GREENWATCH

JUDICIAL TRAINING ON CLIMATE JUSTICE

2024

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ABOUT GREENWATCH

Background

Founded in 1995, Greenwatch is a Non-Governmental Organization dedicated to advocating for environmental rights. Our mission is to foster public engagement in the sustainable management and protection of the environment, ensuring the enforcement of the right to a clean and healthy environment. We envision a Uganda where every citizen enjoys this fundamental right. To realize this vision, we focus on various project areas aligned with our objectives.

One of our primary objectives is to integrate environmental law principles into government policies and legislation. We also prioritize the training of judicial officers, legal practitioners, and environmental law enforcement agencies in environmental law. Our strategies involve collaborating with communities, civil society organizations, governmental institutions, and individuals to promote public participation in environmental conservation. By enhancing stakeholders' understanding of environmental law, we aim to influence policy-making processes positively.

The recent climate crises, such as landslides in Kasese and floods in Kenya, underline the urgency of our mission. These events have resulted in loss of life and displacement, emphasizing the importance of enforcing environmental laws to mitigate such impacts. As we embrace this year's theme, "Enforcing Environmental Laws in the Age of Climate Crisis," we are compelled to act decisively. Our responsibility as stewards of the judicial system is to safeguard citizens' rights against the adverse effects of climate change and environmental degradation.

In collaboration with the Judicial Training Institute (JTI), Greenwatch is proud to organize the Sixth Annual Judicial Training on Climate Justice in Uganda. This initiative aims to equip judicial stakeholders with the knowledge and tools necessary to address environmental challenges effectively. The accompanying resource book provides insights from global environmental cases and their judicial outcomes, offering valuable lessons for Uganda's legal framework.

Greenwatch remains committed to its mission of advocating for environmental rights and promoting sustainable practices. Through collaborative efforts and capacity-building initiatives like the Judicial Training on Climate Justice, we strive to create a greener and healthier future for all Ugandans.

https://www.greenwatch.or.ug/

https://www.monitor.co.ug/uganda/news/national/kasese-mudslides-claim-13-lives-4618988

https://www.npr.org/sections/goatsandsoda/2024/05/10/1250193947/floods-kenya

PROGRAMME

PROGRAMME FOR THE SIXTH JUDICIAL TRAINING ON CLIMATE JUSTICE IN UGANDA HELD AT (MBALE RESORT HOTEL, EASTERN UGANDA)

20th MAY, 2024.

Theme:"Enforcing Environmental Laws in the Age of Climate Crisis"

TIME	ACTIVITY	PERSON RESPONSIBLE
8:00 am – 8:15 am	Registration of Participants	Greenwatch Team and Judicial Training Institute (JTI)
8:15 am – 8:30 am	Welcome Remarks	Samantha Atukunda. K. Mwesigwa Director / Legal Counsel, Greenwatch.
8:30 am – 8:45 am	Opening remarks	Hon. Justice Godfrey Namundi Head, Mbale High Court Circuit
8:45am – 9:30 am	Presentation "Fundamental principles of environmental law as a foundation of climate Justice"	Dr. Peter Mutesasira, Dean Faculty of law, UCU
9:30 am – 10:15am	Presentation "Historical background of UNFCCC to up to where we are now."	Eunice M. Asinguza Legal and Corporate Affairs Manager, NEMA
10:15am – 11:00 am	Presentation " Climate litigation and adjudication; A case study of East Africa"	Ms. Emily Kinama, Katiba Institute Nairobi Kenya
11:00 am – 11:30 am	GROUP PHOTO SESSION AND TEA BREAK	Hotel Management
11: 30 am – 1:30pm	Breakout sessions " The bench perspective; Exploring the strengths and hindrances in climate justice adjudication"	Judicial officers
1:30 pm – 2:30 pm	LUNCH	Hotel Management
2:30 pm – 3:50pm	Presentations by representatives of the different breakout groups	Judicial officers
3:50 pm -4:05 pm	Responses	Resource persons
4:05 pm – 4:30 pm	Evaluation and Closing remarks	Hon. Justice Damalie N. Lwanga Executive Director, JTI
4:30 pm- 5: 00pm	Evening tea and Departure	Hotel management and All

BIOGRAPHIES OF THE RESOURCE PERSONS FACILITATING AT THE TRAINING

We are fortunate to have the following resource persons facilitate the different sessions of the training:

Dr. Peter Mutesasira

Dr. Mutesasira holds a Ph.D in Environmental Law from the University of Amsterdam in the Netherlands and currently serves as the Dean Faculty of Law at Uganda Christian University.

He has published books and articles on environmental law, biosafety and biotechnology law, environmental rights, climate change, and wildlife. He has also undertaken a number of trainings on environmental governance, natural resource governance, environmental and social impact assessment, natural resources inventory/records management, and capacity building in the environmental conservation of local governments.

Dr. Mutesasira has been a consistent facilitator at Judicial trainings on climate justice organized by Greenwatch in partnership with the Judicial Training Institute.

Emily Kimana

Emily is an advocate of the High court of Kenya. She holds LLM and LLB degrees from the University of Pretoria, South Africa. She as well holds a Post Graduate Diploma from the Kenya School of Law.

She currently serves as a litigation and research counsel at Katiba Institute in Nairobi which was established after the promulgation of the 2010 constitution of Kenya to promote constitutionalism in Kenya. She conducts public interest litigation, research and publishes articles on constitutional and human rights issues.

She previously worked as an academic associate at the faculty of law, University of Pretoria and a lecturer at the faculty of law, the African Nazarene University. She has also served in the public interest litigation and legal aid committee of the Law Society of Kenya.

Emily was part of the legal team that successfully represented Save Lamu and members of the Lamu Community to challenge the establishment of the first coal-fired power plant in Kenya. She as well represents indigenous forest-dwelling communities in Kenya- the Sengwer, Mau Ogiek and Mt. Elgon Ogiek in their fight to reclaim their community lands as owner conservators of forests and their proven ability to combat climate change. Emily has gained work experience in government and academia. She has a passion for human rights law and social justice and has published journal articles on issues related to access to justice, cultural rights and women's rights. She enjoys public interest litigation and working with communities.

Emily has been a consistent facilitator at Judicial trainings on climate justice organized by Greenwatch in partnership with the Judicial Training Institute.

Eunice Asinguza Mubangizi

Eunice Is the Legal and Cooperate Affairs Manager at the National Environmental Management Authority (NEMA).

She holds an LLM (Majoring in Climate Change) from Uganda Christian University, a postgraduate Diploma in Legal Practice from the Law Development Center, a bachelors of laws Degree from the Makerere University and other relevant certificates in the field of environment and climate change.

Eunice is a trained Senior negotiator under the UNFCCC processes and holds 11 years' experience in negotiations. She actively participated in negotiating the Modalities, Procedures and Guidelines (MPGs) for the compliance committee under the Paris Agreement which was adopted in Katowice, Poland in 2018. She is a member of the Paris Agreement on implementation of the compliance committee representing the Least Developed Countries (LCD's)

Her major interest among others is to see countries scale up ambition in order to avert the catastrophes which lie ahead if no meaningful action (s) is taken, she loves seeing women play an active role in climate change because they are the most affected, she would love to see countries play an active role in climate governance and policy. She advocates for climate justice and believes that it is everyone's responsibility to play a role in order to address and prevent the effects of climate change because we all have one planet.

Environmental Law Litigation: A Case Study For Kenya

Emily Kinama*

A. Introduction

This paper seeks to address the environmental law litigation in Kenya. The first part of the paper will look at the history of environmental rights in Kenya where before the Constitution of Kenya, 2010 was promulgated there was no recognition of the right to a clean and healthy environment. However, the Environment Management and Coordination Act, was enacted to establish an appropriate legal and institutional framework for the management of the environment and matters connected to the environment. The second part of the will look at how over time, several people and companies have used the Constitution and the Act to enforce instances where there have been violations of environmental rights. This paper will show through case law how the Kenyan people have used constitutional and legislative provisions to realise the right to a clean and healthy environment.

B. The Constitution

Like many colonial constitutions, the Constitution of Kenya of 1963 only protected civil and political rights and rights such as environmental rights were not protected. On 27 August 2010, Kenya promulgated a Constitution that has been hailed as transformative. One of the reasons it is considered transformative is that it has a robust Bill of Rights which enshrines the right to a clean and healthy environment for every person. This right encompasses the right 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 to have obligations relating to the environment fulfilled under Article 70 of the Constitution.

[1]This means that Article 42 of the Constitution must be read together with Article 69 of the Constitution which provides for State obligations in respect of the environment as follows: The State shall:"(a) ensure sustainable exploitation, utilisation, management and conservation of the environment and natural resources, and ensure the equitable sharing of the accruing benefits; (b) work to achieve and maintain a tree cover of at least ten per cent of the land area of Kenya; (c) protect and enhance intellectual property in, and indigenous knowledge of, biodiversity and the genetic resources of the communities; (d) encourage public participation in the management, protection and conservation of the environment; (e) protect genetic resources and biological diversity; (f) establish systems of environmental impact assessment, environmental audit and monitoring of the environment; (g) eliminate processes and activities that are likely to endanger the environment; and (h) utilise the environment and natural resources for the benefit of the people of Kenya."

These State obligations are an addition to the overall obligations of the State under Article 21(1) of the Constitution to observe, protect, promote, respect and fulfil the rights in the Bill of rights which includes the right to a clean and healthy environment. Article 69 covers the positive obligations where the State must do specific things to ensure that the right to a clean and healthy environment are upheld. Article 69(2) also places a positive obligation on every person to cooperate with State organs and other persons to protect and conserve the environment and ensure ecologically sustainable development and use of natural resources. This provision shows that the duty to protect and conserve the environment as a positive obligation is also extended to non-state actors whereby it is the duty of every person to ensure that third parties do not damage the environment and also ensure sustainable development and use of natural resources for future generations.

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[1] *Advocate of the High Court, Kenya and Litigation and Research Counsel, Katiba Institute, Nairobi.*

Emily was part of the legal team that successfully represented Save Lamu and members of the Lamu Community to challenge the establishment of the first coal-fired power plant in Kenya.

This paper was presented at the Sixth Judicial Training on Climate Justice in Uganda held on 20th May 2024 at Mbale Resort Hotel, Mbale City under the theme "Enforcing Environmental Laws in the Age of Climate Crisis".

In addition, Article 70 provides what steps a person should take to enforce the right to a clean and healthy environment. Article 70 states that a person who alleges that 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. Article 70(2) also emphasises specific remedies a party who alleges their rights have been infringed may seek before a court of law. These are unique because although Article 23(3) of the Constitution provides for the remedies to be issued by a Court of law where rights in the Bill of Rights have been violated, Article 70(2) provides specific remedies for violation of the right to a clean and healthy environment. These remedies include (a) to prevent, stop or discontinue any act or omission that is harmful to the environment; (b) to compel any public officer to take measures to prevent or discontinue any act or omission that is harmful to the environment; or (c) to provide compensation for any victim of a violation of the right to a clean and healthy environment. Article 70(3) enshrines the precautionary principle to the extent that it provides that an applicant does not have to demonstrate that any person incurred loss or suffered injury for them to approach a Court and claim the violation of the right to a clean and healthy environment.

In addition, the Constitution has demarcated a specialised Environment and Land Court which is of equal status to the High Court as provided under Article 162(2)(b). This Court is established for the purpose of hearing and determining disputes related to the environment and the use, occupation and title of land. The Environment and Land Court Act was enacted to further realise the structure and functions of the Environment Court.

On 31 July 2023, the Chief Justice launched the Environment and Planning division within the Environment and Land Court to ensure that environmental matters are heard with immediate priority.

In addition, the National Environment Tribunal and the National Environment Complaints Commission are two additional bodies that have the mandate in relation to complaints related to the violation on environmental rights.

C. Case law

Several cases have been determined on the right of to a clean and healthy environment. Environmental law litigation has contributed to the development of law in Kenya. This is evident from the Wangari Maathai v Kenya Times Media Trust Ltd Civil Case 5403 of 1989 that involved the State wanting to build the Times Tower building in Uhuru Park which is a public space. However, the Court dismissed her case on the basis that she had no direct link or locus standi with respect to the protection of Uhuru Park. This position has changed since the Constitution allows any person to file a case where there is a threat or violation of environmental rights and other rights in the Bill of Rights or other constitutional provisions.

It is trite to discuss the cases that have dealt with environmental rights in Kenya from the Supreme Court to the National Environment Tribunal.

At the Supreme Court two cases have dealt with questions on environmental rights litigation, specifically clarifying the jurisdiction of the different bodies determining environmental questions. The first case is Benson Ambuti Andega and Others v Kibos Distillers Ltd Supreme Court Petition No. 3 of 2020. In this case, the Supreme Court recognised that because an Environmental Impact Assessment License had been issued, the Environmental Management and Coordination Act required that the Petitioner first approach the National Environmental Tribunal to appeal the decision of the National Environment Management Authority issuing the license. It faulted the Petitioner and the Environment and Land Court from seizing itself with the matter and using its jurisdiction to interpret whether there was a violation of Article 42 of the Constitution. The Supreme Court further held that where a case was multifaceted and other constitutional violations arose in a matter where the National Environment Tribunal had jurisdiction, the Environment and Land Court was to stay the constitutional matters and transfer the file to the National Environment Tribunal to be dealt with and later deal with the issue as a constitutional matter on appeal.

The second case at the Supreme Court is Nicholus v Attorney General & 7 others; National Environmental Complaints Committee & 5 others (Interested Parties) (Petition E007 of 2023) [2023] KESC 113 (KLR) (28 December 2023). This case involved setting up a mine on the petitioner's land and an electric poll by the Kenya

Power and Lighting Corporation. His petition at the Environment and Land Court stated that he reported to the National Environment Management Authority that the 2nd and 3rd Respondents started a mine on his property without an environmental impact assessment license as well as a mining license. The National Environment Management Authority issued a stop order against the 2nd and 3rd Respondents but they disobeyed the stop order. Afterwards, the Petitioner went to the ELC to file a case challenging the violation of his right to a clean and healthy environment and violation of his right to property. He was dismissed at the ELC and the Court of Appeal on Jurisdiction with the Court of Appeal stating he ought to have gone to the National Environment Tribunal. The Supreme Court held that the Petitioner could either go to the National Environment Tribunal or the Environment and Land Court to seek remedies for violation of his rights and his matter taken back to the Environment and Land Court.

In the case of Mohamed Ali Baadi and Others v Attorney General and Others [2018] eKLR, the Court dealt with a case involving the biggest infrastructural project known as the Lamu Port South Sudan – Ethiopia Transport (LAPSSET) Corridor Project. The LAPSSET project is an infrastructure project dedicated to interconnecting the East African countries of Kenya, Ethiopia and South Sudan. Kenya is spearheading the implementation of the LAPSSET Corridor Project. In that case, the Court held the importance of environmental justice in Kenya specifically the right of access to information in environmental matters and its linkages with public participation and access to justice as enshrined in Principle 10 of the Rio Declaration on Environment and Development.

Concerning climate change, Kenya has several climate change policies, plans and programmes as well as the Climate Change Act, of 2016. The policies and programmes are the National Climate Change Action Plan 2018-2022, the Kenya Green Economy Strategy and Implementation Plan 2016-2030 and Kenya's Nationally Defined Contributions submitted to UNFCCC.

The has also been case law on climate change. In the Republic v National Assembly & 5 Others Ex Parte Greenbelt Movement & 2 Others [2018]eKLR the applicants filed a judicial review challenging nominations to the National Climate Change Council for the President appointing the representative from civil society and marginalised communities. The applicant claimed the appointment did not represent civil society or marginalised communities. However, the Court held the case was overtaken by events because the appointments had already been confirmed.

Save Lamu v National Environment Management Authority and Another NET Appeal No. 196 of 2016 is a case before the National Environment Tribunal where the Applicants appealed the decision of NEMA issuing an Environmental Impact Assessment License to Amu Power for the establishment of a coal-fired power plant 1050 MW in the sea shore of Kwasasi. They challenged the process of issuance of the license lacking in public participation and the negative impacts the coal-fired power plant would have on the public. They prayed that the licence be set aside and a fresh EIA license be issued. There were many local and international expert witnesses. One of the grounds the Applicants challenged the issuance of the license was that the coal-fired power plant contributed to climate change and made the project inconsistent with Kenya's low-carbon development commitments. The tribunal held that the project proponent, Amu Power completely ignored the Climate Change Act which was an error in law. It found that through Amu Power's assessment, the project would emit approximately 8.8 metric tonnes of carbon dioxide into the atmosphere annually and the amount of carbon dioxide would increase Kenya's annual emissions from 73 metric tonnes to 81 metric tonnes according to the Environmental Impact Assessment. There was also expert evidence on climate change- a climate change expert, scientist and marine biologist. The evidence showed that the projected green house gas emissions from coal plant as high as 8.8 million tons of carbon dioxide per year; Climate Change Act, 2016 emphasizes need for a low carbon development pathway; and the National Climate Change Action Plan of 2013-2017 showed that low carbon development pathways and supports increased sources of energy through renewable energy. The experts also stated that the Kenya Green Economy Strategy and Implementation Plan 2016-2030 focuses on renewable energy, innovation and efficiency including reduced emissions in the energy sector and Kenya;s National Determined Contribution (NDC) which was submitted to the United Nations Framework Convention on Climate Change places a commitment by the Country to abate GHG emissions by 2030 and this in Kenya did not anticipate the entry of the coal power generation. In addition the most recent fifth assessment of the Intergovernmental Panel on Climate Change, infrastructure developments and long-lived products that lock societies into greenhouse gas (GHG) emissions pathways may be difficult

or very costly to change, reinforcing the importance of early action for ambitious mitigation. They also testified that Lamu coal powerplant if implemented will impact Kenya's domestic and international commitment.

The Applicants argued that the Environmental Impact Assessment did not contain a proper analysis of climate change impacts considering alternative forms of energy, there was no comprehensive analysis of national low carbon commitments and only adaptation measures for climate change. In addition, the Applicants argued that the carbon monoxide from the coal plant was too steep an incline for the country and the trees proposed to be planted to mitigate the emissions would not be enough to offset the emissions.

The Tribunal held that the failure of the Respondents to consider provisions of the Climate Change Act was significant even though its eventual effect would be unknown. The Tribunal also applied the precautionary principle when it stated that where there was a lack of clarity on the consequences of certain aspects of the project, the Tribunal would reject the project. The Tribunal held that issues related to climate change were even of great importance and failure to consider the legal provisions on this made the EIA incomplete and inadequate. The Tribunal also held that the Project Proponent failed to conduct public participation as prescribed under the Constitution and the Environment Conservation and Management Act.

The case of Greenbelt Movement and 4 Others v NEMA and Others Tribunal Appeal NET 19/2020 was filed by a number of civil society organisations challenging NEMA and the China Road and Bridge Corporation Kenya for the issuance of an EIA license for the construction of the proposed Nairobi Expressway covering 27 KMs. Among other grounds, the appeal stated that the ESIA report did not contain a climate impact assessment and the references to the climate change made in the said report are inadequate and the report should have incorporated the principles set out by the International Association of Impact Assessment.

The Tribunal held that the EIA report recognised the Climate Change Act and stated that it considered climate change adaptations for management options relating to greenhouse gas emissions during construction. Further the EIA mentions climate change but there was no analysis on the project's impacts on climate . In addition, it held that section 20 of the Climate Change Act held that NEMA shall integrate climate risk and vulnerability assessment into all forms of assessment and must liaise with the relevant lead agencies for technical advice. The Tribunal also observed that although the EIA report states that the expressway was to pass through two distinct climatic zones, the report fails to analyze the impacts created by the emissions of greenhouse gases on the sections affected by the expressway. Therefore they found that before issuance of the EIA license it was necessary for there to be a climate change analysis.

The Tribunal made a structural interdict under Section 129(3)(c) of the Environment Management and Coordination Act preserving the environment and for purposes of sustainable development requiring the project proponent to carry out and complete the climate change analysis within 18 months of the date of the judgment.

D. Conclusion

In conclusion, several cases have tackled the issue of environmental rights litigation and specific climate change litigation in Kenya. There is an upward trend in allowing any person to lay claims where there are environmental rights violations and this supports Principle 10 of the Rio Declaration on the Environment and Development that environmental justice will only be achieved where there is access to information, public participation and access to justice.

Climate Justice and the Judicial Application of the Environmental Law Principles in Uganda

Peter Davis Mutesasira (PhD)2*

1.0. Introduction

Climate change is still a significant challenge currently being faced by the human kind and the global environment. In Uganda, the adverse effects of climate change have been mainly manifested through landslides, floods, severe drought, land conflicts, forced displacement, malnutrition, human-wildlife conflicts and unpredictable weather patterns. It is important to note that climate change does not affect all persons and communities equally.[3] Climate change disproportionately affects some persons or communities premised on existing vulnerabilities, historical patterns of inequity, socioeconomic disparities and systemic environmental injustices[4]. It is suggested that climate justice which puts equity and human rights at the core of decision making and action on climate change,[5] is vital in addressing climate change globally and nationally. It is further suggested that the domestic implementation of the principles of environmental law facilitate the full realization of climate justice especially in least developed countries such as Uganda. The principles of environmental law are widely recognized internationally following decades of legal developments such as the: 1972 Stockholm Declaration;[6] 1982 World Charter for Nature;[7] 1992 Rio Declaration;[8] and Agenda 21.[9] The principles of environmental law are also essential for the realization of the right to a clean and healthy environment. At the global level, in July 2022 the United Nations General Assembly (UNGA) recognised the a clean, healthy, and sustainable environment as a human right.[10] This recognition followed the United Nations (UN) Human Rights Council (HRC) resolution 48/13 which acknowledged the right in October 2021.[11] At the

[2] Dean and Senior Lecturer, School of Law at Uganda Christian University (UCU); Email: pdmutesasira@ucu.ac.ug.

This paper was presented at the Sixth Judicial Training on Climate Justice in Uganda held on 20th May 2024 at Mbale Resort Hotel, Mbale City under the theme "Enforcing Environmental Laws in the Age of Climate Crisis".

[3] Myo Myo Khine and Uma Langkulsen, 'The Implications of Climate Change on Health among Vulnerable Populations in South Africa: A Systematic Review', International Journal of Environmental Research and Public Health (IJERPH), Vol. 20 Issue 4, 2023 available at https://www.mdpi.com/1660-4601/20/4/3425.

[4] Ibid.

[5] United Nations Development Programme (UNDP), 'Climate change is a matter of justice – here's why', June 30th 2023, available at https://climatepromise.undp.org/news-and-stories/climate-change-matter-justice-heres-why#:~:tex t=What%20is%20climate%20justice%20and,relation%20to%20the%20climate%20crisis.

[6] The Declaration of the United Nations Conference on the Human Environment (herein after referred to as the 'Stockholm Declaration') drafted 5-16 June 1972 in Stockholm, Sweden available at https://wedocs.unep.org/bitstrea m/handle/20.500.11822/29567/ELGP1StockD.pdf.

[7] The World Charter for Nature, adopted by the United Nations General Assembly (UNGA) at its 37th Session (Resolution A/RES/37/7) on October 28, 1982 in New York, United States of America, available at https://www.eco lex.org/details/literature/the-world-charter-for-nature-mon-088085/.

[8] Rio Declaration on Environment and Development (herein after referred to as the 'Rio Declaration') adopted by the United Nations General Assembly (UNGA) on 12th August 1992 in Rio de Janeiro, Brazil available at https://www.u n.org/en/development/desa/population/migration/generalassembly/docs/globalcompact/A_CONF.151_26_Vol.I_Declaration.pdf.

[9] Agenda 21 which is a product of the Earth Summit held in Rio de Janeiro, Brazil was adopted on 23rd April 1992, available at https://sustainabledevelopment.un.org/content/documents/Agenda21.pdf.

[10] See, e Office of the High Commissioner for Human Rights (OHCHR), United Nations Environment Programme (UNEP) and United Nations Development Programme (UNDP), 'What is the Right to a Healthy Environment?: An Information Note', available at https://www.undp.org/sites/g/files/zskgke326/files/2023-01/UNDP-UNEP-UNHCH R-What-is-the-Right-to-a-Healthy-Environment.pdf

[11] United Nations (UN) Human Rights Council (HRC), 'The human right to a clean, healthy and sustainable environment', Forty-eighth session, Resolution 48/13 adopted by the Human Rights Council on 8 October 2021, available at https://documents.un.org/doc/undoc/gen/g21/289/50/pdf/g2128950.pdf?token=2XoKaISjcswC3jUbBJ& fe=true

domestic level article 39 of the Constitution of Uganda and section 3(1) of the 2019 National Environment Act (NEA) entitle every citizen to a clean, healthy and decent environment.[12] The judiciary has an important role to play in the domestic implementation of the principles of environmental law when adjudicating environmental or climate related disputes. Through litigation, the principles of environmental law have shaped the way in which the environment may be secured from climate change since many environmental advocates have increasingly turned to courts for solutions.[13]

This paper therefore, discusses the role of the principles of environmental law in promoting climate justice from a judicial perspective with specific reference to Uganda. This paper further analyses the legal regulatory framework and case law related to the domestic implementation of selected principles of environmental law. This paper comprises of four sections. Section one is the introduction and section two explores the nexus between climate justice and the principles of environmental law. Section three discusses the principles of environmental law and their role in promoting climate justice from a judicial perspective and section four draws some conclusions.

2.0. Exploring the Nexus Between Climate Justice and the Principles of Environmental Law

Climate change is increasingly being viewed as a human rights issue that is adversely affecting the enjoyment of the right to a clean and healthy environment across the globe. Although climate change is a global challenge affecting human kind, it has severe disproportionate impacts on some States and communities (such as low-income countries or communities and vulnerable sections of society such as the elderly, women, children, persons with special needs, refugees, indigenous peoples, etc.) that are least responsible for the problem.[14] Climate justice suggests that the responsibilities in addressing climate change should be divided according to who is contributing most to the problem, while addressing systemic, socioeconomic, and intergenerational inequalities.[15]

The principles of environmental law can be effectively deployed to addresses inequities between those who have been responsible for causing climate change and those who are suffering most from the consequences of climate change.[16] For instance, the principles of intergenerational equity and common but differentiated responsibilities are well grounded in article 3 of the United Nations Framework Convention on Climate Change (UNFCCC).[17] According to the UNFCCC: "The Parties should protect the climate system for the benefit of present and future generations of humankind, on the basis of equity and in accordance with their common but differentiated responsibilities and respective capabilities. Accordingly, the developed country Parties should take the lead in combating climate change and the adverse effects thereof".[18] It is the view of this paper that the judiciary can therefore, make a meaningful contribution aimed at promoting climate justice by referring to the principles of environmental law while adjudicating environmental or climate disputes. This will compel the other arms of government and private entities to take climate seriously by upholding the fundamental values underpinning the legal framework on the environment.[19]

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[12] The National Environment Act (NEA), Act No. 5 of 2019.

[13] Jacqueline Peel, 'Issues in Climate Change Litigation', Carbon & Climate Law Review (CCLR), Vol. 5 No. 1, 2011 at 15.

[14] Bethuel Sibongiseni Ngcamu, 'Climate change effects on vulnerable populations in the Global South: a systematic review', Natural Hazards (2023) 118:977–991 at 978.

[15] (n 3).

[16] See, Rohini J. Haar and Barry S. Levy, 'Promoting Climate Justice', In Barry S. Levy and Jonathan A. Patz (eds.), Climate Change and Public Health, Oxford University Press 2024.

[17] Lina Lefstad and Jouni Paavola, The evolution of climate justice claims in global climate change negotiations under the UNFCCC, CRITICAL POLICY STUDIES, Taylor & Francis (2023).

18 Article 3(2).

[19] Brian J. Preston, 'The Contribution of the Courts in Tackling Climate Change', Journal of Environmental Law Vol. 20, No. 1 (2016) at 11.

3.0. The Principles of Environmental Law

This section of the paper discusses the role of selected principles of environmental law in promoting climate justice from a judicial perspective with specific reference to Uganda. The key selected principles of environmental law discussed below include: Sustainable Development; Intergenerational Equity; Precautionary; Public Trust Doctrine; Common but differentiated Responsibilities; Polluter Pays; and Participatory.

3.1. Sustainable Development

The principle of sustainable development was defined by the Brundtland Commission on Environment and Development, which stated in its 1987 report, Our Common Future, that: "Sustainable development is development that meets the needs of the present without compromising the ability of the future generations to meet their own needs."[20] Similarly, principle 4 of the Rio Declaration provides that: "In order to achieve sustainable development, environmental protection shall constitute an integral part of the development process and cannot be considered in isolation from it." Further to the sustainable development at the domestic level, the National Objectives and Directive Principles of State Policy (NODPSP) set out in the 1995 Constitution state that: "The state shall promote sustainable development and public awareness of the need to manage land, air, water resources in a balanced manner for the present and future generations. The utilisation of natural resources of Uganda shall be managed in such a way to meet the development and environmental needs of the present and future generations of Ugandans and in particular the state shall take all the possible measures to prevent or minimise damage and destruction to land, air and water resources resulting from population pressures and other causes."[21]

The principle of sustainable development in Uganda is detailed by section 5(2)(b) of the 2019 National Environment Act (NEA) 2019 that provides for equitable, gender responsive and sustainable use of the environment and natural resources, including cultural and natural heritage, for the benefit of both present and future generations. The 2021 National Climate Change Act under section 5(3)(e) provides for the development of a Strategy on Climate Change for Uganda within one year after its commencement which should take into account the need to promote sustainable development in Uganda. There have been some judicial pronouncements on the domestic implementation of the sustainable development principle in Uganda. In Amooti Godfrey Nyakaana v National Environment Management Authority (NEMA) & Others,[22] the appellant challenged the actions of NEMA that culminated into to the demolition of his residential house that had been constructed in an ecologically sensitive area (i.e., wetland). These actions by NEMA followed repeated requests to the appellant to halt the construction which he ignored, including an environmental restoration order. The Supreme Court held that the activities of the appellant endangered wetlands and were inconsistent with the constitutional principles of national interest and common good enshrined in the NODPSP such as, sustainable development. According to the Supreme Court, wetlands required properly planned and controlled utilization and the actions of individual developers such as the appellant had grave consequences on the current and future generations.

3.2. Intergenerational Equity

The principle of inter-generational equity provides that the present generation has the right to use and enjoy resources of the earth but is under an obligation to consider the long-term impact of its activities and to sustain the resource base and the global environment for the benefit of future generations of human kind.[23] Intergenerational equity is also central to the attainment of sustainable development as resources must be

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[20] Report of the World Commission on Environment and Development: Our Common Future, published in October 1987 by the United Nations through the Oxford University Press, available at https://sustainabledevelopment.un.org /content/documents/5987our-common-future.pdf

[21] See, National Objectives and Directive Principles of State Policy (NODPSP), Part XXVII(i) & XXVII(ii).

[22] Supreme Court of Uganda, Constitutional Appeal No. 5 of 2011.

[23] Edith Brown Weiss, Our Rights and Obligations to Future Generations for the Environment, The American Journal of International Law Vol. 81, No. 1, 1990 at 198-207.

used sparingly if they are exhaustible or must be replenished if possible.[24] According to In Brown Weiss:

> "[…] we, the human species, hold the natural and cultural environment of our planet in common with all members of our species: past generations, the present generation, and future generations. As members of the present generation, we hold the earth in trust for future generations. At the same time, we are beneficiaries entitled to use and benefit from it".[25]

Principle 1 of the 1972 Stockholm Declaration under Principle 1 imposes on humans a solemn responsibility to protect and improve the environment for present and future generations. Within the domestic context, the ppreamble of the 1995 Constitution of Uganda, Intergenerational equity requires that the present generations exploit or use natural resources in a way that will enable the next/future generations to use the same resources. In the Minors Oposa Case (Philippines-Oposa & Ors v Fulgencio S. Factoran, Jr. & Ors),[26] the supreme court of the Republic of the Philippines had to determine whether whether the petitioners had a cause of action in preventing the misappropriation or destruction of Philippine rainforests through the allocation of timber logging licenses by the respondents.[27] The petitioners argued that these rain forests were vital for the promotion of the right of Filipinos to a balanced and healthful ecology.[28] While referring to the twin concepts of "inter-generational responsibility" and "inter-generational justice, the Supreme Court held that the petitioners could file a class suit, for others of their generation and for the succeeding generations. The court in considering the concept of intergenerational responsibility, further stated that every generation has a responsibility to the next to preserve that rhythm and harmony necessary for the full enjoyment of a balanced and healthful ecology.

3.3. Precautionary

While referring to the precautionary principle, the 1982 World Charter for Nature in its principle 11(b) states that: "Activities which are likely to pose significant risk to nature shall be preceded by an exhaustive examination; their proponents shall demonstrate that expected benefits outweigh potential damage to nature, and where potential adverse effects are not fully understood, the activities should not proceed." Further to the precautionary principle, the Rio Declaration under principle 15 states that: "In order to protect the environment, the precautionary approach shall be widely applied by states according to their capabilities. Where there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation."

The precautionary principle is also embedded in some international instruments such: as the preamble to the Convention on Biological Diversity (CBD);[29] article 3 of the United Nations Framework Convention on Climate Change (UNFCCC);[30] and articles 1, 10(6) and 11(8) of the Cartagena Protocol on Biosafety.[31] In Uganda, section 5(2)(g) of the 2019 National Environment Act (NEA) 2019 requires that where there are threats of irreversible harm or damage to human health or the environment, lack of scientific certainty is not used as a reason for postponing cost-effective measures to prevent the harm or damage. In the International Court of Justice (ICJ) Order of 22 September 1995, Judge Weeramantry in his dissenting opinion concluded

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[24] Otto Spijkers, 'Intergenerational Equity and the Sustainable Development Goals', Sustainability Vol. 10, Issue 11, 2018.

[25] Edith Brown Weiss, Intergenerational Equity and Rights of Future Generations, in Nikken, P. and Cançado A. Trindade (eds.), The Modern World of Human Rights: Essays in Honour of Thomas Buergenthal, Inter-American Institute of Human Rights: San José, CA, USA, 1996 at 603.

[26] The Minors Oposa Case (Philippines- Oposa & Ors v Fulgencio S. Factoran, Jr. & Ors), Supreme Court of the Republic of Philippines G.R. No. 101083 July 30, 1993.

[27] Ibid, paras 13-14.

[28] Ibid, para. 15.

[29] Convention on Biological Diversity (CBD), adopted on 5th June 1992 and entered into force on 29th December 1993 available at https://www.cbd.int/doc/legal/cbd-en.pdf.

[30] United Nations Framework Convention on Climate Change (UNFCCC) adopted in June 1992 and entered into force on 21 March 1994, available at https://treaties.un.org/doc/source/RecentTexts/unfccc_eng.pdf

[31] Cartagena Protocol on Biosafety, adopted on 16 May 2000 and entered into force on 11 September 2003, available at https://bch.cbd.int/protocol.

that the precautionary principle was gaining increasing support as part the international law of the environment.[32]

Environmental Impact Assessment (EIA) is an elaboration of mechanisms associated with the precautionary principle. Principle 17 of the Rio Declaration states that: "EIA, as a national instrument, shall be undertaken for proposed activities that are likely to have a significant adverse effect on the environment and are subject to the decision of a national competent authority." In Uganda basic EIA requirements are further set forth in the 2019 NEA under sections 110-112. However, some developers have often gone ahead and initiated developments without EIA approvals. In Amooti Godfrey Nyakaana v National Environment Management Authority (NEMA) & Others,[33] the Supreme Court held that developers ought to take environmental law compliance seriously by undertaking precautionary measures or due diligence in the form of EIAs and obtaining approvals from NEMA.

3.4. Public Trust Doctrine

The Public Trust doctrine requires the government to preserve and protect certain resources that the government holds in trust for the public good.[34] The concept of public trust expresses the idea that the present generation holds the natural resources such as forests, rivers, lakes, wildlife and land of the earth in trust for future generations.[35] The public trust doctrine represents a viable legal tool for establishing a system of governance that provides a dynamic and interconnected framework for intergenerational responsibility for the management of natural resources.[36] Part XIII of the 1995 Constitution of the Republic of Uganda under the National Objective and Directive Principles of State Policy (NODPSP) provides that: "The state shall protect important natural resources, including the land, water, wetlands, oil, fauna, and flora on behalf of the people of Uganda."

Further to the public trust doctrine, article 237(b) of the Constitution provides that: "The government or Local government as determined by Parliament by law shall hold in trust for the people and protect natural lakes, rivers, wetlands, forest reserves, game reserves, national parks and any land to be reserved for ecological and tourist purposes of the common good of all citizens." However, governments often violate the public trust doctrine by permitting activities that endanger the environment and the citizens health. In M. C. Mehta v. Kamal Nath and Others,[37] the Supreme Court of India relied on the public trust doctrine to set-aside a lease that had been granted for a private motel by ordering the government to take over the area and restore it to its original condition. According to the Supreme Court, the lease of ecologically fragile land was a violation of the public trust. In Advocates Coalition for Development (ACODE) v Attorney General,[38] the applicants challenged the Uganda government's decision permitting Kakira Sugar Works to occupy Butamira forest reserve through a change of land use without the consent of the public contending that this was a violation the public trust doctrine. The court held that the government violated the public trust doctrine when it granted

[32] International Court of Justice (ICJ), Order of 22 September 1995, Document Number 097-19950922-ORD-01-00-EN, available at https://www.icj-cij.org/node/103563.

[33] (n 20).

[34] Raphael D. Sagarin and Mary Turnipseed, 'The Public Trust Doctrine: Where Ecology Meets Natural Resources Management', Annu. Rev. Environ. Resour. 2012. 37:473–96 at 474-475. See also, Lavanyya Rajamani, 'Doctrine of Public Trust: A Tool to Ensure Effective State Management of Natural Resources', Journal of the Indian Law Institute

Vol. 38, No. 1 (1996) at 72-82.

[35] Dinah Shelton and Alexandre Kiss, Judicial handbook on Environmental Law, United Nations Environment Programme, 2005, at 23.

[36] Erin Ryan, 'A Short History of The Public Trust Doctrine and Its Intersection with Private Water Law', Virginia Environmental Law Journal Vol. 38, No. 2 (2020), at 135-206. See also, Godber Tumushabe, 'Basic Principles of Environmental Law', in Kenneth Kakuru and Irene Ssekyana (eds.), Handbook on Environmental Law in Uganda, Greenwatch Uganda & Environmental Law Institute (ELI), Vol. 1, Second Edition, February 2009 at 24.

[37] Supreme Court of India 1 SC 388 (1997).

[38] The High Court of Uganda Misc. Cause No. 001 of 2004.

concessions or leased Butamira forest reserve it held in trust for the people of Uganda to Kakira Sugar Works without public involvement.

3.5. Common but Differentiated Responsibilities

The principle of common but differentiated responsibilities acknowledges that while all States have a shared obligation to address the climate emergency and environmental destruction, the wealthy States that have caused the lion's share of the planetary crisis need to take primary responsibility for financing and implementing solutions to the crisis.[39] This principle was articulated in Principle 7 of the Rio Declaration which states that: "States shall cooperate in a spirit of global partnership to conserve, protect and restore the health and integrity of the earth's ecosystem. In view to the different contributions to global environmental degradation, states have common but differentiated responsibilities. The developed countries acknowledge the responsibility that they bear in the international pursuit of sustainable development in view of the pressures their societies place on the global environment and the technologies and financial resources they command."

The principle of common but differentiated responsibilities has also been incorporated in the United Nations Framework Convention on Climate Change (UNFCCC) under section 4(1) that requires States to commit to considering their common but differentiated responsibilities and their specific national and regional development priorities, objectives and circumstances.[40] The UNFCCC further requires State parties to protect the climate system for the benefit of present and future generations of humankind, on the basis of equity and in accordance with their common but differentiated responsibilities and respective capabilities.[41] Accordingly, the developed country Parties should take the lead in combating climate change and the adverse effects thereof.[42] The principle of common but differentiated responsibilities has also been embedded: in principle 12 of the Stockholm Declaration; article 10 of the Kyoto Protocol;[43] article 20(4) of the Convention on Biological Diversity (CBD); and article 5(1) of the Montreal Protocol on Substances that Deplete the Ozone Layer.[44]

3.6. Polluter Pays

According to the polluter pays principle a polluter is required to repair the damage he or she has caused either by making actual reparation or paying the necessary monetary compensation to society.[45] Such compensation can be paid before (i.e., in form of deposit bonds, which are tied to environmental performance, to be forfeited if performance falls below expected standards) or after the polluting event (i.e., in the form of fines, damages, insurance pay-outs or reparations). The polluter is therefore, required to incur the cost of

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[39] David R. Boyd, The Right to a Healthy Environment: A User's Guide, The United Nations Human Rights Special Procedures, 2024 at 15, available at https://www.ohchr.org/sites/default/files/documents/issues/environment/srenvir onment/activities/2024-04-22-stm-earth-day-sr-env.pdf

[40] United Nations Framework Convention on Climate Change (UNFCCC), adopted by the United Nations General Assembly (UNGA) on 9th May 1992 in New York, United States of America and entered into force on 21st March 1994, available at https://treaties.un.org/doc/Treaties/1994/03/19940321%2004-56%20AM/Ch_XXVII_07p.pdf.

[41] Ibid, sec. 3(1).

[42] Ibid.

[43] Kyoto Protocol to the United Nations Framework Convention on Climate Change (herein after referred to as the 'Kyoto Protocol'), adopted on 11th December 1997 in Kyoto, Japan and entered into force on 16th February 2005, available at https://treaties.un.org/doc/Treaties/1998/09/19980921%2004-41%20PM/Ch_XXVII_07_ap.pdf.

[44] Montreal Protocol on Substances that Deplete the Ozone Layer, adopted on 16 September 1987 and entered into force on 1 January 1989.

[45] Nicolas de Sadeleer, Environmental Principles: From Political Slogans to Legal Rules, Second Edition Oxford University Press (2020). See also, Roy E. Cordato, 'The Polluter Pays Principle: A Proper Guide for Environmental Policy', Institute for Research on the Economics of Taxation Studies in Social Cost, Regulation, and the Environment: No. 6, at 1-2 available at http://iret.org/pub/SCRE-6.PDF.

remedying such environmental harms—through restoration, rehabilitation and compensation.[46] Polluter pays is enshrined in principle 16 of the Rio Declaration which provides that: "National authorities should endeavour to promote the internalisation of environmental costs and the use of economic instruments, taking into account the approach that the polluter should, in principle bear the cost of pollution, with due regard to the public interest and without distorting international trade and investment."

The polluter pays principle is further amplifies in: article 2(5)(b) of the 1992 Helsinki Convention on the Protection and Use of Transboundary Water Courses and International Lakes,[47] the preamble of the 2003 Protocol on Civil Liability and Compensation for Damage caused by the Transboundary Effects of Industrial Accidents on Transboundary Waters[48] and article 3(2) of the 1996 Protocol to the Convention on Prevention of Marine Pollution by Dumping of Wastes and Other Matter (London Convention).[49]

At the domestic level, the section 5(2)(1) of the 2019 National Environment Act (NEA) provides for polluter pays as part of its principles of environment management. Similarly, section 80 of the 2019 NEA, imposes strict liability on polluters for damage caused to human health and the environment. Section 85(2) of NEA imposes fees for the acquisition of a pollution control license which requires the person contributing the greater amount of pollution to bear the largest burden in paying for cleanup of the environment and by charging less fees for activities that reduce pollution. In Amooti Godfrey Nyakaana v National Environment Management Authority & Others,[50] the Supreme Court reaffirmed the importance of the polluter pays principle by stating that NEMA was within its mandate to ensure that the appellant did not destroy the environment and also bear the cost of restoring the environmental degradation.

3.7. Participatory

Public participation has become an integral part of environmental governance.[51] The participatory principle which is the bedrock of public participation is grounded in some binding and soft international instruments such as: principle 10 of the Rio Declaration; principle 23 of the World Charter for Nature; Agenda 21; article 3(8) of the Espoo Convention; and article 13 of the African Charter on Human and Peoples' Rights (African Charter). Civil Society Organisations (CSOs) and Non-Governmental Organisations (NGOs) play a vital role in enhancing public participation in environmental affairs. The World Heritage Convention under article 8(3) and article 17(5) of the United Nations Economic Commission for Europe (UNECE) Protocol on Pollutant Release and Transfer Registers (PPRTRs) amplify the critical role played by NGOs in facilitating public participation.

Within the domestic context, the Constitution provides for the right to public participation in decision making under Part II (i) of the National Objectives and Directive Principle of State Policy (NODPSP) which states that: "The state shall be based on democratic principles which empower and encourage the active participation of all citizens at all levels of their own governance." Similarly, Part X of the NODPSP states that: "The State shall take all necessary steps to involve the people in the formulation and implementation of development plans

[46] (n 37) at 14.

[47] Helsinki Convention on the Protection and Use of Transboundary Water Courses and International Lakes, adopted on 17th March 1992 in Helsinki, Finland and entered into force on 6th October 1996, available athttps://treaties.un.org /doc/Treaties/1992/03/19920317%2005-46%20AM/Ch_XXVII_05p.pdf.

[48] The Protocol on Civil Liability and Compensation for Damage Caused by the Transboundary Effects of Industrial Accidents on Transboundary Waters was adopted and signed at the Ministerial Conference "Environment for Europe" in Kyiv, Ukraine, on 21 May 2003, available at https://unece.org/DAM/env/civil-liability/documents/protocol_e.pdf.

[49] Protocol to the Convention on Prevention of Marine Pollution by Dumping of Wastes and Other Matter (herein after referred to as the 'London Convention') adopted on 17th November 1996 at a special meeting of the parties to the London Convention in London, United Kingdom and entered into force on 24th March 2006, available at https://www cdn.imo.org/localresources/en/OurWork/Environment/Documents/PROTOCOLAmended2006.pdf

[50] (n 20).

[51] A du Plessis, 'Public Participation, Good Environmental Governance and Fulfilment of Environmental Rights', Potchefstroom Electronic Law Journal (PELJ) (2008) Vol. 11, No. 2 at 171-172.

and programmes that affect them. The 2019 National Environment Act (NEA) under section 5(2)(a) encourages the participation by the people of Uganda, in the development of policies, plans and programmes for the management of the environment. The 2021 National Climate Change Act under section 9 also provides for public participation in climate change mechanisms. However, have been instances where the government of Uganda has fallen short of enabling public participation in environmental decision-making. In Advocates Coalition for Development (ACODE) v Attorney General,[52] the applicants challenged the government's decision that granted concessions to Kakira Sugar Works to occupy the Butamira forest reserve without seeking the views or concerns of the local communities. The Court held that it was not proper for the government to deprive the local communities of the benefits that come with the forest reserve without consulting them. It is important to note the rights of access to information[53] and access to justice[54] are imperative for the full realization of the participatory principle.

4.0. Conclusion

In the past decade the interconnection between climate change and human rights protection has been increasingly recognized.[55] Essentially, climate justice is a global effort that prioritizes the needs and rights of the most vulnerable, ensuring that as we tackle climate change, we do so in a way that's fair and just for everyone.[56] Climate justice recognizes that certain groups suffer the most from the impacts of climate change, even though they have contributed the least to the problem.[57] It is the view of this paper that the principles of environmental law have significantly shaped the current terrain of inclusive climate action globally. The right of access to justice is critical in the struggle to realize climate justice generally and the right to a clean and healthy environment in particular.[58]

The judiciary has a vital role in providing guidance and creativity needed for the domestic implementation of the principles for environmental law aimed at enhancing climate justice. As an important stakeholder in addressing the climate crisis, the continued active involvement of the judiciary will in turn promote equal access to justice, timely and expeditious hearing of climate claims, upholding the rule of law, promoting environmental values, assisting the progressive and principled development of climate change law and making reasoned and evidence-based decisions.[59]

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[52] (n 36).

[53] See, article 41 of the 1995 Ugandan Constitution; sections 146-147 of the 2019 NEA; and section 13 of the 2021 National Climate Change Act

[54] See, articles 50 and 137 of the 1995 Ugandan Constitution; sections 3(3) and 4(2) of the 2019 NEA; and section 26 of the 2021 National Climate Change Act on climate litigation.

[55] Elena Cima, 'The right to a healthy environment: Reconceptualizing human rights in the face of climate change', Review of European Comparative &International Environmental Law (RECIEL) Vol. 31, Issue 1 (April 2022) at 38-39.

[56] World Economic Forum (WEF), 'Explainer: What is Climate Justice?', December 8, 2023 available at https:// ww w.weforum.org/agenda/2023/12/climate-justice-loss-damage-fund-cop28/

[57] Ibid.

[58] Margaux J. Hall, 'Advancing Climate Justice and the Right to Health Through Procedural Rights', Health and Human Rights Journal (2014) Vol. 16, Issue 1 available at https://www.hhrjournal.org/2014/07/advancing-climate-justice-and-the-right-to-health-through-procedural-rights/

[59] (n 17) at 11.

Climate Dictionary*[60]

Adaptation

Climate change adaptation refers to actions that help reduce vulnerability to the current or expected impacts of climate change like weather extremes and natural disasters, sea-level rise, biodiversity loss, or food and water insecurity.

Many adaptation measures need to happen at the local level, so rural communities and cities have a big role to play. Such measures include planting crop varieties that are more resistant to drought and practicing regenerative agriculture, improving water storage and use, managing land to reduce wildfire risks, and building stronger defenses against extreme weather like floods and heat waves.

However, adaptation also needs to be driven at the national and international levels. In addition to developing the policies needed to guide adaptation, governments need to look at large-scale measures such as strengthening or relocating infrastructure from coastal areas affected by sea-level rise, building infrastructure able to withstand more extreme weather conditions, enhancing early warning systems and access to disaster information, developing insurance mechanisms specific to climate-related threats, and creating new protections for wildlife and natural ecosystems.[61]

Blue economy

The world's oceans – their temperature, chemistry, currents, and life – drive global systems that make Earth habitable for humankind. Our rainwater, drinking water, weather, climate, coastlines, much of our food, medicines and even the oxygen in the air we breathe, are all provided and regulated by the seas. However, because of climate change, the health of our oceans is now at significant risk.

The "blue economy" concept seeks to promote economic development, social inclusion, and the preservation or improvement of livelihoods while at the same time ensuring environmental sustainability of the oceans and coastal areas.

Blue economy has diverse components, including established traditional ocean industries such as fisheries, tourism, and maritime transport, but also new and emerging activities, such as offshore renewable energy, aquaculture, seabed extractive activities, and marine biotechnology.

Carbon removal vs. Carbon

Carbon removal is the process of removing greenhouse gas emissions from the atmosphere, through natural solutions such as reforestation and soil management or technological solutions like direct air capture and enhanced mineralization. Carbon removal is not a substitute for cutting greenhouse gas emissions, but it can slow down climate change and is necessary to shorten any period during which we temporarily overshoot our climate targets.

Carbon capture and storage is the process of trapping carbon emissions produced by fossil fuel power plants or other industrial processes before they can enter our atmosphere by storing them deep underground. Carbon capture and storage should not be seen as an alternative to the green energy transition, but it has been proposed as a way to tackle emissions from sectors that are difficult to decarbonize, particularly heavy industries like cement, steel, and chemicals.

However, these technologies are only in the early development stage and will require carefully-designed policies. Dramatically slashing greenhouse gas emissions must remain the top priority to combat the climate crisis.

[60] This dictionary was adopted from UNDP resource publication https://climatepromise.undp.org/news-and-stories/climate-dictionary-everyday-guide-climate-change

Carbon footprint

A carbon footprint is a measure of the greenhouse gas emissions released into the atmosphere by a particular person, organization, product, or activity. A bigger carbon footprint means more emissions of carbon dioxide and methane, and therefore a bigger contribution to the climate crisis.

Measuring a person's or an organization's carbon footprint entails looking at both the direct emissions resulting from the burning of fossil fuels for energy production, heating, and land and air travel, and indirect emissions resulting from the production and disposal of all food, manufactured goods, and services they consume.

Carbon footprints can be reduced by shifting to low-carbon energy sources like wind and solar, improving energy efficiency, strengthening industry policies and regulations, changing purchasing and travel habits, and reducing meat consumption and food waste

Carbon Markets

Carbon markets are trading schemes that create financial incentives for activities that reduce or remove greenhouse gas emissions. In these schemes, emissions are quantified into carbon credits that can be bought and sold. One tradable carbon credit equals one tonne of carbon dioxide, or the equivalent amount of a different greenhouse gas reduced, sequestered or avoided.

Carbon credits can be bought by countries as part of their NDC strategy, by corporations with sustainability targets, and by private individuals that want to compensate for their carbon footprint.

The supply of carbon credits comes from private entities or governments that develop programmes to reduce or remove emissions. These programmes are certified by a third party and registered under a carbon market standard.

For carbon markets to be successful, countries must work together to secure robust carbon accounting, ensure transparency for carbon market transactions, implement safeguards against human rights abuses and other adverse societal impacts, and combat greenwashing and the misrepresentation of carbon-neutral products and services.

Carbon sink

A carbon sink is any process, activity, or mechanism that absorbs more carbon dioxide from the atmosphere than it releases. Forests, oceans, and soil are the world's largest natural carbon sinks.

Oceans absorb carbon dioxide from the atmosphere through marine ecosystems and the plant and animal life they harbor. Sequestering carbon in marine ecosystems is generally referred to as blue carbon. Forests and soil are the other main natural carbon sinks of the planet, storing carbon in trees and vegetation, wetlands and peat bogs, and plant litter.

Today, human activity, like burning fossil fuels and deforestation, causes more carbon to be released into the atmosphere than the Earth's natural carbon sinks can absorb, leading to global warming and climate change. Human activities and climate change are also causing the degradation of these natural carbon sinks, threatening the release of the carbon they store back into the atmosphere. Therefore, protecting carbon sinks and expanding their capability to absorb carbon and store it long-term is a key strategy for tackling climate change and stabilizing the climate.

Circular economy

Circular economy refers to models of production and consumption that minimize waste and reduce pollution, promote sustainable uses of natural resources, and help regenerate nature.

Circular economy approaches are all around us. They can be employed in a number of different sectors from textiles to buildings and construction, and at various stages of a product's lifecycle, including design, manufacturing, distribution, and disposal.

Besides helping tackle the problem of pollution, circular economy approaches can play a critical role in solving other complex challenges such as climate change and biodiversity loss. They can help countries accelerate their transition to more resilient and lowercarbon economies while also creating new green jobs.

Currently, only 7.2 percent of used materials are cycled back into our economies after use. This has a significant burden on the environment and contributes to the climate, biodiversity, and pollution crises. As a result, we currently need about 1.7 Earths to deliver on all the world's resource demands.

Climate Crisis

The climate crisis refers to the serious problems that are being caused, or are likely to be caused, by changes in the planet's climate, including weather extremes and natural disasters, ocean acidification and sea-level rise, loss of biodiversity, food and water insecurity, health risks, economic disruption, displacement, and even violent conflict.

Since the 1800s, human activities have caused the Earth's average temperature to increase by about 1.2° C – with more than two-thirds of this warming occurring since 1975. This is already causing significant damage to human societies and natural ecosystems in many parts of the world. More than 3 billion people live in places that are very vulnerable to the climate crisis, with lower income countries being disproportionately affected.

Scientists expect that an increase beyond 1.5°C would begin to lead to a series of dangerous tipping points that would make many changes irreversible and pose a very serious threat to human civilization. This is why governments must act now to drastically reduce greenhouse gas emissions and chart a course for reaching net zero in the coming decades, invest in adaptation to the unavoidable impacts of climate change, and protect and restore natural ecosystems and biomes upon which the planet depends.

Climate finance

Climate finance refers to financial resources and instruments that are used to support action on climate change. Climate finance is critical to addressing climate change because of the large-scale investments that are needed to transition to a low-carbon global economy and to help societies build resilience and adapt to the impacts of climate change.

Climate finance can come from different sources, public or private, national or international, bilateral or multilateral. It can employ different instruments such as grants and donations, green bonds, debt swaps, guarantees, and concessional loans. And it can be used for different activities, including mitigation, adaptation, and resilience-building.

Some multilateral funds that countries can access include the Green

Climate Fund (GCF), the Global Environment Facility (GEF), and the Adaptation Fund (AF). High-income countries with a significant historical contribution to climate change have committed to raising US$100 billion every year to fund climate action in low-income countries. However, this target has not yet been reached and more funding is required for both mitigation and adaptation interventions.

Climate justice

Climate justice means putting equity and human rights at the core of decision-making and action on climate change.

One aspect of climate justice relates to the unequal historical responsibility that countries bear in relation to

the climate crisis. The concept suggests that the countries, industries, and businesses that have become wealthy from activities that emitted the most greenhouse gas emissions have a responsibility to help mitigate the impacts of climate change on those affected, particularly the most vulnerable countries and communities, who often are the ones that have contributed the least to the crisis.

Even within the same country, because of structural inequalities based on race, ethnicity, gender, and socio-economic status, the responsibilities in addressing climate change need to be divided fairly, with the biggest responsibility resting on those who have contributed to, and benefitted from, causing the crisis the most.

Another aspect of climate justice is the intergenerational one. Children and young people today have not contributed to the climate crisis in a significant way but will bear the full force of climate change impacts as they advance through life. Because their human rights are threatened by the decisions of previous generations, they must have a central role in all climate decision-making and action.

Climate overshoot

Under the Paris Agreement, countries are expected to take the necessary measures to avoid dangerous climate change by limiting global warming to well below 2°C and pursuing efforts to limit it to 1.5°C. But even best-case scenarios now indicate a significant chance of overshooting these goals, even if temporarily. Climate overshoot refers to the period during which warming will have increased past 1.5° C, before falling back down. This period will probably occur around the middle of this century but troubling signs are emerging that it may occur even earlier.

The longer the climate overshoot lasts, the more dangerous the world will become. A prolonged period of higher global temperatures will have devastating and irreversible impacts on natural ecosystems, biodiversity, and human communities, particularly in dry areas, coastal zones, and other vulnerable locations. Making deep emission cuts during this decade is of extreme importance to limiting the duration and impacts of the climate overshoot.

Climate security

Climate change can exacerbate food, water, and livelihood insecurity, with cascading effects such as displacement and migration and increased competition over natural resources, all of which can lead to increased tensions and instability in a country or a region.

Furthermore, the impacts of climate change can aggravate or prolong existing violent conflicts and make it more difficult to deliver climate action and to reach and sustain peace.

Climate security refers to evaluating, managing, and reducing the risks to peace and stability brought on by the climate crisis. This means ensuring that climate mitigation and adaptation goes beyond doing no harm and contributes positively to peace and stability. It also means that conflict prevention and peacebuilding interventions take climate impacts into account. The technical solutions to climate action and adaptation can serve as opportunities to build peace and mend the social fabric, especially in countries affected by conflict and fragility.

Climate action can help alleviate the underlying drivers of conflict and fragility. For example, access to renewable energy can be a lifeline which supports clean water, light, warmth, and sustenance, as well as basic and emergency services. It also powers local economic development, while setting countries on a sustainable development pathway to recovery.

COP

The annual United Nations conference dedicated to climate change, called “the Conference of the Parties” or “COP,” has been organized under the UN Framework Convention on Climate Change (UNFCCC) since 1995.

At the 21st COP, or COP21, which took place in 2015, the Paris Agreement was signed.

The conference now brings together all nations who are parties to the Paris Agreement to discuss their next steps to combat climate change and further establish legally binding agreements to support climate action.

Decarbonization

Decarbonization means reducing the amount of greenhouse gas emissions that a society produces, as well as increasing the amount that is being absorbed. It entails changing many, if not all, aspects of the economy, from how energy is generated, to how goods and services are produced and delivered, to how buildings are built and how lands are managed.

To meet the goals of the Paris Agreement and keep the 1.5° target alive, governments and businesses must rapidly decarbonize by 2030. Meaningful decarbonization requires substantial investments in lowcarbon infrastructure and transportation, renewable energy sources, circular economy and resource efficiency, and land and soil restoration. It also requires a rethinking of current economic models that are focused on growth at all costs.

Feedback loop

Climate feedback loops happen when one change in the climate triggers further changes, in a chain reaction that reinforces itself as time goes on. Ultimately, feedback loops can trigger tipping points, at which point the changes to our planet's climate systems become severe and irreversible.

Currently, scientists are aware of some serious feedback loops that are driving global warming. For example, as sea ice in the Arctic melts, more heat is being absorbed by the darker ocean waters, thus speeding up the warming process and leading to more ice melting. Similarly, as wildfires burn down forests, they release greenhouse gases leading to more warming and more wildfires. Other feedback loops include the thawing of the permafrost, forest dieback, and insect outbreaks.

Global warming vs. Climate Change

Global warming is an increase in the Earth's average surface temperature that occurs when the concentration of greenhouse gases in the atmosphere increases. These gases absorb more solar radiation and trap more heat, thus causing the planet to get hotter. Burning fossil fuels, cutting down forests, and farming livestock are some human activities that release greenhouse gases and contribute to global warming.

Climate change refers to the long-term changes in the Earth's climate that are warming the atmosphere, ocean and land. Climate change is affecting the balance of ecosystems that support life and biodiversity, and impacting health. It also causes more extreme weather events, such as more intense and/or frequent hurricanes, floods, heat waves, and droughts, and leads to sea level rise and coastal erosion as a result of ocean warming, melting of glaciers, ad loss of ice sheets.

Green jobs

Green jobs are decent jobs that contribute to protecting and restoring the environment and addressing climate change. Green jobs can be found in both the production of green products and services, such as renewable energy, and in environmentally friendly processes, such as recycling. Green jobs help improve energy and raw material efficiency, limit greenhouse gas emissions, minimize waste and pollution, protect and restore ecosystems, and support adaptation to the impacts of climate change.

As the market for green jobs is expanding, countries must ensure that the workforce is equipped with the specific skills and education required to carry them out. This can be achieved by investing in training young

people for future green jobs and by retraining workers from carbon-intensive industries. The latter is a key part of ensuring countries are pursuing a just transition and leave no one behind.

Gas emissions

Greenhouse gases are gases that trap heat from the sun in our planet's atmosphere, keeping it warm. Since the industrial era began, human activities have led to the release of dangerous levels of greenhouse gases, causing global warming and climate change.

The main greenhouse gases released by human activities are carbon dioxide, methane, nitrous oxide, and fluorinated gases used for cooling and refrigeration. Carbon dioxide is the primary greenhouse gas resulting from human activities, particularly from burning fossil fuels, deforestation, and changing the way land is used. Our reliance on fossil fuels has led to a 50 percent increase in the concentrations of carbon dioxide in the atmosphere over the last 200 years. Methane is another important greenhouse gas that is responsible for 25 percent of global warming. Methane is released during the extraction and transport of coal, gas, and oil, and by waste landfills and agricultural practices.

To prevent catastrophic climate change, the world's governments must work together to significantly reduce greenhouse gas emissions now and in the coming decades and keep global warming below the dangerous threshold of 1.5°C.

Greenwashing

With public pressure to address the climate crisis rising, private sector companies are joining the transition to a low-carbon global economy. However, their efforts can sometimes turn into more of a marketing exercise than real, meaningful action.

Greenwashing refers to situations where a company makes misleading claims about their positive environmental impact or the sustainability of their products and services to convince consumers that they are acting on climate change. In some cases, greenwashing can be unintentional, because of lack of knowledge on environmental issues. However, it can also be carried out intentionally as a marketing and public relations exercise, exploiting public support towards environmental policies for profit.

Greenwashing can erode public confidence in sustainability and allow negative environmental impacts to continue unabated.

Indigenous knowledge

Indigenous Peoples' ways of life are inherently low-carbon and emphasize balance between humans and the natural world. Their traditional practices have low impact on the environment and are responsive to it, fostering self-sustaining ecosystems.

Indigenous Peoples were among the first to notice climate change and their knowledge and practices help navigate and adapt to its impacts. Indigenous knowledge, which is intergenerational and communitybased, is a great source of meaningful climate solutions that can advance mitigation, enhance adaptation, and build resilience. It can also complement scientific data with precise landscape information that is critical to evaluating climate change scenarios.

