CHAPTER 4: JUDICIAL ADJUDICATION OF ENVIRONMENTAL RIGHTS: A CRITICAL ANALYSIS

In Zimbabwe, specific cases pertaining to environmental rights have included disputes related to land use, wildlife conservation, requests to halt mining operations or developments on wetlands, challenges to Environmental Impact Assessment (EIA) certificates, actions to stop pollution of rivers and other water sources and air pollution by factories; and getting mining companies to promote infrastructure developments in local mining communities and mitigate environmental degradation and pollution.[105] This chapter sample a few cases, illuminating those issues and highlighting the inherent strengths and challenges the judiciary has in adjudicating environmental cases. The selected cases are representative enough and applicable to other cases on the issues and discourses on sustainable development and environmental protection.

Judges have a first-degree role in enforcing new instruments which might not have been duly implemented by political bodies. Legislation intended to reshape society and governance may represent a radical departure from previous precedents. Gilroy notes that "revolutionary laws" have always been as terrifying as courts with emergency powers. Both democratic and non-democratic authorities may exercise emergency powers, but the key difference lies in the presence of checks and balances to prevent arbitrary use. As Malaba states, "Whatever the model of the national justice system or the legal tradition in which it is anchored, independence, quality and efficiency are the essential parameters of an effective justice system and need to be ensured."[106] Law is regarded as the most legitimate and stable medium to foster and maintain collective responses to environmental problems. "It is a

[105] ZHLR, Public Interest Litigation: The pain of litigating environmental issues in Zimbabwe, 2020.
[106] Malaba (n.87 above).

dense thicket of legislation, delegated legislation, treaties, policies, regulatory strategies, and case law shaped by the complexities of many different environmental problems"[107], so its clear interpretation is imperative, especially when operating in highly politicised contexts such as Zimbabwe. The goal is to ensure consistency, predictability and fairness in legal outcomes. Quoting Bradley, "Unless there is an independent Judiciary, able to interpret and apply laws in a manner based on legal rules and principles rather than on political intentions or calculations, the concept of law itself is brought into question."[108]

Judges must focus on legal reasoning and objective analysis in their decisions. Malaba expands:

> Judges are not immune to criticism. Their decisions must be scrutinised, commented on and even criticised... If that is observed, it develops the jurisprudence of the country because the criticism ceases to be mere criticism and becomes a contestation of ideas between and amongst intellectuals. Constructive criticism implies knowledge and understanding of the law prescribing the standard against which the legality of the conduct in dispute is to be measured. It involves setting out the requirements of the law and pointing out the errors committed by the court in its findings of the facts in issue or in its interpretation or application of the law to the facts of the conduct.

This is the spirit guiding this analysis. The selection of cases in this chapter is based on the extent to which, directly or indirectly, efforts to ensure environmental protection and/or sustainable development were highlighted and sought in courts. The discussion looks at cases where the courts have expanded or had the potential to expand environmental rights as provided for in the Constitution. The analysis details some significant cases where environmental protection and sustainable development were implicated.

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[107] Fisher (n.61 above) p.25.

[108] A Bradley, "The New Constitutional Relationship Between the Judiciary, Government and Parliament" at para 2.

Environmental rights also benefited from an expanded *locus standi*.[109] This refers to the legal right of an individual or group to bring a case before the courts. There has been a significant shift in Zimbabwe towards the liberalising *locus standi* under section 85(1) of the Constitution. The Declaration of Rights drafters recognised that the concept of granting rights to the underprivileged and marginalised is undermined by standing restrictions. The common law-based *locus standi*'s narrow reach under the old Constitution significantly hampered the advancement and defence of justiciable environmental rights. The Lancaster House Constitution provided that:

> If any person alleges that the Declaration of Rights has been, is being or is likely to be contravened in relation to him (or in the case of a person who is detained, if any other person alleges such a contravention in relation to the detained person), then, without prejudice to any other action with respect to the same matter which lawfully available, that person (or that other person) may, subject to the provision of subsection (3) apply to the Supreme Court for redress.[110]

Dhiwayo notes that this provision "limited and stifled *locus standi* as a person who wanted to vindicate rights provided for under the Declaration of Rights had to show a direct and substantial interest in the case."[111] The *United Parties v Minister of Justice, Legal and Parliamentary Affairs* case best demonstrates the limited scope of *locus standi* under the old Constitution. In that case, Gubbay CJ as he then was held that:

> Section 24 (1) affords the applicant legal standing to seek redress for a contravention of the Declaration of Rights only in relation to itself (the exception being where a person is detained. It has no right to do either on behalf of the general public or anyone else.'[112]

[109] Section 85 Constitution of Zimbabwe.
[110] Section 24 (1) of the Lancaster House Constitution.
[111] M Dhliwayo, 'A Critical Examination of the Scope, Content and Extent of Environmental Rights in the Constitution of Zimbabwe', 2016.

