direction of the Court and on conviction, such person shall be liable to a fine not exceeding twenty million shillings or to imprisonment for a term not exceeding two years, or to both.¹⁶⁴

Specifically, it has the power to hear and determine disputes —

‘(a) relating to environmental planning and protection, climate issues, land use planning, title, tenure, boundaries, rates, rents, valuations, mining, minerals and other natural resources;

¹⁵⁷ Article 166(5) of the Constitution of Kenya, 2010; Sec 7 of the ELCA.

¹⁵⁸ Kaniaru (n 144 above) 633.

¹⁵⁹ [2017] eKLR.

¹⁶⁰ Paragraphs 78 and 79.

¹⁶¹ Article 167(1) of the Constitution of Kenya, 2010.

¹⁶² Article 4(2) of the ELCA.

¹⁶³ Sec 4(3) of the ELCA.

¹⁶⁴ Sec 29 of the ELCA.

- (b) relating to compulsory acquisition of land;
- (c) relating to land administration and management;
- (d) relating to public, private and community land and contracts, choses in action or other instruments granting any enforceable interests in land; and
- (e) any other dispute relating to environment and land.¹⁶⁵

In 2015, following the amendment to the ELCA, the Chief Justice could appoint certain magistrates to preside over cases involving environmental and land matters in any area in Kenya.¹⁶⁶ The magistrates were given jurisdiction to handle disputes relating to offences provided for in any legislation that deals with environment and land, as well as civil matters that involve occupation and title to land, as long as such matters do not exceed the monetary jurisdiction of the Magistrates' Court Act, 2015.¹⁶⁷ In terms of section 26(4) of the ELCA, appeals from matters in such designated magistrates' courts were heard by the ELC.

Article 165(6) of the Constitution empowers the ELC to have supervisory jurisdiction over subordinate courts, local tribunals, persons, or authorities whose jurisdiction is land or environment-related, such as the National Land Commission,¹⁶⁸ Rent Restriction Tribunal,¹⁶⁹ and the National Environment Tribunal.¹⁷⁰

4.3.2.3 Rules of Procedure

It is submitted that the drafters of the Kenyan Constitution understood the importance of having flexible rules of procedure because they were careful to include Article 159(2)(d) into the Constitution, which enjoined courts to administer justice without undue regard to procedural technicalities. This principle has filtered down as it was adapted by the ELC through section 19(1) of the ELCA, which directs the ELC to act expeditiously without undue regard to technicalities of procedure. Section 19(2) of the ELCA goes further to provide that "the court shall be bound by the procedure laid down by the Civil Procedure Act."¹⁷¹

¹⁶⁵ Sec 13(2) of the ELCA.

¹⁶⁶ Sec 26(3) of the ELCA.

¹⁶⁷ 26 of 2015.

¹⁶⁸ Act 5 of 2012.

¹⁶⁹ Sec 8(2) of Cap 296 of the Laws of Kenya.

¹⁷⁰ Sec 130 of EMCA.

¹⁷¹ Sec 19(2) of ELCA.

Similarly, Clause 1 of the Practice Directions on Proceedings in the Environment and Land Courts, and on Proceedings Relating to the Environment and the Use and Occupation of, and Title to Land and Proceedings in other Courts, 2014, directs the ELC when exercising its authority and jurisdiction, to be guided by Article 159 of the Constitution, 2010 (Kenyan Constitution), sections 1A¹⁷² and 1B¹⁷³ of the Civil Procedure Act Cap 21¹⁷⁴ and section 3 of the ELCA¹⁷⁵ and ensure just, expeditious, proportionate, and accessible resolution of disputes.¹⁷⁶

Article 159(2)(c) of the Constitution enjoins the courts and tribunals in Kenya to promote the use of alternative forms of dispute resolution, which includes reconciliation, mediation, arbitration, and traditional resolution mechanisms.¹⁷⁷ This principle was included in the ELCA under section 20 of the ELCA, read with Rule 38 of the court rules. In terms of section 20(1) of the ELCA, the ELC may adopt and implement on its own motion and with the agreement of, or at the request of the parties, any appropriate means of alternative dispute resolution such as conciliation, mediation, or other traditional dispute resolution mechanism in accordance with Article 159(2)(c) of the Constitution. Rule 38 of the ELCA court rules highlights that the use of Alternative Dispute Resolution mechanisms is to avoid unnecessary costs and delays.

The Court Annexed Mediation (CAM) was introduced in the Judiciary in 2016 with the objective of relieving the courts of high caseloads, reducing the time and money spent on litigation, putting in place accommodative resolutions and producing higher and better quality outcomes.¹⁷⁸ Twenty-two ELC stations used CAM to resolve disputes in the 2021/2022

¹⁷² Sec 1A(1) of the Civil Procedure Act Cap 21 provides that “[t]he overriding objective of this Act and the rules made hereunder is to facilitate the just, expeditious, proportionate and affordable resolution of the civil disputes governed by the Act.”

¹⁷³ Sec 1B of the Civil Procedure Act provides that “[f]or the purpose of furthering the overriding objective specified in section 1A, the Court shall handle all matters presented before it for the purpose of attaining the following aims— (a) the just determination of the proceedings; (b) the efficient disposal of the business of the Court; (c) the efficient use of the available judicial and administrative resources; (d) the timely disposal of the proceedings, and all other proceedings in the Court, at a cost affordable by the respective parties; and (e) the use of suitable technology.”

¹⁷⁴ Cap 21 of the Laws of Kenya.

¹⁷⁵ Section 3(1) of the ELCA provides that “[t]he principal objective of this Act is to enable the Court to facilitate the just, expeditious, proportionate and accessible resolution of disputes governed by this Act.”

¹⁷⁶ Practice Directions on Proceedings in the Environment and Land Courts, and on Proceedings Relating to the Environment and the Use and Occupation of, and Title to Land and Proceedings in other Courts Government Notice No 5178 of 2014.

¹⁷⁷ Article 159(2)(c) of the Kenyan Constitution.

¹⁷⁸ Judiciary of the Republic of Kenya ‘State of the Judiciary and the Administration of Justice Annual Report 2021/2022’ (SJAJAR 2021/2022) 97 <https://www.judiciary.go.ke/wp-content/uploads/2023/07/Sojar-21-22-for-Launch-1.pdf> (accessed 7 June 2023).

financial year.¹⁷⁹ According to the State of the Judiciary and the Administration of Justice Annual Report, 2021/2022, the value of matters referred to mediation since CAM in the ELC is KSh 409 million billion, of which settlement agreements amounting to KSh 108 million were completed.¹⁸⁰

4.3.2.4 Accessibility

In terms of section 26(1) of the ELCA, the ELC must be established in all the counties.¹⁸¹ Thus, each of the 47 counties in Kenya is to have an ELC with one judge appointed to the relevant ELC to deal with environment and land matters.¹⁸² In 2012, the President, on the recommendation of the Judicial Service Commission, appointed sixteen judges to the ELC and as at 2023 there are 53 judges of the court sitting at the 37 ELC stations established across 36 counties in Kenya.¹⁸³ As such, 11 counties do not yet have an ELC. To increase efficiency within courts stations, ameliorate the shortage of Judges and Judicial Officers across the country and to deal with backlogs, the ELC Judges undertake circuit hearings and travel to various court stations to adjudicate disputes.¹⁸⁴ In the 2022/2023 financial year, the ELC had 21 circuit hearings and was able to finalise 102 cases during these circuit hearings.¹⁸⁵

In addition, Practice Directions on Electronic Case Management has been issued by the Chief Justice which applies to all the courts in Kenya including the ELC.¹⁸⁶ Linked to the Practice Directions is the e-filing system which allows litigants to file new cases electronically, choose

¹⁷⁹ SJAJAR 2021/2022 (n 178 above) 99.

¹⁸⁰ Judiciary of the Republic of Kenya 'State of the Judiciary and the Administration of Justice Annual Report 2022/2023' (SJAJAR 2022/2023) 139 – 140 <https://judiciary.go.ke/downloads-reports/> (accessed 13 March 2024).

¹⁸¹ The counties of Kenya are geographical units envisioned by the Constitution of Kenya 2010 as the units of devolved government. As of the 2013 general elections, there are 47 counties whose size and boundaries are based on the 47 legally recognised Districts of Kenya.

¹⁸² SJAJAR 2021/2022 (n 178 above) 16; Article 174(h) of the Constitution of Kenya required the decentralization of state organs, their functions, and services from Nairobi by the creation of counties.

¹⁸³ SJAJAR 2022/2023 (n 180 above) 128. This is the same as reported in 2021 - B Khaduli 'Newly appointed Judges expected to report in (sic) August 1' (2021) <https://www.kenyanews.go.ke/newly-appointed-judges-expected-to-report-in-august-1> (accessed 27 May 2023).

¹⁸⁴ SJAJAR 2022/2023 (n 180 above) 105.

¹⁸⁵ SJAJAR 2022/2023 (n 180 above) 105.

¹⁸⁶ Electronic Case Management Practice Directions, 2020 Government Gazette No 2357 of 2020.

court dates, follow up on the status of cases, and pay court fees.¹⁸⁷ The system is said to have improved access to the court and efficiency of court operations.¹⁸⁸

4.3.2.5 *Locus standi*

Section 3(3) of the EMCA provides a wide *locus standi* for any person to apply to the ELA for redress whether for himself, on behalf of a group or class of persons, members of an association, or in the public interest where the right to a clean and healthy environment has been, is being or is likely to be denied, violated, infringed, or threatened.

Section 3(4) of the EMCA goes on to emphasise that a person instituting an action under section 3(4) of the EMCA can bring the action, even if the person cannot show that the defendant's act or omission has caused or is likely to cause him any personal loss or injury, provided that such action must not be frivolous, vexatious or an abuse of the court process.

When section 3 of the EMCA is read with Article 70(2) of the Constitution which provides that “an applicant does not have to demonstrate that any person has incurred loss or suffered injury” in order to institute proceedings in terms of Article 70(1) of the Constitution to enforce the right to an environment, it is clear that Kenya has relaxed the strict *locus standi* requirement for proceedings that are instituted in the ELC.

4.3.2.6 Appeals

Appeals from the ELC go to the Court of Appeal in terms of section 16 of the ELCA read with article 164(3) of Kenya's Constitution¹⁸⁹

4.3.3 Reflections on the ELC

According to Soyapi, the ELC has been generally successful building a robust environmental jurisprudence.¹⁹⁰ The following factors have been attributed to this, i.e.: the right to a clean and

¹⁸⁷ K Itimu ‘Kenya Judiciary Launches e-Filing System, Integrates ODPP's Management and Tracking System’ (2020) <https://techweez.com/2020/07/01/kenya-judiciary-launches-e-filing-system-integrates-odpps-management-and-tracking-system/> (accessed 5 June 2023).

¹⁸⁸ SJAJAR 2021/2022 (n 178 above) 14 and 108.

¹⁸⁹ Article 164(3) of the Constitution of Kenya provides that “The Court of Appeal has jurisdiction to hear appeals from— (a) the High Court; and (b) any other court or tribunal as prescribed by an Act of Parliament.”

¹⁹⁰ Soyapi (n 152 above) 151.

healthy environment enshrined in the Constitution, public interest litigation, relaxation of the strict *locus standi* rule, and the purpose of the ELC.

However, studies on the functioning of the ELC indicate that the ELC has handled more land related cases as opposed to environmental cases.¹⁹¹ Odote explains that this is because in Kenya, land is the basis of the livelihood of people, hence the court handles more land related cases than environmental cases.¹⁹² Angote, in turn, attributes the low environmental caseload to several factors. These include the lack of public awareness on what constitutes an environmental matter as opposed to a land matter; the lack of public awareness on the various mechanisms that have been included in the Constitution and EMCA such as public interest litigation, relaxation of the strict *locus standi* rule, the right to a clean and healthy environment and the purpose of the ELC; the Court of Appeal's decision in *Law Society of Kenya Nairobi Branch v Malindi Law Society & 6 Others Nairobi*,¹⁹³ where the Court of Appeal held that the ELC does not have exclusive jurisdiction to hear and determine environmental matters and that Magistrates courts can hear and determine environmental matters as a court of first instance; the attitude of Kenyans to environmental matters given the nature of environmental matters in that it affects the wider public; and the costs of embarking on litigation coupled with the ease of accessing the ELC.¹⁹⁴

This state of affairs where few environmental cases are filed in the ELC is one of the reasons given by Judge Angote, the current Presiding Judge, for the proposal to separate the Environment Court from the Land Court and make them exclusive to address environmental and land matters separately.¹⁹⁵ He explains that 97% of cases in the Environment and Land Court are land issues and the creation of an exclusive Environment Court will encourage the public to file environment degradation cases as part of battling climate change effect, and give

¹⁹¹ Angote (n 124 above) 58 citing Justice Samson Okong'o 'Environmental adjudication in Kenya: a reflection on the jurisdiction of the Environment and Land Court' (A presentation made at the Symposium on Environmental Adjudication in the 21st Century held in Auckland New Zealand on 11th April 2017) <http://environmentaladjudication.org/assets/Uploads/General/Okongo-PPT2.pdf>

¹⁹² Odote (n 130 above) 175.

¹⁹³ Civil Appeal No 287 of 2016.

¹⁹⁴ Angote (n 124 above) 61 - 63; F Ogonjo *et al* 'Leveraging AI capabilities in land dispute cases in the Kenyan Environmental and Land Court system' Proceedings of the Second International Workshop on AI and Intelligent Assistance for Legal Professionals in the Digital Workplace (Legal AIIA 2021), held in conjunction with ICAIL 2021 (2021) 2 <https://ceur-ws.org/Vol-2888/paper9.pdf> (accessed 27 May 2023).

¹⁹⁵ MO Oruko 'Kenya to launch exclusive environment court by June, urges Kenyans to use it to fight climate change' (29 March 2023) <https://www.tuko.co.ke/editorial/analysis/500145-judiciary-launch-environment-court-june-urges-kenyans-platform-fight-climate-change/> (accessed 7 May 2023).

the Judiciary the opportunity to make decisions and issues orders that will promote a clean and safe environment.¹⁹⁶ He further states that the decision to separate environmental matters from land matters by establishing separate divisions to deal with environment and land matters, is due to the fact that environmental cases are unique public interest issues, which need to be expeditiously dealt with at no expense and that a specialised court will help to achieve this goal.¹⁹⁷

Despite a reported impressive case clearance rate of 146%, the Environment and Land Court has one of the largest case backlogs in Kenya with 14585 cases at the end of the 2022/2023 financial year.¹⁹⁸ This has been attributed to the limited number of judges currently serving in the court.¹⁹⁹ Although the ELC has tried to address this challenge by putting a circuit system as well as an electronic filing system in place, the lack of judges to serve on the ELC continues to contribute to the high backlog of cases.

Overall, the Kenyan ELC has established itself as a specialised environmental court with the most comprehensive jurisdiction of any in the world, although it does not have criminal jurisdiction.²⁰⁰

4.4 Comparative analysis findings

4.4.1 General findings

Both courts were the results of well-thought-out law reform action and fundamental to this was the fact that there was political will and support for the courts to be established. In addition, the presiding judicial officers in both countries play an active role in the courts. For instance, past and current presiding officers have been consistent in their support of and promotion of the courts. The New South Wales LEC and Kenyan ELC are similarly structured in the following ways:

- a. They are operationally independent model courts.
- b. They are established in terms of enabling legislation.

¹⁹⁶ Oruko (n 195 above).

¹⁹⁷ Oruko (n 195 above).

¹⁹⁸ SJAJAR 2022/2023 (n 180 above) 129.

¹⁹⁹ Sulistiawati *et al* (n 5 above) 17.

²⁰⁰ Sulistiawati *et al* (n 5 above) 33; Sec 13(2) of the ELCA.

- c. They are superior courts of record.
- d. They have exclusive jurisdiction in environmental and land matters.
- e. The presiding officers are permanently appointed until retirement.
- f. They are courts of first instance and appellate courts.
- g. The courts may hold hearings at any place.

4.4.2 Findings on best practices

The following are findings on best practices that have been adopted by the courts and which have contributed to their success:

a. *Enabling legislation*

Both courts have been established under enabling legislation. Kaniaru pointed out that prior to the establishment of the Environment and Land Court, environmental cases were heard by the land and environment division of the High Court which had been established by a practice direction.²⁰¹ The challenge with this was that the division was set up administratively by the Chief Justice and as such could be easily abolished.²⁰² With the ELC established under the Kenyan Constitution and ELCA and the LEC of New South Wales established in terms of the LECA, it is submitted that it would be hard (not impossible) to abolish these courts as such abolishment would have to go through a tedious legislative process.

b. *Flexible court rules and procedure*

Pring and Pring express the view that empowering environmental courts to be able to develop their own rules and procedures is a unique best practice that should be included in the enabling legislation which establishes the specialised environmental court.²⁰³ This is because allowing environmental courts to develop a wide range of “made for purpose” rules will enhance their effectiveness, allow for innovative and “problem solving” approaches to dispute resolution, and ensure better access to justice.²⁰⁴

Both courts in the comparative study can put flexible court rules and procedures in place. In the case of the NSW LEC, the court had established rules that seek to improve access to justice

²⁰¹ Kaniaru (n 144 above) 629.

²⁰² Kaniaru (n 144 above) 629.

²⁰³ Pring and Pring (n 1 above) 46.

²⁰⁴ Pring and Pring (n 1 above) 46.

such as the discretion relating to costs and security, particularly in public interest litigation. As discussed above, generally costs orders are not made in certain proceedings unless the court considers that making the order is fair and reasonable in the circumstances.²⁰⁵ Similarly, the court may decide in a public interest proceeding not to make an order requiring an applicant to give security for the respondent's costs or give a cost order against an unsuccessful litigant.²⁰⁶ In Kenya, the Constitution clearly enjoins the courts to administer justice without undue regard to procedural technicalities.²⁰⁷

c. ***Ease of accessibility***

It is submitted that one of the tenets of a properly functioning judicial system is that it must be accessible to all persons in terms of physical or geolocation access, affordability, use of alternative dispute mechanisms, and awareness of the court process. In the New South Wales LEC, although the court is in Sydney, innovative measures have been put in place to make it easy for litigants to access the court and remove geolocation barriers. These include the online registry which enables parties to lodge certain documents online and in addition, some cases can be started online;²⁰⁸ the ability to file court documents at any of the over 150 local courts in New South Wales;²⁰⁹ and the use of telephonic or online court for directions hearings and other preliminary court proceedings.²¹⁰ In Kenya, it is envisaged that each county will be equipped with its own ELC to ensure ease of access to litigants within the 47 different counties.²¹¹ Until this goal is met, the ELC has adopted innovative measures to improve access to court which includes the circuit hearing system and the electronic filing system.²¹²

d. ***Locus standi***

The *locus standi* principle is relaxed in both courts to enable any person to institute actions in the courts particularly actions in the public interest. It is submitted that a relaxed *locus standi*

²⁰⁵ Rule 3.7 of the LEC Rules, 2007.

²⁰⁶ Rule 4.2(1) of the LEC Rules 2007 - The Court may decide not to make an order for the payment of costs against an unsuccessful applicant in any proceedings if it is satisfied that the proceedings have been brought in the public interest. Rule 4.2(2) of the LEC Rules 2007 - The Court may decide not to make an order requiring an applicant in any proceedings to give security for the respondent's costs if it is satisfied that the proceedings have been brought in the public interest.

²⁰⁷ Article 159(2)(d) of the Kenyan Constitution.

²⁰⁸ NSW Online Registry (n 66 above).

²⁰⁹ NSW Land and Environment Court Access for people in regional areas (n 67 above).

²¹⁰ NSW Land and Environment Court Access for people in regional areas (n 67 above).

²¹¹ Sec 26(1) of the ELCA.

²¹² SJAJAR (n 178) 51.

is key for environmental law as standing is the most significant barrier to environmental protection and access to environment justice especially where it is strictly applied. In fact, Pring and Pring recommend a broad and open standing so that any person can institute legal action whether in their interest or in the interest of the public.²¹³

e. ***Use of alternative dispute mechanisms***

Both courts make use of alternative dispute mechanisms to reduce costs and delays in litigation. Alternative Dispute Resolution is a less formal dispute resolution mechanism which allows for a win-win solution to be agreed on, which it is submitted, usually benefits the environment, and moves away from the adversarial approach of the courts. Pring and Pring advise that the enabling legislation for the specialised environmental court put the use of ADR in place.²¹⁴

f. ***Regular monitoring and evaluation***

There is regular monitoring and evaluation by the NWS LEC to improve its functioning and ensure that it remains on track with respect to the purpose for which it was established and also remain relevant to the ever-changing world. The NSW LEC implements the International Framework for Court Excellence, which is a quality court evaluation and management system.²¹⁵ It is submitted that regular monitoring and evaluation will assist in determining which policy changes and improvements are required.

g. ***Use of science-technical personnel***

The NSW LEC has made provision for commissioners with various science-technical skills and experience to serve on the court. Some proceedings are even heard by only commissioners leaving the judges to focus on matters that are purely legal. Pring and Pring highlight that having law-trained judges and science-technical decision makers (scientists, engineers, economists, planners, academics) is a best practice.²¹⁶ The use of science-technical experts bring two important skill sets into the adjudication process, which are fundamental to complex environmental cases.²¹⁷

²¹³ Pring and Pring (n 1 above) 51.

²¹⁴ Pring and Pring (n 1 above) 47.

²¹⁵ Pring and Pring (n 1 above) 52.

²¹⁶ Pring and Pring (n 1 above) 46.

²¹⁷ Pring and Pring (n 1 above) 46

h. *Use of Ombudsman*

Kenya has a National Environmental Complaints Committee which is similar to an Ombudsman. According to Pring and Pring, the positive aspect of the office of an ombudsman is that they can represent individuals and communities without cost and are also able to use strong oversight powers to resolve environmental complaints both within and outside of court.²¹⁸ Sulistiawati *et al* state that an ombudsman will have wider and stronger standing rights in environmental matters, be it administrative issues, environmental impact assessment and waste management procedures and as such can increase access to justice particularly for citizens.²¹⁹ However, Pring and Pring point out that the use of an ombudsman cannot be a substitute for a specialised environment court or tribunal as an ombudsman on its own does not usually have the power to enforce its recommendations and as such does not meet one of the pertinent requirement for access to justice.²²⁰

4.5 Conclusion

This chapter has focused on a comparative analysis of two specialised environmental courts in New South Wales, Australia, and Kenya, for the purpose of understanding how these courts function and to extract best practices that contribute to the successful functioning of the courts. These best practices will be useful in discussions in chapter 5, which will focus on proposals for a specialised environmental court model for South Africa.

²¹⁸ Pring and Pring (n 1 above) 40.

²¹⁹ Sulistiawati *et al* (n 5 above) 104.

²²⁰ Pring and Pring (n 1 above) 40; fundamental elements of access to justice are legal protection, legal awareness, legal aid and counsel, adjudication, enforcement, and civil society oversight –United Nations Development Programme (UNDP) ‘Access to Justice Practice Notes (2004) 6 https://www.undp.org/sites/g/files/zskgke326/files/publications/Justice_PN_En.pdf (accessed 13 March 2024).

CHAPTER 5

PROPOSALS FOR A SPECIALISED ENVIRONMENTAL COURT FOR SOUTH AFRICA

5.1 Introduction

As previously demonstrated in chapter 2, a specialised environmental court in South Africa is crucial in the fight against environmental crimes because of the extensive impact that environmental crimes have on the environment itself, as well as the impact on human beings.¹ In addition, specialised environmental courts are a viable, specialised alternative to general courts as they provide a directed conflict resolution for the often complex subject-matter of environmental law.² Various models of environmental courts and tribunals exist,³ but as Pring and Pring point out, there is no one best model of a specialised environmental court or tribunal.⁴ Rather, the focus should be on crafting a model that will result in the most effective and efficient dispute resolution process, which ensures access to environmental justice for all persons with affected interests.⁵ As they aptly put it, “environmental courts and tribunals range from fully developed, independent judicial branch bodies with highly trained staffs and large budgets, all the way to the simple, underfunded village (environmental courts) that handle environmental cases, one day a month, with rotating judges.”⁶

Following discussions in chapter 3, it will be seen that South Africa can establish an independent judicial court with jurisdiction in a specific area of law, such as is the case with the Labour Court and the Land Claims Court which adjudicate on labour and land claims matters respectively. South Africa can also designate courts within an established court system with jurisdiction over specific areas of the law such as in the case of the Sexual Offences Court

¹ See paragraph 2.7 of chapter 2.

² R Guidone and H Jonas ‘A review of environmental courts and tribunals for CSOs and the judiciary’ in C Voigt and Z Makuch (eds) *Courts and the environment* (2018) 372.

³ These models include operationally independent model, specialised green chambers (courts), green benches/green judges. This study will not focus on environmental tribunals but lessons from established environmental tribunals will form part of the discourse in this chapter.

⁴ G Pring and C Pring ‘Environmental Courts and Tribunals: A Guide for Policy Makers’ United Nations Environment Programme (2016) 19.

⁵ Pring and Pring (2016) (n 4 above) 19.

⁶ Pring and Pring (2016) (n 4 above) 13.

which focuses on prosecuting sexual offences and the Specialised Commercial Crimes Court which focuses on prosecuting commercial crimes.

The limitation with designated courts, however, is that they can only operate within the jurisdictional parameters of the court system in which they are designated. So, for instance, if a specialised environmental court is designated within the Regional Magistrates' courts system, the jurisdiction of the court will be limited to criminal jurisdiction. This is because the Regional Magistrates' courts only hear criminal matters other than the limited jurisdiction it has in divorce matters.⁷

Chapter 4 has shown that a specialised environment court with a wide jurisdiction to hear civil, administrative, and criminal matters is advantageous, because many of the successful specialised environmental courts are courts which have a wide jurisdiction to hear civil and criminal matters.⁸ Furthermore, as has been seen in the case of the New South Wales Land Environment Courts and Kenya's Environment and Land Court, both courts have, as a result of their wide jurisdiction, contributed to the development of environmental jurisprudence in their respective countries."⁹

This chapter will seek to propose two models of specialised environmental courts for South Africa. The process of identifying the two models will entail considering two of the four decisional steps suggested by Pring and Pring as a tool for countries considering establishing environmental courts and tribunals.¹⁰ The first decisional step will involve considering the following four factors: South Africa's legal structure, political situation, socio-economic conditions, and environmental goals. The second decisional step involves analysing the options of the 12 design decisions or building blocks which, according to Pring and Pring, constitute

⁷ In 2008, the Jurisdiction of Regional Courts Amendment Act 2008 (which came into force on 9 August 2010 under Proclamation R41 in Government Gazette 33448 of 6 August 2010) conferred Regional Magistrate's courts with jurisdiction to deal with certain civil matters, including matters currently dealt with in the Divorce Courts. (Preamble read with section 29(1B) (a) of the Magistrates' Court Act 1944.

⁸ BJ Preston 'Characteristics of successful environmental courts and tribunals' (2014) *Journal of Environmental Law* 372.

⁹ CB Soyapi 'Environmental protection in Kenya's Environment and Land Court' *Journal of Environmental Law* (2019) 151; ML Pearlman 'The Land and Environment Court of New South Wales: a model for environmental protection' *Water, Air, and Soil Pollution: An International Journal of Environmental Pollution* <https://doi.org/10.1023/A:1005251101945> (2000) 396 (accessed 8 March 2023) 406.

¹⁰ G Pring and C Pring 'Greening Justice: Creating and Improving Environmental Courts and Tribunals' *The Access Initiative* (2009) 5 - 6; The other two decisional steps – strategic planning and the development of a comprehensive, ongoing evaluation of the specialised environmental court's procedures and outcomes to determine the court's effectiveness will not be discussed as these two decisional steps fall outside the scope of this study.

elements of a successful environmental court, and that will assist in determining which combination of options is most suitable for South Africa.¹¹ Results from the semi-structured interviews with the three Groups of Respondents No 1 – 13¹² will also be interwoven into the discussions.