Indigenous Peoples protect an estimated 80 percent of the world's remaining biodiversity yet continue to be largely excluded from almost all global decision-making processes on climate change. Their collective knowledge, valuable insights, and rights to their ancestral lands, territories and resources, and their way of life must be recognized and included across climate policies and actions.

IPCC

The Intergovernmental Panel on Climate Change (IPCC) is an independent body founded under the auspices of the World Meteorological Organization (WMO) and the United Nations Environment Programme (UNEP).

The IPCC's main role is to assess the scientific literature and findings on climate change and provide vital scientific information and evidenced-based recommendations to policymakers and the public. It is widely recognized as the most credible source of information related to the science of climate change and its complex analysis of impacts, risks, and adaptation and mitigation options.

Just transition

In the context of climate change, transitioning to a low-carbon or netzero economy requires massive transformation of our economic systems. Such transformation runs the risk of further increasing social inequality, exclusion, civil unrest, and less competitive businesses, sectors, and markets.

As countries work to meet their climate goals, it's vital that they ensure the whole-of-society – all communities, all workers, all social groups – are brought along and part of the structural change that takes place.

Ensuring a just transition means that countries choose to green their economy through transition pathways and approaches that reinforce equality and inclusivity. This means looking at the impacts of the transition on different groups of workers across the economy and providing opportunities for training and reskilling that support decent work and aim to leave no one behind.

Loss and damage

There is no agreed definition of "Loss and damage" in the international climate negotiations. However, the term can refer to the unavoidable impacts of climate change that occur despite, or in the absence of, mitigation and adaptation. Importantly, it highlights that there are limits to what adaptation can accomplish; when tipping point thresholds are crossed, climate change impacts can become unavoidable.

Loss and damage can refer to both economic and non-economic losses. Economic loss and damage can include things like the costs of rebuilding infrastructure that has repeatedly been damaged due to cyclones or floods, or the loss of coastline land (and homes and businesses) due to sea-level rise and coastal erosion.

Non-economic loss and damage include negative impacts that can't be easily assigned a monetary value. This can include things such as trauma from experiencing a climate-related natural disaster, loss of life, the displacement of communities, loss of history and culture or loss of biodiversity.

Long-term strategies

Under the Paris Agreement, countries are invited to communicate long-term strategies (LTS) for emissions reductions that envision a whole-of-society transformation over several decades, usually up to 2050. LTS documents align to the long-term objectives of limiting global warming and achieving net-zero by 2050.

Long-term strategies provide a long-term vision that gives coherence and direction to shorter-term national climate pledges like the NDCs.They guide countries to pursue low-carbon development and prevent fossil fuel-intensive investments, demonstrating the socioeconomic benefits of the green transition. They boost innovation and can help drive investment in low-carbon solutions and sustainable infrastructure. And they help facilitate and promote just and equitable transitions for the people who are most affected, making sure that climate solutions are fair and inclusive.

When countries officially communicate their LTS to the UNFCCC it is called a Long-Term Low Emission Development Strategy (LT-LEDS).

Mitigation

Climate change mitigation refers to any action taken by governments, businesses, or people to reduce or prevent greenhouse gas emissions, or to enhance carbon sinks that remove these gases from the atmosphere.

Reducing or preventing greenhouse gas emissions can be achieved by transitioning to renewable energy sources like wind and solar, using energy more efficiently, adopting low carbon or carbon-free transportation modalities, promoting sustainable agriculture and land use, and changing production and consumption models and diet behaviors. Enhancing carbon sinks can be achieved by restoring forests, wetlands, and marshlands, maintaining soil health, and protecting terrestrial and marine ecosystems.

In order for mitigation actions to be successful, it is crucial that countries develop supportive environments through legislation, policies, and investments.

To limit global warming to 1.5° C, which is the critical goal of the Paris Agreement, the world must implement climate change mitigation actions to reduce greenhouse gas emissions by 45 percent before 2030 and reach net-zero greenhouse gas emissions by midcentury.

Nationally Determined Contributions

Nationally Determined Contributions (NDCs) are climate pledges and action plans that each country is required to develop in line with the Paris Agreement goal of limiting global warming to 1.5° C. NDCs represent short to medium-term plans that are updated every five years with higher ambition on climate.

NDCs outline mitigation and adaptation priorities a country will pursue to reduce greenhouse gas emissions, build resilience, and adapt to climate change, as well as financing strategies and monitoring and verification approaches. In 2023, the first in a series of global “stock takes” will conclude that assesses progress on the implementation of NDCs and Paris Agreement goals.

National Adaptation Plans

National Adaptation Plans (NAPs) help countries plan and implement actions to reduce vulnerability to the impacts of climate change and strengthen adaptive capacity and resilience. NAPs link to Nationally Determined Contributions (NDCs) and other national and sectoral policies and programmes.

For NAPs to be successful they need to be participatory, inclusive, gender-responsive, and transparent. This means that at the design stage, NAPs need to evaluate the specific needs and vulnerabilities of different groups in the country, paying particular attention to those most vulnerable to climate change impacts and involving them in developing and implementing strategies and programmes.

Nature-based solutions

Nature-based solutions are actions to protect, conserve, restore, and sustainably use and manage ecosystems to support climate change adaptation and mitigation efforts, preserve biodiversity, and enable sustainable livelihoods. They are actions that prioritize the importance of ecosystems and biodiversity and are designed and implemented with the full engagement and consent of local communities and Indigenous Peoples, who hold generational knowledge on protecting nature.

Nature-based solutions are used in many ways, across terrestrial, freshwater, coastal, and marine ecosystems. Restoring wetlands protects communities from floods, while conserving mangrove forests supports food sources and minimizes the impact of storms. Forests absorb carbon dioxide, allow biodiversity to thrive, increase water security, and combat landslides, while urban parks and gardens help cool down cities and limit the impact of heatwaves. Regenerative agriculture practices increase the amount of carbon captured by the soil and restore its health and productivity.

Nature-based solutions are seen as a win-win for people and nature, addressing multiple problems at once. They can create jobs, provide new and more resilient livelihood opportunities, and increase income while also protecting the planet and addressing climate change.

Net zero

Reaching net zero requires us to ensure that carbon dioxide emissions from human activity are balanced by human efforts to remove carbon dioxide emissions (for example, by creating carbon sinks to absorb carbon dioxide) - thereby stopping further increases in the concentration of greenhouse gases in the atmosphere.

Transitioning to net zero requires a complete transformation of our energy, transportation, and production and consumption systems. This is necessary to avert the worst consequences of climate change.

To keep global warming below 1.5° C, the world's governments need to ensure that all greenhouse gas emissions peak by 2025, and reach net zero in the second half of this century. The IPCC has recommended to reduce CO2 emissions globally by 45% before 2030 (compared to 2010 levels) and reach net zero by mid-century.

Paris Agreement

The Paris Agreement is a legally binding international treaty aiming to limit global warming to well below 2° C, preferably to 1.5° C, compared to pre-industrial levels. It was adopted by 196 Parties in 2015 at COP21 in Paris and entered into force in 2016.

The Paris Agreement is a landmark achievement in international cooperation on climate change because it is a binding agreement for all Parties to scale up efforts to combat climate change and adapt to its effects. It also provides the instruments for developed nations to assist developing nations in their climate mitigation and adaptation efforts, while creating a framework for transparent monitoring and reporting of results

Reforestation vs. Afforestation

Forests provide immense benefits by removing carbon dioxide and pollutants from the atmosphere, preventing soil erosion, filtering water, and housing half of the world's land species of animals, plants and insects. Reforestation and afforestation are two of the most effective nature-based solutions in fighting climate change and limiting its impacts.

Reforestation is the process of replanting trees in areas that had recent tree cover but where forests were lost, due to wildfires, drought, disease, or human activity such as agricultural clearing. Afforestation is the process of planting trees in areas that have not been forested in recent history. Afforestation helps restore abandoned and degraded agricultural lands, prevent desertification, create carbon sinks, and generate new economic opportunities for local communities.

REDD+

Forest conservation and restoration can provide more than one quarter of the greenhouse gas emissions reductions needed to avoid the worst impacts of climate change. REDD+ is a framework agreed by countries in the international climate negotiations that aims to curb climate change by reducing deforestation and forest degradation, and sustainably managing and conserving forests in developing countries.

REDD stands for "Reducing Emissions from Deforestation and forest Degradation". The "+" signifies the role of conservation, sustainable management of forests and enhancement of forest carbon stocks.

Regenerative agriculture

Regenerative agriculture is a way of farming that nurtures and restores soil health, and therefore reduces water use, prevents land degradation, and promotes biodiversity. By minimizing land ploughing, practicing rotating crops, and using animal manure and compost, regenerative agriculture ensures that the soil stores more carbon, conserves more moisture, and is healthier due to thriving fungal communities.

Intensive agriculture is responsible for a third of global greenhouse gas emissions, uses 70 percent of the fresh water we consume, and leads to soil degradation through its use of heavy machinery, chemical fertilizers, and pesticides. It is also the biggest contributor to biodiversity loss. By contrast, regenerative agriculture helps lower greenhouse gas emissions, conserves water, and restores land. Moreover, healthy soil produces more food and better nutrition and has other positive impacts on ecosystems and biodiversity.

Renewable energy

Renewable energy is energy derived from natural sources that are constantly being replenished, such as wind, sunlight, the flow of moving water, and geothermal heat. In contrast to energy sourced from fossil fuels like coal, oil, and gas, which accounts for 75 percent of the harmful greenhouse gas emissions that are causing climate change, energy from renewable sources is cheap, clean, sustainable, and generates more jobs.

Transitioning from fossil fuels to renewable energy in all sectors – power, heating and cooling, transportation, and industry – is key to addressing the climate crisis. To stay under 1.5°C of global warming, the world needs to immediately phase out fossil fuel use and undergo a profound transformation of the energy system through rapid electrification and sourcing energy from renewable sources.

In 2022, renewable sources provided 29 percent of global electricity. With the right investments, electricity from renewable sources could provide 65 percent of the world's total electricity supply by 2030.

Resilience

Climate resilience is the capacity of a community or environment to anticipate and manage climate impacts, minimize their damage, and recover and transform as needed after the initial shock.

To best safeguard societal wellbeing, economic activity, and the environment, people, communities, and governments need to be equipped to deal with the unavoidable impacts of climate change. This can be done by training people to obtain new skills and diversify the sources of their household income, building more robust disaster response and recovery capacities, enhancing climate information and early warning systems, and working on long-term planning, among others.

Ultimately, a truly climate-resilient society is a low-carbon one, because drastically reducing greenhouse gas emissions is the best way to limit how severe climate impacts will be in the future. It is also a society based in equity and climate justice that prioritizes support for people and communities most exposed to climate impacts or least able to cope with them.

Rewilding

Rewilding is the mass restoration of ecosystems that have been damaged by human activity. More than conservation, which focuses on saving specific species through dedicated human intervention, rewilding refers to setting aside large areas for the natural world to regenerate in on its own terms. This sometimes requires the reintroduction of key species that have been driven extinct in a particular region, such as beavers, wolves, or large herbivores, who help shape entire ecosystems.

Rewilding can help combat climate change by removing more carbon dioxide from the atmosphere through healthy natural processes such as natural woodland regeneration. It also helps prevent species extinction by creating nature-rich habitats that allow wildlife to adapt to climate change and migrate as warming intensifies

Tipping point

A tipping point is a threshold after which certain changes caused by global warming and climate change become irreversible, even if future interventions are successful in driving down average global temperatures. These changes may lead to abrupt and dangerous impacts with very serious implications for the future of humanity and our planet.

As the world gets hotter, several tipping points are becoming very likely. One of them is the collapse of the Greenland and West Antarctic ice sheets, which would lead to significant sea level rise and threaten coastal communities and ecosystems. Another is the thawing of the permafrost in the tundra regions, which will release huge quantities of trapped greenhouse gases, further accelerating global warming and climate change. Mass coral bleaching events and the destruction of rainforests are two other major tipping points with immense implications for both biodiversity and human societies.

Transparency

Under the Paris Agreement, countries must regularly report on the implementation of their Nationally Determined Contributions. It is crucial that this reporting is done with transparency to allow the global community to accurately assess collective progress and build trust that everyone is playing their part.

Transparent reporting allows governments and international bodies to have access to reliable data and make evidence-based decisions. It also enhances our scientific understanding of climate change and the actions and policies needed to mitigate it and adapt to its impacts. Ultimately, transparency is key to unlocking the full potential of the Paris Agreement, by promoting trust, collaboration and knowledge transfer and encouraging further ambition on climate targets.

UNFCCC

The United Nations Framework Convention on Climate Change (UNFCCC) is an international environmental treaty adopted in 1992 to combat dangerous human interference with the climate system. It entered into force in 1994 and enjoys near universal membership, having been signed by 198 parties. It is the parent treaty of both the Paris Agreement and the Kyoto Protocol.

The UNFCCC secretariat is the United Nations entity tasked with supporting the global response to the threat of climate change. The secretariat facilitates intergovernmental climate change negotiations by organizing between two and four negotiating sessions each year, the largest and most important of which is the Conference of the Parties (COP). It also provides technical expertise and assists in the analysis and review of climate change information and maintains the registry of Nationally Determined Contributions (NDC).

Weather vs. Climate

Weather refers to atmospheric conditions at a particular time in a particular location, including temperature, humidity, precipitation, cloudiness, wind, and visibility. Weather conditions do not happen in isolation, they have a ripple effect. The weather in one region will eventually affect the weather hundreds or thousands of kilometers away.

Climate is the average of weather patterns in a specific area over a longer period of time, usually 30 or more years, that represents the overall state of the climate system.

Human activity in the industrial age, and particularly during the last century, is significantly altering our planet's climate through the release of harmful greenhouse gases.

AFRICA

Case 1

THE REPUBLIC OF UGANDA

IN THE SUPREME COURT OF UGANDA, AT KAMPALA

(CORAM: KATUREEBE; TUMWESIGYE; KISAAKYE; ARACH-AMOKO; ODOKI,TSEKOOKO;

OKELLO; JJ.S.C.).

CONSTITUTIONAL APPEAL NO. 05 OF 2011 B E T W E E N

AMOOTI GODFREY NYAKAANA :: APPELLANT AND

NATIONAL ENVIRONMENT MANAGEMENT AUTHORITY

ATTORNEY GENERAL

ADVOCATES COALITION FOR DEVELOPMENT & ENVIRONMENT

ENVIRONMENT ALERT :::::::::::::::::::::::::::::::: RESPONDENTS

GREENWATCH

UGANDA WILDLIFE AUTHORITY

THE ENVIRONMENTAL ACTION NETWORK

(Appeal from the Judgments and Orders of the Constitutional Court at Kampala, A.E. Mpagi- Bahigeine, A. Twinomujuni, C.N.B. Kitumba, C.K. Byamugisha and S.B. Kavuma, JJA, dated 9th November 2009 in Constitutional Petition No. 03 of 2005).

JUDGMENT OF B. M. KATUREEBE, CJ.

This appeal raises issues pertaining to environmental protection vis-à-vis individual property rights, and the Constitutionality of certain sections of the National Environment Act.

BACKGROUND.

The appellant filed a Constitutional Petition in the Constitutional Court (Constitutional Petition No. 03 of 2005) under the provisions of Article 137 (3) of the Constitution and Rule 3 of the Rules of that Court. In that Petition, the appellant challenged the Constitutionality of Sections 67, 68 and 70 of the National Environment Act (Cap 153) Laws of Uganda. He contended that the impugned sections contravene and are inconsistent with Articles 21, 24, 26, 28, 42, 44, 237 and 259 of the Constitution. He further contended that the impugned sections also contravene and are inconsistent with various international Human Rights Conventions and Instruments entrenched in the Constitution under Articles 20 and 45 of the Constitution. The appellant sought declaration and orders for redress.

There is no dispute as to the facts giving rise to the Petition. The appellant was the registered proprietor of land comprised in Leasehold Register Volume 3148 Folio 2 Plot 8 Plantation Road, Bugolobi, Kampala. He

obtained the lease from the then Kampala City Council for the purpose of constructing a residential house. He subsequently applied for and obtained the necessary approvals for the said construction and commenced work. In June 2004 environmental inspectors from the first respondent carried out an inspection of Nakivubo Wetland located in Nakawa Division. According to the inspectors, the appellant's house was in the wetland.

A meeting of residents and the inspectors was arranged whereby the residents were briefed about their properties being in the wetland. The appellant attended the meeting. The appellant refused to heed all calls to halt his construction. The 1st respondent then issued a restoration order and had it served on the appellant. The restoration order required the appellant to comply with certain conditions, including demolition of the house, within a period of 21 days. He failed or refused to do so, consequently the 1st respondent demolished the building on 8th January 2005. The appellant filed his petition.

At the hearing of the Petition before the Constitutional Court, only one issue was agreed to by the parties;

namely, whether sections 67, 68 and 70 of the National Environment Act are inconsistent or contravene Articles 21, 22, 24, 26, 27, 28, 43, 237 and 259 of the Constitution.

The Constitutional Court resolved the issue in favour of the respondents – hence this appeal.

Grounds of Appeal:

In this Court the appellant filed 11 grounds of appeal as follows:-

1. The Honourable learned Justices of the Constitutional Court erred in law and fact when they proceeded to decide the matter on the premise that the appellant's land was a wetland.

2. The Honourable learned Justices of the Constitutional Court erred and misdirected themselves in law and fact when they equated a restoration order to a charge sheet that commences the prosecution of a person who is charged with a criminal offence.

3. The Honourable learned Justices of the Constitutional Court erred in law and fact when in determining the purpose and objective of Section 67 they instead considered the main objectives of the National Environment Act.

4. The Honourable learned Justices of the Constitutional Court erred in law and fact when they held that the appellant had to show that the procedures laid down in the Section are as insufficient to achieve justice without frustrating the intention of the legislation.

5. The Honourable learned Justices of the Constitutional Court erred in law and fact when they held that the appellant failed to show that the safeguard contained in the impugned sections are insufficient to accord the appellant or anyone else a fair hearing.

6. The Honourable learned Justices of the Constitutional Court erred in law and fact when they found and held that the appellant's

   proprietory rights were not infringed by the acts of the respondents

7. The Honourable learned Justices of the Constitutional Court erred in law and fact when they found and held that what was taken away from the appellant was misuse of the land in order to protect the environment.

8. The Honourable learned Justices of the Constitutional Court erred in law and fact when they priotised and gave undue preference to NEMA over the effect of the challenged Section 69.

9. The Honourable learned Justices of the Constitutional Court erred in law and fact when they failed to evaluate and appreciate the effect of the challenged provisions on the rights of the appellant guaranteed under Articles 26 and 28 of the Constitution.

10. The Honourable learned Justices of the Constitutional Court erred in law and fact when they awarded costs to the 3rd, 4th, 5th, 6th and 7th respondents whose participation in the Constitutional Petition was voluntary and in defence of the public interest.

11. The Honourable learned Justices of the Constitutional Court erred in law and fact when in a matter of great public interest and concern ordered the appellant to pay costs to the respondent."

The parties all filed written submissions. At the hearing, the appellant was represented by Mr. Mohammed Mbabazi, while Ms. Christine Akello, Senior Legal Counsel, represented the 1st respondent, Mr. George Kalemera, Senior State Attorney represented the 2nd respondent and Ms. Sarah Naiga represented the 3rd, 4th, 5th, 6th, and 7th respondents.

Submissions of Counsel:

Counsel for the appellant argued all the 11 grounds of appeal jointly. He summarized what he called the main thrust and gravamen of the appeal in the following sub-issues; namely, whether the appellant's certificate of title, physical land and house constructed on the property constituted property with rights guaranteed and protected under the Constitution; whether the appellant's property was a wetland subject to the management of the 1st respondent; and whether the method and procedure of demolishing the appellant's house and stopping him from using his land under sections 67, 68 and 70 of the National Environment Act was consistent with Articles 21, 22, 24, 26, 27, 28, 42, 44, 237 and 259 of the Constitution.

Counsel argued that the issuance and service on the appellant of the Environmental Restoration Order under Sections 67 and 68 of the National Environment Act and subsequent demolition of his house infringed on his right to fair hearing enshrined in Articles 28(1) 42 and 44 of the Constitution. To him, the appellant should have been given an opportunity to be heard before the restoration order could be served on him. He strongly criticized the Constitutional Court for using the analogy of a charge sheet with a restoration order. He contended that a restoration order is a judicial or adjudicatory decision, judgment or order like that of a tribunal which necessitated the appellant being heard before it could be issued. He submitted therefore that the court had erred both in law and fact in equating this type of order to a charge sheet in a criminal trial. To counsel, there should have been an impartial and independent body to adjudicate between the investigation findings on one side and the appellant's defence on the other. It is only after this was done that a restoration order could be given. He asserted that the impugned Section 67, 68 and 70 of the National Environment Act do not allow the exercise of the right to fair hearing by the person receiving the restoration order. He particularly pointed out that section 68(7) expressly denies the person, like the appellant, the opportunity of being heard or making representations to the person conducting the inspection. Thus the restoration order had deprived him of his property which had to be demolished. Counsel contended that the 1st respondent was the accuser, investigator, prosecutor and judge that made the decision to serve the Environment Restoration Order. Counsel cited the case of **DIEDRICHS – SHURLAND & 25 ANOTHER –Vs- TALANGA – STIFTUNG & ANOR.**

(THE BAHAMAS [2006] UKPC 58 which emphasized and expounded on the right to be heard. He further cited what he called "a plethora of authority" on the right to fair hearing and principles of natural justice.

In support of his argument that the 1st respondent acted as a tribunal, he cited the decision of this court in **JOHN KEN LUKYAMUZI –Vs- THE ATTORNEY GENERAL & THE ELECTORAL COMMISSION:** SCCA NO. 2 OF 2007 for the definition of the term "tribunal." He further cited RIDGE –Vs- BALDWIN AND OTHERS [1963] 2 ALL ER for the proposition that a body clothed with powers to decide cannot lawfully proceed without affording the person to be affected with an opportunity to be heard.

Counsel further relied on the decision of this Court in **MPUNGU & SONS TRANSPORTERS LTD –Vs- ATTORNEY GENERAL & KAMBE COFFEE FACTORY (COACH) LTD. SCCA**

NO. 17 OF 2001 on the application of the audi alteram partem rule.

Counsel concluded by submitting that the procedure of issuing an Environment Restoration Order without affording the appellant the right to be heard is a violation of the principle of fair hearing and natural justice, therefore, sections 67, 68 and 70 of the National Environment Act be declared null and void for being inconsistent with Articles 28, 42 and 44 of the Constitution.

On property rights, counsel sought to rely on Article 26 of the Constitution. He contended that as a lawful and registered proprietor of the land, he had been deprived of his property without compensation contrary to Article 26 of the Constitution, and without being given an opportunity to be heard, contrary to Article 28 of the Constitution. He further contended that far reaching powers that affect individual property ought to be exercised judicially after hearing all parties involved. He once again relied on RIDGE –Vs- BALDWIN AND OTHERS [1963] 2 All ER (supra) in support of his argument.

Counsel then turned to the question as to whether the appellant's land was in fact a wetland. He contended that it was not, in so far as it had not been so declared as required by the NEMA ACT and the National Environment (Wetlands, River Banks and Lake Shores Management) Regulations, 2000. Counsel submitted that under those regulations, it was a condition precedent before any land could be taken to be a wetland that the same be so declared and gazetted. It was also necessary to keep a national register of wetlands which had been so declared. Counsel contended that this had never been done. Therefore, his land was not a wetland and any interference with his property rights, leading to the demolition of his house was illegal and in contravention of his rights under Article 26 of the Constitution.

Counsel further argued that the appellant's privacy rights had been violated when the officers of the 1st respondent entered onto his land, contrary to Article 27 of the Constitution. Furthermore, the demolition of the appellant's property constituted a cruel and inhuman treatment of the appellant. He claimed that the appellant had been shot in the course of demolishing the house.

Finally, counsel submitted that sections 67, 68 and 70 of the National Environment Act varied and/or altered articles 21, 22, 24, 26, 27. 28 42, 44, 237 and 259 of the 25 Constitution thereby amending the said provisions of the Constitution by infection. He cited, in support, the case of **PAUL KAWANGA SSEMOGERERE -Vs- ATTORNEY 5 GENERAL: SCCA NO. 1 OF 2002.**

Counsel prayed that the appeal be allowed and consequential orders be made as prayed for.

In reply, Court for the 1st respondent first raised a preliminary point of law that the matters complained of did not raise any matter for constitutional interpretation and ought to be dismissed.

Counsel for the 1st respondent submitted that the right to private property is not an absolute right. It is subject to Article 237 of the Constitution. The right to own property is subject to the public trust doctrine. She noted that all wetlands are held in trust and are protected by the government or local government for the common good of the citizens of Uganda. It is in furtherance of the public trust doctrine that the law prohibits leasing or alienation of wetlands.

Counsel for the 1st respondent further stated that it was not necessary that a wetland should be gazetted before it can be protected and she relied on Article 237(2) (b) of the Constitution. With regard to the right to privacy in relation to property, she noted that this arises only where there is a legitimate right to that property and no such ownership of property exists in the appellant's case.

Counsel for the second respondent adopted the first respondent's submissions and relied on Articles 237(b) of the Constitution and section 44(1) of the Land Act (Cap 227) Laws of Uganda.

On his part, counsel for the 3rd, 4th, 5th, 6th, and 7th respondents emphasized the constitutional provisions to protect the environment for the good of the country as a whole. He submitted that under the National Environment Act, special procedural requirements apply to developments likely to have significant impact on the environment especially if carried out in an environmentally sensitive area. The construction of a residential house in a wetland was an activity that was likely to impact on the environment, and should have been approved by the 1st respondent in accordance with the law. Counsel did not accept that the appellant's

right to fair hearing had been compromised in any way, and submitted that the authorities relied on by the appellant were irrelevant. Counsel fully supported the findings and decision of the Constitutional Court on this point. Counsel also submitted that the actions of the 1st respondent did not interfere with the property rights of the appellant. What was at stake was whether the use of land conform with the law on protection of the environment.

The Preliminary Point of Law:

As indicated above, both the 1st and 2nd respondent raised a preliminary point of law that the matters complained of by the appellant did not raise a matter for Constitutional interpretation, but rather were concerned with enforcement of rights. To them, this should have been addressed to the appropriate court under Article 50 of the Constitution.

I note that this same issue was raised before the Constitutional Court. That Court overruled the objection and proceeded to hear the case. The respondents did not cross-appeal against that decision, but have continued to raise the matter in their submissions as if there was no decision. It is also to be noted that in the Constitutional Court, according to the lead judgment of Byamugisha, JA., the parties agreed on one issue namely:-

"whether sections 67, 68 and 70 of the Nema Act are inconsistent or contravene Articles 21, 22, 24, 26, 27,28, 43, 237 and 259 of the Constitution."

It is that issue that the Constitutional Court determined which decision has given rise to this appeal.

Article 137(3) (a) of the Constitution states as follows:-

137 - (3) "A person who alleges that:-

(a) an Act of Parliament or any other law or anything in or done under the authority of any law…is inconsistent with or in contravention of a provision of this Constitution, may

petition the Constitutional Court for a declaration to that effect, and for redress where appropriate."

This provision clearly sets out the jurisdiction of the Constitutional Court to construe and interpret Acts of Parliament in relation to the Constitution. This court has considered the issue of the jurisdiction of the Constitutional Court in a number of decisions.

In **PAUL K. SSEMOGERERE, ZACHARY OLUM AND JULIET RAINER KAFIRE –Vs- ATTORNEY GENERAL**, Const. App. No. 1 Of 2002, the court held that when it comes to interpretation of the Constitution or to determine whether a given Act or provision is inconsistent with the Constitution, the Constitutional Court is vested with unlimited and unfettered jurisdiction.

The same had been held in **ATTORNEY GENERAL -Vs- MAJOR GENERAL TINYEFUZA**, Const. App. No. 1 of 1997. Additionally it was also decided that the Constitutional Court can grant remedies after making the appropriate declarations.

Given the issue that was agreed in the Constitutional Court, and given the clear provisions of the Constitution, I find it untenable for the respondents to be raising their preliminary point of law even at this stage. It is entirely without merit and accordingly I dismiss it.

The Issues:

In his written submissions before this Court, the appellant's counsel contended that although there were eleven grounds of appeal, "The main thrust and gravamen of this appeal" could be summarized in three issues:

a) "Did the appellant's certificate of title, physical land and house constructed thereon constitute property with rights guaranteed and protected under the Constitution?

b) "If yes, was the appellant's property a wetland subject to the management of the 1st respondent?

c) "If yes, was the method and procedure of demolishing the appellant's property and stopping him from using his land under sections 67, 68 and 70 of the NEMA ACT, consistent with Articles 21, 22, 24, 26, 27, 28, 42, 44, 237 and 259 of the Constitution."

The appellant's submissions outlined above seek to show that the appellant was wronged as alleged and therefore he is entitled to remedies.

I will deal with each of the issues as raised above.

To answer these issues one has to consider and construe a number of provisions of the Constitution. These include provisions relating to land ownership, land use, protection of fundamental human rights and protection of the environment.

In construing these provisions one has to bear in mind some of the principles of Constitutional interpretation as laid out by this Court. In **PAUL K. SSEMOGERERE AND 2 OTHERS –Vs- ATTORNEY GENERAL**, CONST. APP. NO. 1 of 2002, it was held that in interpreting the Constitution, the entire Constitution has to be read as an integrated whole with no particular provision destroying the other but each sustaining the other so as to promote harmony of the Constitution. It has been further held that all provisions bearing on a particular issue should be considered together so as to give effect to the purpose of the Constitution (or statute) as the case may be – **SOUTH DAKOTA –Vs- 5 NORTH COROLINA, 192, US 268 (1940) LED 448.**

Since the appeal involves the issue of protection of fundamental human rights, we shall also be guided by the principle that the Constitution and particularly that part which protects and entrenches fundamental rights and freedoms must be given a generous and purposive interpretation to realize the full benefit of the right guaranteed, and both purpose and effect are important in determining constitutionality.

The first issue touches on the appellant's right to own property. The following provisions of the Constitution are relevant:

Article 26 states as follows:

(1) "Every person has a right to own property either individually or in association with others.

(2) No person shall be compulsorily deprived of property or any interest in or right over property of any description except when the following conditions are satisfied-

(a) the taking of possession or acquisition is necessary for public use or in the interest of defence, public safety, public order, public morality or public health; and

(b) the compulsory taking of possession or acquisition of property is made under a law which makes provision for-

(i) prompt payment of fair and adequate compensation, prior to the taking of possession or acquisition of the property; and

(ii) a right of access to a court of law by any person who has an interest or right over the property."

The next article we should consider is Article 237 on Land Ownership. It states as follows-(in so far as relevant)

237 (1) "Land in Uganda belongs to the citizens of Uganda and shall vest in them in accordance with the land tenure systems provided for in this Constitution.

(2). "Notwithstanding clause (1) of this Article

(b) the Government or a local government as determined by Parliament by law shall hold in trust for the peo-

ple and protect natural lakes, rivers, wetlands, forest reserves, game reserves, national parks and any land to be reserved for ecological and tourist purposes for the common good of all citizens." (emphasis added).

Clause 3 of the articles sets out the land tenure systems which include leasehold. The appellant falls within this category as he owns the land in question by leasehold title from Kampala District Land Board.

The next relevant article is article 242 on land use. It states as follows:-

242:"Government may, under laws made by Parliament and policies made from time to time, regulate the use of land."

Article 245 on Protection and preservation of the environment is particularly relevant to this appeal. It states as follows:-

245 "Parliament shall, by law, provide for measures intended-

(a) to protect and preserve the environment from abuse, pollution and degradation;

(b) to manage the environment for sustainable development; and

(c) to promote environmental awareness.

An analysis of the above provisions of the Constitution points to the principle that although one has a right to own land through one of the systems of land tenure listed in the Constitution, there may be situations which necessitate the government either to take over that land, or to regulate its use for purposes of promoting and protecting the environment for the common good of all the people of Uganda.

That is why Article 237(2) starts with the words "Notwithstanding clause(1) of this article" To my understanding, if a person owns by leasehold or any other form of tenure, some land, and that land contains a wetland, his ownership does not preclude the government from protecting that wetland provided it is done under the law made by Parliament. Under article 242, the government may regulate the use of the land. Thus, the government may require that one uses the land for agriculture instead of housing construction if that will be for the common good of the people.

Similarly, under article 245, Parliament has made the law whose purpose is to protect and preserve the environment. That law is the National Environment Act. That law is the instrument that the State has to use to protect the environment from abuse, pollution and degradation. 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 which 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.

Therefore, the first question must be answered as follows:

The appellant's certificate of title, physical land and house constructed thereon did constitute property with rights guaranteed and protected by or under the Constitution. But the property was also affected by other provisions of the Constitution which must be read together. Whether the land was leased to him by the Kampala City Council or any other authority is beside the point. Even the Kampala City Council ownership would be subject to the Constitutional provisions regarding protection of the environment.

With respect, the appellant's counsel failed to appreciate that Article 26 of the Constitution has to be read together with Article 237(1) and 237(2) (b) as well as with articles 242 and 245. The facts of this case clearly show that the appellant was advised on the improper use to which he was putting the land, i.e. constructing a house in an area said to be a wetland. He was not being deprived of his property. Furthermore, if counsel had studied the leasehold title that is held by the appellant he would have seen that the leasehold is subject to the provisions of the Land Act and rules made/saved there under. This should have directed him to look at the relevant provisions of the Land Act, i.e. Section 23, 43 and 44. Section 43 of the Land Act particularly requires the owner of any land to manage or utilize land in accordance with, inter alia, the National Environ-

ment Act. Section 43 states as follows:-

“A person who owns or occupies land shall manage and utilize the land in accordance with the Forest Act, the Mining Act, the National Environment Act, the Uganda Wildlife Act, and any other law.”

This applies to all land owners including urban authorities like Kampala City Council and all who derive title from them.

Counsel treated the right of the appellant to own property as an absolute right that could not be fettered in any way. But Article 43 of the Constitution requires that in the enjoyment of their rights and freedoms, persons do not prejudice the rights and freedoms of others. Laws like the Land Act or the National Environment Act are specifically provided for in the Constitution to help ensure that when people exercise their rights over their property, they do not prejudice the rights of others or the public interest. This is what could conceivably happen if one obstructed a stream or wetland. Other persons would be affected either by suffering floods or drying up water sources. This must be addressed under the National Environment Act.

I agree with the judgment of the Constitutional Court that the appellant’s proprietary rights were not taken away by the acts of the 1st respondent. He was only prevented from misusing the land.

The next question to answer is whether the appellant’s land was a wetland subject to the management of the 1st respondent. This issue was never canvassed in the Constitutional Court and no findings or decision was made thereon. I have already set out the one issue that was argued for determination by that court and which the court decided on. It is that decision that is before this court on appeal. It should not be proper for this court to entertain matters which were not raised and decided upon in the lower court, which could have called evidence on the matter. Be that as it may, I note that the Petition of the appellant itself did not raise the issue of whether his land was a wetland. He only raised issues of property rights and fair hearing. It is only in his affidavit in support of the Petition that he stated in paragraphs 17 and 18 thereof that he knew his land was not a wetland, and that Kampala District Land Board could not have allocated to him land in a wetland. He stated further that there was no gazettement to that effect. This was replied to by the 1st respondent in the affidavit of Festus Bagoora in support of the reply to the Petition, in paragraph 8 (f) and (g) where he states thus:-

8(f) “That wetlands are defined by section 1 of the National Environment Act and are not determined at the discretion of 1st respondent, nor are the Petitioner or the Kampala District Land Board authorities on wetlands; and that therefore, neither the Petitioner nor the Kampala District Land Board can make a finding on whether or not the Petitioner’s suit property is in a wetland.”

8(g) “That gazettement is not a pre-condition for protection of wetlands, which protection is accorded by law under Article 237(2) (b) of the Constitution, Section 44(4) of the Land Act, Section 36 of the National Environment Act and the National Environment (Wetlands,

River Banks and Lake shores Management) Regulations, S.I No. 3/2000.”

It is important to note that the appellant had notice that his property was being considered to be in a wetland. Thus he was invited to, and he did attend, a Community Sensitization meeting held at Lidia Marchi Youth Centre near Bugolobi on 26th July 2004 where all the residents were advised that they were in a wetland and that they should suspend all activities. He chose to ignore this advice and continued his construction. Environmental Inspectors from NEMA, Kampala City Council and the Wetlands inspection Division visited him several times and advised him accordingly. He refused. [See Annecture K, Letter of the Executive Director NEMA to the appellant dated 5th January 2005.] This same letter states as follows in the first paragraph:-

“Nakivubo wetland was gazetted as a critical wetland in Kampala District and its boundaries are still being mapped out. This wetland includes where you are constructing an illegal structure along Plantation Road in Bugolobi, Nakawa Zone. You were served with a Restoration Order”

The statement in the above letter that Nakivubo wetland was gazette as a critical wetland in Kampala was never challenged.

In subsequent proceedings before the Constitutional Court, i.e. in the conferencing notes or indeed in submissions before the court the issue of whether the appellant's land was a wetland was never raised again. The matter proceeded on the basis that it was a wetland, but concentrated on whether sections 67, 68 and 70 of the National Environment Act were consistent with Articles 21, 22, 24, 26, 27, 28, 42, 44, 237 and 259 of the Constitution.

On the basis of the record before me, I answer the issue in the affirmative that the appellant's land was in a wetland, and subject to the management of the 1st respondent.

The next question to answer is really the crux of the appeal. The question is whether the method and proceeding of demolishing the appellant's property and stopping him from using his land under sections 67, 68 and 70 of the National Environment Act, was consistent with Articles 21, 22, 24, 26, 27, 28, 42, 44, 237 and 259 of the Constitution.

In arguing this issue, counsel for the appellant dwelt on the subject of whether the appellant was accorded fair hearing in the process leading to the demolition of the house. He cited many authorities on the subject to support his contention that he should have been accorded a fair hearing before the Restoration Order was served on him. Counsel further criticized the Constitutional Court for equating the Restoration Order with a charge sheet in a criminal offence. I will set out in full the impugned provisions of section 67, 68 and 70 of the National Environment Act for better appreciation of the issue.

Section 67 states as follows:-

67(1) "Subject to the provisions of this Part, the authority may issue to any person in respect of any matter relating to the management of the environment and natural resources, an order in this Part referred to as an environment restoration order.

(2). An environment restoration order may be issued under subsection (1) for any of the following purposes:-

(a) Requiring the person to restore the environment as near as it may be to the state in which it was before the taking of the action which is the subject of the order;

(b) Preventing the person from taking any action which would or is reasonably likely to do harm to the environment." (emphasis added).

(c)

……

……

(3) In exercising its powers under this section, the authority shall:-

(a) Have regard to the principles as set out in section 2;

(b) Explain the rights of the person, against whom the order is issued, to appeal to the court against that decision." (emphasis added).

Whereas section 67 deals with issuance of the restoration order, section 68 is concerned with the service of the order. It states, in part, as follows:-

"68(1) Where it appears to the authority that harm has been done or is likely to be done to the environment by any activity, by any person, it may serve on that person, an environmental restoration order requiring that person to take such action in such time being not less than twenty one days from the date of the service of the order, to remedy the harm to the environment as may be specified in the order.

(2)……..

(3) ……

(4) ……

(5) ……...

(6) ……

(7) It shall not be necessary for the authority in exercising its powers under sub-section (3) to give any person conducting or involved in the activity the subject of the inspection or residing or working on or developing land on which the activity which is the subject of the inspection is taking place, an opportunity of being heard or by making representations to the person conducting the inspection." (Emphasis added).

Section 69 provides for the reconsideration of an environmental restoration order. It states as follows:-

"69 (1) At any time within twenty one days after service of the environmental restoration order, a person upon whom the order has been served may, by giving reasons in writing, request the authority to reconsider that order.

(2) Where a written request has been made as provided for under sub-section (1), the order shall continue in effect until varied, suspended or withdrawn under sub-section and, if varied, shall continue in effect in accordance with the variation.

(3) Where a request has been made under sub-section (1), the authority shall, within thirty days after receipt of the request, reconsider the environmental restoration order and notify in writing the person who made the request of her or his decision on the order.

(4) The authority may, after reconsidering the case, confirm, vary, suspend or withdraw the environmental restoration order.

(5) The authority shall give the person who had requested a reconsideration of an environmental restoration order the opportunity to be heard orally before a decision is made." (Emphasis added).

It is these provisions of the National Environment Act that the appellant contends to be inconsistent with the named provisions of the Constitution.

I should here reiterate the principle of Constitutional interpretation that the Constitution must be read as a whole, with no one provision destroying another, and that provisions relating to a subject matter must be looked at together. The purpose and effect of the provisions in question must be considered to determine their Constitutionality.

The sage words of Oder, JSC, in A**TTORNEY GENERAL –Vs- SALVATORI ABUKI SUPREME COURT CONST. APP. NO. 1/98**, are very apt. He stated thus:-

"The principle applicable is that in determining the Constitutionality of legislation, its purpose and effect must be taken into consideration. Both purpose and effect are relevant in determining Constitutionality of either an unconstitutional purpose or unconstitutional effect animated by an object the legislation intends to achieve. This object is realized through the impact produced by the operation and application of the legislation. Purpose and effect respectively,. The sense of the legislation's object and ultimate impact are clearly linked if not indivisible. Intended and actual effect has been looked up for guidance in assessing the legislation's object and thus its validity. See **THE QUEEN –Vs- BIG DRUG MARK LTD 1996 CLR 332**."

The purpose of the impugned provisions of the NEMA Act has its base in the Constitution. One has to start with the National Objectives and Directive Principles of State Policy which are meant to "guide all organs and agencies of the State, all citizens, organizations and other bodies and persons in applying or interpreting the Constitution or any other law and in taking and implementing any policy decisions for the establishment and promotion of a just, free and democratic society."

Objective No. XIII commands the state to protect the natural resources of Uganda. It states as follows:-

"The State shall protect important natural resources, including Land, water, wetlands, minerals, oil, fauna and flora on behalf of the people of Uganda."

Objective XXI obligates the State to "take all practical measurers to promote a good water management system at all levels."

Objective XXVII obligates the State to protect the environment and to ensure that land, air and water resources are managed in a sustainable manner to promote development. In particular, under paragraph (ii) it states as follows:-

"The utilization of the natural resources of Uganda shall be managed in such a way as to meet the development and environmental needs of present and future generations of Ugandans; and, in particular, the State shall take all possible measures to prevent or minimize damage and destruction to land, air and water resources resulting from pollution or other causes." (Emphasis added).

These objectives and directives have been given added weight by article 8A of the Constitution which provides that:-

"(1) Uganda shall be governed based on principles

of national interest and common good enshrined in the national objectives and directives principles of State policy." (Emphasis added).

To my mind, this means that these objectives have gone beyond merely guiding us in interpreting the Constitution, but may in themselves be justiciable. The directives on protection of the environment must in my view be read together with Article 39 of the Constitution on the right to a clean and healthy environment to which every Ugandan has a right to.

In his letter referred to above, the Executive Director of National Environment Act refers to the Nakivubo wetland as a "critical wetland in Kampala District." Given the fact that Kampala is a city of more than 2 million people, it is not farfetched to see how so many other people could be impacted by the wrongful use of such critical wetland. The Constitution obligates the State or its agencies to protect such wetland. As already indicated above, Article 245 of the Constitution obliges Parliament to pass a law providing for measures.

(a) "to protect and preserve the environment from abuse, pollution and degradation;

(b) "to manage the environment for sustainable development; and

(c) "to promote environmental awareness."

The National Environment Act is that law. So the purpose of that Act is to serve a Constitutional fiat, and if properly implemented, the effect would be to preserve the environment for the common good of the people of Uganda.

The appellant contends that the above provisions of the Act deprived him of the right to a fair hearing before his property could be demolished, contrary to Article 28 of the Constitution which guarantees a right to fair hearing. Furthermore, he argues, that under Article 44 of the Constitution, the right to fair hearing is non derogable.

The respondents argue that the provisions aforesaid, particularly Section 69 (5) (supra) give the appellant the right to be heard. They support the finding and decision of the Constitutional Court in that regard.

In her lead judgment, Byamugisha, JA, after considering the purpose of the National Environment Act and section 36 thereof that imposes restrictions on the use of wetlands, stated as follows:

"The Petitioner is not challenging the Constitutionality of these restrictions. In my view, it is these restrictions

which gave the first respondent power to carry out inspection on the petitioner's property to ascertain whether the activities he was carrying out on the land was in conformity with the provisions of the section – hence the service of the restoration order. The restoration order is like a charge sheet that commences the prosecution of a person who is charged with a criminal offence. Normally a police officer does not give a hearing to a suspect before charging him or her. The purpose of the Act is to give the first respondent power to deal with and protect the environment for the benefit of all including the Petitioner. The impugned sections in my view have in built mechanisms for fair hearing as enshrined in Article 28."

The learned Justice proceeds to point out that the petitioner, on receipt of the restoration order had 21 days within which to make representations to the first respondent for a review or variation of the order, which he failed, refused or neglected to pursue. The learned Justice further stated that the petitioner had failed to show that the procedures as laid down in the impugned sections were insufficient to achieve justice without frustrating the intention of the legislation. She concludes thus:-

"The Petitioner failed to show that the safeguards contained in the impugned sections are insufficient to accord him or anyone else a fair hearing. I have not been persuaded that the Petitioner's proprietary rights were infringed by the acts of the first respondent. What was taken away from him was misuse of the land and this was done to protect the environment."

I fully concur with the learned Justice of Appeal in her reasoning and findings. I note under Section 69(5) of the National Environment Act, the appellant was entitled to be heard orally before the final decision was made had he chosen to challenge the restoration order. I must also note that under Section 67(5)(b) the appellant had a right to appeal to court against the decision. This was another in – built protection within the law to ensure protection of his rights. Conceivably he could have sought a Court Order to prevent demolition of the property. He choose a physical fight.

The analogy of the criminal charge sheet, which Counsel for the appellant so vehemently criticized, is in my view very apt. Under the criminal law, a police officer, or indeed a private person, may arrest a suspected offender who is reasonably suspected to have committed or is about to commit a cognizable offence. See Sections 10 and 15 of the Criminal Procedure Code Act, Cap. 116. The purpose is either to prevent the commission of the crime, or to bring the offender as soon as possible to be charged in a Court of Law. The law does not require that the arresting officer should first give the suspect a fair hearing. That would defeat the purpose of the law. But the law still presumes the suspect innocent and he/she is entitled to fair trial in a court of law. Similarly in the law relating to the protection of the environment, State Agencies like NEMA have been empowered to send out inspectors to check out on any abuses of the environment and prevent such abuses. It would, in my view, be disastrous if the law allowed the inspectors to enter into arguments and negotiations with persons suspected of harming the environment. The restoration order issued by NEMA after inspectors have made their report sets out in detail what has been damaged by the Petitioner and demands that it should be stopped or corrected. That is how it becomes analogous to a charge sheet in a criminal setting. The law, as pointed out then allows the Petitioner to respond to the matters raised. He can ask that the restoration order be cancelled where he can show grounds for doing so, or that it be varied. He is entitled even to be heard orally before the restoration order is implemented. He may also challenge that order in a court of law. His legal rights are fully covered under the sections he seeks to be declared unconstitutional.

The facts in this case show that the appellant not only ignored the restoration order and his right to challenge it and be heard, but he proceeded to go on with his construction even at awkward hours in total defiance thereof. In short, he continued to do further damage to the environment.

The need to protect the environment is enshrined in the Constitution. The State must act with vigilance to protect the environment to ensure that the common good is protected for the community as a whole.

In the 1st respondent's affidavit in support of the answer to the Petition, the first respondent raises an important issue to consider in matters of protection of the environment. The affidavit of FESTUS BAGORA dated 22nd April 2005, states in paragraph 8, in part, as follows:-

"8. In reply to paragraph 2 (v) (vi) and (vii) of the Petition and paragraphs 15, 16, 17, 18 and 19 of the Peti-

tioner's affidavit in support of the petition, the 1st respondent shall aver and contend as follows:-

(a) That a restoration order is issued under Section 67 of the National Environment Act when harm has been or is likely to be caused to the environment; and that there is no legal requirement to grant the Petitioner a hearing before the restoration order is issued.

(b) That if the right to be heard in a court or a tribunal was a prerequisite to issuance of restoration orders, the environment would be seriously and adversely affected by acts of persons; and that the cardinal principles of precaution and polluter pays in environmental management would not achieve the desired effect of good environmental practice and protection." (Emphasis added).

It is to those cardinal principles of precaution and polluter pays in environmental management that I would now wish to turn.

The Supreme Court of India, while considering similar legislation to ours, i.e. the Environment (Protection) Act, 1986, has considered the above principles. In VELLORE CITIZEN'S WELFARE FORUM –Vs- UNION OF INDIA & OTHERS (1996) 5 Supreme Court cases, 647, the court considered these principles at length. This was a case involving the pollution that was being caused by the discharge of untreated effluent by tannery industries in the state of Tami/Nadu. The Court considered the concept of sustainable development both in municipal as well as international context. It should be recalled that our own Constitution in objective no. XXVII (supra) the State is obligated to "promote sustainable development and public awareness of the need to manage land, air and water resources in a balanced and sustainable manner for the present and future generations."

The Court discussed the concept of sustainable development as it has evolved in international law and adopted the definition adopted by the report of the WORLD COMMISSION ON ENVIRONMENT and DEVELOPMENT (the "Brumdtland Report). That Report defined "Sustainable Development" as "Development that meets needs of the present without compromising the ability of the future generations to meet their own needs." The Court stated thus:-

"We have no hesitation in holding that "sustainable Development" as a balancing concept between ecology and development has been accepted as part of the customary international law though its salient features have yet to be finalized by the international law jurists.

We are, however, of the view that "The Precautionary Principle" and "The Polluter Pays Principle" are essential features of "Sustainable Development." The "Precautionary Principle" – in the context of municipal law – means:

(i) The Environmental measures – by the State Government and the Statutory authorities must anticipate, prevent and attack the causes of environmental degradation.

(ii) Where there are threats of serious and irreversible damage, lack of scientific certainty should not be used as a reason for postponing measures to prevent environmental degradation.

(iii) The "Onus of proof" is on the actor or the developer/industrialist to show that his action is environmentally benign."

On "the Polluter Pays Principle" the court had this to say:-

"The "Polluter Pays Principle" as interpreted by this Court means that the absolute liability for harm to the environment extends not only to compensate the victims of pollution but also the cost of restoring the environmental degradation. Remediation of the damaged environment is part of the process of "sustainable Development" and as such the Polluter is liable to pay the cost to the individual sufferers as well as the cost of reversing the damaged ecology.".

In this case, the wetland in question has been characterized by NEMA as a critical wetland around the Capital City, Kampala. It drains into Lake Victoria which has immerse ecological and economic importance not

only to the City but to the Country and the region as a whole.

Such wetland should call for properly planned and controlled utilization so that the Constitutional requirement to use the resources for sustainable development is realized. Individual developers putting up houses in such a critical wetland unregulated by NEMA may have grave consequences in future. In that case the State will have failed to protect the environment and use the natural resource – wetland – in a sustainable manner. Indeed, the allegation by the appellant that other people may have confirmed with developments would point to a failure of the NEMA to do its job, but a justification for the desecration of the wetland.

Furthermore, the right to a clean and healthy environment enshrined in the Constitution must be protected by the State.

It is my opinion that the above principles must be adopted and applied if the State is to carry out its Constitutional mandate to protect the environment and guarantee a clean and healthy environment for the citizens, while at the same time promoting sustainable development.

In further regard to the issue of the right to fair hearing that the appellant sought to push so hard for, it is sufficient to refer to the case of **REV. BAKALUBA PETER MUKASA –Vs- BETTY NAMBOOZE BAKILEKE (SCCA NO. 4 OF 2009)** where this court considered and pronounced itself on the matter of fair hearing. This case was in fact cited by counsel for the appellant. In that case, this court laid down the guidelines in determining whether the right to a fair hearing had been violated, and emphasized the fundamental nature of that right in our Constitution. In the case of **MPUNGU & SONS TRANSPORTERS LTD –Vs- 15 ATTORNEY GENERAL, (SCCA)**

NO. 17 OF 2001) this court had emphasized the cardinal nature of the right to fair hearing but also emphasized the need to put in into context. The court cited with approval the decision in **RUSSELL –Vs- NORFOLK [1949]1 ALL E.R. 109 wherein Turker, L.J**, stated thus:-

“There are, in my view, no words which are of universal application to every kind of inquiry and every kind of domestic tribunal. The requirements of natural justice must depend on the circumstances of the case, the nature of the inquiry, the rules under which the tribunal is acting, the subject-matter that is being dealt with, and so forth. Accordingly, I do not derive much assistance from the definitions of natural justice which have been from time to time used, but, whatever standard is adopted, one essential is that the person concerned should have a reasonable opportunity of presenting his case. I think from first to last the plaintiff did have such an opportunity.”

I am persuaded by that reasoning. Each case should be examined on its own facts and sets for circumstances, and the test should be whether the person was accorded a reasonable opportunity to be heard or to present his side of the case.

In the appeal, as pointed out, we are dealing with a grave matter of protecting the environment as commanded by the Constitution. This is a matter that is of interest to, and impacts on the community as a whole. The individual’s interest must be viewed in the context of that larger interest of society as a whole and in the context of the Constitution and the laws made thereunder.

The impugned provisions while providing for measures to protect the environment, do contain provisions whereby the appellant could have exercised his right to be heard by challenging the environmental restoration order within the stipulated period. Had he done so, he had a right to be heard in person. He could have challenged the order in a court of law. He chose not only to ignore the environmental restoration order, but continued in carrying out the very activities he had been advised to discontinue. In those circumstances, I find it unacceptable that he should now be heard to say that he was denied a fair hearing. He just refused to take the opportunity accorded to him by the law.

In that regard, I find that the impugned provisions are not inconsistent with any provision of the Constitution as alleged. These provisions actually gave the appellant reasonable opportunity for him to present his case and be heard.

In the circumstances, it is my considered opinion that this appeal should fail.

I would have considered ordering that the appellant make good the damage he did to the wetland, but since the 1st respondent already destroyed his structures, it would not be fair to do so.

I would dismiss the appeal with costs to the 1st and 2nd respondent in this court and in the court below. I would not award costs to the 3rd, 4th, 5th, 6th, 7th respondents since these voluntarily applied to be joined as parties because of the interest they have in protecting the environment. They will bear their own costs.

In the result, by six to one majority decision the appeal is dismissed with costs to the 1st and 2nd respondents in this court and in the court below.

Delivered at Kampala this 20th day of August 2015.

……

B. M. KATUREEBE

CHIEF JUSTICE

THE REPUBLIC OF UGANDA

IN THE SUPREME COURT OF UGANDA AT KAMPALA

[CORAM: KATUREEBE, CJ; TUMWESIGYE; KISAAKYE; ARACH-AMOKO; JJSC, ODOKI; TSEKOOKO; OKELLO; AG. JJSC]

CONSTITUTIONAL APPEAL NO. 05 OF 2011 BETWEEN

AMOOTI GODFREY NYAKANA ::APPELLANT AND

1. NATIONAL ENVIRONMENT MANAGEMENT AUTHORITY
2. ATTORNEY GENERAL
3. ADVOCATES COALITION FOR DEVELOPMENT & ENVIRONMENT
4. ENVIRONMENT ALERT
5. GREENWATCH
6. UGANDA WILDLIFE SOCIETY
7. THE ENVIRONMENT ACTION NETWORK:::::::::::::::::::::::::::: RESPONDENTS

[An Appeal from the decision of the Constitutional Court of Uganda at Kampala, (Bahigeine, Twinomujuni, Kitumba, Byamugisha, Kavuma, JJA) dated 22nd September 2011 in Constitutional Petition No. 03 of 2005]

JUDGMENT OF DR. KISAAKYE, JSC.

The appellant (Nyakana), appealed to this Court after the Constitutional Court dismissed his Petition challenging the constitutionality of section 67, 68 and 70 of the National Environment Act and the actions of the National Environment Management Authority taken on the basis of the said sections, including the demolition of his house which was under construction.

I have had the opportunity to read in draft the judgment of Katureebe, CJ. in which he entirely agrees with the decision of the Constitutional Court, with the exception of the order of costs to the 3rd, 4th, 5th, 6th, and 7th respondents.

I agree with the main thrust of his Judgment that the Environment should be protected. I also agree with him that the National Environment Act entrusted this responsibility with the National Environment Management Authority, hereinafter referred to as NEMA. That notwithstanding, I am of the strong view that the other equally entrenched Constitutional provisions which guarantee citizens' rights to a fair hearing, equal protection of the law, property and privacy rights must also be protected and also be observed by NEMA when it is exercising its statutory powers and obligations to protect the environment. I therefore with all due respect to the learned Chief Justice, respectfully disagree with his decision to dismiss this appeal.

I would instead allow this appeal, set aside the order and decision of the Constitutional Court on the grounds given in this Judgment.

Background to the Appeal

The background to this appeal is as follows. Nyakana filed Constitutional Petition No. 03 of 2005 in the Constitutional Court in which he alleged that sections 67, 68 and 70 of the National Environment Act, Cap 153 are inconsistent with Articles 21, 24, 26, 27, 28, 42, 44, 237 and 259 of the Constitution and International Instruments entrenched in the Constitution under Articles 20 and 45 of the Constitution.

He further alleged that the act of NEMA issuing an Environmental Restoration Order in respect of his alienated land and the consequent entry unto his premises resulting in the demolition of his developments thereon viz a residential house was inconsistent with and contravened the same Articles of the Constitution.

He prayed for the following declarations from the Constitutional Court:

1. That sections 67, 68 and 70 of the National Environment Act, Cap 153 are inconsistent

   with Articles 21, 24, 26, 27, 28, 42, 44, 237 and 259 of the Constitution and the various International Human Rights Convention and Instruments entrenched in the Constitution under Articles 20 and 45.

   Redress by way of orders for:

   a) Permanent injunction against the respondent, its officials, agents or servants restraining and preventing it/them from interfering with the Petitioner's property rights and interests in his property.

   b) Restitution and/or restoration of the Petitioner's developments on his land comprised in Leasehold Register Volume 3148 Folio 2 Plot 8 at Plantation road, Bugolobi Kampala in the same state and condition as at the time of demolition by the respondent on 8th January 2005.

   c) A reference to the High court to investigate, compute and determine the compensation payable to the Petitioner equivalent in monetary terms to the demolished development/property at the prevailing current market value.

   d) Constitutional damages

   e) Costs of this Petition"

The Constitutional Court dismissed his Petition with costs to the respondents and he appealed to this Court on the following grounds:

1. The Honourable learned Justices of the Constitutional Court erred in law and fact when they proceeded to decide the matter on the premise that the appellant's land was a wetland.

2. The Honourable learned Justices of the Constitutional Court erred and misdirected themselves in law and fact when they equated a restoration order to a charge sheet that commences the prosecution of a person who is charged with a criminal offence.

3. The Honourable learned Justices of the Constitutional Court erred in law and fact when in determining the purpose and objective of Section 67 they instead considered the main objectives of the NEMA Act.

4. The Honourable learned Justices of the Constitutional Court erred in law and fact when they held that the appellant had to show that the procedures laid down in the section are as insufficient to achieve justice without frustrating the legislation.

5. The Honourable learned Justices of the Constitutional Court erred in law and fact when they held that the appellant failed to show that the safeguard contained in the impugned sections are insufficient to accord the appellant or anyone else a fair hearing.

6. The Honourable learned Justices of the Constitutional Court erred in law and fact when they found and held that the appellant's proprietary rights were not infringed by the acts of the respondents.

7. The Honourable learned Justices of the Constitutional Court erred in law and fact when they found and held that what was taken away from the appellant was misuse of the land in order to protect the environment.

8. The Honourable learned Justices of the Constitutional Court erred in law and fact when they prioritized and gave undue preference to NEMA over the effect of the challenged section viz section 69.

9. The Honourable learned Justices of the Constitutional Court erred in law and fact when they failed to evaluate and appreciate the effect of the challenged provisions on the rights of the appellant guaranteed under Articles 26 and 28 of the Constitution.

10. The Honourable learned Justices of the Constitutional Court erred in law and fact when they awarded costs to the 3rd, 4th, 5th, 6th and 7th respondents whose participation in the Constitutional Petition was voluntary and in defence of public interest.

11. The Honourable learned Justices of the Constitutional Court erred in law and fact when in a matter of great public importance and concern ordered the appellant to pay costs to the respondents.

He prayed for the following orders:

a) The judgment of the Constitutional Court in Constitutional Petition No. 03 of 2005 be set aside and judgment entered in favour of the appellant as per reliefs, remedies and redress sought in the Petition.

b) Costs for this appeal and in the Court below

For ease of reference, I have reproduced the impugned sections of the National Environment Act in their entirety.

Section 67 of this Act provides as follows:

"(1) Subject to the provisions of this Part, the authority may issue to any person in respect of any matter relating to the management of the environment and natural resources an order in this Part referred to as an environmental restoration order.

(2) An environmental restoration order may be issued under subsection (1) for any of the following purposes—

(a) requiring the person to restore the environment as near as it may be to the state in which it was before the taking of the action which is the subject of the order;

(b) preventing the person from taking any action which would or is reasonably likely to do harm to the environment;

(c) awarding compensation to be paid by that person to other persons whose environment or livelihood has been harmed by the action which is the subject of the order;

(d) levying a charge on that person which represents a reasonable estimate of the cost of any action taken by an authorized person or organization to restore the environment to the state in which it was before the taking of the action which is the subject of the order.

(3) An environmental restoration order may contain such terms and conditions and impose such obligations on the persons on whom it is served as will, in the opinion of the authority, enable the order to achieve all or any of the purposes set out in subsection (1).

(4) Without prejudice to the general effect of the purposes set out in subsection (1) or the powers of the authority set out in subsection (2), an environmental restoration order may require a person on whom it is served to—

(a) take such action as will prevent the commencement or continuation of or the cause of pollution;

(b) restore land, including the replacement of soil, the replanting of trees and other flora and the restoration, as far as may be, of outstanding geological, archaeological or historical features of the land or the area contiguous to the land specified in the order;

(c) take such action as will prevent the commencement or continuation of or the cause of an environmental hazard;

(d) cease to take any action which is causing or may cause or may contribute to causing pollution or an environmental hazard;

(e) remove or alleviate any injury to land or the environment or to the amenities of the area;

(f) prevent damage to the land or the environment, aquifers beneath the land and flora and fauna in, on, under or about the land specified in the order or land or the environment contiguous to land specified in the order;

(g) remove any waste or refuse deposited on land specified in the order;

(h) deposit waste in a place specified in the order;

(i) pay such compensation as is specified in the order.

(5) In exercising its powers under this section, the authority shall—

(a) have regard to the principles as set out in section 2;

(b) explain the rights of the person, against whom the order is issued, to appeal to the court against that decision."

On the other hand, section 68 of the National Environment Act provides as follows:

"(1) Where it appears to the authority that harm has been or is likely to be caused to the environment by an activity by any person, it may serve on that person an environmental restoration order requiring that person to take such action, in such time being not less than twenty-one days from the date of the service of the order, to remedy the harm to the environment as may be specified in the order.

(2) An environmental restoration order shall specify clearly and in a manner which may be easily understood—

(a) the activity to which it relates;

(b) the person or persons to whom it is addressed;

(c) the time at which it comes into effect;

(d) the action which must be taken to remedy the harm to the environment and the time,

being not less than thirty days or such further period as may be prescribed in the order, within which the action must be taken;

(e) the powers of the executive director to enter land and undertake the action specified in paragraph (d);

(f) the penalties which may be imposed if the action specified in paragraph (d) is not undertaken;

(g) the right of the person served with an environmental restoration order to appeal to the court against that order.

(3) The authority may inspect or cause to be inspected any activity to determine whether that activity is harmful to the environment and may take into account the evidence obtained from that inspection in any decision on whether or not to serve an environmental restoration order.

(4) The authority may seek and take into account any technical, professional and scientific advice which it considers to be desirable for a satisfactory decision to be made on an environmental restoration order.

(5) An environmental restoration order shall continue to apply to the activity in respect of which it was served notwithstanding that it has been complied with.