[112] *United Parties v Minister of Justice, Legal and Parliamentary Affairs* 1997(2) ZLR 254 (SC).

However, section 85(1)[113] permits legal action to be taken against alleged violators of the rights in the Declaration of Rights by any of the following: individuals acting in their own interests, individuals acting on behalf of an individual who is unable to act for themselves, individuals acting as members of a group or class of individuals; associations acting on behalf of their members; and any of the aforementioned groups. In the *Harare Wetlands Trust and Newlands Residents Association v Life Covenant Church and Others*[114] case (hereinafter referred to as the Life Covenant Church (LCC case), the court elaborated on the issue of standing. Dhlakama, Tsabora and Dhliwayo referred to this case as setting an important precedent for wetland conservation and use conflicts with other basic rights in Zimbabwe's constitutional system. The first issue to be addressed was the issue of legal standing of the applicants.[115] The necessity to "publicize the importance and value of enhancing the protection of the wetlands and their adjacent areas" was noted by Chinamora J as one of the objectives of the Harare Wetlands Trust. The judge's reasoning was based on section 46(1) of the Constitution that allows courts to "consider relevant foreign law … in the interpretation of the Constitution."[116] He further considered the judgement in *R v Inspectorate of Pollution & Anor: Ex Parte Greenpeace Ltd*[117], where the High Court ruled that denying Greenpeace legal standing would effectively deny its representative constituency an opportunity to have their issues heard by the court. Chinamora inevitably concluded that the two public interest organisations had legal standing.

Ironically, in the LLC case, the judge went at length to look at the interpretation of standing for the applicants in a foreign jurisdiction

[113] Constitution of Zimbabwe.
[114] Harare Wetlands Trust and Newlands Residents Association v Life Covenant Church and Others HH819-19.
[115] Dhliwayo (n.105 above).
[116] Ibid.
[117] 1994] 4 All ER 329.

when he could have just used section 85.[118] Section 85's scope had been comprehensively encapsulated in the *Mudzuru & Others v. Minister of Justice & Ors*[119] case. It was stated that:

> Section 85(1)(d) of the Constitution is based on the presumption that the effect of the infringement of a fundamental right impact upon the community at large or a segment of the community such that there would be no identifiable persons or determinate class of persons who would have suffered a legal injury. The primary purpose of proceedings commenced in terms of s 85(1)(d) of the Constitution is to protect the public interest adversely affected by the infringement of a fundamental right. The effective protection of the public interest must be shown to be the legitimate aim or objective sought to be accomplished by the litigation and the relief sought.

Interestingly, Chinamora still arrived at the same conclusion he would have reached if he had used the section 85 Constitutional provision. This reflects the stability of law, especially in well-established principles such as the *locus standi*. Legal systems are developed around a set of legal ideas and concepts. The consistent application of the law to a specific set of facts ensures legal stability. Legal arguments consistent with well-established rules and principles guarantee the rule of law and justice. When legislation is passed and comes into operation, it, like all laws, gives rise to ambiguities and questions in need of adjudication. Law evolves but must remain committed to stability, rule of law, constitutionality and justice. In light of this, it is critical to develop a body of environmental case law and legal practice that is grounded in robust legal reasoning and a commitment to ideals of environmental protection and sustainable development.