5.2 Decisional Step One: legal structure, political situation, socio-economic conditions, and environmental goals

5.2.1 Legal structure

The legal structure consideration examines the court system structure in place as it will be futile to embark on establishing a specialised court if there is no court system structure under which such a court can be established. South Africa is a constitutional democracy with a supreme law - the SA Constitution.¹³ It has a three-tier government system with an independent judiciary.¹⁴ Section 166 of the SA Constitution provides for the following court structure system in South Africa: the Constitutional Court,¹⁵ the Supreme Court of Appeal¹⁶, the High Court of South Africa, and any high court of appeal that may be established by an Act of Parliament to hear appeals from any court of a status similar to the High Court of South Africa,¹⁷ the Magistrates' Court¹⁸ **and any other court established or recognised in terms of an Act of Parliament,**

¹¹ The 12 design decisions or building blocks are: type of model (should it be a judicial court or administrative tribunal and what would the level of independence be); the legal jurisdiction of the ECT (what substantive laws, policies, and principles will the ECT have authority over); the decisional level of the ECT (would it be a court of first instance, appeal or court of final review and should it have powers to consider civil, criminal or administrative matters or a combination of all three); the geographic area that the ECT would cover – town, city, state or province (in the case of South Africa – local, regional or provincial); the case workload; *locus standi* (who can institute an action in the ECT); cost implications for parties and how can costs be reduced; the use of scientific and technical expertise; would it incorporate alternative dispute resolution mechanisms; competency of the ECT judges (this would include their qualifications, training, term of office, remuneration); the enforcement tools that would make the ECTs decision effective (this includes mediation agreements, injunctions, fines, imprisonment and other related tools) - Pring and Pring (2009) (n 10 above) 20 – 21.

¹² Respondent Nos 1 – 13. Interviews were held between 28 November 2022 – 3 April 2023 with three Groups of people: former Prosecutor in the Hermanus court (Group 1 – Respondent no 1); current Prosecutors in the Gauteng Division (Group 2 - Respondents 2 - 4); and officials who are responsible for environmental criminal investigations in the national department of environmental affairs, provincial departments responsible for environmental affairs in the Western Cape and Gauteng provinces (Group 3 - Respondents 5 - 13).

¹³ Sec 2 of the SA Constitution.

¹⁴ Sec 40 of the SA Constitution provides for the national, provincial, and local sphere of government and section 165(2) provides for an independent judiciary that is subject only to the Constitution and the law.

¹⁵ Sec 166(a) of the SA Constitution.

¹⁶ Sec 166(b) of the SA Constitution.

¹⁷ Sec 166(c) of the SA Constitution.

¹⁸ Sec 166(d) of the SA Constitution.

including any court of a status similar to either the High Court of South Africa or the Magistrates' Courts¹⁹ (own emphasis)

Currently, environmental matters are instituted in two courts – the District and Regional Magistrates' Courts - in respect of environmental criminal matters²⁰ and the High Court - for environmental criminal matters that are of a serious nature and outside the jurisdiction of the Magistrates' Court, as well as environmental civil matters such as interdicts, judicial reviews, or declaratory orders.²¹

It is, therefore, submitted that it is possible for a specialised environmental court to be established within the current South African court system. The specialised environmental court can be established either as an independent court having the same status as a high court or as a green court within the Magistrates' court or the High court system.²²

The appellate court to the independent court or green court, would necessarily follow the appellate court system currently in place for the High Court or the Magistrates' Court. In the case of an independent court having the same status as a high court, this would be the Supreme Court of Appeal,²³ whereas in the case of a green court within the Magistrates' court system, this would be the High Court.²⁴

South Africa has not shied away from establishing specialised courts and tribunals as part of realising the objectives of the socio-economic rights in its Constitution. These courts and tribunals include the Labour Court²⁵, the Land Claims Court²⁶, the Equality Court,²⁷ and the Water Tribunal.²⁸ However, there has been a lack of recognition regarding the significance of

¹⁹ Sec 166(e) of the SA Constitution.

²⁰ It must be highlighted that the Regional Magistrates' courts hear civil matters to the extent that they are divorce matters. In 2008, the Jurisdiction of Regional Courts Amendment Act 2008 (which came into force on 9 August 2010 under Proclamation R41 in Government Gazette 33448 of 6 August 2010) conferred Regional Magistrate's courts with jurisdiction to deal with certain civil matters, including matters currently dealt with in the Divorce Courts. (Preamble read with sec 29(1B) (a) of the Magistrates' Court Act 1944.

²¹ The South African Judiciary 'The high court' <https://www.judiciary.org.za/index.php/about-us/100-high-court> (accessed 13 July 2023).

²² It must be highlighted that each of the court systems has its limitations in relation to jurisdiction. For instance, administrative reviews and civil matters cannot be heard in the Regional Magistrates' Court. However, proposals on how to address the limitation on civil matters will be addressed later in this chapter.

²³ Sec 16(1)(c) of the Superior Courts Act 10 of 2013).

²⁴ Sec 21(1)(a) and (b) of the Superior Courts Act, 2013.

²⁵ Sec 151 of the Labour Relations Act 66 of 1995.

²⁶ Sec 22 of the Restitution of Land Rights Act 22 of 1994 (the Restitution Act).

²⁷ In terms of sec 16(1)(a) of the Promotion of Equality and Promotion of Unfair Discrimination Act 2000, every magistrate's court and every High court is an equality court for the area of its jurisdiction.

²⁸ Sec 146 of the Water Act 36 of 1998.

establishing a specialised environmental court to fully realise and uphold the right to an environment that is not harmful to health and wellbeing as enshrined in section 24 of the SA Constitution. This is regrettable because the right to a clean, healthy, and sustainable environment encompasses the socio-economic rights. The right to a clean, healthy, and sustainable environment will ensure that there is access to unpolluted air, a secure and balanced climate, availability of safe water, toxin-free surroundings for in which to live, work, study and play as well as a healthy biodiversity and ecosystems.²⁹

5.2.2 Political situation

The political situation consideration is two-pronged. The first prong is a consideration of the political environment to establish the stability of government and the second prong focuses on the political will or appetite for the establishment of a specialised environmental court. South Africa transitioned from apartheid to a democracy in 1994, and since then the political environment has been relatively stable in that, unlike several countries in Africa, it is not plagued by continuous wars or coups. The government is cognisant of the importance of protecting the environment and, apart from entrenching the right to an environment in section 24 of the Constitution, has taken steps to promulgate legislation³⁰ which seeks to ensure that the right to the environment as encapsulated in section 24, is protected. In addition, South Africa also adopted a National Development Plan 2030 (NDP) in 2012,³¹ which highlights that “the country needs to: protect the natural environment in all respects, leaving subsequent generations with at least an endowment of at least equal value.”³² South Africa is also signatory

²⁹ United Nations Human Rights ‘The universal declaration: a catalyst for environmental human rights action’ <https://www.ohchr.org/en/get-involved/stories/universal-declaration-catalyst-environmental-human-rights-action> (accessed 13 March 2024).

³⁰ National Environmental Management Act 1998 (Act 107 of 1998) and specific Environmental Management Acts which are the Environment Conservation Act, 1989 (Act 73 of 1989); the National Water Act, 1998 (Act 36 of 1998); the National Environmental Management: Protected Areas Act, 2003 (Act 57 of 2003); the National Environmental Management: Biodiversity Act, 2004 (Act 10 of 2004); the National Environmental Management: Air Quality Act, 2004 (Act 39 of 2004); the National Environmental Management: Integrated Coastal Management Act, 2008 (Act 24 of 2008); the National Environmental Management: Waste Act, 2008 (Act 59 of 2008); and the World Heritage Convention Act, 1999 (Act 49 of 1999). With the Climate Change Act also soon to be added

³¹ National Planning Commission ‘The National Development Plan 2030 Our future – make it work’ (2012) (the NDP). The national Executive Cabinet adopted the National Development Plan on 12 September 2012.

³² The NDP (n 31 above) 47 – 48.

to international conventions that are aimed at protecting the environment and ensuring environmental justice.³³

However, while the political environment is relatively stable, and South Africa has taken positive steps to promulgate various environmental legislation and adopt a national development plan which includes the objective of environmental sustainability, South Africa is still lacking in an important aspect. This refers to the political will to establish a specialised environmental court. As demonstrated in paragraph 3.5.9 of chapter 3 during discussions on the Hermanus Court, there was a political will to establish a specialised environmental court which has been lacking since 2007.³⁴

Two national departments play a role in the establishment of a specialised environmental court - the department responsible for environmental affairs (currently known as the Department of Forestry, Fisheries, and Environment) and the Department responsible for justice (currently the Department of Justice and Constitutional Development). When the Hermanus Court was established in 2004, it was obvious that both of these state departments had the appetite and will to establish the court, because as Rosencrans explains, the establishment of the Hermanus Environmental Court “was strongly supported by the Ministers responsible for justice and environmental affairs, which led to the court being established smoothly and quickly.”³⁵

Over the years there have been calls for the establishment of a specialised environmental court. For instance, in 2009, then Minister of Environmental Affairs suggested the possibility of establishing an environmental court in South Africa.³⁶ In 2018, the Department of Agriculture,

³³ These Conventions include the Stockholm Convention on Persistent Organic Pollutants (POPs), - South Africa ratified in 2002; the Framework Convention on Climate Change (FCCC) 1992 - South Africa ratified the Convention on 29 August 1997; the Convention on Biological Diversity (CBD), 1992 - South Africa ratified it on 2 November 1995; the Convention to Combat Desertification (CCD), 1994 - ratified by South Africa on 29 August 1997; the Basel Convention on the Control of Trans-boundary Movements of Hazardous Wastes and Their Disposal, 1989; The Montreal Protocol on Substances that Deplete the Ozone Layer, 1987 – South Africa ratified it 1992; the Convention on International Trade in Endangered Species of Wild Flora and Fauna (CITES), 1973 - South Africa ratified CITES in 1975; and the Convention on Wetlands of International Importance especially as Waterfowl Habitat (Ramsar Convention), 1971 - South Africa ratified Ramsar in March 1975.

³⁴ See paragraph 3.5.9 of chapter 3. Respondent 1 expressed the view that the lack of political will to continue operating the court led to the eventual closure of the Hermanus Environmental Court even though the Department of Justice and Constitutional Development (DOJCD) consistently stated that the closure of the court was because of the lack of an enabling legislation.

³⁵ K Rosencrans ‘Environmental courts prove to be effective’ *Stop Illegal Fishing Case Study 02* (2011) <https://stopillegalfishing.com/publications/environmental-courts/> (accessed 5 March 2022).

³⁶ E Iannucci ‘SA to reinstate specialised courts to deal with environmental crimes’ (2009) <https://www.engineeringnews.co.za/article/sa-to-reinstate-specialised-courts-to-deal-with-environmental-crimes-sonjica-2009-06-22> (accessed 6 March 2022).

Forestry and Fisheries called for the re-establishment of environmental courts, to prioritise cases of illegal fishing and abalone poaching.³⁷ In 2020, the national Department of Forestry, Fisheries and the Environment (DFFE), responding to a question about specialised environmental courts, indicated that it might now be time to consider establishing a court similar to the Hermanus court, even though, at the time, DFFE engaged with the Department of Justice and Constitutional Development in 2010, the DOJCD was not in favour of dedicated courts due to the complex logistics which would be involved in establishing the court.³⁸ At a provincial level, in the Western Cape province, the Police Ombudsman recommended that an environmental court be established in consultation with the National Minister of Justice and Constitutional Development to address the high incidents of abalone poaching.³⁹ Sadly, the Department of Forestry, Fisheries and Environment cannot establish a specialised environmental court without the support of the Department of Justice and Constitutional Development, which is mandated to establish courts in South Africa.⁴⁰

Another illustration of the lack of political will is the stance of the Minister responsible for minerals and energy on environmental issues. South Africa has put the One Environmental System⁴¹ in place, which seeks to integrate different aspects of environmental management as it relates to mining activities into one efficient system under the NEMA, to ensure proper protection of the environment by an industry whose activities have serious negative impacts on the environment.⁴² However, it is still obvious that the Minister responsible for minerals and

³⁷ B Phakathi 'Bring back the 'green' courts, ministry urges' Business Day (2018) <https://www.businesslive.co.za/bd/national/science-and-environment/2018-08-14-bring-back-the-green-courts-ministry-urges/> (accessed 1 April 2022).

³⁸ Parliamentary Working Group Environment, Forestry and Fisheries Portfolio Committee Workshop (Environment Portfolio Committee Workshop) 'Environment, Forestry and Fisheries Legislation and Policy Meeting Summary' (2020) 3 <https://pmg.org.za/committee-meeting/30899/> (accessed 1 April 2022).

³⁹ Western Cape Government 'Western Cape Police Ombudsman Annual Report 2019/2020' 5 <https://www.westerncape.gov.za/police-ombudsman/documents-and-publications> (accessed 18 May 2022); See also South African Government website 'MEC Albert Fritz escalates Ombudsman's report in the fight against poaching' (2019) <https://www.gov.za/news/media-statements/mec-albert-fritz-escalates-ombudsman%E2%80%99s-report-fight-against-poaching-13-aug> (accessed 18 May 2022).

⁴⁰ Sec 6(3) of the Superior Courts Act 10 of 2013 and Sec 2 of the Magistrates Court Act 32 of 1944. See also item 16 of schedule 6 to the SA Constitution.

⁴¹ The One Environmental System was established through a series of negotiations between the national Minister of Environmental Affairs, the national Minister for Water and Sanitation and the national Minister of Minerals and Energy which culminated into an agreement in 2014. It was given effect in the NEMA through an amendment to the NEMA. Under the One Environmental System, NEMA is the principal Act in terms of which all the environment related aspects including mining would be regulated; and the Minister for minerals and energy is the Competent Authority to issue environmental authorisations relating to all the mining activities and the Minister for environmental affairs is the appeal authority in relation to these authorisations.

⁴² These impacts include climate change, deforestation/habitat destruction, pollution, soil erosion, human-wildlife conflict, and the loss of biodiversity.

energy sees environmental requirements as an impediment to development, if regard is to be given to his comments in his 2022/2023 Budget Vote speech, where the Minister highlights that the “constant contestation between development needs and environmental challenges” constitute one of the critical challenges facing the ability of the state to fully meet its objectives on energy supply and security.⁴³ So, in essence, the tug of war between the environment and development, particularly in the extractive industry sector, is an ongoing one which the One Environment System has not been able to truly address.

If the South African Government is indeed serious about its political commitment to the protection of the environment and ensuring ecologically sustainable development, it will have to seriously consider the establishment of a specialised environmental court. Additionally, it will be important for the Department of Justice and Constitutional Development to look beyond the complex logistics of establishing a specialised environmental court and rather consider the benefits that a specialised environmental court would have on improving access to justice. According to Gramckow and Walsh, studies have shown that, particularly in developing or recently developed countries, the establishment of specialised courts and tribunals dealing specifically with environmental cases improves access to justice for citizens generally, as well as for nongovernmental organisations (NGOs) and disadvantaged groups.⁴⁴

Therefore, while the political environment in South Africa is one that is conducive for the establishment of a specialised environmental court, the political will to establish a specialised environmental court is still lacking. South Africa, in establishing a specialised environmental court will be demonstrating its political commitment to environmental protection and sustainability for current and future generations.

5.2.3 Socio-economic conditions

The consideration of socio-economic conditions is imperative because socio-economic issues have an impact on the environment and an unhealthy environment has an impact on socio-economic issues. There are several socio-economic challenges that South Africa faces

⁴³ South African Government ‘Minister Gwede Mantashe Mineral Resources and Energy Department Budget vote speech 2022/2022’ <https://www.gov.za/speeches/minister-gwede-mantashe-mineral-resources-and-energy-dept-budget-vote-202323-16> =-may-2023 (accessed 8 September 2023).

⁴⁴ H Gramckow and B Walsh ‘Developing specialized court services: international experiences and lessons learned’ *Justice and Development Working Paper Series* (2013) 2 <https://openknowledge.worldbank.org/handle/10986/1667> (accessed 1 March 2022).

including a high rate of poverty, a high unemployment rate, social inequality, and limited access to public services.⁴⁵ However, South Africa has one of the most rigorous legal regimes in place, which seek to address socio-economic concerns.⁴⁶ For instance, the SA Constitution provides for various socio-economic rights⁴⁷ which in terms of section 7(2) of the SA Constitution, the “state is compelled to respect, protect, promote and fulfil.” It is submitted that, in protecting the right to an environment, South Africa will indirectly be protecting other socio-economic rights which are aimed at addressing socio-economic challenges, particularly social inequality. This is because in terms of section 24(b)(ii) of the Constitution, the right to the environment requires the state to put reasonable legislative and other measures in place that secure ecologically sustainable development and use of natural resources while promoting justifiable economic and social development. This, in turn, requires a rigorous ecological consideration of every development to ensure that such developments are economically and socially justifiable.

The preamble to the National Environmental Management Act, 1998 (the NEMA),⁴⁸ states, *inter alia*, that “sustainable development requires the integration of social, economic and environmental factors in the planning, implementation, and evaluation of decisions to ensure that development serves present and future generations.”⁴⁹ Section 2(2) of the NEMA outlines various principles that are required to guide the interpretation, administration, and implementation of [NEMA], and any other law concerned with the protection or management of the environment.”⁵⁰ Relative to the requirement in section 24(b)(ii) is section 2(2)(e) of the NEMA which states that “development must be socially, environmentally and economically sustainable.”

The importance of protecting and conserving the environment cannot be overemphasised because the environment provides the resources needed for economic development and at the

⁴⁵ Development Bank of South Africa ‘Socio-economic factors that challenge SA’s education system’ <https://www.dbsa.org/article/socio-economic-factors-challenge-sas-education-system> (accessed 13 June 2023).

⁴⁶ A du Plessis ‘South Africa’s constitutional environmental right (generously) interpreted: what is in it for poverty?’ (2011) *South African Journal on Human Rights* 281 DOI: 10.1080/19962126.2011.11865016 (accessed 5 April 2022).

⁴⁷ Socio economic rights include the rights to property (sec 25 of the SA Constitution), housing (sec 26 of the SA Constitution), healthcare, food, water, and social security (sec 27 of the SA Constitution) and education (sec 29 of the SA Constitution).

⁴⁸ Act 107 of 1998.

⁴⁹ Preamble to the NEMA 1998.

⁵⁰ Sec 2(1)(e) of the NEMA 1998.

same time acts as a “sink for emissions and waste”.⁵¹ Poor environmental quality and management will, therefore, have (is already having) a negative impact on economic growth and wellbeing because it lowers the quantity and quality of socio-economic resources and increases negative health impacts.⁵² It is, for this reason, imperative that the environment is protected through the efficient and timely enforcement of environmental laws. This is where the courts play a role and more so, a specialised environmental court which, it is submitted, will be better equipped than a general court to balance the protection of the environment *vis a vis* economic development and the social needs of citizens.

It is further submitted that having a specialised environmental court will ensure that the objectives of section 24 of the SA Constitution (environmental right) and the principles in section 2 of the NEMA are realised and upheld. Such a court would be an arbiter on whether section 24 has been infringed and ensure that the principles in section 2 of the NEMA are being upheld by the responsible competent authority when granting authorisations or licences for developments, or when policies and legislation are developed.

5.2.4 Environmental goals

The environmental goals consideration involves contemplating factors such as national environmental goals, as well as the international environmental commitments of a country. It is submitted that a country that has established environmental goals and is committed to meeting its international environmental obligations, is highly likely to consider the importance of an environmental court as instrumental to the achievement of these goals and the fulfilment of its obligations.

⁵¹ M Jakhanwal and MK Mishra *The Economics of Environment and Ecology for Sustainable Development* (2020) 2; The sink function of the environment refers to the ability of the land and ocean to absorb greenhouse gases thus acting as natural carbon sinks - United Nations ‘Biodiversity – our strongest natural defense against climate change’ <https://www.un.org/en/climatechange/science/climate-issues/biodiversity> (accessed 8 September 2023); Four major categories of sinks are land, marine and intertidal, freshwater, animals and plants (biota) – Queensland Government Department of Environment, Science and Innovation Wetland Info ‘Sinks (where waste ends up)’ (2021) available at: <https://wetlandinfo.des.qld.gov.au/wetlands/management/pressures/litter-illegal-dumping/sinks/> (accessed 8 September 2023).

⁵² Jakhanwal (n 51 above) 2. As at 2020, South Africa is ranked as one of the five most polluting carbon-intensive nations in the world – The World Bank ‘CO₂ Emissions (KG per PPP \$ of GDP)’ https://data.worldbank.org/indicator/EN.ATM.CO2E.PP.GD?Most_recent_value_desc=true (accessed 8 September 2023).

Section 24 of the SA Constitution is central to the need for a specialised environmental court as it provides for the entrenchment of the right to an environment. In particular, section 24 provides explicitly that:

Everyone has the right -

- (a) to an environment that is not harmful to their health or well-being; and
- (b) to have the environment protected, for the benefit of present and future generations, through reasonable legislative and other measures that - (i) prevent pollution and ecological degradation; (ii) promote conservation; and (iii) **secure ecologically sustainable development and use of natural resources while promoting justifiable economic and social development.** (own emphasis)

In the case of *HTF Developers (Pty) Ltd v the Minister of Environmental Affairs*⁵³ Murphy J explains section 24 of the Constitution as follows:

“Section 24(a) entrenches the fundamental right to an environment that is not harmful to health or well-being, whereas section 24(b) is more in the nature of a directive principle, having the character of a so-called second-generation right imposing a constitutional imperative on the State to secure the environmental rights by reasonable legislation and other measures.”⁵⁴

South Africa has a plethora of legislation that seeks to protect the environment, thus fulfilling the part of ‘reasonable legislation’ in section 24 of the Constitution. It is submitted that a specialised environmental court is one of the ‘other measures’ referred to in section 24(b) of the Constitution.

Internationally, South Africa supports international environmental declarations that highlight the important role of the Judiciary in implementing, developing, and enforcing environmental law starting with the Johannesburg Principles on the Role of Law and Sustainable Development,⁵⁵ in which South Africa affirmed that,

⁵³ *HTF Developers (Pty) Ltd v The Minister of Environmental Affairs* 2006 (5) SA 512 (T).

⁵⁴ Para 17.

⁵⁵ World Summit on Sustainable Development ‘The Johannesburg Principles on the Role of Law and Sustainable Development’ (the Johannesburg Principles) adopted on 20 August 2002 at the Global Judges Symposium held in Johannesburg, South Africa on 18-20 August 2002’ <http://www.dirco.gov.za/docs/2002/wssd0828a.htm> (accessed 5 March 2022).

“[a]n independent Judiciary and judicial process is vital for the implementation, development and enforcement of environmental law, and that members of the Judiciary, as well as those contributing to the judicial process at the national, regional, and global levels, are crucial partners for promoting compliance with, and the implementation and enforcement of, international and national environmental law.”⁵⁶

This was followed by the Rio Declaration on Environment and Development (Rio +20 Declaration)⁵⁷ in which the role of the Judiciary was reiterated and the countries who attended the Congress,⁵⁸ including South Africa, reaffirmed that,

“... the importance of the Judiciary in environmental matters (has) increased and resulted in a rich corpus of decisions, as well as in the creation of a considerable number of specialised courts and green benches, and a lasting effect on improving social justice, environmental governance and the further development of environmental law, especially in developing countries.”⁵⁹

However, even with these international commitments which emphasise the important role of the Judiciary in environmental matters and in particular, the use of specialised courts and green benches to ensure the protection of the environment, South Africa is yet to seriously consider establishing a specialised environmental court, thus casting a doubt as to whether the country is really committed to the affirmations made at international conventions regarding the importance of specialised environmental courts.

The task of achieving South Africa’s environmental goals is not limited to government alone. There are other role-players who play a critical role in ensuring the protection of environmental rights and achievement of the environmental goals set by government. Sachs J clearly articulated this in *Biowatch Trust v Registrar Genetic Resources and others* case (*Biowatch*),⁶⁰ when he

⁵⁶ Para 5 of the Johannesburg Principles (n 55 above).

⁵⁷ United Nations Environmental Programme (UNEP) ‘Rio+20 Declaration on Justice, Governance and Law for Environmental Sustainability’ in *Advancing Justice Governance and Law for Environmental Sustainability* (2012) 3. The Declaration emphasised the role of courts and tribunals in protecting the environment and for the first time in an authoritative forum there was a call for ECTs.

⁵⁸ The Congress was made up of over 150 Chief Justices, Judges, Attorneys General, Auditors General, Chief Prosecutors, and other high-ranking jurists from different countries. Participants at the Congress “seized a generational opportunity” to contribute to the development of environmental law, sustainability, and access rights by adopting the “Rio+20 Declaration on Justice, Governance, and Law for Environmental Sustainability – (n 57 above).

⁵⁹ Rio+20 Declaration (n 57 above) 66.

⁶⁰ 2009 (6) SA 232 (CC).

said that the protection of environmental rights not only depends on the diligence of public officials, but on the existence of a lively civil society which is willing to litigate in the public interest.⁶¹ Fortunately, the civil society in South Africa is quite active as they often take the government to task to ensure the protection of section 24 of the SA Constitution and ultimately the achievement of its overarching environmental goal of environmental sustainability and resilience.

For instance, in the case of the *Trustees for the time being of Groundwork Trust and another v Minister of Environmental Affairs and others (#DeadlyAir judgment)*,⁶² the applicants, instituted litigation against the Minister responsible for environmental affairs, seeking a declaratory order that the poor ambient air quality in the Highveld Priority Area is a violation of section 24 of the Constitution - the right to an environment that is not harmful to health and well-being, and further, that the Minister responsible for environmental affairs be mandated to prepare and publish regulations in terms of section 20 of the Air Quality Act to implement and enforce the Highveld Air Quality Management Plan.⁶³ The High Court granted the orders sought and declared that the poor air quality in the Highveld Priority Area is in breach of the constitutional right of the residents in the Highveld area to an environment that is not harmful to their health and well-being.⁶⁴ The court further declared that the Minister responsible for environmental affairs has a legal duty to prescribe regulations under Section 20 of the National Environmental Management: Air Quality 2004 (NEMAQA) to implement and enforce the Highveld Priority Area Air Quality Management Plan (Highveld Plan).⁶⁵ The Minister was directed to prepare, initiate, and prescribe regulations in terms of Section 20 of NEMAQA to implement and enforce the Highveld Plan within a period of 12 months.⁶⁶

Another case in point, is the case of *Wakkerstroom Natural Heritage Association v Dr Pixley Ka Isaka Local Municipality (Wakkerstroom)*.⁶⁷ The Applicant brought an interdict application against the Dr Pixley Ka Isaka Local Municipality, to prevent the municipality from proceeding with the construction of a bulk water pipeline project until the requisite additional water use licence was granted and environmental authorisation was issued, because the activity to be

⁶¹ 2022 JDR 1012 (GP) Para 19.

⁶² 2022 JDR 1012 (GP).

⁶³ Para 27.

⁶⁴ Para 241.1.

⁶⁵ Para 241.2.

⁶⁶ Para 241.4.