(6) A person served with an environmental restoration order shall, subject to this Act, comply with all the terms and conditions of the order that has been served on him or her.

(7) It shall not be necessary for the authority in exercising its powers under subsection

(3) to give any person conducting or involved in the activity the subject of the inspection or residing or working on or developing land on which the activity which the subject of the inspection is taking place, an opportunity of being heard by or making representations to the person conducting the inspection."

Lastly, section 70 of the National Environment Act provides as follows:

"(1) Where a person on whom an environmental restoration order has been served fails, neglects or refuses to take the action required by the order, the authority may, with all necessary workers and other officers, enter or authorize any other person to enter any land under the control of the person on whom that order has been served and take all necessary action in respect of the activity to which that order relates and otherwise to enforce that order as may seem fit.

(2) Where the authority exercised the power under subsection (1), it may recover as a civil debt, in any court of competent jurisdiction from the person referred to in subsection (1), the expenses necessarily incurred by it in the exercise of that power."

Consideration of the Appeal

Before I delve into the merits of this appeal, it is important, in my view to reflect on the constitutional framework under which NEMA and all other actors are expected to follow while executing their constitutional and statutory mandates.

There is no doubt that the Constitution clearly entrenches the right to a clean and healthy environment in Article 39. Furthermore, Article 237(2)(b) of the Constitution also provides as follows:

> "The Government or a local government as determined by Parliament by law shall hold in trust for the people and protect natural lakes, rivers, wetlands, forest reserves, game reserves, national parks and any land to be reserved for ecological and touristic purposes for the common good of all citizens;"

This article imposes an obligation on the part of the Government or a local government to hold wetlands and other national resources in trust for all Ugandans.

In furtherance of this obligation, Government enacted the National Environment Act. The purpose of this Act is spelt out in the preamble to the Act as follows:

> "An Act to provide for sustainable management of the environment; to establish an authority as a coordinating, monitoring and supervisory body for that purpose; and for other matters incidental to or connected with the foregoing."

There is therefore no doubt, going by the provisions already cited that NEMA was established pursuant to the State's obligation to protect the environment. The Act gives NEMA wide ranging powers to issue Environmental Impact Assessment reports and to carry out audits to ensure that no activity results in environmental degradation. The duties placed on NEMA are reinforced in section 2(2) of the National Environment Act which provides for the principles of environment management that NEMA must ensure are observed. Section 2(2)(c) in particular lays out one of the principles NEMA is required to follow thus:

> "to use and conserve the environment and natural resources of Uganda equitably and for the benefit of both present and future generations, taking into account the rate of population growth and the productivity of the available resources"

The above provisions notwithstanding, there is also no dispute that in 1995, the people of Uganda set for themselves a very high bar in Article 20(2) of the Constitution when they unequivocally pronounced that the fundamental rights and freedoms of the individual shall be respected by all. This Article provides as follows:

> "The rights and freedoms of the individual and groups enshrined in this Chapter shall be respected, upheld and promoted by all organs and agencies of Government and by all persons."

This Article exempted no one in the executive, legislative or judicial arm of government. Having solemnly declared that the obligation to respect, uphold and promote the rights and freedoms of individuals and groups rests on everyone, the same Constitution proceeded to enumerate very wide ranging fundamental rights and freedoms which are provided for in Articles

21 to 42 that should be respected, upheld and promoted by all organs and agencies of government.

The Constitution however deemed it fit to provide for a general limitation on the fundamental rights and freedoms in Article 43 which provides that in the enjoyment of the rights and freedoms prescribed in this Chapter, no person shall prejudice the fundamental or other human rights and freedoms of others or the public interest.

The Constitution in the same article further provides that:

"Public interest under this article shall not permit—

(a) …;

(b) …;

(c) any limitation of the enjoyment of the rights and freedoms prescribed by this Chapter beyond what is acceptable and demonstrably justifiable in a free and democratic society, or what is provided in this Constitution."

It is therefore clear that while our Constitution permits limitations on the enjoyment of the rights guaranteed under it, those limitations are only permissible to prevent the prejudicing of the rights of others and to protect public interest, which is justifiable in a 'free and democratic society or as provided for by the same Constitution.

Having laid out the constitutional framework on which the challenged sections and NEMA's actions should be assessed, I will now proceed to consider the challenged sections of the National Environment Act.

Consideration of the constitutionality or otherwise of Sections 67, 68 and 70 of the National Environment Act. (Grounds 4, 5, 6, 7, 8 and 9 of appeal)

The sole issue the parties agreed to put before the Constitutional Court was framed as follows: "Whether sections 67, 68 and 70 of the National Environment Act are inconsistent or contravenes Articles 21, 22, 24, 26, 27, 28, 43, 237 and 259 of the Constitution."

The Constitutional Court dismissed the appellant's Petition on the ground that he did not make out a case on which the Court could grant the declarations sought. Byamugisha, JA, who wrote the lead judgment on behalf of the Court, reasoned as follows:

"In order for the Petitioner to succeed, he has to show prima facie that the impugned sections are inconsistent with or contravene the articles of the Constitution which he cited. The purpose of the National Environment Act according to its preamble is:

> "To provide for sustainable management of the environment; to establish an authority as a coordinating, monitoring and supervisory body for that purpose; and for other matters incidental to or connected with the foregoing."

The functions of the 1st respondent with regard to environment are set out in section 6 of the NEMA Act.

…

The purpose of the Act is to give the respondent power to deal with and protect the environment for the benefit of all including the petitioner.

The impugned sections in my view have in built mechanisms for fair hearing as enshrined in Article 28.

On receipt of the restoration order, the petitioner had 21 days within which to make a presentation to the 1st respondent for a review or variation of its order. Procedures before any tribunal which is acting judicially should be fair and be seen to be so. The petitioner had to show that the procedures laid down in the sections are insufficient to achieve justice without frustrating the intention of the legislation. The petitioner failed to show that the safeguards contained in the impugned sections are insufficient to accord him or anyone else a fair hearing. I have not been persuaded that the petitioner's proprietary rights were infringed by the acts of the 1st respondent. What was taken away from him was misuse of the land and this was done to protect the environment."

The majority decision has agreed with the Constitutional Court. I however take issue, just as the appellants did, with part of the holding of the Constitutional Court, as I will discuss in this Judgment.

I have carefully studied the impugned sections of the National environment Act. NEMA is authorized under sections 67 and 68 to issue very wide ranging orders directing the recipient to do any one or more of the following:

a) To restore the environment to as near as it may be, to the state in which it was before the taking of the action which is the subject of the order, [section 67(2) (a)]

b) To refrain from taking any action which would or is reasonably likely to do harm to the environment, [section 67(2) (b)]

c) To give compensation to other persons whose environment or livelihood has been harmed by the action which is the subject of the order, [section 67(2) (c)]

d) To pay a charge which represents a reasonable estimate of the cost of any action taken by an authorized person or organization to restore the environment to the state in which it was before the taking of the action which is the subject of the order, [section 67(2) (d)]

e) To take such action as will prevent the commencement or continuation of or the cause of pollution, [section 67(4)(a)]

f) To restore land, including the replacement of soil, the replanting of trees and other flora and the restoration, as far as may be, of outstanding geological, archaeological or historical features of the land or the area contiguous to the land specified in the order, [section (67(4)(b)]

g) To take such action as will prevent the commencement or continuation of or the cause of an environmental hazard, [section 67(4)(c)]

h) To cease to take any action which is causing or may cause or may contribute to causing pollution or an environmental hazard, [section 67(4)(d)]

i) To remove or alleviate any injury to land or the environment or to the amenities of the area, [section 67(4)(e)]

j) To prevent damage to the land or the environment, acquifers beneath the land and flora and fauna in, on, under or about the land specified in the order or land or the environment contiguous to land specified in the order, [section 67(4)(f)]

k) To remove any waste or refuse deposited on land specified in the order, [section 67(4)(g)]

l) To deposit waste in a place specified in the order, [section 67(4)(h)] and

m) To pay such compensation as is specified in the order, [section 67(4)(i)]

Furthermore, section 68(6) of the National Environment Act provides that a person once served with an Environmental Restoration Order shall, subject to the provisions of the Act, comply with all the terms and conditions of the order that has been served on him or her.

Section 68(3) of the National Environment Act also grants powers to NEMA to carry out inspections into any activity and to enter into a private citizens' land without duly notifying the owners of their purpose. This Section authorizes NEMA to carry out inspections as follows:

> "The authority may inspect or cause to be inspected any activity to determine whether that activity is harmful to the environment and may take into account the evidence obtained from that inspection in any decision on whether or not to serve an environmental restoration order."

On the other hand, section 68(7) authorizes NEMA to undertake inspections without the input of the alleged violator giving his or her side of the story. The section specifically excluded the right of the affected persons to be heard by NEMA inspectors as follows:

> "It shall not be necessary for the authority in exercising its powers under subsection
>
> (3) to give any person conducting or involved in the activity the subject of the inspection or residing or working on or developing land on which the activity which the subject of the inspection is taking place, an opportunity of being heard by or making representations to the person conducting the inspection."

Section 68(1) further permits NEMA to issue such an alleged violator an Environmental Restoration Order hence, condemning him or her of having harmed the environment without giving such a person any hearing or opportunity to be heard. Given the order of the sub-section, it is even possible for NEMA to issue the Environmental Restoration Order even before it has carried out any inspection or got any technical advice to that effect. NEMA is authorized to move 'if it appears that either harm has been or is likely to be caused to the environment.'

The impugned sections of the National Environment Act in as far as they denied the appellant the right to a fair hearing were unconstitutional and so were the acts of the first respondent based on the impugned sections. In my view, it was incumbent upon NEMA, as an authority exercising quasi judicial power, to give a fair hearing to the appellant before condemning his property.

This Court pointed out the dangers of vesting investigating, prosecuting and adjudicating powers in one body in John Ken Lukyamuzi v. The Attorney General & Anor., Constitutional Appeal No. 2 of 2007 where Lukyamuzi challenged the loss of his Parliamentary seat acting on the basis of the Inspectorate of Government's Report. The IGG had found him in breach of the Leadership Code because he failed and/or refused to declare his wealth as required by the Leadership Code Act.

Commenting on the actions of the Inspectorate, Justice Tumwesigye, JSC observed as follows:

> "It would not be in the interest of promoting proper administration of justice in this country to allow a situation where the power of investigation, prosecution and adjudication are combined in one institution. If an institution such as the IGG is big enough, it can have divisions within it, one among them for carrying out the function of investigation and another for carrying out the function of prosecution. However, in my view, it would not be proper to have a division conducting adjudication in respect of the cases investigated by the same institution. For proper administration of justice, a court or tribunal should be independent of agencies which investigate or prosecute cases before it. This is necessary to give persons brought before such a court or tribunal confidence that they will get a fair hearing and justice in the end. … I respectfully agree …that the operational set up of the IGG as an institution makes breach of the principle of nemo judex in causa sua (no person shall be a judge in his or her own cause) unavoidable. For example, in the appellant's case if you read the report or "judgment" of the IGG to the Speaker of Parliament, the IGG is the complainant, the investigator and the judge, all rolled into one. Breaches of the Leadership Code are punished with severe penalties… In my view such penalties should be imposed by a court of law or a tribunal established by law which observes due process. The right to a fair hearing guaranteed by Articles 28(1) and 44(c) of the Constitution is about due process which must be observed by all courts of law or tribunals for justice not only to be done but also to be seen to be done."

According to Words & Phrases Legally Defined Vol. 2: D-J at page 124:

> "The expression "due process of law"…should also include the holding of a hearing in which the principles of fundamental justice recognized by our legal system would be applied. The word "law" here means not only the law to be found in the statutes, but is also used in its abstract or general sense, and includes what are known as the principles of natural justice." as Per Noel ACJ in National Capital Commission v. Lapointe [1972] FCR 568 at 571, FCTD"

Furthermore, Black's Law Dictionary 5th Ed. at page 262 lays down the essential elements of Due process of law as follows:

> "The essential elements of due process of law are notice and opportunity to be heard and to defend in orderly proceeding adapted to the nature of case, and the guarantee of due process requires that every man have protection of day in Court and benefit of general law. Daniel Webster defined this phrase to mean a law which hears before it condemns, which proceeds on inquiry and renders judgment only after trial."

The right to fair hearing is fundamental. This Court has recognized the fundamental nature of the right to be heard in various decisions it has rendered and on several occasions, has nullified decisions reached by statutory and administrative bodies on the basis that the party affected by their decision was not given a fair hearing.

Recently, in Omunyokol Akol Johnson v. The Attorney General, [Supreme Court Civil Appeal No. 06 of 2012] , this Court concurred with the findings of the trial Court and the Court of Appeal and set aside the dismissal of the appellant who was not accorded an opportunity to be heard by his employer.

Similarly, in the recent decision of National Council for Higher Education v. Anifa Kawooya Bangirana, [Supreme Court Constitutional Appeal No. 04 of 2011], this Court also held that, the appellant should have given the respondent a hearing before it recalled the respondent's Certificate of Equivalence. We rejected the argument by the appellant that it would allow the respondent a right to be heard after it had recalled her Certificate.

It therefore follows that the rules of natural justice are very clear. You hear all the parties before condemning them. In the case of the National Environment Act, the reverse is true. NEMA condemns first and then purports to give actual or alleged violators a hearing. However it retains all the powers to stick to its original verdict, that is: the initial Environmental Restoration Order it had issued before holding such a review hearing. In the alternative, if NEMA does not receive any representations, it can proceed to carry out whatever orders it deems necessary against the actual or perceived degrader of the environment, even though the person against whom they are enforcing such an order may not be the person responsible for the degradation or the other activities named in the Environmental Restoration Order or may not have even been served with the Environmental Restoration Order.

With the exceptions of sub-sections 67(5) and 68 (4) of the Act, I therefore find that the remainder of these impugned sections do contravene Articles 26, 27 and 28 of the Constitution.

I find that the rest of the impugned sections are inconsistent with several provisions of the Constitution. I am therefore unable to uphold the constitutionality of these provisions. In this Judgment, I have given clear examples which show that sections 67, 68 and 70 of the National Environment Act are inconsistent and contravene several provisions of the Constitution. In my view, the contentions of the appellant in his Petition were well founded.

The unconstitutionality of these provisions is not remedied by section 67(5) which requires NEMA to have regard to the principles of environment management set out in section 2, because the preceding sections already offer wide discretionary powers to NEMA to do any of the acts authorized under sections 67 and 68 of the Act.

Secondly, there is also no provision in the National Environment Act which sets up a quasi- judicial Tribunal or Committee to hear requests for reconsideration of Environmental Restoration Orders issued by NEMA. Given these gaps, it cannot be ruled out that the very NEMA Inspector(s) who made the inspection or their superior who made the decision to issue an Environmental Restoration Order may be the same person or persons who are responsible for making the decision on a request for its reconsideration. It therefore follows that, although section 69 of the National Environment Act offers an opportunity for a person served with an Environmental Restoration Order to request for its reconsideration, this, in my view, does not remedy the inconsistency of sections 67 (2)&(4) and 68 which I have already pointed above. This is because section

69 only becomes operational if the recipient of the Environmental Restoration Order moves NEMA to reconsider it. Given the low levels of literacy in all fields including legal literacy in Uganda, it is very unlikely that the majority of Ugandans who may be found by NEMA to either be consciously harming the environment or engaging in activities that may cause harm to the environment will be aware about these provisions or that NEMA will bring them to their attention.

With due respect, I find that the Constitutional Court erred in law when it declined to consider the inconsistency or otherwise of sections 67, 68 and 70 with the Constitution and instead held that "the Petitioner had to show that the procedures laid down in the sections are insufficient to achieve justice without frustrating the intention of the legislation" and that "the Petitioner failed to show that the safeguards contained in the impugned sections are insufficient to accord him or anyone else a fair hearing."

This Court has similarly held that the procedure provided for in section 69 of the National Environment Act, which allows for persons who have been served with an Environmental Restoration Order to seek for a review of variation is sufficient to discharge NEMA's constitutional obligation to give a fair hearing to persons affected by Environmental Restoration Orders.

In my view, the procedures laid down under the impugned sections and which were relied on by NEMA do not meet the constitutional standard in as far as they do not give the party likely to be affected by the Environmental Restoration Order an opportunity to be heard before NEMA makes that decision.

With all due respect, I respectfully disagree with the conclusion of the Constitutional Court and my colleagues at this Court. First of all, section 69 of the National Environment Act is problematic because, as the appellant argued, it makes NEMA the investigator, prosecutor, judge and executioner of its orders.

Secondly, section 69 of the National Environment Act only provides for a hearing after NEMA has condemned an alleged environmental degrader unheard in the Environmental Restoration Order it issued. It cannot, in my view, rectify or remove the unconstitutionality of section 67, 68 & 70 with respect to these sections not giving such persons a right to be heard, infringing the right to property during the process of inspection and/or demolition of such structures as NEMA would have condemned having been built in a wetland.

With due respect to the learned Justices of the Constitutional Court and my colleagues on the Coram, I respectfully disagree with their conclusions that the appellant did not make out a case for the court to grant the declarations he sought with respect to sections 67, 68 and 70 of the National Environment Act.

On the contrary, I agree with the submissions of counsel for the appellant that sections 67, 68 and 70 of the National Environment Act contravene Articles 26 (the right to property), Article 27 (the right to privacy), and Article 28(the right to a fair hearing) and Article 42 (Right to just and fair treatment in administrative decisions).

It should further be noted that this appeal is not only concerned with the question whether sections 67, 68 and 70 of the National Environment Act are inconsistent with or contravene the Constitution. The appellant, on the other hand, based his petition and this appeal on several other constitutional provisions found in the Bill of Rights, which include Articles 21, 26, 27, 28, 42 and 44.

The respondent, on the other hand, relied on various constitutional provisions intended to protect the environment and other natural resources. These include Articles 39, and 237(2)(b), which I have quoted earlier in this Judgment.

The Constitutional Court, in my view, focused on the provisions protecting the environment and paid little regard to those relied on by the appellant. This approach, in my view, was at variance with the principles of Constitutional interpretation which are well known and have been followed from time to time by this Court and the Constitutional Court.

One of the relevant principles which should have guided the Court in this appeal is the rule of harmony or completeness which requires that Constitutional provisions should not be looked at in isolation. Rather, the Constitution should be looked at as a whole with no provision destroying another but supporting each other. This is the rule of harmony, the rule of completeness, and exhaustiveness and the rule of paramountancy of the Constitution. This has been stated in several decisions of this court which include Paul Semogerere v. Attorney General, Constitutional Appeal No. 1 of 2002 and Attorney General v. Susan Kigula and Others, Constitutional Appeal No. 03 of 2006, among others.

Another principle of constitutional interpretation requires that where several provisions of the Constitution have a bearing on the same subject, they should be read and considered together so as to bring out the full meaning and effect of their intent. None should be ignored or preferred over the other. This principle has been restated in several decisions of this Court and in the Constitutional Court.

Furthermore, this Court has also held in several cases, which include Attorney General V Uganda Law Society, Constitutional Appeal No. 1 of 2006 that a constitutional provision containing a fundamental right is a permanent provision intended to cater for all times to come and must be given an interpretation that realizes the full benefit of the guaranteed right.

Lastly, in Attorney General v. Salvatori Abuki, Constitutional Appeal No. 1 of 1998, this Court held that a non-derogatable article confers absolute protection and should be enforced by all government and non-government organs and individuals.

In Tinyefuza v. Attorney General, Constitutional Petition No. 1 of 1996, Manyindo, DCJ (as he then was) rightly summed these principles as follows:

> "The entire Constitution has to be read as an integrated whole, and no one particular provision destroying the other but each sustaining the other. This is the rule of harmony, rule of completeness and exhaustiveness and the rule of paramountancy of the written constitution."

I entirely agree with the position as stated by the learned Deputy Chief Justice.

In line with the principles of constitutional interpretation discussed above, it therefore follows that while NEMA was tasked with the responsibility of protecting the environment for the benefit of all Ugandans who are living and those to come, it must also respect the rights of Ugandans entrenched in the Constitution, while it is performing its duties. For it cannot be true that the Constitution or the National Environment Act gave NEMA a waiver to observe and respect the constitutionally protected rights in order to protect the environment, while restricting each and every other constitutionally and/or statutorily established body to perform its respective duties while respecting the Constitution and the rights guaranteed under it.

It is my view that no article in the Constitution warrants and gives a right to NEMA to trample on other equally entrenched rights guaranteed to Ugandan citizens by the same Constitution from which it derives its powers. The enabling sections in the National Environment Act however do so in the manner I have described in this Judgment. The challenged sections of the National Environment Act are very problematic because, as the appellant argued, they make NEMA the investigator, prosecutor, judge and executioner of its orders. In so doing, they have failed to meet the Constitutional test and should therefore be declared so, for being inconsistent with and in contravention of the cited provisions of the Constitution.

Sections 67, 68 & 70 of the National Environment Act are inconsistent with or contravene Articles 21 and 28 of the Constitution because they also create opportunities for abuse by NEMA officials which can result in bias, discriminatory and preferential treatment of individuals by the NEMA officials without giving those persons affected the opportunity to be heard and before they are found guilty of harming the environment or engaging in activities that are either harming or are likely to harm the environment.

The Constitutional Court and this Court have justified the need for NEMA to act unilaterally to save the environment without any delay. I am not convinced that these fears are founded.

I am fortified in my view by the fact that the quashing of the impugned provisions would not lead to a de-

feat of the purpose of the National Environment Act. On the contrary, NEMA will still be able to protect the wetlands and other forms of the environment, while at the same time respecting the other constitutionally guaranteed rights of all those persons who are either suspected of or who have been found to have engaged in activities that are harmful to the environment. NEMA will still be able to take advantage of section 3(3) of the National Environment Act, which grants NEMA a statutory right to apply to court for any order to restrain or stop an impending or actual degradation of the environment upon receiving information to that effect. This section provides as follows:

> "In furtherance of the right to a healthy environment and enforcement of the duty to maintain and enhance the environment, the authority or the local environment committee so informed under sub-section (2) is entitled to bring an action against any other person whose activities or omissions have or are likely to have a significant impact on the environment to—
>
> (a) prevent, stop or discontinue any act or omission deleterious to the environment;
>
> (b) compel any public officer to take measures to prevent or to discontinue any act or omission deleterious to the environment;
>
> (c) require that any ongoing activity be subjected to an environmental audit in accordance with section 22;
>
> (d) require that any ongoing activity be subjected to environmental monitoring in accordance with section 23;
>
> (e) request a court order for the taking of other measures that would ensure that the environment does not suffer any significant damage."

In addition to section 3(3), NEMA can also take advantage of section 71 of the National Environment Act to seek issuance of Environmental Restoration Orders from the Court. Section 71 provides as follows:

> "(1) Without prejudice to the powers of the authority under sections 67, 68 and 69, the court may, in any proceedings brought by any person, issue an environmental restoration order against a person who has harmed, is harming or is reasonably likely to harm the environment.
>
> (2) For the avoidance of doubt, it shall not be necessary for a plaintiff under this section to show that he or she has a right of, or interest in, the property, in the environment or land alleged to have been harmed or in the environment or land contiguous to such environment or land."

A Court issued Environmental Restoration Order, in my view, would ensure due process of the law. While it can be argued that this section gives a right to other persons other than NEMA to apply to Court for Environmental Restoration Orders, there is nothing to stop NEMA from taking advantage of it as well. This is because under section 4 of the National Environment Act, NEMA is a body corporate, with capacity to sue and be sued in its own name.

By NEMA taking advantage of these sections, the environment will, in my view, be protected in a sustainable manner while taking into account the needs of present and future generations. Otherwise, it would be wrong and unsustainable, in my view, to have a situation where the courts allow the rights of the present generation to be violated in the name of preserving the rights of a future generation to live in a safe environment and to enjoy all the other rights guaranteed under Chapter 4 of our Constitution and the various international instruments Uganda has ratified.

Article 20 of the Constitution imposes the duty to respect, protect and promote the fundamental rights and freedoms guaranteed under Chapter 4 of the Constitution of Uganda on organs and agencies of government. As the Constitutional Court rightly noted in Maj. Gen. David Tinyefuza v. Attorney General; Constitutional Petition No. 01 of 1996,

> "… it is the duty of this court to enforce the paramount commands of the Constitution. The current thrust of highly persuasive opinions from courts in the Commonwealth is to apply a generous and purposive construction of the Constitution that gives effect to and recognition of fundamental human rights and freedoms. We believe that this is in harmony with the threefold injunctions contained in Article 20(2) commanding the respect of; upholding and promoting human rights and freedoms of the individual and groups enshrined in chapter 4 by all organs and agencies of government and by all persons. To hold otherwise, may be to suggest that Article 20(2) is idle and vain."

I therefore find, based on the discussions and reasoning given in this Judgment that learned Justices of the Constitutional Court erred in law and fact when they held that:

(a) the appellant had to show that the procedures laid down in the section are insufficient to achieve justice without frustrating the legislation;

(b) the appellant failed to show that the safeguards contained in the impugned sections are insufficient to accord the appellant or anyone else a fair hearing; and

(c) the appellant's proprietary rights were not infringed by the acts of the respondents.

(d) what was taken away from the appellant was misuse of the land in order to protect the environment.

I would accordingly allow grounds 4, 5, 6, 7, 8 and 9 of the appeal.

Ground 1 of the Appeal

I will now turn to consider ground 1 of the Appeal. Under this ground, counsel for the appellant faulted the Constitutional Court for having decided the Petition on the premise that the appellant's land was a wetland.

It is indeed true that the Constitutional Court did not consider this issue of whether the appellant's land was a wetland, given that the parties never specifically framed it for the Court's consideration and that they only raised one issue on whether sections 67, 68 and 70 are inconsistent with or contravene the various articles of the Constitution as was alleged in the Petition.

The Constitutional Court also did not find it important, on its volition, to address itself to this question of whether the land in question was a wetland and whether there was any need for NEMA to gazette such wetlands. My colleagues on the panel have similarly declined to consider it on grounds that it had not been raised for the determination of the Constitutional Court.

I do agree that the issue whether the appellant's land was a wetland or not was never specifically framed at the Constitutional Court. However, as the record of appeal and all the pleadings clearly indicate, this issue was evident from the pleadings and was important to the determination of part of the appellant's Petition. It was therefore an unfortunate oversight on the part of counsel on both sides not to specifically frame it, and also for the Constitutional Court not to address it as a fundamental issue lying at the core of the appellant's case.

Although the question whether the appellant's land was a wetland was not canvassed at the Constitutional Court, I have found it necessary to delve into this ground of appeal. This is because it is only if the question is answered in the affirmative that NEMA's actions with respect to the appellant's land, including the demolition of the appellant's house in pursuance of the Environmental Restoration Order to protect the environment, could be justified.

I will now turn to examine the provisions relating to wetlands. Section 1(ooo) of the National Environment Act defines a wetland as:

> "Areas permanently or seasonally flooded by water where plants and animals have become adopted."

Furthermore, Regulation 2 of The National Environment (Wetlands, River Banks & Lake Shores Management) Regulations, S.I. No.3/2000 also defines wetlands as follows:

> "Areas permanently or seasonally flooded by water where plants and animals have become adapted; and include swamps, dambos, areas of marsh, peatland, mountain bogs, banks of rivers, vegetation, areas of impeded drainage, or blackish salt."

The National Environment Act definition of a wetland is vague, in my view, as almost any part of Uganda could easily qualify to be termed as a wetland, depending on the season. The definition in the Regulations complicates the situation even further by adopting of a much more complex and technical definition of a wetland. How for example, are ordinary, law abiding citizens supposed to know what a 'dambo' or 'mountain bog' or 'blackish salt' mean or are, to avoid degrading them?

Section 36 of the National Environment Act, on the other hand, regulates building and other activities that may be undertaken in a wetland. It provides as follows:

> (1) No person shall—
>
> (a) reclaim or drain any wetland;
>
> (b) erect, construct, place, alter, extend, remove or demolish any structure that is fixed in, on, under or over any wetland;
>
> (c) disturb any wetland by drilling or tunnelling in a manner that has or is likely to have an adverse effect on the wetland;
>
> (d) deposit in, on or under any wetland any substance in a manner that has or is likely to have an adverse effect on the wetland;
>
> (e) destroy, damage or disturb any wetland in a manner that has or is likely to have an adverse effect on any plant or animal or its habitat;
>
> (f) introduce or plant any exotic or introduced plant or animal in a wetland, unless he or she has written approval from the authority given in consultation with the lead agency.
>
> (2) The authority may, in consultation with the lead agency, and upon an application to carry on any activity referred to in subsection (1), make any investigation it considers necessary, including an environmental impact assessment referred to in section 19 to determine the effect of that activity on the wetland and the environment in general.
>
> (3) The authority shall, in consultation with the lead agency, and by statutory order, specify the traditional uses of wetlands which shall be exempted from the application of subsection (1).

Byamugisha, JA addressed herself to this Section in her Judgment when she observed as follows: "With

> regard to the wetlands section 36 of the Act imposes restrictions on the use of wetlands and to carry out any activity on the wetlands requires written approval of the 1st respondent. The petitioner is not challenging the constitutionality of these restrictions. In my view, it is these restrictions which gave the 1st respondent power to carry out inspection on the petitioner's property to ascertain whether the activities he was carrying out on the land was in conformity with the provisions of the section- hence the service of the restoration order."

As can clearly be seen from the provisions of section 36, building in a wetland is not outlawed by National Environment Act. What is required is that any such building or other activity can only be done after NEMA's approval. It therefore follows that a mere finding that a given person has constructed a building in a wetland

is not per se, sufficient to support the conclusion that the environment or wetland has been degraded.

In response to Nyakana's contention that his land was not in a wetland and that no gazetting of the same had been made, NEMA filed an Affidavit in Reply sworn by Mr. Festus Bagora, where he averred as follows:

> 8 (f) That wetlands are defined by section 1 of the National Environment Act and are not determined at the discretion of the 1st respondent, nor are the Petitioner or the Kampala District Land Board authorities on wetlands; and that, therefore, neither the Petitioner nor the Kampala District Land Board can make a finding on whether or not the Petitioner's suit property is in a wetland.
>
> (g) That gazettement is not a pre-condition for protection of wetlands, which protection is accorded by law under Article 237(2)(b) of the Constitution, section 44(4) of the Land Act, section 36 of the National Environment Act and the National Environment (Wetlands, River Banks & Lake Shores Management) Regulations,
>
> S.I. No.3/2000

In light of NEMA's pleadings and failure to comply with the express provisions of the law to gazette the land which is a subject matter of this appeal as a wetland, it was erroneous, in my view, for the Constitutional Court to proceed with the appellant's petition, on the premise that it was in a wetland.

As I discussed before, the National Environment Act and the National Environment (Wetlands, River Banks & Lake Shores Management) Regulations, S.I. No.3/2000 specifically impose a duty on NEMA to gazette wetlands which it failed to do in this particular case. In my view, it is therefore imperative that before NEMA condemns persons of harming the environment or for failure to seek its approval before any construction or activities, that the wetlands are known and gazetted.

In the absence of NEMA's clear designation and gazetting of wetlands that should be protected, the Constitutional Court and indeed this Court would, in my view, be treading very dangerously, to uphold the constitutionality of sections 67, 68 & 70 of the National Environment Act which permit NEMA to unilaterally act and issue Environmental Restoration Orders and to proceed to demolish structures and take such other punitive measures as it may deem fit, against a person suspected or believed to be degrading the environment, without due process of the law. This is especially so where such a person has even been issued with a Certificate of Title and has a duly approved building plan from the relevant local authority.

I therefore find that the learned Justices of the Constitutional Court erred in law and fact when they proceeded to decide the appellant's Petition on the premise that the land where he was constructing a house was as a wetland, without having evidence on the record to support NEMA's claims. Accordingly, I would allow ground 1 of the appeal.

Ground 2 of Appeal

I will now turn to consider ground 2 of appeal. Under this ground, counsel for the appellant faulted the learned Justices of the Constitutional Court for holding that the Environmental Restoration Order was similar to a charge sheet issued in criminal proceedings.

In her lead Judgment, Byamugisha, JA. held as follows in respect to the Environmental Restoration Order:

> "The restoration order is like a charge sheet that commences the prosecution of a person who is charged with a criminal offence. Normally a police officer does not give a hearing to a suspect before charging him or her."

I disagree with the analogy that was made and conclusion reached by the Constitutional Court and the majority in this Court which equates an Environmental Restoration Order with a Charge Sheet. In my view, the analogy used by the Constitutional Court was erroneous. A close look at the provisions of sections 67 and 68 of the National Environment Act reveals that NEMA is not obliged to issue Environmental Restoration Orders. However, when NEMA opts to issue the Environmental Restoration Orders, it would not simply be

charging the actual or alleged degrader of the environment. It would be pronouncing its verdict against the real or perceived degrader of the environment and require compliance with it. Failure to comply with the Environmental Restoration Order would result in NEMA taking further action by enforcing any one or more of the orders I already highlighted in this Judgment, under the discussion of whether sections 67, 68 and 70 of the National Environment Act are unconstitutional.

The nature and effect of the Environmental Restoration Order is in clear contrast to a charge sheet in criminal proceedings, which as the learned Justice Byamugisha, JA correctly put it, only commences criminal proceedings. After the accused has been charged, he is not condemned and required to serve a sentence. Rather, the charging of the accused is followed by the taking of his or her plea. Where the accused pleads not guilty, a trial will commence and the accused person will fully participate in the hearing while the State adduces evidence against him/her. He/she has the opportunity to cross-examine the witnesses testifying against him, to scrutinize all the evidence tendered and lastly to put up his/her defence (if he/she wishes to do so). All this is done before the presiding judicial officer makes a decision finding the accused person guilty as charged or acquitting him.

An Environmental Restoration Order, however, is not issued to commence proceedings. As the discussion on sections 67 and 68 earlier in this Judgment clearly shows, an Environmental Restoration Order is issued at the conclusion of investigations and NEMA's internal processes where NEMA's inspection findings are made, considered and decided upon. This is done after NEMA has reached the conclusion and made a decision that the recipient of the Environmental Restoration Order is either about to harm or has harmed the environment in the manner stated in the Environmental Restoration Order. NEMA then proceeds to 'convict' him and to order/direct him or her to take such remedial measures as NEMA, in its own exclusive opinion deems fit, to 'restore' the environment. It is worth noting that throughout the entire process before the Environmental Restoration Order is issued, the person alleged to be harming or likely to harm the environment has no opportunity to participate in it. Hence, the Environmental Restoration Order is issued in total disregard to the due process of the law for the real or alleged degrader of the Environment.

In the appeal under consideration, these orders are clearly evidenced from the following quote taken from the Environmental Restoration Order.

> "You are given Twenty one Days (21) from the date of this Restoration Order within which to comply. This Environmental Restoration Order comes into effect from the date of this Restoration Order.
>
> TAKE NOTICE that failure to comply with the above directives/orders shall result into this Authority or any other person authorized taking all the necessary steps against you to ensure that the above directives are complied with
>
> TAKE FURTHER NOTICE that this Authority may recover as a civil debt in Court the expenses necessarily incurred by it or any other authorized person in the Exercise of enforcing this Restoration Order."

The true nature and effect of the Environmental Restoration Order became evident in the actions of NEMA with respect to the appellant's land. When NEMA came to the conclusion that it needed to enforce its orders, it did not resort to Court. Rather it only sought assistance from another arm of Government (the Police) to enforce the Environmental Restoration Order it had issued to the appellant.

In a letter to the Police which I have reproduced in its entirety in the following section, NEMA made additional prejudicial claims against the appellant, and proceeded to request for security from Police to 'restore the environment' by demolishing the appellant's house. NEMA's letter read as follows:

> "Wednesday, January 05, 2005
>
> The Director CID Headquarters Kampala Attention: Mr. Stephen Kamukuguzi D/SSP CID Headquarters

KAMPALA

RE: PROSECUTION OF GODFREY NYAKANA AND PROVISION OF SECURITY DURING THE RESTORATION OF NAKIVUBO WETLAND IN NAKAWA DIVISION.

The protection of the environment and wetlands in particular, has been provided by law. Article 237(2)(b) of the Constitution provides that Government or a local government shall hold in trust for the people and protect wetlands for the common good of all citizens. This is reiterated by section 44 of the Land Act Cap. 227. In addition, sections 36 and 37 of the National Environment Act Cap 153 provide for restricted use and sustainable management of wetlands. In addition, under section 3 of Cap. 153 every person is obliged to maintain and enhance the environment.

NEMA is also required to issue restoration orders where the environment has been significantly affected. Where restoration orders are issued NEMA may authorize their enforcement through other organs of Government. The National Environment (Wetlands, River Banks and Lake Shores Management) Regulations, S.I No. 3/2000 have been particularly put in place to protect wetlands from encroachment and to regulate activities in the wetlands.

In regard to the above subject matter, Nakivubo wetland located in Nakawa and Makindye Divisions has been gazetted as a critical wetland in Kampala District. An inventory of affected persons with structures was made in June 2004 and they were issued with Environmental Orders to the effect that they should:-

(i) Stop any further degradation of the wetland;

(ii) Demolish all illegal structures erected within the wetland; and

(iii) Restore to as near as possible the wetlands ecosystems to their original state before the degradation activities were undertaken.

A community sensitization meeting was also held at Lidia Macchi Youth Centre- Bugolobi (near St. Kizito Primary school) on Sunday 25th July 2004. During the meeting, participants were directed to suspend all activities in the wetland until the gazettment process is finalized.

One of the people who were issued with Restoration Orders was Godfrey Nyakana, who purportedly owns Plot 8 on Plantation Road. That plot is in the wetland. To-date he has not complied with the Restoration Order Ref: NEMA/ERO/KLA/02/07/2004 (attached) issued to him, but instead has caused more degradation of the wetland. Mr. Nyakana is also one of those who attended the community sensitization meeting that was conducted at Lidia Macchi Youth Centre-Bugolobi (on Sunday 25th July 2004.

On many occasions, Environmental Inspectors from this Authority, Kampala City Council and Wetlands Inspection Division have stopped the erection of Nyakana's above said structure but he has always later resumed construction especially during awkward hours, despite repeated warnings to stop. Indeed, he is still erecting the illegal structure in the wetland. The period during which he was required to restore the wetland has since passed.

In view of the above, the National Environment Management Authority under section 68(1) of the National Environment Act, are going ahead to enforce the provisions of the Environmental Restoration Order served on Mr. Nyakana.

The purpose of the letter, therefore, is to request you to play your role of prosecuting Mr. Nyakana under section 101(a) of the National Environment Act, for the offence of failing or refusing to comply with the Restoration Order issued to him. We are also requesting you to provide security to the team mandated by NEMA to restore the wetland in view of Mr. Nyakana's failure to comply with the Restoration Order. This activity is planned to take place on Thursday 6th January 2005 starting at 4:00 AM.

I look forward to our continued collaboration on this matter. (Sign)

.....

Aryamanya-Mugisha, Henry

EXECUTIVE DIRECTOR "

It is worth noting that NEMA scheduled this house demolition exercise to commence at 4.00 a.m.

As is clearly evident from NEMA's letter to the Police, NEMA's interpretation of what the effect of the Environment Restoration Order and its powers to act on such Orders after issuing them, is consistent with my interpretation that the combined effect of section 67, 68 and 70 of the National Environment Act is to give NEMA an unfettered right to trample and violate all the Constitutionally entrenched rights to fair hearing and due process of the law, property and privacy. For example, I am not aware of any law in Uganda which prescribes what time of the day or night a person can build. It is common practice for big construction companies in this country and elsewhere to undertake night construction when there is minimal interruption from other users, particularly in areas with a lot of human and/or commercial activity.

Given the clear distinction between the nature and effect of an Environment Protection Order and a Charge Sheet I have discussed above, I find that the learned Justices of the Constitutional Court erred and misdirected themselves in law and fact when they equated the environment restoration order to a charge sheet that commences the prosecution of a person who is charged with a criminal offence. I would therefore allow Ground 2 of appeal to succeed.

Whether Nyakana's Failure to seek NEMA's review was a relevant factor to take into account in determining his Constitutional Petition?

I now wish to turn to the particular facts of this appeal and consider the merits of the appellant's claims vis a vis NEMA's actions undertaken under the authority of the sections 67, 68 and 70 of the National Environment Act.

According to the record, NEMA demolished the appellant's house because he ignored the Environmental Restoration Order it had issued against him. The Environmental Restoration Order read as follows:

" Monday, July 19, 2004

TO: Mr. Nyakana Godfrey

Plantation Road, Bugolobi Parish Nakawa Division

Kampala District

ENVIRONMENTAL RESTORATION ORDER

(Issued under Section 67(1) of the National Environment Act Cap 153) REGARDING

DEGRADATION OF NAKIVUBO WETLAND LOCATED IN NAKAWA DIVISION KAMPALA DISTRICT

TAKE NOTICE that on 13th July, 2004, Environmental Inspectors and officials from Kampala City Council, Wetlands Inspection Division and the Police carried out inspections in Nakivubo wetland located in Nakawa Division in Kampala District to assess compliance of land use with environmental laws and regulations.

The findings of the inspections indicate that you have continuously degraded the wetland in an illegal manner by dumping soil and constructing a housing structure in a wetland contrary to the National Environment Act Cap 153 and the Regulations made there under.

You are therefore ORDERED to immediately comply with the following environmental improvement order(s)-

1. Demolish the house structure you have constructed in the wetland

2. Remove all the debris arising thereof from the demolition of the house structure including the soil you have dumped in the wetland and dispose it off in a safe place without causing any more degradation of the environment; and

3. Restore as near as possible the wetland to its original state before dumping the soil in it.

You are given Twenty one Days (21) from the date of this Restoration Order within which to comply. This Environmental Restoration Order comes into effect from the date of this Restoration Order.

TAKE NOTICE that failure to comply with the above directives/orders shall result into this Authority or any other person authorized taking all the necessary steps against you to ensure that the above directives are complied with.

TAKE FURTHER NOTICE that this Authority may recover as a civil debt in Court the expenses necessarily incurred by it or any other authorized person in the Exercise of enforcing this Restoration Order.

(Sign)

.....

Aryamanya-Mugisha, Henry
EXECUTIVE DIRECTOR

According to the Environmental Restoration Order, NEMA had undertaken an inspection which established that the appellant had degraded Nakivubo wetland by dumping soil in it and by constructing a house therein. NEMA also contended that the Nyakana had continued with building his house even after he was directed to stop and was notified in a meeting and by inspectors on his site.

Despite the claims of NEMA of having met with Nyakana and also of having carried out the inspection of the wetland Nyakana is said to have degraded, NEMA opted to neither tender in the minutes of the residents' meeting they alleged the appellant attended nor a copy of the inspection report they relied upon to demolish the appellant's house.

Bagora, in his affidavit sworn on behalf of NEMA averred as follows:

7 (a) That in June 2004, the 1st Respondent's inspectors carried out an inspection of Nakivubo wetland located in Nakawa and Makindye Divisions of Kampala and found that the petitioner was degrading a part of the wetland situate at Bugolobi on Plantation Road, by constructing a house on a plot he purportedly owns.

(b) That an inventory of affected persons with structures in the wetland was made in June 2004 and they were issued with Environmental Restoration Orders.

…

(e) That the 1st Respondent called the Petitioner to a community sensitization meeting held at Lidia Macchi Youth Centre-Bugolobi (near St. Kizito Primary School) on Sunday 25th July 2004. During the meeting, participants were directed to suspend all activities in the wetland until gazettement process is finalized; and that evidence by way of video tape shall be adduced at the hearing of this petition to show that the Petitioner was given audience to air his views during the meeting."

The facts that Mr. Bagora deponed to in his Affidavit filed on behalf of NEMA are at variance with those that were stated in the Environmental Restoration Order NEMA claimed to have served on the appellant. First, although the Environmental Restoration Order (which I have produced in this Judgment) was dated July 19, 2004, Bagora swore that the appellant and other affected persons were served with Environmental Restoration Orders in June 2004. Secondly, NEMA claimed in the Environmental Restoration Order to have carried out inspections on the Nakivubo wetland on 13th July 2004. However, Bagora in his affidavit claimed that inspections were carried out in June 2004. Thirdly, according to Bagora's affidavit, it is after issuing Environmental Restoration Orders to the appellant and other affected persons that NEMA called the appellant to a community sensitization meeting on 25th July 2004 where the appellant and others in attendance were directed to suspend all activities in the wetland until the gazettement process is finalized. However, under the terms of the Environmental Restoration Order which was issued on July 19, 2004, NEMA had already reached a decision that the appellant had 'continuously degraded the wetland…by dumping soil and constructing a housing structure in the wetland contrary to the National Environment Act and the Regulations made there under.' Under the same Environmental Restoration Order, the Environmental Restoration Order took immediate effect and required the appellant to comply with it within 21 days. There was no mention in the Environmental Restoration Order of the appellant's right to seek a reconsideration of the Environmental Restoration Order under section 69, as was claimed by the respondents. The question that arises is why would NEMA issue contradictory documents with conflicting dates and sequence of events regarding the same incident?

In NEMA's letter to the Police which I have already reproduced in this judgment, NEMA claimed that "on many occasions", it stopped Nyakana from erecting his structure in a wetland. However, when it was taken to task to reply to Nyakana's Petition, the only evidence it was able to tender was (i) a copy of the Environmental Restoration Order, which it claimed had been served on Nyakana but was in effect served on Mr. Kugonza Sam, who signed as Nyakana's foreman and (ii) affidavit evidence claiming that Nyakana had notice of his alleged degradation of Nakivubo channel, because he had attended a 'Community Sensitization Meeting' where NEMA informed attendees to halt their development 'until it had finalized the process of gazetting their land as a wetland'.

In defending the Petition, NEMA also placed great reliance on the fact that Nyakana had attended a sensitization meeting of all stakeholders and that this was a sufficient impartial hearing for Nyakana and other affected persons. However, NEMA chose not to attach the minutes and/or report of the sensitization meeting or the inspection it referred to in the Environmental Restoration Order it served on Nyakana. I find it very surprising that NEMA even went ahead to depone that it was not even its duty to define or gazette wetlands!

In the appeal under consideration, there was no hearing before a restoration order with such grave repercussions was issued. Findings of the Inspectors were never communicated to the appellant to respond to them. Only NEMA's inspectors and management knew the scope and findings of their investigation which led to the issuance of the Environmental Restoration Order. NEMA did not place the Inspection Report on record to guide the Court. After their investigation, NEMA delivered its verdict against the appellant and afterwards enforced it by demolishing the appellant's house. The Process of issuing, serving and enforcing the Environmental Restoration Order, was in my view, unconstitutional.

The gravity of such an Environmental Restoration Order issued against the appellant without according him an opportunity to be heard cannot be taken lightly especially when one looks at the orders and actions that were required of the appellant. These included demolition of the house structure already erected; removal of all debris arising thereof from the demolition of the house structure including the soil dumped in the wetland and disposing it off in a safe place without causing any more degradation of the environment; and restoration to as near as possible the wetland to its original state before dumping the soil in it.

NEMA and the Constitutional Court took comfort in the meeting that NEMA claimed to have held with the locals/residents regarding the wetland in question. However, no minutes of the meeting were put on record to show what was discussed, who attended this meeting, and what the outcomes of this meeting were. Does video evidence, for example show what was discussed? Were the "residents" who attended owners of land in the affected land or the users of the wetland? The meeting was also held in the "process of gazetting the

wetland." How did the meeting validate the whole process culminating into demolition of the appellant's house?

Furthermore, under section 67(5) (b), NEMA is required to explain to the person against whom an Environmental Restoration Order has been issued, the right to appeal to Court. This section would seem to imply that service of the Environmental Restoration Order has to be effected in person. Yet in this appeal under consideration, NEMA served someone at the appellant's site, who signed for the Environmental Restoration Order as a foreman. The question arises whether service on the foreman was effective service on the appellant?

Secondly, since this sub-section 67(5)(b) creates a right of appeal to a Court of law against the Environmental Restoration Order, two possible scenarios could arise. One is a situation where the person served with an Environmental Restoration Order would be challenging the Environmental Restoration Order in court, while NEMA is invoking its powers under sections 68 and 70 of the National environment Act to proceed to put into effect the orders contained in the Environmental Restoration Order, hence rendering the appeal nugatory.

On the other hand, a person served with an Environmental Restoration Order could seek and obtain an injunction against NEMA and hence incapacitate it or unduly delay NEMA's ability to intervene to protect the environment. In the first scenario, the right to appeal would be rendered meaningless, while in the second scenario, NEMA's ability to act in a timely manner would be greatly curtailed. But this could easily be avoided if NEMA ensured due process in issuing Environmental Restoration Orders or sought Court ordered Environmental Restoration Orders.

But as the facts of the appeal under consideration show, NEMA opted to act under the provisions of National Environment Act hence rendering the minimal protection this sub-section could have offered to not be realized.

By ensuring due process of the law in its operations, NEMA would not be incapacitated from acting against environmental degraders or from responding in a timely manner against environmental threats. In the appeal under consideration, for example, NEMA claimed to have discovered that Nyakana, the appellant, was degrading Nakivubo Channel in June or July 2004. However, it only proceeded to demolish his house in January 2005. Although delays in court processes are not unusual, it cannot be said that NEMA could have failed to obtain a temporary injunction from the Court much earlier than the six months it took before it demolished the appellant's house at 4.00 a.m. in the dead of the night.

There is also need to recognize the dangers associated with NEMA issued Environmental Restoration Orders. What if the person served with the Environmental Restoration Order is not the owner of the land or the violator, for instance a tenant who ends up having his or her personal property destroyed. As court, we need to take notice of the danger of having property of innocent persons destroyed because NEMA Inspectors are empowered by the National Environment Act not to talk to anybody as it enforces its mandate. The inspectors can enter at any time to inspect and have no duty to explain themselves and also NEMA can enforce its Environmental Restoration Orders at any time, including 4 a.m.!. This is a draconian way of doing things.

The Constitutional Court also criticized Nyakana for his failure to move NEMA to reconsider the Environmental Restoration Order. With all due respect to the learned Justices of the Constitutional Court, I am of the view that the constitutionality of the impugned sections (sections 67, 68 and 70) did not depend on Nyakana's refusal or failure to comply with the Environmental Restoration Order or to seek for its reconsideration under section 69 of the National Environment Act. This is because any one who had not directly suffered personal damage could have brought this Petition under Article 137(3) & (4) of the Constitution challenging the constitutionality of the impugned sections

With due respect to the learned Justices, it is my view that the role of the Petitioner in this case was to petition the Constitutional Court about the alleged contravention and/or inconsistency of the impugned sections of the National Environment Act with the provisions of the Constitution he cited. Having done that, it was the constitutional duty of the Constitutional Court to consider the merits of those allegations and to determine whether to grant the declarations sought and the appropriate redress. Hence it is my finding that the Con-

stitutional Court erred in law when it hinged its decision in this Petition on the Petitioner's (now appellant's) conduct.

Prayers for Redress

As for prayers the appellant made seeking for redress, I also find that since Nyakana's house was demolished by NEMA without due process of the law, he is entitled to compensation for the value of the house and such other attendant relief arising from NEMA's conduct.

I have made no findings on grounds 3 and 8 of appeal because they are, in my view, inconsequential to the resolution of this appeal. I have also made no findings with regard to the challenged sections of the National Environment Act vis a vis Articles 237 and 259. In my view, except to the extent I have discussed Article 237 in this Judgment, I did not find it necessary to consider either of these Articles any further.

Grounds 10 and 11 of the appeal

Grounds 10 and 11 of the appeal were concerned with the Constitutional Court's decision to award costs against the appellant to NEMA, the Attorney General and 5 other respondents who had voluntarily joined the proceedings in public interest.

I am aware that the learned Chief Justice in his Judgment has reversed this order, with the exception of the first and second respondents. I agree with him. But I also believe that the appellant should not be condemned in costs even to the 1st (NEMA) or the 2nd respondents (the Attorney General).

Both the Petition and this appeal, in my view, raised important questions, on how we can protect our environment while respecting constitutionally guaranteed rights. Even though the appellant has by virtue of the majority decision of this Court lost his appeal, his appeal has nevertheless made a contribution to the jurisprudence of this country, on the issues of how to balance the need and duty to protect the environment imposed on the State in Uganda vis-à-vis other equally entrenched rights which are protected by the same Constitution, such as the right to property, to a fair hearing by administrative bodies, to privacy and the right to equal protection of the law. I would therefore allow grounds 10 and 11 of appeal accordingly order that each party bear their own costs.

Conclusion

In conclusion, for the reasons I have given in this Judgment I would allow the appeal and make the following orders:

(1) That with the exception of section 67(5) and 68 (4) of the National Environment Act, sections 67, 68 and 69 of the National Environment Act are inconsistent with Articles 21, 26, 27, 28 and 44 of the Constitution.

(2) As for the redress prayed for, I would refer the matter to the High Court to assess the appropriate compensation due to the appellant, special and general damages from the demolition of his house and infringement of his rights.

(3) Each party should bear their costs.

DATED at Kampala this …….....day of 2015

HON. DR. ESTHER KISAAKYE, JSC

JUSTICE OF THE SUPREME COURT.

Case 2

REPUBLIC OF KENYA

IN THE NATIONAL ENVIRONMENTAL

TRIBUNAL AT NAIROBI

TRIBUNAL APPEAL NO. NET 196 of 2016

SAVE LAMU ..... 1ST APPELLANT

SOMO M. SOMO ..... 2ND APPELLANT

RAYA FAMAU AHMED ..... 3RD APPELLANT

MOHAMMED MBWANA ..... 4TH APPELLANT

JAMAL AHMED ALI ..... 5TH APPELLANT

ABUBAKAR MOHAMMED TWALIB ..... 6TH APPELLANT

-versus-

NATIONAL ENVIRONMENTAL

MANAGEMENT AUTHORITY (NEMA) ..... 1ST RESPONDENT

AMU POWER COMPANY LIMITED ..... 2ND RESPONDENT

JUDGMENT

1. As part of a vision of the country's economic blueprint for development and industrialization of the country the Government of Kenya, through the Kenya Vision 2030 initiative, formulated a power generation program intended to increase the generation of total effective capacity to about 5000 MW. This program included the setting up of the intended 1050 MW coal fired power plant in Lamu to be built, owned and operated by the 2nd Respondent , who were the successful bidders following an expression of interest by the Government. It was proposed to have the coal power plant on the sea shore of Kwasasi area, Hindi Division, in Lamu County.

2. The 2nd Respondent engaged Kurrent Technologies Limited, to undertake an Environmental & Social Impact Assessment (ESIA) Study for its coal power plant in Lamu, and, upon completion, presented the same to the 1st Respondent Authority for licensing purposes. The 1st Respondent , NEMA, proceeded to issue an Environmental Impact Assessment Licence No. NEMA/ESIA /PSL/3798 to the 2nd Respondent on 7th September, 2016.

3. The 1st Appellant , a community based organisation representing the interests and welfare of Lamu and whose membership comprised of individuals and several community groups within Lamu together with the 2nd to 6th Appellant s were aggrieved by the issuance of the said EIA License dated 7th September 2016. They filed the present appeal on 7th November, 2016 challenging the issuance of the EIA Licence as well as the process in obtaining the same. They prayed, inter alia, for the following relief(s):-

    a. The setting aside of the decision by the 1st Respondent to grant the 2nd Respondent an EIA Licence;

    b. That a fresh EIA study be conducted based on specific and current information invol-

ving all stakeholders; and

c. That each party bears its own cost.

4. The grounds of the appeal included the following:-

a. There was a poor analysis of alternatives and economic justification and failure to take into account economic issues and to identify and analyse alternatives to the proposed project;

b. Insufficient scoping process that lacked proper Public Participation;

c. Adverse effects on the Marine Environment through the discharge of thermal effluent into the marine environment by using poor and outdated cooling system;

d. Approval of the project on land falling within an ecologically sensitive area;

e. A flawed EIA Report plagued with misrepresentations inconsistencies and omissions;

f. The Negative Impact on Kenya's Air Quality with adverse effects on human health and biodiversity

g. Contribution to climate change and making the Project inconsistent with Kenya's low carbon development commitments;

h. The Failure to put conditions in the EIA licence to put in place mitigation measures to address coal pollution caused by coal handling and storage;

i. Lack of sound mitigation measures

j. Compounded unviability of the project

5. The 1st Respondent filed its Reply to Appeal dated 16th January 2017 before this Tribunal along with its witness statements and documents on 16th March 2017; the 2nd Respondent responded to the Appeal and Grounds through the 2nd Respondent's Reply to Appeal dated 3rd November 2016 and filed in the Tribunal on 2nd December, 2016.

The Hearing

6. Following a site visit by the Tribunal members of the proposed project at Kwasasi on 11th May 2017, the Tribunal commenced hearing of the appeal in Lamu on 12th May 2017.

7. The Tribunal took the evidence of the first three witnesses of the Appellant s, AW1. Raya Famau Ahmed, AW2 Mohamed Athman and AW 3 Dr. David Obura in Lamu before adjourning the proceedings to Nairobi.

8. In Nairobi, the Appellant called nine (9) other witnesses to the stand: These were AW4 Ernie Niemi, AW5 Dr. Mark Chernaik, AW6 Lauri Myllvtra, AW7 Hindpal Jabbal, AW8 Mohammed Mbwana, AW9 Somo M Somo, AW10 Jackson Kiplagat, AW11 Francis Dyer and AW12 Mike Olendo.

9. The 1st Respondent on commencement of his case called one witness RW1 Gideon Kipchirchir Rotich (the NEMA Compliance and Enforcement officer EIA section)

10. The 2nd Respondent on their part called 3 witnesses: RW2 Abdulrahman Aboud (who discussed the issue of public participation and mangrove regeneration plan), RW3 Mr. Sanjay Gandhi (the lead EIA expert tasked with coordinating and conducting the EIA study report) and RW4 Andreas Szechowycz

(an Engineer working for the international firm of Sargent and Lundy LLC and responsible for the design of the coal plant)

Agreed Issues submitted by the parties

11. On 9th February, 2018 the following six agreed issues were presented to the Tribunal for determination:

a. Whether the grant of the ESIA Licence by the 1st Respondent is in violation of the Environmental (Impact Assessment & Audit) Regulations and the Constitution of Kenya.

b. Whether the process leading to the preparation of the ESIA Study Report by the 2nd Respondent involved proper and effective public participation.

c. Whether the Respondents conducted a proper analysis of alternatives of the project.

d. Whether the Respondents conducted a proper analysis of the economic viability of the project.

e. Whether the ESIA Study Report prepared by the 2nd Respondent contains adequate mitigation measures.

f. Whether the 1st Respondent in evaluating the mitigation measures and issuing the ESIA licence discharged its mandate in accordance to the law.

Deliberation by the tribunal

12. From the outset it is important to clarify that the jurisdiction of the Tribunal under Section 129(1) of the Environmental Management and Coordination Act 2009 ("EMCA") is not unlimited. The Tribunal is an appellate court from the decision of the 1st Respondent in matters relating to EIA licenses. In Miscellaneous Application Number 391 of 2006 - Republic –vs- National Environmental Tribunal & 3 Others Ex-Parte Overlook Management Ltd and Silversand Camping Site Limited while considering the jurisdiction of the Tribunal to entertain an appeal against an EIA approval, Emukule J, considered the legislative intent of the provisions of EMCA and held as follows:

"….I have shown in the discussions on the two previous issues that the powers of the Respondent Tribunal are not unrestricted. The Tribunal 's powers to entertain appeals are limited to decisions made under powers given to NEMA (Authority) or to NEMA's Director General or Committee of NEMA… This is about where the jurisdiction of the Respondent Tribunal ends...On the other hand, the High Court has both original and appellate jurisdiction commencing from the provisions of Section 3(3) of the Act …"

13. In Nairobi HCCC Petition NO 22 OF 2012: MOHAMED ALI BAADI AND OTHERS vs THE HON. ATTORNEY GENERAL and 7 others the Constitutional court in a matter dealing with the LAPSETT project and associated with the present Lamu Coal Plant made the following observations on the jurisdiction of the Tribunal :-

"93. In our view, the mandate of the Tribunal is limited to the matters provided for in section 129 of EMCA. Of all the functions of the Tribunal under Section 129 of EMCA, the only applicable one would be Section 129(1)(a) to the extent that the Petitioners challenge the completeness and scientific sufficiency of the ESIA Report that resulted in the license issued by NEMA to the LAPSSET Project's proponent. However, the scope and range of issues, rights and controversies involved in the present dispute surpasses the narrow question of the conditions which can be imposed as part of the EIA License …..

1. In our considered opinion, the Tribunal is not a suitable forum for the purpose of settling environmental conflicts at community level as disclosed in this Petition. In addition, the design of the Tribunal is such that it does not envisage the participation of all interested parties, such as developers, government, the community, non-governmental organizations, and environmental groups in a joint effort aimed at restoring the environment and agreeing on their sustainable use. Differently put, the multiplicity of parties and the polycentricity of issues in a case such as this one makes it unsuitable for the Tribunal ."

14. The purpose of this observation on the Tribunals jurisdiction and scope of mandate is to ensure that the Tribunal does not stray outside the scope and mandate set out in section 129 (1) (a) of Environmental Management and Coordination Act, 1999 when dealing with the present dispute to matters outside the licensing regime or in issues where there are "multiplicity of parties and polycentricity of issues". The jurisdiction of the Tribunal is narrow. It is to examine "the completeness and scientific sufficiency of the ESIA Report that resulted in the license issued by NEMA".

15. The Tribunal has considered the evidence tendered by the respective witnesses and submissions of the parties. The evidence of the expert witness for both the Appellant s and the Respondents was extremely helpful to the Tribunal and their expertise was not called into question by any of the parties.

16. The purpose of the Environment Impact Assessment (EIA) process is to assist a country in attaining sustainable development when commissioning projects. The United Nations has set Sustainable Development Goals (SDGs), which are an urgent call for action by all countries recognizing that ending poverty and other deprivations must go hand-in-hand with strategies that improve health and education, reduce inequality, and spur economic growth – all while tackling climate change and working to preserve our oceans and forests.

17. Accordingly, contrary to popular belief the purpose of environmental audits are not meant to hinder development but to ensure economic progress in a country takes into account environmental impacts of such proposed economic activity. With this in mind, we must also make it absolutely clear that the common perception that a coal power plant project will always be rejected in Kenya as part of its development agenda is not correct. As long as coal power plant projects meet the required standards of the law and abide by conditions imposed to mitigate potential impacts then they remain a viable and an acceptable mode of power generation. We say this being alive to the recent changes in the Energy law as enacted by the Energy Act 2019 that contains an entire provision on coal plants. Part V of the Energy Act 2019, (sections 94 to 116) capture the licensing requirements for operation of Downstream Coal activities and includes environmental conditions as one of the things to be met before licensing. Section 94 of the Energy Act provides as follows:

"94. (1) A licence or permit as the case may be, is required by a person who wishes to carry out the production of energy from coal.

(2) A person who wishes to undertake— (a) electricity generation using coal must have a valid licence issued by the Authority; (b) transportation of coal for energy production using a vehicle must have a valid permit in respect of that vehicle issued by the Authority."

18. Importantly, for the construction of a coal power plant section 107 provides as follows:-

"107. (1) A person who intends to construct a facility that produces energy using coal shall, before commencing such construction, apply in writing to the Authority for a permit to do so. Construction permits.

(2) An application under subsection (1) shall—

(a) specify the name and address of the proposed owner;

(b) be accompanied by the registration documents of the proposed beneficial owner;

(c) be accompanied by a copy of detailed layout plans and specifications prepared by a professional engineer;

(d) be accompanied by a Strategic Environment Assessment and Social Impact Assessment licenses; and

(e) contain such other details as may be necessary."

19. Accordingly, Parliament in its wisdom has identified coal energy as one source of possible energy sources for this country. The only relevant considerations are compliance with the provisions of the Energy Act 2019 and the Environmental Management and Coordination Act, 1999 when setting up such plants. As such, we repeat that, subject to meeting the conditions set out in the Act and in so far as it relates to this Tribunal , if the requisite conditions are met with respect to environmental matters including the due and proper preparation of an EIA study report in compliance with EMCA, coal fired power plants remain, for the time being, a lawful option in the power generation mix of this country.