While many factors affected the realisation of environmental rights under the old Constitution[120] and EMA, the lack of standing was one of the major reasons. Whilst the courts still must be satisfied that parties in the case have an interest in the matter at hand and are "not mere

[118] Constitution of Zimbabwe.
[119] Mudzuru & Anor v Minister of Justice, Legal & Parliamentary Affairs & Ors CCZ 12/15.
[120] Lancaster House Constitution.

meddlesome busybodies",[121] the Constitution has expanded legal standing. This is favourable in environmental rights, where representative constituencies have an opportunity to have their issues heard by the court. Environmental issues typically involve the public interest and impact both individuals and groups of people. The new Constitution offers procedural and substantive rights that can be leveraged to advance the implementation of environmental rights. The turn to substantive and procedural environmental rights in this manner is "a move that promises to invigorate civil litigation's role as a complement to state-led enforcement efforts in Zimbabwean law."[122]

Zimbabwean courts have generally embraced the expanded *locus standi* provision, especially concerning environmental protection cases. Ndlovu explains how courts have been instrumental in developing the law on *locus standi* in environmental cases and relaxing the technicalities in Public Interest Litigation (PIL).[123] For example, in the Augar Investments OU case, the court pointed out that the first respondent was barred in terms of Rule 238(2b) of the Rules of the High Court 1971 for failing to file its heads of argument on time but "[t]he court's view was that neither party would be prejudiced by these concessions, so they were allowed."[124] Ndlovu comments how, in most cases brought to court by ZELA, the respondents would challenge the legal standing of the applicants, but the courts would relax the rules related to standing and allow the matters to be heard on their merits.[125] There are cases such as the COSMO Trust case, *Debshan (Pvt) Ltd. v Provincial Mining Director, Mat. South Province & Others*[126] and *Hillside Residents Association v Glorious All Time Functions (Private)*

[121] LCC Case (n.105 above).
[122] Madebwe, (n.20 above) p108.
[123] F Ndlovu, An appraisal of the judicial enforcement of environmental protection in Zimbabwe, North-West University, 2021.
[124] See Augar Case.
[125] Ndlovu (n.118 above).
[126] HB 11/17.

Limited and Others.[127] Relaxing rules on standing expresses an explicit recognition of the importance of environmental protection and that technicalities such as issues having to do with standing cannot be a barrier against protecting the environment.

Section 85, similar to section 38 of the South African Constitution, expands the meaning of *locus standi* by granting procedural rights. This is significant because it makes access to justice more democratic by enabling a larger range of people to use the legal system to defend their legal rights. This gives more meaning to the equality provisions in the Constitution and militates against discrimination based on economic circumstances.[128]

Judicial activism is an approach in which judges actively interpret legal provisions, particularly constitutional ones, and are more willing to invalidate legislative or executive actions.[129] Regarding environmental rights, judicial activism is crucial in shaping environmental jurisprudence. Although the term is frequently used in describing a judicial decision or philosophy, it can bear several meanings. Rather than giving precedence to the opinions of past courts or other government authorities, activist judges uphold their own interpretation of the Constitution's provisions. Referring to judges as activists in this sense is to argue that they decide cases based on their own extension and interpretation of the law rather than governmental policy preferences and they "legislate from the bench."[130] In Zimbabwe, there have been conscious attempts in some cases to promote the concept of sustainable development.

[127] 19-HH-349.
[128] ZELA, Public Interest Litigation: The pain of litigating environmental issues in Zimbabwe, 2020, https://zela.org/public-interest-litigationthe-pain-of-litigating-environmental-issues-in-zimbabwe/.
[129] K Roosevelt, Brittanica, https://www.britannica.com/topic/judicial-activism.
[130] Fisher, (n.61 above).

Challenges in adjudicating environmental rights include interpreting the constitutional text. This brings us to what Dhlakama *et al.*[131] capture as "the definitional conundrum." In the few environmental cases that are brought before the courts, there seem to be many missed opportunities to clarify the definitions and expand on environmental constitutionalism. The LCC case is one of the rare cases in which sustainable development was mentioned, and the judiciary had an opportunity to make a pronouncement on the concept of sustainable development. The first respondent, New Life Covenant Church, was building a superstructure on a wetland. The applicants asserted that the development would result in detrimental and irreparable harm to the environment in violation of sections 73 and 4 of the Constitution and the EMA respectively, that provide for the right to a clean and healthy environment which is not harmful to one 's health and encompassing sustainable development. Chinamora pointed out the need to strike a balance between development and sustainable environmental management that is at the heart of the concept of sustainable development. He articulated the concept by noting, "In each individual case, the particular economic and benefits of planned action must be assessed and weighed against the environmental costs, alternatives must be considered which would affect the balance of values."[132] Based on the necessity to strike a balance between economic development and environmental protection, the court granted both a declaratory order and an interdict that was sought by the applicants. Dhlakama *et al.* commend that "the court was on sound ground in as far as the concept of sustainable development is concerned" as it was "alive to the environmental considerations of the case, declaring that in no way, should economic, environmental and social considerations trump each other in the quest to achieve sustainable development."[133]

[131] Dhlakama et al (n.109 above).
[132] LCC, p1.
[133] Dhakama et al (n.109 above).