⁶⁷ Unreported judgment Case no. 1765/2019 High Court, Mpumalanga Division, Middelburg (Local Seat).

undertaken was located in close proximity to an endangered ecosystem, wetlands and indigenous vegetation located in undisturbed topsoil.⁶⁸ The court granted the interdict, ordering that the municipality was interdicted from continuing with the construction of the pipeline until an Environmental Authorisation was obtained.⁶⁹ Further to that, the Municipality was interdicted from abstracting any water in excess of what was permitted by the current water use license, or any water use license granted in favour of the municipality in future.⁷⁰

Another key role-player is the South African Human Rights Commission, one of the country's Chapter Nine institutions.⁷¹ In 2021, the South African Human Rights Commission instituted action against the Msunduzi Local Municipality & Others,⁷² (SAHRC case) seeking a declaratory relief that Msunduzi (first respondent) was in violation of the Waste Management Licence issued for the site, its constitutional obligations in terms of section 24 of the Constitution, the Compliance Notice, the provisions of the NEMA, National Environment Management Act: Waste Act, 2008 (NEM: WA) the National Water Act, 1998 (NWA) and international law.⁷³ It also sought to obtain a structural interdict against the Msunduzi Local Municipality to allow the court to exercise some form of supervisory jurisdiction over the municipality to ensure that the order is implemented.⁷⁴ The Municipality opposed the declaratory relief arguing that it had not breached the Constitutional right to an environment that is not harmful to health or wellbeing.⁷⁵ Msunduzi further argued that it had huge budgetary and procurement challenges in its management and operation of the landfill site.⁷⁶ The court found that the Municipality was in breach of section 24 of the Constitution as well as the provisions of the NEMA, NEM: WA, the NWA, and its obligations in terms of international law.⁷⁷ With respect to the structural interdict, the court ordered the Municipality to submit an Action Plan to the court, within a month of the order.⁷⁸

⁶⁸ Para 1.

⁶⁹ Para 115 subparagraph 1.

⁷⁰ Para 115 subparagraph 2.

⁷¹ Chapter nine institutions are independent institutions established in terms of chapter 9 of the SA Constitution to strengthen constitutional democracy in South Africa – section 181 of the SA Constitution.

⁷² *The South African Human Rights Commission v Msunduzi Local Municipality and Others* (8407/2020P) [2021] ZAKZPHC 35 (17 June 2021).

⁷³ Para 10.

⁷⁴ Para 10.

⁷⁵ Para 13.

⁷⁶ Para 60.

⁷⁷ Para 109 subparagraph 1 – 3.

⁷⁸ Para 109 subparagraph 4.

In summary, while South Africa has clear environmental goals which are embedded in its Constitution and the NDP 2030, the lack of a specialised environmental court speaks volumes about the country's commitment to advancing the achievement of South Africa's environmental goals. It is submitted that the establishment of a specialised environmental court would constitute one of the 'other measures' referred to in section 24(b) of the SA Constitution required for the protection of the environment for the benefit of present and future generations. As discussed in paragraph 3.3 of chapter 3, a specialised environmental court will offer various benefits such as greater efficiency, reduction of pending case backlogs in regular courts, better and higher-quality decisions, uniformity of decisions, greater predictability and confidence in the courts, the power to adopt new rules of procedure, evidence and *locus standi* which are flexible, streamlined and more effective compared to the rules of general courts, use of "problem-solving approaches", and increase in the judiciary's responsiveness. As further highlighted in paragraph 2.8 of chapter 2, the time taken by general courts to adjudicate on environmental matters can be lengthy and, in turn, this has an impact on the environment because the non-compliance continues unabated while the environment continues to suffer, sometimes with irreversible damage to the environment.

5.3 Summary of factors under decisional step one

The four factors considered under decisional step one can be summarised as follows:

- a. There is a legal structure in place which will cater for the establishment of a specialised environmental court. The legal structure allows for a specialised environmental court to be established, either as an independent specialised court like the Labour Court or the Land Claims Court, or as a designated court like the Sexual Offences Court or Specialised Commercial Crimes Court.
- b. The political environment in South Africa is relatively stable and largely responsive to environmental issues. However, the lack of political will remains a concern, particularly if the Department that holds the ultimate authority in whether a specialised court should be established or not, does not consider a specialised environmental court a necessity because of the complex logistics that would be involved in establishing such as court. It is, however, notable that the courts remain independent in their task of holding the executive accountable to its responsibility of upholding section 24 of the SA Constitution.

- c. South Africa has not shied away from implementing policies, promulgating legislation, and putting structures in place to address its socio-economic challenges. However, it has not considered that the establishment of a specialised environmental court is necessary for ensuring better protection of the environment, which, in turn, will have a positive impact on the socio-economic challenges faced by its citizens.
- d. South Africa has clear environmental goals which are entrenched in the Constitution and the National Development Plan. While it has in place the policy and legislative imperatives, it is yet to show full commitment towards the realisation of the right to an environment in certain aspects. However, civil society and the South African Human Rights Commission are devoted to ensuring environmental protection and are committed to making sure that the government fulfils its responsibility in the protection of the environment. Having a specialised environmental court in place would enhance civil society's ability to holding government accountable as environmental cases will be dealt with more efficiently and in a timely manner.

5.4 Decisional Step Two: the twelve design decisions

5.4.1 Type of forum

The type of forum relates to a choice between a judicial court or a tribunal and the level of independence of the selected forum.⁷⁹ Pring and Pring initially categorised environmental courts into: freestanding independent courts; green chambers and green judges.⁸⁰ However, this categorisation was modified in 2016 as follows: operationally independent court; decisionally independent court; mix of law-trained and science-trained judges – multidisciplinary decision-making; general court judges assigned environmental cases; general court judges trained in environmental law.⁸¹ Even though this study will not be focusing on tribunals, it is important to highlight that environmental tribunals are categorised into independent tribunals; quasi-independent tribunals and captive tribunals.⁸²

In terms of best practice, Pring and Pring indicate that the best model or 'zenith of environmental courts' is the operationally independent environmental court - a court that is

⁷⁹ Pring and Pring (2016) (n 4 above) xiv.

⁸⁰ Pring and Pring (2009) (n 10 above) 21.

⁸¹ Pring and Pring (2016) (n 4 above) 20.

⁸² Pring and Pring (2016) (n 4 above) 21.

independent, easily identifiable by the public, whose decision makers are highly trained in environmental law, and whose decisions are documented and published.⁸³ They further emphasise that the operationally independent environmental court provides the public with reassurance that it is an accessible, legitimate and unbiased place that citizens can convey their environmental concerns.⁸⁴

The type of forum that will be considered for the specialised environmental court is a judicial court, with options between an independent court model and a green court model. The independent court model will have the benefit of bringing flexible court rules, procedures, and remedies into effect.⁸⁵ This will effectively mean that the independent court model will be free from the limitations of the general court system's rules that relate to standing, evidence, cost awards, orders, penalties, etc., and will be able to put a wider range of "made for purpose" rules in place that improve access to justice and effectiveness.⁸⁶ As highlighted in paragraph 4.4.2 of chapter 4, the independent nature of the two courts – the Land and Environment Court of New South Wales and the Environment and Land Court in Kenya – has allowed the courts to be able to develop their own flexible court rules and procedures which has positively impacted the functioning of the courts. However, in as much as the independent model of environmental courts is laudable, one major shortcoming has been the costs and length of time that will be expended in establishing such courts, because the court will require its own infrastructure and personnel. Further, there would be the need to promulgate legislation to establish the court which can be a lengthy process. For instance, the Land Court Bill was first introduced in the National Assembly in May 2021 and was assented to by the President on 16 September 2023 after being passed by the National Assembly and National Council of Provinces in June 2023.⁸⁷ It has, however, not come into force. Thus, the green court model is a more viable option in that the green court model is cheaper, quicker, and easier to establish when compared with the

⁸³ Pring and Pring (2009) (n 10 above) at 26; Pring and Pring (2016) (n 4 above) 20 – they also referred to operationally independent environmental courts as the Rolls Royce of environmental courts; See also LY Sulistiawati *et al Environmental Courts and Tribunals - 2021: A Guide for Policymakers* United Nations Environmental Programme (2022) 44.

⁸⁴ Pring and Pring (n 10 above) 26; See also E Woodruff 'Environmental courts and tribunals: how can nations tackle the growing demand for justice on environmental issues?' *Denver Journal of International Law and Policy* (2011) 554.

⁸⁵ Pring and Pring (2016) (n 4 above) 46.

⁸⁶ Pring and Pring (2016) (n 4 above) 46.

⁸⁷ Parliamentary Monitoring Group 'The Land Court Bill (B11 – 2021)' <https://pmg.org.za/bill/1022/> (accessed 19 August 2023). The Bill would have been preceded by a White Paper and even when it is signed into law by the President it does not immediately come into force.

independent court model.⁸⁸ As Pring and Pring explain, the green court model entails designating an existing general court as a specialised environmental court with the advantage of being able to make use of existing court infrastructure and personnel.⁸⁹ This does not imply that there will be no financial implications or legislative amendments that may be required, but when compared with the costs of establishing an independent court model, it is cheaper and quicker.

5.4.2 Legal jurisdiction

This involves determining the legal jurisdiction of the specialised environmental court in terms of laws. That is, which laws or environmental matters would it cover and what would be its enforcement powers – narrow: limited to either criminal or civil or wide: all-encompassing jurisdiction of civil, criminal and administrative matters.⁹⁰ Pring and Pring advise that it is best practice to give the specialised environmental court “the ability to adjudicate civil, criminal and administrative issues together, because environmental disputes frequently involve more than one (if not all three) of these legal regimes and a court which has jurisdiction over criminal environmental laws will be better placed to achieve environmental justice and sustainable development.”⁹¹

Preston suggests that the specialised environmental court should have jurisdiction over a wide range of substantive environmental matters (including land use planning) and that its enforcement powers should cover civil, criminal, and administrative jurisdiction as this would provide the most comprehensive access to environmental justice and also provide a comprehensive one-stop shop for litigants.⁹² Preston further points out that the law establishing the court should create enabling legislation that relates to the aspects of the environment that

⁸⁸ Pring and Pring (2016) (n 4 above) 45.

⁸⁹ Pring and Pring (2016) (n 4 above) 45. The Hermanus Environmental Court started in a prefab container and a Magistrate, and two Prosecutors were deployed to serve in the court - Interview with Respondent No 1.

⁹⁰ Pring and Pring (2009) (n 10 above) 26; Pring and Pring (2016) (n 4 above) 48.

⁹¹ Pring and Pring (2016) (n 4 above) 16 and 48; Civil jurisdiction covers private disputes between individuals, businesses, and others on issues such as personal injury, property damage, and contracts, where the public is not usually a party; criminal jurisdiction deals with violations of the government’s laws defining criminally prohibited conduct and meting out punishment such as imprisonment and/or monetary fines and administrative jurisdiction deals with claims by or against the government - Pring and Pring (2016) (n 4 above) 6.

⁹² Preston (n 8 above) 372. See also Pring and Pring (2009) (n 10 above) 28; Pring and Pring (2016) (n 4 above) 48.

litigants would want to seek to protect because if there is no right of action then the courts would not have jurisdiction to hear a party who feels aggrieved.⁹³

It is submitted that a wide jurisdiction would work best in an independent environmental court because in a green court, the jurisdiction would have to be limited to the specific legal jurisdiction of the green court. For instance, if it is proposed that the specialised environmental court be established under the Magistrates court system, specifically the Regional Magistrates' court, the Magistrates' Court Act, 1944⁹⁴ will have to be amended to allow for Regional Magistrates' Courts to have civil jurisdiction in environmental matters, as was done with divorce matters.⁹⁵ This is because, in the Regional Magistrates' Court, the civil jurisdiction is limited to certain, specific matters. Similarly, where it is proposed that the green judge model be used, then again, such environmental court will be limited to the specific legal jurisdiction of the court in which the green judge is situated.

Pring and Pring argue that an integrated jurisdiction represents "the jurisdictional scope that best provides comprehensive access to environmental justice."⁹⁶ Preston also argues that it is ideal for an environmental court to have a comprehensive and integrated jurisdiction in substantive matters it deals with, such as environmental protection, land use and planning, pollution control, and in terms of the cases it has authority to hear - such as civil, administrative, merits review, judicial review and civil enforcement.⁹⁷ However, Sulistiawati *et al* caution that a broad jurisdiction for a specialised environmental court is only useful where the necessary resources and enforcement capacity is in place.⁹⁸ Using the Kenyan Environment and Land Court (ELC) as an example, they point out that when Kenya established its broad jurisdiction environmental courts, the courts struggled to keep up with the flood of environmental and land cases.⁹⁹

⁹³ Preston (n 8 above) 373.

⁹⁴ Act 32 of 1944.

⁹⁵ Sec 29(1B) of the Magistrates' Court Act 1944.

⁹⁶ Pring and Pring (2009) (n 10 above) 28.

⁹⁷ Preston (n 8 above) 375.

⁹⁸ Sulistiawati *et al* (n 83 above) 34.

⁹⁹ Sulistiawati *et al* (n 83 above) 34.

It is submitted that the proposed specialised environmental court should be given a wide jurisdiction to hear all environmental matters and land use planning matters.¹⁰⁰ Land use planning matters are proposed for inclusion for the following reasons:

- a. Land is a natural resource, and it is imperative that the way land is used is sustainable both for the current and future generation in line with section 24 of the Constitution.
- b. The Spatial Planning and Land Use Act, 2013 (SPLUMA)¹⁰¹ is the current national framework legislation for land use and planning in South Africa and can be regarded as one of the reasonable legislative measures envisaged in terms of section 24(b)(iii) of the Constitution to “secure ecologically **sustainable development and use of natural resources** while promoting justifiable economic and social development.”¹⁰² (own emphasis) This is clearly articulated in SPLUMA’s Preamble which highlights that a land use planning system must be protective of the environment and that “sustainable development of land requires the integration of social, economic and environmental considerations in both forward planning and ongoing land use management to ensure that development of land serves present and future generations;”¹⁰³

5.4.3 Level of decisional review

Pring and Pring suggest that a specialised environmental court at a trial level (otherwise referred to as a court of first instance) is preferable to having the court at an appellate level.¹⁰⁴ Most specialised courts are often at a trial level. For instance, in South Africa, the specialised courts are at a trial level with appeals to a specialised appeal court or to the Supreme Court of Appeal.¹⁰⁵ Similarly, in the two jurisdictions we considered in chapter 4 (New South Wales and Kenya), the two specialised environmental courts are courts of first instance with the status of a high court.¹⁰⁶

¹⁰⁰ The focus will be on land use planning and not municipal governance/service delivery issues or land reform/redistribution *per se* because the issue of land reform/redistribution is covered by the Restitution of Land Rights Act 22 of 1994 and Land Claims Court (soon to be replaced by the Land Court – see discussions on the proposed Land Court in chapter 3).

¹⁰¹ Act 16 of 2013.

¹⁰² Sec 24(b)(iii) of the SA Constitution, 1996.

¹⁰³ Preamble to the SPLUMA, 2013.

¹⁰⁴ Pring and Pring (2009) (n 10 above) 30.

¹⁰⁵ The Labour Court, the Land Claims Court, the Equality Court, and the Sexual Offences Court.

¹⁰⁶ Both courts also have appellate jurisdiction in certain specific matters. For instance, Kenya’s Environment and Land Court has appellate jurisdiction over the decisions of subordinate courts and local tribunals whose

With respect to the court's discretion in decision-making, Pring and Pring do not support *de novo* reviews or for new evidence to be allowed at the second and third instance review level.¹⁰⁷ In their view, this increases the cost of litigation and wastes time.¹⁰⁸

It is submitted that South Africa's environmental court should be a court of first instance with appellate powers to hear appeals from environmental related tribunals that exist in South Africa, such as the Water Tribunal.¹⁰⁹

5.4.4 Geographic area

Geographic coverage is key to ensuring access by all citizens to the court, thus ensuring environmental justice. According to Pring and Pring, the ideal geographic area of a court should be one that is compatible with other judicial and political boundaries to ensure that citizens have easy physical access to courts.¹¹⁰ They further suggest that, where it is not possible to situate the court within existing judicial and political boundaries, to ensure access by all citizens irrespective of how far they live from the court, the court should be a mobile court, and alternatively video and telecommunication mechanisms can also be put in place.¹¹¹

Tandon highlights the challenge of having one centralised environmental forum - the National Green Tribunal (NGT) - which has its headquarter in Delhi with four regional benches in Bhopal, Calcutta, Pune and Chennai - when he states that "a centralised forum at the national level is inadequate for a vast country such as India as it is inaccessible to a majority of people and that it would have been better to make use of the well-established network of high court as

jurisdiction are land or environment related such as the National Land Commission Act 5 of 2012, Rent Restriction Tribunal, Sec 8(2) of Cap 296 of the Laws of Kenya, and the National Environment Tribunal in terms of sec 130 of EMCA. The New South Wales' Land and Environment Court has appellate jurisdiction over appeals under the Environmental Planning and Assessment Act 1979 against refusals of local councils to grant development consent, but also includes appeals under the Protection of the Environment Operations Act 1997, the Waste Minimisation and Management Act 1995, the Threatened Species Conservation Act 1995, the Native Vegetation Conservation Act 1997 and more (class 1); appeals under various sections of the Local Government Act, as well as other Acts such as the Catchment Management Act 1989 and the Swimming Pools Act 1992 (class 2); objections to land valuation and rating appeals (class 3); decisions of the Local Court in prosecutions for environmental offences (class 6).

¹⁰⁷ Pring and Pring (2009) (n 10 above) 30.

¹⁰⁸ Pring and Pring (2009) (n 10 above) 30.

¹⁰⁹ Currently appeals from the Water Tribunal go to the High Court – section 149(1) of the National Water Act, 1998 (Act 36 of 1998).

¹¹⁰ Pring and Pring (2009) (n 10 above) 31.

¹¹¹ Sulistiawati *et al* (n 83 above) 23.

recommended by the Law Commission of India in its 186th Report”.¹¹² The result is that environmental issues do not reach the NGT thus invariably defeating the purpose of the NGT to offer remedies that are “just, quick and cheap”.¹¹³

As discussed in paragraph 4.3.2.4 of chapter 4, to counter the challenges of lack of access to court due to geographical location, Kenya makes use of circuit courts where the Environment and Land Court judges undertake circuit hearings and travel to various court stations to adjudicate disputes¹¹⁴ and also conducts proceedings through electronic means of communication, including tele-conferencing, video-conferences, or other modes of electronic communication.¹¹⁵ Similarly, in New South Wales, the Land and Environment Court allows for matters to be instituted via the online registry, for certain documents to be lodged online, or for directions hearings and other preliminary court proceedings to be conducted telephonically or online.¹¹⁶

While it might be possible to adopt the use of the local courts as New South Wales has done, it is submitted that the use of video and other telecommunication technology as a solution to ensuring access, might not offer the best solution in South Africa as not all citizens have equal access to video and telecommunication services. Therefore, socio-economic factors must be weighed carefully when determining the geographic location of the specialised environmental court. In South Africa, this might entail considering establishing the environmental court along magisterial districts as opposed to having one court situated in one place. If the latter is the most feasible, then various access options would have to be carefully considered as to what would work best to ensure access to the court by all citizens, without disadvantaging any person.

¹¹² U Tandon ‘Environmental courts and tribunals: a comparative analysis of Australia’s LEC and India’s NGT’ (2016) *The Indian Yearbook of Comparative Law* 13 <https://ssrn.com/abstract=3693408> or <http://dx.doi.org/10.2139/ssrn.3693408> (accessed 22 July 2023).

¹¹³ K Raj ‘Decentralising environmental justice: debating the National Green Tribunal *Economic and Political Weekly* (2014) <https://www.epw.in/journal/2014/48/web-exclusives/decentralising-environmental-justice.html> (accessed 22 June 2023).

¹¹⁴ Judiciary of the Republic of Kenya ‘State of the Judiciary and the Administration of Justice Annual Report 2021/2022’ (SJAJAR) 51 <https://www.judiciary.go.ke/wp-content/uploads/2023/07/Sojar-21-22-for-Launch-1.pdf> (accessed 7 June 2023).

¹¹⁵ Sec 23(2) of the Land and Environment Court Act, 2011 (Act 19 of 2011).

¹¹⁶ Land and Environment Court of NSW ‘Access for people in regional areas’ <https://www.lec.nsw.gov.au/Facilities-and-support/access-for-people-in-regional-areas.html> (accessed 20 April 2023). Rule 2.5 of the NSW Land and Environment Court Rules 2007.

5.4.5 Case volume

A major consideration for whether a country should establish an independent model or simply make use of the existing court structure by designating a green court or green judge, is the caseload. Pring and Pring opine that there should be at least 100 actual cases filed per judge per year, to justify a stand-alone ECT.¹¹⁷ Gramckow and Walsh opine that the need for more comprehensive specialisation and justification for investing in specialisation should be determined by the number of cases that require special treatment whether in the form of judicial expertise, processes, or services.¹¹⁸ Sulistiawati *et al* and Preston link the development of a rich and comprehensive environmental jurisprudence with a sufficient caseload.¹¹⁹

During interviews with Respondents Nos 2 to 4, it was highlighted by the Respondents that the number of environmental criminal cases does not justify establishing an independent environmental court.¹²⁰ The Respondents could, however, not confirm what caseload numbers would constitute a sufficient caseload. When asked if a specialised environment court would be of benefit if the caseload justified the establishment of such a court, all three Respondents were of the view that a specialised environmental court would be of benefit, given the nature of environmental law which is both a legally and scientifically technical field of law.¹²¹

A comparative analysis of the 2022/2023 annual reports from the National Prosecuting Authority (NPA) and the National Environment Compliance and Enforcement Inspectorate respectively, revealed that there is an anomaly in the statistics on environmental crimes reported in the NPA Annual Report and that of the National Environment Compliance and Enforcement Report (NECER). In the 2022/2023 NECER the total number of environmental crimes handed over to the NPA was 359 and 90 convictions were reported (a conviction rate of 25%).¹²² However, the statistics indicated in the NPA Annual Report 2022/2023 paint a different picture, in that the conviction rate is reported as 96% derived from 792 convictions of 825 verdict cases in environmental crimes.¹²³ It seems that the NPA and the EMIs gather

¹¹⁷ Pring and Pring (2009) (n 10 above) 33.

¹¹⁸ Gramckow and Walsh (n 44 above) 10.

¹¹⁹ Sulistiawati *et al* (n 83 above) 26; Preston (n 8 above) 368.

¹²⁰ Group 2 (current Prosecutors): Respondent No 2 (interview held on 21 February 2023); Respondent No 3 (interview held on 21 February 2023) Respondent No 4 (interview held on 3 April 2023).

¹²¹ Interviews with Respondent No 2 – 4 (n 120 above).

¹²² Department of Forestry, Fisheries and Environment 'National Environment Compliance and Enforcement Report (NECER) 2022/2023' 12.

¹²³ National Prosecuting Authority (NPA) 'Annual Report 2022/2023' 45.

different statistics from different perspectives, which makes it difficult to accurately confirm the number of criminal investigations handed over to the NPA and therefore, difficult to confirm the number of environmental crime cases that would constitute the caseload statistics. It is suggested that the two institutions align their targets and definitions of environmental crimes to address this inconsistency to ensure there is clear and accurate statistics relating to the actual caseload of environmental crime cases.

As highlighted in paragraph 2.4.2 of chapter 2, there are no specific statistics on environmental cases heard at the High Court because neither the DOJCD Annual Report nor Judiciary Annual Report filter civil matters filed and finalised in the High Court per area of law. In the 2022/2023 NECER, no civil court applications were reported.¹²⁴ It is, therefore, difficult to use the NECER to determine the number of environmental civil cases because it seems that the NECER focused on those civil applications instituted by the regulatory authorities, whereas civil applications cover much more.

The challenges highlighted above buttress the argument made in paragraph 2.4.1 of chapter 2, where it was pointed out that statistics are usually only available where there is a focus on that specific area of law, or where a specialised court has been established. For instance, in Kenya, the State of the Judiciary and the Administration of Justice Reports provides statistics on the number of cases filed and finalised in the Environment and Land Court.¹²⁵ Similarly, the NSW Land and Environment Court provides comprehensive statistics in its Annual Review.¹²⁶

It is submitted that the establishment of a specialised environmental court will ensure that proper records are kept of environmental criminal and civil cases heard by the court, such as is the case for labour cases and land claim cases in the Labour Court and the Land Claims Court in the DOJCD and Judiciary Annual Reports, respectively.

¹²⁴ NECER 2022/2023 (n 122 above). Civil Court applications are defined to mean civil proceedings instituted in the High Court (e.g., interdict, declaratory order) by regulatory authorities, usually in circumstances where notices or directives are ignored, and/ or actual or imminent significant harm is being caused to the environment (NECER 2022/2023 xii).

¹²⁵ The Judiciary of the Republic of Kenya 'State of the Judiciary and the Administration of Justice Annual Report 2021/2022' (SJAJAR) 81 <https://www.judiciary.go.ke/wp-content/uploads/2023/07/Sojar-21-22-for-Launch-1.pdf> (accessed 7 June 2023); See also The Judiciary of the Republic of Kenya 'State of the Judiciary and the Administration of Justice Annual Report 2022/2023' (SJAJAR 2022/2023) 128 - 129 <https://judiciary.go.ke/downloads-reports/> (accessed 13 March 2024).

¹²⁶ The Land and Environment Court 'The NSW Land and Environment Court Annual Review 2022' 30 – 36 https://lec.nsw.gov.au/documents/annual-review/2022_Annual_Review.pdf (accessed 13 March 2024).

It is, however, important to emphasise that there are other underlying factors that could account for a low caseload. These factors include limited jurisdiction of the current courts handling environmental crime cases, lack of political independence or will, or the perceived lack of credibility of the court.¹²⁷ It is, therefore, submitted that all factors that may contribute to low caseloads be considered holistically before using ‘a low caseload’ as the primary rationale for not establishing a specialised environmental court. A case in point is that of Ireland where the caseload was relatively low when it decided to establish a specialised commercial planning and environment court.¹²⁸ It had 87 environmental cases as of 2020 when it was considering establishing a specialised environment court.¹²⁹ As such, the focus should not necessarily be on a high caseload but whether, in considering whichever few cases come before the specialised environmental court, such decisions would promote environmental justice and ensure the protection of the environment.

It is submitted that a specialised environmental court with a wide jurisdiction over environmental and land use planning matters would ensure a sizeable caseload. The wide jurisdiction of the NWS LEC ensured the LEC had a sizeable caseload at its inception.¹³⁰ In Kenya, the Environment and Land Court also had a high caseload given the fact that it heard both land related and environment cases.¹³¹ It is further submitted that the existence of a specialised environmental court will give citizens the impetus to initiate litigation as such a court would be regarded as a forum where their environmental concerns would be better understood and adjudicated by judges who are specialists in the field.

¹²⁷ Woodruff (n 84 above) 556.

¹²⁸ On 17 April 2023, Ireland adopted a green court model with a dedicated division of the High Court with specialised judges established through Practice Direction HC119 - S Roger [The new commercial planning and environmental division of Ireland’s High Court that becomes effective from today’ (2023) <https://www.ogier.com/news-and-insights/insights/the-new-commercial-planning-and-environmental-division-of-irelands-high-court-that-becomes-effective-from-today/> (accessed 17 August 2023).

¹²⁹ R Mulcahy SC ‘The proposed environment court and its implications for the Irish planning system’ [PowerPoint slides] (2020) https://www.ipi.ie/sites/default/files/accordion-files/ipi_rory_mulcahy.pdf (accessed 13 July 2023).

¹³⁰ BJ Preston ‘Benefits of judicial specialization in environmental law: the Land and Environment Court of New South Wales as a case study’ (2012) *Pace Environmental Law Review* 407. See also B Preston ‘The role of the courts in delivering environmental justice’ lecture delivered by the Honourable Justice Brian Preston at the 2023 Sir Ninian Stephen Lecture University of Newcastle School of Law and Justice (2023) 10 <https://lec.nsw.gov.au/publications-and-resources/judicial-speeches-and-papers.html> (accessed 1 April 2024) where Preston explains that “centralisation facilitates the specialist environmental court having a critical mass of cases to achieve economies of scale.”

¹³¹ Sulistiawati *et al* (n 83 above) 34.