20. In the present case, turning now to the issues agreed upon by the parties and upon reading the submissions of all parties, based on the evidence on record, we address each issue as follows:-

A. Whether the grant of the ESIA Licence by the 1st Respondent is in violation of the Environmental (Impact Assessment & Audit) Regulations and the Constitution of Kenya;

-and-

B. Whether the process leading to the preparation of the ESIA Study Report by the 2nd Respondent involved proper and effective Public Participation.

21. To these issues, we observe that the legal regime for the issuance of EIA Licenses is anchored in the Constitution of Kenya where Article 69 (f) requires the State to establish systems of environmental impact assessment, environmental audit and monitoring of the environment.

22. These systems are set out in EMCA and in particular Part VI of the EMCA as read with the relevant provisions of the Environmental (Impact Assessment and Audit) Regulations 2003 ("the Regulations") made thereunder have set out the framework of environmental impact assessment, environmental audit and monitoring of the environment and the procedures and processes involved in securing the same. These requirements in the EMCA and the Regulations ought to be complied with in the preparation of an EIA report. As part of the Tribunal s mandate, it is important that there be strict compliance and adherence to the letter of the law. The Tribunal s jurisdiction does not allow it to waive provisions of statute or regulations made thereunder. In this case, the legal requirements imposed on the 1st and 2nd Respondents when undertaking an EIA study have to be strictly complied with considering the nature of the Lamu coal power plant project and its unique position as the first coal power plant proposed to be developed and operated in Kenya.

23. The Appellants have complained about the lack of proper and effective public participation as a ground of appeal and as one of the agreed issues. The Respondents disagree that there was a lack of consultation and point to the vast amount of attachments to the exhibits showing that there was public participation with the community and other lead agencies. It is trite law that a key element in the system of environmental impact assessment is that of public participation by individuals and communities in this process. The foundation of public participation can be found in Principle 10 of the Rio Declaration on Environment and Development, 1992 which

states as follows:-

"Environmental issues are best handled with participation of all concerned citizens, at the relevant level. At the national level, each individual shall have appropriate access to information concerning the environment that is held by public authorities, including information on hazardous materials and activities in their communities, and the opportunity to participate in decision-making processes. States shall facilitate and encourage public awareness and participation by making information widely available. Effective access to judicial and administrative proceedings, including redress and remedy, shall be provided. "

24. It will be seen that access to information for the persons affected is important for meaningful participation by citizens and motivates them to participate in decision and policymaking processes in an informed manner as it seeks to take into account the community's and different stakeholders concerns.

25. In Constitutional Petition No. 305 of 2012: Mui Coal Basin Local Community & 15 others v Permanent Secretary Ministry of Energy & 17 others a three judge bench of the Kenya Constitutional Court set out the minimum basis for adequate public participation as follows:-

"97. From our analysis of the case law, international law and comparative law, we find that public participation in the area of environmental governance as implicated in this case, at a minimum, entails the following elements or principles:

a. First, it is incumbent upon the government agency or public official involved to fashion a programme of public participation that accords with the nature of the subject matter. It is the government agency or Public Official who is to craft the modalities of public participation but in so doing the government agency or Public Official must take into account both the quantity and quality of the governed to participate in their own governance. Yet the government agency enjoys some considerable measure of discretion in fashioning those modalities.

b. Second, public participation calls for innovation and malleability depending on the nature of the subject matter, culture, logistical constraints, and so forth. In other words, no single regime or programme of public participation can be prescribed and the Courts will not use any litmus test to determine if public participation has been achieved or not. The only test the Courts use is one of effectiveness. A variety of mechanisms may be used to achieve public participation.

Sachs J. of the South African Constitutional Court stated this principle quite concisely thus: "The forms of facilitating an appropriate degree of participation in the law- making process are indeed capable of infinite variation. What matters is that at the end of the day, a reasonable opportunity is offered to members of the public and all interested parties to know about the issues and to have an adequate say. What amounts to a reasonable opportunity will depend on the circumstances of each case. (Minister of Health and Another v New Clicks South Africa (Pty) Ltd and Others 2006 (2) SA 311 (CC))"

c. Third, whatever programme of public participation is fashioned, it must include access to and dissemination of relevant information.

See Republic vs The Attorney General & Another ex parte Hon. Francis Chachu Ganya (JR Misc. App. No. 374 of 2012). In relevant portion, the Court stated: "Participation of the people necessarily requires that the information be availed to the members of the public whenever public policy decisions are intended and the public be afforded a forum in which they can adequately ventilate them."

In the instant case, environmental information sharing depends on availability of information. Hence, public participation is on-going obligation on the state through the processes of Environmental Impact

Assessment – as we will point out below.

d. Fourth, public participation does not dictate that everyone must give their views on an issue of environmental governance. To have such a standard would be to give a virtual veto power to each individual in the community to determine community collective affairs. A public participation programme, especially in environmental governance matters must, however, show intentional inclusivity and diversity. Any clear and intentional attempts to keep out bona fide stakeholders would render the public participation programme ineffective and illegal by definition. In determining inclusivity in the design of a public participation regime, the government agency or Public Official must take into account the subsidiarity principle: those most affected by a policy, legislation or action must have a bigger say in that policy, legislation or action and their views must be more deliberately sought and taken into account.

e. Fifth, the right of public participation does not guarantee that each individual's views will be taken as controlling; the right is one to represent one's views – not a duty of the agency to accept the view given as dispositive. However, there is a duty for the government agency or Public Official involved to take into consideration, in good faith, all the views received as part of public participation programme. The government agency or Public Official cannot merely be going through the motions or engaging in democratic theatre so as to tick the Constitutional box.

f. Sixthly, the right of public participation is not meant to usurp the technical or democratic role of the office holders but to cross-fertilize and enrich their views with the views of those who will be most affected by the decision or policy at hand."

26. We accept the principles and guidelines set out in the Mui Coal basin case as a proper path in examining the level of process of public participation undertaken by the proponents and the true test of participation being the effectiveness of the process.

27. The 2nd Respondents relied on National Association for the Financial Inclusion of the Informal Sector v Minister for Finance & Another [2012] eKLR (per Majanja J), for the holding that the Constitution does not prescribe how public participation is to be effected and in every case where a violation is alleged, it is a matter of fact whether there is such a breach or not. While this may be true for the Constitutional provisions and/ or other sectors, in the matter of Environmental Impact Assessment Studies the EMCA and its regulations provide a structure of how the public participation exercise will be conducted.

28. The relevant provisions of law require that an Environmental Impact Study be conducted for projects of the nature contemplated by the 2nd Respondent herein as a matter falling within the Second Schedule to the Act and Regulations. It envisages three general stages leading up to the issuance of the EIA Licence by the 1st Respondent. These stages are firstly, the formulation of the terms of reference (TOR) as per Regulation 11, secondly, the carrying out of the EIA study in terms of Regulations 16-17 leading to the preparation and presentation of the EIA Study report and finally, the post-study report where certain actions had to be undertaken as per Regulations 18-22 culminating in the issuance of an EIA licence to a project proponent. Depending on the stage of the process, there are different roles to be played by either the 1st or 2nd Respondent and different levels and requirements for participation.

29. In the instant appeal, the evidence showed that the 2nd Respondent , through Kurrent Technologies Limited, prepared an Environmental Project Report for the Proposed 1050 MW Coal Power Plant in September, 2015 and submitted the same to the National Environmental Management Authority (NEMA), 1st Respondent who in turn submitted copies of the project report to each of the relevant lead agencies and the relevant District Environment Committee by its letters of 26th October, 2015 and 16th October, 2015 respectively. The Appellants tendered their comments to the Project Report through their letter of 12th November 2015. Up till this stage the

parties appeared to proceed on the basis of a project report.

30. At this stage it is important to clarify that with effect from 17th June 2015, Act No 5 of 2015 amended Section 58 of the EMCA so that all projects falling within the Second Schedule to the Act now required an EIA Study as opposed to a mere project report which was the case prior to the amendment. The current project fell within the Second Schedule.

31. In any event, through a letter dated 26th October 2015 the 1st Respondent , in line with the now substituted provisions, required the 2nd Respondent to undertake an environmental impact assessment study as the project would have a significant impact on the environment and demanded wider public consultation and in-depth coverage of the foreseen impacts and mitigation measures thereof. The 2nd Respondent was thereby required to liaise with its EIA Experts to develop a Terms of Reference for its approval before it carried out the EIA Study. The letter of 26th October 2015 is of paramount significance to this case and concluded as follows:

"You will be expected to (among other things) include the following details in your study:

1. Project rationale and justification (especially with regard to the site)
2. Detailed Engineering and related drawings
3. A comprehensive analysis of project alternatives (site, technology, materials etc)
4. Detailed and comprehensive stakeholder consultation."

32. Turning now to each phase that the study process had to undergo, the Tribunal considers the following:-

Phase I: the Terms of Reference

33. In commencing the EIA Study, the 2nd Respondent complied with the directive of the 1st Respondent and regulation 11 of the Regulations by preparing the Terms of Reference dated 27th January 2016 and submitted the same to the 1st Respondent Authority on 29th January 2016.

34. After the development of the Terms of Reference for the EIA Study in January 2016, the Regulation required fulfilment of the two further stages mentioned earlier before approval could be given and licence issued: the EIA Study phase leading to publication of an EIA Study report on the one hand and the post EIA study report phase on the other, each with its own process and requirements for public consultation and participation.

Phase II: The EIA Study phase

35. Regulation 17 of the Environmental (Impact Assessment and Audit) Regulations 2003, required the proponent of a project to seek views of the persons to be affected after approval of the project report and during the process of the study. In particular, Regulation 17 (2) required the proponent to publicize the project and its anticipated effects and benefits by

a. posting posters with information on the proposed project in strategic public places in the vicinity of the site, and

b. publish a notice on the proposed project for two successive weeks in a newspaper with nation – wide circulation ; and

c. make an announcement of the notice in both official and local languages in a radio with nationwide coverage for at least once a week for two consecutive weeks.

d. Thereafter, the proponent was required to hold at least three public meetings with the affected parties and communities to explain the project and its effects, and to receive

their oral or written comments.

e. For these meetings, a notice of the time and venue was to be communicated at least one week before the meeting. The meetings were expected to be at a time and venue convenient to the affected communities and other concerned parties

f. A coordinator to record the comments was to be availed as well as a translator made available during the meeting. The views collected from this meeting would then be incorporated in the preparation of the EIA Study report.

36. The 1st to 6th Appellants case revolves around the adequacy of the consultation process leading to the preparation of the ESIA study. The 1st and 2nd Respondents submissions is that Save Lamu, through its officers and members, including the Appellants, continued to appear and represent their views at different fora on the project as seen from the annexure presented in evidence. In their testimony, Raya Famau Ahmed AW1, Somo M Somo AW9 and Mohamed Athman AW2 confirmed their individual membership of the 1st Appellant , Save Lamu. The Lamu Tourism Association represented by AW11 – John Francis Dyer, a beach hotel owner in Manda also confirmed its membership including a letter dated 13 March 2016 addressed to the Director Compliance and Enforcement of the 1st Appellant giving their views on the proposed project. The input of the 1st Appellant and the various members who attended the meetings organized by the Respondents were documented as part of the evidence of the RW3 Sanjay Gandhi at Page 269 of the Appellants' Bundle of documents as proof of the 2nd Respondents position that the Appellants had actually participated in the process.

37. From the Appellants' Annexure at Pages 189-197 and at Pages 207-265 of the Appellants Bundle of Documents (Volume 1) there is evidence that the Appellants gave their views and comments and took part in ventilating their views leading to the preparation of the Project Report and scoping stage and even after the Project report but before the EIA study had commenced.

38. To support their contention of adequate participation, the 2nd Respondents point to the Appellant s letter dated 15th January, 2015 annexed to the Appellant s' Bundle of Documents (1) as SL 4 where they are specifically invited by the 2nd Respondent's Lead ESIA Expert, Sanjay Gandhi, to attend a public hearing to give their views. Later on in 2016, they directly communicated to the 2nd Respondent's Managing Director, Francis Njogu, vide their unsolicited letter dated 13th March, 2016 giving their comments on the Proposed Project. In the 2nd Respondents view, this was proof that there was engagement of the Appellants in the process.

39. The 2nd Respondents witness RW3 Sanjay Gandhi, who was also the Lead EIA Expert for the project, pointed out that a total of 31 meetings were undertaken at various locations between 9th January 2015 and 25th June 2015 with a variety of stakeholders in Lamu County, Nairobi and Malindi. A complete record of each meeting including completed registration sheets, photographic evidence and Issues and Response (I&R) Reports were presented as evidence. The ESIA report also contains a very clear Stakeholder Engagement Plan at Pages 1407-1481 (of volume II) intended to cover the Scoping Phase, the ESIA Study Phase, the Construction Phase, the Operational Phase and the Decommissioning Phase dated 10th July 2016. Table 3.1 at page 1429-1434 (of volume II) presented a summary of the stakeholder engagement activities commencing with the meeting at Subira Hotel, Hindi on 9th January 2015 to the Focus Group Discussion at Chiefs Camp Pate Island on 25th June 2015 as per the table below:-

40.

DATE AND PLACE	STAKEHOLDER GROUP AND MEETING PURPOSE
9TH January 2015 Subira Hotel,Hindi, Lamu Island	Ward admin, Hindi/ Senior Chief, Village headmen, community leaders & mangrove cutters representatives.
9th January 2013 Lamu Museum, Lamu Island	National Museum of Kenya Representatives
9th January 2015 Lamu Island	Assistant County Commissioner, Lamu County
24th January 2015 Mwana Arafa Restaurant, Lamu Island	Save Lamu Representatives workshop
24th January 2015 Mwana Arafa Restaurant, Lamu Island	Lamu Youth Alliance Representatives Workshop
25th January 2015 Mwana Arafa Restaurant, Lamu Island	Male Opinion Leaders Representatives Workshop
25th January 2015 Mwana Arafa Restaurant, Lamu Island	Female Opinion leaders Representatives
26th January 2015 Bargoni Primary School	Bargoni and Ngini Residents Dissemination and consultation public meeting
26th January 2015 Mokowe Primary School	Mokowe residents Dissemination and consultation public meeting
27th January 2015 Ardhi House, Mokowe, Lamu	Lamu County Land Management Board Project Briefing Meeting
27th January 2015 Kwasasi (proposed project site)	Kwasasi Residents Dissemination and consultation public meeting
27th January 2015 Hindi Digital Sport Center and News	Hindi Residents Dissemination and consultation public meeting
28th January 2015 Change Chini, Mtangawanda, Pate Island	Mtangawanda residents Dissemination and consultation public meeting
28th January 2015 Pate social hall, Pate Island	Pate residents Dissemination and consultation public meeting
2nd February -3rd February 2015 Sarova Panafric hotel, Nairobi	Lamu County Government Workshop
10th February 2015 Serena Hotel Nairobi	Media Editors kick-off briefing
11th February 2015	Standard Media group editors kick-off

Standard Media Group offices, Nairobi	Briefing
12th February – 13th February 2015 Tamani Jua Resort, Malindi	Lamu members of County Assembly workshop
24th February 2015 Crowne Plaza Hotel, Nairobi	Media Houses press briefing
1st April 2015 Mwana Arafa Restaurant Gardens,	Lamu County Administration Kick-off workshop
22nd June 2015 Lamu Island	Ministry of Gender, Youth and social services, Lamu County Government
23rd June 2015 Ardhi House, Mokowe	Ministry of Education Lamu County Government
23rd June 2015 Public Health Office Lamu Island	Ministry of Health and Environment Lamu County Government
24th June 2015 Ministry of Agriculture Office Lamu Island	Ministry of Agriculture Lamu County Government
23rd June 2015 Chief's Camp, Hindi	Focus Group Discussion pastoralist communities
24th June 2015 Chief's Camp, Hindi	Focus Group Discussion / women with Vulnerable stakeholders groups
24th June 2015 Chief's Camp, Hindi	Focus Group Discussion/ Elders from indigenous minority communities
25th June 2015 Chief's Camp, Pate Island	Focus Group Discussion Farmers

41. A public/ stakeholder meeting for civil society organizations based in Lamu was organized by the Ministry of Energy and Petroleum on 14th October 2015 to discuss the proposed project and its potential impacts. The 2nd Respondent also engaged the services of a company by the name Africa Practice to conduct physical door to door campaigns in homes situated in various locations within Lamu Islands of Pate namely Kizingitini, Mbwajumwali, Faza, Myabogi, Tchundwa, Siyu and Shanga between 5th April and 2nd May 2015, to sensitize the residents about the project. RW2 Abdulrahman Aboud, testified how posters were placed at strategic places all over Lamu for purposes of notifying the public of the project and calling on their comments and views during the public hearings that were conducted all over Lamu. He also testified about the use of other mechanisms to reach the public in remote parts of Lamu such as the use of the so-called criers who relayed messages about meetings.The 2nd respondents witness RW2 Abdulrahman Aboud confirmed that Mr Gandhi explained and engaged with some of the participants at the various meetings in Kiswahili

42. language which he was fluent in taking into account the language most widely spoken in the region.

43. Looking at the evidence produced we accept that wide public participation had been undertaken during the scoping phase for the project report.

44. However, this were all done before the study had been commenced or conducted or the study report prepared. The meetings that took place from 9th January 2015 to 25th June 2015, well before the EIA Study was itself conducted, were in the Tribunal s view not the meetings contemplated by Regulation 17 of the regulations which provides at Regulation 17 (2) that the seeking of views of the public could only happen after the approval of the project report by the 1st Respondent.

From the table of the summary of the meetings, it will be seen that these were introductory in nature but not structured to share information on the possible effects and impacts of the project on the population and the proposed mitigation measures that the 2nd Respondent would undertake. AW1 Raya Famau who attended the first consultative meeting held on 24th January 2015 testified that participants were given very limited time to ask questions and answers appeared inadequate and Sanjay Gandhi for the 2nd Respondents informed them that specialist studies were still being conducted to determine the precise impacts of the coal plant project. To date, answers to these queries had not been provided. AW8 Mbwana, also complained of the same thing. By the time these meetings were taking place the Study process had not commenced and the attendees were informed that subsequent meetings were planned for to provide more details on the concerns they raised. These meetings to explain the project properly and allay the concerns of the residents never took place. Essentially, the proponent had put the cart before the horse by relying on information obtained prior to the EIA Study as the basis for justifying the EIA Study. It also contradicted the directive by the 1st Respondent of 26th October 2015 when the 2nd Respondent was asked to undertake wider public consultation and in-depth coverage of the foreseen impacts and mitigation measures thereof. The directive was intended to cover greater additional consultation and inclusion of these impacts.

45. From the evidence of both the 1st and 2nd Respondents no attempt was made to show that public consultation meetings had taken place in line with regulations 17(1) and 17 (2) for the period from the formulation of the Terms of reference in January 2016 to July 2016 when the EIA study report was concluded. No notice of meetings were issued or meetings held under the requirements of regulation 17. Instead the Respondents sought to circumvent these requirements by repeatedly referring to the meetings at the scoping and project stage of the process in the year 2015, well before the EIA Study had commenced. At that stage of the project report in 2015, and as pointed out by the 1st Respondents letter, there was lack of access to information that was a prerequisite to a meaningful exercise of public consultation and participation.

46. The danger of relying on the year 2015 meetings is evident from the inaccuracy of certain information presented then. For instance, to the question asked on whether it was possible that the Kenya Power Limited Company would not take up the power produced, Mr Gandhi replied that it was highly unlikely as Kenya would require 5000 MW within 40 months of the year 2013. To date, even in the year 2019, from the evidence of the Appellants witness, Mr Jabbal, Kenya's requirement remains at an average of 2000 MW only. On the land position and size, in January 2015 Mr Gandhi confirmed that no firm decision had been made on the exact location or the size that would be required. To the question of climate change and the requirements of the Climate Change Act, 2016, Mr Gandhi in his testimony conceded that he had not given greater attention to these aspects and he would give the same more emphasis should the process be repeated. These examples are but a few and illustrate the inaccuracy and uncertainty of information at that stage in the year 2015. Further meetings ought to have been held to give the correct information during the conduct of a proper study and when data on most of the areas identified by the terms of reference had been collected and verified. Lack of accurate information cannot be the basis of proper and effective public participation.

There was no evidence that the Appellants views or that of other members of the public were sought or received at the ESIA Study phase- Phase II, ie the period after 31st January 2016 to 14th July 2016. In failing to engage the public at this stage of the process, there was a breach of the subsidiarity principle and the provisions of regulation 17(2) of the Environmental Impact Assessment Regulations, as no public meeting had been undertaken in accordance with the elaborate procedure provided therein or at all. This breach is further exacerbated by the fact that the 2nd Respondent ignored the directive of the 1st Respondent of 26th October 2015 on the need for greater public participation.

47. As far back as January 2015, and the months following, the residents of Lamu had expressed interest in having their concerns heard and addressed. The failure to hold any meetings from January 2016 to July 2016 and the preparation of a comprehensive EIA Study report without the

participation of the persons most affected was contemptuous of these same people and residents who would have the most to sacrifice should the project proceed and impact found to be more severe than that addressed by the 2nd Respondent.

Human beings are justifiably concerned about the environmental impacts of projects to their location and especially where those projects are novel in nature. These environmental impacts are not restricted to the ecological effects alone but extend to other wider areas that affect their lives like the health impacts to them and their families, to their livelihood and economic opportunities, socio-cultural heritage and traditions. Being concerned about all these environmental effects of a project the people most affected by a project must therefore have a say on each and every aspect of the project and its impact. In carrying out a consultative process, it is not a must that every person must support the project nor can a proponent address every unreasonable demand and suggestion, but it is vital that even the most feeble of voices be heard and views considered. It is presumptuous for a proponent, like the 2nd Respondent did in this case, to proceed with the EIA study, identify the impacts and then unilaterally provide for mitigation measures in complete disregard of the people of Lamu and their views. We therefore find that public participation in phase II of the EIA Study process was non- existent and in violation of the law.

48. On Phase III: the post- study report. The 2nd Respondents ESIA Study report was completed and forwarded to the 1st Respondent on 14th July 2016. From this moment on till the issuance of the EIA Licence, the responsibility to undertake certain specified acts in accordance with the law now shifted to the 1st Respondent. Regulation 20 of the Environmental (Impact Assessment and Audit) Regulations, required the 1st Respondent to forward the ESIA Study report, within 14 days of its receipt, to the relevant Lead Agencies for their comments. This was done by a letter dated 18th July, 2016.

49. Under section 59 of EMCA and Regulation 21 (2) (a) of the Environmental (Impact Assessment and Audit) Regulations, the 1st Respondent was required, within 14 days of receipt of the said ESIA Study Report from the 2nd Respondent , to invite members of the public to make oral or written comments on the report and proceed to publish the same in the Kenya Gazette and in a newspaper circulating in the area or proposed area of the project a notice of the Project. The notice published provided for a time limit of 30 days for comments.

Newspaper advertisements were published in Taifa Leo of Monday, 18th July, 2016 followed by the publication in the Daily Nation of Tuesday, 19th July, 2016 inviting the public to submit their views and comments on the proposed project within thirty (30) days from the date of Publication as well as the Daily Nation of Monday, 25th July, 2016 and Taifa Leo of Monday, 25th July, 2016 all setting similar time lines from the date of publication. The 1st and 2nd Respondents point to the documents annexed at Pages 24-31 of the 1st Respondent 's Bundle of Documents as proof of compliance. The Kenya Gazette notice of 29th July 2016 also gave 30 days for presentation of views. From the various time-lines given in the newspaper advertisement and the Kenya gazette, the 1st Respondent attempted to comply with the law by providing for a 30 day notice period but having set different start dates for the 30 days it became prejudicial and unfair to parties who wished to respond to these notices as they could not be sure of the last day for presentation of comments as invited. Essentially, following the last advertisement in the Kenya Gazette, the only logical deadline became the 29th August 2016. Any attempt to deny people their submission of comments before then, including those received on 29th August 2016, was procedurally unfair and made the process defective. Various lead agencies and stakeholder groups submitted their comments in what they believed to be in compliance of Regulation 21 (3) of the Environmental (Impact Assessment and Audit) Regulations, albeit on different dates up to 30th August 2016 and beyond. The said comments are contained at Pages 34-168 of the 1st Respondent 's Bundle of Documents

50. On the radio announcements, the evidence tendered showed that an announcement was made in both official and local languages and also broadcast at least once a week for two consecutive weeks on Radio Salaam and Radio Sifa although no evidence was adduced to show that these were radio stations with national coverage as provided for under Regulation 21 (2) (b) of the Environmental (Impact Assessment and Audit) Regulations. The emphasis on nation-wide publication/ announcement was because the impact of such projects, in many instances, were of national inte-

rest. Whereas the EIA Studies had to consider the subsidiarity principle in asking for participation of the most affected members it was still imperative that such study also consider the wider views beyond the project area, where the nature of the project meant that its impact could potentially extend beyond the geographical location, as also alleged by the Appellant s in their submission. This is the main reason for the requirement for nation-wide as opposed to localized participation.

Following the submission of the ESIA Study to NEMA for consideration, the 2nd Respondent rolled out a program of 5 public stakeholder consultation meetings. These meetings were held at various locations in Lamu County between August 8 and 11, 2016. The purpose of these meetings was to share the contents of the ESIA Study and Specialist Studies and to receive comments and views from the stakeholders. The stakeholder group and location of the 5 meetings were as follows: (i) Members of the Lamu County Assembly at the County Assembly of Lamu, (ii) Technical Community Committee at the KPA boardroom in Lamu, (iii) County Administration at Mwana Arafa Hall in Lamu, (iv) Imams and Preachers at Mwana Arafa Hall in Lamu, (v) Women's groups at Subira Guesthouse, Lamu and (vi) Public and Farmers at Kwasasi, the project area. The evidence thereof is annexed at pages 73-118 of Sanjay Gandhi's Witness Statement. It is important to note that after the submission of the ESIA study report to NEMA, the regulations oblige the 1st Respondent (at the cost of the 2nd Respondent) to carry out the public consultation exercise. There is no requirement for the 2nd Respondent at this stage to call for any further meetings or consultations- this was the 1st Respondents role. In allowing the 2nd Respondent to act like it was still in charge of the process at this stage, the 1st Respondent appeared to have taken a back seat and abdicated its role to the 2nd Respondent. The 2nd Respondent in rolling out its stakeholder consultation of August 2016 was engaged in something over and above what was legally required of them. The stakeholder engagement, after the report had been presented to the 1st Respondent , was not a requirement of the regulations, at this stage of the process

51. Notwithstanding, these activities by the 2nd Respondent , the 1st Respondent attempted to also engage the Lead Agencies through a meeting held on 25th August 2016 for some select groups. The minutes of this meeting were post-dated to 1st September 2016 but painted a very grim view of the project by these lead experts. It was clear from the minutes of 1st September 2016, that all the lead agents at that meeting had raised concerns on the location of the Kwasasi public meeting of 26th August 2016, the day of the meeting being a Friday, the time lines for submitting of comments and all were unanimous in their view that the time was too short and pointed to the failure to have a proper civic education process for members of the public.

52. Upon receipt of both oral and written comments as specified by sections 59 and 60 of the Act, and as provided for under Regulation 22, the 1st Respondent Authority was required to publish a Notice for a Public hearing. The 1st Respondent purported to do this through a paid advertisement in the Daily Nation of 19th August, 2016 (refer: Page 169 of the 1st Respondent's Bundle of Documents). The Public Notice was scheduled to be held on 26th August, 2016. This was in spite of the fact that views were still being received and the deadline given had not lapsed.

53. Ignoring these defects, a public hearing took place at Kwasasi, the project site, on 26th August, 2016. The Appellants contend that this meeting was premature. The Respondents submitted that it was conducted after the expiry of the 30 days contained in the notices referred to herein. On the conclusion of the hearing, the presiding officer compiled a report of the views presented at the public hearing and submitted the report to the Director-General within fourteen days from the date of the public hearing as can be seen from the record of attendance.

The Tribunal has already observed that the different deadlines set in the newspapers and the Kenya Gazette notifications served to confuse the last day for presentation of comments. Accordingly, it made no sense for the meeting of 26th August 2016 to be held prior to the last possible day for the close of presentation of views and before all parties had been given an opportunity to present comments as advertised. It is our considered finding that the notice of 19th August 2016 was inappropriate and the meeting of 26th August 2016 thus premature as the time under the Kenya gazette had not expired by this time. The earliest the meeting could take place was after the 29th August 2016. In the Tribunal s

view this confused approach and state of affairs made the process procedurally unfair as it subjected members of the public to conflicting dates and deadlines. The process appeared to be deliberately hurried to either meet the proponents expectations or to lock out members of the public from the process.

54. The 2nd Respondents point out the fact that the Appellant s presented further views to the 1st Respondent 's Director General vide their undated letter enclosing their 50-Page comments annexed as SL 14 at pages 207-265 of the Appellant s Bundle of Documents (volume 1). The said letter was signed by the Appellants Shalom M Ndiku, their lawyer and the Chairman.

55. They also point to the fact that both the Appellant s and the chairman attended the Public hearing at Kwasasi on 26th August, 2016 and gave the Appellant s' comments which are captured at Page 268-269 of the Appellant s of Annexure SL 15 to the Appellant s Bundle of Documents (Volume 1). AW2 – Mohamed Athman attended the public hearing at Kwasasi on 26th August, 2016, including a written Memorandum presented by Somo M Somo.

From the evidence of Somo M Somo, the Tribunal formed the impression that the conduct of the meeting of 26th August 2016 at Kwasasi fell short of that contemplated by the regulations. The Kwasasi meeting was not a consultative meeting to explain the nature of the project and its impact as required by the Regulations. It fast degenerated into a popularity contest, engulfed by an atmosphere of tension, where the participants were split into two groups and a poll of some sort was conducted to establish the numbers who supported as opposed to those against the project. There was a lack of true and genuine engagement on the merits and demerits of the project. Mike Olendo, an expert working with WWF, complained about the manner in which participation was conducted as he felt it was more of a routine check-off approach. Regulation 22 (5) provides that a proponent would be entitled to make a presentation and thereafter respond to presentations made at the meeting. This did not include converting the meeting to a popularity contest.

56. The 1st Respondents compliance and enforcement officer in the EIA section, RW1 Gideon Kipchirchir Rotich, laid no evidence to show that there was any attempt to even comply with the prescribed clear regulations and procedures on public participation despite NEMA being solely responsible for the arrangement and conduct of the public participation after July 2016. Other than confirming advertisement of the meeting on 19th August 2016 for the meeting of 26th August 2016, Mr Rotich laid no evidence to show what efforts had been made by the 1st Respondent to have a proper and meaningful exercise in compliance with the EMCA and the Regulations before then and or to clarify the conflicting deadlines.

57. The Tribunal therefore finds that for Phase III, the steps taken after the publication of the EIA Study report in July 2016 to September 2016, including the notices issues, time for receipt of comments and the time and venue of meetings were all done in a manner contrary to the regulations and did not meet the threshold of regulation 21 of the Regulations for public participation.

58. The Tribunal thus finds that the 1st Respondent in issuing the EIA Licence on 7th September 2016 failed to properly consider its own directive of 26th October 2015, the compliance with the same and of the regulations in so far as the process of consultation was concerned at the second and third phases of the EIA study and further erred by approving the project without considering the views presented after 26th August 2016. It also disregarded the views and advise of the meeting of the lead experts of 25th August 2016. We have no hesitation in holding that there was a lack of proper and effective public participation as required by law. The issuance of the licence was unreasonable in ignoring the prescribed procedure and its own directive, arbitrary and disregarded the views given without providing reasons for refusal to consider the same.

In the case of National Association for the Financial Inclusion of the Informal Sector v Minister for Finance & Another [2012] eKLR, Majanja J, held as follows at Page 195 as regards public participation:

25. "24. I agree that public participation as a national value is rooted in the fact that Kenya is a democratic state and that public participation fulfills and complements the other values of good governance, transparency and accountability. The Constitution does not prescribe how public participation is to be effected and in every case where a violation is alleged, it is a matter of fact whether there is such a breach or not. [Emphasis Added]"

In the case of Consumer Federation of Kenya (COFEK) vs Attorney General & Others – Nairobi Petition No. 11 of 2012 (Unreported), the Court noted at para. 52, that:

26. "The values outlined in Article 10 of the Constitution are not defined nor are they cast in stone. I would agree with Mr. Gatonye that they are applied in a particular context and the court in examining whether particular values are fulfilled must look at the legislative architecture of the statute and the facts and circumstances of the case bearing in mind that every statute, rule, regulation or policy must be read in a manner that is intended to fulfill these values."

The Court further quoted with approval the sentiments of the Constitutional Court of South Africa in Minister of Health and Another vs New Click (Pty) Limited and Others CCT 59/2004, [2005] ZACC 14 that:

59. "The forms of facilitating an appropriate degree of participation in law-making process are indeed capable of infinite variation. What matters is that at the end of the day, a reasonable opportunity is offered to members of the public and all interested parties to know about the issues and have an adequate say."

The 2nd Respondent has also correctly pointed out that part of the Appellant s grievances on public participation arose from a common misunderstanding of public participation where participants expect all their views to be accepted as seen from paragraph 33 of the Appeal (Page 13 of the Notice of Appeal) where the Appellant s state:

"33. THAT upon inspection of the EIA Licence's accompanying conditions, we noticed that a great portion of our comments, concerns and queries on the Report were not included in the conditions, indicating a failure to properly consider these comments prior [to] issuing the EIA Licence to APCL."

In Musimba v The National Land Commission & Others [2016] 2 EA 260, a 5 Judge-Bench comprising Lenaola J. (as he then was), Mumbi, Achode., Odunga and Onguto, JJ held as follows at Page 283:

> "…the fact that the views given by the attendees at a public forum are all not taken into consideration does not vitiate the fact that there has been compliance with the requirement for public participation.

In the instant case, there was facilitation. The public and other relevant stakeholders were involved as the third Respondent undertook its statutory mandate. There is undisputed evidence that Kenya Wildlife service, the Ministry of State for Planning, the Kenya Forest Service and National Museums were all involved. These were all stakeholders with different interests.

60. There is also adequate evidence that pursuant to section 21 of the Environmental (Impact Assessment and Audit) Regulations, LN Number 101 of 2003, the second and third Respondents caused to be published in the newspapers of 6 November 2012 and 13 November 2012 notice to the public inviting comments within 60 days from the public on the project. The said notice were also published in the Kenya Gazette also disclosed the anticipated impacts and proposed mitigation measures. The notices were all published before the Environmental Impact Assessment Licence being issued and some comments were indeed received, taken into account and acted upon by the third Respondent."

We agree with this holding that the failure to consider all views given at a public forum would not vitiate the process of participation. In the instant case, however, the Appellant s and other members of the public were giving their views on a project report before the EIA study had been conducted or the report published. A vital condition of public participation is access to information. The information contained in the study report had not been made available in good time to members of the public, or at all, nor had there been an effort to undertake the same level of engagement with the public after the EIA study had been conducted and report published. The seriousness of access to information cannot be overstated.

Would members of the public have supported the project if certain information in the possession of the 2nd respondent had been availed to them? For instance, if the observations at page 1693-1694 of volume II had been specifically drawn to the attention of the public would there have been a negative or positive reaction by the public? These included identification of potential harm to the biodiversity flora and fauna, air quality that was stated to be potentially hazardous and may cause difficulty in breathing and the climate change effect leading to adverse consequences on human health- the report raises concern on "increased risk of asthma, lung damage and premature death". It continues to raise concern on potential for acid rain which can spread and "can fall from the sky in rain over a widespread area, killing fish and plants" and also the adverse effects on forests and soil and vegetation. (refer page 1693-194 of the ESIA report). There well may be mitigation measures to curb these impacts but it was only fair that the people of Lamu were educated on the adverse impacts identified and within the knowledge of the proponent and thereafter have the mitigation measures explained to them in order to make an informed decision during the period from January 2016 to July 2016 and thereafter at the post study report stage. That is public participation. The lead agents who gave their comments around the 29th August 2016 also had their views disregarded and there is nothing to show that such views were ever considered and accepted or rejected.

In the Privy Council decision from the Supreme Court of Belize in Claim No. 223 of 2014: Belize Alliance of Conservation Non-Governmental Organizations v The Department of the Environment and Belize Electric Company Limited, stated as follows:-

"…….. As Linden JA said with reference to the Canadian legislation in Bow Valley Naturalists Society v Minister of Canadian Heritage [2001] 2 FC 461, 494 (in a passage quoted by the Chief Justice in this case):-

61. "The Court must ensure that the steps in the Act are followed, but it must defer to the responsible authorities in their substantive determinations as to the scope of the project, the extent of the screening and the assessment of the cumulative effects in the light of the mitigating factors proposed. It is not for the judges to decide what projects are to be authorised but, as long as they follow the statutory process, it is for the responsible authorities."

From the above authority, it is incumbent for the Tribunal to be satisfied that the process and procedures under the Act were complied with and to ensure that the Regulators decision is not touched except where it is unreasonable or goes contrary to the law. The judicial function of the Tribunal is to examine whether there was compliance with statute. In the present appeal, the procedure was not followed and the process was seriously flawed. The 1st respondent owed a duty to properly supervise and ensure there had been compliance. They did not. Public participation conducted in a manner envisaged by a proponent is not one necessarily in conformity with the law. The Tribunal is interested more in the latter than the former.

62. At this juncture it is important to point out that is imperative that those in administration be keen when faced with objections to projects, where objectors hold the view that the project may compromise the environment. This Tribunal cannot permit authorities to deal so nonchalantly with such objections. Such objections need to be taken seriously and need to be considered. Public participation especially when it comes to EIAs are extremely critical and cannot be treated as a formality or inconvenience. It is at the very core of any EIA exercise. The EIA public participation process cannot be a mechanical exercise but a vibrant and dynamic activity where affected persons are engaged in a fair and reasonable manner.

63. In our view, public participation in an EIA Study process is the oxygen by which the EIA study and the report are given life. In the absence of public participation, the EIA study process is a still-born and deprived of life, no matter how voluminous or impressive the presentation and literal content of the EIA study report is. In this case, the report was extremely bulky and purported to capture a lot of information. By all accounts, it was an impressive piece of literal work but devoid of public consultation content, in the manner prescribed by the law, thus rendering it ineffective and at best

only of academic value.

In the case of Ken Kasinga vs Daniel Kiplagat Kirui & 5 Others, Nakuru ELC Constitutional Petition No. 50 of 2013, the court in dicta stated as follows

64. «where a procedure for the protection of the environment is provided by law and is not followed, then an assumption ought to be drawn that the project is one that violates the right to a clean and healthy environment, or at the very least, is one that has potential to harm the environment."

Following the authorities cited, we have no hesitation in finding and hereby do that the process leading to the preparation of the ESIA Study Report by the 2nd Respondent was not properly conducted, had side-stepped the procedure laid out under the regulations and having done so, there was a failure of effective public participation and the procedure for the issuance of the ESIA Licence by the 1st Respondent was in violation of the elaborate procedure set out in the Environmental (Impact Assessment & Audit) Regulations and the Constitution of Kenya.

Having found that the process was flawed, the Tribunal then has to ask whether such failure in the consultation process was fatal to the ESIA study. On this point, we draw judicial support from the decision of the Supreme Court of Belize in Claim No. 223 of 2014 – Belize Tourism Industry Association v National Environmental Appraisal Committee & 2 Others where the Court quoted the decision of Sykes, J in Northern Jamaica Conservation Association & Ors v The Natural Resources Conservation Authority and the National Environment & Planning Agency where the Learned Judge found that the consultation process was flawed because an important part of the ESIA was not placed in the public domain and where the Court explained thus:

65. "It does not follow…that flaws in the consultation process will necessarily mean that the decision should be quashed. It would seem that it depends on the seriousness of the flaw and the impact that it had or might have had on the consultation process. Consultation is the means by which the decision -maker receives concerns, fears and anxieties from the persons who might or will be affected by his decision. These concerns should be taken into account conscientiously when making his decision…the Courts will examine what took place and make a judgment on whether the flaws were serious enough to deprive the consultation process of efficacy…"

C. While we respectfully accept the observations made in the Belize case that not every non- compliance will vitiate the entire process where such flaws were not substantive, as a Tribunal we are unfortunately bound by the governing statute establishing and spelling out the functions of the Tribunal . As a Tribunal we lack inherent powers to excuse non- compliance of the rules and regulations on public participation. Even if we are wrong on this issue of lack of powers to consider the effect of non-compliance and follow the Belize court decision, we would still find that the flaws mentioned were sufficiently serious to vitiate the process as in this case there was an outright disregard of the need to conduct effective public consultation to the detriment of the public and residents of Kwasasi area and the larger Lamu region surrounding the project site.

66. Whether the Respondents conducted a proper analysis of alternatives of the project.

Regulations 16 (b) of the Environmental (Impact Assessment and Audit) Regulations requires that an EIA study identifies and analyses alternatives to the proposed project

67. Regulations 18(i) and (j) of the Environmental (Impact Assessment and Audit) Regulations also mandates a proponent to consider alternative technologies and processes available and reasons for preferring the chosen technology and processes in the environmental content of an EIA Study report.

68. The proponent of the project conducted an analysis and took into consideration the Project Alternatives in the ESIA Study report it presented to the 1st Respondent as can be seen from Page 254 of the ESIA Study contained in Volume II of the Appellants' Bundle of Documents. These alternatives included the location/ site analysis, scheduling of the development and time constraints,

the energy supply options for the same amount of power as the intended coal plant project, the different technological systems (such as the sub-critical, supercritical and ultra-super critical) and finally the analysis of not proceeding with the project (also known as the "Do-Nothing option")

69. For the Location Alternative, a proponent is ideally required not only to analyse the location selection for the project and its alternatives but also to examine the placement of the plant on the project location site and the impact of its various components on the environment, if any, by placing in one sector as opposed to another.

The coal power plant with a capacity of 1,050MW and located at Lamu appears to have already been identified by the government as a necessary source of power and expression of interest had already been sent out for interested parties to apply. The 2nd Respondents witness, Sanjay Gandhi, testified that the Kwasasi site was a pre-selected site as part of the wider LAPSSET project and the proponents settled on the inverted "L" shape upon considering three other available alternatives. In other words, the 2nd Respondent's testimony was that it had no say in the selection of the location. In the final holding of Nairobi HCCC Petition NO 22 OF 2012: MOHAMED ALI BAADI AND OTHERS vs THE HON. ATTORNEY GENERAL and 7 others the Constitutional court found that a Strategic Environmental Assessment (SEA) study should have been undertaken with respect to the LAPSETT project and the impact of its various components, of which the Lamu Coal power plant is one of the components. To date, no evidence has been tendered that a SEA has been done or completed and thereby supporting the choice of location. We do not see how a meaningful EIA study could be undertaken in the instant case when the basis for the choice of location and other components of the LAPPSETT project had already been called into question by a superior court. It appears to us that both the desired project, that is, a coal plant and the desired site of Kwasasi had already been pre-determined even before the SEA for the whole LAPSSET project were completed. This was outside the 2nd Respondent's control.

70. As regards the site placement on the location itself, the 2nd Respondent did not submit a proper detailed architectural or engineering plan of the coal plant or the site plan, whether approved by the Lamu county government, or otherwise, for the preferred pre- selected location and instead referred the Tribunal to a sketch plan of the site (refer: pages 1674-1686 of volume II) accompanied by oral explanations as to where different elements of the plant layout would be set out. This presented a challenge to the Tribunal in considering some of the mitigation measures proposed, as will be seen later in the judgment. This lack of specific and current information on where various components of the project would be placed did not give an opportunity for the Tribunal or other members of the public at the study stage, to consider the likely effect of each project component on the environment. For instance, precise measurement of distances between different features on the site as well as distances of each feature to the fragile sea shore became difficult to examine.

The 2nd Respondent has referred us to the authority in Jamii Bora Charitable Trust & Another V Director General National Environment Management Authority & Another [2006] eKLR where the Tribunal expressed itself as follows:

71. "The Tribunal does not consider that an analysis of alternative sites is always practicable. A developer cannot reasonably be expected to compare the potential impacts of developing a project on a site which he owns as against the potential impacts of developing the project on another alternative site, which he does not own. Such a comparison would not be meaningful, as the developer may well not be able to acquire the alternative site. Yet, a developer cannot be expected to acquire alternative sites for the sole reason of comparing the potential impacts of the proposed project on those alternative sites."

This is true in smaller projects where a proponent had a say and participated in the choice of location and when such proponent had already invested in immovable property but not in large scale projects of this nature where the developer is not in control of the site and location and where acquisition of the property remained pending so that there still existed room for relocation should a project location found to be unsuitable. In the instant case, evidence was led that the government had intended to acquire the land through compulsory acquisition hence the same cannot be equated to private land in the hands

of a project proponent

72. Whilst the 2nd Respondents purported to undertake an analysis of the location and project alternatives; their hands were tied on these issues by virtue of the expression of interest. Only a SEA undertaken prior to the expression of interest would have properly considered the location and project alternatives. Accordingly, we find there was a failure to have a proper analysis of the location and project alternatives as these were pre- determined and the exercise thereafter was to merely justify what had already been determined.

73. The omission to carry out a SEA by the Government prior to the expression of interest put stakeholders such as the Kenya Forest Service, a statutory body established under the Forests Act and a lead agency under Section 60 of EMCA, who have the overall functions of management of all state forests and providing plans for utilization of all forests in the country, in difficulty as they remained opposed to the location of the project and its location. They expressed grave concern on the possible impact to mangroves and other forest cover. Their views were not heeded nor could the concerns of any other stakeholder be taken into account on this issue by virtue of the pre-selection of the site and the failure to undertake an Strategic Environmental Assessment in respect of the entire LAPPSETT project.

In addition to the location alternative, the report mentioned the scheduling alternative (refer at Page 263 of the ESIA Study – Volume II of the Appellant s' Bundle of Documents) from a time frame perspective concluded that the Government needed to accelerate power generation from coal in order to supply baseload electricity to the economic activities envisaged by the policy behind the Expression of Interest. This was not challenged.

On Energy Supply Alternatives considered in the ESIA report, the proponent purported to identify and consider Nuclear Power, Large Hydro power, Geothermal Power, Natural Gas Power, Coal fired power, Medium Speed Diesel Power, solar and wind power. This was highly contentious for the parties. The 2nd Respondent's witness, RW2 SANJAY GANDHI, gave his evidence on the various available energy alternatives and the choice of coal power, which in his view, remained a viable alternative based on his own personal involvement in other alternative energy source projects in Kenya. RW3 ANDREAS SZECHOWYCZ also testified on the Project alternatives. APW7 Mr HINDPAL SINGH JABBAL, the Appellants' Witness, on the other hand, considered the economic value of coal generated power as opposed to other energy sources. His testimony was based on his Witness Statement dated 24th February, 2017 which he adopted as his evidence-in- chief and focused on submissions he had already made to the Energy Regulatory Commission on the issuance of the Power generation licence. While the ERC decision, annexed to the 2nd Respondent 's Supplementary Bundle of Documents, dismissed the Appellants' objection to the grant of a Power Generation licence to the 2nd Respondent, the Tribunal is not prevented from considering the environmental impact of the submissions made with relation to the EIA licence issued by the 1st Respondent but not the entire presentation by HINDPAL SINGH JABBAL that had already been submitted before the ERC in objection to the application by the 2nd Respondent for a Power Generation Licence on matters beyond the environment. This would essentially be tantamount to this Tribunal being converted into an appellate body against the ERC's decision with potentially embarrassing consequences. The Tribunal finds that the evidence of HINDPAL SINGH JABBAL, while useful for purposes of considering the various economic impacts of the different energy supply alternatives was more suited for presentation before the ERC process. The Appellants at this stage failed to exhibit evidence such as the power purchase agreement (PPA) to enable the Tribunal determine the agreed rates between the 2nd Respondent and the Government of Kenya that would have assisted their evidence on whether the consumer rates would be affected adversely. In any event this aspect of the case was best left for the Energy regulators determination rather than the environmental authority. Notwithstanding, the testimony (and evidence submitted) of both SANJAY GANDHI and ANDREAS SZECHOWYCZ on Project Alternatives, the ESIA Study analysed the economic advantages and disadvantages of the various available sources of energy including nuclear, large hydro, geothermal, natural gas, coal fired power, medium speed diesel power, solar and wind power concluding that the benefit of the project for the development of the 1050 MW coal fired power plant in Lamu overrode any other

alternative energy source for the same.

74. The ESIA also analysed alternative technologies e.g. sub-critical, supercritical and ultra- super critical and processes available and reasons for preferring the chosen technology and processes as required under Regulation 18 (i) of the Environmental (Impact Assessment and Audit) Regulations

75. The ESIA analysed the available Fuel Combustion technologies, the cooling system technologies, the Once-Through Cooling and the Direct-dry cooling system and settling on once-through cooling system as it provided the highest efficiency for cooling using supercritical boiler technology. To this extent, there was an analysis of the technological alternatives.

Finally, in considering the 'do-nothing' option (analysed at Page 267 of the Appellants' Bundle of Documents (Volume II)) the 2nd Respondent makes the conclusion that although the do-nothing option entails no environmental or social impacts in the project area, not undertaking the project will mean that Kenya will not manage to produce the electricity that it needs under the 5000 Plus MW program which will have adverse socio- economic impacts. AW10 Dr Jackson Kiplagat, witness for the Appellants working with WWF, was of the view that in his opinion, there were no appropriate mitigation measures that could be introduced in the ESIA license conditions that would make the project viable not only in Lamu but anywhere else in Kenya; the only option was to stop the project completely and invalidate the ESIA license. We find this approach to development as too simplistic and unrealistic. Development projects will always have an environmental impact. The extent and magnitude is the difference. To these impacts, the law has set out requirements for mitigation measures to be put in place. Accordingly, and as stated earlier, in view of the provisions of the Energy Act 2019, we do not find that an approach that suggests a blanket denial of licenses for such projects as not being very helpful. A number of factors have to be considered in deciding to licence such a project or not.

Whether the Respondents conducted a proper analysis of the economic viability of the project

76. The 2nd Respondent in its ESIA Study report justified the need for the construction of the 1050 MW Coal Fired Power Plant on the Government's vision 2030 predictions on the intensive economic activities that were intended to be achieved by this Vision 2030 together with the analysis of the available energy supply alternatives mentioned above.

77. The 2nd Respondents submitted that Chapter 8 of the ESIA Study contains an in-depth analysis of the economic viability of the project in the Social Impact Assessment Study contained at Pages 1009-1051 of the ESIA. At Pages 1109-1116. It analysed the socio-cultural environment and the resultant increase in affordability, reliability and stability of electricity supply from the coal power project.

78. The 2nd Respondents ought to justify that once complete, the project would constitute approximately 36% of the new combined grid capacity as well as bring down the average cost of generation for Kenya Power & Lighting Company Limited (KPLC) which would, as a result, inter alia, reduce the cost of electricity charged to consumers;.

79. At Pages 1113-1115 of the ESIA Study, the Study analyses the magnitude of the projected growth likely to arise from the project to the whole country and the East African region through the elevation of the Lamu county's profile with subsequent infrastructural development, increased revenue and investment in the county, access to renewable and reliable power, enhanced availability of markets for local products and increased tax revenue.

80. At Pages 1115-1116 of the ESIA Study, the Study analyses the impact of the project on infrastructure development and concludes that the proposed project will stimulate the enhancement of the transport, public health, communications and energy infrastructure.

Reminding ourselves of the limit of the Tribunal's jurisdiction, the economic viability of the project (as opposed to the economic impact of the project) is not within the jurisdiction of the Tribunal to consider

but that of the policy makers and the Energy Regulatory Commission and we will not delve into this issue.

D. On the last two agreed issues dealing with mitigation measures, the same are addressed as follows:-

Whether the ESIA Study Report prepared by the 2nd Respondent contains adequate

mitigation measures.

-and-

81. F Whether the 1st Respondent in evaluating the mitigation measures and issuing the ESIA licence discharged its mandate in accordance to the law.

82. Regulation 16 (c) of the Environmental (Impact Assessment & Audit) Regulations requires the ESIA study to propose mitigation measures to be taken during and after the implementation of the project.

83. From the Study and the evidence of the Lead ESIA Expert who prepared the Study, Sanjay Gandhi, identified the anticipated environmental impacts of the project and the scale of the impacts under Chapter 8 – at Pages 275-392 of the Main ESIA Study, as well as the Cumulative Impacts of the Project in Chapter 10 at Pages 409-416 of the Main Study. In addition, the ESIA proposes mitigation measures to be taken during and after the implementation of the project under Chapter 8 – at Pages 275-392 of the Main ESIA Study.

a. The chapter on mitigation measures is one of the largest sections in the ESIA Report and there was an attempt to broadly cover different areas such:

b. Surface and Ground water Quality;

c. Thermal effluent;

d. Terrestrial Fauna and Flora ;

e. Air Quality Impacts;

f. Emission control technologies;

g. Visual/Aesthetic Impacts;

84. Cultural Heritage Impacts

Under Chapter 8 of the Study Report, the conclusions at part 12.2 summarized the proposed mitigation measures (refer to Pages 483 -491 of the Appellant s' Bundle of Documents – Volume II) which were also supported by specialized studies undertaken. The 2nd Respondent provided the following listed mitigation measures:

85. Atmospheric Emissions/Air Quality

From the Atmospheric Dispersion Modeling Report (Air Quality Study) the study considered the following Pollutants of Concern due to their known impact on human health and their potential to be released to the atmosphere from project activities:

a. NOx – The sum of Nitric oxide (NO) and nitrogen dioxide (NO2);

b. Sulphur dioxide (SO2);

Particulate Matter (PM): PM10 and PM2.5 (fine particulate matter);

86. The adverse effects of the combustion of coal identified in the Study and as explained by the Lead ESIA Expert, RW3, Sanjay Gandhi and RW4 Andreas Sczechowycz are associated with Sulphur dioxide (SO2), (Nitrous Oxide) NOx and Particulate Matter (PM) emissions.

They proposed to put in place certain Mitigation measures against these air emissions from the Power plant during the operational phase including the installation of a Wet Flue Gas Desulphurization (FGD) system to remove Sulphur dioxide from the flue gas before the flue gas is emitted into the atmosphere. within SO2 emission limits recommended by the International Finance Corporation (IFC) EHS Guidelines for Thermal Plants; the use of low NOx burners to reduce nitrous oxide (NOx) before the flue gas is discharged into the atmosphere; the design and installation of Electrostatic Precipitator (ESP) upstream of the Flue Gas Desulphurization (FGD)/ chimney and downstream of the air heaters by the Project Contractor; the installation of a Continuous Emission Monitoring System (CEMS) mounted within the Stack would continuously monitor NOx, SOx, CO2 and PM10 emissions to ensure compliant conditions are maintained through appropriate process controls.

87. All these were intended to be within by the International Finance Corporation (IFC) EHS Guidelines.

AW6 Lauri Myllvtrta, challenged the modelling and sampling method used as well as the period when such sampling was done as completely inadequate. He testified that the air pollution would cause a significant amount of indoor air pollution that has detrimental health impacts on children and parents exposed to these uncontrolled and untreated emissions. However, no evidence was laid to challenge the mitigation measures proposed and we find this was adequately covered.

88. The Coal Handling and Storage

The ESIA had identified potential adverse impacts in relation to the Coal Storage yard which was a recurrent theme in the Appellants' evidence.

At Page 145 the ESIA study states thus as regards Coal storage yard and the proposed mitigation measure to control its dust:

"To control dust to the air from the coal storage area, a permanent water sprinkler system shall be provided. The coal storage area will need a coal setting basin that can be cleaned with a loader and sump pumps in a separate bay for handling overflow and runoff.

89. The entire coal handling system, including the coal conveyors shall be completely encapsulated by dust-proof enclosures. At areas where dust formation is expected, e.g. at transfer points, dust shall be collected by suction systems with filters. Collected dust shall be returned to the main coal flow."

We also find that the mitigation measure provided for the coal handling and storage to be adequate.

90. Ash Yard and Ash-handling

91. The other concern raised was that of the Ash yard and the Ash pit where the ash would be accumulated.

a. The ESIA Study (at pages 153-154 of the Appellant s' Bundle of Documents (Volume II)) deals with the Coal Combustible Products (CCPs), Fly ash and bottom ash. Fly ash is generated from the Electrostatic Precipitators (ESPs) connected to each boiler while bottom ash will be generated as a result of the coal burning process. These were to be stored in the ash yard. At Page 150 of Main ESIA study, the ash-yard was stated to be designed to prevent subsurface soil and groundwater contamination by leachates. The witness for the 2nd Respondent explained that the design of the ash yard impermeable layers foundation will be composed of three layers of protection and constructed as per the specifications which take mitigating measures under Table 8-23 at Page 316-317 of the ESIA study:

b. A 1.5 M thick in-situ compacted layer of clay;

c. An appropriately designed HDPE layer around the ash yard;

d. A 200mm thick layer of sand on top of the HDPE layer for protection;

e. A network of perforated pipes to collect leachate for subsequent treatment.

A leachate collection system will be incorporated in the ash yard design and provided at the lowest point(s) of the ash yard. The leachate and runoff will be collected from the coal ash pile and diverted into a leachate storage or treatment system.

92. A groundwater monitoring system made up of wells will be installed and operated around the ash yard capable of verifying whether coal ash or leachate has penetrated the pad or HDPE liner.

93. It was stated that storm-water canals will be constructed along the perimeter of the ash dump. The leachate from the canals will be collected and treated in the ash treatment pool with the treated water used in the ash yard through a sprinkler system for dust suppression. A 7 m wide road will be constructed along the perimeter of the ash yard complete with drains for access purposes

94. Despite this attempt to make the ash yard seem foolproof, RW4 Andreas was hard pressed to explain what would happen in the event of a flood to the area. He pleaded ignorance of knowledge of overflow from ash pits in other jurisdictions such as the USA during the occurrence of hurricanes and the long term pollution it leaves behind in the event of a mishap. The ESIA study report presented acknowledges that the location where the plant would be located is a flat plain land close to the sea shore and prone to flooding. Other than for the explanation that the canals will be constructed and separated also by a road with drainage no other details were provided to justify its construction on an area prone to flooding. In fact, the problem of failure to provide proper architectural site plans for the plant and associated facilities made it difficult to determine its proximity to the sea shore and whether the proposed mitigation measures would be adequate. As these were also not within the knowledge of the public, who are more familiar with the sea levels and tides in the areas, it would have been difficult for them to raise meaningful suggestions in the absence of details of the ash yards/ ash pits proximity to the sea.

95. AW3 Dr. David Obura, a marine biologist testifying on behalf of the Appellants, pointed out that the information pertaining to the ash-yard was inadequate or unclear. In his opinion, the ash heap in the ash yard will, over time, likely be as long as 4km and form a mountain of ash. How this waste will be contained was not addressed at all in the ESIA report despite the capacity being for 5 years, yet the plant was planned for operation over a 30 year period. This observation is significant.

RW1, Mr. Gideon Kipchirchir Rotich gave the Tribunal an overview of the site. His testimony was worrying. The proposed site of the plant was prone to tidal flooding and that climate change was likely to exacerbate this issue. Nonetheless, he stated that the site was appropriate as it was the most convenient for transportation of coal and near a water source for cooling purposes. He confirmed that no quantity or estimates of fly ash had been provided in the ESIA and that there was no explanation of what would happen once the 15 years storage capacity of the ash was reached.

96. He also confirmed that he was familiar with the design and layout of the plant particularly where the ash yard is to be constructed but on cross examination conceded that the ESIA acknowledged that an environmental analysis of the coal handling system had not been done because at the time of submission of the report to NEMA, the design had not been completed.

97. It is the Tribunal's finding that the unclear location of the ash yard in relation to the plant and the sea shore gives rise to an inference of the ash pit being located in a highly risky area susceptible to floods. The ash pit location was an important factor in deciding to issue the licence or not and stringent conditions ought to have been imposed in the EIA Licence on its location, construction and continuous monitoring.

98. As regards the utilization of the fly ash, commercial use can be found in road paving, manufacture of concrete blocks and manufacture of cement etc. Whereas the Appellants' 5th Witness, DR. MARK CHERNAIK, confirmed the beneficial use of CCPs in his evidence, DR. DAVID OBURA, PW 3 clearly contradicted this by stating that the CCPs are poisonous and cannot be used at all. DR. CHERNAIK confirmed that best practice (drawing of India's example) require that the CCPs should be capable of being recycled and used as intended in this project.

The ESIA Study has articulated the principle of managing coal dust pollution through Good International Industry Practice (GIIP) in Table 8-6 of the ESIA Study (Pages 287-288 of the Appellant's Bundle of Documents – Volume II) and under Table 11-3 of the ESIA Study (Pages 448-449 of the Appellant's Bundle of Documents – Volume II) located in Section 11 – Environment and Social Management Plan. According to the study, the design company was to incorporate dust suppression systems for the coal handling system to be constructed by the EPC Contractor. An Operations and Maintenance (O&M) Company was proposed to have responsibility for managing the system during the operational

99. phase of the project. While the fly ash stock may be used towards commercial application as explained by witnesses for both the Appellant s and the 2nd Respondents , no evidence was laid before the Tribunal to show that this was anything but speculative and no mention was made of the time frame within which industries would be set up to take up this harmful by product from the plant or provision made for the infrastructure necessary like road networks and situation of factories to deal with these by products. In fact, the lead agent in charge of roads voiced concern on this in his comments.

To this end, the mitigation measures on the ash yard and ash pit are found to be inadequate.

100. The Coal Conveyor System & the 2000-Acre Limestone Concession Quarry

101. Finally, on the Appellants complaint that the ESIA Study report omitted critical information such as the 2000 acre limestone concession, 15km conveyor belt and a coal handling berth, we observe that the report made mention of the availability of coal handling facilities and a 15km long conveyor belt system with a preliminary routing provided for.

102. The 2nd Respondent admitted to the lack of the actual design of the coal conveyor system and this was again information not available to the public or provided for at the time of the hearing of this appeal other than for a general description that the same will be completely encapsulated. The omission was attributed to the uncertainty created by change of location where the coal would be shipped. The 2nd Respondent's witness explained that the ideal receiving port for the coal was intended for Kwasasi but the Government changed this to the Lamu port, thus the omission in consideration of the transportation system. These aspects were important omissions that ought to have been dealt with by the 2nd Respondent and their exclusion questioned by the 1st Respondent. The 1st Respondent failed in its duty to ensure that engineering plans for the same were provided for along the entire routing. To this extent the Study report on this aspect was incomplete.

With respect to the limestone concession area, we agree that the same is not the subject of this process as the 2nd Respondent has indicated that it was going to procure the same from third parties. The limestone quarry would be the subject of an independent EIA process undertaken by the third party supplier. It is not relevant to the present proceedings.

Based on the foregoing measures, the Appellants' contention in the grounds in support of their appeal that the ESIA Study is silent on pertinent matters on coal handling and storage have no basis whatsoever but we do find that such mention to be incomplete, insufficient and inconclusive to form the basis for the 1st Respondents decision to issue a licence.

103. Ecological Impacts Mitigation

a. The Study Report addressed the Marine Ecological Impacts at Chapter 8.9 from Pages 326-

331 of the Appellants' Bundle of Documents (Volume II). These impacts include:

b. Impacts of construction of activities of marine structures; and

c. Impacts during operation – impingement and entrainment of organisms due to intake of large quantities of seawater;

d. Localised rise of sea water temperature due to cooling water discharge;

Impacts on water quality.

105. The Study then sets out the proposed mitigation measures to address the impacts to the marine ecology at Pages 329-331; Terrestrial Ecological Impacts and the mitigation measures at Pages 332-343; Impacts on Herpetofauna and the mitigation measures thereof at Pages 334-350; Impacts on mammals and mitigation measures thereof at Pages 357-359.

Accordingly, subject to the issue of public participation these matters were covered.

106. Thermal Effluent & Mitigation Measures

107. From the evidence tendered the proposed coal fired power plant will utilize a once- through cooling system for the condenser. This cooling system carries off waste heat from the power plant by means of water obtained directly from the sea flowing through the condenser and discharges it to the back to the sea. The water temperature will vary on discharge.