The LCC case also becomes significant from an international best standard practice as it references the Ramsar Convention, an international instrument and how it fits within the global environmental conservation discourse.[134] As the Ramsar Convention states, "conservation, management, and wise use of wetlands"[135] must be encouraged. Notwithstanding the definitions in the EMA and the Ramsar Convention, the usage of wetlands and their boundaries have always been controversial topics. The first respondent in the LCC case argued that the area in question did not meet the wetland concept defined by the Ramsar Convention. Because the area in question was not a wetland as defined by the EMA, the church objected to the requirement to comply with section 46(2) of the Water Act.[136] In determining what is or is not a wetland, the court referred to the judgement in the Augar Investments case,[137] where it was stated that:

> The definition of a wetland is clear. It is a question of fact, not law, whether a piece of land is a wetland. Not all wetlands are ecologically sensitive, and declaring a wetland to be ecologically sensitive must surely be based on scientific study and determination of such ecological sensitivity.

EMA defines a wetland as any area that is a "marsh, fen, peatland or water, whether natural or artificial, permanent or temporary, with water that is static or flowing, fresh, brackish or salt, and includes riparian land adjacent to the wetland."[138] This definition was wide enough to encamp the area that was in question in the LCC case. The court concluded that the area in question fell within the definition of a wetland, a position that was also supported by LCC's own EIA consultant's report.[139] In the end, the court decided that since a permit is granted after careful evaluation of several factors, one was required before the development could start. This could be interpreted as a

[134] Ibid.
[135] See Ramsar Convention.
[136] Water Act [Chapter 20:24].
[137] Augar Investments OU v Minister of Water and Climate & Anor HH 278-15, Page 6.
[138] Section 2.
[139] LCC, Page 12 paragraph 5.

wetland's designation would not prevent development in that area provided that one possesses the required authorisation.

The LCC case can be paralleled with the *Augar Investments* case. In the case, the issue for determination was whether the first respondent, the Minister of Water and Climate, was empowered to declare that a piece of land is a 'wetland' or whether his powers were confined to declaring an existing wetland to be 'an ecologically sensitive area'. Section 113 (1) of EMA on the Protection of Wetlands provides that "The Minister may declare any wetland to be an ecologically sensitive area and may impose "limitations on development in or around such area."

The relief sought by applicants was granted, as it was ordered that the General Notices that declared the land described in the schedule as wetlands were a nullity and of no force or effect. The judge concluded that whether a piece of land is a wetland is a question of fact, not law. He explained how not all wetlands are ecologically sensitive, and declaring a wetland to be ecologically sensitive must be based on scientific study and determination of such ecological sensitivity and that a wetland not become ecologically sensitive just because it has been declared so. However, this need for scientific evidence contradicts the acclaimed, internationally recognised key sustainable development principle, the precautionary theory. It states that when there is scientific uncertainty about the potential harm of an action, decision-makers should err on the side of caution to prevent irreversible damage. In wetlands, this principle emphasises the need to protect these ecologically sensitive areas. This was enunciated in the *COSMO* case. In the Augar case, the court concluded that no evidence was placed before the court that it could rely on to deny the applicant permission to develop its land. The judge based his judgment on the natural justice principles and ruled that there was no proper representation and inadequate time was given to the applicant with a

particular interest in this issue. The case highlights the importance of proper procedures and adequate representation when designating wetlands. Though elements of environmental justice are illuminated in this case, it ignored balancing it with the precautionary principle, a principle that anchors sustainable development. The principle is a risk management strategy that emphasises exercising caution, stopping, and reviewing new developments that may prove disastrous. Environmental justice goes beyond environmental protection and considers the well-being of affected people and communities who bear the costs of environmental degradation. Environmental justice is a critical concept that intersects with sustainable development that provides equity for all social groups by guaranteeing that everyone, regardless of race or socioeconomic status, is treated fairly. To avoid contradictions, sustainability provides a foundation for achieving environmental justice by promoting long-term well-being. It considers social equity and ensures that environmental benefits and burdens are distributed fairly.