5.4.6 Standing

Pring and Pring explain that it is important to provide broad access rights to the specialised environmental court or tribunal so that citizens have access to every stage of the judicial process and ultimately access to environmental justice.¹³² They emphasise that a wide standing is key to maximising access to justice for citizens on environmental issues, because “if (a person) cannot get through the door of the courthouse there is no access to environmental justice.”¹³³

Fortunately, the SA Constitution makes clear provision for a wide *locus standi*. In terms of section 38 of the SA Constitution,

“Anyone listed in this section has the right to approach a competent court, alleging that a right in the Bill of Rights has been infringed or threatened, and the court may grant appropriate relief, including a declaration of rights. The persons who may approach a court are –

- a. anyone acting in their own interest;
- b. anyone acting on behalf of another person who cannot act in their own name;
- c. anyone acting as a member of, or in the interest of, a group or class of persons;
- d. anyone acting in the public interest; and
- e. an association acting in the interest of its members.”¹³⁴

Similarly, section 32 of the NEMA provides for a wide *locus standi* along the lines of those provided for in the SA Constitution. Section 32(1) of the NEMA provides that,

“Any person or group of persons may seek appropriate relief in respect of any breach or threatened breach of any provision of this Act, including a principle contained in Chapter 1, or of any provision of a specific environmental management Act, or of any other statutory provision concerned with the protection of the environment or the use of natural resources-

¹³² Pring and Pring (2009) (n 10 above) 33; Pring and Pring (2016) (n 4 above) 51; Sulistiawati *et al* (n 83 above) 34.

¹³³ Pring and Pring (2009) (n 10 above) 33.

¹³⁴ Sec 38(1) of the SA Constitution, 1996.

- (a) in that person's or group of person's own interest;
- (b) in the interest of, or on behalf of, a person who is, for practical reasons, unable to institute such proceedings;
- (c) in the interest of or on behalf of a group or class of persons whose interests are affected;
- (d) in the public interest; and
- (e) in the interest of protecting the environment.”¹³⁵

The wide *locus standi* provisions in section 32(1) of the NEMA and section 38 of the Constitution are being applied consistently by the courts. It was given effect to by the High court in *Sustaining the Wild Coast NPC and others v Minister of Mineral Resources and Energy and others (Sustaining the Wild Coast)*¹³⁶ when it considered whether the eighth and ninth applicants who applied to be joined in the litigation had made out a case for intervention. In deciding on this aspect Mbenenge J stated that:

“[i]t is trite law that an applicant for leave to intervene must show that it has **a direct and substantial interest** in the subject matter of the litigation, in the form of a legal interest that may be prejudicially affected by the judgment of the court.”¹³⁷ (own emphasis)

He further went on to explain that the generous approach to standing adopted in section 38 of the Constitution is an overriding factor to the need to show direct and substantial interest because the section grants *locus standi* to any party alleging the infringement of a right in the Bill of Rights acting in its own interest, on behalf of another person who cannot act in their own interest, in the interest of a group or class of persons, in the interest of the public or as an association acting in the interest of its members.¹³⁸ Further that section 32(1) of the NEMA makes provisions for an even broader legal standing to enforce environmental law in respect of any breach or threatened breach of NEMA as it “accords standing to any person or group of

¹³⁵ Sec 32(1) of the NEMA, 1998.

¹³⁶ 2022 (6) SA 589 (ECMk).

¹³⁷ Para 43.

¹³⁸ Para 45.

persons referred to in section 38 of the Constitution, but, most importantly, adds ‘in the interests of protecting the environment’ as another relevant factor.¹³⁹ He, therefore, granted the joinder application of the eighth and ninth applicants for the following reasons:¹⁴⁰

- a. the litigation they sought to be joined is of a public or constitutional character as it involves an infringement of the Bill of Rights and a breach or threatened breach of NEMA; and
- b. they were acting in the public interest and under the broader standing provisions set out in NEMA, therefore the range of interests upon which they rely, in contending for a direct and substantial interest, has to be broadly construed.

The *locus standi* of the municipality was challenged in the *City of Ekurhuleni v New Star Technology and another*.¹⁴¹ The first respondent raised a point *in limine* relating to the issue of *locus standi*. He contended that the City of Ekurhuleni (the applicant) was not competent to obtain the interdict as it is the Member of the Executive Council responsible for environmental affairs who has a direct and substantial interest in the matter and who should pursue the relief sought.¹⁴² Mia J in dealing with this point *in limine* highlighted that the applicant relied on section 32 of NEMA to institute the action “in its own interest and in the public interest so as to protect the environment for present and future generations”.¹⁴³ In view of this, the judge opined that he could see no bar to the applicant lodging “the application to pursue a group interest namely a community interest or its own obligation provided in terms of the Waste Act, the Air Quality Act or NEMA to ensure it protects the environment.”¹⁴⁴ The court, therefore, determined that in terms of section 32 of the NEMA, the applicant has the requisite standing to institute the application.¹⁴⁵

With adequate provision for a wide *locus standi* in the SA Constitution and the NEMA (the national framework legislation for South Africa), it will not be difficult to make provision for a wide *locus standi* in the proposed specialised environmental court as this will be consistent with the SA Constitution and the NEMA.

¹³⁹ Para 46.

¹⁴⁰ Para 48.

¹⁴¹ [2022] ZAGPJHC 769; 2023 (3) SA 579 (GJ) (23 September 2022).

¹⁴² Para 14.

¹⁴³ Para 18

¹⁴⁴ Para 18.

¹⁴⁵ Para 19.

5.4.7 Costs

Costs play a major role in ensuring access to environmental justice.¹⁴⁶ There are two aspects to the issue of costs. The first aspect relates to the costs of instituting litigation – court fees and lawyers’ fees. Litigants often cite the issue of costs and financial risk as chilling factors to instituting environmental litigation.¹⁴⁷ It is, therefore, important that specialised courts adopt cost-reduction strategies to encourage citizens to institute or seek redress from the court. Pring and Pring outline the following cost reduction ideas to reduce the costs of litigation:¹⁴⁸

- a. reducing or waiving filing or court fees,
- b. making use of public environmental prosecutors.
- c. providing financial support for indigent parties and public interest litigants.
- d. Putting in place an efficient case management system.
- e. Adopting ADR mechanisms.
- f. Permitting litigants to represent themselves.
- g. Dispensing with the requirement for a plaintiff to pay a security cost even when temporary restraining orders and preliminary injunctions to preserve the status quo are issued.
- h. Making provision for court-appointed experts.
- i. Combining similar complaints into one adjudication process.

Chaturvedi, on his part, links decrease in litigation costs with a readily available court which has a wide *locus standi* because litigators are saved money and time which would otherwise have been spent traveling from place to place.¹⁴⁹ It is submitted that the proposed specialised environmental court should have cost reduction strategies in place but as Pring and Pring caution, not at the expense of revenue that needs to be generated for the running of the court.¹⁵⁰ A balance must be sought to ensure that litigants are still able to access the court to seek justice while at the same time, the court generates some funding for its continued existence.

¹⁴⁶ Pring and Pring (2009) (n 10 above) 54.

¹⁴⁷ Pring and Pring (2009) (n 10 above) 40.

¹⁴⁸ Pring and Pring (2009) (n 10 above) 54; Sulistiawati *et al* (n 83 above) 56 – 57.

¹⁴⁹ E Chaturvedi ‘Green courts: the way forward?’ *Cornell Policy Law Review* (2020) 6.

¹⁵⁰ Pring and Pring (2009) (n 10 above) at 41.

The second aspect of the issue of costs relates to the award of costs to successful litigants or against unsuccessful litigants. Section 32(2) of the NEMA clearly articulates South Africa's position with respect to the award of costs in environmental litigation. Section 32(2) provides that,

“A court may decide not to award costs against a person who, or group of persons which, fails to secure the relief sought in respect of any breach or threatened breach of any provision of this Act, including a principle contained in Chapter 1, or of any provision of a specific environmental management Act, or of any other statutory provision concerned with the protection of the environment or the use of natural resources, **if the court is of the opinion that the person or group of persons acted reasonably out of a concern for the public interest or in the interest of protecting the environment and had made due efforts to use other means reasonably available for obtaining the relief sought.**”¹⁵¹ (own emphasis)

The effect of section 32(2) is to ensure that litigants who seek to institute action with the intention of protecting the environment or the use of natural resources can do so without fear of costs being instituted against them should the action fail. Of course, the court must be convinced that the action was instituted out of a reasonable concern for the public interest or in the interests of protecting the environment and due efforts to use other means reasonably available have been made by the person or group of persons who institute the action. Kidd emphasises that the costs provision in section 32 of the NEMA is a very important provision in that, by reducing the disincentive for citizens to approach the courts to enforce environmental law, concerned citizens are more likely to use the courts to enforce environmental law, which is vital to the protection of the South African environment.¹⁵²

The provisions of section 32(2) have over the years found expression in court decisions on the issue of costs awards in constitutional litigation which seek to protect constitutional rights. For instance, in *Affordable Medicines Trust and Others v Minister of Health and Others (Affordable Medicines)*¹⁵³ Ngcobo J espoused the general principle (which is different from the

¹⁵¹ Sec 32(2) of the NEMA, 1998.

¹⁵² M Kidd ‘Of Gas Pipelines and Sour Judicial Air: *Merebank Environmental Action Committee v Executive Member of KwaZulu-Natal Council for Agricultural and Environmental Affairs*’ (2001) *South African Journal of Environmental Law and Policy* 138.

¹⁵³ 2006 (3) SA 247 (CC).

general principles on costs awards established over the years by the Supreme court of Appeal)¹⁵⁴ that an unsuccessful litigant in proceedings against the State ought not to be ordered to pay costs, “as an award of cost might have a chilling effect on the litigants who may wish to vindicate their constitutional rights”¹⁵⁵

The Constitutional Court’s decision in the *Biowatch Trust v Registrar Genetic Resources and others* case (*Biowatch*),¹⁵⁶ further expatiated on the general principle espoused by Ngcobo J in *Affordable Medicines*, when considering the issue of cost orders against public bodies or persons who institute legal action in defence of constitutional rights. *Biowatch Trust* (the applicant) sought leave to appeal to the Constitutional Court (CC) against two costs decisions issued to it by the High Court in an application that concerned the issue of access to information. The Constitutional Court granted the appeal and set aside the two costs orders granted against the applicant.¹⁵⁷ The following basic principles in relation to costs awards in constitutional litigation were highlighted by the Constitutional Court in its decision:

- a. Characterisation of the parties is not the correct way to begin the enquiry on a costs award.¹⁵⁸
- b. Costs awards should not be dependent on whether the parties were acting in their own interests or in the public interest, or whether the parties were financially well endowed or indigent or, as in the case of many NGOs, reliant on external funding.¹⁵⁹ The primary consideration in constitutional litigation should be how a cost order would hinder or promote the advancement of constitutional justice.¹⁶⁰
- c. Where a private party loses in constitutional litigation against the State when seeking to assert a constitutional right against the State, each party would bear its own costs.¹⁶¹
- d. Powerful reasons had to exist for a court not to award costs against the State in favour of a private litigant who was successful in litigation instituted against the State and in

¹⁵⁴ These two principles are that a judicial officer who hears a matter has wide discretion to decide on the parties’ costs and that ‘costs follow the outcome of a case’. See *Kruger Bros and Wasserman v Ruskin* 1918 AD 63 at 69. See also *Fripp v Gibbon and Co* 1913 AD 354 at 357 and *Merber v Merber* 1948 (1) SA 446 (A), at 452.

¹⁵⁵ Para 138.

¹⁵⁶ 2009 (6) SA 232 (CC).

¹⁵⁷ Para 61.

¹⁵⁸ Para 16.

¹⁵⁹ Para 16.

¹⁶⁰ Para 16.

¹⁶¹ Para 23.

this instance the reasons advanced by the High Court, for its departure from the general rule in constitutional litigation between a private party and the State, were not compelling.¹⁶²

- e. The general point of departure in a matter where the State was shown to have failed to fulfil its constitutional and statutory obligations, and where different private parties were affected, is that the State would bear the costs of successful private litigants and ordinarily there would be no costs orders against any unsuccessful private litigants who are part of the litigation.¹⁶³

The need to address the chilling effects of costs in environmental litigation was also highlighted in the case of *South Durban Community Environmental Alliance v MEC for Economic Development, Tourism and Environmental Affairs: KwaZulu-Natal Provincial Government*¹⁶⁴ where the SCA dismissed the appeal but set aside the cost order that had been imposed against South Durban Community Environmental Alliance (the Appellant). In this case the Appellant had applied to the High Court to review a decision in which Capital Property Fund Limited (first respondents) had been granted an environmental authorisation to construct a logistics park near the Durban port.¹⁶⁵ The High Court dismissed the review application with costs, holding that the Appellant had failed to provide evidence supporting its contentions relating to air pollution. On appeal to the SCA, the appeal was dismissed but three of the SCA judges of the five SCA judges disagreed with the main judgment on the issue of costs and set aside the cost order. Specifically, Makgoka JA held that, “the chilling effect which a costs order in the circumstances of this case will have on environmental non-governmental organisations, is manifest.”¹⁶⁶

These cases show that generally courts are now leaning towards exercising the discretion in section 32 of the NEMA in favour of environmental litigants who bring actions in the public interest to protect constitutional rights.¹⁶⁷ Nonetheless, such litigation must not be frivolous or

¹⁶² Para 24 and 43.

¹⁶³ Para 56.

¹⁶⁴ [2020] ZASCA 39 (17 April 2020).

¹⁶⁵ The Applicant had argued that the logistics park would produce vehicular emissions of disproportionate scale and the communities residing in its vicinity would be exposed to significant levels of ambient air pollution.

¹⁶⁶ Para 74.

¹⁶⁷ In earlier environmental litigation, some Judges did not apply section 32(2) of the NEMA when considering the issue of costs against unsuccessful environmental litigants. For instance, in the case of *Merebank*

unreasonable as the court espoused in *Wildlife and Environmental Society of South Africa v MEC for Economic Affairs, Environment and Tourism, Eastern Cape, and Others*.¹⁶⁸ The applicant instituted a review application against the respondent seeking to set aside an environmental authorisation issued to the third respondent by the Department for Economic Affairs, Environment and Tourism, Eastern Cape (second respondent), granting it authorisation to install an incinerator.¹⁶⁹ The applicant was concerned about the high levels of emissions that would be emitted due to toxic chromium chemicals that would be present in the waste to be incinerated.¹⁷⁰ It, however, withdrew the application without tendering costs when it discovered that its concerns regarding the chromium emission had already been addressed (before the launch of the review application) and filed a replying affidavit to support its argument that no costs order should be issued against it.¹⁷¹ The court did not dispute that the applicant brought the review application in the public interest and in the interest of protecting the environment.¹⁷² However, the court awarded costs against the applicant on the reasoning that the applicant should have exercised due care so that it would have become aware that its concerns had already been met and the application was therefore unnecessary.¹⁷³

The discretion for the award of costs by the proposed specialised environmental court will certainly be aligned to section 32(2) of the NEMA. This will ensure that litigants are not reluctant or deterred from instituting environmental litigation in the court fearing the exorbitant costs awards that may be issued against them. This will in turn increase the number of environmental cases that are instituted in the court leading to the development of environmental jurisprudence in the specialised environmental court.

Environmental Action Committee v Executive Member of KwaZulu-Natal Council for Agricultural and Environmental Affairs Unreported case nr 2691/01, the Judge did not consider section 32(2) of the NEMA even though the Applicant argued that different considerations should be applied to the question of costs because the matter before the court was an environmental matter. Instead, the Judge granted costs orders against the Applicant who he stated was not willing to make the concession that if he was successful, he would agree that costs should not follow the result because environmental factors were involved. Kidd points out that the Merebank case was the first opportunity for the High Court to provide judicial interpretation of section 32(2) of the NEMA, but it failed to do so and thereby sent a wrong message to environmental activists who wish to use the courts to enforce environmental legislation that they do so at risk to their own pockets. Fortunately, the ‘precedent’ set by Merebank has not been followed to the extent that it has become an established precedent. Kidd (n 152 above) 138.

¹⁶⁸ 2005 (6) SA 123 (E).

¹⁶⁹ 2005 (6) SA 123 (E) 126.

¹⁷⁰ 2005 (6) SA 123 (E) 126.

¹⁷¹ 2005 (6) SA 123 (E) 127.

¹⁷² 2005 (6) SA 123 (E) 133.

¹⁷³ 2005 (6) SA 123 (E) 143 – 144.

It is also important to highlight the provisions of section 32(3) of the NEMA which provides for the award of costs to advocates and attorneys who represent environmental litigants on a *pro bono* basis, where the litigants they are representing secure the relief sought. In terms of section 32(3)(a) of the NEMA

“Where a person or group of persons secures the relief sought in respect of any breach or threatened breach of any provision of this Act, or of any provision of a specific environmental management Act, or of any other statutory provision concerned with the protection of the environment, a court may on application -

(a) award costs on an appropriate scale to any person or persons entitled to practise as advocate or attorney in the Republic who provided free legal assistance or representation to such person or group in the preparation for or conduct of the proceedings;”¹⁷⁴

In terms of section 32(3)(b) of the NEMA, the court may order an unsuccessful defendant to pay the plaintiff any reasonable costs incurred by the plaintiff in the investigation of the matter and for preparations made for the proceedings.¹⁷⁵

Couzens explains that the purpose of section 32(3) of the NEMA is to encourage legal representatives to become involved with environmental litigation and to also provide potential environmental litigants with “further inducement to litigate, by extending the scope of the costs recoverable on success in the action”.¹⁷⁶

5.4.8 Scientific and technical expertise

Environmental law is a technical and science-based area of law. The technical and scientific nature of environmental law has been one of the main justifications for the establishment of

¹⁷⁴ Sec 32(3)(a) of the NEMA, 1998.

¹⁷⁵ Sec 32(3)(b) provides that [w]here a person or group of persons secures the relief sought in respect of any breach or threatened breach of any provision of this Act, or of any provision of a specific environmental management Act, or of any other statutory provision concerned with the protection of the environment, a court may on application . . . (b) order that the party against whom the relief is granted pay to the person or group concerned any reasonable costs incurred by such person or group in the investigation of the matter and its preparation for the proceedings.”

¹⁷⁶ Ed Couzens ‘Costs, with pained regret: Wildlife and Environmental Society of South Africa v MEC for Economic Affairs, Environment and Tourism, Eastern Cape, and Others 2005 (6) SA123 (E)’ (2007) *South African Journal of Environmental Law and Policy* 219 – 220.

specialised environmental court in most countries. As Park explains, judges need to understand the scientific methodology that is central to environmental cases before they make decisions.¹⁷⁷ Preston explains that specialised environmental courts should have access to scientific expertise so as to provide better analysis of scientific evidence in cases before the court.¹⁷⁸ He further highlights that internal scientific expertise is preferable to external expertise, as the former would eliminate or reduce the potential for partisan and biased testimony.¹⁷⁹ Similarly, Chaturvedi highlights that an expert who is part of the justice delivery system is more likely to be impartial than someone who is appointed externally.¹⁸⁰

The use of assessors in the courts is not new in South Africa. For instance, the Land Claims Court makes use of assessors who are required to have the skills and knowledge relevant to the work of the court but need not have any legal qualifications.¹⁸¹ The Magistrates' court and High courts make use of assessors in criminal trials,¹⁸² while section 34 of the Magistrates' Courts Act, 1944 *inter alia* makes provision for the use of assessors in civil matters.¹⁸³

It is submitted that the proposed specialised environmental court should provide for judges to sit with at least one technical expert (with an environmental science, management or technical education), similar to the system that is in place in the New South Wales LEC, where commissioners are appointed in terms of section 12 of the Land and Environment Court Act,

¹⁷⁷ KJ Park 'Judicial utilization of scientific evidence in complex environmental torts: redefining litigation driven research' (2011) *Fordham Environmental Law Review* 487. See also Sulistiwati *et al* (n 83 above) 30.

¹⁷⁸ Preston (n 8 above) 381.

¹⁷⁹ Preston (n 8 above) 381.

¹⁸⁰ Chaturvedi (n 149 above) 6.

¹⁸¹ Sec 27(1) and (2) of the Restitution of Lands Act, 1994.

¹⁸² Sec 93ter of the Magistrates' Court Act, 1944 provides that (1) The judicial officer presiding at any trial may, if he deems it expedient for the administration of justice - (a) before any evidence has been led; or (b) in considering a community-based punishment in respect of any person who has been convicted of any offence, summon to his assistance any one or two persons who, in his opinion, may be of assistance at the trial of the case or in the determination of a proper sentence, as the case may be, to sit with him as assessor or assessors. Sec 145(1)(a) of the Criminal Procedure Act 51 of 1977 states that "[e]xcept as provided in section 148, an accused arraigned before a superior court shall be tried by a judge of that court sitting with or without assessors" and Sec 145(1)(b) of the Criminal Procedure Act 1977 states that "[a]n assessor for the purposes of this section means a person who, in the opinion of the judge who presides at a trial, has experience in the administration of justice or skill in any matter which may be considered at the trial." B Tshela and MC Marumoagae highlight that in the high court an assessor is required to have experience in the criminal justice system or possess some other skill such as accounting and finance knowledge in commercial crimes which presiding judges may deem useful in a particular case while in the magistrates' courts no experience in the criminal justice system or other useful skill is required for assessors - B Tshela and MC Marumoagae 'Lay participation in the South African criminal justice system: An assessment of the assessor system' (2021) *South African Journal of Criminal Justice* 343 and 344.

¹⁸³ Sec 34 of the Magistrates' Court Act 1944 provides that "In any action the court may, upon the application of either party, summon to its assistance one or two persons of skill and experience in the matter to which the action relates who may be willing to sit and act as assessors in an advisory capacity."

1979¹⁸⁴ by the Governor and are required to have special knowledge of, and experience in fields which are related to the areas of jurisdiction of the LEC.

5.4.9 Alternative Dispute Resolution

The use of alternative dispute resolutions (ADR) is not new in specialised environmental courts and tribunal systems.¹⁸⁵ An ADR system seeks to reduce costs, court caseloads, and trial time.¹⁸⁶ Most importantly, for environmental disputes, they offer the option of creative win-win outcomes instead of the adversarial nature of general litigation where a party wins while the other loses.¹⁸⁷ Environmental disputes can involve various parties including private individuals to the general public or other communities and can impact various places, nationally and internationally. As Dani explains, ADR is a mechanism that provides the kind of flexibility to settling an environmental dispute which litigation cannot provide and allows the parties concerned the chance to jointly decide on a process to resolve the dispute.¹⁸⁸ It is not as formal or time and money consuming as litigation and also provides for the opportunity to repair relationships between the parties.¹⁸⁹ Various forms of ADR mechanisms can be adopted such as mediation, conciliation, early neutral evaluation, negotiation, expert determination and arbitration - all aimed at an efficient resolution of the environmental dispute.¹⁹⁰

The NEMA makes provision for the following ADR mechanisms – conciliation (alternatively referred to as mediation),¹⁹¹ and arbitration.¹⁹² Where an environmental dispute is before a court or tribunal, section 17(3) of the NEMA allows the court or tribunal to order the parties

¹⁸⁴ Land and Environment Court Act 204 of 1979.

¹⁸⁵ Federal Environmental Tribunal of Ethiopia, the Land Court of Queensland, the Environment and Land Court of New South Wales are examples of countries who make use of ADR in their environmental court system – Sulistiawati *et al* (n 83 above) 89 and 106.

¹⁸⁶ Pring and Pring (2009) (n 10 above) 15; Preston (n 8 above) 380.

¹⁸⁷ Preston (n 8 above) 380; Pring and Pring (2009) (n 10 above) 15.

¹⁸⁸ R Dani 'Role of Alternative Dispute Resolution in Environmental Disputes'

<https://viamediationcentre.org/readnews/NTE3/Role-of-Alternative-Dispute-Resolution-in-Environmental-Disputes> (accessed 17 September 2023)

¹⁸⁹ Dani (n 188 above).

¹⁹⁰ Pring and Pring (2009) (n 10 above) 15; See also RM Ingonga 'Alternative Dispute Resolution in Environmental Disputes: A Case of the Specialized Environment and Land Court in Kenya' (2018) *Journal of Conflict Management and Sustainable Development* <https://journalofcmsd.net/alternative-dispute-resolution-in-environmental-disputes-a-case-of-the-specialized-environment-and-land-court-in-kenya/> (accessed 20 September 2023).

¹⁹¹ Secs 17 and 18 of the NEMA.

¹⁹² Sec 19 of the NEMA.

to submit the dispute to a conciliator appointed by the Director-General in terms of the NEMA and suspend the proceedings pending the outcome of the conciliation.¹⁹³ Section 19 of the NEMA provides for the arbitration process. However, this process is subject to a panel of arbitrators having been established by the Minister responsible for environmental affairs in terms of section 21(2) of the NEMA, or where no such panel has been appointed, the use of the panel established in terms of the Land Reform (Labour Tenants) Act, 1996.¹⁹⁴

It is submitted that the use of ADR mechanisms will be of benefit in the proposed specialised environmental court because, and as discussed here and in chapter 4, ADR mechanisms enhance litigants access to justice.¹⁹⁵ As Pring and Pring advise, the enabling legislation for the specialised environmental court should put the use of ADR in place.¹⁹⁶ In Kenya, section 20(1) of the Environment and Land Court Act makes provision for Kenya's Environment and Land Court to adopt and implement on its own motion and with the agreement of, or at the request of the parties, any appropriate means of alternative dispute resolution such as conciliation, mediation or other traditional dispute resolution mechanism as envisaged by Article 159(2)(c) of the Constitution of the Republic of Kenya, 2010. However, regard must be had to Preston's caution that ADR mechanisms should not be compulsory, but rather each case should be assessed to determine whether the use of ADR would be appropriate.¹⁹⁷

5.4.10 Competence of judges and decision makers

A main characteristic of specialised courts is the appointment of competent judges and/or decision-makers. Competence in the context of specialised environmental courts could mean judges who are experts in environmental law,¹⁹⁸ whether already acquired or to be acquired through training.¹⁹⁹ Preston opines that the ideal would be for judges to be 'environmentally literate' before their appointment, because they would be able to make better judgments and ensure uniformity, consistency, and access to environmental justice.²⁰⁰

¹⁹³ The conciliator may be appointed on agreement by the parties or where the parties do not reach an agreement by the Director-General – sec 18(1) of the NEMA.

¹⁹⁴ Sec 21(3) of the NEMA.

¹⁹⁵ Pring and Pring (2009) (n 10 above) xiv.

¹⁹⁶ Pring and Pring (2016) (n 4 above) 47.

¹⁹⁷ Preston (n 8 above) 380.

¹⁹⁸ Sulistiawati *et al* (n 83 above) 26.

¹⁹⁹ Preston (n 8 above) 377.

²⁰⁰ Preston (n 8 above) 377.

Such competency requirements can be embedded in the legislation that caters for the appointment of the judges of the specialised environmental court. For instance, in Kenya, to be appointed as a judge of the Land and Environment Court, such a person must have at least 10 years' experience as a distinguished academic or legal practitioner with knowledge and experience in matters relating to environment or land.²⁰¹

It is also important that, even if a judge has the requisite expertise in environmental law, there should be continuing environmental legal education training which must be commensurate with general court judges, particularly because environmental law is an evolving law.²⁰²

Linked to the appointment of a judge who is competent is the selection process which must be transparent and merit-based,²⁰³ Pring and Pring suggest that a neutral third party must be responsible for nominating the environmental court's judges instead of nomination by the government.²⁰⁴ For instance, Raj laments the fact that the NGT is not transparent with the appointment of the chairman, judicial member and technical member, in that the selection process is not based on a system of public notification and an open process.²⁰⁵ Rather, the NGT Act provides for the qualifications of the chairman, judicial member and technical member and in section 6 simply states that the chairperson shall be appointed by the central government in consultation with the Chief Justice, while the judicial and technical members will be appointed on the recommendations of the selection committee. According to Raj, consultation and recommendations does not necessarily lead to a meritorious appointment.²⁰⁶ In South Africa, the appointment of judges and magistrates follows a rigorous process that involves the Judicial Service Commission in the case of appointment of judges²⁰⁷ to the High Court and the Magistrates' Commission in the case of appointment of magistrates to the Magistrates court.²⁰⁸

²⁰¹ Sec 7(1)(b) provides that (1) A person shall be qualified for appointment as Judge of the Court if the person - (b) has at least ten years' experience as a distinguished academic or legal practitioner with knowledge and experience in matters relating to environment or land.