The Appellant's contention is the Study report indicates that a significant temperature increase of 9 C is likely as a result of the discharge, but does not fully analyze the impacts this change in temperature will have on the marine ecosystem.

108. RW3 Sanjay Gandhi during cross-examination explained that there will be a 600m long pipe from the condenser outlet to the circulating water discharge outlet which will reduce the elevated temperature differential of 9 C at the condenser to temperatures lower than 9 C at the discharge point. His evidence was that although the temperature discharge limit of ±3 C set in the Third Schedule of the Environment Management and Coordination (Water Quality) Regulations, 2006 does not specify if this is applicable to a point of discharge, an ambient criteria or within a mixing zone, the thermal effluent will not exceed the limits set out in Kenyan law. According to him, in order to resolve this problem, the specialist engaged by the 2nd Respondent utilized the World Bank Group's General EHS Guidelines for Wastewater and Ambient Water Quality (April 2007). This guideline recommends that the "temperature of wastewater prior to discharge should not result in an increase greater than 3°C of ambient temperature at the edge of a scientifically established mixing zone which takes into account ambient water quality, receiving water use and assimilative capacity among other considerations".

109. The World Bank Group's EHS Guidelines for Thermal Power Plants (December 2008) defines a mixing zone as "the zone where initial dilution of a discharge takes place within which relevant water quality temperature standards are allowed to exceed and takes into account the cumulative impact of seasonal variations, ambient water quality, receiving water use, potential receptors and assimilative capacity among other considerations".

110. From the results of the marine thermal discharge modelling study the 2nd Respondents did, they believed that using the selected design of the outfall pipe and diffuser, the proposed project will be able to comply with the guidelines of EMCA, the World Bank Group's General EHS Guidelines and EHS Guidelines for Thermal Power Plants and subsequently may have minimal detrimental impacts to the marine ecology.

RW1, Mr. Rotich from the 1st Respondent, however, testified that there would be likelihood of rapid increases in water temperature due to intake and out take of sea water for cooling of the plant. He agreed that warm

waters hold less oxygen, which in turn has impacts on marine life, and eventually negative impacts on the people of Lamu who dependent on the Environment for their livelihood and further agreed that there were no specific conditions for the protection of sea grass, corals and mangroves. He explained that NEMA's role in approval of EIA's is to ensure a proper review even after a project approval.

111. Climate Change & Mitigation Measures

112. The Appellants' criticism against the proposed project is that it is in breach of Kenya's obligations under the Paris Agreement. The 2nd Respondents in reply pointed out that the Paris Agreement entered into force on 4th November, 2016, way after the ESIA study had been concluded and the ESIA Licence issued to the 2nd Respondent and in their view, the Appellants never demonstrated how and to what extent the proposed project violates Kenya's commitments under the Agreement, especially in the light of the mitigation and adaptation measures put in place in the ESIA study regarding the challenge of climate change.

113. The ESIA study has set out adaptation measures for climate change at Table 8-19 at pages 308-309 upon an analysis of the potential Climate change risks and consequences set out at Table 8-18 at Pages 306-307 of the Study

114. Kenya had enacted the Climate Change Act whose commencement date was set as 27th May 2016. Mr Gandhi in his evidence confirmed a failure to consider and comply with the provisions of the Climate Change Act, 2016 but explained that the omissions arose from the fact that the legislation was enacted during the process of the study.

115. Climate Change issues are pertinent in projects of this nature and due consideration and compliance with all laws relating to the same. The omission to consider the provisions of the Climate Change Act 2016 was significant even though its eventual effect would be unknown.

116. In applying the precautionary principle where there is lack of clarity on the consequences of certain aspects of the project it behooves the Tribunal to reject it. On climate change issues this is of greater importance and made the provisions on climate change within the report incomplete and inadequate.

a. Other Environmental Impacts and the attendant mitigation measures had been provided for in the ESIA Study report and included:-

b. Socio-economic-cultural environment – P. 359-365 Land Acquisition and Involuntary Resettlement – P. 368-372

c. Impacts to Demographic profile – P. 372-374

d. Impact on Public health, Occupational Health and Safety – P. 377-382

e. Impacts on Archaeological Artefacts – P. 385-386

f. Landscape and Visual Impacts – P. 386-389

g. Cultural Heritage Impacts – P. 389-391

117. Impacts Associated with World Heritage Site/Outstanding Universal Value – P. 391-392

118. We find that, as shown above, that despite the ESIA Study Report prepared by the 2nd Respondent containing mitigation measures as required under EMCA and the Environmental (Impact Assessment & Audit) Regulations, the adequacy of those measures are yet to be subjected to proper public participation and until then may remain mere academic presentations.

119. This brings us to the question of whether the 1st Respondent Authority having considered these mitigation measures properly evaluated the same and thus discharged its mandate in relation to

the issue of an ESIA Licence as stipulated in EMCA and the Environmental (Impact Assessment & Audit) Regulations.

120. The 1st Respondent in issuing the EIA licence for the project, imposed conditions for the approval. These are attached to the licence. The conditions attached are in generalized terms and do not appear to make mention of the matters identified by the 2nd Respondent in its mitigation proposals. Accordingly, the Tribunal is unable to say with certainty whether there was a proper evaluation undertaken by the 1st Respondent in issuing the licence.

121. The conditions imposed ought to have been more comprehensive and bind the 2nd Respondent to its commitments as spelt out in ESIA Study report. To this extent, the conditions set are inadequate and display a casual approach by the 1st Respondent to an otherwise serious and important project.

Despite objections made to the 1st Respondent around the 29th August 2016, it appears that most of these concerns were largely ignored. We have stated before that it is not oblationary for the 1st Respondent to accept all comments given but it must give due consideration to the same whether accepted as being meritorious or not.

122. NEMA could not have made an informed decision without at least having given serious consideration to further specialist advice, comments or opinions. The inference is that the 1st Respondent failed to place due weight on the necessity of making a properly informed decision about the impact of the proposed development on the natural environment and as a result had no substantial basis for grant of the licence or imposition of generalized conditions.

123. The EIA Licence conditions appeared to be generic and not targeted at the project before it. For instance, the General conditions 2.10 and 2.11 of the EIA Licence conditions appear to be relevant to a fuel depot and storage conditions of fuel rather than a coal plant. Conditions for coal storage and ash yard were either too basic or lacking thus suggesting a pedestrian and casual consideration of the Environmental impacts identified by the proponent.

124. As a general principle, the Tribunal will not interfere with the exercise of discretion by an administrative body even if the Tribunal were to act differently were it in the shoes of that body. The discretion involved is that of the administrative body, in this case the 1st Respondent, not of the Tribunal. The circumstances under which the Tribunal would interfere with such decisions are limited: if the decision is unreasonable or violates the law, in this case EMCA and the regulations.

In Claim No. 550 of 2010 – Peninsula Citizens for Sustainable Development Limited v Department of the Environment & Placencia Marina Limited where the claimant had challenged the decision to build the dam as unlawful on the ground that the procedure by which the decision was made was not in accordance with several provisions of the Environmental Protection Act and the Environmental Impact Assessment Regulations, 1995 [Kenya's equivalent of EMCA and the Environmental (Impact Assessment and Audit) Regulations] in that the steps required by the Legislation to be followed prior to approval of the project were not complied with by the government before approval of the construction of the dam, both the Supreme Court and the Court of Appeal in Belize and the Privy Council rejected the case for the claimant and held as follows at Page 37:

"The Privy Council held that it was not necessary that the ESIA should pursue investigations to resolve every issue or topic. "The fact," says Lord Hoffman, "that the environmental impact statement does not cover every topic and expose every avenue advocated by experts does not necessarily invalidate it or require a finding that it does not substantially comply with the statute and the regulations: See also to the same effect Cripps J in Prineas

v. Forestry Commission of New South Wales 1983 49 LGRA 402 at p. 417.

The court further held that, there must be included into the statutory obligations a concept of reasonableness, where an environmental impact statement is comprehensive in its treatment of the subject matter, objective in

its approach and meets the requirement that it alerts the decision maker and members of the public to the effect of the activity on the environment and the consequences to the community inherent in the carrying out of the activity, it meets the standards imposed by the regulation…"

Similarly, in MEC for Environmental Affairs and Development Planning v Clairison's CC (408/2012) [2013] ZASCA 82 (31 May 2013), the Supreme Court of South Africa held as follows

"What was said in Durban Rent Board is consistent with present constitutional principle and we find no need to re-formulate what was said pertinently on the issue that arises in this case. The law remains, as we see it, that when a functionary is entrusted with a discretion, the weight to be attached to particular factors, or how far a particular factor affects the eventual determination of the issue, is a matter for the functionary to decide, and as he acts in good faith (and reasonably and rationally) a court of law cannot interfere. That seems to us to be but one manifestation of the broader principles explained – in a context that does not arise in this case–

[24] There is one further matter under this heading that we need to deal with. The MEC shared the opinion of his department that the proposed development was detrimental to the biodiversity of the area, and to an environmental corridor between two rivers. Expert opinion advanced by Clairisons challenged that opinion. On that controversy the court below said the following:

125. 'Much of the information relied upon by the [MEC] seems to amount to academic statements about, and definitions of, the nature of critical biodiversity areas and corridors and very little is provided in the way of factual evidence under the guise of engaging with the critique provided by [Clairisons] specialist. As far as the functionality of the corridor between the rivers is concerned, it seems to me that this type of dispute cries out for independent specialist input (which it was open to the [MEC] to call for)... It is difficult to understand how the [MEC] could have made an informed decision merely by weighing up [Clairisons] input against the department's input and without at least having given serious consideration to further specialist advice. The inference is that he failed to place due weight on the necessity of making a properly informed decision about the impact of the proposed development on the natural environment and as a result the grounds relied upon by him were insubstantial. This also constitutes a ground for review.'

In the case of Republic v Institute of Certified Public Accountants of Kenya ex parte Vipichandra Bhatt T/A J V Bhatt & Company Nairobi HCMA No. 285 of 2006 the court held that:

126. "Error of law by a public body is a good ground for judicial review. An administrative or executive authority entrusted with the exercise of a discretion must direct itself properly in law…It is axiomatic that that statutory power can only be exercised validly if they are exercised reasonably. No statute can ever allow anyone on whom it confers a power to exercise such power arbitrarily and capriciously or in bad faith."

127. The Tribunal has considered all these cases and finds that despite the ESIA Study reports endeavour to capture as much of the reasonably foreseeable anticipated impacts of the proposed project and attempted to address the mitigation measures to be put in place to mitigate the various matters identified as Environmental and Social impacts, however, the comprehensiveness of the EIA Study report did not excuse the failure to carry out effective public participation during this process as well as after the preparation of the voluminous EIA study report. The EIA study and report thereof were thus never subjected to proper and effective public participation that would have covered most of the grievances now raised in this appeal. As we have found earlier, the 1st Respondent's approval of the ESIA Study and the consequent issue of the ESIA Licence and its conditions failed to meet the requirements of the law. The 1st Respondent therefore failed in discharging its mandate as provided for under the enabling Statute, EMCA by appearing to have only formally endorsed the EIA study process and ESIA Study report contrary to its own directive. It is also clear from the 2nd Respondent's own witness that he failed to consider certain factors such as the impact of climate change in relation to the Climate Change Act to determine compliance.

To repeat the words of the court in In Nairobi HCCC Petition NO 22 OF 2012: MOHAMED ALI BAADI AND OTHERS vs THE HON. ATTORNEY GENERAL and 7 others:-

128. "Of all the functions of the Tribunal under Section 129 of EMCA, the only applicable one would be Section 129(1)(a) to the extent that the Petitioners challenge the completeness and scientific sufficiency of the ESIA Report that resulted in the license issued by NEMA". In the instant case, in addition to the failure to undertake proper and meaningful public participation, the 2nd Respondent's ESIA Study report was incomplete and scientifically insufficient for the omissions mentioned above.

Having made the above findings what orders should we make. The Tribunal is empowered under Section 129(3) of the EMCA to make the following orders upon hearing of an appeal:-

(a) (3) Upon any appeal, the Tribunal may confirm, set aside or vary the order or decision in question;

(b) exercise any of the powers which could have been exercised by the Authority in the proceedings in connection with which the appeal is brought; or

129. make such other order, including orders to enhance the principles of sustainable development and an order for costs, as it may deem just;

130. Accordingly, for the reasons stated above, we allow the appeal and set aside the decision of the 1st Respondent to issue the Environmental Impact Assessment Licence No. NEMA/ESIA /PSL/3798 dated 7th September 2016 to the 2nd Respondent.

131. In furtherance of our powers under section 129(3) (b) and (c) we order the 2nd Respondent, should it still wish to pursue the construction and operation of the project, to undertake a fresh EIA study following the terms of reference already formulated in January 2016, and in compliance with the Director - general's directive of 26th October 2015, as well as adhere to each step of the requirements of the EIA Regulations on EIA Studies. The fresh EIA study, if undertaken, is to, inter alia, include all approved and legible detailed architectural and engineering plans for the plant and its ancillary facilities (such as the coal storage and handling facility and the ash pit with its location in relation to the sea shore), consideration of the Climate Change Act 2016, the Energy Act 2019 and the Natural Resources (Classes of Transactions subject to Ratification) Act 2016 in so far as the project will utilise sea water for the plant and/ or if applicable.

132. Subject to these steps being undertaken, a fresh EIA study report is to be prepared and presented to the 1st Respondent. The 1st Respondent is directed to comply with the provisions of regulations 17 and 21, engage with the lead agencies and the public, in the manner and strict timelines provided for under the said law. The 1st Respondent is to share its memorandum of reasons for reaching its decision whether for or against the project with the relevant parties and publish its decision on the grant or refusal to issue an EIA Licence accompanied with a summary of its reasons within 7 days of its decision. Such publication should be in a newspaper with nationwide circulation.

These extraordinary measures are necessary to ensure sufficient access to information by the public on a project that will be the first of its kind in Kenya and the East African region.

133. As the Appellant had prayed for each party to bear its own costs, we so order.

134. The parties attention is also drawn to the provisions of section 130 of the EMCA on the right of appeal within 30 days of this decision.

Finally, we would like to commend and thank all counsel who appeared before us for their patience and persistence during the course of the hearing of this Appeal and who were always courteous and cooperative with the Tribunal and the witnesses who appeared in the matter.

DELIVERED at NAIROBI this 26th day of June 2019

MOHAMMED S BALALA .....CHAIRMAN

CHRISTINE KIPSANG… .....VICE-CHAIRPERSON

BAHATI MWAMUYE .....MEMBER

WAITHAKA NGARUIYA .....MEMBER

KARIUKI MUIGUA… .....MEMBER

Case 3

REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA (EASTERN CAPE DIVISION, MAKHANDA)

CASE NO: 3491/2021

Reportable In the matter between:

SUSTAINING THE WILD COAST NPC — 1st Applicant

MASHONA WETU DLAMINI — 2nd Applicant

DWESA-CWEBE COMMUNAL PROPERTY ASSOCIATION — 3rd Applicant

NTSINDISO NONGCAVU — 4th Applicant

SAZISE MAXWELL PEKAYO — 5th Applicant

CAMERON THORPE — 6th Applicant

ALL RISE ATTORNEYS FOR CLIMATE AND THE ENVIRONMENT NPC — 7th Applicant

NATURAL JUSTICE — 8th Applicant

GREENPEACE ENVIRONMENTAL ORGANIZATION — 9th Applicant

and

MINISTER OF MINERAL RESOURCES AND ENERGY — 1st Respondent

MINISTER OF ENVIRONMENT, FORESTRY AND FISHERIES — 2nd Respondent

SHELL EXPLORATION AND PRODUCTION SOUTH AFRICA B V — 3rd Respondent

IMPACT AFRICA LIMITED — 4th Respondent

BG INTERNATIONAL LIMITED — 5th Respondent

JUDGMENT

MBENENGE JP:

Introduction

[1] Stripped of verbiage, the principal question dealt with in these proceedings is whether the grant of an exploration right for the exploration of oil and gas, which has culminated in the need to conduct a seismic survey along the Southeast coast of South Africa,[1] is lawful.

[2] While some enjoy water sports on the beaches comprising the Eastern Cape coast, it is, to others, a

home for communities that are steeped in customary rituals. These communities subsist on fishing and other marine resources to supplement their livelihood.

[3] The Eastern Cape coast is not only a haven for marine and bird life, including endangered, threatened and protected species but also a centre of attraction to entities desirous of exploring mineral and petroleum resources from its seabed. To this end, one of these entities has sought and obtained an exploration right in terms of the applicable statutory framework. As a precursor to the exploration, it has become necessary to conduct a seismic survey[2] off the Eastern Cape coast. The quest to conduct the survey and possible resulting exploration does not find favour with communities and entities who uphold nature conservation and protection of the coastal environment, the contention being, inter alia, that the survey will impact negatively upon the livelihood and the constitutionally and customarily held rights, including customary fishing and religious rights, of the coastal communities.

The scramble for the utilisation of our coastal waters often brings to the fore the interplay, foreshadowed in section 24 of the Constitution,[3] between the right to a protected

[1] Otherwise referred to as the Eastern Cape coast. Part of this coast is a 250 km strip commonly known as the "Wild Coast" straggling the Mthamvuma River in the North and the Great Kei River to the South.

[2] A seismic survey is the study in which seismic waves generated through compressed air are used to image layers of rock below the seafloor in search of geological structures to determine the potential presence of naturally occurring hydrocarbons (i.e. oil and gas).

[3] The section reads:

'Everyone has a right environment, on the one hand, and socio-economic development, on the other, once echoed by Ngcobo J in Fuel Retailers Association of Southern Africa v Director-General: Environmental Management, Department of Agriculture, Conservation and Environment, Mpumalanga Province and Others [4] in the following terms:

'. . . [D]evelopment cannot subsist upon a deteriorating environmental base. Unlimited development is detrimental to the environment and the destruction of the environment is detrimental to development. Promotion of development requires the protection of the environment. Yet the environment cannot be protected if development does not pay attention to the costs of environmental destruction. The environment and development are thus inexorably linked.'

The parties

[4] In light of the nature of these proceedings and the issues raised by the parties, it is imperative to give a detailed description of the parties to this litigious matter and, as far as possible, to mention what cause they champion.

[5] The first applicant is Sustaining the Wild Coast NPC,[5] a non-profit company whose objective is to promote sustainable livelihood that constructs, rehabilitates and protects the natural environment on the Wild Coast.

[6] The second applicant is Mashona Wetu Dlamini, a resident of Sigidi Village in the Umgungundlovu Community which forms part of Amadiba Traditional Community. Mr Dlamini is a traditional healer and a member of the council of inkosana of Umgungundlovu, Duduzile Baleni. He acts for himself, on behalf of traditional healers along the Wild Coast and on behalf of the Umgungundlovu Community.

The third applicant is the Dwesa-Cwebe Communal Property Association,[6] a duly established juristic entity in whose favour land of which the Dwesa-Cwebe community[7] had been dispossessed under colonialism and apartheid was restored under the Restitution of Land to an environment that is not harmful to their health or well-being; and

(i) to have the environment protected, for the benefit of present and future generations, through

reasonable legislative and other measures that –

(ii) prevent pollution and ecological degradation;

(iii) promote conservation; and secure ecologically sustainable development and use of natural resources while promoting justifiable economy and social development.'

[4] (CCT 67/06) [2007] ZACC 13; 2007 (10) BCLR 1059 (CC); [2007] (6) SA 4 (CC); (07 June 2007), para 44.

[5] SWC.

[6] The Dwesa-Cwebe Community.

[7] Made up of the Mendwane, Hobeni, Cwebe, Ngoma, Ntlangano, Mpume and Ntubeni villages.

[7] Rights Act 22 of 1994. Dwesa-Cwebe is a marine protected area[8] bordering the Cwebe Reserve located along the Wild Coast, in the district of Elliotdale.

[8] The fourth applicant is Ntsindiso Nongcavu, a fisher from Port St Johns, who brings the application for himself and on behalf of fellow Wild Coast fishers.

[9] Saziso Maxwell Pekayo and Cameron Thorpe are the fifth and sixth applicants, respectively. They form part of a local cooperative, Kei Mouth Fisheries, and launch the application on their own behalf, on behalf of their community and of Wild Coast fishers.

[10] The seventh applicant is All Rise Attorneys for Climate and Environmental Justice NPC,[9] a law clinic and a duly incorporated non-profit company representing communities fighting against and affected by climate change.

[11] Natural Justice and the Greenpeace Environmental Organisation NPC seek to join these proceedings as the eighth and ninth applicants, respectively. Natural Justice is a voluntary association whose objectives are to provide legal support to indigenous people and local communities and ensure that the interests of these communities are effectively represented in the development and implementation of domestic and international law and policy. Greenpeace Environmental Organization NPC[10] works towards the achievement of environmental rights and social and environmental justice in communities across South Africa.

[12] The second, fourth, fifth, sixth and seventh applicants act in the public interest and in the interest of protecting the environment. In addition to acting in the public interest, the third applicant acts in the interest of its members.

The first respondent is the Minister of Mineral Resources and Energy, responsible for the administration of the Mineral and Petroleum Resources Development Act 28 of 2002.[11] The second respondent is the Minister of Environment, Forestry and Fisheries, cited in her capacity as the functionary who administers the National Environmental Management Act 107 of 1998,[12] the Integrated Coastal Management Act 24 of 2008[13] and the National

[8] By virtue of being a marine protected area, some of the concerns raised in this application would otherwise have no bearing on this area. The view taken of this matter and the orders to be eventually granted render this aspect of the case unnecessary to deal with.

[9] All Rise.

[10] GPAF.

[11] MPRDA.

[12] NEMA.

[13] ICMA.

[13] Environmental Management: Biodiversity Act 10 of 2004.[14] The legislation administered by these ministries has one thing in common: the recognition of everyone's constitutional right to have the environment, including the coastal environment, protected for the benefit of present and future generations.

[14] The third respondent is Shell Exploration and Production South Africa BV.[15] Shell is an integrated energy company. It holds itself out as 'one of the largest corporates in the world' and considers itself to be 'a pioneer in the development of new technologies and processes in an energy-hungry world.'

[15] The fourth respondent is Impact Africa Limited.[16] Impact undertakes '[to substantially and meaningfully expand opportunities for historically disadvantaged South Africans, including women, to enter the petroleum industry and to benefit from the exploitation of the nation's petroleum resources]' and to '[promote and advance the social and economic welfare of all South Africans].'[17] It is not in dispute that Shell and Impact have each a 50% participating interest in the exploration right which authorised the seismic survey and exploration sought to be conducted on the Wild Coast.

The fifth respondent is BG International Limited, a duly incorporated external company conducting business in, inter alia, the Gauteng Province. It is also not in dispute that the fifth respondent is the Shell entity which co-owns the project affected by the relief sought in these proceedings, hence the third and fifth respondents are otherwise hereinafter collectively referred to as Shell.

Factual background

[16] Even though the issues raised in this application are largely more legal rather than factual, a brief setting out of the relevant background facts is nevertheless necessary. On 14 July 2011, Impact applied for a technical co-operation permit. That permit was granted by the Deputy Director-General of the Department of Mineral Resources and Energy[18] on 27 July 2012. Thereafter, on 18 February 2013, Impact applied for an exploration right to, inter alia,

[14] NEMBA.

[15] Shell.

[16] Impact.

[17] These objectives are set out in an annexure to Impact's answering affidavit, being a letter addressed to PASA, dated 08 May 2017.

[18] The Deputy Director-General.

[17] use the seismic survey to seek out oil and gas reserves off the Eastern Cape coast[19] in the Transkei Algoa exploration area, in terms of section 79 of MPRDA.[20] The application was accepted on 01 March 2013. Impact was required to submit an environmental management program[21] on the proposed activities to the Petroleum Agency of South Africa[22] for consideration and approval by the Minister responsible for mineral resources. In this regard, regulation 52 of the Regulations promulgated under MPRDA makes provision for the details to be included in an EMPr.[23]

(a) Pursuant to PASA's acceptance of the application, the consultation process engaged in by an independent environmental assessment practitioner, at the instance of Impact, then the operator for conducting the seismic survey, was as follows:

(b) Potential interested and affected parties were identified through analysis of potential stakeholders and based on stakeholders engaged in previous similar studies in the area.

A list setting out these parties was generated for use in the envisaged consultation. The list included various functionaries at local, regional and national levels, and representatives of NGOs, industry groups

and communities.

[19] The Transkei Algoa Exploration area is located between Port Elizabeth in the Eastern Cape Province (33˚ 54'S, 23˚ 36') and Ramsgate in the KwaZulu-Natal Province (30˚ 40'S, 30˚ 20'E). The Transkei part of the area extends along a narrow strip of the continental shelf to a maximum distance of approximately 135 km of the Eastern Cape coastline. The Algoa part is located further offshore immediately South of the continental shelf, approximately 100 km from the Port Elizabeth shoreline. The proposed exploration areas cover an area of approximately 45,838 km^2.

[20] In relevant part, the section provides:

(a) ' (1) Any person who wishes to apply to the Minister for an exploration right must lodge the application-

(b) at the office of the designated agency;

(c) in the prescribed manner; and together with the prescribed non-refundable application fee."

(a) (2) The designated agency must, within 14 days of the receipt of the application, accept an application for an exploration right if-

(b) the requirements contemplated in subsection (1) are met;

(c) no other person holds a technical co-operation permit, exploration right or production right for petroleum over the same land and area applied for; and no prior application for a technical co-operation permit, exploration right or production right over the same mineral, land and area applied for has been accepted.'

[21] EMPr.

[22] PASA.

[23] These are -

(b) '(a) a description of the environment likely to be affected by the proposed prospecting or mining operation;

(c) an assessment of the potential impacts of the proposed prospecting or mining operation on the environment, socio-economic conditions and cultural heritage, if any;

(d) a summary of the assessment of the significance of the potential impacts, and the proposed mitigation and management measures to minimise adverse impacts and benefits;

(i) financial provision which must include –

(ii) the determination of the quantum of the financial provision contemplated in regulation 54; and

(e) details of the method providing for the financial provision contemplated in regulation 53;

(f) planned monitoring and performance assessment of the environment management plan;

(g) closure and environmental objectives;

(h) a record of the public participation undertaken and the results thereof; and an undertaking by the applicant regarding the execution of the environmental management plan.'

(c) A background information document providing an overview of the proposed exploration activities and locations was compiled and distributed to the interested and affected parties. The docu-

ment provided instructions for submitting comments and input for consideration in the EMPr.

(d) Adverts were placed in The Times, Die Burger (Eastern Cape), The Herald and The Daily Dispatch newspapers on Friday 22 March 2013 notifying members of the public of the proposed project. The public was also thereby provided with details of the consultation process, including information on how they could provide input into and comment on the EMPr process.

(e) 21 calendar days[24] were allowed for interested and affected parties to submit issues or express concerns for consideration in the compilation of the draft EMPr. This period also allowed for members of the public to register as interested and affected parties and/or submit issues or concerns.

(f) Issues or concerns were received and compiled into a report that formed part of the draft EMPr. The draft EMPr was made available to interested and affected parties for 30 calendar days[25] on the project website.

(g) The interested and affected parties on the stakeholder database were notified of and invited to group meetings held in Port Elizabeth,[26] East London[27] and Port St Johns.[28] Two group meetings were held with officials from the Eastern Cape Parks and Tourism Agency and the Department of Development, Environmental Affairs and Tourism in East London on 04 June 2013.

Meetings involving the monarchs in the Transkei[29] through the monarchs' representative, Mr Richard Stephenson, and the Royal Monarch Council were held in

[24] 22 March 2013 to 12 April 2013.

[25] 24 May to 24 June.

[26] On 03 June 2013. Port Elizabeth is now known as "Gqeberha."

[27] On 04 June.

[28] On 05 June.

[29] AbaThembu, amaMpondo of the East and of the West and amaXhosa monarchs. The "Transkei" territory is a former black homeland which gained self-governing status in 1963 and was granted "independence" in 1976. Transkei did not receive international recognition as an independent State, having been considered to be a product of apartheid. Following a multiracial election that took place in 1994, apartheid came to an end and Transkei, together with other homelands, was reabsorbed into South Africa. The appellation "Transkei" is nevertheless used in this judgment for the sake of convenience.

(h) Mthatha and comments received therefrom for consideration by the relevant functionary.

[18] All comments received on the draft EMPr were compiled and documented in the comments and responses report. No substantive changes were made to the EMPr in preparing the final report for submission to PASA.

[19] Pursuant to this process, PASA recommended the approval of the EMPr on 09 September 2013. The Deputy Director-General gave such approval on 17 April 2014.

The exploration right applied for by Impact was granted on 29 April 2014.[30] In terms of section 80(5) of MPRDA, an exploration right is subject to prescribed terms and conditions and is valid for a period not exceeding three years. No meaningful seismic and exploration activities were immediately conducted along the eastern coastline, but the following developments unfolded:

(a) On 17 May 2017, Impact, together with EXXONMOBIL Exploration Product SA Ltd (EMEPSAL),[31] applied for the first renewal of the exploration right. The application was granted on 20 December 2017.

(b) In 2018,[32] PGS Geophysical conducted a 2D[33] multi-client seismic survey in the area in question as a precursor to the 3D[34] survey which is the subject of this application.

On 13 March 2020, Impact applied for the second renewal of the exploration right.[35]

[30] Exploration Right 12/3/252 (otherwise hereinafter referred to as the exploration right).

[31] Impact assigned 75% participating interest in the exploration right to EMEPSAL and became 25% participating interest holder. By notarial deed dated August 2017 EMEPSAL assigned the interest to and in favour of STATOIL South Africa BV (Incorporated in Netherlands) (STATOIL). In terms of the deed, the participating interest of the parties in the exploration right were: EMEPSAL, 40%; STATOIL, 35%; and Impact, 25%.

[32] The same exercise appears to have been conducted in 2013, as well.

[33] Seismic surveys are undertaken to collect either 2-dimensional (2D) or 3-dimensional (3D) data. The 2D survey provide a vertical slice though the earth's crust along the survey trackline. The vertical scales on displays of such profiles are generally in 2-way sonic time, which can be converted to depth displays by using sound velocity data. 2D surveys are typically applied to obtain regional data from widely spaced survey grids (10s of kilometres) (para 2.3.2, EMPr).

[34] A 3D survey comprises a toed airgun array; up to 12 or more lines of hydrophones spaced 5 to 10m apart and between 3m and 25m below the water surface (the array can be upwards of 12 000m long and 1200 m wide); and a control and recording system co-ordinating the firing of shots, the recording of returned signals and accurate position fixing (Id).

[35] At this point in time, EMEPSAL had a 40% interest; Equinor (formally STATOIL), 35%; and Impact, 25%. EMEPSAL further recorded that it had withdrawn from the exploration right and that it had no objection to Impact making the renewal application in its sole name. Likewise, and by virtue of a joint operating agreement, Equinor (together with EMEPSAL) consented to the transfer of its entire participating interest in the exploration right to Impact.

(c) On 04 June 2021, the Director-General of the Department consented to the assignment and transfer of a 50% participating interest, in the exploration right in the Transkei Algoa exploration area, to the fifth respondent.

The second renewal was granted on 30 July 2021.

[20] On 29 October 2021, SLR Consulting (South Africa) Ltd,[36] at the instance of Shell, as operator of the exploration right, gave notice of Shell's intention to commence with a 3D seismic survey along the Wild Coast, pursuant to the exploration right and the EMPr approved in 2014.

[21] The survey is conducted by a seismic vessel sailing off the coastline, towing a 6- kilometres-long array of airguns behind it. During the survey, the seismic vessel[37] discharges pressurised air from its airgun[38] arrays[39] to generate sound waves that are directed downwards towards the seabed. The waves are reflected from geological layers below the seafloor and recorded by multiple receivers or hydrophones which are towed behind the seismic vessel by multiple streamers that are 6 kilometres long. Analyses of the returned signals allow for interpretation of sub-geological formations and structures. During the survey, the vessel sails off the coastline between 20 and 80 kilometres from the shore.

[22] It is common cause that Impact and Shell have secured no environmental authorisation to undertake the impugned survey and exploration.

Mr Reinford Sinegugu Zukulu, the deponent to the affidavit filed in support of the first to seventh applicants, registered as an interested and affected party on 07 November 2021, lending support to petitions that were, at the time, in circulation as part of a mass campaign mobilized to ask the relevant Minister to hold in abeyance the proposed activities. The campaign yielded nought.

[36] SLR, otherwise referred to as "the consultants."

[37] In this instance, the Amazon Warrior.

[38] An airgun is an underwater pneumatic device from which high pressure air is released suddenly into the surrounding water. On release of pressure, the resulting bubble pulsates rapidly producing an acoustic signal that is proportional to the rate of change of the volume of the bubble. The acoustic signal propagates through the water and subsurface and reflections are transmitted back to the surface. The sound source must be submerged in the water, typically at a depth of 5 to 25 metres (para 2.3.4 of the EMPr).

[39] Airguns are used on an individual basis (usually for shallow water surveys). Arrays of airguns are made of towed parallel strings of airguns (usually comprised of between 12 and 70 airguns) and are normally towed between 50 meters and 100 meters behind the seismic vessel. The airgun would be fired at approximately 10 to 20 second intervals at an opening pressure of between 2000 to 2500 bsi and a volume of 3000 to 5000 cubic inches (para 2.3.4 EMPr).

In the wake of these events, urgent proceedings were launched by Border Deep Sea Angling, Kei Mouth Ski Boat Club and the eighth and ninth applicants against the present respondents on 30 November 2021. An order was sought to restrain Shell and Impact from undertaking seismic survey operations pursuant to Impact's exploration rights from 01 December 2021 onwards, pending separate proceedings to be launched to review the exploration right and its renewals. The first to seventh applicants in the current proceedings had been desirous to join those proceedings but ended up not doing so due to having been overtaken by events. The court[40] dismissed the application on the ground that the applicants had not established a well-grounded apprehension of irreparable harm if interim relief was not granted and the ultimate relief eventually granted, or that the balance of convenience favoured them.[41] Because nothing hinges on this judgment, nothing more about it, for present purposes, will be said. It suffices only to state that the judgment subsequently became the subject of an application for leave to appeal on the merits and costs. Only leave to appeal the costs order was pursued. That application was dismissed.[42]

This application

[23] As a result of the notice to conduct the impugned survey, the first to seventh applicants, claiming to have learned of SLR's notice upon its publication, resorted to court by way of urgency seeking an order interdicting the third, fourth and fifth respondents from undertaking the survey,[43] pending the determination of part B of that application.[44] The urgent application was premised on the contention that the survey would not only be harmful but would be unlawful, given that Shell does not have an environmental authorisation to conduct the exploration right in terms of NEMA. They furthermore contended that they had not been consulted prior to the decision granting the exploration right being taken and that the survey would cause harm to the environment and their livelihoods, culture and heritage.

[40] Per Govindjee AJ.

[41] Border Deep Sea Association v Minister of Mineral Resources & Energy (3865/2021) [2021] ZAECGHC 111 (03 December 2021); 2021 JDR 3208 (ECG).

[42] Border Deep Sea Angling Association & Others v Minister of Mineral Resources & Energy & Others

(3865/2021) [2022] ZAECMKHC 38 (07 June 2022) (BDSA).

[43] Part A.

[44] At that point, Part B comprised a prayer interdicting the third, fourth and fifth respondents from undertaking seismic survey operations under the exploration right unless and until they have obtained an environmental authorisation under NEMA.

[24] Amidst opposition by the first and fifth respondents, the court,[45] having been satisfied that the requisites for the grant of an interim interdict had been fulfilled, granted the interdict pending the finalisation of Part B, and directed the first and fifth respondents to pay the costs of the application incurred thus far.[46]

[25] In the course of time, the relief sought in Part B was augmented to, inter alia, seek orders reviewing the decision granting the exploration right, including the renewals thereof, and declaratory and interdictory relief, including relief consequential thereto. Part B, in amplified form, now serves before this court. To the extent that there might have been a delay in launching the proceedings and failure to exhaust internal remedies before launching the application, condonation therefor is also being sought.[47]

This case is significant for all the parties involved. Some of the issues raised are novel. In light of this, a full court sitting as the court of first instance was constituted, in terms of section 14(1)(a) of the Superior Courts Act 10 of 2013.[48] Also, even though the case is justiciable before the High Court in Makhanda,[49] for the sake of convenience, it was, with the consent of all the parties, heard in the High Court, Gqeberha.

[45] Per Bloem J.

[46] Sustaining The Wild Coast NPC and Others v Minister of Mineral Resources and Energy and Others (3491/2021) [2021] ZAECGHC 118; [2022] All SA 796 (ECG); 2022 (2) SA 585 (ECG) (28 December 2021).

[47] The first to seventh applicants seek an order that –

2. The fifth respondent may not undertake any seismic survey if it has not been granted an environmental authorisation in terms of [NEMA].

3. The decision taken by the first respondent, on 29 April 2014, to grant an exploration right to the fourth respondent to explore for oil and gas in the Transkei and Algoa exploration areas . . . is reviewed and set aside.

4. The decision taken by the first respondent, on 20 December 2017, to grant a renewal of exploration right 12/3/252 is reviewed and set aside.

5. The decision taken by the first respondent, on 26 August 2021, to grant a further renewal of exploration right 12/3/252 is reviewed and set aside.

6. The decision to allow the fifth respondent to commence the seismic survey without the environmental authorisation in terms of NEMA is declared to be invalid and is set aside.

7. The applicants' failure to exhausts internal remedies in respect of the decisions in 2, 3, 4, and 5 is condoned.

8. The time period of 180 days in section 7 (1) of PAJA is extended, in accordance with section 9 of PAJA, to the date that the review relief in Part B was instituted.

9. In the alternative to 2 - 7, the fourth and fifth respondents are interdicted from undertaking seismic survey operations under exploration right 12/3/252 unless and until they obtain an environmental authorisation in terms of NEMA.

10. The applicants are granted leave to file the supplementary affidavit of Reinford Sinegugu Zukulu, together with all supporting affidavit annexed thereto.

The first, fourth and fifth respondents are ordered to pay the applicants' costs.'

[48] The Act.

[49] By reason of the Makhanda High Court, as the main seat (in terms of section 6 (1) (a) of the Act), having concurrent jurisdiction with the various local seats (Mthatha, Bhisho and Gqeberha) in which the cause of action arose.

The parties' contentions

[26] The first to seventh applicants' assertion is, first, that environmental authorisation in terms of NEMA is necessary for exploration activities regulated by the MPRDA and that the seismic survey is a listed activity under NEMA which may not commence without such authorisation having been secured. Second, the process of consulting with potential interested and affected parties is materially flawed and inadequate as it did not take into account the nature and structure of the applicants' communities and the manner in which decisions are taken by the communities; in addition to the customary law rights and duties held by all the applicant communities, the Dwesa-Cwebe community holds recognised customary fishing rights and ought, therefore, to have been specifically consulted. Third, because the first to seventh applicants were not aware of the application for the exploration right and the renewals thereof, the impugned decisions were taken without paying heed to the fundamental considerations, including the anticipated harm to marine and bird life along the Wild Coast and the communities' spiritual and cultural rights; on a proper application of the precautionary principle, the court should find that the threat of harm to marine and bird life justifies a cautious approach, which was not given heed to when the exploration right was granted. As a result, the mitigation measures contained in the EMPr are woefully insufficient to address the threat of harm arising from the proposed seismic survey.

[27] The eighth and ninth applicants seek leave to intervene in these proceedings on the basis that they have a direct and substantial interest in the outcome thereof. They otherwise align themselves with the relief sought by the first to seventh applicants. Their point of emphasis is that the area in which the impugned survey is to be conducted enjoys a special legal status that affords the environment a particularly high level of protection, given the ecological value of the area and the presence of many critically endangered, threatened and protected species. They, therefore, assert that the impugned decisions ought to be set aside on the basis that the decision-makers failed to consider the National Environmental Management: Integrated Coastal Management Act 24 of 2008 and made no proper consideration of the climate change impacts of the impugned decision.

The second to fifth respondents have taken the preliminary points that the applicants are barred from seeking to review the impugned decisions because more than 180 days elapsed since the decisions were taken and the applicants failed to exhaust internal remedies available to them. On the merits, Shell and Impact contend that there was no need to secure environmental authorisation under NEMA in addition to the EMPr in terms of the MPRDA. In further support of the impugned decisions and actions, they allege that seismic surveys are routine and have been performed in the past, which is evidence that they are not harmful to marine and bird life in the area concerned. They also contend that there are no climate change impacts to access a seismic vessel any more than there would be a fishing or commercial vessel. Reliance for these contentions is placed on evidence tendered by experts who deny that harm will result from the seismic surveys; it is contended that there is no research globally showing that serious injury, death or stranding of marine mammals has occurred from exposure to sound from seismic surveys when the appropriate mitigating and monitoring measures are implemented.[50] Regard being had to the social and economic development that will ensue from the survey, argue Shell and Impact, the survey ought to be allowed. Shell and Impact maintain that the consultation process followed was adequate, having been in accordance with the applicable regulatory framework and that they had no obligation to consult the applicants specifically, in circumstances where the applicants concerned took no steps to register as interested and affected parties.

[28] For his part, the first respondent resists the review and setting aside of the impugned decision on the basis that due process was followed in taking the decisions based on the prescribed material before him to which he applied his mind. The first respondent associates himself with Impact and Shell in (a) contending that the applicants should be non-suited for having delayed before launching this application; (b) defending the consultation process as having been adequate; and (c) asserting that

no separate environmental authorisation in terms of NEMA is required for exploration activities. At the hearing, the first respondent also persisted in contending, together with the other respondents, that the applicants should be non- suited for having delayed before launching this application.

In rebuttal of the preliminary points, the applicants dispute that the review application was brought out of time; they only became aware of the impugned decision in November 2021.

[50] These measures are the invocation of international standards, including additional mitigation measures specific for the area concerned; the reduction of the sound source output to its lowest practically possible level; the engagement of qualified independent marine mammal observers (MMO) and passive acoustic monitoring (PAM) operators who will be on-board the vessel to observe and record responses of marine fauna to the seismic survey; the implementation of a dedicated MMO and PAM pre-shoot watch of at least 60 minutes to ensure that there are no diving seabirds, turtles, seals or cetaceans within 800 metres of the seismic source; the carrying out of airgun firing as soft-starts of at least 20 minutes duration; the suspension of the survey if cetaceans enter the 800 metre mitigation zone or if there are mortality or injuries as a direct result of the survey; and steering clear of declared marine protected areas with a 5 kilometre buffer zone being maintained around MPAs exceeding the current standard in South Africa of a 2 kilometre buffer zone around MPAs.

[29] They further contend that, given the first respondent's approach to the litigation[51] and public statements he made,[52] no purpose would have been served in lodging an internal appeal. Based on expert evidence, the applicants dispute that they will benefit from the results of the seismic survey and the ensuing projected exploration.

[30] In his supplementary affidavit attested and filed of record on 7 December 2021, Mr Zukulu sought an indulgence to tender expert evidence setting out the risks of harm associated with seismic surveys in general, and on the Wild Coast, in particular. In the affidavit, he makes the point that the founding papers had been prepared in extreme urgency and haste, the information embodied therein not having been to hand five days prior thereto, on 2 December. The delivery of the supplementary affidavit and the relevant reports were at no stage made the subject of controversy. Indeed, doing so would, in my view, have been tantamount to creating a storm in a teacup. This is especially so if one has regard to the fact that leave to file the affidavit was applied for and the respondents averse to such filing were invited to oppose the same.[53] The notice attracted no such opposition. The interests of justice dictate that the affidavit be admitted. This case will be adjudicated with all the facts having been placed before court. No prejudice will be suffered by the admission of the affidavit. None was pointed to, either.

[31] The late delivery of the supplementary affidavit of Mr Zukulu, together with annexures thereto, is accordingly condoned.

[32] A further preliminary issue that was the subject of a skirmish at the hearing of this application was whether the belatedly delivered affidavit of Dr Jammine, Impact's expert witness, should be admitted. The affidavit deals with the macro and regional economic and social consequences of the relief being granted in the terms sought by the applicants and the intervening parties. Dr Jammine's commitments and unforeseen logistical challenges are said to have rendered it well neigh impossible for Impact to deliver the affidavit timeously.

Only the intervening parties opposed the interlocutory application, contending, in the main, that, due to paucity of time, they would be prejudiced as they had not been able to procure

[51] Initially, the first respondent had evinced a determination to abide the decision of the court, but suddenly changed stance and filed answering papers shortly before the delivery of the applicants' replying affidavit.

[52] Public statements made by the Minister criticizing the applicants and aligning himself with Shell in its desire to conduct the seismic survey on the basis that the EMPr "constitutes an environmental authorisation as envisaged by the NEMA."

[53] Compare MEC for Health, Eastern Cape v Khumbulela Melane (2017/2015) [2022] ZAECMHC 4 (15 March 2022), where the court upheld the salutary approach of seeking condonation for the delivery of supplementary papers. An expert witness to answer Dr Jammine's affidavit. The affidavit, so it was contended, related to an issue that should have been raised at the outset and that, therefore, the application for the admission of the affidavit did not meet the threshold.

[33] Amidst such opposition, the court provisionally accepted the affidavit, with the parties acknowledging that this was a pragmatic solution in the circumstances of this case. It bears mentioning that, whilst the intervening parties could have asked for more time by even seeking a postponement at the cost of the errant party, they did not do so. Instead, as a fall-back position, they accepted that the applicants' expert, Professor Bond, does participate in the debate on the topic at hand.

[34] No reason has been found for rejecting the affidavit. Impact's application for the admission of the affidavit is, therefore, granted, leaving the court to consider issues that are germane to the merits of these proceedings.

- The entitlement or otherwise of the applicants and the intervening parties to the grant of the relief they are seeking hinges on answers to the following questions, namely: have the eighth and ninth applicants made out a case for intervention;

- do the applicants fall to be non-suited due tothe alleged delay in launching these proceedings; and not having exhausted internal remedies prior to the launch of this application; do the grounds for the review of the impugned decisions pass muster; should the declaratory and interdictory relief sought be granted; and

what costs order should be made?

Each one of these questions will be dealt with in the order in which they have been posed.

The intervention

It 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.[54] It is incumbent on the applicant for

[54] SA Riding for the Disabled Association v Regional Land Claims Commissioner and Others (CCT172/16) [2017] ZACC4; 2017 (8) BCLR 1053 (CC); 2017 (5) SA 1 (CC) (23 February 2017), para 9.

[35] intervention to demonstrate that it has a right adversely affected or likely to be affected by the order sought. However, the party seeking to intervene is not required to satisfy the court at the stage of intervention that it will succeed; it need only make allegations which, if proved, would entitle it to relief.[55]

[36] Where a party has shown a direct and substantial interest in the subject matter of a case, the court has no discretion to exercise. It must grant the intervention.[56]

[37] The generous approach to standing adopted under section 38 of the Constitution is the overriding factor. That section grants locus standi to any party alleging the infringement of a right in the Bill of Rights acting in its own interest,[57] on behalf of another person who cannot act in their own interest,[58] in the interest of a group or class of persons,[59] in the interest of the public[60] or as an association acting in the interest of its members.[61]

[38] Section 32(1) of NEMA makes provision for an even broader legal standing to enforce environmental laws in respect of any breach or threatened breach of NEMA. It accords standing to any person or group of persons referred to in section 38 of the Constitution, but, most importantly, adds 'in the interests of protecting the environment'[62] as another relevant factor.

[39] In Ferreira v Levin NO and Others; Vryenhoek and Others v Powell NO and Others[63] O' Regan J ad-

vocated for a more generous approach regarding standing in the constitutional dispensation than at common law. All courts required to adjudicate constitutional claims are required to invoke the generous approach.[64]

In this matter, regard should be had to the fact that the litigation is of a public or constitutional character; it involves an infringement of the Bill of Rights and a breach or threatened breach of NEMA. Therefore, the range of interests upon which an intervening party might rely in contending for a direct and substantial interest ought to be broadly construed.

[55] SA Riding case, supra.

[56] Nelson Mandela Metropolitan Municipality v Greyvenouw CC 2004 (2) SA 81 (SE) at 89B - C.

[57] Section 38(a).

[58] Section 38(b).

[59] Section 38(c).

[60] Section 38(d).

[61] Section 38(e).

[62] Section 32(1) (e) of NEMA.

[63] 1996(1) SA 984 (CC); 1996 (1) BCLR 1 (06 December 1995), para 229.

[64] Beukes v Krugersdorp Transitional Local Council and Another 1996 (3) SA 467 (W) at 474 E – H.

[40] In the view of this court, the objectives of the intervening parties and the entities or persons in whose interests the litigation is brought, establish the entitlement to seek the substantive relief prayed for in the intervening parties' notice of motion in their own right, independently of the first to seventh applicants.

[41] The Minister and Shell have consented to the joinder sought. Only Impact opposes the intervention application. But, Impact does not deny that the intervening parties have the standing to seek the substantive relief sought in the notice of motion in their own right. It merely contends that the intervening parties' participation is redundant because the first to seventh applicants already represent the public interest and there is overlap in the factual allegations, review grounds, statutory provisions and relief sought between the intervening parties and the first to seventh applicants. Impact's stance is predicated on the contention that the intervention would not be of "assistance to the court." That is, however, hardly the test for intervention.[65]

[42] There is yet another relevant factor; it was available to the intervening parties to pursue Part B of the BDSA case regardless of the fact that Part A was not successful. They did not do so but elected to intervene in these proceedings. Had they pursued Part B, their application and the instant application would, in all probability, have had to be consolidated. The intervening parties deserve of being commended for the prudent step they took which has had the effect of avoiding a multiplicity of applications. In any event, the interests of justice dictate that they be allowed to intervene in these proceedings. It is also of importance that, in this instance, the intervening parties seek to join these proceedings acting in the public interests and under the broader standing provisions set out in NEMA.

In these circumstances, Natural Justice and Greenpeace Africa have made out a case for the intervention they are seeking. Henceforth, these entities are applicants in these proceedings and will be referred to as such interchangeably with the appellation "intervening parties."

Has there been an unreasonable delay?

Three administrative decisions are at the heart of the review part of the applicants' prayers namely, the

decision to grant the exploration right made on 29 April 2014; the decision

[65] Minister of Social Development and Others v Net1 Applied Technologies South Africa (Pty) Ltd and Others

[2018] ZASCA 129 (27 September 2018).

[43] taken on 20 December 2017 to renew the exploration right; and the decision of 26 August 2021 further renewing the exploration right.

[44] The respondents seek to bar the challenge to the impugned decisions on the ground that the applicants launched these proceedings on 02 December 2021, outside of the 180 days period referred to in section 7 of the Promotion of Administrative Justice Act 3 of 2000.[66] The applicants dispute this and, in the alternative, seek an order extending the 180 days in accordance with section 9 of PAJA.[67]

[45] In terms of section 7(1)(b) of PAJA, any proceedings for judicial review in terms of section 6 must be instituted without unreasonable delay and no later than 180 days after the date on which the person concerned 'was informed of the administrative action,' became aware of the action and the reasons for it or might reasonably have been expected to have become aware of the action and the reasons.

[46] The enquiry whether there was an unreasonable delay in launching review proceedings is factual, involving a value judgment in the light of all the relevant circumstances including any explanation that is offered for the delay.[68]

In NAPTOSA and Others v Minister of Education, Western Cape and Others[69] Conradie J held:

[47] 'It is well established law that undue delay may be taken into account in exercising a discretion as to whether to grant an interdict or a mandamus, or to grant relief in review proceedings. The declaratory order, being as flexible as it is, can be used to obtain much the same relief as would be vouchsafed by an interdict or a mandamus. Where it is not necessary that a record of proceedings be put before the court, a declaratory order could serve as a review. A court, in exercising its discretion whether to grant a declaratory order should, accordingly, in an appropriate case, weigh the same considerations of 'justice or convenience' as it might do in case of an interdict or review.'

In the current dispensation where the review of administrative action is regulated by PAJA and not the common law,[70] these remarks may best be understood within the context of

[66] PAJA.

[67] In relevant part, the section provides that the period of 180 days referred to in section 7 may be extended by a court on application by the person concerned where the interests of justice so require.

[68] Wolgroeiers Afslaers (Edms) Bpk v Munisipaliteit van Kaapstad 1978 (1) SA 13 (A); Setsokosane Busdiens (Edms) Bpk v Voorsitter, Nasionale Vervoerkommissie 1986 (2) SA 57 (A); Gqwetha v Transkei Development Corporation Ltd and Others 2006 (2) SA 603 (SCA).

[69] (4842/99) [2000] ZAWCHC 9; 2001 (2) SA 112 (C) (20 October 2000), at 126E - G.

[70] Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism and Others (CCT 27/03) [2004] ZACC 15; 2004 (4) SA 490 (CC); 2004 (7) BCLR 687 (CC) (12 March 2004); Pharmaceutical Manufacturers Association of SA and Others: In re: Ex parte application of President of the RSA and Others 2000 (2) SA 674 (CC) paras 45 and 51; 2000 (3) BCLR 241 (CC).

what Plasket AJA said in Beweging vir Christelik-Volkseie v Minister of Education and Others,[71] namely:

[48] 'In respect of the prayers for declarators, no decision is taken on review, whether directly or indirectly, no exercise of public power is sought to be set aside and the PAJA has no bearing on the relief claimed

because no administrative action is implicated. That being so, section 7 (1) and section 9 of the PAJA have no application. The relief claimed being discretional, however, the appellants were obliged to have launched their application within a reasonable time. In other words, the common law delay rule . . . applies to determine whether the application in respect of this relief was brought timeously and, if not, whether any unreasonable delay should be condoned.'

[49] The undue delay objection has no bearing on the prayer that seeks to interdict Shell and Impact from conducting the seismic survey under the exploration right without environmental authorisation in terms of the applicable dispensation. None of the respondents has suggested that this relief is affected by the alleged undue delay. Assuming the applicants' contention that authorisation in terms of NEMA is required, conducting the survey would constitute a criminal offence, the challenge of which would not be barred by the delay rule.

[50] Mr Zukulu says he only learned about the proposed seismic survey after the publication of the SLR from media reports in early November 2021 and that the applicants whose cause he is championing became aware of the publication subsequent thereto, on diverse occasions, they not having been consulted prior to the exploration right and the renewals thereof being granted.

[51] The respondents do not deny that the applicants concerned only became aware of the proposed seismic survey in November 2021. They have contented themselves with merely contending that the applicants and their communities were neither denied nor precluded from registering as interested parties pursuant to the newspaper advert of 2013 and from attending any one of the group meetings held as part of the public consultation process.

[52] For their part, the intervening parties, too, allege that they discovered that the exploration right had been awarded on 29 October 2021; even though the deponent to their affidavits[72] registered as an interested and affected party in his personal capacity during the consultation process in 2013, he was not notified of either the grant of the exploration right or the first and second renewals of the right or the EMPr compliance audit.

All that is said to counter the intervening parties' version is that it is "improbable" that the interested and affected parties would not have come to know that a decision had been taken earlier than 2021. No facts are put up to controvert the allegations made in the founding papers

[71] (308/2011)[2012] ZASCA 45; [2012] 2 All SA 462 (SCA), para 34.

[72] Mr Poovalingum Moodley.

[53] that, due to the failure on the part of the relevant Department to inform the interested and affected parties and the public at large that the exploration right had been granted, they did not learn of the decision until October 2021, in the case of the intervening parties, and November 2021 in the case of the applicants.

In Wightman t/a JW Construction v Headfour (Pty) Ltd & Another[73] the court held:

[54] 'When the facts averred are such that the disputing party must necessarily possess knowledge of them and be able to provide an answer (or countervailing evidence) if they be not true or accurate but, instead of doing so, rests his case on a bare or ambiguous denial the court will generally have difficulty in finding that the test is satisfied. I say "generally" because factual averments seldom stand apart from a broader matrix of circumstances all of which needs to be borne in mind when arriving at a decision. A litigant may not necessarily recognise or understand the nuances of a bare or general denial as against a real attempt to grapple with all relevant factual allegations made by the other party. But when he signs the answering affidavit, he commits himself to its contents, inadequate as they may be, and will only in exceptional circumstances be permitted to disavow them. There is thus a serious duty imposed upon a legal adviser who settles an answering affidavit to ascertain and engage with facts which his client disputes and to reflect such disputes fully and accurately in the answering affidavit. If that does not

happen it should come as no surprise that the court takes a robust view of the matter.'

[55] A dispute of fact also does not arise with a party seeking to controvert the version of another by casting aspersions on or making speculative remarks in relation to those being controverted.[74] Only concrete allegations or facts placing in issue the allegations made in the founding papers would have created a dispute of fact warranting the invocation of the Plascon Evans rule.[75]

[56] In these circumstances, there is no dispute of fact in relation to when the applicants got to know of the award of the impugned exploration right and the renewals thereof. The ineluctable conclusion is, therefore, that the Department did not inform the interested and affected parties and the public at large of the decision granting the exploration right. The intervening parties became aware of the decision in October 2021 and the applicants in November 2021.

It is important to note that PAJA requires of the applicant to bring review proceedings within 180 days, not only from the date when the applicant 'was informed of the administrative action or became aware of the action and the reasons,' but from the date when the applicant 'might reasonably have been expected to have become aware of the action and the reasons.'[76]

[73] [2008] ZASCA 6; 2008 (3) SA 371 (SCA), para 13.

[74] Malawu v MEC for Co- operative Governance and Traditional Affairs, Eastern Cape and Another (CA & R 118/2021) [2022] ZAECMKHC 27 (31 May 2022), paras 53 - 5.

[75] Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd 1984 (3) SA 623 (A).

[76] Section 7 (1) (b) of PAJA.

In Opposition to Urban Tolling Alliance v South African National Roads Agency Limited[77] the SCA, with reference to Gqwetha v Transkei Development Corporation[78] on the importance of the delay rule, drew a distinction between administrative acts which affect and are then challenged by an individual and those which affect the public at large and said:

'In its terms, sections 7(1) envisages asking when "the person concerned" was informed or became aware, or might reasonably be expected to have become aware, of the administrative action. This admits of an answer where the act affects and is challenged by an individual, but does not readily admit of an answer where it affects the public at large. In that situation, it would be anomalous-if not absurd-even if the administrative act were to be reviewable at the instance of one member of the public, and not at the instance of one another, depending upon the peculiar knowledge of each. It seems to me that in those circumstances a court must take a broad view of when the public at large might reasonably be expected to have had the knowledge of the action, not dictated by knowledge or lack of it, of the particular member or members of the public who have chosen to challenge the acts.'[79] (Emphasis supplied)

There is, however, a dimension to these proceedings which distinguishes it from OUTA.

(a) In terms of section 3(2)(b)(iii) of PAJA, in order to give effect to the right to procedurally fair administrative action, an administrator must give persons materially and adversely affected by the decision a clear statement of the administrative action. The affected person should at least be able to tell from the statement what has been decided, when, by whom, and on what legal and factual bases. Without this information, notice of any right of appeal or review would be pointless.[80]

Section 3(2)(b)(iv) requires that the persons concerned also be notified of any right of review or internal appeal where applicable. This requirement is repeated in regulation 23(b) of the Regulations on Fair Administrative Procedures, 2002[81] which requires adversely affected persons to be informed of administrative action that has been taken. In terms of regulation 25, a notice contemplated in regulation 23(b) must also, where applicable, stipulate the period, if any, in which the review or appeal proceedings must be instituted; state the name and address of the person with whom proceedings for review or appeal must be instituted; and set out any other formal requirements in respect of the proceedings for

review or appeal.

[77] OUTA v SANRAL (90/2013) [2013] ZASCA 148; [2013] 4 All SA 639 (SCA) (09 October 2013).

[78] 2006 (2) SA 603 (SCA), paras 22 – 3.

[79] OUTA, supra, para 27.

[80] Hoexter and Penfold, Administrative Law in South Africa (3rd Ed), p 521; also see Police and Prisons Civil Rights Union and Other v Minister of Correctional Services and Others (No 1) (603/05) [2006] ZAE-CHC 4; 2008

(3) SA 91 (E); [2006] 2 All SA 175 (E); 2006 (8) BCLR 971 (E); [2006] 4 BLLR (E) 12 January 2006), where

Plasket J held that administrative decisions taken in violation of the rules of procedural fairness are invalid, irrespective of the merits.

[81] Made in terms of PAJA and published in GN R1022, G. 23674 dated 31 July 2002.

(b) Provision is made in MPRDA[82] for the lodging of an appeal by any person whose rights or legitimate expectations have been materially and adversely affected or who is aggrieved by any administrative decision in terms of MPRDA within 30 days of becoming aware of such decision.

[57] Section 3(2)(b)(v) provides for the giving of adequate notice to the person concerned of the right to request reasons.

PAJA is incorporated by reference in section 6 of the MPRDA, which reads:

'(1) Subject to the Promotion of Administrative Justice Act, 2000 (Act 3 of 2000), any administrative process conducted or decision taken in terms of this Act must be conducted or taken, as the case may be, within a reasonable time and in accordance with the principles of lawfulness, reasonableness and procedural fairness.

(2) Any decision contemplated in subsection (1) must be in writing and accompanied by written reasons for such decision.'

[58] Section 6 of the MPRDA is subservient to section 3(2)(b) of PAJA. Therefore, it is incumbent on the Minister or his delegate to give notice of the award of an exploration right and its renewals in writing to interested and affected parties, to inform them of their right to lodge a review or an appeal against the decision and of their right to request reasons for the decision. Neither section 6 of MPRDA nor section 3(2)(b) of PAJA was complied with by the ministry.

Shell argued, with reference to BDSA,[83] that the public including the applicants, must, objectively, be deemed to have known about the granting of the exploration right and the renewals by no later than 2020. This contention is unavailing. According to BDSA, the notification merely afforded the interested and affected parties a 30-day period for comment. In this case, there is not a shred of evidence that the intended recipients of the notice were informed of their right to review or appeal the decision, or the right to request reasons for the decision. The notice relied on by the respondents falls foul of the requirements of section 3(2)(b).

[82] Section 96 of MPRDA.

[83] Supra, para 29, which reads:

'It must be noted that ERM sent a notification of its environmental audit report to the entire interested and affected parties' database from the 2013 process. This data base included a few hundred people including Stone and Mr JC Rance, the environmental office for the first applicant and now Chair of the

second applicants. That notification, sent on 20 May 2020, is headed "Notification to Stakeholders: Environmental Compliance Audit related to exploration right 12/3/252, in substantial compliance with Regulation 34 (6) of the EIA Regulations GNR326 of April 2017. "it references the exploration right and that there was an approved EMPr, and afforded interested and affected parties a 30-day for comment. No comments were received.'

[59] The failure by the Minister or his delegate to comply with section 3(2)(b) of PAJA is fatal to the respondents' preliminary point that the applicants delayed in bringing the review proceedings. Such failure negates the suggestion that the applicants are reasonably expected to have become aware of the action and the reasons therefor.

Accordingly, the 180 days period in question did not start running before November 2021. There was, therefore, no delay in bringing this application, let alone an unreasonable delay.

Exhaustion of internal remedies

[60] Section 7(2)(a) of PAJA requires a court to review an administrative action in terms of PAJA where an internal remedy provided for in any other law has first been exhausted.

[61] Section 96(3) of MPRDA provides that no person may apply to the court for the review of an administrative decision made in terms of MPRDA until that person has lodged an appeal against the administrative decision and the appeal process has been exhausted.

[62] However, a court may, in exceptional circumstances, and on application by the person concerned, exempt such person from the obligation to exhaust such remedy before instituting proceedings in a court for judicial review in terms of PAJA.[84] What constitutes exceptional circumstances depends on the facts and the circumstances of the case and the nature of the administrative action in issue.[85]

The applicants did not lodge an appeal. Four reasons are advanced: First, they became aware of the grant and renewals of the exploration right in November 2021, some 7 years after the exploration right was initially granted. Second, when they launched an application for the grant of urgent interdictory relief the commencement of the impugned seismic survey was imminent and following the internal process would have defeated the purpose of approaching the court for effective relief. Third, because of the agreement reached by the parties to expedite timeframes for the resolution of part B, it became incumbent on the applicants to pursue the main application and avoid any delay that would have arisen from pursuing an internal appeal. Fourth, the applicants harboured an apprehension that the Minister is biased against them- an apprehension fortified by the statements he made criticising public interest groups for

[84] Section 7(2)(c).