This case presents what Dhlakama *et al.* regarded as a missed opportunity upon which clarity in Zimbabwe's legal system on "whether wetlands could be used or not at all for any developments in the future" could have been given.[140] To use Dhlakama *et al.*'s words,[141] "the court rowed in safe waters", in mentioning sustainable development. In obiter, the judge said, "It is hoped that the citizens of Zimbabwe vigorously pursue and enforce their rights as provided in terms of the Environmental Management Act, lest we be judged and found wanting, by future generations, for failing to play our part in preserving and protecting the environment."[142] This was not married to how, in his decisions, he was balancing the issues of protecting the environment for future generations and considering the progressive

[140] Dhlakama et al (n.109 above).
[141] Though they used it in the LCC case, it is more applicable here.
[142] See Augar Case.

realisation of using natural resources whilst promoting socio-economic development.

Ironically, the Augar case is a 2015 judgement and, in its deliberations, it relied solely on the EMA and not even a single reference or implied acknowledgement of the Constitution that was enacted in 2013 and has explicit, overarching provisions on environmental rights. In referring to EMA, enacted in 2002, the judge says, "This is a relatively new piece of legislation in this country, and its ability to nurture and protect the environment may be dependent upon the interpretation given to its provisions."[143] Judicial reviews are essential for ensuring constitutionalism and constitutional efficacy. Zimbabwe's Constitution is the supreme law of the land.[144] All legislation must thus be interpreted in a manner that conforms with the Constitution wherever possible. Considering both statutes and constitutional principles ensures a robust legal framework for environmental protection. Ignoring either could lead to legal uncertainty and undermine the rule of law and constitutionalism. Commenting on the Augar case, Chinamora asserted that "the nullification of the subsidiary by CHIGUMBA J does not affect the ecological or factual definition of the area of construction as wetland".[145] Generally, a constitution is designed to create a network of prevention and control mechanisms—checks and balances—throughout all levels of state authority exercise, thereby removing the arbitrary application of constitutional principles.[146] Furthermore, the courts must regard international best practice in interpreting these constitutional rights. Thus, like many other countries, including South Africa, Zimbabwe's environmental law has been reinforced by the Constitution. Nonetheless, measures should be taken to establish legal, economic, and social frameworks that unequivocally require the government, civic organisations, and

[143] Augar, para 1.
[144] Sec 2 Constitution of Zimbabwe.
[145] LCC Case.
[146] J Kokott and M Kaspar, Ensuring Constitutional Efficacy, 2012.

private individuals to act as knowledgeable and accountable guardians of the environment.

Contrary to the Augar case, the *COSMO* case is critical for its detailed expansion of environmental rights and critical engagement with all aspects as provided in the Constitution. In the case of COSMO Trust, the Administrative Court conducted such a balancing act. The case was on the awarding of a development permit by the City of Harare to construct a cluster of houses on part of a stand within a wetland which attracts a range of birds and mammals. It was argued that the wetland attracts a diverse range of migratory birds from all over the world for breeding purposes. However, no scientific studies determined what attracted these birds to this wetland. In that case, Mandeya J relied heavily on the Ugandan case of *Amooti Godfrey Nyakaana v. National Environmental Management Authority and 6 Others*[147] to provide an understanding of the concept of the precautionary principle alongside the polluter-pays principle. The judge in the Ugandan case's definition calls for the State to identify, stop, and combat the root causes of environmental deterioration. Consequently, actions to avoid environmental deterioration should not be delayed due to a lack of scientific assurance when there is a substantial threat of serious and irreparable damage. In the case, the Chief Justice (CJ) of Uganda articulated that:

> A person cannot degrade a wetland and cause pollution to other citizens simply because he owns the land. This would defeat the whole purpose of the Constitution that requires that citizens may own land, but not cause pollution or degradation of the environment which may affect other people and the country as a whole.[148]

The Ugandan judge furthers that "[t]he individual's interest must be viewed in the context of the larger interest of society as a whole and in

[147] CA 5/11, 2011.
[148] Ibid.

the context of the Constitution and the laws made there under."[149] In the COSMO case, all the parties agreed that the proposed area for constructing the housing units was a wetland. The court reasoned that allowing the project could result in massive degradation and irreparable destruction of the wetland, affecting the bird habitat and the wetland's natural water processes. The case detailed what sustainable development entails and weighed the environmental rights of citizens and future generations to protect their water source by preserving an internationally protected wetland. This was ahead of the rights of private property owners to derive the short-term economic benefits of constructing a housing development on their property. The judge held that private property rights must be exercised reasonably and with due regard to the rights and freedoms of others.