²⁰² BJ Preston (n 130 above) 409; Pring and Pring (n 10 above) 73; Pring and Pring (n 4 above) 47.

²⁰³ Pring and Pring (2009) (n 10 above) 29.

²⁰⁴ Pring and Pring (2009) (n 10 above) 75.

²⁰⁵ Raj (n 113 above).

²⁰⁶ Raj (n 113 above).

²⁰⁷ Sec 174(1) and (2) of the SA Constitution read together with the Summary and explanation of the criteria and guidelines used by the Judicial Service Commission when considering candidates for judicial appointment 2022 The South African Judiciary 'Summary and Explanation of the Criteria and Guidelines used by the Judicial Service Commission when considering candidates for judicial appointment' (2022) <https://www.judiciary.org.za/index.php/judicial-service-commission/criteria-for-judicial-appointment> (accessed 27 December 2022).

²⁰⁸ Sec 10 of the Magistrates Act 90 of 1993.

It is submitted that the process of appointing judges and magistrates should remain the same for the appointment of judges or magistrates to the specialised environmental court, as the case may be. What is pertinent is the competency in terms of expertise of the judges or the magistrates who will serve in the court. Such judges or magistrates should at the minimum have experience in environmental law or alternatively, must receive training in environmental law, once appointed. Continuous training in environmental law must be emphasised because environmental law is an evolving field of law.

5.4.11 Case management

Case management goes hand in hand with reducing litigation time and costs and thus increasing the efficiency of a court. Over the years specialised courts have implemented case management systems aimed at fast tracking cases before them. According to Sulistiawati *et al*, efficient case management systems will ensure that courts finalise a higher proportion of cases and as such, a good case management system benefit not just the litigants, but the court as well.²⁰⁹

Active case management is defined as “any court-based process or technology designed to move cases more efficiently and fairly from filing through trial to an appropriate conclusion”.²¹⁰ There is a wide range of active case management tools²¹¹ that can be used by the court, and these include:

a. *Efficient Court Managers/Registrars/Clerks*

The court manager, registrar or clerk can monitor case progress from the day the case is lodged.²¹² They will assist parties and members of the public during the filing process guiding on the process, rules, forms, costs, and expectations.²¹³

b. *Early review of cases*

Cases are reviewed early and on an ongoing basis by the court registrar/clerk to ensure that deadlines are met, and documents are filed within the stipulated time.²¹⁴

²⁰⁹ Sulistiawati *et al* (n 83 above) 38.

²¹⁰ Pring and Pring (2009) (n 10 above) 76.

²¹¹ Pring and Pring (2009) (n 10 above) 76 – 79; Pring and Pring (2016) (n 4 above) 25; Sulistiawati *et al* (n 83 above) 38 – 39. Preston (n 8 above) 385.

²¹² Pring and Pring (2009) (n 10 above) 23; Pring and Pring (2016) (n 4 above) 25.

²¹³ Pring and Pring (2016) (n 4 above) 25.

²¹⁴ Pring and Pring (2009) (n 10 above) 76.

c. *Directions Hearings*

Meetings are held with the judge, registrar, or clerk of the court to set timelines for filing of documents, exchange of information, determine the applicability of ADR, consideration of expert reports, hearing of interlocutory motions and setting of a hearing date.²¹⁵ In Australia's State of Queensland Planning and Environment Court, the judges, attorneys and parties meet at the beginning of litigation and develop a "fast-track calendar" for the entire case, including the trial date.²¹⁶ This case management system has the positive effect of cutting costs on both sides and the trial dates are usually within three months of the meeting with trials, lasting not more than three days.²¹⁷

With the advent of technology, case management has also taken on a digital form, and these include:

d. *Computer Data Management Systems*

Digital data management systems for cases that keep track of the status, progress, and deadlines. Such systems also publish public notices and decisions.²¹⁸ They also automatically notify court staff of key dates in advance so that parties can be reminded to carry out the tasks that is required of them in relation to the case.²¹⁹

e. *ADR Screening Process*

The ADR screening process reviews cases early to determine if the case is suitable for mediation or other ADR mechanism.²²⁰

f. *Websites*

Several courts make use of interactive websites that provide relevant information on the court relating to history, jurisdiction, process for instituting legal actions, case decisions, annual

²¹⁵ Preston (n 8 above) 385; Pring and Pring (n 4 above) 55; Sulistiawati *et al* (n 83 above) 39.

²¹⁶ Pring and Pring (2009) (n 10 above) 44.

²¹⁷ Pring and Pring (2009) (n 10 above) 43 and 54.

²¹⁸ Pring and Pring (2009) (n 10 above) 77.

²¹⁹ Preston (n 8 above) 385.

²²⁰ Sulistiawati *et al* (n 83 above) 25; Pring and Pring (2016) (n 4 above) 47; Pring and Pring (2009) (n 10 above) 76, 78.

reports and evaluation reports, notices of hearing.²²¹ Some also have the capability of online filing of documents.²²²

g. Digital media

Some courts make use of video conferencing or tele-conferencing for meetings and hearings.²²³

h. Traveling Courts

This is often linked to independent court models to ensure access to justice by parties who do not live within the physical jurisdiction of the court, so the judges are transported to the people and the environmental problem.²²⁴ Another form of traveling court is to conduct *in-situ* hearings for purpose of visual observation, investigation and fact finding.²²⁵

i. Alternate Hours

Some courts sit at night or during the weekend so that parties can attend hearings without impacting on their day work.²²⁶

j. Relaxed Rules

Specialised courts often put less complicated technical rules of procedure and evidence in place.²²⁷

South Africa makes use of some of the tools outlined above, particularly in its civil procedure matters. For instance, the High court in Pretoria and Johannesburg has adopted hybrid hearings which include video-link hearings;²²⁸ and requires that all new cases be initiated on the Court Online Portal for issuing and enrolment.²²⁹ In the Regional Magistrates' court, the Civil

²²¹ Preston (n 8 above) 385; Pring and Pring (2009) (n 10 above) 76.

²²² Preston (n 8 above) 385; Pring and Pring (2016) (n 4 above) 54; Pring and Pring (2009) (n 10 above) 76.

²²³ Pring and Pring (2009) (n 10 above) 76.

²²⁴ Pring and Pring (2016) (n 4 above) 55; Pring and Pring (2009) (n 10 above) 78; Sulistiwati *et al* (n 83 above) 39.

²²⁵ Pring and Pring (2009) (n 10 above) 76.

²²⁶ Pring and Pring (2009) (n 10 above) 78.

²²⁷ Pring and Pring (2009) (n 10 above) 76; Pring and Pring (2016) (n 4 above) 55.

²²⁸ Paragraph 1.1 of Judge President's revised consolidated directive in re: court operations in the Pretoria and Johannesburg high courts of the Gauteng division, Directive 2 of 2022 with effect from 18 July 2022.

²²⁹ Paragraph 2.1 of Directive 1 of 2022 (the Court Online Pilot Directive).

Practice Directives for the Regional Courts (Civil Practice Directives),²³⁰ incorporate several case management tools which include:

- a. the use of audio-visual links for appearance and hearing in civil matters;²³¹
- b. dispensing with any provision of the Rules Regulating the Conduct of the Proceedings of the Magistrates' Courts of South Africa²³² and giving directions on the procedure to be followed by the parties so as to dispose of the action in the most expeditious and least costly manner;²³³
- c. holding a pre-trial conference in all opposed action proceedings;²³⁴
- d. all Regional Magistrates must strive to finalise civil matters within nine months from the date of issuing;²³⁵
- e. judgments may not be reserved *sine die* and the presiding officer shall indicate the date on which judgment will be handed down in open court by the presiding officer of record, or be handed down electronically;²³⁶ and
- f. delivering judgments within 30 days after the last date of hearing failing which the regional magistrate will be required to submit reasons to the Regional Court President why the judgment was not delivered within 30 days.²³⁷

In India, a specific timeframe is provided for in the National Green Tribunal Act, 2010 (NGT Act)²³⁸ within which cases must be concluded. Section 18 (3) of the NGT Act, stipulates that “the NGT shall deal with a case as expeditiously as possible and shall endeavour to dispose of the same within six months from the date the case is instituted.” Chaturvedi expresses his support for this approach as, in his view, indicating a timeframe within which decisions must

²³⁰ Civil Practice Directives for the Regional Courts in South Africa (2023 Revision). The amended Civil Practice Directives took effect on 1 May 2023.

²³¹ Paragraph 1.1 of the Civil Practice Directives for the Regional Courts in South Africa, 2023 Revision. The parties are required in terms of paragraph 1.3 to when filing their requests for dates of hearing or notices of set down with the Registrar/Assistant Registrars, indicate whether they agree to the use of any virtual platform or electronic/digital hearing of the matter and/or remote audio-visual testimony by any witness.

²³² Rules Regulating the conduct of the Proceedings of the Magistrates' Courts of South Africa, 2010 (as amended) GN R740, G. 33487.

²³³ Paragraph 3.2 of the Civil Practice Directives 2023.

²³⁴ Paragraph 3.3 of the Civil Practice Directives 2023; Paragraph 3.6 provides that any party may request a pre-trial conference in terms of section 54 of the Magistrates' Court Act, 32 of 1944 (MCA) in writing as provided for in Rule 25(4).

²³⁵ Paragraph 8.1 of the Civil Practice Directives 2023.

²³⁶ Paragraph 9 of the Civil Practice Directives 2023.

²³⁷ Paragraph 9.2; Although paragraph 5.2.6 of the Norms and Standards state that judgments should be handed down within three months after the last date of hearing.

²³⁸ Act 19 of 2010.

be finalised in the legislation establishing the court would ensure that the timeframe is adhered to.²³⁹ He, however points out that this would be near impossible to impose in the general courts as the general courts are required to devote their time equally to all the cases that are before them.²⁴⁰

Without a doubt, the use of case management tools is of benefit to the efficient disposal of cases, and it would be a useful element for the proposed specialised environment court.

5.4.12 Enforcement tools and remedies

Apart from having an efficient and effective process for environmental disputes, access to justice also requires that the decisions of the judicial forum must be enforceable.²⁴¹ A specialised environmental court requires adequate powers to enforce its decisions as well as adequate remedies to give relief to litigants.²⁴² Environmental courts that have a wide jurisdiction covering civil, criminal and administrative usually have the widest range of enforcement tools and remedies, such as civil, administrative and criminal penalties as well as creative and innovative solutions to environment disputes, at their disposal.²⁴³

Pring and Pring recommend that enforcement powers/remedies should be outlined in the enabling legislation when establishing such an environmental court and such powers should also be incorporated in the court's practice and procedure rules to ensure that the environment court is truly effective.²⁴⁴

Kenya's Environment and Land Court Act, 2011 (ELCA)²⁴⁵ makes provision for a wide variety of enforcement powers. Specifically, section 13(7) of the ELCA, 2011 provides that,

“In exercise of its jurisdiction under this Act, the Court shall have power to make any order and grant any relief as the Court deems fit and just, including—

(a) interim or permanent preservation orders including injunctions;

²³⁹ Chaturvedi (n 149 above) 8.

²⁴⁰ Chaturvedi (n 149 above) 8.

²⁴¹ Pring and Pring (2009) (n 10 above) 79.

²⁴² Pring and Pring (2016) (n 4 above) 52.

²⁴³ Pring and Pring (2009) (n 10 above) 82; Pring and Pring (2016) (n 4 above) 52; Preston (n 8 above) 375.

²⁴⁴ Pring and Pring (2009) (n 10 above) 87.

²⁴⁵ Act 19 of 2011.

- (b) prerogative orders;
- (c) award of damages;
- (d) compensation;
- (e) specific performance;
- (g) restitution;
- (h) declaration; or
- (i) costs.”

An interesting example of innovative and flexible enforcement powers/remedies can be found in the environment court of the State of Amazonas, Brazil, where in lieu of jail and/or fines, the judge in the environment court gives convicted defendants “the alternative to go to his ‘environmental night school’; polluting bus companies to carry environmental advertisements; poachers to do “volunteer” work for wildlife organisations and illegal developers and loggers to renovate public parks and replant forests”.²⁴⁶ These innovative remedies have been successful because much of Brazil’s environmental enforcement is based on criminal law, so the judge is able to offer convicted offenders a choice between the usual criminal sanctions (fines or prison) or the innovative orders of attending environmental night school or paying for public environmental education.²⁴⁷

Enforcement tools to be proposed will be aligned to the legal jurisdiction of the court model. These enforcement tools will include judicial review, specific performance, interdicts, and injunctions, award of damages, restitution, declaratory orders, cost orders, terms of imprisonment and fines and even innovative remedies so that the court has a wide scope of remedies that it can grant and is, therefore, effective.

5.5 Additional Components

This chapter would be incomplete without addressing two additional components which it is submitted is necessary for the proper establishment and functioning of a specialised

²⁴⁶ Pring and Pring (2016) (n 4 above) 52; Sulistiawati *et al* (n 83 above) 45.

²⁴⁷ Pring and Pring (2016) (n 4 above) 23.

environment court. These are enabling legislation, establishing the court and the need for specialised prosecutors.

5.5.1 Enabling Legislation

As indicated in chapter 3, enabling legislation for the establishment of a specialised environmental court is of utmost importance.²⁴⁸ Sulistiawati *et al* emphasise that for environmental courts to be secure for the long term, they should be “created through specific laws and not the “discretionary decisions of court presidents or judicial councils.”²⁴⁹ They further explain that “ECTs operate most effectively when their status, authority and jurisdiction are clearly specified in legislation”.²⁵⁰

A case that illustrates the importance of enabling legislation is that of the Skukuza Regional Court. In March 2017, the Skukuza Regional Court was initiated through a Directive issued by the Judge President of the Mpumalanga Court Division, acting in terms of section 8(4)(c) of the Superior Courts Act 2013²⁵¹ to handle the hearing of criminal trials instituted against poachers/ traffickers arrested in the environs of the Kruger National Park (KNP).²⁵² The reasoning behind the Skukuza Regional Court was to ensure that courts are brought closer to the victims of crime.²⁵³ This court successfully dealt with rhino poaching crimes, because in the first year, the two prosecutors assigned to the court convicted 90 poachers with prison sentences of between 12 to 40 years.²⁵⁴ It was, however, closed in 2019 when the Mpumalanga Regional Court president wanted the poaching cases to be moved to another court, kilometres away from the Kruger National Park in defiance of the Directive issued by the Judge President.²⁵⁵ After a lengthy court case, it was eventually reopened in 2021 and continues to operate at Skukuza.

²⁴⁸ Paragraph 3.6 of chapter 3.

²⁴⁹ Sulistiawati *et al* (n 83 above) 6.

²⁵⁰ Sulistiawati *et al* (n 83 above) 26.

²⁵¹ Act 10 of 2013.

²⁵² Section 8(4)(c) of the Superior Courts Act 2013 provides that “Subject to subsections (2) and (3), the Judge President of a Division is also responsible for the co-ordination of the judicial functions of all Magistrates’ Courts falling within the jurisdiction of that Division”; See also L Neme ‘This ‘rhino court’ had 100 percent poacher convictions. Why was it closed?’ <https://www.seej-africa.org/africa/rhino-court-with-100-poacher-convictions-closed-for-reasons-unknown> (accessed 16 February 2023).

²⁵³ Neme (n 252 above).

²⁵⁴ Neme (n 252 above).

²⁵⁵ Neme (n 252 above).

The issues relating to the dispute fall outside the scope of this research, suffice to highlight that the dispute would not have occurred had there been an enabling legislation in place, formally establishing or designating the Skukhuza Regional court as a specialised environmental court as opposed to a Directive issued by the Judge President. It is submitted that directives, while a useful tool in court management, is not the best tool to be used to establish or designate a specialised court, more so given the recent Supreme Court of Appeal judgment in *National Director of Public Prosecution (Ex parte Application)*²⁵⁶ in which the SCA indicated that “the practice directive is subordinate to any relevant statute, the common law and the Uniform rules and it cannot be applied to restrict or undermine any piece of legislation, the Uniform Rules of Court or the common law. Practice directives deal essentially with the daily functioning of the courts and their purpose is to supplement the rules of court.”²⁵⁷

It would also be recalled from discussions in paragraph 3.5.8 of chapter 3, that the Hermanus environmental court was closed because, according to the Department of Justice and Constitutional Development, it lacked legislative mandate,²⁵⁸ and the Department could not “continue to provide extra personnel and facilities for a specialised court that was not mandated by specific legislation”.²⁵⁹

Therefore, it is crucial that the specialised environmental court be established through enabling legislation. This could take the form of promulgating new legislation such as is the case with the Labour Court, amending existing legislation to designate Regional Magistrates courts or High Courts as environmental courts such as is the case of the Sexual Offences Court, or including provisions for the court’s establishment within relevant legislation such as in the case of the Land Claims Court. Thus, for example, the NEMA can be amended to establish the specialised environmental court or new legislation could be enacted for this purpose.

5.5.2 Specialised Prosecutors

It would be beneficial for specialised environmental prosecutors to be assigned to the specialised environmental court. Sulistiawati *et al* highlight that in several countries,

²⁵⁶ (905/2017) [2018] ZASCA 86; 2018 (2) SACR 176 (SCA) (31 May 2018).

²⁵⁷ Paragraph 31.

²⁵⁸ Rosencrans (n 35 above).

²⁵⁹ F Craigie, P Snijman and M Fourie *Environmental Compliance and Enforcement Institutions in Environmental Compliance and Enforcement in South Africa: Legal Perspectives* AR Paterson and LJ Kotzé (eds) (2009) 98; See also Kotzé and Du Plessis ‘Some brief observations on fifteen years of environmental rights jurisprudence in South Africa’ *Journal of Court Innovation* (2010) 161 – 162.

specialised environmental prosecutors are assigned to exclusively prosecute environmental crimes.²⁶⁰ This is similar to what obtains in the Specialised Commercial Crimes Court where prosecutors are specially designated to serve in this court.²⁶¹

During the interviews, all the respondents in Group 3 raised the concern that most of the prosecutors were not experts in environmental law, which had an impact on the successful prosecution of environmental crimes that were handed over to the prosecutors.²⁶² When asked if presiding officers in a specialised environmental court should be experts in environmental law, Respondent No 1 asserted that it would be more important for the prosecutors to be experts in, and have a passion for environmental cases.²⁶³ This is based on the fact that prosecutors are required to, when prosecuting, ensure that all the requirements of the crime are in place to achieve a successful prosecution.²⁶⁴ All the respondents expressed the view that it is important for the prosecutors prosecuting environmental crimes, to work closely with the Environmental Management Inspectors who are tasked with investigating such crimes.²⁶⁵

5.6 Proposals for a Specialised Environment Court for South Africa

As highlighted previously, the independent judicial court is the best model or ‘zenith of environmental courts’ as it is independent, easily identifiable by the public, whose decision makers are highly trained in environmental law, and whose decisions are documented and published.²⁶⁶ It further provides the public with reassurance that it is an accessible, legitimate and unbiased place that citizens can bring their environmental concerns to.²⁶⁷ However, if one considers the costs implications²⁶⁸ and lengthy legislative process²⁶⁹ that will be involved in

²⁶⁰ Sulistiawati *et al* (n 83 above) 49.

²⁶¹ See discussions in chapter 3 on the Specialised Commercial Crimes Court.

²⁶² Group 3 Respondents (Environmental Management Inspectors) No 5 – 13 interviews.

²⁶³ Respondent No 1 Virtual Interview (30 November 2022).

²⁶⁴ Respondent No 1 Virtual Interview (30 November 2022).

²⁶⁵ Groups 1, 2 and 3 Respondents No 1 – 13 interviews (28 November 2022 to 3 April 2023).

²⁶⁶ Pring and Pring (2009) (n 10 above) at 26; Pring and Pring (2016) (n 4 above) 20 – they also referred to operationally independent environmental courts as the Rolls Royce of environmental courts; Sulistiawati *et al* (n 83 above) 44.

²⁶⁷ Pring and Pring (2009) (n 10 above) 26; See also Woodruff (n 84 above) 554.

²⁶⁸ For instance, in the case of the Land Court, paragraph 5 of the Memorandum on the Object of the Land Court Bill highlights the main financial implications for the Land Court as additional human resources relating to the appointment of judges, officers of the Court, and the appointment of mediators and arbitrators who are not employed full time by the State; Altbeker ‘A model for justice delivery? The Specialised Commercial Crimes Court’ (2002) *SA Crime Quarterly* 32.

²⁶⁹ For instance, the Bill to establish the Land Court started in 2021 and was signed into law in 2023 but is not yet in force – Parliamentary Monitoring Group Land Court Bill B11 - 2021 <https://pmg.org.za/bill/1022/> (accessed 19 September 2023).

establishing an independent judicial court, a second option that is practicable and feasible for South Africa needs to be considered.

As mentioned in paragraph 2.6 of chapter 2, opponents of establishing a specialised environmental court argue that establishing and running a new system of courts can be costly, because it would entail employing new court personnel, including renting of new premises which cost is likely to be borne by taxpayers, a majority of who are not likely to use the court.²⁷⁰ One of the counters to this argument was that reform from within the court system can be used, by starting with a specialised judge, then a green bench before establishing a stand-alone environmental court.²⁷¹ Personnel and infrastructure costs will be reduced as judges, prosecutors, support staff members, and courtrooms can be assigned from the normal courts for the purpose of creating the court.

Gramckow and Walsh also proffer a solution to the lengthy legislative process, by suggesting the creation of a separate court division within an existing court to be done with less formality than through special legislation, which will be required for an independent court.²⁷² This, they state can be done by administrative direction, (which was the case in the Skukuza regional court) or by rules adopted by the court itself.²⁷³

It is noteworthy that twelve of the thirteen respondents interviewed agree that a specialised environmental court would assist in ensuring the quicker finalisation of environmental cases, as currently, environmental cases are not prioritised in the general courts.²⁷⁴ When the respondents were asked to indicate the most feasible model for South Africa, seven of the thirteen respondents were of the view that the most feasible model of specialised environmental court would be the green court model – where a court within the Magistrates’ court system is designated as an environmental court – while five respondents were of the view that a green bench model – where a specific magistrate/judge would be designated to hear environmental

²⁷⁰ VC Perez ‘Specialisation trends: water courts’ (2019) *Environmental Law* 595 https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3253349 (accessed 17 March 2022).

²⁷¹ G Pring and C Pring ‘Specialized environmental courts and tribunals: the explosion of new institutions to adjudicate climate change and other complex environmental issues’ (2010) 3 – paper presented at the 2nd Global Conference on Environmental Governance and Democracy 17.

²⁷² Gramckow and Walsh (n 44 above) 11.

²⁷³ Gramckow and Walsh (n 44 above) 11.

²⁷⁴ Groups 1, 2, and 3 Respondents No 1 – 13 interviews (28 November 2022 to 3 April 2023).

matters – would be the most feasible model.²⁷⁵ Taking these factors into consideration, it is submitted that the most feasible option for South Africa would be the green court model.

The next issue to consider is whether the specialised environmental court should be rolled out to all provinces immediately. It is submitted that this will not be the best action to take. It will be recalled that the Hermanus Court was established as a pilot project.²⁷⁶ Similarly, the Sexual Offences Court started as a pilot project.²⁷⁷ This is because, and as suggested by Altbeker, a pilot project will allow for a proper assessment of the court on a bigger scale,²⁷⁸ so that once the court moves beyond the pilot stage, it is easier to institutionalise the court through court rules or some form of formal legislation – the latter of which would be preferable.

The third issue to consider is the locality of where the pilot of the green court should be undertaken. It is proposed that the pilot of the green court be undertaken in Gauteng. This is because Gauteng is South Africa's most urbanised and industrialised province, with the highest human interaction with the environment from various developments and infrastructure.²⁷⁹ The pilot project in Gauteng will allow for a proper evaluation of the resources that would be required for a specialised environmental court and provide direction on how to roll out the model in the other eight provinces of South Africa.

In summary, two alternative models (an ideal model and a feasible model) are proposed for South Africa. The ideal model proposed is an independent judicial court with the same status as the High Court, while the feasible model is the designated green court model within the Regional Magistrates' court system. The implementation of the environmental court would be through a pilot project proposed to be rolled out in Gauteng and subsequently other provinces.

5.7 Conclusion

This chapter has explored the 12 building design blocks suggested by Pring and Pring and two additional components to guide the determination of a specialised environmental court model

²⁷⁵ Groups 1, 2, and 3 Respondents No 1 – 13 interviews (28 November 2022 to 3 April 2023).

²⁷⁶ Respondent No 1 interviews (28 November 2022).

²⁷⁷ Respondent No 1 interviews (28 November 2022).

²⁷⁸ A Altbeker, "Justice Through Specialisation? The Case of the Specialised Commercial Crime Court," ISS Monograph 33 (Pretoria: Institute for Security Studies, 2003).

²⁷⁹ N Cowling *Total population of South Africa 2021, by province* (2023) <https://www.statista.com/statistics/1112169/total-population-of-south-africa-by-province> (accessed 14 August 2023); Statistics SA *Four facts about our provincial economies* <https://www.statssa.gov.za/?p=12056> (accessed 14 August 2023).

for South Africa. The exploration has been interwoven with findings on attributes and best practices of the specialised courts discussed in chapter 3 and chapter 4. Two different models of a specialised environmental court have been proposed for South Africa. The first model – an independent court model – and the second model – a green court model. The most feasible model has been identified as the green court model. It has further been proposed that the court is rolled out on a pilot project basis in the Gauteng Province. Recommendations on the features of the two proposed models as well as proposals for new legislation/legislative amendments required for the two proposed models, will be outlined in chapter six.

CHAPTER 6

CONCLUSION AND RECOMMENDATIONS

6.1 Introduction

This research thesis aimed to motivate for and determine the most suitable specialised environmental court model for South Africa, which would facilitate swift access to environmental justice and foster the development of environmental jurisprudence. This concluding chapter comprises a synthesis of the findings from the preceding chapters, specifically addressing the sub-questions that guided the research and culminated in the proposal for two alternative court models in chapter 5. Recommendations are then made on the distinct characteristics of each of the two proposed court models, as well as suggestions for legislation required to be promulgated or amended for its establishment.

6.2 Summary of findings

In responding to the first sub-question “what is the role of courts *vis a vis* environmental protection”, it was established in chapter 2 that the courts fulfil three pivotal roles – that of developing environmental law jurisprudence, promoting compliance with environmental law, and enforcing environmental and the constitutional environmental right.

The second sub-question “what are the benefits of specialised courts” was responded to in chapter 3. Benefits of specialised courts that were highlighted, were that they allowed for greater efficiency and reduction of case backlogs as well as uniform, better, and higher quality decisions. Further, such courts have the power to adopt flexible rules of procedure (evidence and *locus standi*) which enhanced access to justice. The courts could also adopt a problem-solving approach as opposed to the rigid application of the law and its technicalities that is common in the general courts. These benefits increase the judiciary’s responsiveness to the area of law that the specialised court has been established for.

The third sub-question “what useful attributes can be extrapolated from existing specialised courts in South Africa” was addressed in chapter 3. To extrapolate useful attributes of currently existing specialised courts in South Africa, discussions focused on the establishment, composition, appointment of judges, jurisdiction, accessibility, *locus standi* and appeal

mechanisms of four existing specialised courts in South Africa: the Labour Court, the Land Claims Court, the Sexual Offence Court, and the Specialised Commercial Crimes Court. An analysis of the functioning of the Hermanus Environmental Court (Hermanus Court) which had been established in Western Cape was also undertaken.