[85] Koyabe and others v Minister of Home Affairs and others (Lawyers for human rights as amicus curiae) [2009] ZACC 23; 2009 (12) BCLR 1192 (CC); 2010 (4) SA 327 (CC), para 39.

[63] challenging seismic surveys and maintaining his refusal to review Shell's exploration rights. Also, in circumstances where the Minister could simply have abided the decision of the court in relation to the grant of part A of the application, which he was initially minded to do, he ended up being partisan and opposing the interdictory relief.

[64] The respondents have not pertinently engaged with the applicants regarding their reasons for not pursuing an internal appeal. The overwhelming evidence is that the applicants were not aware of the Minister's decision to grant the exploration right prior to November 2021. It should be borne in mind that there had been a failed attempt to interdict the seismic survey on 30 November 2021. The imminence of the survey when the current proceedings were launched should be viewed against that background.

[65] The Minister has tendered a bald denial to the allegations of bias. He offered no explanation for his change of mind, and sudden opposition to Part A of the application, for having publicly criticised inte-

rest groups who challenged the survey and maintaining his refusal to review Shell's exploration rights.

[66] The rule against bias is entrenched in the Constitution, which places a high premium on the substantive enjoyment of rights. Any existing administrative remedy has to be an effective one. A remedy will be effective if it is objectively implemented, taking into account the relevant principles and values of administrative justice present in the Constitution and our law.[86] The reasons proffered by the applicants in their request to be exempted from exhausting internal remedies are good for the intervening parties as well. The public statements made by the Minister do give rise to a reasonable apprehension of bias against the applicants and relieve the applicants and the intervening parties of the duty to exhaust their internal remedies as such appeal would have been an exercise in futility.

This is a classic case of an internal remedy that would not have been objectively implemented and which would have rendered nugatory the values of administrative justice enshrined in the Constitution and upheld by PAJA. Not even the belated reliance by Impact on Ncumcara Community Forest Management Association v The Environmental Commissioner[87] detracts from this conclusion. The case is distinguishable on the facts and the law; whilst upholding the principle on exhaustion of domestic remedies, the court accepted that

[86] Koyabe, supra, para 44.

[87] (HC-MD-CIV-MOT-GEN-2022/00289 [2022] NAHCMD 380 (29 July 2022), submitted in terms of paragraph

61.11 of the Code of Conduct of all Practitioners, Candidate Legal Practitioners and Juristic Entities.

[67] in very exceptional circumstances a case in which domestic remedies have not been exhausted may be entertained if doing so will achieve justice between the parties. In any event, the instant case is, for the reasons already advanced, "very exceptional."

The applicants have, therefore, made out a proper case for being exempted from the obligation to exhaust internal remedies.

Do the grounds for the review of the impugned decisions pass muster?

(a) The applicants assail the three administrative decisions[88] in terms of PAJA under the following sub-headings:

procedural unfairness;

failure to take into account relevant considerations; and failure to comply with applicable legal prescripts, all of which are dealt with seriatim.

[68] Procedural unfairness

[69] According to the applicants, the decision to grant the exploration right is procedurally unfair because Impact failed to adequately consult (or consult at all) with interested and affected communities, including the applicants. Impact and Shell's contention, on the other hand, is that the obligation imposed upon Impact by MPRDA[89] and the Regulations made thereunder was fulfilled.

[70] The applicants' contention is premised on the right to procedurally fair administrative action enshrined in the Constitution, the provisions of MPRDA and the Regulations made thereunder.

Law or conduct inconsistent with the Constitution is invalid and the obligations imposed by it must be fulfilled.[90] It is also settled law that the award of a prospecting right constitutes administrative action.[91] The right to procedurally fair administrative action is

[88] The original decision granting Impact the right to explore for oil and gas in the Transkei and Algoa areas and the two renewals thereof.

[89] Section 79 of MPRDA (fn 20 above).

[90] Section 2 of the Constitution.

[91] Bengwenyama Minerals (Pty) Ltd and Others v Genorah Resources (Pty) Ltd and Others 2011(4) SA 113 (CC)

[71] enshrined in section 33(1), and PAJA is the law contemplated in section 33(3) of the Constitution. MPRDA makes provision for consultations to be made with interested and affected parties, and so do the Regulations.

In light of its centrality to the issue at hand, regulation 3 of the Mineral and Petroleum Resources Development Regulations[92] deserves of being quoted copiously. It reads:

(1) '3. Consultation with interested and affected persons

(2) The Regional Manager or designated agency, as the case may be, must make known by way of a notice, that an application contemplated in regulation 2, has been accepted in respect of the land or offshore area, as the case may be.

(3) The notice referred to in sub-regulation (1) must be placed on a notice board at the office of the Regional Manager or designated agency, as the case may be, that is accessible to the public.

(a) In addition to the notice referred to in sub-regulation (1) the Regional Manager or designated agency, as the case may be, must also make known the application by at least one of the following methods –

(b) Publication in the applicable Provincial Gazette;

(c) Notice in the Magistrate's Court in the magisterial district applicable to the land in question; or

(4) Advertisement in a local or national newspaper circulating . . . where the land or offshore area to which the application relates is situated.

(a) A publication, notice or advertisement referred to in sub-regulation (3) must include -

(b) An invitation to members of the public to submit comments in writing on or before a date specified in the publication, notice or advertisement, which date may not be earlier than 30 days from the date of such publication, notice or advertisement;

(c) The name and official title of the person to whom any comments must be sent or delivered;

(i) Work, postal and street address and if available, an electronic mail address;

(ii) Work telephone number; and

Facsimile number, if any, of the person contemplated in paragraph (b).'

[72] The procedure that was followed by Impact in this instance is adumbrated in paragraph [19]. Repeating the same would unnecessarily overburden this judgment. What remains to consider is whether the procedure stands the requirements of the Constitution and the law.

As already stated, the consultants identified the interested and affected parties, not through a public process, but through an analysis of potential stakeholders engaged in previous similar studies in the area. The EMPr does not explain what "stakeholder analysis" denotes. There is a dearth of information as to what "previous studies in the area" means. There is no evidence that the applicant communities were involved in such studies. Despite Impact having been aware of numerous communities in the area concerned, there is nothing from a reading of the papers pointing to Shell or Impact or the consultants

as having conducted investigations to unleash the identity of the communities. Consequently, the communities did not form part of

[92] Published in GNR 420 of 27 March 2020.

[73] The stakeholder database. This disadvantaged the communities as they ended up not receiving the relevant background information, and, eventually, not being consulted.

[74] The first time the consultants endeavoured to reach out to the public was when an advert was publicised in newspapers on 22 March 2013 informing the broader public about the proposed exploration activities. It is also not in dispute that the newspapers are out of reach of the Dwesa-Cwebe, Xolobeni and the Pondoland area communities. When the newspapers finally came to hand, they turned out to have been in the English and Afrikaans languages, which members of the affected communities barely understood as they are Xhosa speaking.

[75] It is very telling that the Transkei monarchs or communities thereof were not invited and did not attend any of the consultation meetings. It would seem Impact and Shell were content to consult with only the monarchs or the communities, adopting the ill-begotten stance that such consultations sufficed. That view was clearly incorrect. From a reading of the application papers, it is evident that the traditional leaders concerned urged the consultants to deal directly with members of the affected communities, to no avail. In any event, the top- down approach whereby kings or monarchs were consulted on the basis that they spoke for all their subjects is a thing of the past which finds no space in a constitutional democracy. There is no law, and none was pointed to, authorising traditional authorities to represent their communities in consultations. In any event, the applicant communities do not fall within the kingdoms listed in the EMPr.

For purposes of MPRDA, a community means 'a group of historically disadvantaged persons with interests or rights in the particular area of land on which the members have or exercise communal rights in terms of an agreement, custom or law: Provided that, where as a consequence of the provisions of this Act, negotiations or consultations with the community is required, the community shall include the members or part of the community directly affected by mining on land occupied by such members or part of the community.' Therefore, the community is a separate entity from the Chief and "Chief" does not denote the community. In this regard, the following remarks on the nature of communal participation made by Petse AJ in Maledu and Others v Itereleng Bagatla Mineral Resources (Pty) Ltd and Another[93] are illuminating:

'However, in instances where land is held on a communal basis, affected parties must be given sufficient notice of and be afforded a reasonable opportunity to participate, either in person or through representatives, at any meeting where a decision to dispose of their rights to land is to be taken. And this

[93] 2019 (2) SA 1 (CC), para 97.

Decision can competently be taken only with the support of the majority of the affected persons having an interest in or rights to the land concerned, and who are present at such a meeting.'

[76] The respondents criticise the applicants for adopting a pedantic approach. They contend that MPRDA and the Regulations were given effect to; the Regulations require that the public be notified in two languages, which was done. The requirements of regulation 3, so argue the respondents, were fulfilled. Had the applicants been of the view that regulation 3 was invalid because it does not meet the requirements of the Constitution and the law, they should have assailed it accordingly, which they never did. I disagree.

[77] In the first place, meaningful consultations consist not in the mere ticking of a checklist, but in engaging in a genuine, bona fide substantive two-way process aimed at achieving, as far as possible, consensus, especially in relation to what the process entails and the import thereof. Moreover and in any event, the Constitution, PAJA, MPRDA and the Regulations apply contemporaneously to the impugned consul-

tation process. The prescripts of MPRDA and regulation 3 are subject to the Constitution and PAJA. Therefore, it is within the prism of the Constitution and PAJA that regulation 3 should be interpreted.

In Zondi v MEC for Traditional and Local Government Affairs[94] the Constitutional Court explained the applicable position as follows:

[78] 'PAJA was enacted pursuant to the provisions of s 33, which requires the enactment of national legislation to give effect to the right to administrative action. PAJA therefore governs the exercise of administrative action in general. All decision-makers who are entrusted with the authority to make administrative decisions by any statute are therefore required to do so in a manner that is consistent with PAJA. The effect of this is that statutes that authorise administrative action must now be read together with PAJA unless, upon a proper construction, the provisions of the statutes in question are inconsistent with PAJA.'

The importance of meaningful consultations where, as in the present matter, communal rights are at stake, was clarified as follows in Bengwenyama:[95]

'Another more general purpose of the consultation is to provide land owners or occupiers with the necessary information on everything that is to be done so that they can make an informed decision in relation to the representations to be made, whether to use the internal procedures if the application goes against them and whether to take the administrative action concerned on review. The consultation process and its result is the integral part of the fairness process. . .

The consultation process required by section 16(4)(b) of the Act thus requires that the applicant must:

inform the land owner in writing that his application for prospecting rights on the owner's land has been accepted for consideration by the Regional Manager concerned;

[94] 2005 (3) SA 589 (CC), para 101.

[95] Supra, paras 66 - 7.

inform the land owner in sufficient detail of what the prospecting operation will entail on the land, in order for the land owner to access what impact the prospecting will have on the land owner's use of the land;

consult with the land owner with a view to reach an agreement to the satisfaction of both parties in regard to the impact of the proposed prospecting operation; and

submit the result of the consultation process to the Regional Manager within 30 days of receiving notification to consult.'

[79] Admittedly, Bengwenyama dealt with consultation in the context of a prospecting right application. However, there is no reason in logic why the principle enunciated in the case and its rationale should not apply to an exploration right application.

[80] For all we know, contrary to the provisions of regulation 3, the consultants did not "make known" by way of a notice that there was an exploration application underway; no notice accessible to the public was placed on a notice board at a place determined to be accessible to the public; the consultants purportedly "[made] known" to the public by way of provincial and national newspapers (not a local newspaper). The Times,[96] Die Burger (Eastern Cape) and the Herald have little coverage in Transkei. In any event, Die Burger is in Afrikaans, a language that is hardly spoken in Transkei. There is no gainsaying that over the years, especially since 1976,[97] Afrikaans fell into disuse in Transkei where the majority of inhabitants are Xhosa speaking.[98] To the extent that the Daily Dispatch circulates widely in the Transkei and Algoa areas, it did not reach the applicant communities at Xolobeni and Dwesa-Cwebe. In any event, they would not have understood the advert because they are not conversant with English. Had the consultants and those who mandated them been serious about reaching out to the applicant

communities, they would have seen their way clear to utilising a newspaper that is in a language spoken by the majority of people in the area concerned. I'solezwe lesiXhosa or broadcast in Umhlobo Wenene radio station would have yielded better results.

In these circumstances, the object of regulation 3, in so far as it provides that the notice must let the affected and interested parties know and that the notice must be accessible to all

[96] Also known as the "Sunday Times", circulating on Sundays.

[97] In pursuit of the separate development policy, the Constitution of the "Republic of Transkei" scrapped off Afrikaans as an official language, in favour of isiXhosa, in Transkei. Much as Afrikaans was reinstated as one of the nine official languages, the country over in 1994, the usage of Afrikaans has not regained foothold in Transkei. The 2016 community survey conducted by statistics South Africa reveals that 10.29% of the Eastern Cape population speaks Afrikaans. OR Tambo and Alfred Nzo district municipalities (making up the greater part of Transkei) records 0,18% and 0.21%, respectively, Afrikaans speakers.

[98] According to South Africa gateway tabulating languages that are spoken in South Africa's nine provinces in the Eastern Cape 78.8% of the population speak isiXhosa and 10.6% Afrikaans.

[81] Affected communities, was thwarted. This is a clear case where little regard (or no regard at all) was paid to the significance of language as a tool of communication.

[82] The consultation process was woefully lacking in yet another respect; after the initial project information had been compiled and availed "online," a website was provided for interested and affected persons to have access to more information. Much as in this age and era computers and other similar devices are more ubiquitous than flies on a summer day, this court does not hesitate in taking judicial notice of the fact that a great number of the population, especially in rural communities, still lacks access to these devices. The applicant communities are part of those who are still disadvantaged. The majority of members of aMadiba community are on record as not having access to email or internet facilities. In these circumstances, the distribution of the relevant information document by email and on the website would be neither accessible nor effective as a consultation tool within aMadiba community.

[83] What this all translates to is that Impact did not give the applicant communities proper notice of the nature and purpose of the proposed seismic survey, the information required to make meaningful representation, or the opportunity to make representations. At the hearing, some time was spent debating what the affected and interested communities would have said had they been consulted. The fact that the communities might have had little or nothing to say regarding whether or not the exploration right should be granted is not germane to the enquiry whether the communities were entitled to meaningful consultation.[99]

In sum, therefore, the consultation carried out by Impact was procedurally unfair. The decision to grant the exploration right falls to be reviewed on this ground alone, in terms of section 6(2)(c) of PAJA.[100] The renewals depend upon the grant of the exploration right whose process has been proven to have been fatally defective.[101] By the same token, the decisions to renew the exploration right also fall to be reviewed.

[99] Compare Administrator of the Transvaal and Others v Zenzile and Others (444/88) [1990] ZASCA 108; 1991

(1) SA 21 (AD); [1991] 1 All SA 240 (A) (27 September 1990) wherein Hoexter JA made reference to the following statement (in Wade, Administrative Law (6th ed) pp 533-4):

'Procedural objections are often raised by unmeritorious parties. Judges may then be tempted to refuse relief on the ground that a fair hearing could have made no difference to the result. But in principle it is vital that the procedure and the merits should be kept strictly apart, since otherwise the merits may be prejudiced unfairly.'

[100] The section provides that 'a court or tribunal has the power to judicially review an administrative action if the action was procedurally unfair.'

[101] See Magnificent Miletrading 30 (Pty) Ltd v Charmaine Celliers NO and Others (CCT157/18) [2019] ZACC 36; 2020 (1) BCLR 41 (CC); 2020 (4) SA 375 (CC)[2017] ZACC 36, where it was held:

[84] The corollary of the inadequate consultation process is that factors that the applicants and the intervening parties would have placed before the Minister to inform the decision- making process were not considered.

Because it takes a single bad reason to render the entire decision reviewable,[102] the applicants need only prove one ground of the review to succeed in assailing the grant of the exploration right.[103] However, for the sake of completeness and in view of the importance of this matter, it behoves this court to deal, albeit in a truncated fashion, with other review grounds, as well, which is what is considered next.

Failure to take into account relevant considerations.

[85] Section 6(2)(e)(iii) of PAJA provides for judicial review where action was taken without taking into account relevant considerations.

(a) The fundamental considerations that are said to be absent from the EMPr and the record filed in terms of rule 53 of the Uniform Rules of Court in these proceedings are –

the anticipated harm to the marine and bird life along the Eastern Cape coast;

the communities' spiritual and cultural rights and their rights to livelihood; and the climate change considerations and requirements advocated by the intervening parties.

These considerations are, in turn, dealt with one after the other.

'The proper enquiry in each case - at least at first – is not whether the initial act was valid but rather whether its substantive validity was a necessary precondition for the validity of consequent acts. If the validity of consequent acts is dependent on no more than the factual existence of the initial act then the consequent act will have legal effect for so long as initial act is not set aside by a competent court.

[102] Patel v Witbank Town Council 1931 TPD 284; compare Westinghouse Electric Belgium SA v Eskom Holdings (SOC) Ltd and Another (476/2015) [2015] ZASCA 208; [2016] 1 All SA 483 (SCA); 2016 (3) SA 1 (SCA) (9)

December 2015), paras 44-5 where it was held:

'It is a well-established principle that if an administrative body takes into account any reason for its decision which is bad, or irrelevant, then the whole decision, even if there are other good reasons for it, is vitiated.

. . . Once a bad reason plays a significant role in the outcome it is not possible to say that the reasons given for it provide a rational connection to it. (The decision of this court was reversed by the Constitutional Court but this principle was not questioned: Sidumo and Another v Rustenburg Platinum Mines Ltd and Others 2008 (2) SA 24 (CC) . . .'

[103] Also see Rustenburg Platinum Mines Ltd (Rustenburg Section) v Commission for Conciliation, Mediation and Arbitration and Others 2007 (1) SA 576 (SCA) (2006) 27 ILJ 2076; [2006] 11 BLLR 1021; [2007] 1 All SA 164)

para 24 where Cameron JA said that '(t)his dimension of rationality in decision-making predates its constitutional formulation.'

[86] For their contention that the anticipated harm to marine and bird life is a fundamental consideration,

the applicants rely on the evidence of experts. The experts are in agreement that there is a reasonable apprehension of harm to marine and bird life and that the mitigation measures proposed by Shell and Impact do not adequately manage the threat of harm. The applicants' experts emphasise the need for evidence ruling out a significant risk of harm before the seismic survey may be conducted. The respondents, likewise, rely on experts to refute the suggestion of possible harm to marine and bird life. They suggest that the detrimental effect of seismic surveys are not known and that, in so far as there is a possibility of death or stranding of marine animals from exposure to sound from seismic surveys, there are appropriate mitigating and monitoring measures in place.

[87] Because of the apparent dispute between the experts as to the adequacy of the mitigation measures minimising the known effects of seismic surveys, it would have been incumbent on the decision-maker to invoke the precautionary principle. In Fuel Retailers,[104] the duty imposed on environmental authorities was examined. The court emphasised that the approach adopted in our environmental legislation is one of risk-aversion and caution, which entails 'taking into account the limitation on present knowledge about the consequences of an environmental decision.'[105] It was further held that the precautionary principle is applicable 'where, due to unavailable scientific knowledge, there is uncertainty as to the future impact of the proposed development.'[106]

[88] The onus rests on the party refuting the applicability of the precautionary principle to establish that the principle is of no application.[107]

The institutional competence of judges to make decisions relating to which considerations are relevant and which are not is a perilous course that has the potential to turn judges into administrators.[108] Notwithstanding this, the courts' power to review decisions on the basis of relevant and irrelevant considerations was affirmed in Johannesburg Stock Exchange v Witwatersrand Nigel Ltd.[109] The advent of PAJA has fortified the position, so

[104] Supra.

[105] Supra, para 81.

[106] Supra, para 98.

[107] Space Securitisation (Pty) Ltd v Trans Caledon Tunnel Authority and Others [2012] 4 All SA 624 (GSJ).

[108] Hoexter and Penfold, ibid, p 439.

[109] 1988 3 SA 32 (A) at 541-2.

[89] much so that post-1994 law reports abound with instances in which relevant considerations were not taken into account at all, resulting in the review court setting aside the action.[110]

Apropos the complaint that the Minister failed to consider the relevant communities' spiritual and cultural rights and their rights to livelihood, an apt starting point are the instructive remarks by O' Regan J in MEC for Education, KwaZulu-Natal and Others v Pillay.[111] She said:

'My understanding of how our Constitution requires us to approach the rights to culture, therefore, emphasising four things: cultural rights are associative practices which are protected because of the meaning that shared practices give to individuals and to succeed in a claim relating to a cultural practice a litigant will need to establish its associative quality; an approach to cultural right in our Constitution must be based on the value of human dignity which means that we value cultural practices because they afford individuals the possibility and choice to live a meaningful life; cultural rights are protected in our Constitution in the light of a clear constitutional purpose to establish unity and solidarity amongst all who live in our diverse society; and solidarity is not best achieved through simple toleration arising from a subjectively asserted practice. It needs to be built through institutional enabled dialogue.'

This judgment, especially on the aspect under discussion, would be incomplete without reference being

made to the following remarks by Bloem J in Sustaining the Wild Coast NPC:[112]

'I accept that customary practices and spiritual relationship that the applicant communities have with the sea may be foreign to some and therefore difficult to comprehend. How ancestors can reside in the sea and how they can be disturbed, may be asked. It is not the duty of this court to seek answers to those questions. We must accept that those practices and beliefs exist. What this case is about is to show that had Shell consulted with the applicant communities, it would have been informed about those practices and beliefs and would then have considered, with the applicant communities, the measures to be taken to mitigate against the possible infringement of those practices and beliefs. In terms of the Constitution those practices and beliefs must be respected and where conduct offends those practices and beliefs and impacts negatively on the environment, the court has a duty to step in and protect those who are offended and the environment.'

The remarks, though made in the context of a temporary interdict, are timeless in their force and application. The issue is whether it was incumbent on the relevant authorities to consider the spiritual and cultural rights at the particular point when the decision-making process was under way. It will be for the administrative functionary concerned (and not this court) to give due weight to this consideration in light of all other factors serving before it. Approaching it differently would usurp the functions of the administrative tribunal.

[110] See for example SA Jewish Board of Deputies v Sutherland NO and Others 2004 (4) SA 368 (W), paras 29- 30; Pieterse NO v The Master 2004 (3) SA 593 (C), para 13 and NSPCA v Minister of Environmental Affairs and Others 2020 (1) SA 249 (GP), para 75.

[111] 2008 (1) SA 474 (CC), para 157 (minority judgment).

[112] Supra, para 32.

[90] The applicant communities contend that they bear duties and obligations relating to the sea and other common resources like our land and forests; it is incumbent on them to protect natural resources, including the ocean, for present and future generations; the ocean is the sacred site where their ancestors live and so have a duty to ensure that their ancestors are not unnecessarily disturbed and that they are content. If there is a potential for disturbance, they contend, they must be given the opportunity to follow their customary practices for dealing with the anticipated disturbance.

[91] In his affidavit, Mr Zukulu states that the sea plays an important role in his community's way of life; it is a key part of their livelihood. They collect mussels, limpets, oysters and cray- fish. They also fish for a range of species, including king fish as well as garrick, kob and shad. Sea food, to this community, forms a vital part of their diet and contributes to the fact that their community has some of the lowest rates of hunger in South Africa. Sea food provides them with income as they are able to sell their catches to tourists and neighbours on a cash basis. They are concerned that the proposed seismic survey will have an impact on their ability to sustain themselves from the sea.

[92] Mr Zukulu has also averred that, even as lay persons, they are already seeing signs of climate change in his area: their agriculture is becoming more challenging as they experience much more unpredictable weather patterns and more extreme weather events such as more droughts and heavier downpours of rain. Their livestock is sick more often. As a coastal community, they are very concerned about the prospect of rising sea levels.

[93] According to Shell and Impact, no harm will ensue from the seismic survey because it will be conducted approximately 20 km into the sea, away from the shore. They also contend that measures have been put in place to mitigate and monitor possible death or stranding of marine mammals from exposure to sound from seismic surveys.

There is no evidence that when the impugned decisions were taken the possibility of harm was considered. None of the measures contended for by the respondents addresses the potential harm to the appli-

cants and their religious or ancestral beliefs and practices. In any event, there is no evidence of the decision-maker having taken into account the alleged remedial measures.

[94] The intervening parties' contention that the decision-maker gave no proper consideration to the climate change impacts of the decision to grant the exploration right is an important factor to be considered in the process of granting an exploration right.

[95] Reliance for this contention, by the intervening parties, is placed on expert testimony[113] showing that most of the discovered reserves of oil and gas cannot be burnt if we are to stay on the pathway to keep global average temperature increases below 1.5 degrees Celsius. Authorising new oil and gas exploration, with its goal of finding exploitable oil and/or gas reserves and consequently leading to production, is not consistent with South Africa complying with its international climate change commitments.

[96] According to the respondents, climate change considerations and the right to access food and livelihood are irrelevant when considering an application for an exploration right; these considerations are premature because they fall to be considered at a much later stage.

[97] On the authority of Director: Mineral Development, Gauteng Region and Another v Save the Vaal Environment and Others[114] the processes are discrete stages in a single process that culminates in the production and combustion of oil and gas, and the emission of greenhouse gases that will exacerbate the climate crisis and impact communities' livelihoods and access to food.

The respondents' thesis does not find support from Earthlife Africa Johannesburg v Minister of Environmental Affairs and Others,[115] either, where Murphy J said:

'The absence of express provision in the statute requiring a climate change impact assessment does not entail that there is no legal duty to consider climate change as a relevant consideration and does not answer the interpretative question of whether such a duty exists in administrative law. Allowing for the respondents' argument that no empowering vision in NEMA or the regulations explicitly prescribes a mandatory procedure or condition to conduct a formal climate change assessment, the climate change impacts are undoubtedly a relevant consideration as contemplated by section 240 of NEMA for the reasons already discussed. A formal expert report on climate change impacts will be the best evidentiary means of establishing that this relevant factor in its multifaceted dimensions was indeed considered, while the absence of one will be symptomatic of the fact that it was not.[116]'

It seems clear from the aforegoing, even taking into account the contentions raised by the respondents, that, had the decision-maker had the benefit of considering a comprehensive assessment of the need and desirability of exploring for new oil and gas reserves for climate

[113] Professor New.

[114] (133/98) [1999] ZASCA 9 (12 March 1999).

[115] (2017) JOL 37526 (GNP); [2017] ZAGPPHC (GP); [2017] 2 All SA 519 (GP).

[116] Para 88.

[98] change and the right to food perspective, the decision-maker may very well have concluded that the proposed exploration is neither needed nor desirable.

[99] The intervening parties have added another fundamental factor which they claim was not considered namely, failure by the decision-maker to take the factors mentioned in ICMA into account when making the relevant decision. Section 12 of ICMA makes the State the public trustee of coastal public property and casts a duty on the State to ensure that coastal public property is used, managed, protected, conserved and enhanced in the interest of the whole community. Section 21 confers the power upon an organ of state that is legally responsible for controlling and managing any activity on or in coastal waters to control and manage the activity in the interest of the whole community.

[100] There is no doubt that the Minister and his delegate constitute an organ of State responsible for managing activities on or in coastal waters when they consider applications for an exploration right, even one that entails seismic surveys.

[101] The Minister has not disputed that the provisions of ICMA were not considered. He was merely content to argue that the provisions of ICMA are only triggered if and when an environmental authorisation under NEMA is required. This is a legal argument. The deponent to the Minister's affidavit is a functionary who did not take any of the impugned decisions. Her affidavit offers no basis upon which she could give evidence concerning what was in the mind of the decision-maker at the time they took the impugned decision.

[102] The obligations imposed upon organs of state in terms of section 12 and 21 of ICMA are not triggered only in the event that an environmental authorisation is required. It is only section 63 which is conditional on the requirements of an environmental authorisation in terms of NEMA.

The area to which the exploration right applies enjoys a special legal status that affords the environment and within this area a particularly high level of protection and necessitates that decisions affecting it be taken in a manner that complies with the requirements of ICMA. One of the objectives of ICMA is to introduce an integrated approach to management and in this instance, the decision-maker did quite the opposite and dealt with the application as an energy sector-specific issue.

[103] The Minister was duty bound to take into account the considerations referred to in ICMA. As a matter of fact, he did not do so. This, in and by itself, renders the impugned decision reviewable.

By way of summation, the failure on the part of the Minister to take into account the considerations dealt with above is fatal to the decision to grant the exploration right and the renewals thereof, rendering these reviewable in terms of section 6(2)(e)(iii) of PAJA.

[104] Failure to comply with applicable legal prescripts.

[105] In terms of section (6)(2)(b) of PAJA, a court has the power to review an administrative action in the event that legal prescripts were not complied with. The applicants seek to assail the decision granting the exploration right on this front, as well.

[106] There was non-compliance, they argue, with section 80(1)(g) of MPRDA in that the objects referred to in section 2(d) and (f) of MPRDA were not satisfied. These are substantial and meaningful expansion of the opportunities for historically disadvantaged persons to enter into and actively participate in the mineral and petroleum industries, benefit from the exploitation of the nation's mineral and petroleum resources, promote employment and advance the social and economic welfare of all South Africans.

[107] Much as there were statements made in the EMPr that the seismic survey would create jobs and increase government revenues etc, no detail to substantiate these claims is made; no explanation as to how the jobs will be created, and how the economy will be stimulated, or how the seismic survey will improve the socio-economic circumstances in which most South Africans live are provided.

On this additional ground, too, the impugned decisions are liable to be set aside.

Should the declaratory and interdictory relief be granted?

Additional to the review, the applicants seek an order which in effect declares that the fifth respondent is not entitled to commence any exploration activities, including conducting a seismic survey, without seeking and obtaining an environmental authorisation in terms of NEMA. The setting aside of the decision granting the exploration right and its renewals renders it unnecessary for the court to determine the applicants' entitlement to the declaratory relief. There is no longer any dispute between the parties in need of resolution by way of a declaratory order.

The prayer to interdict the fourth and fifth respondents from undertaking seismic survey operations un-

der the exploration right unless and until they obtain an environmental authorisation in terms of NEMA is sought in the alternative to the declaratory and review relief. The success of the review will render this prayer redundant. The review and setting aside of the decision granting the exploration right will have the effect of removing the right (including the renewals thereof) in its entirety resulting in Shell being prohibited from conducting the seismic survey.

Conclusion

The court is satisfied that the review grounds meet the threshold. It is demonstrably clear that the decisions were not preceded by a fair procedure; the decision-maker failed to take relevant considerations into account and to comply with the relevant legal prescripts. Therefore, the decision granting the exploration right falls to be reviewed under section 6(2) of PAJA and the principle of legality. Logically, the renewals arose from the exploration right and have no independent and separate existence from the right. It follows that if the exploration right is wrong in law, the renewals are legally untenable. The decisions are liable to be set aside in terms of section 8 of PAJA.

Costs

The applicants have attained substantial success and are thus entitled to their costs. In view of the complexity of the case and its importance to the parties, the involvement of more than one counsel in each of the legal teams was warranted. Such involvement redounded to a smooth and structured hearing and culminated in the determination of this matter.

Order

The following order is, therefore, made:

1. The decision taken by the first respondent on 29 April 2014 granting exploration right 12/3/252 to the fourth respondent for the exploration of oil and gas in the Transkei and Algoa exploration areas is reviewed and set aside.

The decision taken by the first respondent on 20 December 2021 to grant a renewal of the exploration right is reviewed and set aside.

2. The decision taken by the first respondent on 26 August 2021 to grant a further renewal of the exploration right is reviewed and set aside.

The first, fourth and fifth respondents shall pay costs of this application, jointly and severally, the one paying the other to be absolved, such costs to include, in the case of the first to seventh applicants, the costs of three counsel and, in the case of the eighth and ninth applicants, the costs of two counsel.

S M MBENENGE

JUDGE PRESIDENT OF THE HIGH COURT

NHLANGULELA DJP:

I agree.

Z M NHLANGULELA

DEPUTY JUDGE PRESIDENT OF THE HIGH COURT NORMAN J:

I agree.

T V NORMAN

JUDGE OF THE HIGH COURT

Appearances:

	Counsel for the 1st to 7th applicants : T Ngcukaitobi SC
(with him, E Webber and N Stein)	
	Instructed by : Legal Resources Centre Cape Town
C/o Huxtable Attorneys Makhanda	
	Counsel for the 8th and 9th applicants : N Ferreira (with him C Tabata) Instructed by : Cullinan & Associates
	Kenilworth, Cape Town
C/o Huxtable Attorneys Makhanda	
	Counsel for the 1st respondent : A Beyleveld SC (with him, A Barnet) Instructed by : The State Attorney
	Gqeberha
C/o Whitesides Attorneys Makhanda	
	Counsel for the 4th respondent : J J Gauntlett SC QC (with him, F B Pelser, A Nacerodien
and N M Nyathi)	
	Instructed by : Cliffe Dekker Hofmeyer Inc Cape Town
C/o Wheeldon, Rushmere & Cole Inc Makhanda	
	Counsel for the 5th respondents : A Friedman
(with him, S Pudfin-Jones)	
Instructed by : Durban C/o Nettletons Attorneys Makhanda	Shepstone & Wylie Attorneys UMhlanga Rocks,
Heard on :	30 & 31 May 2022
Delivered on :	01 September 2022

Case 1

IN THE SUPREME COURT OF NEW ZEALAND

I TE KŌTI MANA NUI O AOTEAROA

SC 149/2021[2024] NZSC 5

BETWEEN	MICHAEL JOHN SMITH Appellant
AND	FONTERRA CO-OPERATIVE GROUP LIMITED First Respondent GENESIS ENERGY LIMITED Second Respondent DAIRY HOLDINGS LIMITED Third Respondent NEW ZEALAND STEEL LIMITED Fourth Respondent Z ENERGY LIMITED Fifth Respondent CHANNEL INFRASTRUCTURE NZ LIMITED Sixth Respondent BT MINING LIMITED Seventh Respondent

Hearing:	15–17 August 2022
Further Submissions:	2 September 2022
Court:	Winkelmann CJ, Glazebrook, Ellen France, Williams and Kós JJ

Counsel:	D M Salmon KC, D A C Bullock, N R Coates and N T Sussmanfor Appellant D R Kalderimis, N K Swan and T A T K Dewes for FirstRespondent S J P Ladd and T M J Shiels for Second RespondentB G Williams and J P Papps for Third Respondent D T Broadmore and C T Ottow for Fourth RespondentT D Smith and A M Lampitt for Fifth Respondent A J Horne and J S Hofer for Sixth Respondent

MICHAEL JOHN SMITH v FONTERRA CO-OPERATIVE GROUP LIMITED [2024] NZSC 5

[7 February2024]

	R J Gordon and A S Dawson-Swale for Seventh Respondent J S Cooper KC, J D Every-Palmer KC and J P Cundy for Lawyersfor Climate Action NZ Incorporated as Intervener M K Mahuika and H K Irwin-Easthope for Te Hunga Rōia Māorio Aotearoa | The Māori Law Society as Intervener A S Butler, R A Kirkness and H Z Yang for Human RightsCommission | Te Kāhui Tika Tangata as Intervener
Judgment:	7 February 2024

JUDGMENT OF THE COURT

The appeal is allowed.

The appellant's claim is reinstated.C There is no order as to costs.

REASONS

(Given by Williams and Kós JJ)

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Introduction

This appeal concerns strike out of a claim in tort (comprised of three causes ofaction) relating to damage caused by climate change. The question is whether the plaintiff's claim should be allowed to proceed to trial, or whether, regardless of what might be proved at trial, it is bound to fail and should be struck out now.

The Court of Appeal considered the claim bound to fail. Differing from that Court, we consider the application of orthodox, long-settled principles governing strike out means this claim should be allowed to proceed to trial, rather than being struck out pre-emptively. As we observe later in the judgment, reinstatement of the claim and allowing it to proceed to trial is not a commentary on whether or not it willultimately succeed.

The plaintiff, Mr Smith, is an elder of Ngāpuhi and Ngāti Kahu, and a climatechange spokesperson for the Iwi Chairs Forum, a national forum of tribal leaders. In August 2019 he filed a statement of claim in the High Court, against the seven

respondents. Each is a New Zealand company said to be involved in an industry thateither emits greenhouse gases (GHGs) or supplies products which release GHGs whenburned.[1] Mr Smith alleges that the respondents have contributed materially to the climate crisis and have damaged, and will continue to damage, his whenua and moana,including places of customary, cultural, historical, nutritional and spiritual significanceto him and his whānau.

Mr Smith raises three causes of action in tort: public nuisance, negligence anda proposed new tort involving a duty, cognisable at law, to cease materially contributing to: damage to the climate system; dangerous anthropogenic interference with the climate system; and the adverse effects of climate change.[2] He seeks a declaration that the respondents have (individually and/or collectively) unlawfully either breached a duty owed to him or caused or contributed to a public nuisance, andhave caused or will cause him loss through their activities. Injunctions also are soughtrequiring the respondents to produce or cause a peaking of their emissions by 2025, aparticularised reduction in their emissions by the ends of 2030 and 2040 (by linear reductions in net emissions each year until those times), and zero net emissions by 2050. Alternatively, a (potentially suspended) injunction requiring the respondents to immediately cease emitting (or contributing to) net emissions is sought.[3]

[1] A distinctive aspect of the proceeding in this Court is that Mr Smith pleads thattikanga M ori should inform the reach and content of his causes of action, this in accordance with the general proposition that tikanga should inform the common law of New Zealand generally. He does not allege that the respondents directly owed, or violated, any obligations under tikanga M ori.

[2] The respondents applied to strike out the proceeding. Each broadly argued thatMr Smith's statement of claim raised no reasonably arguable cause of action. The claim related to complex policy matters best addressed by Parliament (and having beenaddressed by Parliament). As part of their application, the respondents filed affidavit

[1] The sixth and seventh respondents, Channel Infrastructure NZ Ltd and BT Mining Ltd, filed separate submissions, claiming that they are differently placed to the other respondents.

[2] We will refer to the last of these as the "proposed climate system damage tort".

[3] This language comes from Mr Smith's amended draft statement of claim. It differs from his written submissions, which refer to (potentially suspended) "injunctions requiring the respondentsto cease their emissions-creating activities immediately" (emphasis added). evidence that each is operating within the relevant statutory and regulatoryrequirements. That is not disputed by Mr Smith.

[3] In the High Court, Wylie J determined that the claims in public nuisance and negligence were not reasonably arguable and struck them out.[4] He declined to strike out the claim based on the proposed climate system damage tort.

[4] Mr Smith appealed and the respondents cross-appealed. The Court of Appealstruck out all three causes of action.[5] Its overarching view was that:[6]

> … the magnitude of the crisis which is climate change simply cannot be appropriately or adequately addressed by common law tort claims pursued through the courts. It is quintessentially a matter that calls for a sophisticated regulatory response at a national level supported by international co-ordination.

[5] The Court nevertheless addressed each cause of action in more detail. For various reasons, the Court concluded that the causes of action in public nuisance and negligence could not be made out. In relation to the proposed climate system damagetort, the Court's view was that the "bare assertion of the existence of a new tort withoutany attempt to delineate its scope" was insufficient to withstand strike out "on the basisof speculation that science may evolve by the time the matter gets to trial".[7]

[6] Mr Smith appeals. He submits his claim fits within the traditional role of the courts, the common law and the law of torts. As he puts it, the respondents are wronging him, and he seeks the courts' aid to have them stop. No re-invention of tortlaw is required. The questions raised warrant a trial and determination upon evidence.

[7] The respondents submit that Mr Smith's claim requires this Court to stretch, bend and invent tort law to injunct sectors of the New Zealand economy.[8] The respondents say that while the common law may be flexible, it cannot and ought not

[4] Smith v Fonterra Co-operative Group Ltd [2020] NZHC 419, [2020] 2 NZLR 394 [HC judgment].

[5] Smith v Fonterra Co-operative Group Ltd [2021] NZCA 552, [2022] NZLR 284 (French, Cooperand Goddard JJ) [CA judgment].

[6] At [16].

[7] At [124].

[8] As noted above at n 1, the sixth and seventh respondents filed separate submissions (arguing they were differently placed to the other respondents) but otherwise adopted the submissions of the first to fifth respondents.

To respond to this situation. They say climate change raises insurmountable problemsfor liability—particularly ones of standing and causation—where everyone bothcontributes to, and is adversely affected by, GHG emissions, and where it is not possible to link, evidentially, emissions to the harm suffered by plaintiffs. They say that for the law to evolve in the way advanced by Mr Smith would introduce open-ended liability for defendants and dramatically disrupt economies. They also say the courts are ill-suited to deal with a systemic problem of this nature with all thecomplexity entailed. Instead, it is best left to Parliament; indeed, Parliament can be seen already to have addressed the situation and settled

upon a detailed and coherent legislative response.

[8] We also received submissions from Lawyers for Climate Action NZ Incorporated, Te Hunga R ia M ori o Aotearoa | The M ori Law Society, and the Human Rights Commission | Te K hui Tika Tangata as interveners. The former aligned itself substantially with Mr Smith; the latter two made submissions on discreteissues. We were assisted by receipt of all these submissions.

Climate change

[9] The following points may be taken as common ground or indisputable.[9]

[10] Climate change threatens human well-being and planetary health.[10] As the Intergovernmental Panel on Climate Change (IPCC) observes, the window of opportunity to ensure a liveable and sustainable future for all is rapidly closing.[11] Thechoices made, and actions implemented, in this decade will have impacts both now and for thousands of years.[12]

[9] This section draws on the Intergovernmental Panel on Climate Change's (IPCC's) Sixth Assessment Report [AR6], which summarises the current state of knowledge of climate change, its widespread impacts and risks, and the areas of mitigation and adaptation. The reports of the three Working Groups that contributed to AR6 were admitted into evidence by minute of this Court dated 28 June 2022. Two of the three Special Reports that contributed to AR6 were admitted intoevidence at the High Court hearing. Following a minute of this Court dated 1 June 2023, the parties confirmed that the AR6 Synthesis Report (both the Summary for Policymakers and the Longer Report) could also be admitted into evidence.

[10] IPCC Climate Change 2023: Synthesis Report – Summary for Policymakers (20 March 2023) [AR6 Synthesis Report Summary] at [C.1]. The IPCC uses calibrated language to express a level of confidence in statements of facts; this was said with very high confidence.

[11] At [C.1] (very high confidence).

[12] At [C.1] (high confidence).

A recent IPCC report summarised its findings in this way:[13]

The report confirms the strong interactions of the natural, social and climate systems and that human-induced climate change has caused widespread adverse impacts to nature and people. It is clear that across sectors and regions, the most vulnerable people and systems are disproportionately affected and climate extremes have led to irreversible impacts. The assessment underscores the importance of limiting global warming to 1.5 ifwe are to achieve a fair, equitable and sustainable world. While the assessment concluded that there are feasible and effective adaptation options which can reduce risks to nature and people, it also found that there are limitsto adaptation and that there is a need for increased ambition in both adaptationand mitigation. These and other findings confirm and enhance our understanding of the importance of climate resilient development acrosssectors and regions and, as such, demands the urgent attention of both policymakers and the general public.

[11] The evidence is "unequivocal" that humans have warmed the atmosphere, ocean and land, principally through the emission of GHGs.[14] The best estimate of global surface temperature increase from 1850–1900 to 2010–2019 is 1.07°C.[15] Atmospheric concentrations of carbon dioxide (CO_2) in 2019 were higher than at anypoint in the last two million years.[16] Concentrations of methane (CH_4) and nitrous oxide (N_2O) were higher than at any time in at least the last 800,000 years.[17]

[12] Human-caused climate change is the "consequence of more than a century of net GHG emissions from unsustainable energy use, land-use and land use change, lifestyle and patterns of consumption and production".[18] Widespread and rapid changes in the atmosphere, ocean, cryosphere and biosphere have already occurred.[19] Human-caused climate change is already "affecting" climate and weather

extremes in

[13] IPCC Climate Change 2022: Impacts, Adaptation and Vulnerability – Working Group II Contribution to the Sixth Assessment Report of the Intergovernmental Panel on Climate Change (Cambridge University Press, 28 February 2022) [AR6 Working Group II] at vii.

[14] At [A.2.1] (high confidence). See also IPCC Climate Change 2021: The Physical Science Basis

– Working Group I Contribution to the Sixth Assessment Report of the Intergovernmental Panel on Climate Change (Cambridge University Press, 9 August 2021) [AR6 Working Group I]at [A.1], ch 3 and ch 5.

[15] AR6 Synthesis Report Summary, above n 10, at [A.1.2.]. See also AR6 Working Group I, above n 14, at [A.1.3].

[16] AR6 Synthesis Report Summary, above n 10, at [A.1.3] (high confidence). See also AR6 Working Group I, above n 14, at [A.2.1].

[17] AR6 Synthesis Report Summary, above n 10, at [A.1.3] (very high confidence). See also AR6 Working Group I, above n 14, at [A.2.1].

[18] IPCC Climate Change 2022: Mitigation of Climate Change – Working Group III contribution to the Sixth Assessment Report of the Intergovernmental Panel on Climate Change (Cambridge University Press, 4 April 2022) [AR6 Working Group III] at [D.1.1].

[19] AR6 Synthesis Report Summary, above n 10, at [A.2] (high confidence).

every region in the world.[20] It has caused widespread adverse impacts, losses and damage to nature and people.[21] Indeed, evidence of observed changes in extremes—such as heavy precipitation, droughts, heatwaves and tropical cyclones—and in particular their attribution to human influence, strengthened since the IPCC's Fifth Assessment Report, released in 2014.[22]

[13] Between 3.3 and 3.6 billion people "live in contexts that are highly vulnerable to climate change".[23] Vulnerable communities, which historically have contributed the least to the problem, are being "disproportionately affected" by climate change.[24] Many of the impacts of warming, and some of the potential impacts of mitigation actions required to limit warming, "fall disproportionately on the poor and vulnerable".[25] Between 2010 and 2020, for example, human mortality resulting from droughts, storms and floods was 15 times higher in highly vulnerable regions than in regions with very low vulnerability.[26]

[14] Some of the impacts of climate change are locked in; "[m]any changes due to past and future greenhouse gas emissions are irreversible for centuries to millennia, especially changes in the ocean, ice sheets and global sea level."[27]

[15] The IPCC recently summarised the impact of continued warming in the near term:[28]

Continued greenhouse gas emissions will lead to increasing global warming, with the best estimate of reaching 1.5°C in the near term in considered scenarios and modelled pathways. Every increment of global warming will intensify multiple and concurrent hazards (high confidence).

[20] At [A.2] (high confidence). See also AR6 Working Group I, above n 14, at [A.3].

[21] AR6 Synthesis Report Summary, above n 10, at [A.2] (high confidence). See also AR6 Working Group II, above n 13, at [B.1].

[22] AR6 Working Group I, above n 14, at [A.3].

[23] AR6 Synthesis Report Summary, above n 10, at [A.2.2] (high confidence).

[24] At [A.2] (high confidence). See also AR6 Working Group II, above n 13, at [B.1].

[25] IPCC Global Warming of 1.5°C: An IPCC Special Report on the impacts of global warming of 1.5°C above pre-industrial levels and related global greenhouse gas emission pathways, in the context of strengthening the global response to the threat of climate change, sustainable development, and efforts to eradicate poverty (Cambridge University Press, October 2018) at 31 (high confidence, said in the context of limiting warming to 1.5°C).

[26] AR6 Synthesis Report Summary, above n 10, at [A.2.2] (high confidence).

[27] AR6 Working Group I, above n 14, at [B.5]. See also AR6 Synthesis Report Summary, above n 10, at [B.3] (high confidence).

[28] AR6 Synthesis Report Summary, above n 10, at [B.1] (emphasis in original).

Such future warming would have widespread impacts:[29]

In the near term, every region in the world is projected to face further increases in climate hazards (medium to high confidence, depending on region and hazard), increasing multiple risks to ecosystems and humans (very high confidence). Hazards and associated risks expected in the near term include an increase in heat-related human mortality and morbidity (high confidence), food-borne, water-borne, and vector-borne diseases (high confidence), and mental health challenges (very high confidence), flooding in coastal and other low-lying cities and regions (high confidence), biodiversity loss in land, freshwater and ocean ecosystems (medium to very high confidence, depending on ecosystem), and a decrease in food production in some regions (high confidence). Cryosphere-related changes in floods, landslides, and water availability have the potential to lead to severe consequences for people, infrastructure and the economy in most mountain regions (high confidence). The projected increase in frequency and intensity of heavy precipitation (high confidence) will increase rain-generated local flooding (medium confidence).

[16] Moreover, as the planet continues to warm, climate change risks "will become increasingly complex and more difficult to manage".[30] The probability of "abrupt and/or irreversible changes" increases with higher global warming levels,[31] as does the probability of low-likelihood outcomes that have potentially "very large adverse impacts".[32]

[17] Limiting human-caused global warming requires net zero CO_2 emissions combined with strong reductions in other GHG emissions.[33] Cumulative CO_2 emissions before reaching this point, and the level of GHG emissions reductions made this decade, will "largely determine whether warming can be limited to 1.5°C or 2°C".[34]

[18] All global modelled pathways that involve limiting warming to 1.5°C with no or only limited overshoot, and those that involve limiting warming to 2°C, involve "rapid and deep and, in most cases, immediate greenhouse gas emissions reductions in all sectors this decade".[35] On these pathways, net zero CO_2 emissions are reached

[29] At [B.2.1] (footnote omitted and emphasis in original).

[30] At [B.2.3] (high confidence).

[31] At [B.3] (high confidence).

[32] At [B.3] (high confidence).

[33] At [B.5] and [B.5.1] (high confidence).

[34] At [B.5] (high confidence).

[35] At [B.6] (high confidence).

in the early 2050s and around the early 2070s respectively.[36] The following table from the IPCC (beginning at the year 2019) summarises the position:[37]

[19] The respondents emphasise that responding to climate change requires profound societal transformation: "having depended on carbon for all aspects of our social and economic life, we must now transition to low-carbon societies". The IPCC has described the drivers for, and constraints on, "low-carbon societal transitions" as comprising:[38]

> … economic and technological factors (the means by which services such as food, heating and shelter are provided and for whom, the emissions intensity of traded products, finance and investment), socio-political issues (political economy, equity and fairness, social innovation and behaviour change), and institutional factors (legal framework and institutions, and the quality of international cooperation).

[20] The IPCC has also reported on the specific effects of climate change in New Zealand.[39] Mr Smith's submissions summarised those findings in this way:

> Temperatures have increased by 1.1°C over the last 110 years with more extreme hot days. Oceans have risen, acidified and warmed significantly with longer and more frequent marine heat waves. Snow depths have declined and glaciers have receded. Most of northern New Zealand (where Mahinepua C [the land block in question] is situated) has become drier, while also seeing more extreme flooding. Wildfire conditions have increased. Effects on marine, terrestrial and freshwater ecosystems are already evident, including the expansion of invasive plants, animals and pathogens. Erosion, coastal flooding and insurance losses for floods have all increased.

[36] At [B.6] (high confidence).

[37] At 21.

[38] AR6 Working Group III, above n 18, at [TS.2] (emphasis added).

[39] AR6 Working Group II, above n 13, at ch 11.

Statutory response to climate change

[21] The United Nations Framework Convention on Climate Change (UNFCCC), which was opened for signature at the Rio de Janeiro United Nations Conference on Environment and Development (Earth Summit) in 1992, is the foundational international treaty on climate change.[40] Its "ultimate objective" is:[41]

		Reductions from 2019 emission levels (%)			
		2030	2035	2040	2050
Limit warming to 1.5°C (>50%) with no or limited overshoot	GHG	43 [34-60]	60 [49-77]	69 [58-90]	84 [73-98]
	CO_2	48 [36-69]	65 [50-96]	80 [61-109]	99 [79-119]
Limit warming to 2°C (>67%)	GHG	21 [1-42]	35 [22-55]	46 [34-63]	64 [53-77]
	CO_2	22 [1-44]	37 [21-59]	51 [36-70]	73 [55-90]

> … to achieve, in accordance with the relevant provisions of the Convention, stabilization of greenhouse gas concentrations in the atmosphere at a level that would prevent dangerous anthropogenic interference with the climate system. Such a level should be achieved within a time-frame sufficient to allow ecosystems to adapt naturally to climate change, to ensure that food production is not threatened and to enable economic development to proceed in a sustainable manner.

[22] The Kyoto Protocol to the UNFCCC was adopted at the third session of the Conference of the Parties (COP 3) in 1997 and came into force on 16 February 2005.[42] For the first time, legally binding limits were placed on "developed" countries' GHG emissions.[43]

[23] The Paris Agreement is a binding international treaty that came into force on 4 November 2016.[44] It "aims to strengthen the global response to the threat of climate change" by, among other things:[45]

Holding the increase in the global average temperature to well below 2°C above pre-industrial levels and pursuing efforts to limit the temperatureincrease to 1.5°C above pre-industrial levels, recognizing that this would significantly reduce the risks and impacts of climate change …

Under the Agreement, party countries are to communicate a Nationally Determined Contribution (NDC) to the global response to climate change every five years.[46]

[40] United Nations Framework Convention on Climate Change 1771 UNTS 107 (opened for signature4 June 1992, entered into force 21 March 1994).

[41] Article 2.

[42] Kyoto Protocol to the United Nations Framework Convention on Climate Change 2303 UNTS162 (opened for signature 16 March 1998, entered into force 16 February 2005).

[43] For Annex I countries, which includes New Zealand: see art 3(1).

[44] Paris Agreement 3156 UNTS 79 (opened for signature 22 April 2016, entered into force4 November 2016).

[45] Article 2(1)(a).

[46] Articles 3, 4(2) and 4(9).

In December 2020, Parliament passed a motion declaring a climate emergencyin New Zealand. New Zealand's first NDC, required under the Paris Agreement, wasupdated in October 2021. It sets a headline target of a 50 per cent reduction of net emissions below gross 2005 levels by 2030.

[24] Parliament, through legislation, has put in place measures which seek to regulate New Zealand's GHG emissions.[47] The essential purpose of this legislation isto limit GHG emissions in order to contribute to the global effort to limit global temperature increase to 1.5 above pre-industrial levels.

Climate Change Response Act 2002

[25] The Climate Change Response Act 2002 (CCRA) is the centrepiece of Parliament's response. The CCRA provides the legal framework for New Zealand to meet its international emissions reduction obligations.

[26] The CCRA has been through of series of amendments as Parliament has developed and tweaked New Zealand's climate change framework and policies. As Wylie J said in the High Court, these amendments collectively:[48]

… represent the balance that Parliament has struck, and continues to strike, between environmental, technical, social and economic considerations, and the anticipated effects, costs and benefits of various alternative options considered in the process.

[27] The purpose of the CCRA—updated by one of those amendments, the Climate Change Response (Zero Carbon) Amendment Act 2019, which passed with cross-party support—is set out in s 3. In short, it is to provide a framework by whichNew Zealand can develop and implement clear and stable climate change policies thatcontribute to the global effort under the Paris Agreement to limit the global average temperature increase to 1.5°C above pre-industrial levels, and allow New Zealand to prepare for, and adapt to, the effects of climate change; enable New Zealand to meet its international obligations; provide for the implementation, operation, and

[47] We draw hereafter on the summary given by Wylie J in the High Court, updated to take account of subsequent developments: HC judgment, above n 4, at [34]–[52].

[48] At [35].

administration of a GHG emissions trading scheme; and provide for the imposition, operation, and administration of specific levies.

[28] The CCRA establishes targets for emissions reductions requiring the net accounting of GHGs in a calendar year (excluding biogenic methane) to be zero by the calendar year beginning on 1 January 2050 (and for each subsequent calendar year); and requiring the yearly emissions of biogenic methane to be (i) 10 per cent lessthan 2017 emissions by 2030 and (ii) 24 per cent to 47 per cent less than 2017 emissions by 2050 (and for each subsequent calendar year).[49] No remedy or relief is available for failure by the government to meet the 2050 target (or an emissions budget), but a court may make a declaration to that effect.[50]

(a) The Climate Change Commission

[29] The Climate Change Commission, established by the 2019 Amendment Act, isa Crown entity, which is required to act independently.[51] Its purposes are to provide independent, expert advice to the government on mitigating climate change (including through reducing GHG emissions) and adapting to the effects of climate change; and to monitor and review the government's progress towards its emissions reduction andadaptation goals.[52]

(b) Emissions budgets

[30] The responsible Minister is required to set economy-wide, mandatory emissions budgets for each emissions budget period (beginning with the period 2022–2025, and then for five-yearly periods until 2050).[53] Each emissions budget must state the total GHG emissions permitted for the budget period, expressed as a net quantity of CO_2 equivalent.[54] Budgets are to be met, so far as is possible, through domestic emissions reductions and removals.[55] Budgets can be understood as

49 Climate Change Response Act 2002 [CCRA], s 5Q.

50 Section 5ZM.

51 Sections 5A, 5C and 5O.

52 Section 5B.

53 Section 5X. The Minister must also have regard to particular matters set out in s 5ZC.

54 Section 5Y. "Permitted" is not used here in the sense of "authorised": see [45] and [99] below.

55 Section 5Z(1). Offshore mitigation may be used in particular circumstances: s 5Z(2).

"stepping stones" to the 2050 target.[56] The Commission must advise the Minister on matters relevant to setting an emissions budget.[57]

(c) Emissions reduction plans

[31] For each emissions budget period, the Minister must prepare and make publicly available an emissions reduction plan (ERP) setting out the policies and strategies formeeting the relevant emissions budget.[58] The plan must include sector-specificpolicies; a multi-sector strategy; a strategy mitigating the impacts that reducing emissions and increasing removals will have on employees and employers, regions, iwi and Māori, and wider communities; and any other policies or strategies the Minister considers necessary.[59] The Commission must provide the Minister with advice on the direction of the policy required in an ERP.[60] In May 2022 the Government published the first three emissions budgets (2022–2025, 2026–2030 and 2031–2035), and published its first ERP, setting the direction for climate action for the next 15 years in New Zealand.

(d) Monitoring

[32] The CCRA contains comprehensive monitoring and enforcement provisions. The Commission, for example, performs a monitoring role, regularly monitoring and reporting on progress regarding national adaptation plans,[61] emissions budgets and the 2050 target.[62] It can recommend changes or amendments to the 2050 target and emissions budgets.[63] The Act also provides for an inventory agency,[64] with inspectors holding comprehensive powers to enter land or premises to collect information to estimate emissions or removals of GHGs.[65]

56 Climate Change Response (Zero Carbon) Amendment Bill 2019 (136-1) (explanatory note) at 3.

57 CCRA, s 5ZA(1). The Commission must also have regard to particular matters set out in s 5ZC.

58 Section 5ZG.

59 Section 5ZG(3).

60 Section 5ZH. The matters that the Commission is required to have regard to in providing advice on emissions budgets also apply to advice on ERPs: s 5ZH(3).

61 See ss 5J(h), 5ZS, 5ZT and 5ZU. The first national adaptation plan was published in August 2020.

62 Sections 5ZJ, 5ZK and 5ZL.

63 Section 5J(a) and (c).

64 The inventory agency means the chief executive of the Ministry for the Environment: ss 4(1) and 9A(b).

65 Part 3.

(e) The Emissions Trading Scheme (ETS)

[33] The ETS, established by the Climate Change Response (Emissions Trading) Amendment Act 2008, was the result of an extensive process of policy formulation and consultation.[66] A range of options, including a carbon tax, were considered.[67] The ETS emerged as the "consensus solution".[68] It is New Zealand's "main tool" for reducing GHG emissions.[69] Most of the key CO_2-emitting sectors of New Zealand's economy are subject to the ETS, including liquid fossil fuels, stationary energy (including importing and mining coal), industrial processes (such as producing iron or steel) and agriculture (although agricultural emissions do not at present trigger surrender obligations).[70]

[34] The architecture of the ETS is found in Part 4 of the CCRA. "Participants" must notify the Environmental Protection Agency (EPA) that they are required to participate in the ETS and then open a holding account.[71] That account is used to surrender, repay and receive emissions "units".[72] An emissions unit represents a metric tonne of CO_2 equivalent.

[35] Participants in the scheme are liable to surrender one unit for each whole tonne of emissions from listed activities that the participant carries out.[73] Conversely, participants are entitled to receive one unit for each whole tonne of removals from removal activities.[74] Participants are required to submit annual emissions returns to the EPA.[75] Those returns must contain an assessment of the participant's liability to surrender units and/or entitlement to receive units.[76] Participants must then, if

66 See, for example, Catherine Leining Time-travelling on the New Zealand Emissions Trading Scheme (Motu Economic and Public Policy Research, Note 22, 2016) at 2.

67 At 2.

68 HC judgment, above n 4, at [51].

69 Climate Change Response (Emissions Trading Reform) Amendment Bill 2019 (186-1) (explanatory

note) at 1.

[70] HC judgment, above n 4, at [44]. Schedule 3 of the CCRA lists the activities with respect to which persons must be participants. Schedule 4 lists activities with respect to which persons may be participants.

[71] Section 56.

[72] Section 61.

[73] Section 63.

[74] Section 64.

[75] Section 65(1).

[76] Section 65(2)(c).

necessary, surrender the required number of units to the government to cover theiremissions.[77] Failure to do so results in liability for penalties.[78]

[36] The ETS is a market-based scheme. Units are tradeable, and participants withinsufficient units must purchase units from other participants to cover their emissions. The price of units, often referred to as the carbon price, is broadly set by supply and demand. The government, however, allocates emissions units to industry for activitiesthat are emission-intensive and trade-exposed (an industrial allocation).[79]

[37] The ETS attempts to drive efficient behaviour change. The logic is that sellersof surplus units are rewarded and further encouraged to reduce emissions or increase removal activities to obtain more sellable units. Buyers, on the other hand, are encouraged to reduce emissions to limit the number of units they must buy to cover their emissions. It is expected that the price signal the scheme sends should lead to emissions reductions that may not otherwise occur.[80]

[38] Importantly, and as Mr Salmon submitted for Mr Smith, the CCRA does not "permit" emissions or create a "right to emit". It neither authorises nor immunises. Instead, it places obligations on ETS participants who emit, requiring them to surrender units matching their emissions.[81] Mr Salmon submitted the distinction is subtle, but important. The respondents did not contend to the contrary but submitted that for the common law to intervene in controlling GHGs would create a parallel andinconsistent regulatory regime. Their point is that Parliament has not prohibited GHGemissions and has thus allowed emitting activities to continue. We will return to thisissue.[82]

[77] Section 65(4).

[78] Section 134.

[79] Ministry for the Environment | Manat M Te Taiao "Overview of industrial allocation" (10 October 2023) <https://environment.govt.nz>. See also CCRA, ss 80, 81 and 85. The Climate Change Response (Late Payment Penalties and Industrial Allocation) Amendment Act 2023 introduced changes to the industrial allocation policy in the ETS.

[80] Alastair Cameron Climate Change and Emissions Trading: Environmental Handbook (online ed, Thomson Reuters) at [CC3.01].

[81] CCRA, s 63.

[82] See below at [99].

Other statutory responses

[39] The CCRA is part of a broader regulatory structure, which includes the Resource Management Act

1991[83] (RMA) and more specific Acts such as the Crown Minerals (Petroleum) Amendment Act 2018 (which banned new offshore oil and gas exploration) and the Land Transport (Clean Vehicles) Amendment Act 2022 (which aims to achieve a rapid reduction in CO_2 emissions from light vehicles imported into New Zealand).[84]

[40] The relationship between the RMA and climate change is complex.[85] Since 2004, climate change has been an express relevant consideration for RMA decision-makers. For example, s 7(i) of the RMA provides that decision-makers musthave "particular regard to … the effects of climate change".[86] But until relatively recently, environmental regulation of GHG discharges was solely a matter for centralgovernment via the promulgation of National Environmental Standards (NES) under s 43 of that Act.[87] Local and regional councils regulated human interaction with the effects of climate change—for example, sea level rise—but they had no direct role incontrolling GHG emissions.[88] With effect from 2022, that constraint was removed andreplaced with a requirement on local and regional councils to have regard to CCRA emissions reduction plans and national adaptation plans when exercising their own

[83] The new resource management legislative framework will also form part of this matrix.