One can note that in the majority of the wetlands cases, such as the LCC case, *Trustees of the Harare Wetlands Trust v. University of Zimbabwe* and *Hillside Park Association v. Glorious All Time Functions (Pvt) Ltd*, have resulted in orders and judgments declaring developments that lack the necessary permits—such as an EIA certificate, development permit, and permit from the Catchment Council unlawful. As ZHLR clarifies, rather than forbidding the projects because of their potential negative environmental effects, these rulings and decrees have regrettably been restricted to procedural irregularities. Therefore, private developers have not been barred from simply applying for the required permits afterwards. In the Augar case[150], the Minister withdrew the gazetting of some wetlands that had previously been granted. The court determined that although wetlands had been defined as "wetlands," which was a factual rather than a legal term, the legislation only permitted their proclamation and protection as "ecologically sensitive areas." The court further declared that no consultation had taken place throughout the gazetting procedure with

[149] Ibid.
[150] Augar case.

the private owners of the wetlands. Therefore, it is currently unknown if wetlands be designated as ecologically sensitive areas and what limitations be imposed on the mapped wetland locations.

It is also highlighted that in some cases, developers have disregarded court orders and rulings in several wetlands cases, allowing development to proceed. Developers disregarded both a contempt order and an interdict in the Latimer Road wetland in Greendale, Harare, until, eventually, a demolition order was requested. The High Court ordered the City of Harare to immediately demolish houses illegally constructed on the wetlands and slapped the council with costs. These cases show that in the absence of specific legislation protecting wetlands as non-development sites, the government continue to issue permits for these sites, and the degradation of wetlands continues.

Environmental rights provide a framework for appreciating the interrelationship between environmental outcomes and other fundamental human rights,[151] such as the right to access information, the right to life, the right to safe, clean and potable water and human dignity.[152] The Nepalese Supreme Court in the Godavari Marble case enunciated that:

> Article 12(1) of the Interim Constitution has also incorporated the right to live with dignity under the right to life. It shall be erroneous and incomplete to have a narrow thinking that the right to life is only a matter of sustaining life. Rather it should be understood that all rights necessary for living a dignified life as a human being are included in it. Not only that, it cannot be imagined to live with dignity in a polluted environment rather it may create an adverse situation even exposing human life to dangers.[153]

[151] J May and Darly E, Global Judicial Handbook on Environmental Constitutionalism, United Nations Environment Programme (UNEP), 2019.
[152] Sec 51.
[153] Suray Prasad Sharma Dhungel v. Godavari Marble Industries and others.

Incorporating other human rights, such as the right to life and dignity, is "relevant in at least three phases of constitutional litigation: defining the cause of action, getting into court, and remedies."[154]

Expanding definitions of provisions in environmental rights ensures that all provided rights are adequately covered, protected and upheld. The intertwining of human rights and the environment is pervasive. Human rights cannot be fully enjoyed without a safe, clean, and healthy environment. Conversely, sustainable environmental governance cannot exist without establishing and respecting other human rights. Health or well-being is stressed as part of every person's right, specifically against harm to health due to environmental-induced toxicity.[155] Courts that have dealt with the right to a healthy environment have mostly emphasised what can potentially be harmful to human health. Very limited attention has been paid to the meaning of health and well-being. This illuminates how people, lawyers and courts generally have a limited real meaning and a particularly narrow view of the meaning of "the environment". The content and meaning of section 73 rights in Zimbabwe, a developing nation grappling with socio-economic challenges, remain unclear and underutilised.