The following useful attributes were determined:

- a. Enabling legislation: all the specialised courts were established through specific enabling legislation. The Labour Court was established in accordance with section 151(1) of the Labour Relations Act, 1995, the Land Claims Court was established via section 22(1) of the Restitution of Land Rights Act, 1994, while the Sexual Offences Court¹ and Specialised Commercial Crimes Court² have been designated within the Magistrates' court system.
- b. Permanent presiding officers: all the specialised courts, except one, have permanent presiding officers. The Land Claims Court, which previously lacked permanent presiding judges, is now to be replaced with a Land Court featuring permanent judges.³
- c. Accessibility: the attribute of ease of accessibility or proximity to the victims of crime is crucial as it guarantees access to justice. While the independent courts have their primary seat in one location, they have also established additional seats in other provinces and can also set up courts in loco, as and when required. The designated courts are established within various magisterial districts in every province.
- d. Use of assessors: three of the specialised courts (the Land Claims Court, Sexual Offences Court, and Specialised Commercial Crimes Court) make use of assessors. The significance of assessors lies in their ability to provide distinct perspectives, either from an expert or layperson's standpoint, which further enhances and enriches the decision-making process.
- e. The Investigator-Prosecutor co-location: this attribute has been a contributing factor to the success of the Specialised Commercial Crimes Court. Its relevance is particularly pronounced in the prosecution of environmental crimes, which entail investigations of

¹ Sec 55A of the Criminal Law (Sexual Offences and Related Matters) Act 32 of 2007.

² Specialised Commercial Crimes Courts (SCCCs) have been established by Notice in the Government Gazette issued by the Department of Justice and Constitutional Development (now Department of Justice and Correctional Services). The latest being GN 157 of 2021 in which notice was given of the establishment of Specialised Commercial Crimes court in Limpopo, Mpumalanga, Northwest, and Northern Cape Provinces as the Regional Magistrates' court level.

³ Land Court Act 6 of 2023 (not yet in force).

such crimes by environmental management inspectors (EMIs) which are subsequently prosecuted by specialised prosecutors. The need for close collaboration between the EMIs and prosecutors cannot be overstated. In the interview with Respondent 1, this was highlighted as a key factor which contributed to the successful convictions in cases brought before the Hermanus Court.

- f. Dedicated Prosecutors: the presence of dedicated prosecutors in the Sexual Offence Court and the Specialised Commercial Crimes Court was recognised as a significant factor contributing to the high rate of convictions in these courts. Throughout interviews with Respondents 1 – 4, the importance of having dedicated prosecutors specialised in environmental law within a specialised environmental court was emphasised, primarily due to the intricate and complex nature of environmental crimes.

In the same chapter, the analysis of the functioning of the Hermanus Court revealed that it possessed all but two of the key attributes identified in the four specialised courts, namely the lack of establishment through enabling legislation, and the fact that the magistrate was not permanently assigned to the court.

Recognising that the absence of enabling legislation was a contributing factor in the closure of the Hermanus Court,⁴ underscores the vital importance of this attribute when considering establishing a specialised environmental court for South Africa. It is imperative that the specialised environmental court be established through enabling legislation, as any alternative mechanism, such as practice directives, may render it susceptible to legal challenges and the possibility of closure, as evidenced in the discussions on the Skukuza Regional Court and the SCA's pronouncement on the subordinate nature of Directives judgment in *National Director of Public Prosecution (Ex parte Application)*⁵ in paragraph 5.5.1 of chapter 5.

The comparative analysis carried out in chapter 4 aimed to respond to sub-question 4 “what best practices and attributes can be extrapolated from the New South Wales’ Land and Environment Court (NSW LEC) and Kenya’s Environment and Land Court (ELC)?” The analysis focused on the following fundamental components and operations of the two courts: judicial officers, jurisdiction, rules of procedure, accessibility, *locus standi*, and appeals. It was observed that these courts share similar attributes operating as independent superior courts

⁴ See chapter 3.

⁵ (905/2017) [2018] ZASCA 86; 2018 (2) SACR 176 (SCA) (31 May 2018).

established by enabling legislation, with exclusive jurisdiction in matters related to environment and land. They serve as courts of first instance with appellate jurisdiction over lower courts. In addition, the presiding officers are appointed on a permanent basis until their retirement, and they have the flexibility to conduct hearings at various locations.

Common best practices contributing to the efficient functioning of the courts include the power to establish flexible court rules and procedures aimed at reducing the average hearing time, and the implementation of innovative measures to make it easy for litigants to access the court and eliminate geolocation barriers. Both courts utilise alternative dispute resolution mechanisms to reduce costs and delays in litigation. The NSW LEC makes provision for commissioners with various science-technical skills and experience to serve on the court. The NSW LEC implements the International Framework for Court Excellence, which is a quality court evaluation and management system. Kenya has a National Environmental Complaints Committee, which operates in a manner similar to an Environmental Ombudsman.

Chapter 5 was a pivotal part of the research study as it responded to the main research question “which specialised environmental court model would be most appropriate for South Africa to ensure access to swift environmental justice and encourage the development of environmental jurisprudence?” Two of the four decisional steps discussed in chapter 2 were applied to guide the answer to this question.⁶ Decisional step one involved analysing the following factors: legal structure, political situation, socio-economic conditions, and environmental goals. It was determined that a legal structure is already in place that permits the establishment of a specialised environment court in South Africa, whether as an independent specialised court, akin to the Labour Court or the Land Claims Court, or as a designated court, akin to the Sexual Offences Court and Specialised Commercial Crimes Court, as described in chapter 3.

The political environment of South Africa was assessed as relatively stable. Nevertheless, a noteworthy concern that emerged was the perceived lack of political will by the Department of Justice and Constitutional Development (DOJCD) to establish a specialised environmental court despite provisions for the protection of environmental rights in section 24 of the Constitution of the Republic of South Africa. On a positive note, the vibrant participation of two crucial role players in South Africa’s environmental governance system, namely civil

⁶ Only two of the four decisional steps were analysed as the other two - strategic planning process and evaluation and assessment of the established ECT - fall outside the scope of the study.

society, and the South African Human Rights Commission (SAHRC), was highlighted as integral to holding the government accountable for environmental protection and conservation. It was contended that the establishment of a specialised environmental court would further bolster the pivotal role played by civil society and the SAHRC in this regard.

It was observed that despite the inclusion of the environmental right in its Constitution, the implementation of environmental-related policies, the promulgation of environmental legislation, and the establishment of structures to address its socio-economic challenges, South Africa has yet to seriously consider the establishment of a specialised environmental court. It was argued that such a court would significantly enhance environmental protection and positively impact the socio-economic challenges faced by its citizens.⁷ It was submitted that, by safeguarding the right to a healthy environment, South Africa would indirectly be protecting other socio-economic rights aimed at addressing socio-economic challenges, particularly social inequality.⁸

It was also established that South Africa has well-defined environmental goals which are entrenched in the SA Constitution and its National Development Plan. However, it has not displayed complete commitment towards the realisation of the right to a healthy environment in certain aspects, such as establishing a specialised environmental court. It was argued that such a court would significantly improve civil society's capacity to hold the government and private sector accountable by ensuring that environmental cases are handled more efficiently, effectively, and in a timely manner.

In the subsequent part of chapter 5, Pring and Pring's twelve design blocks were applied.⁹ After a thorough examination of each design block, commonalities between the attributes found in the established specialised courts in South Africa as discussed in chapter 3, and the two

⁷ See chapter 5 paragraph 5.2.3.

⁸ See chapter 5 paragraph 5.2.3.

⁹ The twelve design blocks cover the type of model (should it be a judicial court or administrative tribunal and what would the level of independence be); the legal jurisdiction of the ECT (what substantive laws, policies, and principles will the ECT have authority over); the decisional level of the ECT (would it be a court of first instance, appeal or court of final review and should it have powers to consider civil, criminal or administrative matters or a combination of all three); the geographic area that the ECT would cover – town, city, state or province (in the case of South Africa – local, regional or provincial); the case workload; locus standi (who can institute an action in the ECT); cost implications for parties and how can costs be reduced; the use of scientific and technical expertise; would it incorporate alternative dispute resolution mechanisms; competency of the ECT judges (this would include their qualifications, training, term of office, remuneration); the enforcement tools that would make the ECTs decision effective (this includes mediation agreements, injunctions, fines, imprisonment and other related tools).

specialised environmental courts in New South Wales and Kenya discussed in chapter 4, emerged. In particular, the following points of alignment became apparent:

- a. Enabling legislation: the significance of enabling legislation was emphasised as a fundamental requirement in the establishment of a specialised environment court.
- b. Flexible court rules and procedure: the ability of specialised courts to put in place flexible court rules and procedures was emphasised as important for enhancing access to justice.
- c. Use of assessors/commissioners: the use of assessors/commissioners who have science-technical expertise was seen as fundamental for a specialised environmental court given the complex and technical nature of environmental law and cases.
- a. Access to court: the importance of implementing innovative measures to make it easy for litigants to access the court and eliminate geolocation barriers to court access.
- b. Wide *locus standi*: the inclusion of a wide *locus standi* to enable a wider range of individuals or entities to bring cases without the hindrance of proving a direct interest in such cases.
- c. Alternative dispute resolution mechanisms: the utilisation of alternative dispute resolution mechanisms to mitigate costs and expedite the finalisation of litigation.

The findings from the interviews conducted provided insights into the views of the thirteen Respondents on the usefulness of a specialised environmental court in South Africa. Twelve of the thirteen Respondents interviewed agreed that a specialised environmental court would expedite the resolution of environmental cases, as in their view, these cases are currently not prioritised in the general courts.¹⁰

Discussions in chapters 4 and 5 supported the fact that the best specialised environmental court model is the “independent judicial court” model as such a court is independent, easily identifiable by the public and can appoint judicial officers who are highly trained in the specialised area of law.¹¹ An independent judicial court will further provide the public with

¹⁰ Groups 1, 2 and 3 Respondents No 1 – 13 interviews (28 November 2022 to 3 April 2023).

¹¹ G Pring and C Pring ‘Greening Justice: Creating and Improving Environmental Courts and Tribunals’ The Access Initiative (2009) 26; G Pring and C Pring *Environmental Courts and Tribunals: A Guide for Policy Makers* United Nations Environment Programme (2016) 19 – they also referred to operationally independent environmental courts as the Rolls Royce of environmental courts; See also LY Sulistawati *et al Environmental Courts and Tribunals - 2021: A Guide for Policymakers* United Nations Environmental Programme (2022) 44.

reassurance that it is an accessible, legitimate, and unbiased place where environmental cases can be instituted.¹² However, further consideration had to be given to two significant factors in the establishment of a court - cost considerations¹³ and the protracted legislative process.¹⁴ Bearing in mind Gramckow and Walsh's suggestion that a solution to the lengthy legislative process is to establish a separate court division within an existing court, which can be achieved with less formality than through special legislation required for an independent court,¹⁵ it was determined that while the independent judicial court is the ideal model, the most practical and feasible specialised environmental court model for South Africa is the green court model, similar to the Hermanus Court and the Sexual Offences Court.

It was further proposed that the "green court" be introduced on a pilot project basis, with the initial implementation to be conducted in Gauteng Province. This choice stems from the fact that Gauteng is South Africa's most urbanised and industrialised province with the highest human interaction with the environment due to various developments and infrastructure projects.¹⁶ The pilot project in Gauteng will enable a thorough assessment of the resources needed for a specialised environmental court and offer valuable insights for the subsequent rollout of the model in the other eight provinces.

In summary, two court models were proposed for South Africa in chapter 5: an ideal model - an independent judicial court with the same status as the High Court, and a feasible model - a designated green court model within the Regional Magistrates' court system. Two alternatives are proposed because either model would be suitable for South Africa and both models are

¹² G Pring and C Pring (n 11 above) 26; See also E Woodruff 'Environmental courts and tribunals: how can nations tackle the growing demand for justice on environmental issues?' *Denver Journal of International Law and Policy* (2011) 554.

¹³ A Altbeker 'A model for justice delivery? The Specialised Commercial Crimes Court' *SA Crime Quarterly* (2002) 32.

¹⁴ For instance, the process of promulgating the Bill to establish the Land Court started in 2021 and the Bill was passed into law on 16 September 2023 as the Land Court Act 6 of 2023 and published in Government Gazette GN 49372 of 27 September 2023. <https://pmg.org.za/bill/1022/> (accessed 19 September 2023); the Act is not yet in force, and it may take a further one year for the Act to come into force.

¹⁵ Gramckow and Walsh 'Developing specialized court services: international experiences and lessons learned' *Justice and Development Working Paper Series* (2013) 11 <https://openknowledge.worldbank.org/handle/10986/1667> (accessed 1 March 2022).

¹⁶ N Cowling 'Total population of South Africa 2021 by province' (2023) <https://www.statista.com/statistics/1112169/total-population-of-south-africa-by-province> (accessed 14 August 2023); Statistics SA 'Four facts about our provincial economies' <https://www.statssa.gov.za/?p=12056> (accessed 14 August 2023); Gauteng Provincial Government 'Gauteng Province Environmental Outlook' (2017) 14.

catered for under the current court system provided for in terms of section 166(e) of the SA Constitution.

6.3 Recommendations

Recommendations for the features of the proposed independent judicial court and the designated green court are presented in Tables 4 and 5 respectively. These recommendations draw from the shared attributes and best practices discussed and emphasised in chapters 3, 4, and 5, serving as the foundation for structuring the two specialised environmental court models.

As established in this thesis, enabling legislation is pivotal for the establishment of the specialised environmental court. For the independent judicial court, this could either entail the enactment of new legislation or amendments to the National Environmental Management Act (NEMA). In the case of the designated green court model, it may involve amending the Magistrates' Court Act, 1944, to include a section granting the Regional Magistrates' Court exclusive jurisdiction over environmental criminal and civil matters. Recommendations for potential legislation and legislative amendments are presented in Tables 6 and 7 respectively.

Table 4 Features of the proposed Independent Judicial Court model

Building Block Design	Proposal
Type of Forum	a. An independent judicial court with the same status as a high court b. Proposed name: Environment and Land Use Planning Court
Legal Jurisdiction	a. Civil, criminal, and administrative jurisdiction b. Exclusive jurisdiction over all environmental and land use planning matters in South Africa

	c. Relevant legislation: NEMA, ¹⁷ SEMAs ¹⁸ and SPLUMA ¹⁹
Decisional level	a. A court of first instance and an appellate court. b. Appellate jurisdiction: - hear matters on appeals from decisions of the Water Tribunal as currently section 149 of the National Water Act 1998, makes provision for appeals to be made to the High Court on a question of law²⁰ - hear matters on appeals from decisions of the Municipal Planning Tribunal. c. Decisions of the Environment and Land Use Planning Court would go to the Supreme Court of Appeal.
Geographical Area	a. In all provinces in South Africa b. Can sit in various places when required
Case Volume	Will be substantial as it would consider environmental and land use planning matters exclusively.
Standing	Standing will be wide and aligned with section 38 of the Constitution and section 32(1) of the NEMA.
Costs	a. Aligned to section 32(2) and (3) of the NEMA for environmental related cases. b. Cost saving mechanisms such as use of ADR mechanisms, reducing or waiving filing or court fees, making use of public environmental prosecutors, providing financial support for indigent parties and public

¹⁷ Act 107 of 1998.

¹⁸ Sec 1 of the NEMA lists the following Acts as Specific Environmental Management Acts - (a) the Environment Conservation Act, 1989 (Act 73 of 1989); (b) the National Water Act, 1998 (Act 36 of 1998); (c) the National Environmental Management: Protected Areas Act, 2003 (Act 57 of 2003); (d) the National Environmental Management: Biodiversity Act, 2004 (Act 10 of 2004); (e) the National Environmental Management: Air Quality Act, 2004 (Act 39 of 2004); (f) the National Environmental Management: Integrated Coastal Management Act, 2008 (Act 24 of 2008); (g) the National Environmental Management: Waste Act, 2008 (Act 59 of 2008); or (h) the World Heritage Convention Act, 1999 (Act 49 of 1999), and includes any regulation or other subordinate legislation made in terms of any of [these] Acts.”

¹⁹ Act 16 of 2013.

²⁰ Act 36 of 1998.

	interest litigants, and putting in place an efficient case management system.
Access to Scientific-Technical Expertise	Yes - assessors who would have expertise in environmental law, land use planning, town planning, environmental management, environmental science
Alternative Dispute Resolution	Yes – but not a compulsory requirement except in instances of court annexed mediation directed by the Judge.
Competence of judges and decision-makers	a. Judges will be appointed in line with section 174(1) and (2) of the SA Constitution. Therefore, the judges are required to be appropriately qualified fit, and proper persons²¹ and should reflect broadly the racial and gender composition of South Africa.²² b. Judges must be legally qualified and have the relevant legal experience in environmental law and/or land use planning. c. Judges will be permanently appointed, and their conditions of service will be similar to judges in the general high court
Case Management	The following case management tools are proposed: i. Website ii. Online court iii. Relaxed rules iv. ADR Screening Process v. Traveling courts
Enforcement tools and remedies	Civil remedies i. Merit review ii. Interdicts

²¹ Sec 174(2) of the Constitution of the Republic of South Africa, 1996 (SA Constitution).

²² Sec 174(3) of the SA Constitution.

	iii. Injunctions iv. Specific performance v. Declaratory orders Administrative orders Judicial Review Criminal enforcement remedies a. Imprisonment b. Criminal fine Innovative remedies such as attending environmental school, working for an environmental organisation, paying for public environmental education efforts; impact offsets, clean-ups, donating towards waste management initiatives, habitat restoration, public apologies, species reintroduction, and financial compensation
Enabling Legislation	Promulgation of legislation establishing the Environment and Land Use Planning Court Alternatively, amendment of NEMA to make provision for the establishment of the Environmental and Land Use Planning Court
Specialised Prosecutor	a. Prosecutors with expertise in environmental law to be appointed to the court. b. Prosecutors will be expected to deal with one case through its life cycle like the prosecutors in the Specialised Commercial Crimes Court.

Table 5 Features of the proposed Designated Green Court model

Design Decision Block	Proposal
Type of Forum	Green Court in the Regional Magistrates' Court system
Legal Jurisdiction	a. Criminal and civil jurisdiction b. Legislation: NEMA/SEMA (excluding the National Water Act because there currently exist a Water Tribunal which is at the level of a Magistrates' court which considers cases under the National Water Act²³) / Provincial legislation dealing with environmental matters
Decisional level	a. Court of first instance with criminal and civil jurisdiction b. Appeals to the High Court
Geographical Area	Regional Magistrates' Courts in all provinces in South Africa
Case Volume	Where the case volume does not justify designating the regional court in a specific area, then the Magistrate can also hear other general court matters, but environmental cases must be prioritised.
Standing	Wide standing aligned with section 38 of the Constitution and section 32(1) of the NEMA (for civil matters)
Costs	Will be aligned to section 32(2) and (3) of the NEMA (for civil matters)
Access to Scientific-Technical Expertise	a. The court will have internal expertise in the form of Assessors for criminal matters and civil matters. b. Assessors must be experts in the field of environmental law, environmental management, biodiversity

²³ Sec 149(4) of the Water Act 1998 places the Water Tribunal at a magistrates' court level.

Alternative Dispute Resolution	Provisions will be made for conciliation, mediation and arbitration in civil matters but will not be compulsory for litigants to agree to ADR, except for court annexed mediation directed by the presiding Magistrate.
Competence of judges and decision makers	a. Magistrates will be appointed in terms of section 10 of the Magistrates Act, 1993²⁴ by the Minister of Justice and Constitutional Development, after consultation with the Magistrates Commission. b. Magistrates will be permanently appointed, and their conditions of service will be similar to other magistrates in the Magistrates' court. c. Magistrates must be legally qualified and have the relevant legal experience in environmental law.
Case Management	Case management tools that currently exist in Regional Magistrates' court will be applicable.
Enforcement tools and remedies	Civil remedies i. Judicial review ii. Interdicts Criminal remedies i. Imprisonment ii. Criminal fines Innovative remedies such as attending environmental school, working for an environmental organisation, paying for public environmental education efforts; impact offsets, clean-ups, donating towards waste management initiatives, habitat restoration, public apologies, species reintroduction, and financial compensation

²⁴ Act 90 of 1993.

Enabling Legislation	a. Amendment of Magistrates' Court Act 1944 specifically section 29 to confer Regional Magistrates' Courts with jurisdiction in environmental matters.
Specialised Prosecutors	a. Prosecutors with expertise in environmental law to be allocated to the court. b. Prosecutors will be expected to deal with one case through its life cycle similar to the prosecutors in the Specialised Commercial Crimes Court.

Table 6 Independent Judicial Court: proposed legislation/legislative amendments

Proposed Legislation/Legislative Amendments	Provisions
Promulgation of the Environment and Land Use Planning Court Act	Establishment of the court This part will cover the establishment of the Environment and Land Use Planning Court, status of the court, seat of the court, areas of jurisdiction. Composition of the court This part will cover the appointment of presiding officers (judges, assessors, registrar), the qualification, appointment, and tenure of presiding officers. Jurisdiction of the court This part will cover the jurisdiction of the court over environmental law and land use planning law. Powers and proceedings of the court

	This part will cover powers and procedures, ADR mechanisms, representations before the court, rules, and costs. Appeals This part will indicate that the appellate jurisdiction of the court is the Supreme Court of Appeal General Provisions This part will cover regulations, offences, transitional provisions, and repeal of legislation.
Amendments to the NEMA	Amendment of section 34H (1) and deletion of section 34H (2) Jurisdiction (1) [Notwithstanding anything to the contrary in any other law, a magistrate's court] <u>The Environment and Land Use Planning Court shall have jurisdiction to impose any penalty prescribed by this Act or any specific Environmental Management Acts.</u> [(2) Where a competent authority is of the view that a more severe penalty could be considered than those penalties referred to in Section 49B, the competent authority may request the National Prosecuting Authority to institute the criminal proceedings in the High Court.] Insertion of a new section 43A

	<u>43A Any person who is aggrieved by a decision taken in terms of Section 43 may appeal to the Environment and Land Use Planning Court.</u>
Amendment to the SPLUMA	Insertion of a new section 51(8) <u>The decision of the appeal authority in terms of this section may be taken on appeal to the Environment and Land Use Planning Court.</u>

Table 7 Designated Green Court: proposed legislative amendments

Proposed Amendment	Possible provision
Amendment of section 2 of the Magistrates' Court Act 1944	2 Minister's powers relative to districts, regional divisions, and courts (1) The Minister may, by notice in the <i>Gazette</i> - appoint one or more places within each regional division for the holding of a court for the adjudication of civil disputes contemplated in- (i) Section 29(1); or (ii) Section 29(1B); or (iii) Section 29(1) and (1B); or <u>(iv) Section 29(1D)</u> and prescribe the local limits within which such courts shall have jurisdiction, and may include within those limits any portion of an adjoining regional division;
Amendment of section 29 of the Magistrates' Court Act 1944 to give	Insertion of section 29(1D)

Regional Magistrates' Courts exclusive powers to hear environmental civil matters	29(1D) (a) A court for a regional division, in respect of causes of action, shall, subject to section 28(1A), have jurisdiction to hear and determine action relating to environmental matters and to decide upon any question arising therefrom, and to hear any matter and grant any order provided for in terms of the National Environmental Management Act 107 of 1998 or any of the Specific Environmental Management Acts (b) The presiding officer of a court for a regional division hearing a matter referred to in paragraph (a) must summon to his or her assistance at least one person but not more than two to sit and act as an assessor in an advisory capacity on questions of fact.
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6.4 Suggestions for future research

This research did not investigate the feasibility of implementing an environmental tribunal for South Africa, or the potential role such a tribunal could play within the environmental legal framework, similar to what obtains in Kenya, which includes both the ELC and an environmental tribunal that adjudicates on decisions related to environmental impact assessment licenses by the National Environment Management Authority.

Additionally, the research has not explored the concept of an environmental ombudsman and the potential role such an ombudsman might play in the resolution of environmental disputes in conjunction with a specialised environmental court. These areas remain open possibilities for future research endeavours.

6.5 Concluding remarks

The White Paper on Environmental Management Policy (White Paper) which was formulated and adopted following an extensive Consultative National Environmental Policy Process,²⁵ laid the basis for sound environmental governance in South Africa. It, however, fell short of considering the crucial role that courts would need to play in enforcing environmental legislation, especially because in the NEMA that was subsequently promulgated, final recourse in settling civil and criminal environmental matters is up to the courts. At the time of its adoption, a number of countries had already seen the benefit of establishing specialised environmental courts.

The initial decision to establish a specialised environmental court with the intent of a wider rollout was short-lived, as the Hermanus Court was prematurely closed. The closure was based on the grounds that it was not mandated by a specific legislative mandate, despite its notable high conviction rate during its brief existence. Since that time there has been no renewed effort to establish a specialised environmental court in South Africa, apart from the limited initiative through Directives issued by the Judge President in Mpumalanga, as seen in the case of the Skukhuza Regional court. However, this approach has its inherent limitations as highlighted in paragraph 5.5.1 of chapter 5.

Nevertheless, the establishment of specialised environmental courts remains of crucial importance to the protection of the environment and fostering sustainable development in South Africa. This is because the establishment of such specialised courts would send a robust signal of the government's dedication and commitment to upholding section 24 of the Constitution of the Republic of South Africa, and its international environmental obligations under various multilateral environmental agreements.

Specialised environmental courts remain pivotal to environmental protection. Similar to the positive impact observed in the Sexual Offences Courts, specialised environmental courts would enhance the competencies of court personnel, reduce case processing time (and indirectly litigation costs), promote efficient prosecution and adjudication of environmental criminal cases. Further, as Preston states, specialised environmental courts are more adept at

²⁵ GN 749 of 1998.

undertaking a responsive environmental adjudication compared to other courts.²⁶ He explains that this is because of their specific structures, capabilities, and expertise in resolving environmental disputes and the fact that they are specialised in recognising the unique characteristics of environmental issues in practice.²⁷

Furthermore, the establishment of a specialised environmental court will see an improvement in the enforcement of environmental crimes and finalisation of environmental disputes. It would also see more resources deployed towards upskilling judicial officers and prosecutors who prosecute environmental crimes. Additionally, it will significantly bolster the development of environmental jurisprudence. In the words of Sulistiawati *et al*, specialised environmental courts “help countries meet the objectives of the United Nations 2030 Agenda for Sustainable Development and the Paris Agreement on Climate Change, among other international environmental instruments and commitments.”²⁸

In conclusion, it is possible to surmount the legal and financial obstacles to establishing a specialised environmental court in South Africa by starting with a green court model and subsequently progressing towards an independent judicial court model.

²⁶ BJ Preston ‘Specialist environmental courts: their objective, integrity and legitimacy’ (2023) 33 – 34 paper presented to AAL, AIJA and ALJ at the Enduring Courts in Changing Times Conference, 10 September 2023, Sydney <https://lec.nsw.gov.au/publications-and-resources/judicial-speeches-and-papers.html> (accessed 1 April 2024).

²⁷ Preston (n 26 above) 34.

²⁸ Sulistiawati *et al* (above n 11) i.