[84] We note that while the current Government has discussed the potential repeal of the ban on offshore oil and gas exploration, as at the date of judgment a ban is still in force. The clean vehiclediscount scheme introduced by the Land Transport (Clean Vehicles) Amendment Act 2022 was repealed on 1 January 2024 by the Land Transport (Clean Vehicle Discount Scheme Repeal) Amendment Act 2023, but other sections relating to clean vehicle standards remain in force.

[85] For more on the Resource Management Act 1991 [RMA] see below at [95]–[96].

[86] Inserted by s 5(2) of the Resource Management (Energy and Climate Change) Amendment Act 2004 [RMA 2004 Amendment].

[87] Until recently, no comprehensive NES for climate change had been promulgated. In June 2023 a NES for GHG emissions from industrial process heat was made under s 43: Resource Management (National Environmental Standards for Greenhouse Gas Emissions from Industrial Process Heat) Regulations 2023 [GHG emissions NES]. That will be binding notwithstanding anything in CCRA plans and targets.

[88] See RMA, ss 70A, 70B, 104E and 104F (all now repealed). See also West Coast ENT Inc v Buller Coal Ltd [2013] NZSC 87, [2014] 1 NZLR 32, in which this Court considered the effect of the RMA 2004 Amendment on the content and structure of the RMA's rulemaking and consenting functions. The majority held that the effect of these sections was to remove from regional councilsthe ability to control GHG emissions via the discharge to air controls referred to in s 15 (see [160]and [168] per McGrath, William Young and Glazebrook JJ). See also Genesis Power Ltd v Greenpeace New Zealand Inc [2007] NZCA 569, [2008] 1 NZLR 803. The repeal of ss 70A, 70B, 104E and 104F restored the status quo ante, subject to the amendments referred to in the following footnote which brought the RMA and CCRA closer together.

Rulemaking and consenting functions.[89] It may be noted that, in contrast to the relationship between NES and regional or local planning instruments, these CCRA plans are relevant for RMA decision-makers but not expressly binding. But while theyremain in place, the practical effect of the GHG emissions NES, emissions budgets and the ERP will be that GHG emissions will be managed to a significant extent through planning instruments and resource consents.[90]

[41] We will address later the interrelationship between statute and common law.[91]

The claim

[42] We summarise here the claim made by Mr Smith. We do so by reference to a draft amended statement of claim tendered by his counsel.[92] The draft amended claimdiffers in certain respects from the pleading considered in the Courts below, particularly as regards the alleged consequences of the release of GHGs into the atmosphere, the tikanga pleading and the relief sought.

Parties

Mr Smith claims customary interests in lands and other resources and sites situated in or around Mahinepua in Northland. In particular, he claims an interest according to custom and tikanga in the Mahinepua C block, an approximately 91-ha block of Māori freehold land situated on the coast of Wainui Bay, Northland. He sayshe is a representative of the interests of his whānau and descendants in that land. He says that this land and its surroundings possess sites of customary, cultural, historical,nutritional and spiritual significance to him, including tauranga ika (fishing places), tauranga waka (landing places), ara moana (pathways to the ocean), wāhi tapu (burial

caves, cemeteries and sacred trees), rivers, streams, wetlands, seasonal food gathering camps, p sites, battle sites, and other sites of historical significance. Many of these sites are situated in close proximity to the coast and waterways or are in the sea itself.

[43] Mr Smith alleges that:[93]

> (a) Fonterra owns and operates eight dairy factories in New Zealand that burn coal (in excess of 520,000 tonnes per annum) to generate energy.Fonterra will continue to burn coal in its factories for the foreseeable future, and the combustion of coal releases GHGs.
>
> (b) Genesis operates the Huntly Power Station, the largest thermal power station in New Zealand. It is fuelled by the combustion of coal and natural gases, which releases GHGs.
>
> (c) Dairy Holdings Ltd operates 59 dairy farms in the South Island, with some 50,000 milking cows. These cows release methane as a result of enteric fermentation, and nitrogen dioxide is also released from nitrogen-based fertiliser use on the farms.
>
> (d) New Zealand Steel Ltd operates the Glenbrook Steel Mill, which is primarily fuelled by the combustion of coal and has the capacity to burn800,000 tonnes of coal per annum. The combustion of coal releases GHGs.
>
> (e) Z Energy Ltd supplies retail and commercial customers withpetroleum-related fuel products. It knows that these products are burned by its customers, resulting in the release of GHGs.
>
> (f) Channel Infrastructure NZ Ltd (previously known as The New ZealandRefining Company Ltd) operates the Marsden Point oil refinery and import terminal, and the Refinery to Auckland Pipeline. It imports and

[89] See ss 61(2)(d)–(e), 66(2)(f)–(g) and 74(2)(d)–(e), inserted by the Resource Management Amendment Act 2020. RMA plans and policies drafted in light of CCRA emissions reduction plans and national adaptation plans would then be reflected in resource consent decisions.

[90] For example, the GHG emissions NES will render GHG discharges from fossil fuel industrial heat processes ("heat devices" such as furnaces) either prohibited activities or restricted discretionary activities for which discharge consent applicants must prepare emissions plans by which GHG emissions are reduced and managed.

[91] See below at [92]–[101].

[92] This was furnished in sufficient time ahead of the hearing, and there was no substantive objectionby counsel for the respondents. That is appropriate: strike out is more concerned with what can and will be pleaded, rather than what has been pleaded: Couch v Attorney-General [2008] NZSC45, [2008] 3 NZLR 725 at [123] per Blanchard, Tipping and McGrath JJ.

[93] We omit from this summary pleaded mitigations engaged or intended by the respondents—for instance as to reduction in consumption of fossil fuels by certain dates.

supplies the majority of petroleum-related fuel products consumed in New Zealand. The refining process at Marsden Point causes the release of GHGs.[94] Channel Infrastructure knows that its products are burned by others to power combustion engines, or to generate electricity, resulting in the release of GHGs.

(g) BT Mining Ltd owns and operates the Stockton Mine, north of Westport, the largest opencast mine in New Zealand. It produces bituminous, coking and thermal coal,[95] the majority of which is exported, much of it to China, where it is primarily burned in the production of steel. BT Mining knows that the burning of the coal it produces releases GHGs.

Alleged consequences of the release of GHGs into the atmosphere

[44] Mr Smith next alleges that:

(a) In 2020–2021, the respondents were together responsible for more than one-third of New Zealand's total reported GHG emissions (and that just 15 companies were responsible for more than 75 per cent).

(b) The release of GHGs into the atmosphere from human activities (including the respondents' activities) increases the natural greenhouse effect, and causes, among other things, the warming of the planet.

(c) Climate change from the release of GHGs into the atmosphere from human activities (including the respondents' activities) will result in the additional warming of the Earth's surface and atmosphere, and will adversely affect natural ecosystems and humankind.

94 Channel Infrastructure's submissions state that: "On 31 March 2022, Channel closed its refining operations permanently. In doing so, by its estimate, Channel reduced its CO_2 emissions by 98%

– or by more than 1 million tonnes per annum – from its 2019 levels."

95 It is alleged that the Stockton Mine produced and exported approximately 0.8 million tonnes of coal in 2018, and 1.1 million tonnes was forecast to be produced and exported in 2019.

The release of GHGs into the atmosphere from human activities (including the respondents' activities) will result in dangerous anthropogenic interference with the climate system and adverse effects—including increased temperatures; a loss of biodiversity and biomass; a loss of land (including as a result of sea level rise); risks to food and water security; increased extreme weather events; ocean acidification; geopolitical instability and population displacement; adverse health consequences; economic losses; the reaching of tipping points which may cause the catastrophic breakdown of crucial environmental systems; and an unacceptable and escalating risk of social and economic collapse and mass loss of human life.

(d) Poor and minority communities will be disproportionately burdened by the adverse effects of climate change.

(e) The current scientific consensus as to the nature, effects and mitigation requirements of climate change is set out in recent reports of the IPCC from between 2014 and 2022, which are relied upon by Mr Smith.

(f) It is necessary to limit warming caused by climate change to 1.5 to avoid dangerous anthropogenic interference with the climate system and to minimise the long-term and irreversible adverse effects from climate change.

[45] Mr Smith then alleges that, according to the most recent science from the IPCC, to avoid dangerous climate change:

(a) By 2025, at the latest, global GHG emissions must peak.

(b) By 2030, global CO_2 emissions must be reduced by 48 per cent, and global CH_4 emissions by 34 per cent, compared to 2019 levels.

(c) By 2040, global CO_2 emissions must be reduced by 80 per cent, and global CH_4 emissions by 44 per cent, compared to 2019 levels.

By 2050, global GHG emissions must be net zero (meaning that after 2050 no more net anthropogenic emissions can be added to the atmosphere anywhere in the world).

[46] Mr Smith pleads that it is possible for the respondents to reduce the emissionsfrom their activities and products to reflect these required reductions, and that requiring them to cease or reduce their GHG emissions (or contribution to emissions from producing and selling fossil fuels) will materially reduce the adverse effects of climate change. He pleads that these reductions cannot be achieved without the contribution of non-state actors, including the respondents.

[47] Mr Smith then pleads that despite enacting the CCRA, since 2002New Zealand's net and gross GHG emissions have increased and not reduced. Currentand proposed measures under that Act will not result in New Zealand achieving reductions in GHG emissions, or the respondents being required to reduce emissions,in line with a proportionate contribution to minimum required reductions.

[48] Mr Smith pleads that the respondents have variously:

(a) failed to credibly commit to voluntary measures that would see them contribute proportionately (or better) to the minimum required reductions; and

(b) actively lobbied against regulatory measures that would require them to reduce their emissions to contribute proportionately (or better) to theminimum required reductions.

[49] Mr Smith further pleads that the GHG emissions of several of the respondents are actually or effectively unconstrained by the current regulatory regime. Agricultural GHG emissions are not part of the ETS; BT Mining exports coal to jurisdictions where there is no credible regulation of GHG emissions; some respondents (including NZ Steel) have received substantial allocations of "free" unitsunder the ETS, impeding a reduction in their emissions; and aspects of the ETS do not incentivise or require the respondents participating in that scheme to reduce theiremissions in a manner consistent with the minimum reductions required.

[50] Mr Smith pleads:

> The consequence, in fact and law, of the [respondents'] actions is that Mr Smith, his wh[ā]nau, his descendants and others will bear the cost of dealing with harms contributed to by the [respondents'] historical, current andfuture [GHG] emissions.

He further pleads that:

> The orders sought in this proceeding will cause rapid sectoral change that willlead to other major New Zealand emitters taking similar steps to reduce their emissions in a manner that will materially mitigate the harm faced by Mr Smith, his wh[ā]nau and his descendants.

Tikanga pleading

[51] Mr Smith relies on principles of tikanga Māori to "inform the legal basis of thepleaded causes of action and the development of the common law of New Zealand".

[52] The principles pleaded are that tikanga Māori has its own system of obligations and recognition of wrongs arising from those obligations; that such obligations are grounded in whakapapa (genealogical) and whanaungatanga (kinship) relationships; that these relationships include a connection to

whenua (land and the environment) through whakapapa, giving rise to corresponding obligations of kaitiakitanga (loosely, to care for or nurture); and that breaching tikanga creates a hara or take (issue or cause) requiring utu (compensatory action) to restore ea (a state of harmony or balance).

[53] He further claims that, under tikanga, environmental harm is a harm in and of itself, creating corresponding harm to those who have interests in the environment, including kaitiaki (loosely, those whose role it is to care for the environment) and mana whenua (again loosely, those with traditional authority in the particular environment). Where the environment has suffered damage, the principle of kaitiakitanga requires steps to be taken to restore balance, such as imposing rāhui (traditional use and impact controls). Finally, Mr Smith argues, tikanga Māori recognises that hara (in this context, environment-damaging wrong) has both a collective and an individual dimension as to those responsible for it and those who suffer it.

First cause of action: public nuisance

[54] The first cause of action pleaded is public nuisance.

[55] Mr Smith claims that he will suffer harm from the effects of dangerous anthropogenic interference with the climate system caused or contributed to by the respondents jointly and separately. In particular, he pleads that climate change will:

(a) Result in increasing sea levels, irrevocably damaging his family land at Mahinepua C by the physical loss of land from erosion and inundation, the loss of productive land, the loss of economic value, and the loss of sites of cultural and spiritual significance;

(b) irrevocably damage customary resources and sites, including traditional or customary fisheries, landing sites and burial caves and cemeteries;

(c) result in ocean warming and acidification which will adversely impact coastal and freshwater fisheries he customarily uses;

(d) result in the irrevocable and irreplaceable loss of land, resources and species that are economically, culturally and spiritually significant to him as tangata whenua; and

(e) result in increasing adverse health impacts to which he and Māori communities have particular vulnerability.

[56] It is then said that the respondents' actions have interfered with or will interfere with the following public rights: the rights to public health, public safety, public comfort, public convenience, public peace, and a safe and habitable climate system. Mr Smith pleads that the respondents' interference with these public rights is substantial, material and unreasonable and that they knew, or ought reasonably to have known, since at least the release of the IPCC's Fourth Assessment Report in 2007, that

(a) their activities were contributing to dangerous anthropogenic interference with the climate system and (b) it was necessary for them to immediately and significantly reduce their GHG emissions (or production and supply of products which result in GHG emissions) in order to avoid causing or contributing to dangerous anthropogenic interference in the climate system and the adverse consequences of climate change. He pleads that despite that knowledge, the respondents have continued to emit GHGs into the atmosphere (or to produce and supply products which result in GHG emissions) and have failed to significantly reduce their GHG emissions (and have, in some instances, increased them). He further pleads that requiring the respondents to reduce, or cease, their GHG emissions (directly or arising from their fossil fuel products) will reduce the injury that will otherwise be suffered by him and his descendants as a result of the adverse effects of climate change.

We set the relief sought out in full, which is essentially the same in each cause of action:[96]

Relief sought

(a) A declaration that the defendants have (individually and/or collectively) unlawfully caused or contributed to a public nuisance through their emitting activities (or their production of coal in the case of BT Mining; and their production or supply of [f]uel [p]roducts in the case of Channel and Z Energy);

(b) An injunction requiring … each of the defendants to produce (or cause in relation to the products they sell, in the case of BT Mining, Channel and Z Energy):

(i) A peaking of their emissions by 2025; and

(ii) A reduction in their emissions in the amount of the Minimum 2030 Reductions[97] by the end of 2030, by linear reductions in net emissions each year until that time (to be supervised by the Court);

(iii) A reduction in their emissions in the amount of the Minimum 2040 Reductions[98] by the end of 2040, by linear reductions in net emissions each year until that time (to be supervised by the Court);

(iv) [Z]ero net [GHG] emissions from their activities by 2050 by continued linear reductions (to be supervised by the Court);

[96] Emphasis in original. The negligence prayer for declaration is cast in terms of the loss caused by unlawful breach of a duty (the proposed climate system damage tort claim is also cast in terms of unlawful breach of a duty).

[97] See above at [53](b).

[98] See above at [53](c).

Alternatively, an injunction (which may be suspended) requiring the defendants to immediately cease emitting net [GHG] emissions, or contributing to the net emission of [GHGs] through the sale of their products;

(c) Such other relief as the Court determines appropriate to enable the mitigation of or [adaptation] to damage to climate systems contributed to by the [respondents];

(d) [Mr Smith] brings this proceeding in the public interest, and with the assistance of pro bono legal representation, and for that reason does not seek costs.

Second cause of action: negligence

[57] The second (additional or alternative) cause of action is negligence.

[58] Mr Smith alleges that the respondents owe him, and persons like him, a duty to take reasonable care not to operate their businesses in a way that will cause him loss by contributing to dangerous anthropogenic interference in the climate system.

[59] He claims that the respondents have breached this duty by doing acts that have contributed to, and will continue to contribute to, dangerous anthropogenic interference in the climate system; that they knew, or ought reasonably to have known from 2007, that their activities would contribute to such interference; that they then knew, or ought reasonably to have known, that it was necessary for them to immediately and significantly reduce their GHG emissions; and that, despite that knowledge, they have continued to emit GHGs into the atmosphere (or to produce and supply products which result in the emission of GHGs) and have failed to significantly reduce their GHG emissions (and have, in some instances, increased them).

[60] Mr Smith claims that the respondents' breach of duty has or will cause him harm; that the respondents' contribution to that harm is material; and that requiring cessation or reduction of the respondents' GHG emissions will reduce that harm.

[61] The relief sought is cast in similar terms to that sought for the first cause of action.

Third cause of action: proposed climate system damage tort

[62] The third cause of action advances the novel, proposed climate system damage tort. We set the draft amended pleading out in full:

> The defendants owe a duty, cognisable at law, to cease materially contributing to damage to the climate system, dangerous anthropogenic interference with the climate system, and the [a]dverse [e]ffects of climate change through their emission of [GHGs] into the atmosphere (or their production or exportation of coal in the case of BT Mining; and their production and supply of [f]uel [p]roducts in the case of Channel and Z Energy).
>
> The defendants have breached, and will continue to breach, the duty by [emitting GHGs] into the atmosphere (or [causing] the emission of [GHGs] through the sale of fossil fuel products) for their own profit and knowing that those emissions will contribute to damage to the climate system, dangerous anthropogenic interference with the climate system, the [a]dverse [e]ffects of climate change, and injury to the plaintiff and people like him.

[63] The relief sought is cast in similar terms to that sought for the first cause of action.

Strike out

[64] As we have noted, the respondents applied to strike out Mr Smith's proceeding on the basis that it raises no reasonably arguable cause of action.

General principles

[65] Rule 15.1(1)(a) of the High Court Rules 2016 provides that the court may strike out all or part of a pleading if it "discloses no reasonably arguable cause of action".

Addressing that provision, the Court of Appeal said:[99]

> [38] We [address each cause of action] through the lens of well-established strike out principles. That is to say, we assume the pleaded material facts are true save for those that are entirely speculative and without foundation and we also bear in mind that the strike out jurisdiction is to be exercised sparingly and only in clear cases. We must be certain the claim is so untenable it cannot succeed and slow to strike out claims in any developing area of law. The fact a claim involves a complex question of law which requires extensive argument should be no bar provided we have the requisite materials and assistance to determine the matter. We must also be mindful of the well established principle that if any deficiencies can be cured by an amendment to the pleadings, allowing the claim to proceed on condition the necessary amendments are made, is preferable to strike out.

[66] Mr Smith accepts that to be a correct statement of principle, drawing as it does directly on the decision of the Court of Appeal in Attorney-General v Prince, delivered a quarter-century ago.[100] But he complains the Court did not apply it correctly.

[67] Our focus here is on this passage in the reasoning above: "We must be certain the claim is so untenable it cannot succeed and slow to strike out claims in any developing area of law." In Prince, the Court of Appeal explained that last principle as follows:[101]

> It is only where, on the facts alleged in the statement of claim, and however broadly they are stated, no private law claim of the kind or kinds advanced can succeed that it is appropriate to strike out the proceedings at a preliminary stage. And in that assessment the public policy considerations must be solidly founded in the relevant legislation, other relevant material, or the experience of the Courts.

As the Court went on to say, in some cases aspects of policy may require the kind of analysis and testing of

expert evidence, including evidence of economic and social analysis, that is available only at trial. In other cases, however, policy considerationsare patent—explicit or implicit in the relevant legislation or reflected in other areas ofthe law.[102] Alternatively, a court may feel the considerations are readily identifiable and capable of evaluation without the testing of evidence at trial.[103]

[68] In some cases, summary resolution may be appropriate, despite the novelty ofthe claim. In Burns v National Bank of New Zealand Ltd, the Court of Appeal felt ableto strike out a novel claim for "spoliation".[104] This cause of action, concerning alleged destruction or concealment of documentary evidence in litigation, found some supportin Canada and some states in the United States. It had not been recognised in either the United Kingdom or Australia. In declining to recognise it in this jurisdiction, the Court of Appeal noted that remedies already exist to address the same conduct—underthe High Court Rules, law of contempt of court, professional disciplinary rules and

100 Attorney-General v Prince [1998] 1 NZLR 262 (CA).

101 At 267 per Richardson P, Thomas and Keith JJ, 285 per Henry J and 291 per Tipping J.

102 At 267 per Richardson P, Thomas and Keith JJ, 285 per Henry J and 291 per Tipping J.

103 At 267–268 per Richardson P, Thomas and Keith JJ, 285 per Henry J and 291 per Tipping J.

104 Burns v National Bank of New Zealand Ltd [2004] 3 NZLR 289 (CA).

criminal law—and the case for recognition of the new tort was not made out.[105] TheCourt noted:[106]

This case is distinct from, say, a negligence claim alleging a novel duty of carewhere the exact relationship between the parties is required to be determined in order to decide whether a duty should be imposed.

[69] A decade after Prince this Court endorsed the approach taken in that case. Couch v Attorney-General dealt with a relatively novel duty of care alleging responsibility on the part of the Department of Corrections for the supervision of a paroled violent offender who had been assessed by the Probation Servicepsychologists as having a high risk of reoffending.[107] The Attorney-General's strike out application succeeded in the Court of Appeal. This Court unanimously allowed the plaintiff's appeal.

[70] Blanchard, Tipping and McGrath JJ concluded that "the case should be allowedto go to trial, unless as a matter of law the pleaded facts are incapable of giving rise tothe duty of care asserted".[108] Discussing the relevance of policy matters at this point of the proceedings, they said:[109]

The claim should be struck out on the ground that policy militates against a duty of care only if, at this stage of the proceedings, it can be said that this is undoubtedly so. Claims in tort relying on breach of a duty of care have of course been struck out in the past on this basis. But everything depends on the circumstances and, in particular, on whether it is necessary or desirable forthe case to go to trial to enable a fair and fully informed policy determinationto be made.

[71] That case involved a balance between two main policy considerations: protection of citizens and rehabilitation of offenders.[110] While the policy arguments against imposing a duty of care had force, they could not be said to preclude a duty ofcare pre-emptively.[111] Even though the policy arguments for both sides were capableof being weighed up on an abstract basis, it was "necessary and, if not necessary,

105 At [74], [80] and [91].

106 At [89].

107 Couch, above n 92.

108 At [118].

[109] At [126].

[110] At [128] per Blanchard, Tipping and McGrath JJ.

[111] At [129] per Blanchard, Tipping and McGrath JJ.

desirable to make the ultimate determination when all relevant facts ha[d] been examined and conclusions [could] be reached upon them".[112]

[72] Concurring, but writing separately, Elias CJ and Anderson J noted that:[113]

[73] It is often not easy to decide whether a duty of care not previously recognised by authority is owed to the plaintiff, as Woodhouse J in Takaro[114] acknowledged and as is amply demonstrated on the authorities. It may be unrealistic to expect that the pleadings and arguments to support a claim will always be adequate at an early stage of the proceedings. Caution in disposing of such cases on a summary basis is necessary both to prevent injustice to claimants and to avoid skewing the law with confident propositions of legal principle or assumptions about policy considerations, undisciplined by facts.

[1] It is inappropriate to strike out a claim summarily unless the court can be certain that it cannot succeed. The case must be "so certainly or clearly bad" that it should be precluded from going forward. Particular care is required in areas where the law is confused or developing. …

[74] Elias CJ and Anderson J referred to the decision of the House of Lords in X (Minors) v Bedfordshire County Council where Lord Browne-Wilkinson (with whom the other Judges agreed) observed that where "the law is not settled but is in a state of development … it is normally inappropriate to decide novel questions on hypothetical facts"—and particularly so where the question is whether a common law duty of care exists.[115] Lord Browne-Wilkinson went on to note it might be otherwise if evident that, whatever the facts, no duty could exist. But if, on the facts alleged, it was not possible to give a certain answer whether the claim was maintainable, it would not be appropriate to strike it out.[116]

Our approach

[75] These authorities articulate what are long-established principles: a measured approach to strike out is appropriate where a claim—whether in negligence, nuisance or otherwise—is novel, but at least founded on seriously arguable non-trivial harm. That is so even if attribution to individual respondents remains difficult. In such a

[112] At [130] per Blanchard, Tipping and McGrath JJ.

[113] Footnotes omitted.

[114] Takaro Properties Ltd (in rec) v Rowling [1978] 2 NZLR 314 (CA).

[115] X (Minors) v Bedfordshire County Council [1995] 2 AC 633 (HL) at 740–741.

[116] At 741.

case the common law should lean towards receipt of the claim, and full evaluation based on evidence and argument at trial, over pre-emptive elimination.

[76]

Such an approach is consistent with fully informed access to civil justice by those who have a tenable case that they have been harmed, and who will otherwise go without remedy based on a pre-emptive evaluation only. And, as was observed in Couch, a refusal to strike out a cause of action "says little about its eventual merit".[117] That is to say, it is not a commentary on whether or not the claim will ultimately succeed.

[77] Pre-emptive elimination is only appropriate where it can be said that whateverthe facts proved, or arguments and policy considerations advanced at trial, a case is bound to fail.

Are common law actions over GHG emissions excluded by statute?

[78] We deal with this question first, because if the respondents are correct that thestatutory scheme displaces the operation of the common law, that is dispositive of theappeal—none of the causes of action could succeed and the claim would have to be struck out.

[79] The High Court Judge considered one of the policy factors that negated the imposition of a duty of care was that the alleged duty was "inconsistent with Parliament's regulation of emissions".[118] The Judge continued:[119]

> Recognising a liability in negligence would potentially compromise Parliament's response, and would require the Courts to engage in complex polycentric issues, which are more appropriately left to Parliament. It is an area where the authority of Parliament should be respected. This is not to saythat climate change is a "no go" area. Rather, the better course is for aggrievedvictims of climate change to seek to hold the Government responsible. The provisions of s 5ZM of the [CCRA] … are directly in point.

[80] The Court of Appeal agreed, holding that a critical factor telling against the imposition of a duty of care was the "existence of international obligations and a

> [117] Couch, above n 92, at [37] per Elias CJ and Anderson J.
>
> [118] HC judgment, above n 4, at [98](e).
>
> [119] At [98](f) .

comprehensive legislative framework", and that to "superimpose a common law duty of care [was] likely to cut across that framework, not enhance or supplement it".[120]

[81] Speaking more generally, the Court of Appeal was also of the view thatMr Smith's claims were "not consistent with the policy goals and scheme of the legislation and in particular the goals of ensuring that this country's response to climatechange is effective, efficient and just".[121] Private litigation could mean emitters are required to "comply with requirements that are more stringent than those imposed bystatute".[122] The Court's role was instead to "[support] and [enforce] the statutory scheme for climate change responses and [hold] the Government to account".[123]

Submissions

[82] Counsel for Mr Smith submitted that his claim does not cut across New Zealand's international commitments or domestic climate policies but rather supports them. A finding that there can never be tortious liability connected to GHG emissions cuts across the statutory scheme because it takes away a mechanism that could contribute to those reductions. There is nothing uncommon in using tort law to support statutory regulation.[124] Moreover, the CCRA and ETS do not "permit" emissions, a point we will discuss further below.[125] And finally, a number of the respondents do not have obligations, or have limited obligations, under the ETS. Thismeans the CCRA is not a complete answer.

[83] Mr Kalderimis and Ms Swan, for the respondents, submitted that the pleaded claim invites judicial criticism of the efficacy of that statutory framework, and requiresthe creation of a parallel, and inconsistent, regulatory regime. Mr Smith's claim wouldrender some respondents liable in tort despite compliance with the ETS, or despite not

> [120] CA judgment, above n 5, at [116]. These sentiments were also reflected by the United States Federal Court of Appeals (2nd Circuit) in City of New York v Chevron Corp 993 F 3d 81 (2d Cir 2021), where that Court found that the Federal Clean Air Act 42 USC § 7401 displaced the common law in so far as control of GHGs was concerned.

[121] At [33].

[122] At [33].

[123] At [35].

[124] Mr Smith gives the example of tortious liability running alongside the disciplinary regime in the Lawyers and Conveyancers Act 2006.

[125] See below at [99].

being subject to the ETS. And, they say, it risks distorting the market-based operation of the ETS by targeting only selected emitters.

Our assessment

[84] Statute law has been active in New Zealand in displacing or modifying the application of the common law of torts.[126] To state the obvious, statutory reform alters context, and may thereby necessitate reform of existing and related common law principles.[127] In that instance, statute's impact is indirect. Some statutory reforms may however displace tort directly.

[85] The best-known (and most dramatic) example is the Accident Compensation Act 2001 (and its predecessor Acts) proscribing claims for damages for personal injuries covered by the legislative compensation scheme. Exemplary damages were retained to perform tort law's deterrent function, and in the workplace context, the Health and Safety at Work Act 2015 supplies the missing deterrent function in the absence of workplace personal injury liability.[128]

[86] There are also other important, targeted examples: statutory immunities in the Biosecurity Act 1993 in favour of biosecurity officials barred the claim by kiwifruit growers against the Crown in Attorney-General v Strathboss Kiwifruit Ltd.[129] Statutory immunities of varying extent in favour of persons undertaking statutory functions can be found throughout New Zealand legislation.[130] A rather different example of a proscriptive statutory provision is to be found in the Harmful Digital

[126] Stephen Todd (ed) Todd on Torts (9th ed, Thomson Reuters, Wellington, 2023) at 19. Professor John Burrows KC has observed that the common law and statute occasionally overlap, sometimes with a "jagged and awkward" interface, and at other times they run in parallel. The common law has shown "remarkable vitality" in the face of areas already regulated by statute: John Burrows "Common Law among the Statutes: The Lord Cooke Lecture 2007" (2008) 39 VUWLR 401 at 410–411.

[127] Lord Sales "Exploring the Interface Between the Common Law of Tort and Statute Law" (Annual Richard Davies Lecture, London, 29 November 2023).

[128] Early on, the Court of Appeal determined that personal injury claims for exemplary damages could still be brought: Donselaar v Donselaar [1982] 1 NZLR 97 (CA). See now: Accident Compensation Act 2001, s 319.

[129] Section 163; and Attorney-General v Strathboss Kiwifruit Ltd [2020] NZCA 98, [2020] 3 NZLR 247 at [124]–[147].

[130] See the discussion in Strathboss Kiwifruit Ltd, above n 129, at [138].

Communications Act 2015, which prevents civil (and criminal) actions being brought against an online content host if it takes certain action in responding to a complaint.[131]

[87] But statutory reform may also supplement common law causes of action in a way that has a partial but significant displacement effect. The RMA is a good example of this effect, and, as summarised above, it has particular relevance to climate change issues. The RMA regulates the environmental effects of human activity and, conversely, mitigation of the effects of environmental processes on humans. It

does this through environmental policies, standards, and rules, and through local authority consenting functions. These controls tend to reduce, but not completely remove, the potential for nuisance and the need for resort to environmental tort actions. The RMA also provides enforcement controls in relation to environmental effects. These perform the same function as actions in nuisance did historically. For example, s 17 entitles local authorities and the EPA (through abatement notices) or the Environment Court (through enforcements orders) to prevent any person from doing anything where its effect on the environment "is or is likely to be noxious, dangerous, offensive, or objectionable". Only enforcement officers[132] can issue abatement notices, but private parties may apply to the Environment Court for an enforcement order under ss 17 and 316(1).

[88] Yet, although Parliament saw fit to make the RMA enforcement regime accessible to public authorities and private citizens, s 23 expressly preserves access to common law rights of action:

> 23 Other legal requirements not affected
>
> (1) Compliance with this Act does not remove the need to comply with all other applicable legislation and other rules of law.
>
> (2) The duties and restrictions described in this Part shall only be enforceable against any person through the provisions of this Act; and no person shall be liable to any other person for a breach of any such duty or restriction except in accordance with the provisions of this Act.

[131] Section 24.

[132] An "enforcement officer" is defined in s 2(1) (so far as is relevant for the purposes of s 17) as an "enforcement officer authorised under section 38 or 343I". Section 38 empowers local authorities to authorise their officers to carry out the functions and powers of an enforcement officer. Section 343I empowers the EPA to authorise a person to be an enforcement officer for the purpose of carrying out its enforcement functions under the RMA.

Nothing in subsection (2) limits or affects any right of action which any person may have independently of the provisions of this Act.

This is perhaps unsurprising given the antiquity of environmental nuisance actions and the continuing resort to them.[133]

[89] What then is the effect of the CCRA on tort actions? Was the former intended to exclude the latter? Unless there is reasonably clear language in the CCRA to that effect, or it is a necessary implication of the CCRA's operation, that seems inherently unlikely for two reasons.

[90] First, as this Court said in the Sunset Terraces case, in the context of the Building Act 1991:[134]

> [25] Nothing in the 1991 Act signalled with the necessary clarity that the Act was intended to remove the common law duty affirmed in Hamlin. … What is clear is that the common law duty was not expressly removed. Nor can it be said that the duty was removed by necessary implication. If Parliament had meant to achieve the outcome for which the Council contended, it would have done so in clear and unmistakeable terms.

Similarly, Tipping J remarked in Hosking v Runting, in the context of the Privacy Act 1993:[135]

> If Parliament wishes a particular field to be covered entirely by an enactment, and to be otherwise a no-go area for the Courts, it would need to make the restriction clear. I am unpersuaded by the view that if Parliament has only gone so far, this is an implicit message to the Courts to stay their hands. Any such implication would have to be both clear and necessary … Here the posited implication is far from clear or necessary.

[133] See, for example, Hawkes Bay Protein Ltd v Davidson [2003] 1 NZLR 536 (HC); and

Semple v Wilson [2018] NZHC 992, [2018] NZAR 1025.

[134] North Shore City Council v Body Corporate 188529 [2010] NZSC 158, [2011] 2 NZLR 289 [Sunset Terraces] per Blanchard, Tipping, McGrath and Anderson JJ. See also Invercargill City Council v Hamlin [1996] 1 NZLR 513 (PC).

[135] Hosking v Runting [2005] 1 NZLR 1 (CA). In Andrew Burrows "The Relationship Between Common Law and Statute Law in the Law of Obligations" (2012) 128 LQR 232 at 239, he observed that, "given that the common law is a carefully developed evolutionary system of law, the default position should be that, unless the exclusion of the common law is express or is very clearly implied, there should be no such exclusion".

This is entirely orthodox. Lord Reid expressed the point in similar terms in Black-Clawson International Ltd v Papierwerke Waldhof-Aschaffenburg AG:[136]

There is a presumption which can be stated in various ways. One is that in the absence of any clear indication to the contrary Parliament can be presumed not to have altered the common law further than was necessary to remedy the "mischief."

[91] Second, as we have noted, the ETS neither authorises nor immunises GHG emissions. It merely facilitates state-introduced market signals via a trading scheme in emissions units. There is provision in the CCRA for fines and other sanctions for failing to register as a participant, for under reporting emissions or for holding insufficient emissions units,[137] but there is no power in the EPA or any other CCRA agency to forbid an emitter from discharging GHGs for want of emissions units. In fact, as already discussed, policing the actual environmental effects of the activities of individual emitters is primarily the province of the RMA, not the CCRA.

[92] The last point is important to grasp. The CCRA does not purport to cover the entire field. It is a companion measure designed to operate alongside the RMA in relation to GHG emissions. As we noted at [47], RMA amendments in 2004 and 2022 required all decision-makers to have particular regard to the effects of climate change, and regional and local authorities to have regard to CCRA emissions reduction plans and national adaptation plans. We also referred to the recent NES on GHG emissions, which provides for consent authority control of GHGs emitted by industrial process heat devices such as boilers and furnaces.[138] At the risk of labouring the point, resort to common law actions in relation to adverse environmental effects is expressly preserved in the RMA within this overlapping system of legislative controls. Parliament has not pre-emptively excluded a common law response to damage caused by GHG emissions. On the contrary, it has retained that possibility.

[93] There is therefore no basis to conclude that Parliament has displaced the law of torts in the realm of climate change in New Zealand. Rather, it has left a pathway

[136] Black-Clawson International Ltd v Papierwerke Waldhof-Aschaffenburg AG [1975] AC 591 (HL) at 614. See also Lord Hutton's observations in Regina (Rottman) v Commissioner of Police of the Metropolis [2002] UKHL 20, [2002] 2 AC 692 at 720.

[137] See generally s 129 of the CCRA and the Climate Change Response (Infringement Offences) Regulations 2021, made under s 30M of the CCRA.

[138] GHG emissions NES, above n 87.

Open for the common law to operate, develop and evolve (if that is thought to be required in this case) amid a statutory landscape that does not displace the common law by the interposition of permits, immunities, policies, rules and resource consents.[139]

Is the public nuisance claim bound to fail?

[94] The question we address here is whether it can be said that, whatever the facts proved or policy argu-

ments advanced at trial, the pleaded public nuisance claim is bound to fail.

Evolution and elements of the tort

[95] In the early years of the common law, it became clear that there were sociallyobjectionable actions and omissions that could not found a private nuisance action because the harm was suffered by a "community as a whole rather than by individualvictims and because members of the public suffered injury to their rights as such ratherthan as private owners or occupiers".[140] As a result, conduct of this nature began to be treated as criminal.[141] The Star Chamber, and later the King's Bench and its successors, held the "residual power to punish any misconduct that threatened the public good".[142] Thus the term "public nuisance" (or common nuisance) came to be used to describe the power of these courts to punish behaviour which was harmful to the public.[143]

[96] The offence of public nuisance was concerned with actions or omissions that obstructed or caused "inconvenience or damage to the public in the exercise of rights

[139] That is not to say that the statutory regime cannot be called upon by the parties at trial in framingthe common law pathway and its remedies.

[140] Regina v Rimmington [2005] UKHL 63, [2006] 1 AC 459 at [6] per Lord Bingham.

[141] At [6] per Lord Bingham. The "court leet" was one forum in which this assortment of offences was dealt with: JR Spencer "Public Nuisance—A Critical Examination" (1989) 48 CLJ 55at 59–60.

[142] Spencer, above n 141, at 61.

[143] At 63. The examples referred to by Spencer (at 63, n 32) include "concealment of treasure trove, digging up the wall of a church, making off with the property of a Royal foundation; and also stopping up the highway". See also William Hawkins A Treatise of the Pleas of the Crown: Or aSystem of the Principal Matters relating to that Subject, digested under their proper Heads (printed by Eliz Nutt for J Walthoe, London, 1716) vol 1. Hawkins defined a common nuisance as "an offence against the public, either by doing a thing which tends to the annoyance of all the King's subjects, or by neglecting to do a thing which the common good requires" (at 197, spelling and grammar updated to reflect modern usage).

common to all His Majesty's subjects".[144] It was traditionally used to deal with the obstruction of public highways and rivers, and activities that caused a loss of amenityin a neighbourhood (for example through noises or smells).[145] It was often invoked toprosecute harms to the community that were otherwise not punishable.[146]

[97] The reach of public nuisance remained "exclusively criminal" until the 16th century.[147] The transformative case, an anonymous 1535 decision published in the Yearbooks, involved a plaintiff who could not access his close due to a blocked highway.[148] Fitzherbert J concluded that a plaintiff who "has suffered greater hurt orinconvenience than the generality have … can have an action to recover the damage which he has by reason of this special hurt".[149] This approach to public nuisance, which became known as the "special damage" rule, was adopted expressly in New Zealand in 1869 in Mayor of Kaiapoi v Beswick.[150]

[98] The first reported attempt to obtain an injunction to restrain a public nuisance seems to have occurred in the 1752 decision Baines v Baker.[151] There, the plaintiff sought to stop the building of an inoculation hospital for smallpox. He lived nearby and was concerned about catching the disease. The Lord Chancellor denied the injunction, in part because the case should have been an "information in the name of the Attorney-General".[152] Leaving redress for public nuisances to the

[144] James Fitzjames Stephen and Lewis Frederick Sturge A Digest of the Criminal Law (Indictable Offences) (9th ed, Sweet & Maxwell, London, 1950) at 179 (cited with approval in Rimmington, above n 140, at [10] and [36] per Lord Bingham and [45] per Lord Rodger). This definition is unchanged from

the original definition provided in the first edition published in 1877: Rimmington, above n 140, at [10] per Lord Bingham. See also Bill Atkin "Nuisance" in Stephen Todd (ed) Todd on Torts (9th ed, Thomson Reuters, Wellington, 2023) 579 at 644–645.

[145] Law Commission (of England and Wales) Simplification of Criminal Law: Public Nuisance and Outraging Public Decency (Law Com No 358, 4 June 2015) at [2.21].

[146] John Murphy The Law of Nuisance (Oxford University Press, Oxford, 2010) at [7.14] citing, among other things, Rex v Crunden (1809) 2 Camp 89, 170 ER 1091.

[147] Carolyn Sappideen and Prue Vines (eds) Fleming's The Law of Torts (10th ed, Thomson Reuters, Sydney, 2011) [Fleming] at [21.20].

[148] Anonymous (1535) YB Mich 27 Hen 8, f 27, pl 10 (cited in CHS Fifoot History and Sources of the Common Law: Tort and Contract (Stevens & Sons, London, 1949) at 98).

[149] Fifoot, above n 148, at 98. Baldwin CJ denied the claim but it was Fitzherbert J who was later followed: William L Prosser "Private Action for Public Nuisance" (1966) 52 Va L Rev 997 at 1005 citing, among other things, Rose v Miles (1815) 4 M & S 101, 105 ER 773 (KB).

[150] Mayor of Kaiapoi v Beswick (1869) 1 NZCA 192. Arney CJ, for instance, canvassed the English case law before summarising it in this way (at 207): "In all these examples the damage was particular, direct, and following upon the individual immediately from the obstruction".

[151] Spencer, above n 141, at 67. See Baines v Baker (1752) 3 Atk 750, 27 ER 105 (Ch) at 106.

[152] Baines, above n 151, at 106. See also Spencer, above n 141, at 67.

Attorney-General as the public representative was historically justified on the basis that:[153]

… common [nuisances] are such inconvenient or troublesome offences, as annoy the whole community in general, and not merely some particular person; and … it would be unreasonable to multiply suits, by giving every man a separate right of action.

[99] Common law crimes were abolished in New Zealand in the Criminal Code Act 1893.[154] The statutory offence of criminal nuisance established by that same Act was significantly retrenched by the addition of a knowledge requirement in the Crimes Act 1961.[155] Neither development was "treated as removing the jurisprudential foundation of the tort of public nuisance" in New Zealand, which survives as a "self-sustaining common law action".[156]

[100] The leading authority in New Zealand on public nuisance—Attorney-General v Abraham and Williams Ltd, which concerned noise, odour and pests emitted from a long-established insanitary stockyard in a once-rural, suburbanised location—was delivered by the Court of Appeal almost 75 years ago.[157] Most of the case law cited within it was English. O'Leary CJ posed the core issue on appeal in these terms:[158]

… whether the yards do constitute a public nuisance, which, of course, in brief terms means that there are acts or omissions which endanger the lives, safety, health, property, or comfort of the public. The escape of deleterious things, such as smells, noxious air, noises, and the like, clearly constitutes a nuisance.

[101] The principal English authority on public nuisance is now Regina v Rimmington.[159] Lord Bingham gave the leading speech, in which he canvassed a variety of different formulations of the criminal offence of public nuisance

[153] William Blackstone Commentaries on the Laws of England: Book the Fourth – A Reprint of the First Edition with Supplement (Dawsons of Pall Mall, London, 1966) at 167.

[154] Criminal Code Act 1893, s 6. See now s 9(1) of the Crimes Act 1961.

[155] Compare Crimes Act 1961, s 145 with Criminal Code Act, s 140; and Crimes Act 1908, s 158.

[156] Atkin, above n 144, at [9.3.1]. See, for example, Attorney-General v Abraham and Williams Ltd [1949] NZLR 461 (CA); Amalgamated Theatres Ltd v Charles S Luney Ltd [1962] NZLR 226 (SC); Hankins v The King (1905) 25 NZLR 787 (CA); and Lower Hutt City Council v Attorney-General ex rel Moulder [1977] 1 NZLR 184 (CA).

[157] Abraham and Williams Ltd, above n 156.

[158] At 473.

[159] Rimmington, above n 140. See also Attorney-General v PYA Quarries Ltd [1957] 2 QB 169 (CA), which Lord Bingham in Rimmington called the "leading modern authority on public nuisance" (at [18]); and Overseas Tankship (UK) Ltd v The Miller Steamship Co Pty [1967] 1 AC 617 (PC) [The Wagon Mound (No 2)].

before arriving at the definition in Archbold: Criminal Pleading, Evidence and Practice:[160]

… a person is guilty of a public nuisance (also known as common nuisance), who–

(a) does an act not warranted by law, or

(b) omits to discharge a legal duty,

if the effect of the action or omission is to endanger the life, health, property or comfort of the public, or to obstruct the public in the exercise or enjoyment of rights common to all Her Majesty's subjects …

Although expressed in a criminal context, it is now widely acknowledged that the analysis applies also to civil claims.

[102] Thus stated, the tort of public nuisance is subject to a number of important limits particular to it. First, while the tort is one of strict liability, meaning negligence is not required, a defendant will only be liable if the kind of harm suffered was a reasonably foreseeable consequence of the defendant's conduct, meaning there was a real risk of damage.[161]

[103] Second, the defendant's act or omission must substantially and unreasonably interfere with public rights.[162] As to the need for an unreasonable interference, Romer LJ observed, in the context of a footpath obstruction case, that the "law relating to the user of highways is in truth the law of give and take".[163] The Court of Appeal in the present case observed that the two elements—"substantially and unreasonably"—are conjunctive,[164] a point also made by this Court in Wu v Body

[160] This is from the current edition: see Mark Lucraft (ed) Archbold 2024 (Sweet & Maxwell, London, 2024) at [31-40]. At the time of Rimmington, the Archbold formulation was identical save that it read "life, health, property, morals or comfort". The House of Lords rejected the reference to morals (at [10] and [36] per Lord Bingham and [45] per Lord Rodger), and it is no longer included in the Archbold formulation. The remainder of the formulation was described as "clear, precise, adequately defined and based on a discernible rational principle" (at [36] per Lord Bingham).

[161] Hamilton v Papakura District Council [2002] UKPC 9, [2002] 3 NZLR 308 at [39] per Lord Nicholls, Sir Andrew Leggatt and Sir Kenneth Keith referring to The Wagon Mound (No 2), above n 159, at 639–640.

[162] Harper v G N Haden and Sons Ltd [1933] Ch 298 (CA) at 304 per Lord Hanworth MR; Fleming, above n 147, at [21.50]; and Allen M Linden and others Canadian Tort Law (12th ed, LexisNexis, Toronto, 2022) at 573–574.

[163] Harper, above n 162, at 320.

[164] CA judgment, above n 5, at [41].

Corporate 36661, a private nuisance case.[165] But in Fearn v Board of Trustees of the Tate Gallery, the United Kingdom Supreme Court held, in the context of private nuisance at least, that the unreasonableness element added nothing of substance to the evaluative process.[166] The leading public nuisance cases, Rimmington and, in New Zealand, Abraham and Williams Ltd, remain opaque on whether an unreasonableness requirement adds ballast or not. That question remains one for judicial determination in New Zealand in due course.

[104] Third, the tort does not generally depend on any particular person suffering damage. However, private actionability may be limited to persons who can demonstrate they have suffered some damage particular to them arising from the interference. This is the so-called "special damage" rule, and we return to it later in this judgment.[167]

[105] A fourth particular limit arguably may exist: that of independent illegality (that is, illegality apart from the tort itself). For reasons given later, we conclude that limit does not apply in New Zealand.[168]

High Court and Court of Appeal

[106] In the High Court, Wylie J concluded four fundamental obstacles lay in the way of the tenability of the public nuisance claim. First, the damage claimed by Mr Smith was neither particular nor direct, and not appreciably more serious or substantial in degree than that suffered by the public generally.[169] It may be suffered by many others, including iwi, hap and other landowners and members of the public who live in or use the coastal marine area around New Zealand. Second, the pleaded harm was consequential and not the direct result of the respondents' activities.[170] As the Judge put it, even if Mr Smith were to obtain the relief he sought, it would not

[165] Wu v Body Corporate 366611 [2014] NZSC 137, [2015] 1 NZLR 215, where it was noted that "[o]ften the concepts of substantial and unreasonable will overlap" (at [130], n 117 per Elias CJ, McGrath, Glazebrook and Tipping JJ).

[166] Fearn v Board of Trustees of the Tate Gallery [2023] UKSC 4, [2024] AC 1 at [18]–[21] per Lord Leggatt SCJ (with whom Lord Reed P and Lord Lloyd-Jones SCJ agreed).

[167] See above at [105] and below at [148]–[152].

[168] See below at [146]–[147].

[169] HC judgment, above n 4, at [62].

[170] At [63].prevent the damage he claimed he would suffer. Mr Smith did not and could not plead that but for the respondents' activities, he would not suffer the claimed damage.[171] Third, the underlying acts or omissions of the respondents were lawful, because they complied with all relevant statutory and regulatory requirements.[172] Contrary to Mr Smith's submission, there was a requirement for independent unlawfulness.

Finally, there were also significant problems with the relief sought.[173]

[107] The Court of Appeal analysed Mr Smith's public nuisance claim by reference to four questions:

(a) whether actionable public rights were pleaded;

(b) whether independent illegality was required;

(c) whether the special damage rule was met or required; and

(d) whether there was a "sufficient connection" between the pleaded harmand the respondents' activities.

Ultimately it found for Mr Smith on the first two questions, and for the respondents on the last two. As we consider those were the correct questions to address, we will apply the same framework later in this judgment.[174]

[108] The Court of Appeal's analysis began with the observation that it was "fair todescribe the law of public nuisance as lacking some precision".[175] This was essentiallythe result of its history and "its application to a number of disparate situations at a timewhen there was no perceived need to define its boundaries with any precision".[176]

171 At [67].

172 At [69].

173 At [73] and [105]–[108].

174 Beginning below at [143].

175 CA judgment, above n 5, at [58].

176 At [58] (footnote omitted).

On the first question, the Court concluded that a nuisance was public if either or both of the following conditions were satisfied:[177]

(a) The nuisance must affect a class of the public such as the inhabitants ofa local neighbourhood or a representative cross-section of them. The adverse effects need not extend to a public place.

(b) The nuisance must infringe rights belonging to the public as such.

The former, particularly, related to acts which endangered the life, health, property, or comfort of the public. On that basis, the rights pleaded in the statement of claim appeared to be consistent with the tort of public nuisance, and it was not necessary toplead them as established public rights.

[109] On the second question, the Court of Appeal disagreed with the High Court Judge's assessment that the interference with the public right must be independently unlawful, in addition to interfering with public rights.[178] It said:[179]

What matters is that the act or omission causes common injury. To put it another way, the focus as a matter of principle is not on the legal character ofthe act or omission complained of but rather its adverse effect.

[110] On the third question, the Court of Appeal said that it was willing to adopt the"most liberal formulation of the special damage rule" and therefore only looked to seewhether the pleaded harm was capable of being viewed as appreciably exceeding thatsuffered by the general public.[180] The Court concluded:[181]

In our view the harm suffered by those interests [Mr Smith claims to represent]does not sufficiently exceed the degree of harm to very many other people inNew Zealand (or elsewhere in the world) who suffer the same interference, including landowners, other iwi and hap .

The Court went on to observe that in very many places throughout New Zealand therewould be sites of historical, nutritional, spiritual and cultural significance at risk or

177 At [67]. See generally at [60]–[68].

178 See generally at [69]–[74].

[179] At [72].

[180] At [82]. See generally at [75]–[87].

[181] At [82].

under threat, and the harm there was substantially the same. That was not a contestable fact, and not something that could be overcome by re-pleading or involving concepts of tikanga.

[111] The Court acknowledged that the special damage rule had been criticised by some commentators but did not reach a conclusion as to whether it should be retained. That was because it was satisfied that, even if the rule were abolished, the claim in public nuisance was "still doomed to fail" and should therefore be struck out for reasons we now explain.[182]

[112] Finally, the Court of Appeal concluded that a fatal obstacle lying in the path of Mr Smith was the lack of a sufficient connection between the pleaded harm and the respondents' activities.[183] The Court continued:

… All of the cases which have invoked this aggregation principle [the proposition that a defendant will not be exempted from liability on the grounds that they were simply one of many causing a nuisance] have involved a finite number of known contributors to the harm, all of whom were before the Court. That is no accident. It is a critical factor. None of the cases involved the sort of situation before us where there is in fact no identifiable group of defendants that can be brought before the Court to stop the pleaded harm. In none of the "Nuisance due to many" cases did the Court grant the claimant or the Attorney-General an injunction knowing it would do nothing to stop or even abate the nuisance. Indeed, we know of no public nuisance case where an injunction has been issued in those circumstances. And none was cited to us.

We therefore agree with the High Court that the claim in public nuisance is clearly untenable and should be struck out. To allow it to proceed would not extend the existing law but distort it.

Submissions

[113] We now review the key submissions made to us.

(a) For Mr Smith

[114] In terms of the first question, Mr Bullock argued that the Court of Appeal was right to find that Mr Smith's claim involved a tenable interference with public rights. Further, it was also right to find that interferences with rights pleaded in the claim were

[182] At [87].

[183] See generally at [88]–[93].

tenable foundations for a claim in public nuisance and consistent with general formulations of the tort of public nuisance. He submitted that the pleaded conduct is tenably a public nuisance either because it unreasonably causes or contributes to widespread harm that materially affects the reasonable comfort or convenience of the public (including Mr Smith)—a question of fact and tenable on the pleaded claim—and/or that there is a common law public right "requiring those using the atmosphere to dispose of their GHGs in a manner that does not interfere with the continued existence of a safe and habitable climate system". This latter option was said to be a logical extension of recognised common law public rights to access roads, fisheries and watercourses.[184] Protection of a safe and habitable climate system was also said to be essential to, and a prior condition of, the exercise of all other common law rights.

[115] On the second question, Mr Bullock submitted that the Court of Appeal was plainly right to reject a requirement for independent illegality. Such a requirement was said to have been rejected by leading

texts and the England and Wales Law Commission.[185]

[116] On the third question, Mr Bullock noted that the common law has confined standing to bring private claims in public nuisance to only those who suffered a particular (or "special") injury from an interference with rights.[186] The concern was to ensure that only plaintiffs who had suffered an actual injury (including property damage and economic loss) from an interference with the public right could bring a claim. All a plaintiff must show is an injury that is "more than mere infringement of a theoretical right which the plaintiff shares with everyone else".[187] In view of these "well-established" principles, Mr Smith's claim to standing was said to be plainly tenable. Physical damage to property has always been sufficient particular damage tofound standing for a claim in public nuisance. In the alternative, Mr Bullock submittedthat this Court should either abolish or relax the special damage rule in this context.

[184] This submission drew on the scholarship of Arthur Ripstein Force and Freedom: Kant's Legal andPolitical Philosophy (Harvard University Press, Cambridge, 2009); and also JW Neyers "Reconceptualising the Tort of Public Nuisance" (2017) 76 CLJ 87.

[185] Counsel cited, among other things, Murphy, above n 146, at 138; Halsbury's Laws of England

(5th ed, 2018, online ed) vol 78 Nuisance at [105]; and Law Commission, above n 145, at [2.4].

[186] Counsel cited, among other things, Anonymous, above n 148.

[187] Counsel cited Fleming, above n 147, at 491.

[117] On the fourth question, Mr Bullock submitted that public nuisance is a tort engaging collective action problems. It often arises where the injury at issue was caused by "very many people in a small amount much like the case before the Court now". Mr Bullock submitted that it was important to recall that a public nuisance is established by a defendant's material contribution to a state of affairs that amounts toan unreasonable interference with a public right or with the comfort or convenience ofa class of subjects. The relevant causal question is whether the defendant contributedto that rights-interfering state of affairs. A plaintiff does not need to prove that they were harmed by the defendant directly. All a plaintiff must establish is that they suffered a particular injury from the state of affairs to which the defendant contributed. Asked where this approach left the de minimis principle,[188] Mr Bullock submitted thatonly unreasonable users commit public nuisances.

[118] The Court of Appeal had acknowledged that there were a number of English cases standing for the proposition that a defendant will not be exempted from liabilityon the grounds that they were simply one of many causing a nuisance. That would beso even if the defendant's actions in isolation would not amount to a nuisance or of itself cause any harm—the nuisance consisting "in the aggregation".[189] The Court of Appeal accepted those principles could be part of New Zealand law, albeit they had not been explicitly endorsed.

[119] But Mr Bullock submitted that the Court of Appeal then erred in distinguishingthose cases on the basis thatthey involved a finite number of known contributors to the harm, all of whom were before the Courts. He submitted that distinction does notbear scrutiny. There are numerous cases where defendants have been found to have caused a public nuisance for discharges into rivers, despite individual householders being the actual contributors of the discharge or the waterways having been polluted

[188] "De minimis", or "de minimis non curat lex", is a legal doctrine that translates as "the law cares not for small things". In the context of tort law, it means that a defendant cannot be said to have caused a harm if their contribution was so small as to be considered trivial: see Todd, above n 126,at [19.2.2].

[189] CA judgment, above n 5, at [90].

by numerous other non-party sources (including other industrial users).[190] Mr Bullocksubmits that it is irrelevant that there are other contributors not before the Court, and that, if the respondents consider others should be put before the Court, it is open to them to join them. He concluded, on this point,

"Mr Smith is entitled to restrain anyone doing him wrong, and he is not required to identify and restrain everyone doing so".

[120] Finally, on relief, counsel for Mr Smith submitted that the injunctions sought are effective and open to the court, the relief sought still enables policy questions to be left to the policy-makers, and declaratory relief is important even if an injunction is not granted.

[121] Ultimately, Mr Bullock submitted that policy concerns have never been a reason to deny a plaintiff recourse to the courts where public nuisance is alleged. The courts have long used the tort to address complex, polycentric and regulation-laden problems. The proper approach is to identify whether the plaintiff has been wronged and to grant relief. Policy implications can be tackled by the executive and the legislature. Injunctive relief might be suspended in anticipation of such action. But that is a matter for the trial judge.

(b) For the respondents

[122] We start by noting that, at a broad level, counsel for the respondents, led by Mr Kalderimis, submitted that the Court ought not to engage in a judicial response to climate change, because it is not equipped to design or implement one. The problem is polycentric and political; there are a broad range of interests and trade-offs at issue; and complex scientific and economic judgements are required.[191] They submit that

[190] Mr Bullock cited, for example, Attorney-General v Leeds Corp (1870) LR 5 Ch App 583 (Court of Appeal in Chancery); Attorney-General v Colney Hatch Lunatic Asylum (1868) LR 4 Ch App 146 (Court of Appeal in Chancery); Rex v Neil (1826) 2 Car & P 485, 172 ER 219; Woodyear v Schaefer 57 Md 1 (Court of Appeals of Maryland 1881); Blair v Deakin (1887) 57 LT 522 (Ch); Crossley and Sons Ltd v Lightowler (1867) LR 2 Ch App 478 (Court of Appeal in Chancery); The Attorney-General for the Dominion of Canada v Ewen (1895) 3 BCR 468 (BCSC); Thorpe v Brumfitt (1873) LR 8 Ch App 650 (Court of Appeal in Chancery); and Lambton v Mellish (1894) 3 Ch 163 (Ch).

[191] Among other authorities, the respondents refer to the decision of the Federal Court of Australia, Full Court in Minister for Environment v Sharma [2022] FCAFC 35, (2022) 291 FCR 311 at [228] and [253]—a claim in negligence.

Mr Smith's claim is legally incoherent and would damage the integrity of tort law. Tort law is founded, they say, on a relational connection between plaintiff and tortfeasor.[192] Mr Smith's claim, involving no relationship with the respondents, "would do violence to New Zealand's law of obligations". It would abrogate "the relational underpinnings that are fundamental to tort law".[193] They argue that the fact that the appeal is to the courts' rights-protection function, rather than to the executive or legislative branches, should of itself be a warning sign. It is a departure from the common law's "incremental method of development", and an invitation to the judiciary to "rewrite the foundations of tort law, and to step beyond tort law and into the domain of the political branches". They contrast the development of the common law in invasion of privacy in Hosking v Runting,[194] which they say was a "logical development" from United States and British jurisprudence.

[123] Taking the first and second questions together, on the basis that they are related issues, Mr Kalderimis and Mr T D Smith submitted the Court of Appeal was wrong to accept that interests in "public health, property or comfort" are public rights protected by the law of public nuisance, without an identified, independent illegality. The cases involving a public nuisance are said to fall into two categories: (1) those involving a specific established public right, such as to navigation of the highway; and (2) those involving independently unlawful interferences to public health, safety or comfort. The latter also involve public rights, "as the public have a right in common to be free of the effects of unlawful conduct". The cases relied on by Mr Smith were said to involve interference with the use of a public highway or widespread private nuisances, themselves independently unlawful, or cases of public mischief.

[124] On the third question, counsel for the respondents submitted that the special damage rule is a long-es-

tablished requirement and should be retained. Public rights are vested in the Attorney-General, which is a constitutional protection. They submit that although Mr Smith asserts that it is sufficient for him to have suffered an actual injury, that does not constitute special damage if others suffer the same harm, because

[192] Counsel cited MacPherson v Buick Motor Co 217 NY 382 (Court of Appeals of New York 1916) at 385, referred to in M'Alister v Stevenson [1932] AC 562 (HL) (commonly known as Donoghue v Stevenson).

[193] Citing CA judgment, above n 5, at [113].

[194] Hosking v Runting, above n 135, at [117] per Gault P and Blanchard J.

it is insufficiently particular. They submit Mr Smith's pleaded damage is not sufficiently particular or direct; it is no different in kind from damage that will be suffered by many thousands of others—and nor is it significantly different in degree. The respondents submit that if any public rights require vindication here, this should be done by the Attorney-General or through a relator action with the Attorney-General's consent.

[125] On the fourth question, Mr Kalderimis and Mr T D Smith submitted that the core of public nuisance lies where there is a clear analogy with private nuisance.[195] In this context, the requirement for "emanation"—transferral of the nuisance—creates a relational and causal connection between plaintiff and defendant, while enabling identification of a finite class of defendants over which the court could have jurisdiction.[196] Those defendants must have made a direct and serious contribution to the relevant harm. As climate change is a "phenomenon caused by the global combination of all emission activities over decades", the respondents' future net emissions, either individually or collectively, cannot be said to "cause the nuisance".

[126] Counsel for the respondents submitted that the factual and legal analogy between the 19th-century sewage cases and climate change is untenable. Counsel submitted those cases involved an emanation (1) physically traceable to the defendant, reflecting a close analogy with private nuisance or a direct obstruction of a right of way, so that an injunction would remove the emanation or obstruction; and (2) which was either itself a nuisance or substantially aggravated the interference with the plaintiff's rights.

[127] In contrast, the effects of climate change are the products of emissions from millions of sources, located globally, over many decades. The sewage cases involved established private or public rights, discrete and identifiable defendants subject to the courts' jurisdiction, a simple physical connection between the activities of the

[195] Counsel submitted that courts draw heavily on the more frequent private nuisance cases in considering public nuisance cases, citing as authority Spencer, above n 141, at 58; and Law Commission, above n 145, at [3.12].

[196] Counsel emphasised the discussion of emanation by this Court in Wu, above n 165, at [122]–[124] per Elias CJ, McGrath, Glazebrook and Tipping JJ. Counsel also submitted that exceptions to a requirement for emanation were rare and concerned direct obstruction to the use and enjoyment of land.

defendant and the interference with the established rights, and a simple relationship between relief and abatement of the harm. None of these qualities, the respondents say, exist in the case of climate change and public nuisance.

[128] Counsel for the respondents submitted that indeterminacy issues arise by the very vagueness of a "materiality" threshold. The respondents are not responsible for at least 99.8 per cent of global emissions. Harm to Mr Smith will not be avoided if emitters elsewhere are permitted to emit at levels above the reductions said to be essential.[197] They submit there is no principled reason why materiality should be assessed by reference to New Zealand, rather than global, emissions. As Mr Kalderimis put it, none of the respondents are among the world's major emitters, and to capture them,

Mr Smith would need to bring his claim against foreign corporations and state entities.