In Zimbabwe, we are yet to see the courts marrying the essential principles in their adjudication. Though we have cases like the *Hillside Residents Association v Glorious All Time Functions (Private) Limited and Others*[156] cases linked environmental rights to other fundamental rights, such as the right to food and water, they are few. In this case, the applicant wanted to establish a function or a wedding venue on a wetland without an Environmental Impact Assessment (EIA) certificate. In granting the order to stop the construction of the

[154] May and Darly, (n.147 above) p90.
[155] Sec 73 (1) (a).
[156] SC 327/19, 2019.

venue without EIA certification, the judge illustrated that the applicant, Hillside Residents Association, was representing the public interest, specifically residents' rights to protection of Harare's natural resources in terms of sections 73[157], 77[158] that provides for the right to food and water and section 4 of the Environmental Management Act. Considering that well-being has a distinct meaning and has been purposefully added to Zimbabwe's constitutional environmental right, it is critical to strengthen and broaden this particular right's protection within the courts. Given the language of Section 73 and the state's obligation to uphold, defend, encourage, and carry out every one of the rights outlined in the Bill of Rights. Unlike other jurisdictions such as South Africa and India, no attempts have been made in Zimbabwe to articulate aspects of the potential meaning of well-being as it features in the Constitution. So, the question to be addressed is what this suggests for the duty-bearers to ensure the indivisibility of rights.

The indivisibility of rights and the centrality of environmental human rights in the constitutional landscape is well captured in the Lahore High Court case in Pakistan. The court highlighted that:

> Fundamental rights, like the right to life which includes the right to a healthy and clean environment and right to human dignity read with constitutional principles of democracy, equality, social, economic and political justice include within their ambit and commitment, the international environmental principles of sustainable development, precautionary principle, environmental impact assessment, inter and intra-generational equity and public trust doctrine. Environment and its protection has taken a centre stage in the scheme of our constitutional rights.[159]

The indivisibility of environmental rights emphasises that these rights are interconnected, and recognising this interdependence promotes a holistic approach to human well-being and socio-economic development. This outcome must be sought in multiple ways,

[157] Constitution of Zimbabwe.
[158] Ibid.
[159] Ashgar Leghari v. Federation of Pakistan (2018).

including via the principles guiding environmental decision-making and how authorities decide on priorities in judicial adjudication.

In 2019, in the *Community Water Alliance (CWA) v Environmental Management* case, the High Court of Zimbabwe delivered what ZELA considers a landmark judgment critical for environmental justice in Zimbabwe that had great implications for the realisation of environmental rights in the country. In this case, the CWA, an organisation that provides civic education, monitors and observes water service delivery, disseminates information, and provides capacity building and research on issues pertaining to water, sued Environmental Management of Zimbabwe and the minister responsible for the Environment. CWA`s case was premised on the lack of access to information on the Environmental Impact Assessment document. It argued that section 180 of EMA's[160] restricting members of the public from making copies or reproducing EIA documents violated the right to access to information provided for in the Constitution[161]. Further, they argued that SI 7 of 2007's prescription fees for one to inspect the document limits the right to access information. They sought a declaratory order to have section 108 unlawful and inconsistent with the right to access information. They further prayed for an order declaring the prescribed fee ultra vires section 62 of the Constitution.[162] The court decided that Section 180 of EMA was ultra vires section 62 of the Constitution and null and void to the extent it prohibits the reproduction of documents by the public. It declared members to be allowed to inspect the machine-readable record and make notes of EIA reports and copies thereof. The Minister of Environment was ordered to take reasonable measures to review the

[160] EMA (Chapter 20:27).
[161] ZELA, Public Interest Litigation: The pain of litigating environmental issues in Zimbabwe, 2020, https://zela.org/public-interest-litigationthe-pain-of-litigating-environmental-issues-in-zimbabwe/.
[162] ZELA, (n.156 above).

fee in line with reasonable standards that consider the right to access to information.

ZELA views this as a remarkable judgment in respect of environmental justice. It asserts this judgement as "progressive and vindicates fundamental rights that are provided for in the Constitution in particular section 62 of the Constitution". ZELA notes that the judgment is key, especially for mineral host communities where EIA documents before this judgment information was held in secrecy, and the public could not access the documents. Even public interest litigation organisations ZELA have faced resistance from responsible authorities to reproduce the document for litigation. The increased access to the EIA documents enhances community monitoring of compliance and asserting their rights in case of non-compliance and violation of rights.