BIBLIOGRAPHY

Journal Articles

Altbeker A 'A model for justice delivery? The Specialised Commercial Crimes Court' (2002) *SA Crime Quarterly* 31

Amirante D 'Environmental courts in comparative perspective: preliminary reflections on the National Green Tribunal of India' (2012) *Pace Environmental Law Review* 441 available at: <https://digitalcommons.pace.edu/pelr/vol29/iss2/3>

Angote OA 'Environmental litigation in Kenya: a call for reforms' (2019) *Journal of Conflict Management and Sustainable Development* available at <https://journalofcmsd.net/wp-content/uploads/2019/06/Justice-Oscar-Amugo-Angote-Environment-Litigation-and-A-Call-for-Reforms-10th-june-2019.pdf>

Anker HT, Fauchald OK, Nilsson A and Suvantola L 'The role of courts in environmental law – a Nordic comparative study' (2009) *Nordic Environmental Law Journal* 9

Baum L 'Probing the effect of judicial specialization' (2009) *Duke Law Journal* 1667

Benjamin AH 'We, the judges, and the environment' (2012) *Pace Environmental Law Review* 582

Birdsong BC 'Adjudicating sustainability: New Zealand's Environment Court' (2002) *Ecology Law Quarterly* 1

Blackman A, Li Z and Liu AA 'Efficacy of command-and-control and market-based environmental regulation in developing countries' *Annual Review of Resource Economics* (2018) 382 available at <https://www.annualreviews.org/content/journals/resource/10/>

Botha M and Mischke C 'A new labour dispensation for South Africa' (1997) *Journal of African Law* 134

Bruff HH 'Specialized courts in administrative law' (1991) *Administrative Law Review* 329 available at <https://scholar.law.colorado.edu/articles/883>

Chaskalson M 'The Land Claims Court' *Consultus* (1997) 31

Chaturvedi E ‘Green courts: the way forward?’ *Cornell Policy Law Review* (2020) 1

Couzens E ‘Costs, with pained regret: Wildlife and Environmental Society of South Africa v MEC for Economic Affairs, Environment and Tourism, Eastern Cape, and Others 2005 (6) SA123 (E)’ (2007) *South African Journal of Environmental Law and Policy* 217

Damle SJ ‘Specialize the judge, not the court: a lesson from the German Constitutional Court’ (2005) *Virginia Law Review* 1267 available at <https://virginialawreview.org/wp-content/uploads/2020/12/1267.pdf> (accessed 26 April 2023)

Dickey A ‘The Province and functions of assessors in English courts’ *The Modern Law Review* (1970) 494

Du Plessis A ‘South Africa’s constitutional environmental right (generously) interpreted: what is in it for poverty?’ (2011) *South African Journal on Human Rights* 279

Feris L ‘Constitutional environmental rights: an under-utilised resource’ (2008) *South African Journal on Human Rights* 29

Feris LA ‘The role of good environmental governance in the sustainable development of South Africa’ (2010) *Potchefstroom Electronic Law Journal* 73
<https://repository.nwu.ac.za/handle/10394/4042>

Fourie M ‘How civil and administrative penalties can change the face of environmental compliance in South Africa’ (2009) *South African Journal of Environmental Law and Policy* 93

Garoupa N, Jorgensen N and Vazquez P ‘Assessing the argument for specialized courts: evidence from Family Courts in Spain, International’ (2010) *Journal of Law, Policy, and the Family* 54 available at <https://scholarship.law.tamu.edu/facscholar/444>

Gill GN ‘Precautionary principle, its interpretation and application by the Indian judiciary: ‘When I use a word it means just what I choose it to mean-neither more nor less’ Humpty Dumpty’ (2019) *Environmental Law Review* 292

Gill GN ‘The National Green Tribunal of India: decision-making, scientific expertise and uncertainty’ (2017) *Environmental Law and Management* 1

Glinski C 'Environmental justice in South African law and policy' (2003) *Law and Politics in Africa, Asia, and Latin America* 49

Goetz DJ 'China's environmental problems: is a specialized court the solution?' (2009) *Pacific Rim Law and Policy Journal* 155 available at: <https://digitalcommons.law.uw.edu/wilj/vol18/iss1/6>

Hamman E Walters R and Maguire R 'Environmental crime and specialist courts: the case for one-stop (judicial) shop in Queensland' (2015) *Current Issues in Criminal Justice* 59

Howard RM 'Comparing the decision making of specialized courts and general courts: an exploration of tax decisions' (2005) *The Justice System Journal* 135

Ingonga RM 'Alternative Dispute Resolution in Environmental Disputes: A Case of the Specialized Environment and Land Court in Kenya' (2018) *Journal of Conflict Management and Sustainable Development* available at <https://journalofcmsd.net/alternative-dispute-resolution-in-environmental-disputes-a-case-of-the-specialized-environment-and-land-court-in-kenya/>

Kadish SH 'The crisis of overcriminalization' (1967) *The Annals of the American Academy of Political and Social Science* 157

Kameri-Mbote P and Odote C 'Courts as champions of sustainable development: lessons from East Africa' (2009) *Sustainable Development Law and Policy* 31

Kaniaru DW 'Environmental Courts and Tribunals: The Case of Kenya' 29 *Pace Environmental Law Review* (2012) 566 available at <https://digitalcommons.pace.edu/pelr/vol29/iss2/7>

Kaniaru DW 'Launching a new environment court: challenges and opportunities' *Pace Environmental Law Review* (2012) 626 Available at: <https://digitalcommons.pace.edu/pelr/vol29/iss2/11>

Kathree F 'Public interest law: its continuing role in South Africa' (2002) *Advocate* 32 available at https://journals.co.za/doi/pdf/10.10520/AJA10128743_259

Kessler G and Finkelstein LJ 'The Evolution of a Multi-Door Courthouse' *Catholic University Law Review* (1988) 577

Kidd M ‘Greening the Judiciary’ (2006) *Potchefstroom Electronic Law Journal* 72 available at <https://repository.nwu.ac.za/handle/10394/1743>

Kidd M ‘Of Gas Pipelines and Sour Judicial Air: Merebank Environmental Action Committee v Executive Member of KwaZulu-Natal Council for Agricultural and Environmental Affairs’ (2001) *South African Journal of Environmental Law and Policy* 135

Kotzé LJ ‘The Constitutional Court’s contribution to sustainable development in South Africa’ (2003) *Potchefstroom Electronic Law Journal* 81
<https://repository.nwu.ac.za/handle/10394/1964>

Kotzé LJ and du Plessis A ‘Some brief observations on fifteen years of environmental rights jurisprudence in South Africa’ (2010) *Journal of Court Innovation* 157

Kruger HB and Reyneke JM ‘Sexual Offence Courts: better justice for children’ (2006) *Journal for Juridical Science* 73

Kruger HB and Reyneke JM ‘Sexual Offence Courts: quo vadis’ (2008) *Journal for Juridical Science* 32

Kruger R ‘The Silent Right: Environmental Rights in the Constitutional Court of South Africa’ (2019) *Constitutional Court Review* 474 available at <https://doi.org/10.2989/CCR/2019.0018>

Kurukulasuriya L ‘The role of the judiciary in promoting environmental governance and the rule of law’ Chief Environmental Law Programme UNEP Global Environmental Governance: The Post-Johannesburg Agenda Yale Center for Environmental Law and Policy (2003) available at <https://www.academia.edu/4624916/> (accessed 10 September 2022)

Lalich P and Neilson S ‘Review of the Land and Environment Court’s jurisdiction: Discussion of issues relating to the Working Party review and reform of the Court’ (2001) *Local Government Law Journal* 49

Larkins CM ‘Judicial independence and democratization: a theoretical and conceptual analysis’ (1996) *American Journal of Comparative Law* 605

Manyathi-Jele N ‘Rationalisation of magisterial districts bringing justice closer’ (2015) *De Rebus* 11

Manyathi-Jele N ‘Sexual offences courts to be re-established’ (2013) *De Rebus* 10

Markowitz KJ and Gerardu JJA ‘The importance of the judiciary in environmental compliance and enforcement’ (2012) 29 *Pace Environmental Law Review* 538 available at <https://digitalcommons.pace.edu/pelr/vol29/iss2/5>

McAuslan P ‘The role of courts and other judicial type bodies in environmental management’ (1991) *Journal of Environmental Law* 195

Mulkey ME “Judges and other lawmakers: critical contributions to environmental law enforcement” (2004) *Sustainable Development Law and Policy* 2

Müller KD and van der Merwe IA ‘The sexual offences prosecutor: a new specialisation’ (2004) *Journal for Juridical Science* 13

Muriithi PM ‘Critiquing the role of courts and tribunals in developing environmental law jurisprudence’ (2020) *Journal of Conflict Management and Sustainable Development* 69

Musukubili F and van der Walt A ‘Namibian labour dispute resolution system: Some lessons from South Africa’ (2014) *Obiter* 126

Nemesio IV ‘Strengthening environmental rule of law: enforcement, combatting corruption, and encouraging citizen suits’ (2015) *Georgetown International Law Review* 321

Odeku KO and Gundani SR ‘Accentuating criminal sanctions for environmental degradation: issues and perspectives’ (2017) *Environmental Economics* 28

Odote C ‘Kenya: The New Environment and Land Court’ (2013) *IUCN Academy of Environmental Law E Journal* 17

Park KJ ‘Judicial utilization of scientific evidence in complex environmental torts: redefining litigation driven research’ (2011) *Fordham Environmental Law Review* 483

Pearlman ML ‘The Land and Environment Court of New South Wales: a model for environmental protection’ (2000) *Water, Air, and Soil Pollution: An International Journal of Environmental Pollution* 395 available at <https://doi.org/10.1023/A:1005251101945>

Perez VC ‘Specialisation trends: water courts’ (2019) *Environmental Law* 587 available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3253349

Pienaar JM 'Restitutionary road: reflecting on good governance and the role of the Land Claims Court' (2011) *Potchefstroom Electronic Law Journal* 30 available at <https://repository.nwu.ac.za/handle/10394/4670>

Preston BJ 'Benefits of judicial specialization in environmental law: the Land and Environment Court of New South Wales as a case study' (2012) *Pace Environmental Law Review* 396 available at: <https://digitalcommons.pace.edu/pelr/vol29/iss2/2>

Preston BJ 'Characteristics of Successful Environmental Courts and Tribunals' (2014) *Journal of Environmental Law* 365

Preston BJ 'Operating an environment court: The experience of the Land and Environment Court of New South Wales' (2008) *Environmental and Planning Law Journal* 385

Preston BJ 'The Land and Environment Court of New South Wales: a very short history of an environmental court in action' (2020) *Australian Law Journal* 631

Preston BJ 'The role of the judiciary in promoting sustainable development: the experience of Asia and the Pacific' (2005) *Asia Pacific Journal of Environmental Law* 109 available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1124804

Pring G and Pring C 'Specialized environmental courts and tribunals at the confluence of human rights and the environment' (2009) *11 Oregon Review International Law* 301

Raj K 'Decentralising environmental justice: debating the National Green Tribunal (2014) *Economic and Political Weekly* available at <https://www.epw.in/journal/2014/48/web-exclusives/decentralising-environmental-justice.html>

Rottman DB 'Does effective therapeutic jurisprudence require specialized courts (and do specialized courts imply specialist judges)?' *Court Review* (2000) 22

Sheahan T 'Use of ADR in New South Wales and in the Land and Environment Court' *NSW ACPECT* (2010) https://lec.nsw.gov.au/documents/speeches-and-papers/sheahan_acpect_adr.pdf (accessed 1 June 2023)

Snijman PJ and Phil M 'Hermanus' environmental court: does it protect the environment?' (2005) *News and Views for Magistrates* 2

Soyapi CB ‘A multijurisdictional assessment of the judiciary’s role in advancing environmental protection in Africa’ *Hague Journal on the Rule of Law* (2020) 307

Soyapi CB ‘Environmental Protection in Kenya’s Environment and Land Court’ *Journal of Environmental Law* (2019) 151

Stafford, A ‘The Role of Commissioners in the NSW Land and Environment Court’ *Practice and Procedure* (2019) available at <https://www8.austlii.edu.au/au/journals/NSWBarAssocNews/2019/70.pdf>

Stein PL ‘Specialist Environmental Courts: The Land and Environmental Court of New South Wales, Australia’ *Environmental Law Review* (2002) 5

Steyn P ‘The lingering environmental impact of repressive governance: the environmental legacy of the apartheid-era for the new South Africa’ (2005) 1 available at <https://core.ac.uk/download/9049847.pdf>

Tandon U ‘Environmental courts and tribunals: a comparative analysis of Australia’s LEC and India’s NGT’ (2016) *The Indian Yearbook of Comparative Law* available at <https://ssrn.com/abstract=3693408> or <http://dx.doi.org/10.2139/ssrn.3693408> (accessed 22 July 2023)

Tshehla B and Marumoagae MC ‘Lay participation in the South African criminal justice system: An assessment of the assessor system’ *South African Journal of Criminal Justice* (2021) 339

Uhlmann DM ‘Environmental crime comes of age: the evolution of criminal enforcement in the environmental regulatory scheme’ (2009) *Utah Law Review* 1223

van den Berg, JP ‘Environmental dispute resolution in South Africa - towards sustainable development’ (1998) *South African Journal of Environmental Law and Policy* 74

van Sittert L, Branch G, Hauck M and Sowman M ‘Benchmarking the first decade of post-apartheid fisheries reform in South Africa’ *Marine Policy* (2006) 96 available at www.sciencedirect.com

Wannenburg G ‘Putting paid to the untouchables? The effects of dissolving the Directorate of Special Operations and the Specialised Commercial Crime units’ (2008) *SA Crime Quarterly* 17

White R ‘Environmental crime and problem-solving courts’ (2013) *Crime, Law, and Social Change* 267

Whitney SC ‘The case for creating a special environmental court system’ (1973) *William and Mary Law Review* 473 available at <https://scholarship.law.wm.edu/wmlr/vol14/iss3/2> (accessed 13 March 2022)

Williams LA ‘The role of courts in the quantitative-implementation of social and economic rights: a comparative study’ (2010) *Constitutional Court Review* 141

Wood DP ‘Generalist judges in a specialized world’ (1997) *50 SMU Law Review* 1755

Woodruff E ‘Environmental courts and tribunals: how can nations tackle the growing demand for justice on environmental issues?’ *Denver Journal of International Law and Policy* (2011) 553

Zimmer MB ‘Overview of specialized courts’ (2009) *International Journal for Court Administration* 1

Books

Altbeker A (2003) *Justice through Specialisation? The case of the Specialised Commercial Crime Court* Monograph Issue Institute for Security Studies

Gramckow H and Walsh B (2013) *Developing Specialized Court Services: International Experiences and Lessons Learned* Justice and Development Working Paper Series No 24 The World Bank

Jakhanwal M and Mishra MK (2020) *The Economics of Environment and Ecology for Sustainable Development* ZBW - Leibniz Information Centre for Economics, Kiel, Hamburg

Pring G and Pring C (2009) *Greening Justice: Creating and Improving Environmental Courts and Tribunals* The Access Initiative

Pring G and Pring C (2016) *Environmental Courts and Tribunals; A Guide for Policymakers* United Nations Environmental Programme

Shelton D and Kiss (2005) *A Judicial Handbook on Environmental Law* United Nations Environment Programme/Earthprint

Smith S (2001) *A Review of the Land and Environment Court New South Wales* New South Wales Parliamentary Research Service

Sulistiawati LY, Bouquelle F, Lin J, Lavrysen L, Ortega M, Pereira R and Tseng S (2022) *Environmental Courts and Tribunals - 2021: A Guide for Policymakers* United Nations Environmental Programme, Nairobi

United Nations Environmental Programme *Environmental rule of law First Global Report* (2019) United Nations Environmental Programme, Nairobi

United Nations Environmental Programme *Environmental Rule of Law: Tracking Progress and Charting Future Directions* (2023) United Nations Environmental Programme, Nairobi

United Nations Environmental Programme *Global Climate Litigation Report: 2020 Status Review*. (2020) United Nations Environmental Programme, Nairobi

van der Linder M and Feris L (eds) (2010) *Compendium of South African Environmental Legislation* 2nd edition Pretoria: University Law Press

Chapters in Books

Clifford M and Edwards TD ‘Defining Environmental Crime’ in Clifford M (ed) (1998) *Environmental Crime: Enforcement and Social Responsibility* Boston: Aspen Publishers

Craigie F, Snijman P and Fourie M ‘Environmental Compliance and Enforcement Institutions’ in A Paterson and LJ Kotzé (eds) (2009) *Environmental Compliance and Enforcement in South Africa: Legal Perspectives* Western Cape: Juta

Fulton S and Benjamin AH ‘Foundations of sustainability’ in United Nations Environmental Programme (UNEP) (2012) *Advancing Justice, Governance and Law for Environmental Sustainability* Nairobi: UNON Publishing Services

Guidone R and Jonas H ‘A review of environmental courts and tribunals for CSOs and the judiciary’ in C Voigt and Z Makuch (eds) (2018) *Courts and the Environment* Edward Elgar Publishing Limited

Kameri-Mbote P ‘Kenya’ in *The Role of the Judiciary in Environmental Governance: Comparative Perspectives* LJ Kotzé and A Paterson (eds) (2009) Kluwer Law International

Lavrysen L ‘The fundamental right to the protection of a healthy environment’ in United Nations Environment Programme (UNEP) *Advancing Justice Governance and Law for Environmental Sustainability* (2012) (2012) Nairobi: UNON Publishing Services

Mumma A ‘The role of administrative dispute resolution institutions and processes in sustainable land use management: the case of the national environment tribunal and the public complaints committee of Kenya’ in N Chalifour *et al* (eds) (2007) *Land Use Law for Sustainable Development* Cambridge University Press

Patterson A and Kotze LJ ‘Towards a more effective environmental compliance and enforcement regime for South Africa’ in A Paterson and LJ Kotzé (eds) (2009) *Environmental Compliance and Enforcement in South Africa: Legal Perspectives* Western Cape: Juta

Preston BJ ‘The many facets of a cutting edge court: a study of the Land and Environment Court of New South Wales’ in E Fisher and B Preston (eds) (2022) *An environmental court in action: function, doctrine, and process* Hart Publishing

Robinson NA ‘The nature of courts’ in C Voigt & Z Makuch (eds) (2018) *Courts and the environment* Edward Elgar Publishing Limited

UNEP ‘Rio+20 Declaration on Justice, Governance and Law for Environmental Sustainability’ in United Nations Environmental Programme (UNEP) *Advancing Justice Governance and Law for Environmental Sustainability* (2012) Nairobi: UNON Publishing Services

UNEP ‘World Congress highlights’ in United Nations Environmental Programme (UNEP) *Advancing Justice Governance and Law for Environmental Sustainability* (2012) Nairobi: UNON Publishing Services

Voigt C and Makuch Z ‘Courts and the environment: an introduction’ in C Voigt and Z Makuch (eds) (2018) *Courts and the environment* Edward Elgar Publishing Limited

Case Law

South African

Affordable Medicines Trust and Others v Minister of Health and Others 2006 (3) SA 247 (CC)

Biowatch Trust v Registrar Genetic Resources and others 2009 (6) SA 232 (CC).

City of Ekurhuleni v New Star Technology and another [2022] ZAGPJHC 769; 2023 (3) SA 579 (GJ)

Earthlife Africa (Cape Town) v Director-General: Department of Environmental Affairs and Tourism and another 2005 (3) SA 156

Fripp v Gibbon and Co 1913 AD 354

Fuel Retailers Association of SA (Pty) Ltd v Director General, Environmental Management Mpumalanga, and others 2007 ZACC 13

HTF Developers (Pty) Ltd v the Minister of Environmental Affairs 2006 (5) SA 512 (T).

Kruger Bros and Wasserman v Ruskin 1918 AD 63

Mazibuko and others v City of Johannesburg and others 2009 ZACC 28

Merafong Municipality v Anglogold Ashanti Limited 2016 ZACC 35

Merber v Merber 1948 (1) SA 446 (A)

Mfolozi Community Environmental Justice Organisation & others v Minister of Minerals and Energy & others unreported High Court judgment Gauteng Division Pretoria Case No: 82865/18 delivered on 4 May 2022

Minister for Environmental Affairs and another v Aquarius Platinum 2016 ZACC 4,

Normandien Farms (Pty) Limited v South African Agency for Promotion of Petroleum Exportation and Exploitation SOC Limited and Others [2020] ZACC 5

S v Jaipal 2005 (4) SA 581 (CC)

South African Human Rights Commission v Msunduzi Local Government and Others (8407/2020P) [2021] ZAKZPHC 35; [2021] 3 All SA 939 (KZP); 2021 (6) SA 500 (KZP) (17 June 2021)

South Durban Community Environmental Alliance v MEC for Economic Development, Tourism and Environmental Affairs: KwaZulu-Natal Provincial Government [2020] ZASCA 39 (17 April 2020)

Sustaining the Wild Coast NPC and others v Minister of Mineral Resources and Energy and others 2022 (6) SA 589 (ECMk)

Trustees for the time being of Groundwork Trust and another v Minister of Environmental Affairs and others 2022 JDR 1012 (GP)

Wakkerstroom Natural Heritage Association v Dr Pixley Ka Isaka Local Municipality unreported judgment case no. 1765/2019 High Court, Mpumalanga Division, Middelburg (Local Seat)

Wickham v Magistrate, Stellenbosch and others [2016] ZACC 36

Wildlife and Environmental Society of South Africa v MEC for Economic Affairs, Environment and Tourism, Eastern Cape, and Others 2005 (6) SA 123 (E)

Foreign

Kenya

Kelvin Musyoke and 9 others v The Hon Attorney General and 7 others ELC Pet No 1/2016

Law Society of Kenya Nairobi Branch v Malindi Law Society & 6 Others Nairobi Civil Appeal No. 287 of 2016

National Director of Public Prosecution (Ex parte Application) (905/2017) [2018] ZASCA 86; 2018 (2) SACR 176 (SCA) (31 May 2018)

Republic v Karisa Chengo and others [2017] eKLR

Australia

Sader v Elgammal [2022] NSWLEC 107

India

A P Pollution Control Board v MV Nayudu and others 2001(2) SCC 62 Point 5

Indian Council for Enviro-Legal Action v Union of India 1996 1996(3) SCC 212

M C Mehta v Union of India 1986 (2) SCC 176

Legislation

South Africa

Banks Act 94 of 1990

Children's Act 38 of 2005

Companies Act 71 of 2008

Competition Act 89 of 1998

Constitution Act 200 of 1993

Constitution of the Republic of South Africa, 1996

Cooperative Banks Act 40 of 2007

Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007

Criminal Procedure Act 51 of 1977

Electoral Commissions Act 51 of 1996

Environment Conservation Act 73 of 1989)

Environment Conservation Amendment Act 79 of 1992

Extension of Security of Tenure Act 62 of 1997

Jurisdiction of Regional Courts Amendment Act 2008

Labour Relations Act 66 of 1995

Land Court Act 6 of 2023

Land Reform (Labour Tenants) Act 3 of 1996

Lands Restitution Act 22 of 1994

Marine Living Resource Act 18 of 1998

Mineral and Petroleum Resources Development Act 28 of 2002

National Environmental Management Act 107 of 1998

National Environmental Management: Air Quality Act 39 of 2004

National Environmental Management: Biodiversity Act 10 of 2004

National Environmental Management: Integrated Coastal Management Act 24 of 2008

National Environmental Management: Protected Areas Act 57 of 2003

National Environmental Management: Waste Act 59 of 2008

National Water Act 36 of 1998

Occupational Health and Safety Act 85 of 1995

Promotion of Administrative Justice Act 3 of 2000

Promotion of Equality and Prevention of Unfair Discrimination Act 4 of

Regulations in terms of the Marine Living Resources Act GNR 1111 of GN 19205 of 2
September 1998

Restitution of Land Rights Act 22 of 1994

Spatial Planning and Land Use Management Act 16 of 2013

Superior Courts Act 10 of 2013

World Heritage Convention Act 49 of 1999

Australia

Aboriginal Land Rights Act 42 of 1983 (NSW)

Catchment Management Act 235 of 1989 (NSW)

Contaminated Land Management Act 140 of 1997 (NSW)

Environmental Planning and Assessment Act 203 of 1979 (NSW)

Environmentally Hazardous Chemicals Act 14 of 1985 (NSW)

Environmental Offences and Penalties Act 150 of 1989

Fisheries Management Act 38 of 1994 (NSW)

Forestry and National Park Estate Act 163 of 1998 (NSW)

Heritage Act 136 of 1977 (NSW)

Land Acquisition (Just Terms Compensation) Act 22 of 1991 (NSW)

Land and Environment Court Act 204 of 1979

Local Government Act 30 of 1993 (NSW)

Local Government Act 41 of 1919 (NSW)

National Parks and Wildlife Act 80 of 1974 (NSW)

Native Vegetation Act 103 of 2003 (NSW)

Native Vegetation Conservation Act 133 of 1997 (NSW)

Noxious Weeds Act 11 of 1993 (NSW)

Pesticides Act 80 of 1999 (NSW)

Pipelines Act 90 of 1967 (NSW)

Protection of the Environment Operations Act 156 of 1997 (NSW)

Roads Act 33 of 1993 (NSW)

Swimming Pools Act 49 of 1992 (NSW)

Threatened Species Conservation Act 101 of 1995 (NSW)

Trees (Disputes Between Neighbours) Act 126 of 2006 (NSW)

Waste Minimisation and Management Act 102 of 1995 (NSW)

Water Management Act 92 of 2000 (NSW)

Land and Environment Court Rules 2007

China

Environmental Protection Law of the People's Republic Law of China Order 9 of 2014

Kenya

Civil Procedure Act Cap 21 of the Laws of Kenya

Electronic Case Management Practice Directions, 2020 Government Gazette No 2357 of 2020

Environmental Management and Coordination Act 8 of 1999

Magistrates Court Act 26 of 2015

National Land Commission Act 5 of 2012

Notice 301 of 2007 published in Kenyan Government Gazette Vol CIX No 9 (19 January 2007)
30

Practice Directions on Proceedings in the Environment and Land Courts, and on Proceedings
Relating to the Environment and the Use and Occupation of, and Title to Land and Proceedings
in other Courts Government Notice No 5178 of 2014

Rent Restriction Tribunal Cap 296 of the Laws of Kenya

The Constitution of Kenya, 2010

The Environment and Land Court Act 19 of 2011

New Zealand

Resource Management Act 69 of 1991

Regulations, Court Rules, and Directives

Civil Practice Directives for the Regional Courts in South Africa (2023 Revision)

Consolidated directive in re: court operations in the Pretoria and Johannesburg high courts of
the Gauteng division, Directive 2 of 2022

Court Online Pilot Directive 1 of 2022

Designation of Courts for the Regional Divisions at which Sexual Offences Courts must be
established GN R2690 in GG 47410 of 31 October 2022

Labour Court Rules, GN 1665 in GG 17495 of 14 October 1996

Land Claims Court Rules GN 300 of 1997 published in GG 17804 of
21 February 1997

Regulations Relating to Sexual Offences Courts GNR 108 of 7 February 2020

Rules regulating the conduct of the Proceedings of the Magistrates' Courts of South Africa GN R470 of G. 33487 of 15 October 2010

International Conventions and Declarations

Basel Convention on the Control of Trans-boundary Movements of Hazardous Wastes and Their Disposal, 1989

Convention on International Trade in Endangered Species of Wild Flora and Fauna (CITES), 1973

Convention on Wetlands of International Importance especially as Waterfowl Habitat (Ramsar Convention), 1971

Convention on Biological Diversity (CBD), 1992

Convention to Combat Desertification (CCD), 1994

Framework Convention on Climate Change (FCCC), 1992

Montreal Protocol on Substances that Deplete the Ozone Layer, 1987

Rio+20 Declaration (2012)

Stockholm Convention on Persistent Organic Pollutants (POPs), 2001

Reports

South Africa

Advisory Panel on Land Reform and Agriculture (2019) 'Final report of the Presidential Advisory Panel on Land Reform and Agriculture' available at https://www.gov.za/sites/default/files/gcis_document/201907/panelreportlandreform_1.pdf (accessed 15 June 2022)

Department of Environmental Affairs 'Annual Report 2010/2011' Department of Environmental Affairs: Communications

Department of Environmental Affairs and Tourism 'Green Paper on an Environmental Policy for South Africa' (1996) available at https://www.dffe.gov.za/sites/default/files/legislation/2023-09/environmental_policy_0.pdf (accessed 1 September 2022)

Department of Environment, Forestry and Fisheries (2021) 'Report back on Rhino Poaching in South Africa in 2020' available at <https://www.gov.za/speeches/environment-forestry-and-fisheries-rhino-poaching-south-africa-2020-1-feb-2021-0000> (accessed 17 May 2022)

Department of Forestry, Fisheries and Environmental Affairs 'National Environmental Crimes Report 2021/2022' Department of Forestry, Fisheries and Environmental Affairs: Communications and Advocacy