[129] Relatedly, counsel submitted that public and private nuisance claims do not extend to suppliers of products used to create a nuisance. In the present case those suppliers (and/or producers) are the respondents Z Energy, Channel Infrastructure and BT Mining. In this instance, the alleged nuisance is said to be caused by users of the products, rather than those respondents.[198] The respondents rely on overseas authorities that have struck out public and private nuisance claims in such cases.[199]

[130] Finally, on relief, the respondents submitted that the relief sought is contrived, which points to deeper problems with Mr Smith's claim. The fact that, on examination, the claim boils down to essentially symbolic relief indicates that the rights sought to be created are inconsistent with the law of private obligations.

[197] See above at [53].

[198] BT Mining also made the point that the emissions complained of in relation to them occur exclusively overseas and that they did not exist until 2016. Channel Infrastructure argued that it was further removed than the other parties because it is simply a carrier of products.

[199] Counsel cited, among other things, Budden v BP Oil Ltd (1980) 124 SJ 376 (CA); Hoffman v Monsanto Canada Inc 2005 SKQB 225, (2005) 15 CELR (3d) 42 (affirmed in 2007 SKCA 47, (2007) 283 DLR (4th) 190, and leave to appeal refused in [2007] SCCA 347); and Re Syngenta AG Mir 162 Corn Litigation 131 F Supp 3d 1177 (D Kan 2015).

(c) For the interveners

[131] On behalf of Lawyers for Climate Action, Ms Cooper KC submitted that Mr Smith's claims are arguable and should therefore go to trial. His claims were said to be based on the "unremarkable proposition" that those causing him harm should be held responsible. Ms Cooper submitted that one of the functions of tort law is to promote efficiency by requiring people to internalise the costs of harms from accidents and pollutants. To that end, holding a polluting factory owner responsible for damage the factory causes to the environment will encourage appropriate steps to be taken to reduce that damage. Absent liability, the factory owner would likely continue to damage the environment because the costs are externalised. There is an argument, it was said, that climate change is a paradigmatic case for tort law to make emitters bear the true costs of their GHG emissions and drive necessary steps to reduce GHG emissions.

[132] Ms Cooper submitted that climate change has much in common with the pollution nuisance cases relied on by Mr Smith, and that his claim falls within the orthodox principles of public nuisance. As to causation, Ms Cooper submitted that this Court should now recognise an alternative approach to causation whereby multiple contributors who factually contribute to a harm bear causal responsibility even if the harm would have occurred without that contributor's particular contribution. Ms Cooper submitted that even if this Court considers that "but for" causation is a requirement of the current law, it should expressly recognise that it is no longer required in cases such as Mr Smith's. Those who materially contribute to environmental harm should be responsible even if the harm would still have been suffered but for their individual contributions.

[133] Finally, on behalf of the Human Rights Commission, Mr Butler first submitted that development of the common law torts is an act done by the judicial branch of government of New Zealand, within the meaning of s 3(a) of the New Zealand Bill of Rights Act 1990 (NZBORA). The courts are therefore required to ensure that those torts are developed in a manner not inconsistent with the rights and freedoms protected by NZBORA. Here, at least the right not to be deprived of life in s 8 and the right of minorities to enjoy their culture in s 20 of NZBORA appeared to be engaged. Second,

Mr Butler submitted that even if s 3(a) is not engaged (or neither of the two rights is directly implicated), as a matter of common law methodology, the courts apply a strong presumption that New Zealand's

domestic law, including the common law of torts, should be compatible with New Zealand's international obligations, including under both international human rights law and the international law of environmental protection. Third, Mr Butler submitted that, in any event, the Court might also have regard to relevant international materials and comparative jurisprudence relating to human-induced climate change, to the extent it assists the Court with its consideration of the present claim, particularly in considering a potential novel duty of care and potential recognition of a new tort.

Our assessment

[134] As noted earlier, we are satisfied that the four questions posed by the Court of Appeal—see at [115] above—are the right questions to address on strike out. But we are not satisfied that the Court reached the right conclusion on each of them. In the end, we consider the standard for strike out of this cause of action—the standard prescribed at [83]–[85] above—is not met. Because the matter must now proceed to trial and may yet return to us with the benefit of evidence and fuller argument, we must express our reasons succinctly. The test for strike out is either met or it is not. Here it is not, and Mr Smith now gets his day in court. Were this a substantive judgment, rather than an interlocutory appeal, we would say more. But we reiterate the point made above at [84]—a refusal to strike out a cause of action is not a commentary on whether or not the claim ultimately will succeed.

(a) The "first question": actionable public rights tenably pleaded

[135] We agree with the Court of Appeal's approach to the first question—whether actionable public rights are tenably pleaded. The Court concluded that a nuisance is public if it (1) affects a class of the public, such as the inhabitants of a local neighbourhood or a representative cross-section of them (the adverse effects need not extend to a public place); and/or (2) infringes rights belonging to the public as such.[200] That analysis drew on the approach taken by the House of Lords in Rimmington—

[200] CA judgment, above n 5, at [67].

which in turn drew on a definition of the "cognate offence" given by Archbold.[201]

Thus expressed, they are alternative formulations.[202]

[136] For present purposes it is sufficient to observe that rights pleaded by Mr Smith—the rights to public health, public safety, public comfort, public convenience and public peace—fall tenably within (or bear sufficient relation to) the particular rights identified in Rimmington as providing foundation for a public nuisance pleading: i.e. public rights to life, health, property or comfort. Similar rights were relied on by our Court of Appeal in Abraham and Williams Ltd.[203]

(b) The "second question": independent illegality not required

[137] We turn now to the second question posed by the Court of Appeal—whether independent illegality is required. It will be recalled that the Court of Appeal concluded that it was not necessary for the act or omission to be in itself a legal wrong separate from the alleged nuisance, and that what mattered was that the act or omission caused common injury. This raises a question of law.

[138] Here English law is less relevant to the analysis, for the tort of public nuisance there arose (as we noted earlier) largely in lockstep with the parallel common law criminal offence. The criminal law of this country has been codified by statute for 130 years, since the Criminal Code Act 1893. We consider that parallel unlawfulness is not a prerequisite in New Zealand, and it may be doubted that it still is in England.[204] Nor is it readily apparent why, as a matter of policy, liability in tort for public nuisance—i.e. a substantial common injury to rights to life, health, property or comfort of the public—should need to be dependent on an alternative underlying illegality. The primary limit noted at [111] above still applies: the defendant's act or omission must substantially and unreasonably interfere with public rights before it is actionable. We agree, therefore, with the Court of Appeal's observation that what really matters is that the act or omission causes common injury. As that Court put it, "the focus as a

[201] Rimmington, above n 140, at [10] and [36] per Lord Bingham and [45] per Lord Rodger. See above at [109].

[202] See Law Commission, above n 145, at [3.36].

[203] Abraham and Williams Ltd, above n 156, at 484 per Gresson J.

[204] Halsbury's Laws of England, above n 185, at [105]; Murphy, above n 146, at 138; and Law Commission, above n 145, at [2.4].

matter of principle is not on the legal character of the act or omission complained of but rather its adverse effect".[205] The tort can stand on its own two feet. Its development in New Zealand does not require the act or omission complained of to be independently unlawful.

(c) The "third question": special damage rule requires reconsideration

[139] We turn now to the special damage rule. Correctly for a strike out, the Court of Appeal said that it was willing to adopt the "most liberal formulation of the special damage rule" and would only look to see whether the pleaded harm was "capable of being viewed as appreciably exceeding that suffered by the general public".[206] However, the Court then took the view that the harm suffered by Mr Smith's interests did not sufficiently exceed the degree of harm to very many other people in New Zealand (or elsewhere in the world) who suffer the same interference, including landowners, other iwi and hap .[207]

[140] The special damage rule is a rule of standing. It is said to come down to a "simple question": whether the damage suffered by the plaintiff is different from that suffered by other members of the community.[208] Its justifications are broadly two: a proposition that relief for common injury should be in the hands of the Crown, and a concern about potential multiplicity of actions.[209] The former is logically connected to the 18th- and 19th-century connections made between the tort and crime of public nuisance, which no longer apply in New Zealand, and the latter concern predates 20th-century developments in class actions and case management. As the authors of Fleming's The Law of Torts suggest, the rationales for the standing rule are not now particularly convincing:[210]

The mere fact that a great number of people have cause to complain is not otherwise recognised as a disqualification from bringing suit; indeed, if the complainants could establish their standing to sue for private nuisance, it would not matter how many there were who shared the same plight. Besides, the requirement ill befits our renewed consciousness for safeguarding the

[205] CA judgment, above n 5, at [72].

[206] At [82].

[207] See above at [119].

[208] Stein v Gonzales (1985) 14 DLR (4th) 263 (BCSC) at 267–277.

[209] See, for example, Fleming, above n 147, at 490.

[210] At 490 (footnote omitted). See also Murphy, above n 146, at 144–147.

environment and the desirability of encouraging private initiative against polluters.

[141] Modern authority suggests a rather more nuanced question than the "simple" question suggested above lies at the heart of the special damage rule. Fleming's The Law of Torts identifies a "clear modern tendency to reject the elusive distinction between difference in kind and in degree, and to allow recovery if the obstruction causes more than mere infringement of a theoretical right which the plaintiff shares with everyone else".[211] A similar point is made by the authors of Fridman's The Law of Torts in Canada:[212]

Although arguments can be made in support of each view [whether differencein kind or in degree is required], [a] liberal approach to the special damage requirement [where a difference in degree suffices] is preferable. This is because it coheres better with the traditional understanding of the requirements of particularity and directness. The particularity requirement is best interpreted as requiring that an individual plaintiff bringing an action forpublic nuisance has suffered some loss over and above the mere interference with his or her rights as a member of the public, and this is captured by a difference in degree or extent rather than by a difference in kind. And the directness requirement, which can be traced back to Ricket v Directors of theMetropolitan Railway Company, is nothing but the requirement that the damages in question must flow from an interference with the plaintiff's exercise of his or her public rights, rather than from an interference with the public rights of somebody else. The directness requirement, in short, is a matter of privity.

[142] As noted, the authoritative requirement for special damage in New Zealand dates back to a 19th-century decision of the Court of Appeal, Mayor of Kaiapoiv Beswick.[213] Even then the Court of Appeal observed that "[t]o reconcile the authorities [on the special damage rule] would be difficult, perhaps impossible".[214] We consider the special damage rule requires reconsideration in a 21st century context, in which the implications of ubiquitous harms such as pollution (including from GHGs) are more evident and better understood, and in which class actions and activejudicial case management have developed and are better able to meet fears of an oppressive multiplicity of actions. In public law, for instance, New Zealand takes a

[211] Fleming, above n 147, at 211.

[212] Erika Chamberlain and Stephen GA Pitel (eds) Fridman's The Law of Torts in Canada (4th ed, Thomson Reuters, Toronto, 2020) at 238 (footnotes omitted) citing Ricket v Metropolitan RailwayCo (1867) LR 2 HL 175 (HL).

[213] Beswick, above n 150, at 207 per Arney CJ. Mr Bullock submitted that it is far from clear that

Beswick remains good law, if it ever was.

[214] At 206 per Arney CJ.

liberal approach to standing in cases involving the public interest.[215] Whether the special damage requirement, if such it be, should remain part of New Zealand law, andwhether it should require difference in kind and/or degree from damage suffered by other members of the community generally, needs review in the context of full evidence and associated argument (including, as we note later, as to the implications of tikanga on such a requirement).[216]

[143] However, regardless of whether the standing rule is revoked, retained or reformed, we consider Mr Smith has a tenable claim to meeting its present requirements because of his pleading of damage to coastal land at Mahinepua C in which he and others he represents claim both a legal interest and distinct tikanga interests. If the interests of many others, whether proprietary or tikanga, are likewiseaffected, that may say more about the gravity of the alleged tort than the propriety of entertaining it. While the effects of human-caused climate change are ubiquitous and grave for humanity, their precise impact is distributed and different. The pleaded effects, including inundation of coastal land and impacts on fishing and cultural interests, go beyond a wholly common interference with public rights.

(d) The "fourth question": sufficient connection, or causation

[144] Finally, we turn to the question of sufficient connection, or causation. The Court of Appeal's conclusion on this issue—which it said presented a fatal obstacle for Mr Smith—is set out at paragraph [121] above.

[145] Ultimately, the Court of Appeal considered that "climate change simply cannotbe appropriately or adequately addressed by common law tort claims". It was, it said,"quintessentially a matter that calls for a sophisticated regulatory response at a nationallevel supported by international co-ordination".[217] It may

indeed be beyond the capacity of the common law to resolve climate change in fact, but we are not presently convinced, at this stage of the proceeding, addressing only strike out, that the common law is incapable of addressing tortious aspects of climate change.

[215] See, for example, Environmental Defence Society Inc v South Pacific Aluminium Ltd (No 3) [1981] 1 NZLR 216 (CA); and Budget Rent-A-Car Ltd v Auckland Regional Authority [1985] 2 NZLR 414 (CA).

[216] At [182] below.

[217] CA judgment, above n 5, at [16].

[146] Climate change was described to us as an existential crisis, and the respondents would have it that its range and diffuse and disparate causes exceed the capacity of the common law for response. The Court of Appeal appeared to share that view. Another assessment, that might arise after the benefit of evidence and a full trial, may be that climate change is different in scale, but a consequence of a continuum of human activities that may or may not remain lawful depending on whether the harm they cause to others is capable of assessment and attribution. It is here beyond question that the respondents are either very substantial emitters of GHGs or are (or have been) very substantial suppliers of fossil fuels that release GHGs when burned by others. Further, as we are dealing with a strike out application, where pleaded facts are assumed to be capable of proof, we have been required to assume for present purposes that the consequence of those emissions attributable to the respondents' activities is harm to the land and other pleaded interests held by Mr Smith.

[147] The common law has not previously grappled with a crisis as all-embracing as climate change. But in the 19th and early 20th centuries it had to deal with another existential crisis, albeit one of lesser scale, when the industrial revolution dramatically enlarged the risk of accidents through the mechanisation of factories, transportation and mining.[218] The law's response was a mixture of the flawed (e.g. the common employment rule restricting claims by employees for injury)[219] and the inspired (e.g. the duty of care based on neighbourhood, expounded by Lord Atkin in Donoghue v Stevenson).[220] Importantly, where the common law's response proved flawed, it was revised by the legislature either enlarging or limiting its reach (e.g. via the Factory Acts, workers' compensation and ultimately in this country by the accident compensation scheme).

[218] See, for example, WR Cornish and G de N Clark Law and Society in England 1750–1950 (Sweet & Maxwell, London, 1989) at 483–541.

[219] See, for example, Ken Oliphant "Tort Law, Risk and Technological Innovation in England" (2014) 59 McGill LJ 819; and Michael Ashley Stein "Victorian Tort Liability for Workplace Injuries" [2008] U Ill L Rev 933. Oliphant observes (at 834, footnotes omitted) that "claims by injured workers ran into an obdurate judiciary that contrived to insulate employers from the costs of workplace accidents through the application of an 'unholy trinity' of defences: contributory negligence (which was then a complete defence), volenti non fit injuria (voluntary acceptance of risk) and common employment. … Essentially, the common employment rule provided that an employer could not be held vicariously liable for tortious injury caused by one employee to another, as every employee is deemed to accept the risk of negligence by a fellow servant."

[220] Donoghue v Stevenson, above n 192.

[148] As a consequence of the long, global industrial revolution, the common law had to deal with new, widespread risk and damage caused by air and water pollution and the escape of biohazards.[221] We note two well-known, mid-19th-century examples.[222] First, Attorney-General v Council of the Borough of Birmingham, in which a wealthy landowner obtained an injunction against the local authority in Birmingham restraining it from discharging the town's sewage into the River Tame, despite the difficulties that might cause the city.[223] Seven years later, in St Helen's Smelting Co v Tipping, the House of Lords held a factory owner liable in private nuisance for noxious discharges from a copper smelting chimney

that diffused over the plaintiff's country estate on the outskirts of the heavily industrialised town ofSt Helens.[224] An injunction was ultimately granted in separate Chancery proceedings.[225] In these activities (sewage disposal and smelting) there is a mix of public and private harm and public and private good, and the common law (revised sometimes by statute) has had to mediate liability for the former. Climate change engages comparable complexities, albeit at a quantum leap scale enlargement.

[149] In the appeal now before us, the Court of Appeal said that:[226]

All of the cases which have invoked this aggregation principle have involveda finite number of known contributors to the harm, all of whom were before the Court. That is no accident. It is a critical factor.

[150] As Mr Bullock submitted, however, there are numerous cases where defendants have been found to have caused public nuisances by discharging into

[221] The efficacy of the common law's response to these harms is often debated: see, for example, Joel Franklin Brenner "Nuisance Law and the Industrial Revolutions" (1974) 3 JLS 403; John PSMcLaren "Nuisance Law and the Industrial Revolution—Some Lessons from Social History" (1983) 3 Oxford Journal of Legal Studies 155; Ben Pontin "Nuisance Law and the Industrial Revolution: A Reinterpretation of Doctrine and Institutional Competence" (2012) 75 MLR 1010; and David Bullock "Public Nuisance and Climate Change: The Common Law's Solutions to the Plaintiff, Defendant and Causation Problems" (2022) 85 MLR 1136 at 1159–1160.

[222] Other examples include Bamford v Turnley (1862) 3 B & S 66, 122 ER 27 (KB); Crossley and Sons Ltd, above n 190; Colney Hatch Lunatic Asylum, above n 190; Leeds Corp, above n 190; Blair, above n 190; Pride of Derby and Derbyshire Angling Association LD v British Celanese LD[1953] Ch 149 (CA); Southport Corp v Esso Petroleum Co Ltd [1954] 2 QB 182 (CA) (reversed on appeal in Esso Petroleum Co Ltd v Southport Corp [1956] AC 216 (HL)); and Halsey v Esso Petroleum Co Ltd [1961] 1 WLR 683 (QB).

[223] Attorney-General v Council of the Borough of Birmingham (1858) 4 K & J 528, 70 ER 220 (Ch) at 225–226.

[224] St Helen's Smelting Co v Tipping (1865) 11 HL Cas 642 (HL).

[225] Ben Pontin Nuisance Law and Environmental Protection: A study of nuisance injunctions in practice (Lawtext Publishing, Oxfordshire, 2013) at 88–94.

[226] CA judgment, above n 5, at [92].

rivers, despite individual householders being the actual contributors to the discharge or the waterways having been polluted by numerous other non-party sources (including other industrial users). As he says, in these cases not all of the contributing polluters were before the court, and nor was it realistic to identify any meaningful finite number of known contributors. It will suffice to refer to four authorities.

[151] In Crossley and Sons Ltd v Lightowler, the plaintiff was a manufacturer claiming that the waters of the River Hebble, on which it depended, had been pollutedby the defendant's dye works upstream.[227] One defence advanced was that the waterhad already been fouled by other manufacturers, so an injunction would be immaterialand would not stop the harm experienced by the plaintiff.[228] An injunction having been issued at first instance, Baron Chelmsford LC said on appeal: "Where there are many existing nuisances, either to the air, or to water, it may be very difficult to traceto its source the injury occasioned by any one of them."[229] The defendant could not "add to the former foul state of the water" and then assert that they "are not to be responsible on account of its previous condition".[230] As the Lord Chancellor noted, that would effectively make the defendant's pollution lawful, so that it might continueeven if the plaintiff succeeded in getting the other polluters to stop.[231] As a matter of evidence, the Court was satisfied that non-parties had not polluted to the extent allegedby the defendant, meaning the defendant was a significant cause, but not necessarily the exclusive cause of the nuisance.[232]

[152] Blair v Deakin was another case of a dye works upstream impacting upon plaintiffs' factories downstream.[233] Opposing an injunction and damages, the defendants argued that its pollution was diluted to the point of being innocuous by the

[227] Crossley and Sons Ltd, above n 190.

[228] At 478.

[229] At 481.

[230] At 481.

[231] At 481–482.

[232] Crossley & Sons Ltd v Lightowler (1866) LR 3 Eq 279 at 289–290 (seemingly unchallenged on appeal).

[233] Blair, above n 190.

time it reached the plaintiffs' intakes, and that the effect experienced by the plaintiffs was caused by other factories along the brook. Granting an injunction, Kay J asked:[234]

… is it the law that, supposing it is impossible to say that any one of those persons pours into this stream foul matter enough by itself to create a nuisance, but that what they all pour in together does create a nuisance, that the plaintiffs cannot sue any one of them? If that were so I suppose a plaintiff who lost that which is his natural right—namely, to have the water of the stream pass in its original pure condition—might lose that right entirely by the combined action of a number of manufacturers above him. They might all laugh at him and say, "You cannot sue any one of us because you cannot prove that what each one of us does would of itself be enough to cause you damage." All I can observe is that, in my opinion, it would be a most unjust law if there were such a law.

[153] In The Attorney-General for the Dominion of Canada v Ewen, the defendant's canning factory was depositing fish waste material into a river to, as the plaintiffs claimed, "the detriment of navigation and the annoyance of the public".[235] The defendant contended the waste material only became a nuisance (if at all) because of a number of other factories doing the same thing. The Supreme Court of British Columbia held, following, among other cases, Blair, that "[everyone] who contributes to a nuisance is liable, if in the aggregate a nuisance is proved".[236]

[154] Finally, in Woodyear v Schaefer the Court of Appeals of Maryland issued an injunction restraining a slaughterhouse from dumping blood products in a river, despite the defence run that many other slaughterhouses were contributors.[237] Relying in part on Crossley, the Court held:[238]

It is no answer to a complaint of nuisance that a great many others are committing similar acts of nuisance upon the stream. Each and every one is liable to a separate action, and to be restrained.

[155] There are several other authorities to the same effect.[239] It is not, therefore, the case that all defendants causing or contributing to a nuisance must be before the court

[234] At 525.

[235] Ewen, above n 190, at 468.

[236] At 471.

[237] Woodyear, above n 190.

[238] At 9 (citations omitted).

[239] See, for example, Leeds Corp, above n 190; and Colney Hatch Lunatic Asylum, above n 190, where the fact there were other contributors did not prevent an injunction being issued. See also,in the private nuisance context, St Helen's Smelting Co, above n 224, where the defendants unsuccessfully submitted that no material damage was done by whatever the defendants might bedoing (such being the district) and that other chimneys were contributory.

(or capable of being so). Further, the waterway cases suggest it is certainly arguable that in the case of public nuisance, a defendant must take responsibility for its contribution to a common interference with public rights; its responsibility should notbe contingent on the absence of co-contribution or be in effect discharged by the equivalent acts of others.[240]

[156] As noted earlier, the respondents submit that an emanation, in the form of a physical, traceable transferral of the nuisance, is required in most public nuisance cases. Mr T D Smith gave the example, in the context of the historic waterway cases,of taking a particle of effluent discharged from a defendant's sewer outlet and tracingit all the way down the waterway to where it interfered with the plaintiff's rights. Whether this is so, or should as a matter of principle remain so, is open to argument. It does not follow that the "but for" causation reasoning that dominates the tort of negligence should serve the same function in the tort of public nuisance.

[157] How the law of torts should respond to cumulative causation in a public nuisance case involving newer technologies and newer harms (GHGs, rather than sewage and other water pollution) is a matter that should not be answered pre-emptively, without evidence and policy analysis exceeding that available on a strike out application. Accordingly, suppliers of fuels producing GHGs—here the fifth, sixth and seventh respondents, who supply retail and commercial customers withfuel products; operate a shipping terminal, storage tanks and a pipeline that carries fuel; and who mine coal principally for export, respectively—should not in our view be eliminated as parties until these difficult but fact- and policy-driven questions havebeen resolved by full trial and (potential) appeal.[241]

[158] In any case, and as we have already said, we must assume for present purposesthat the consequence of those emissions attributable to the respondents' activities is harm to the land and other pleaded interests held by Mr Smith. Likely evidence at trialwill include evidence as to the scientific attribution of climate change to the

[240] See, for example, Jane Stapleton "Unnecessary Causes" (2013) 129 LQR 39 at 60–61 and 64–65; and Jane Stapleton "An 'Extended But-For' Test for the Causal Relation in the Law of Obligations" (2015) 35 Oxford Journal of Legal Studies 697.

[241] See also above at [138].

respondents' activities,[242] bearing in mind that Mr Smith submits that these contributions collectively represent about one-third of New Zealand's total reported GHG emissions, but that New Zealand's GHG emissions are a fractional proportion of the global total and that historic emissions remain substantially contributory. One question that will need to be considered at trial, on the basis of evidence and policy analysis, is whether New Zealand's law of public nuisance should sanction GHG emissions here, given this state of affairs.

[159] It is also the case, as we have already established, that a defendant's actions oromissions must amount to a substantial and unreasonable interference with public rights. Even allowing for the uncertainty noted there as to the impact (if any) of the unreasonableness element, this limit still creates a significant threshold for plaintiffs. Only some emitters will cross it. Patently, ordinary domestic activities involving individuals travelling, warming their houses and cooking food, will not do so and may be de minimis, albeit collective actions of individuals are causative of climate change.As Romer LJ said, there must be "give and take".[243] Such actions, undertaken by individuals, may simply be a part of the price of living in society.

[160] Whether the respondents' actions amount to a substantial and unreasonable interference with public

rights remains a fundamental issue of fact for trial. We do notprejudge that issue here. As just noted, it will depend on evidence, including (as we note shortly) of tikanga, and also analysis of policy factors and consideration of the human rights obligations Mr Butler referred to in his submissions on behalf of the Human Rights Commission. These last-mentioned obligations may be found, it was submitted, in both domestic rights legislation and international instruments such as theInternational Covenant on Civil and Political Rights and the United Nations Declaration on the Rights of Indigenous Peoples.[244] It would be inappropriate to express any view at this stage on the possible merits of the propositions advanced by

[242] For the developing literature on attribution science see, for example, Sophie Marjanac and Lindene Patton "Extreme weather event attribution science and climate change litigation: an essential stepin the causal chain?" (2018) 36 JERL 265; and Michael Burger, Jessica Wentz and Radley Horton "The Law and Science of Climate Change Attribution" (2020) 45 Colum J Envtl L 57.

[243] See above at [111].

[244] International Covenant on Civil and Political Rights 999 UNTS 171 (opened for signature 16 December 1966, entered into force 23 March 1976); and United Nations Declaration on the Rights of Indigenous Peoples GA Res 61/295 (2007).

Mr Butler, except to suggest that these too will be matters with which the court willbe required to grapple, as have courts in other jurisdictions.[245]

[161] Logic and experience suggest the fundamental battleground between the parties lies in this part of the case: causation, substantiality and unreasonableness, and(by association) remedy—to which we now turn.

[162] As to remedy, we acknowledge that Mr Smith may face obstacles in obtaining any remedy requiring cessation (by injunction). But on the other hand, it might also be thought that closer, more conventional examination of causation is commanded bya claim for compensation, requiring attribution of particular loss to a particular actionor omission. A claim for damages is not a feature of this proceeding. Injunctive reliefinvolves a rather different inquiry: if liability for public nuisance is established (including sufficient connection, substantiality and unreasonableness), the question turns to whether such rights-infringing activity may continue at all, and if so, on whatterms.[246] As an equitable remedy involving a substantial measure of discretion in the calibration of remedial impact, a somewhat different approach to connection and causation may be available, as compared to a common law claim for compensatory damages. Nor do we overlook the declaratory remedy sought. The utility of the declaration of inconsistency jurisdiction in public law suggests the court should not dismiss the power of purely declaratory relief in private law. That itself was a motivating factor in the enlargement of remedies created by the Defamation Act 1992.[247]

[245] See, for example, the cases referred to in United Nations Environment Programme Global Climate Litigation Report: 2023 Status Review (2023) at 50–53; and Vereniging Milieudefensie v Royal Dutch Shell plc (District Court, The Hague, C/09/571932, 26 May 2021) (decision under appeal).

[246] As, for example, in Abraham and Williams Ltd, above n 156, where injunctive relief against the public nuisance was suspended for 12 months to permit the operators "to rectify the position" of the stockyard, so as to avert further nuisance to the plaintiff, and with leave to apply to extend further (at 476 per O'Leary).

[247] In Recommendations on the Law on Defamation: Report of the Committee on Defamation (December 1977) (often called the McKay Committee Report), which preceded the current legislation, it was said at [401] that: "Although the court already possesses the power to make a declaratory judgment, it is a discretionary remedy and is so far untried as a remedy for defamation.There is considerable doubt whether a judge would be prepared to grant it. We consider that use of this avenue by plaintiffs who merely sought to clear their name would be encouraged by making specific statutory reference to it as a

remedy for defamation." A draft declaration provision was included in the McKay Committee Report which formed the basis of s 24 of the Defamation Act 1992: at 158.

Concluding observations

[163] As we have said already, real caution is necessary before pre-emptivelydisposing of a claim where seriously arguable non-trivial harm is in issue. The courtsin New Zealand have barely touched (let alone grappled with) the law of public nuisance in the last century.[248] The leading authority in this country—Abraham and Williams Ltd—was delivered by the Court of Appeal almost 75 years ago, and most ofthe case law cited within it was English.[249] The principles governing public nuisance ought not to stand still in the face of massive environmental challenges attributable tohuman economic activity. The common law, where it is not clearly excluded, respondsto challenge and change in a considered way, through trials involving the testing of evidence.

[164] In sum, we do not consider the obstacles are so overwhelming as to meet the standard for strike out stated at [83]–[85] above. The courts must be measured as to the pre-emptive denial of access to justice where it is incontestable that the respondents' actions form a part of a collective activity causing a plaintiff substantialharm. The consequence, therefore, is that they must now submit to argument, and evidence, at trial. In this area, the common law must develop, if at all, in the fertile fields of trial, not on the barren rocks of a strike out application.

What about the remaining causes of action?

[165] Where the primary cause of action is not struck out, the authorities generally discourage striking out any remaining causes of action as a point of principle, unless it can be said they both meet the criteria for striking out and are likely to add materiallyto costs, hearing time and deployment of other court resources.[250]

[248] For a rare excursion see, for example, Coldicutt v Ffowcs-Williams HC Auckland AP 130-SW00, 8 February 2001.

[249] Abraham and Williams Ltd, above n 156.

[250] See, for example, Jull v Little [2012] NZCA 364 (affirming Little v Jull [2012] NZCCLR 3 (HC));Williams and Humbert Ltd v W & H Trade Marks (Jersey) Ltd [1986] AC 368 (HL); Lonrho plc v Fayed [1992] 1 AC 448 (HL); Three Rivers District Council v Governor and Company of the Bank of England (No 3) [2003] 2 AC 1 (HL); Sun Earth Homes PtyLtd v Australian Broadcasting Corp (1990) 98 ALR 101 (FCA); and John Holland Pty Ltd v Maritime Union of Australia [2009] FCA 437.

[166] In this case, there are good reasons to follow that approach. As the pleading itself demonstrates, the same facts are alleged, and are alleged to be relevant, in all three causes of action. Striking out the remaining claims in negligence and the proposed climate system damage tort would be unlikely to produce a material saving in hearing time or other court resources. And, although each cause of action has its own doctrinal underpinning, the deeper questions of necessary relationship, proximity,causation, disproportionality and indeterminacy raise issues common to all. Any added burden the respondents may be required to bear in confronting two additional causes of action will not be significant. Counsel for the respondents did not suggest otherwise.

[167] It follows that it is neither necessary nor appropriate that this Court traverse the remaining claims struck out in the Courts below, and we do not do so.

Can tikanga inform the formulation of tort claims?

[168] Mr Smith claims, in accordance with tikanga, a whakapapa (genealogical) andwhanaungatanga (kinship) connection to the subject whenua (land), wai (fresh water)and moana (sea) in and around Mahinepua C. He claims that the respondents have contributed to climate change effects that are causing ongoing injury to the customary,cultural, historical, spiritual and nutritional values associated with these

places. He alleges that his tikanga-based connection to the subject environment provides a foundation for the claim that the injury to place is also an injury to himself, his wh nau (extended family) and descendants. It is alleged that the respondents must bear some responsibility for these harms.

[169] The Court of Appeal found these matters did not assist in formulating a claim in tort. To the contrary, the Court considered that "controlling climate change through regulatory means [such as the CCRA] is consistent with kaitiakitanga".[251] In other words, legislative regulation was already consistent with the responsibility, according to tikanga, of traditional owners to care for their lands and, implicitly, tort-based controls were not. The Court also commented, in relation to the special damage rule,

[251] CA judgment, above n 5, at [34]. The Court also rejected Mr Smith's argument that striking out his claims would be a breach of the Treaty of Waitangi.

that Mr Smith could not overcome this by "re-pleading or invoking concepts of tikanga".[252]

Submissions

[170] For Mr Smith, Ms Coates submitted that caution should be exercised in striking out claims that involve the application of tikanga to areas of law to which it has not previously been applied. Expert evidence will generally be required. She argued that the essence of Mr Smith's case is not that tikanga M ori creates direct obligations on the parties to this case; rather it is that its principles must inform tort law's development in New Zealand in relation to climate change. There are aspects of tikanga, she submitted, that speak to the existing torts of public nuisance and negligence but, in particular, tikanga principles would assist in framing the proposed climate system damage tort. For example, she argued, tikanga would push against a narrow conception of proximity founded on individualism.

[171] Mr Kalderimis submitted that Mr Smith's generalised references to tikanga principles do not, any more than generalised allusions to values underlying the English common law, salvage Mr Smith's claim. What is missing from Mr Smith's claim is any adequate articulation of how tikanga principles work coherently within the framework and principles of tort law to bridge the gaps to an arguable claim. For example, there is no existing principle of tikanga, he argued, that imposes obligations on one party where they have no relational proximity to the alleged wrongdoer.

[172] On behalf of Te Hunga R ia M ori o Aotearoa, Mr Mahuika submitted that the common law must evolve within the context and needs of New Zealand, of which tikanga forms a part. He submitted that tikanga was clearly relevant to the development of the common law, and to the development of any new tort, although it may also have relevance to the application of the established torts of public nuisance and negligence. Further, assessing the application of tikanga and its precise relevance will require an evidentiary inquiry, and evidence (including tikanga evidence) would be critical at trial. A broad approach, he argued, that accords with principles of tikanga

[252] At [82].

Māori, should be applied to standing, including in respect of public nuisance—that being a reference to the special damage rule in that context.

Our assessment

[173] It is important to keep to the fore that the specific loss pleaded by Mr Smith in this case is in part tikanga-based. Since that form of loss is an essential fact, in addressing this part of the claim the trial court will be required to engage with tikanga. Apart from any more conceptual impact tikanga may be argued to have on the framing of particular causes of action, that engagement will need to consider the potential effect of tikanga on any special damage requirement in public nuisance (if in fact special damage is required) and, with regard to all causes of action, whether tikanga-related harm is a cognisable form of loss.

[174] This is not a new phenomenon. Tikanga has in fact been applied to tort actions as required by the case

and the evidence since the early days of the common law's operation in this country. Two examples will suffice: one concerning pounamu (greenstone) and the other about whales.

[175] In the 1866 case of Reynolds v Tuangau, there was a dispute over title to a pounamu boulder weighing "considerably more than a ton".[253] Mr Reynolds said that he had found it in a West Coast river. He broke the boulder up and had it removed in 16 bags by horse and boat to the mouth of the Taramakau river. The bags were seized by the police at the direction of the local mining warden who considered the pounamu belonged to one Simon Tuangau.

[176] Mr Reynolds sued Mr Tuangau in the Hokitika Supreme Court in trover, detinue and conversion, seeking return of the pounamu. Mr Tuangau contended the pounamu was his according to tikanga as he had worked the boulder and had left his mark on it to render it tapu (restricted) to him alone. Counsel for Mr Reynolds argued that evidence of tikanga was inadmissible "on English territory". Gresson J

[253] "James Reynolds v Simon Tuangau" West Coast Times (New Zealand, 8 August 1866) at 2–3. It was common in the 19th century for newspapers to report court proceedings in detail. A summary of this case is provided in Reynold v Tuangau SC Wellington, 7 August 1866 available at www.wgtn.ac.nz/law/nzlostcases/.

nonetheless admitted independent evidence about tikanga rendering objects tapu to their owner in this way. He directed the jury that this tikanga had been proved for the purpose of their consideration of the case.[254] While the first jury was unable to reach a verdict, a second returned a "special verdict", finding that Mr Tuangau was the "first discoverer" of the pounamu, had worked it, and had not abandoned it by the time Mr Reynolds claimed it. Mr Reynolds' claim was summarily dismissed by a five-judge appellate bench (which included Gresson J).[255]

[177] Better known is the 1910 case of Baldick v Jackson.[256] In that case Stout CJ dismissed an appeal by Mr Baldick and others, who were whalers, against a judgment in the Magistrate's Court in Blenheim in favour of the plaintiff, Mr Jackson, also a whaler. Mr Jackson had filed a plaint note in conversion. He claimed that Mr Baldick and company had converted the carcass of a right whale belonging to him, valued at

£200. In response, the appellants argued that a 14th-century statute affirmed that the King owned all whales, meaning Mr Jackson could not establish a proprietary interest in the whale sufficient to maintain an action in conversion.[257] Stout CJ held that this statute did not apply to the circumstances of the colony of New Zealand because "Maoris … were accustomed to engage in whaling" and such activity was protected by Article Two of the Treaty of Waitangi.[258] Judgment was entered for Mr Jackson.

[178] In more recent times, the common law has re-engaged with tikanga. For example, in 2003, a five-judge bench in the Court of Appeal affirmed that M ori land rights (including in the foreshore and seabed) derived from tikanga were cognisable at common law.[259] Citing extensive authority, the Court found that this had been the position since the common law's arrival in 1840. And in Takamore v Clarke,[260] Trans-Tasman Resources Ltd v Taranaki-Whanganui Conservation Board[261] and

[254] "The Supreme Court" West Coast Times (New Zealand, 11 August 1866) at 5.

[255] See "Court of Appeal" Daily Southern Cross (New Zealand, 9 November 1866) at 6.

[256] Baldick v Jackson (1910) 30 NZLR 343 (SC).

[257] It is unclear whether the statute was enacted in 1322: Statute of the King's Prerogative (Eng) 15 Edw II c 2; or 1324: Statute of the King's Prerogative (Eng) 17 Edw II c 2. But in any event, s 13 provided that "the King shall have" shipwrecks, sturgeons and whales taken in the sea.

[258] Baldick, above n 256, at 344–345. The other ground of appeal, that Mr Jackson had abandoned the whale, also failed.

[259] Attorney-General v Ngati Apa [2003] 3 NZLR 643 (CA).

[260] Takamore v Clarke [2012] NZSC 116, [2013] 2 NZLR 733.

[261] Trans-Tasman Resources Ltd v Taranaki-Whanganui Conservation Board [2021] NZSC 127, [2021] 1 NZLR 801.

Ellis v R (Continuance)[262] this Court considered the relationship between tikanga andthe common law as it operates outside the sphere of customary title.[263] To summarisethe essential conclusions reached, tikanga was the first law of New Zealand, and it willcontinue to influence New Zealand's distinctive common law as appropriate according to the case and to the extent appropriate in the case.[264] The respondents do not challenge these propositions. As noted, their argument is not with the relationship between tikanga and the common law, but with its practical utility in the circumstancesof this case.

[179] So, to return to the starting point, whatever the cause of action, the trial court will need to grapple with the fact that Mr Smith purports to bring proceedings not merely as an alleged proprietor who has suffered loss, but as a kaitiaki acting on behalfof the whenua, wai and moana—distinct entities in their own right.[265] And it must consider some tikanga conceptions of loss that are neither physical nor economic. Inother words, addressing and assessing matters of tikanga simply cannot be avoided.

[180] The analytical methodology outlined in Ellis (Continuance) will assist the court in this respect,[266] but more neither can nor need be said at this early stage since all we have are factual assertions that must be accepted for strike out purposes.Mr Smith's ultimate prospects at trial will depend, in part, on the quality of the evidence, including that in relation to tikanga.

Conclusion

[181] For the above reasons, the appeal is allowed and the appellant's claim is reinstated.

[182] Mr Smith is represented on a pro bono basis and does not seek costs. Whateverthe outcome, he sought that costs lie where they fall in this Court, as they have done

[262] Ellis v R (Continuance) [2022] NZSC 114, [2022] 1 NZLR 239.

[263] Customary title is also known as "native title" in Australia and "aboriginal title" in Canada.

[264] The past and present interface of tikanga and the common law was recently discussed in: Te Aka Matua o te Ture | Law Commission He Poutama (NZLC SP24, 2023).

[265] We note that a proprietary interest in the affected land is not an element of public nuisance: see Kit Barker and others The Law of Torts in Australia (5th ed, Oxford University Press, Melbourne,2012) at 219–220.

[266] See Ellis (Continuance), above n 262, at [121]–[125] per Glazebrook J, [181] per Winkelmann CJand [261]–[273] per Williams J.

in the Courts below, because the proceeding is brought on a public interest basis andhas wider implications beyond the case at hand. We agree.

Result

[183] The appeal is allowed.

[184] The appellant's claim is reinstated.

[185] There is no order as to costs.

Solicitors:

LeeSalmonLong, Auckland for Appellant

Chapman Tripp, Wellington for First, Third and Fifth RespondentsBell Gully, Auckland for Second Respondent

Buddle Findlay, Auckland for Fourth Respondent

MinterEllisonRuddWatts, Auckland for Sixth Respondent MinterEllisonRuddWatts, Wellington for Seventh Respondent

J P Cundy, Auckland for Lawyers for Climate Action NZ Incorporated as Intervener

Kāhui Legal, Wellington and Whāia Legal, Wellington for Te Hunga Rōia Māori o Aotearoa | TheMāori Law Society as Intervener

J S Hancock, Auckland for Human Rights Commission | Te Kāhui Tika Tangata as Intervener

Case 1

Future Generations v. Ministry of the Environment and Others
"Demanda Generaciones Futuras v. Minambiente"
Filing Date: 2018
Reporter Info: 11001 22 03 000 2018 0031900
Status: Decided
Country: Colombia
Court: Supreme court

Please see below for key excerpts from the Supreme Court's decision, selected and translated

by Dejusticia. Obtained from 'Climate ChangeLitigation Database

(https://climatecasechart.com/non-us-case/future-generation-v-ministry-environment-others/)

Luis Armando Tolosa Villabona

Reporting Judge STC4360-2018

Number: 11001-22-03-000-2018-00319-01

(Approved in session on April 4th, 2018)

Bogotá, D.C., fifth of april of twenty eighteen (2018)

Deciding the appeal filed against the sentence on February 12th, 2018, issued by the Civil Chamber Specialized in Land Restitution of the Superior Court of the Judicial District of Bogotá on the tutela established by Andrea Lozano Barragán, Victoria Alexandra Arenas Sánchez, José Daniel and FélixJeffry Rodríguez Peña, among others, against the Presidency of the Republic, the Ministries of Environment and Sustainable Development and Agriculture and Rural Development, the Special Administrative Unit of Natural National Parks, and the Governorships of the Amazon, Caquetá, Guainía, Guaviare, Putumayo and Vaupés, for the "increased deforestation in the Amazon."

1. Background (p.1)

1. The plaintiffs plead for the protection of "supralegal" rights, highlighting those of "enjoying a healthy environment," life, and health, allegedly violated by the accused.

2. They argue as a basis for their claim, in summary, the following:

2.1. As a first measure, they are identified as

"(...) a group of 25 children, adolescents, and young adults… between 7 and 25 years of age, living in cities that are part of the list of cities most at risk due to climate change… [With] a hope to live for 78 years on average (75 years for men and 80 for women) which is why they expect to develop their adult life between 2041-2017 and in their old age from 2071 onwards. In those periods of time, according to the climate change scenarios presented by IDEAM, the average temperature in Colombia is expected to increase by 1.6° C and 2.14°C, respectively (...)"

2.2 They explain that in the Paris Agreement and in Law 1753 of 2015, the government acquired national and international commitments to achieve "...reduction of deforestation and the emission

of greenhouse gases in a context of climate change…" among which, the obligation to "reduce thenet rate of deforestation to zero in the Colombian Amazon by 2020" stands out.

2.3 Despite the foregoing, they report that in the "early Warning Deforestation Bulletin (AT-D) ofthe first semester of 2017," jointly prepared by the Ministry of Environment and Sustainable Development and IDEAM, it was concluded that "...the Amazon is the region with the highest AT-D of the country, with 66.2% of the total…"

Additionally, the "Comprehensive Strategy for Controlling Deforestation and Management of Forests in Colombia," reported that the country lost 178,697 hectares in 2016, that is, that deforestation increased by 44% from the figure reported in 2015…" and, of that number, 70,074 hectares were in the Amazon.

They expose the causes of the phenomenon as "land grabbing (60-65%), illicit crops (20- 22%), illegal extraction of mineral deposits (7-8%), infrastructure, agro-industrial crops, and the illegalextraction of wood(…)"

2.4 They affirm that "deforestation in the Amazon has consequences not only in that region, but also in the ecosystems of the rest" of the national territory, among which they list:

"(...) 1) The negative alteration of the water cycle; 2) the alteration of the soils to capture and absorb water when it rains (and the consequent floods that this generates); 3) changes in the water supplies that reach the páramos1 and that in turn provide water for the cities where the plaintiffs live; and 4) global warming due to carbon dioxide emissions that in non-deforestation conditions are stored in forests (...)"

2.5 According to what is argued, the above is relevant because those convened have not adopted the appropriate measures to deal with this eventuality and, in addition, this has dire consequences for the places of their residence, alternating their living conditions, and cutting off the possibility of "enjoying a healthy environment."

p. 4-5 lists the main arguments and petitions of the tutela, p. 6-9 includes details about the defendants' response, p.9-10 explain the appeal where the plaintiffs argue that a) the tutela is the ideal mechanism for this lawsuit, and b) the deforestation in the Amazon implies an irreparable harm.

14. Daniel M. Galpern, attached an amicus "on behalf of" James E. Hansen, Director of Climate Science, Awareness and Solutions at the Earth Institute at Columbia University (USA), instating that the aforementioned scientist supported the protection:

1 Páramo is a special alpine tundra ecosystem in Colombia

"While we are late in acting with purpose to arrest global warming, the precautionary principle still counsels us to act now to avert calamitous climate change before every last detail is fully known (or fully appreciated). Similarly, while sea level rise and ocean acidification derived from deforestation-induced regional and global warming conflicts with the fundamental rights and interests of the present generation, it will impact and thus violate the rights of future generations more severely still."

"Accordingly, the principle of intergenerational equity compels action without further delay so as not to burden disproportionately young persons and future generations. As well, the principles of solidarity, participation, and the best interest of children counsel consideration of interests retained by persons beyond those wielding present political authority. Considered interests, as well, must not be limited to those within the specific region of this Court's usual jurisdiction. Neither should they be limited to those of the present generation."

2. Consideraciones (p.10)

p. 10-13 discusses procedural details regarding the tutela process. In the first ruling, the District Court argued that the tutela was not an adequate mechanism to file this particular action because of the collective nature of the problem. However, a tutela can be filed as long as it i) shows the connection between the violation of collective and fundamental or individual rights, ii) the person filing the tutela is the person directly affected, iii) the violation of a fundamental right is not hypothetical but fully proved, and iv) the judicial order must be oriented towards restoring individual rights, and not collective ones.

(p. 13)

By virtue of what has been said, it can be preached, that the fundamental rights of life, health, the minimum subsistence, freedom, and human dignity are substantially linked and determined by the environment and the ecosystem. Without a healthy environment, subjects of law and sentient beings in general will not be able to survive, much less protect those rights, for our children or for future generations. Neither can the existence of the family, society or the state itself be guaranteed.

The increasing deterioration of the environment is a serious attack on current and future life and on other fundamental rights; it gradually depletes life and all its related rights. The inability to exercise the fundamental rights to water, to breathe pure air, and to enjoy a healthy environment is making Colombians sick. It also increases the lack of fresh water and decreases the ability to enjoy a dignified life.

Therefore, in this case, the exceptional proceeding of the tutela is sufficiently demonstrated to resolve in depth the problems raised, because the jurisprudential assumptions for this purpose are met, given the connectedness of the environment with fundamental rights.

(...)

p. 15

4. Due to multiple simultaneous causes, derived, connected, or isolated, that negatively impact the ecosystem, environmental issues occupy a prominent place on the international agenda, not only of scientists and researchers, but also of politicians, the common people and, naturally, judges and lawyers. Day to day the news, articles and reports of different tiers presenting the gravity of the planetary conditions are abundant. There is a growing threat to the possibility of existence of human beings.

These imminent dangers are evident in phenomena such as the excessive increase of temperatures, the thawing of the poles, the massive extinction of animal and plant species, the increasingly frequent occurrence of meteorological events and disasters outside margins previously considered normal. There are unusual and unforeseen rainy seasons, permanent droughts, hurricanes or destructive tornadoes, strong and unpredictable tidal waves, draining rivers, increasing disappearance of species, etc.

(...)

p. 16

Humanity is the main actor responsible for this scenario, as its global hegemonic position led to the adoption of an anthropocentric and selfish model, whose characteristic features are harmful to environmental stability, namely: i) the excessive demographic growth; ii) the adoption of a rapid development system guided by consumerism and the current political-economic systems; and iii) the excessive exploitation of natural resources.

(...)

p. 18

We are all obligated to stop exclusively thinking about our self-interest. We must consider the way in which our daily actions and behaviors affect society and nature. In the words of Peces-Barba, we must shift from “private ethics,” focused on private goods, to “public ethics,” understood as the implementationof moral values that aim to achieve a particular notion of social justice.

(...)

5.2 The protection of fundamental rights not only involves the individual, but implicates the “other.” The neighbor is otherness; its essence, the other people that inhabit the planet, also include other animal and plant species. But in addition, this includes the unborn, who also deserve to enjoy the same environmental conditions that we have.

5.3 The environmental rights of future generations are based on the (i) ethical duty of the solidarity of the species and (ii) on the intrinsic value of nature.

(...)

p.20

The first is explained by the fact that natural resources are shared by all inhabitants of Planet Earth, and bytheir descendants or future generations who do not yet have a physical hold of them, but who are tributaries, recipients, and owners of them, even if they, in a contradictory way, are increasingly insufficient and limited. Thus, without an equitable and prudent approach to consumption, the future of humankind may be compromised due to the scarcity of essential life resources. In this way, solidarity and environmentalism are “related until they become the same.

(...)

The second transcends the anthropocentric perspective, and focuses on “ecocentric- anthropic” criteria, which places the human being on par with the environmental ecosystem, whose purpose is to avoid arrogant, dismissive, and irresponsible treatment of the environmental resources, and its entire context, to satisfy materialistic ends, without any protectionist or conservationist respect.

(...)

p. 21

What has been stated then, develops a binding legal relationship regarding the environmental rights of future generations, such as an “omission,” whose impact translates into a limitation to the freedom of action of present generations, while simultaneously implicitly demanding new burdens of environmental commitments, to the extent that they take on the care and stewardship of natural resources and the future world.

p. 22

6. In view of the foregoing, numerous regulations have emerged in the international field, hard and soft law, which constitute a global ecological public order and serves as guiding criteria for national legislation, as to resolve citizen complaints on the destruction of our habitat, in favor of the protection of the subjective rights of people, of present and future generations.

The most relevant legal instruments are the following:

(6.1 discusses the International Covenant on Economic, Social and Cultural Rights, 6.2 discusses the Convention on the Prohibition of Military or Any Other Hostile Use of Environmental Modification Techniques as well as the additional protocol to the Geneva Convention and 6.3 discusses the Stockholm Declaration.)

6.4 The Conference of the United Nations on the Environment and Development held in Rio de Janeiro in

1992: concerted with the objective of "...elaborating strategies and measures to stop and reverse the effects of environmental degradation in the context of the efforts directed to promote a sustainable and environmentally balanced environment, carried out both at the international and national levels…"

6.5 The Framework Convention on Climate Change in Paris 2015: after several unsuccessful attempts to adopt a binding document for the states that consigned the current needs in environmental matters, in Paris-this purpose was achieved, as the countries agreed upon:

"... maintain and promote regional and international cooperation in order to mobilize more vigorous and ambitious action to address the climate, by all parties and by non-parties, including civil society, the private sector, financial institutions, cities and other subnational authorities, local communities and indigenous peoples…"

Never before has a tool of this type established binding measures to mitigate climate change, requiring countries to make concrete commitments to reduce pollution and the increase of global temperatures.

7. (Description of 1991 Constitution and its impact on environmental governance)

The Constitutional Court has played an important role with its pronouncements, and has designed a jurisprudential line welcoming the concepts and advances arising on the subject in the international and academic scene.

In this sense, it has analyzed the Constitution's postulates from a "green" perspective, cataloging the Political Charter as an "Ecological Constitution" and elevating the environment to the category of fundamental rights.

(...)

p.3 0

10. The conservation of the Amazon is a national and global obligation, as it is the main environmentalaxis of the planet, and as such has been called the "lung of the world..."

(...)

The international community has generated various commitments to achieve its conservation; the Amazonian Cooperation Treaty (TCA) should be highlighted, as its main objective is the "...promotion of the harmonious development of the Amazon, and the incorporation of its territories to the respective national economies, which is fundamental for maintaining the balance between economic growth and environmental preservation…"

Likewise, in the aforementioned Framework Convention on Climate Change in Paris of 2015, where Colombia, among other responsibilities, agreed to reducing "deforestation in the Colombian Amazon"

and with this purpose promoted the "Sustainable Colombia Initiative" and the "Vision Amazon" Fund, forwhich the following pillars were agreed upon (….)

(...)

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The factors reviewed directly generate deforestation in the Amazon, causing short, medium, and long termimminent and serious damage to the children, adolescents and adults who filed this lawsuit, and in general,all inhabitants of the national territory, including both present and future generations, as it leads to rampant emissions of carbon dioxide (CO2) into the atmosphere, producing the greenhouse gas effect, which in turn transforms and fragments ecosystems, altering water sources and the water supply for population centers and land degradation.

To this we must add the threat that deforestation brings to the species of flora and fauna native to that region, as highlighted by various reports from expert organizations, where it is specified that about 57% oftree species are in danger, including animals such as the jaguar or the Andean bear, for example.

This previous reality, in contrast with the legal environmental principles of i) precaution; intergenerationalequity; and (iii) solidarity, leads the Court to conclude the following:

11.1 Relative to the first of the aforementioned principles, there is no doubt that there is a risk of damage, given that according to the IDEAM, the increase in GHG emissions resulting from deforestation in the Amazon forest would generate an increase in Colombia's temperature between "0.7 and 1.1 degrees Celsius between 2011 and 2040," while for the period "between 2041 and 2070", the estimates indicate anincrease between "1.4 and 1.7" degrees Celsius, to reach 2.7 degrees Celsius "in the period between 2071and 2100."

Likewise, the mass reduction of the Amazon forest would break the ecosystem connection with the Andes, causing the probable extinction or threat of the subsistence of species inhabiting that corridor, generating "damage in its ecological integrity."

Additionally, according to the IDEAM, GHG emissions due to deforestation would result in two main types of consequences related to rainfall. First, an increase in several regions of the country, a situation that would trigger an increase in water levels and thus, in runoff, spreading polluting agents coming from water. Second, a deficit in other departments, causing a reduction in the water supply, as well as prolonged droughts.

The irreversibility of the damage and the scientific certainty, both additional components of the precautionary principle, are also evident since the GHG emitted from deforestation, constitutes 36% of the forestry sector, rapidly becoming an uncontrollable component of CO2 emissions; information supported, in detail, by the studies conducted by the IDEAM, the Ministry of Foreign Affairs, the Ministry of Environment and Sustainable Development, the UNDP, and many others.

11.2 In terms of intergenerational equity, the transgression is obvious, as the forecast of temperature increase is 1.6 degrees in 2041 and 2.14 in 2071; future generations, including children who brought this action, will be directly affected, unless we presently reduce the deforestation rate to zero.

11.3 The principle of solidarity, for the specific case, is determined by the duty and co- responsibility of the Colombian state to stop the causes of the GHG emissions from the abrupt forest reduction in the Amazon; thus, it is imperative to adopt immediate mitigation measures, and to protect the right to environmental welfare, both of the plaintiffs, and to the other people who inhabit and share the Amazonian territory, not only nationals, but foreigners, together with all inhabitants of the globe, including ecosystems and living beings.

11.3 The previous reality, in addition to transgressing the regulations pertaining to the Environmental Charter of the country, and the international instruments that make up the global ecological public order, constitutes a serious ignorance of the obligations acquired by the State in the Framework Convention on Climate Change of Paris 2015, where Colombia, among other commitments, undertook an agreement to reduce the "deforestation in the Colombian Amazon," with the objective of reducing deforestation to zero in that region by 2020, as achieving it, according to the Ministry of Environment and Sustainable Development, would ensure that "...44 megatons of greenhouse gases would not enter the atmosphere and 100,000 hectares of agriculture in areas of high deforestation would be more friendly to the environment…"

It is up to the authorities to respond effectively to the specific questions of the problem, among which, it isimportant to highlight the urgent need to adopt mitigation and corrective measures for

i) the excessive expansion of illicit crops and illegal mining that unreasonably destroy the Amazonian forest; ii) fill the void left by the FARC and paramilitaries to make an active state presence in favor of the conservation of Amazonian territories that in the context of armed conflict were conquered by insurgent groups, merciless predators, irrational colonizers, and generally, people and organizations outside the law; iii) prevent and mitigate the growing fires, deforestation, and unreasonable expansion of the agricultural frontier; iv) the lack of prevention of the consequences inherent to constructing roads, granting titles to property and mining

concessions; v) the expansion of large-scale agroindustrial and livestock farming; vi) the preservation of this ecosystem due to its importance in regulating the global climate; vii) the lack of scientific calculations of the release of tons of carbon through burning and the loss of biomass, which constitutes the vegetation cover; and viii) to confront climate change due to the destruction of the Amazonrainforest in the national territory.

12. Therefore, the excessive intensification of this problem is evident, showing the ineffectiveness of governmental measures adopted to confront this, and, from that perspective, granting the protection for thebreach of fundamental guarantees to water, air, a dignified life, health, among others in connection with the environment.

(...)

13. It is clear that despite several international commitments, legislation, and jurisprudence on the subject,the Colombian State has not efficiently tackled the problem of deforestation in the Amazon.

(….)

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In this way, the aforementioned environmental authorities are not fulfilling their duty to evaluate, control, and monitor natural resources, nor to impose and implement sanctions in the case that there is a violation of environmental protection norms in their jurisdiction, despite being able to request help from other national and local agencies in order to protect natural resources in the case they lack sufficient resources

13.2 (….)The deforestation in natural national parks is proof of the negligence in fulfilling the legal functions assigned to the Natural National Parks of Colombia (...)

(Further discusses the negligence of municipalities in the Amazon)

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14. Therefore, in order to protect this ecosystem vital for our global future, just as the Constitutional Court declared the Atrato river, the Colombian Amazon is recognized as a "subject of rights," entitled to protection, conservation, maintenance and restoration led by the State and the territorial agencies.

Consequently, we grant the relief, and order the Presidency of the Republic, the Ministry of Environment and Sustainable Development, and the Ministry of Agriculture and Rural Development, in coordination with the actors of the National Environmental System and the participation of the plaintiffs, the affected communities, and the interested population in general, to formulate a short, medium, and long term action plan within the next four (4) months from today's notice, to counteract the rate of deforestation in the Amazon, tackling climate change impacts.

This plan will aim to mitigate the early deforestation warnings issued by the IDEAM.

Likewise, the Presidency of the Republic, the Ministry of Environment and Sustainable Development, and the Ministry of Agriculture and Rural Development, will be ordered to formulate within the next five months following today's notice, with the active participation of the plaintiffs, the affected communities, scientific organizations or environmental research groups, and the interested population in general, the construction of an "intergenerational pact for the life of the Colombian Amazon - PIVAC" to adopt measures aimed at reducing deforestation to zero and greenhouse gas emissions, and has national, regional, and local implementation strategies of a preventative, mandatory, corrective, and pedagogical nature, directed towards climate change adaptation.

Also, all the municipalities of the Colombian Amazon, within the next five months following today's notice, are compelled to update and implement the Land Management Plans, and when relevant, include

an action plan to reduce deforestation to zero in its territory, which should encompass preventative, mandatory, corrective, and pedagogical measurable strategies, oriented towards climate change adaptation.

The Corporation for the Sustainable Development of the South of the Amazon - Corpoamazonia, the Corporation for the Sustainable Development of the North and the East of the Amazon -CDA, and the Corporation for the Sustainable Development of the Special Management Area La Macarena - Cormacarena will be ordered, within the next five months following today's notice and regarding its jurisdiction, an action plan that counteracts through police, judicial, or administrative measures, the deforestation problems reported by the IDEAM.

In addition, within their duties, the defendants will have to, in the forty-eight hours following the completion of this ruling, increase actions tending to mitigate deforestation while carrying out the modifications contained in the aforementioned mandate. Within the responsibilities assigned, they must urgently present the complaints before the corresponding administrative and judicial entities.

3. DECISION

In merit of the above, the Supreme Court of Justice, in a CIvil Appeals Court, administering justice in the name of the Republic and by authority of the Constitution and the Law,

4. RESOLVES:

FIRST, REVOKE the sentence filed on the date and place mentioned before, and instead, grant the protection requested.

Consequently, it ORDERS that the Presidency of the Republic, the Ministry of Environment and Sustainable Development, and the Ministry of Agriculture and Rural Development, in coordination with the actors of the National Environmental System and the participation of the plaintiffs, the affected communities and interested population in general, to formulate a short, medium, and long term action plan within the next four (4) months from today's notice, to counteract the deforestation rate in the Amazon, tackling climate change impacts.

This plan will aim to mitigate the early deforestation warnings issued by the IDEAM.

Similarly, it ORDERS the Presidency of the Republic, the Ministry of Environment and Sustainable Development, and the Ministry of Agriculture and Rural Development, to formulate in the five (5) following months from today's notice, with the active participation of the plaintiffs, affected communities, scientific organizations or environmental research groups, and interested population in general, the construction of an "intergenerational pact for the life of the Colombian Amazon - PIVAC," to adopt measures aimed at reducing deforestation to zero and greenhouse gas emissions, and has national, regional and local implementation strategies of a preventative, mandatory, corrective, and pedagogical nature, directed towards climate change adaptation.

In the same manner, it ORDERS all municipalities in the Colombian Amazon, within the next five months (5) following today's notice, to update and implement Land Management Plans, and when relevant, include an action plan to reduce deforestation to zero in its territory, which should encompass preventative, mandatory, corrective, and pedagogical measurable strategies, oriented towards climate change adaptation.

Last, it ORDERS the Corporation for the Sustainable Development of the South Amazon - Corpoamazonia, the Corporation for the Sustainable Development of the North and East Amazon

- CDA. and the Corporation for the Sustainable Development for the Special Management Area in the Amazon - Cormacarena, within the next five (5) months following today's notice and regarding its jurisdiction, to create an action plan that counteracts through police, judicial or administrative measures, the deforestation problems reported by the IDEAM.

In addition, within their duties, the defendants will have to, in the forty-eight hours following the completion of this ruling, increase actions tending to mitigate deforestation while carrying out the modifications contained in the aforementioned mandate. Within the responsibilities assigned, they must urgently present the complaints

before the corresponding administrative and judicial entities.

SECOND, Communicate in writing what was decided to those interested and send a file to the Constitutional Court for its eventual review.

NOTIFY AND IMPLEMENT

AROLDO WILSON QUIROZ MONSALVE (President of the Chamber)

MARGARITA CABELLO BLANCO

ALVAROFERNANDOGARCIARESTREPO(issuingminority opinion)

LUIS ALONSO RICO PUERTA (issuing minority opinion)

ARIEL SALAZAR RAMIREZ (issuing minority opinion)

OCTAVIO AUGUSTO TEJEIRO DUQUE

LUIS ARMANDO TOLOSA VILLABONA

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GREENWATCH

1st Floor, Suite F-5, Plot 7 & 9 Second Street,
Industrial Area, P.O. Box 146097 Kampala
GPO, Uganda

+256 39 3236151

environment@greenwatch.or.ug
www.greenwatch.or.ug