The obligation of the Minister of Environment to review the prescribed fee for EIA inspection in line with reasonable standards and the right to access information as, in most cases, the interested and affected people could not afford to pay the fee.

There are cases such as the *ZELA v Chitungwiza Municipality*[163] case, where the court had the opportunity to expand on environmental rights and the right to a healthy environment by linking it to other rights, such as the right to life and human dignity. The judgment established a crucial precedent for the progressive realisation of the rights to a healthy environment and clean water. In this case, ZELA brought a challenge in relation to the discharge of sewerage into Lake Chivero. ZELA demonstrated that the municipality was negligently discharging raw sewage into a public stream and a residential area in contravention of the then-recently enacted EMA and its right to a healthy environment. The court granted the order, interdicting

[163] HC 2778/20.

Chitungwiza Municipality from releasing sewerage into water bodies or any part of the environment. The order directed the Municipality to repair, within three months of the order, or otherwise upgrade its water treatment plants and sewer systems to ensure proper effluent treatment before discharge into the environment and water bodies. The EMA was also directed to conduct compliance assessments within three months and submit a report to the Registrar of the High Court.

The municipality admitted to the pollution but pleaded that it did not have the resources to rehabilitate the contaminated land or build proper sewage structures. This is typical of many other water pollution cases brought before the courts. The respondents are found guilty, but they evoke the restrictive clause which states that "reasonable legislative and other measures, within the limits of the resources available to it, to achieve the progressive realization"[164] of rights in the environmental rights provision. Considering how environmental rights are human rights, the concept of progressive realisation is not meant to inordinate delay by the government in taking steps.[165] As Tsabora explains:

> It requires the state to take steps expeditiously and such steps must be appropriate. These could either be legislative, provision of judicial remedies, policy and other administrative measures to make sure that the rights are implemented. The obligation to progressively realise does also not mean discretion on the state to defer indefinitely the full realisation of the rights. In fact, the state must set time limits and benchmarks, targets and indicators on the progressive implementation of the protected rights.

Water pollution cases are a violation of the right of life which is shown by how there end up being many cholera outbreaks which have claimed lives. The progressive realisation clause militates against the effective realisation of environmental rights and other fundamental rights if they are left to the discretion of government."[166] Courts have

[164] Section 73 (2) Constitution of Zimbabwe.
[165] Tsabora (n.37 above).
[166] Ndlovu (n.118 above).

made orders in cases such as *ZELA v Anjin Investments (Pvt) Ltd*,[167] *Dora Community v Mutare City Council*, and many others but these orders have not been enforced or followed through. As Ndlovu explains:

> The implication is that even if the court makes an order to the effect that there has been a violation of environmental rights, as long as the State maintains that it does not have sufficient resources to remedy the violation, then the order remains a *brutum fulmen* (a noise).

In the cases, nothing was done, but "there seems to be no record of a return to court in an attempt to have the judgment enforced."[168] This means that "the court orders are impotent",[169] in Soyapi's words. This demonstrates how fulfilling the right to a healthy environment entirely relies on the executives playing their part. Clearly, the courts have not hesitated to order government environmental agencies to take action, but the government and its agencies have been found wanting. This points to an uncomfortable disregard for EROL and the respect that should be given to the judiciary.

By interpreting and applying environmental rights, the courts contribute to safeguarding the environment for present and future generations. Since the 2013 constitutional dispensation, there has been an increase in environmental litigation as the issues on *locus standi* and environmental rights have been expanded. Courts should increasingly embrace and enforce constitutional environmental rights to promote protection and sustainability. Even without explicit constitutional environmental rights, the judiciary's proactive stance underscores its importance in advancing environmental causes. The judiciary has the potential to be a powerful advocate for environmental rights, ensuring that sustainable development aligns with environmental preservation. Striking a balance between sustainable development and

[167] (HC 9451/12).
[168] Soyapi (n.17 above).
[169] Ibid.

environmental protection remains challenging. We have yet to see the courts marrying the essential principles of environmental rights and expanding on sustainable development and environmental protection as fundamental human rights, such as the right to life, in their adjudication. There are currently very limited precedents on the right to a healthy environment and environmental jurisprudence in Zimbabwe. Notwithstanding the difficulties mentioned above, the many favourable decisions in the cases under discussion demonstrate that environmental jurisprudence is gradually evolving.