Department of Forestry, Fisheries and Environmental Affairs 'National Environmental Crimes Report 2022/2023' Department of Forestry, Fisheries and Environmental Affairs: Communications and Advocacy

Department of Justice and Constitutional Development 'Annual Report 2003/2004'

Department of Justice and Constitutional Development 'Annual Report 2004/2005'

Department of Justice and Constitutional Development 'Annual Report 2021/2022'

Department of Justice and Constitutional Development 'Annual Report 2022/2023'

Department of Justice and Correctional Services 'South Africa Yearbook 2005/2006'

Department of Planning, Monitoring and Evaluation (2014) 'Twenty Year Review South Africa 1994 - 2014 - Background Paper: Environment and Sustainable Development' available at <https://www.dpme.gov.za/news/Documents/20%20Year%20Review.pdf>

Gauteng Provincial Government 'Gauteng Province Environmental Outlook' (2017)

Ministerial Advisory Task Team on the Adjudication of Sexual Offence Matters (2013) 'Report on the Re-Establishment of Sexual Offences Courts' available at <https://www.justice.gov.za/reportfiles/other/2013-sxo-courts-report-aug2013.pdf>

National Planning Commission 'The National Development Plan 2030 Our future – make it work' (2012) (The NDP) available at https://www.gov.za/sites/default/files/gcis_document/201409/ndp-2030-our-future-make-it-workr.pdf

National Prosecuting Authority 'Annual Report 2005/2006'

National Prosecuting Authority 'Annual Report 2011/2012'

National Prosecuting Authority 'Annual Report 2015/2016'

National Prosecuting Authority ‘Annual Report 2020/2021’

National Prosecuting Authority ‘Annual Report 2022/2023’

Parliament of South Africa ‘Report of the High-Level Panel on the Assessment of Key Legislation and the Acceleration of Fundamental Change’ (2017) available at https://www.parliament.gov.za/storage/app/media/Pages/2017/october/High_Level_Panel/HL_P_Report/HLP_report.pdf (accessed 15 June 2022)

South African Human Rights Commission (2002) ‘Report on sexual violence against children: does the criminal justice system protect children?’ available at https://www.sahrc.org.za/home/21/files/Reports/child_sexual_offences_report_april_2002.pdf (accessed 1 March 2023)

Western Cape Government ‘Western Cape Police Ombudsman Annual Report (2019/2020)’ available at <https://www.westerncape.gov.za/police-ombudsman/documents-and-publications> (accessed 18 May 2022)

Australia

The Land and Environment Court ‘The NSW Land and Environment Court Annual Review 2022’ available at https://lec.nsw.gov.au/documents/annual-review/2022_Annual_Review.pdf (accessed 13 March 2024)

India

Law Commission of India (2003) ‘The 186th report on proposal to constitute environment courts’ available at <https://indiankanoon.org/doc/162923904> (accessed 14 March 2022)

Kenya

Judiciary of the Republic of Kenya (2021/2022) ‘State of the Judiciary and the Administration of Justice Annual Report’ available at <https://www.judiciary.go.ke/wp-content/uploads/2023/07/Sojar-21-22-for-Launch-1.pdf> (accessed 7 June 2023)

Judiciary of the Republic of Kenya ‘State of the Judiciary and the Administration of Justice Annual Report 2022/2023’ available at <https://judiciary.go.ke/downloads-reports/> (accessed 13 March 2024)

Kenya Commission of Enquiry ‘The Report of the Commission of Inquiry into the illegal/irregular allocation of public land’ (2004) available at <http://kenyalaw.org/kl/fileadmin/CommissionReports/> (accessed 21 April 2023)

Kenya Law ‘Final Report of the Constitution of Kenya Review Commission’ (2005) <http://kenyalaw.org/kl/fileadmin/CommissionReports/The-Final-Report-of-the-Constitution-of-Kenya-Review-Commission-2005.pdf> (accessed 15 March 2022)

International

Governing Council of the United Nations Environment Programme ‘Report of the Global Judges Symposium on sustainable development and the role of law’ (2003) presented at the 22nd session of the Governing Council/ Global Ministerial Environment Forum UNEP/GC.22/INF/24

United Nations ‘Report of the World Commission on Environment and Development: Our Common Future’ (Brundtland Report) (1987) Available at <https://sustainabledevelopment.un.org/content/documents/5987our-common-future.pdf>

United Nations Environment Programme (UNEP) ‘Environmental rule of law: tracking progress and charting future directions’ (2023) available at <https://doi.org/10.59117/20.500.11822/43943>

United Nations Environment Programme (UNEP) ‘Global climate litigation report: 2020 status review’ (2021) available at <https://www.unep.org/resources/report/global-climate-litigation-report-2020-status-review>.

United Nations Environmental Programme ‘Environmental Rule of Law First Global Report’ (2019) available at <https://www.unep.org/resources/assessment/environmental-rule-law-first-global-report>

Websites

South Africa

Constitutional Court ‘How cases reach the Constitutional Court’ available at <https://www.concourt.org.za/index.php/28-role-of-the-constitutional-court/how-cases-reach-the-constitutional-court> (accessed 24 April 2023)

Department of Justice and Constitutional Development (22 December 2014) How will the rationalisation of magisterial districts benefit you? Facebook available at <https://www.facebook.com/DoJCD/posts/how-will-the-rationalisation-of-magisterial-districts-benefit-you-every-person-o/799616430084900/> (accessed 21 April 2023)

Land Portal ‘The Land Claims Court of South Africa’ available at <https://data.landportal.info/organization/land-claims-court-south-africa> (accessed 15 June 2022)

National Government of South Africa ‘Land Claims Court’ available at <https://nationalgovernment.co.za/units/view/56/land-claims-court-lcc> (accessed 15 June 2022)

The South African Judiciary ‘The High Court’ available at <https://www.judiciary.org.za/index.php/about-us/100-high-court> (accessed 13 July 2023).

Australia

Land and Environment Court of NSW ‘About us’ <https://www.lec.nsw.gov.au/lec/about-us.html> (accessed 15 March 2022)

Land and Environment Court of NSW ‘Access for people in regional areas’ <https://www.lec.nsw.gov.au/Facilities-and-support/access-for-people-in-regional-areas.html> (accessed 20 April 2023)

Land and Environment Court of NSW ‘Judicial officers and decision makers’ <https://www.lec.nsw.gov.au/about-us/judicial-officers-and-decision-makers.html> (accessed 20 April 2023)

Land and Environment Court of NSW ‘Types of cases’ <https://www.lec.nsw.gov.au/types-of-cases/class-2---tree-disputes-and-local-government-appeals.html> (accessed 1 June 2023)

Land and Environment Court of NSW Access for people in regional areas <https://www.lec.nsw.gov.au/Facilities-and-support/access-for-people-in-regional-areas.html> (accessed 20 April 2023). Rule 2.5 of the Land and Environment Court Rules 2007.

New South Wales Government Facts about New South Wales <https://www.nsw.gov.au/about-nsw/key-facts-about-nsw#toc-geography-of-nsw> (accessed 15 March 2022)

NSW ‘Online Registry’ <https://onlineregistry.lawlink.nsw.gov.au/content/> (accessed 20 April 2023)

NSW Government NSW legislation <https://legislation.nsw.gov.au/> (accessed 15 March 2022)

Kenya

Kenyan Judiciary ‘The Environment and Land Court’ available at <https://www.judiciary.go.ke/courts/environment-and-land-court/> (accessed 21 April 2023)

Ministry of Foreign and Diaspora Affairs ‘Country Profile’ <https://mfa.go.ke/country-profile/> (accessed 7 May 2023)

United Kingdom

Courts and Tribunal Judiciary ‘Judicial Reviews’ available at <https://www.judiciary.uk/you-and-the-judiciary/judicial-review/> (accessed 22 March 2022)

Courts and Tribunals Judiciary ‘Judicial Review’ available at <https://www.judiciary.uk/you-and-the-judiciary/judicial-review/> (accessed 22 September 2022)

Papers presented at Conferences

South Africa

Majokweni T ‘The future of the multidisciplinary approach in the court system in respect of sexual offences, with particular reference to the sexually abused child’ Keynote Address delivered by Adv Thoko Majokweni at the First National Conference of SAPSAC’ *Child Abuse Research in South Africa* (2000)

Opperman ME ‘Sexual Offences Courts’ presentation at the Conference on the Multi-disciplinary Approach to Child Abuse (2003) University of the Free State

International

de Windt CS and Brown L ‘Symposium on “Judiciary and the Environment: Adjudicating our Future”: A historic global gathering of U.S. and international judges held August 2018 at the Organization of American States in Washington D.C.’ (2018) available at <https://www.iucn.org/news/world-commission-environmental-law/201810/symposium->

judiciary-and-environment-adjudicating-our-future-a-historic-global-gathering-us-and-international-judges-held-august-2018-organization (accessed 6 March 2022).

Governing Council of the United Nations Environment Programme ‘Report of the Global Judges Symposium on Sustainable Development and the role of law’ presented at the 22nd session of the Governing Council/ Global Ministerial Environment Forum (2003) UNEP/GC.22/INF/24 available at <https://digitallibrary.un.org/record/484610?ln=en&v=pdf> (accessed 20 August 2022)

Kaniaru D, Kurukulasuriya L, and Okidi C *UNEP Judicial Symposium on the Role of the Judiciary in Promoting Sustainable Development* in J Gerardu and C Wasserman (eds) Conference Proceedings Volume 1 of the 5th International Conference on Environmental Compliance and Enforcement in Monterey, California (1998) 22 available at <https://wedocs.unep.org/handle/20.500.11822/29972> (accessed 25 September 2022).

Ogonjo F, Gitonga JT, Wairegi A, Rutenberg I ‘Leveraging AI Capabilities in Land Dispute Cases in the Kenyan Environmental and Land Court System’ Proceedings of the Second International Workshop on AI and Intelligent Assistance for Legal Professionals in the Digital Workplace (LegalAIIA 2021), held in conjunction with ICAIL 2021 (2021) 2 available at <https://ceur-ws.org/Vol-2888/paper9.pdf> (accessed 27 May 2023).

Okong’o S ‘Environmental Adjudication in Kenya: A Reflection on the Jurisdiction of the Environment and Land Court’ A presentation made at the Symposium on Environmental Adjudication in the 21st Century held in Auckland New Zealand on 11th April 2017) available at <http://environmentaladjudication.org/assets/Uploads/General/Okongo-PPT2.pdf>

Preston B ‘The role of the courts in delivering environmental justice’ The 2023 Sir Ninian Stephen Lecture delivered by the Honourable Justice Brian Preston University of Newcastle School of Law and Justice (2023) 10 available at <https://lec.nsw.gov.au/publications-and-resources/judicial-speeches-and-papers.html> (accessed 1 April 2024)

Preston BJ ‘Specialist environmental courts: their objective, integrity and legitimacy’ (2023) 33 – 34 paper presented to AAL, AIJA and ALJ at the Enduring Courts in Changing Times Conference, 10 September 2023, Sydney available at <https://lec.nsw.gov.au/publications-and-resources/judicial-speeches-and-papers.html> (accessed 1 April 2024)

Preston BJ ‘The Land and Environment Court of New South Wales: Moving Towards a Multi-Door Courthouse’ Keynote address to: LEADR NSW Chapter annual dinner (2007) 12 available at <https://ssrn.com/abstract=2346046> (accessed 18 March 2023)

Pring G and Pring C ‘Specialised Environmental Courts and Tribunals: the explosion of new institutions to adjudicate climate change and other complex environmental issues’ Paper presented at the Yale University and UN Institute for Training and Research’s 2nd Global Conference on Environmental Governance and Democracy – On Strengthening Institutions to Address Climate Change and Advance a Green Economy (2010) 17 – 18 available at <https://static1.squarespace.com/static/56c0ae80ab48de4417bd17fa/t/56d8661ee32140c576556844/1457022504944/ECTs-and-Climate-Change+-2010.pdf>

Unpublished Theses

Chohan I Environmental courts: an analysis of their viability in South Africa with particular reference to the Hermanus environmental court [Unpublished LLM School of Law University of Kwa Zulu Natal] (2013)

Gathongo JK Labour dispute resolution in Kenya: compliance with international standards and a comparison with South Africa [Unpublished PhD thesis Nelson Mandela Metropolitan University] (2018)

Myeza NW An analysis of the prosecution-led investigation model in murder cases [Unpublished PhD Department of Police Science, University of South Africa] (2019) 135

Walker SP The Court for Sexual Offences: perceptions of the parties involved [Unpublished PhD Department of Psychology, University of the Free State] (2002)

Newspaper articles, Speeches, and Media Statements

South Africa

Department of Environment, Forestry and Fisheries ‘Report back on Rhino Poaching in South Africa in 2020’ 1 February 2021 available at <https://www.gov.za/speeches/environment-forestry-and-fisheries-rhino-poaching-south-africa-2020-1-feb-2021-0000> (accessed 17 May 2022)

Department of Justice and Constitutional Development ‘B Mabandla 2005/2006 Budget Vote Speech’ (2005) 6 available at <https://www.polity.org.za/article/b-mabandla-justice-dept-budget-vote-20052006-20052005-2005-05-20>

Gabara N ‘Sonjica talks tough on illegal dumping’ (2009) available at <https://www.sanews.gov.za/south-africa/sonjica-talks-tough-illegal-dumping> (accessed 6 March 2022)

Iannucci E ‘SA to reinstate specialised courts to deal with environmental crimes’ (2009) available at <https://www.engineeringnews.co.za/article/sa-to-reinstate-specialised-courts-to-deal-with-environmental-crimes-sonjica-2009-06-22> (accessed 6 March 2022)

Phakathi B ‘Bring back the ‘green’ courts, ministry urges’ Business Day (2018) available at <https://www.businesslive.co.za/bd/national/science-and-environment/2018-08-14-bring-back-the-green-courts-ministry-urges/> (accessed 1 April 2022)

South African Government ‘MEC Albert Fritz escalates Ombudsman’s report in fight against poaching’ (2019) available at <https://www.gov.za/news/media-statements/mec-albert-fritz-escalates-ombudsman%E2%80%99s-report-fight-against-poaching-13-aug> (accessed 18 May 2022)

South African Government ‘Minister Gwede Mantashe Mineral Resources and Energy Department Budget vote speech 2022/2022’ available at <https://www.gov.za/speeches/minister-gwede-mantashe-mineral-resources-and-energy-dept-budget-vote-202323-16> --may-2023 (accessed 8 September 2023)

Ireland

Roger S ‘The new commercial planning and environmental division of Ireland’s High Court that becomes effective from today (2023) <https://www.ogier.com/news-and-insights/insights/the-new-commercial-planning-and-environmental-division-of-irelands-high-court-that-becomes-effective-from-today/> (accessed 17 August 2023)

Kenya

Itimu K ‘Kenya Judiciary Launches e-Filing System, Integrates ODPP’s Management and Tracking System’ (2020) available at <https://techweez.com/2020/07/01/kenya-judiciary->

launches-e-filing-system-integrates-odpps-management-and-tracking-system/ (accessed 5 June 2023)

Khaduli B Newly Appointed Judges Expected to Report on August 1 (2021) available at <https://www.kenyanews.go.ke/newly-appointed-judges-expected-to-report-in-august-1> (accessed 27 May 2023)

Oruko MO Kenya to launch exclusive environment court by June, urges Kenyans to use it to fight climate change (2023) available at <https://www.tuko.co.ke/editorial/analysis/500145-judiciary-launch-environment-court-june-urges-kenyans-platform-fight-climate-change/> (accessed 7 May 2023)

Other Internet sources

AllsopLaw G ‘New Land Court Bill seeks to address slow processing of land claims’ (2021) available at <https://www.groundup.org.za/article/new-land-court-bill-seeks-address-slow-processing-land-claims> (accessed 15 June 2022)

British Columbia Ministry of Justice *British Columbia Specialised Courts Strategy* (2016) 6 available at <https://www2.gov.bc.ca/assets/gov/law-crime-and-justice/about-bc-justice-system/justice-reform-initiatives/specialized-courts-strategy.pdf> (accessed 26 November 2020)

Business and Human Rights Resource Centre *SLAPPED but Not Silenced: Defending Human Rights in the Face of Legal Risks* (2021) 5 available at https://media.business-humanrights.org/media/documents/2021_SLAPPs_Briefing_EN_v51.pdf. (accessed 30 September 2022)

Caparini M ‘Organized environmental crime: why it matters for peace operations’ (2022) available at <https://www.sipri.org/commentary/topical-background/2022/organized-environmental-crime-why-it-matters-peace-operations> (accessed 12 September 2022).

Cowling N ‘Total population of South Africa 2021 by province’ (2023) available at <https://www.statista.com/statistics/1112169/total-population-of-south-africa-by-province> (accessed 14 August 2023)

Dani R ‘Role of Alternative Dispute Resolution in Environmental Disputes’ available at <https://viamediationcentre.org/readnews/NTE3/Role-of-Alternative-Dispute-Resolution-in-Environmental-Disputes> (accessed 17 September 2023)

Development Bank of South Africa ‘Socio-economic factors that challenge SA’s education system’ available at <https://www.dbsa.org/article/socio-economic-factors-challenge-sas-education-system> (accessed 13 June 2023).

Elazegui DD ‘A law of nature the command-and-control approach’ Economic Issue of the Day (2002) available at https://sswm.info/sites/default/files/reference_attachments/PIDS (accessed 10 September 2022).

Environment, Forestry and Fisheries Portfolio Committee Workshop ‘Environment, Forestry and Fisheries Legislation and Policy Meeting Summary’ (2020) available at <https://pmg.org.za/committee-meeting/30899/> (accessed 1 April 2022)

Environmental Investigation Agency (EI Agency) ‘Environmental crimes a threat to our future’ (2008) available at <https://globalinitiative.net/wp-content/uploads/2017/12/EIA-Environmental-Crime-A-Threat-to-Our-Future.pdf> (accessed 14 May 2005)

Explanatory Memorandum on the 1995 Labour Relations Bill RS 36, 1997 available at [http://jutastat.juta.co.za/nxt/gateway.dll/sall/87/132/387?f=templates\\$fn=default.htm](http://jutastat.juta.co.za/nxt/gateway.dll/sall/87/132/387?f=templates$fn=default.htm) (accessed 28 December 2022)

Heath A, Artz L, Odayan M, and Gihwala H ‘Improving case outcomes for sexual offences cases project: pilot study on Sexual Offences courts’ *Gender Health and Justice Research Unit* (2018) 188 available at <https://www.researchgate.net/publication/326606336> (accessed 26 September 2022)

Kroeze MJ ‘The companies and business court as a specialised court’ available at <https://www.oecd.org/daf/ca/corporategovernanceprinciples/37188740.pdf> (accessed 16 March 2023)

LegalKitz ‘Directions vs call-over hearing’ available at <https://legalkitz.com.au/directions-vs-call-over-hearing/> (accessed 1 June 2023)

Mazumber N ‘Defining Public Interest Law’ available at <https://careercenter.umich.edu/article/defining-public-interest-law> (accessed 22 April 2023).

National Assembly ‘Question NW2296 to the Minister of Justice and Correctional Services’ available at <https://pmg.org.za/committee-question/23242/> (accessed 13 October 2023)

National Prosecuting Authority ‘Prosecutions Policy’ 2013 available at <https://www.npa.gov.za/media/prosecution-policy> (accessed 8 March 2023).

National Resource and Technical Assistance Center ‘Investigating Violent Crime: The Prosecutor’s Role’ (2018) available at <https://crimegunintelcenters.org> (accessed 5 February 2023).

National Sexual Violence Resource Centre ‘Best Practices for Prosecution’ available at <https://www.nsvrc.org/best-practices-prosecution> (accessed 27 April 2023).

Organisation for Economic Cooperation and Development (OECD) ‘Leveraging the SDGs for inclusive growth: delivering access to justice for all’ (2016) available at <https://www.oecd.org/about/secretary-general/leveraging-the-sustainable-development-goals-delivering-access-to-justice-for-all.htm>.

Parliamentary Monitoring Group (PMG) ‘Hearing on the report of the Auditor-General on a performance audit of the handling of confiscated abalone by Department of Environmental Affairs and Tourism’ (2009) available at <http://www.pmg.org.za/report/20091007-hearing-report-auditor-general-performance-audit-handlingconfiscated> (accessed 12 April 2022)

Parliamentary Monitoring Group (PMG) ‘National Assembly question for written reply Parliamentary question no: 924 – Minister of Justice and Correctional Services response’ (March 2022) available at <https://pmg.org.za/committee-question/18554/> (accessed 28 November 2022)

Parliamentary Monitoring Group ‘The Land Court Bill (B11 – 2021) <https://pmg.org.za/bill/1022/> (accessed 19 August 2023)

Parliamentary Monitoring Group Environment, Forestry and Fisheries Portfolio Committee Workshop (Environment Portfolio Committee Workshop) ‘Environment, Forestry and Fisheries Legislation and Policy Meeting Summary’ (2020) available at <https://pmg.org.za/committee-meeting/30899/> (accessed 1 April 2022)

Parliamentary Monitoring Group ‘Hearing on the report of the Auditor-General on a performance audit of the handling of confiscated abalone by Department of Environmental

Affairs and Tourism’ (2009) available at <http://www.pmg.org.za/report/20091007-hearing-report-auditor-general-performance-audit-handlingconfiscated> (accessed 12 April 2022).

Parliamentary Monitoring Group ‘Media briefing by Minister of Water and Environmental Affairs, Ms Buyelwa Sonjica’ (2009) available at <https://pmg.org.za/briefing/18714/> 17 June 2009 (accessed 14 July 2024)

Parliamentary Monitoring Group Land Court Bill (B11 – 2021) available at <https://pmg.org.za/bill/1022/> (accessed 19 September 2023)

Parliamentary Monitoring Group ‘Question NW2198 to the Minister of Justice and Correctional Services’ 27 September 2022 <https://pmg.org.za/committee-question/19984/> (accessed 21 April 2023)

Queensland Government Department of Environment, Science, and Innovation Wetland Info ‘Sinks (where waste ends up)’ (2021) available at: <https://wetlandinfo.des.qld.gov.au/wetlands/management/pressures/litter-illegal-dumping/sinks/> (accessed 8 September 2023)

Rogers G ‘Prosecutors in appeal for environmental circuit court’ (2005) available at http://www.lawlibrary.co.za/notice/earthairandwater/2005/2005_03_30.htm#press_prosecutors (accessed 13 March 2022)

Rosencrans K ‘Environmental Courts Prove to Be Effective’ Stop Illegal Fishing Case Study 02 (2011) available at <https://stopillegalfishing.com/publications/enviromental-courts/> (accessed 5 March 2022).

Statistics SA ‘Four facts about our provincial economies’ available at <https://www.statssa.gov.za/?p=12056> (accessed 14 August 2023)

Steyn P ‘The lingering environmental impact of repressive governance: the environmental legacy of the apartheid-era for the new South Africa’ (2005) available at <https://core.ac.uk/download/9049847.pdf> (accessed 4 September 2022)

The South African Judiciary ‘Summary and Explanation of the Criteria and Guidelines used by the Judicial Service Commission when considering candidates for judicial appointment’ (2022) available at <https://www.judiciary.org.za/index.php/judicial-service-commission/criteria-for-judicial-appointment> (accessed 27 December 2022)

The World Bank ‘CO2 Emissions (KG per PPP \$ of GDP’
https://data.worldbank.org/indicator/EN.ATM.CO2E.PP.GD?most_recent_value_desc=true
(accessed 8 September 2023).

Thorpe J ‘The roll out of the first Sexual Offences courts’ <https://rapecrisis.org.za/part-2-the-roll-out-of-the-first-sexual-offences-courts/> (accessed 7 January 2023).

Thorpe J ‘Sexual Offences courts rollout stops and restarts’ available at <https://rapecrisis.org.za/part-3-sexual-offences-courts-rollout-stops-and-restarts/> (accessed 7 January 2023).

United Nations Human Rights Council Resolution 48/13 adopted on 8 October 2021 available at <https://digitallibrary.un.org/record/3945636?ln=en> (accessed 10 February 2024)

United Nations Human Rights ‘Court ruling in Kenya: a milestone in environmental justice’ available at <https://www2.ohchr.org/english/OHCHRreport2020/court-ruling-in-kenya-a-milestone-in-environmental-justice.html> (accessed 18 October 2022)

United Association of South Africa (UASA) The Union ‘What is the labour court and what are its functions’ available at <https://www.uasa.co.za/what-is-the-labour-court-and-what-are-its-functions> (accessed 29 December 2022)

United Nations ‘Biodiversity – our strongest natural defense against climate change’ <https://www.un.org/en/climatechange/science/climate-issues/biodiversity> (accessed 8 September 2023)

United Nations ‘Background to the United Nations Conference on Environment and Development, Rio de Janeiro, Brazil, 3-14 June 1992’ available at <https://www.un.org/en/conferences/environment/rio1992> (accessed 10 February 2024)

United Nations ‘Background to the United Nations Conference on the Human Environment, 5-16 June 1972, Stockholm’ available at <https://www.un.org/en/conferences/environment/stockholm1972> (accessed 10 February 2024)

United Nations Environmental Programme (UNEP) The New South Wales Land and Environment Court <https://leap.unep.org/node/49> (accessed 15 March 2022).

United Nations General Assembly Resolution A/76/L.75 adopted on 28 July 2022 Available at <https://digitallibrary.un.org/record/3982508?ln=en&v=pdf> (accessed 10 February 2024)

United Nations Interregional Crime and Justice Research Institute (UNICRI) ‘Environmental Crimes’ <http://www.unicri.us/topics/environmental/> (accessed 13 November 2022).

Warren LM ‘Working towards an environmental jurisprudence’ *Environmental Law and Ecology Magazine* available at http://www.ceja.org.mx/IMG/pdf/Dra._Warren_ingles_.pdf (accessed 13 March 2022).

World Summit on Sustainable Development ‘The Johannesburg Principles on the Role of Law and Sustainable Development’ (the Johannesburg Principles) adopted on 20 August 2002 at the Global Judges Symposium held in Johannesburg, South Africa on 18-20 August 2002’ <http://www.dirco.gov.za/docs/2002/wssd0828a.htm> (accessed 5 March 2022).

Zehra SM *Environmental Crime Investigations and Financial Intelligence* (2019) <https://www.acamstoday.org/environmental-crime-investigations-and-financial-intelligence> (accessed 21 November 2022)

Zhang JD ‘A thesis on the establishment of specialized environmental and resources courts in China’ (2019) *IOP Conference Series: Earth and Environmental Science* available at <https://iopscience.iop.org/article/10.1088/1755-1315/354/1/012059> (accessed 1 March 2022).

Interview Transcripts

Group One: Former Prosecutor

Interview with Respondent No 1 on 30 November 2022

Group Two: Current Prosecutors

Interview with Respondent No 2 on 21 February 2023

Interview with Respondent No 3 on 21 February 2023

Interview with Respondent No 4 on 3 April 2023

Group Three

National Department of Forestry, Fisheries and Environment

Interview with Respondent No 5 on 13 February 2023

Interview with Respondent No 6 on 20 February 2023

Interview with Respondent No 7 on 13 March 2023

Western Cape Department of Environmental Affairs and Development Planning

Interview with Respondent No 8 on 13 December 2022

Interview with Respondent No 9 on 19 December 2022

Interview with Respondent No 10 on 30 January 2023

Gauteng Department of Agriculture, Rural Development and Environment

Interview with Respondent No 11 on 29 November 2022

Interview with Respondent No 12 on 12 December 2022

Interview with Respondent No 13 on 24 January 2023

PowerPoint presentations

Jordaan C Specialised Commercial Crime Unit: an overview [PowerPoint slides] (2008)
<https://pmg.org.za/files/docs/080220scu.ppt> (accessed 26 January 2023)

Mulcahy R The proposed environment court and its implications for the Irish planning system
[PowerPoint slides] (2020) https://www.ipi.ie/sites/default/files/accordion-files/ipi_rory_mulcahy.pdf (accessed 13 July 2023)