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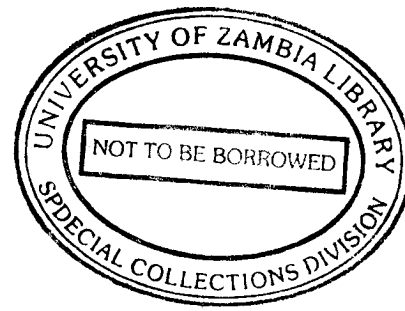
REMEDIES IN ENVIRONMENTAL CASES IN ZAMBIA

BY

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**Being a paper submitted to the University of Zambia, School of Law in partial
fulfilment of the requirements for the award of the degree of Bachelor of Laws.**

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THE UNIVERSITY OF ZAMBIA
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REMEDIES IN ENVIRONMENTAL CASES IN ZAMBIA

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Dated...19.1.07

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DECLARATION

I, KINGSTONE MUSAILA- COMPUTER NO. 21078904 do hereby declare that I am the author of this Directed Research Paper entitled: Remedies in Environmental Cases in Zambia, and confirm that it is my original work. I further declare that due acknowledgment has been given where other scholars' work have been used. I verily believe that this research has not been previously presented in the school for academic purposes.

Student's Signature:.....

Date:..18/01/07.....

DEDICATED

TO

My Mother

(Grace Chikumbi Musaila)

and

My Brothers and Sisters

ACKNOWLEDGMENTS

I thank my Lord and God for sustaining and giving me success throughout my life, without whom I could not have done anything.

Mom, thank you for raising us all under very difficult circumstances. I appreciate all the love and care you continue giving to me.

Sophie, you have always been there for me, given me material, emotional and spiritual support. Thank you for your love.

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PREFACE

This essay has been written in order to provide an insight on the remedies that are available to victims and potential victims of environmental harm. It will advocate for the need to provide effective legal remedies to persons exposed to pollution.

The essay is divided into four chapters. The first Chapter mainly deals with the principles of environmental law. It also looks at the definition of air pollution and its effects on human beings. The nature of environmental rights is also discussed in this Chapter.

The second Chapter deals with relief in environmental cases. The types of action that may be commenced when environmental harm has occurred or is likely to occur are discussed in this chapter. The Chapter also highlights the various issues that affect the grant of remedies in environmental cases.

Locus standi in both domestic and trans-boundary environmental cases is discussed in the third Chapter.

The last Chapter will contain a conclusion of the study as well as recommendations aimed at securing access to effective remedies by victims and potential victims of environmental harm.

CHAPTER ONE

PRINCIPLES OF ENVIRONMENTAL LAW

1.0 Introduction

There is growing awareness in environmental issues in Zambia. In the past few years there has been debate relating to whether the Zambian Bill of Rights should incorporate environmental rights. The Mung'omba Constitution Review Commission had occasion to look at this issue. Apart from having legislation that deals with environmental protection Zambia is a State Party to a number of international instruments that concern the environment such as the United Nations Convention on Climate Change, 1994. The state of the environment affects the quality of life of every nation's population. A polluted environment poses a threat to vegetation, animals and human beings. There is an intricate link between the rights to development, life, health and a clean and healthy environment which necessitates harmonisation between human activity and the natural environment. For this reason calls have been made for the proper utilisation and conservation of the environment.

The definition of air pollution and the effects it has on human beings is discussed in this chapter. The chapter also looks at the nature of environmental rights and the principles of environmental law. The interconnectedness of the principles will also be shown. The principles of environmental law will be dealt with first because the remedies available in this area of law flow from them.

1.1 Air Pollution

The Environmental Protection and Pollution Control Act (hereinafter called the Act) defines air pollution as a condition of the ambient air arising wholly or partly from the presence of one or more pollutants in the air that endangers the health, safety or welfare of persons or that interferes with the normal enjoyment of life or property or that endangers animal life or that causes damage to plant life or property.¹ Air pollution is also considered to be the addition to the atmosphere of any material which will have a harmful effect to life upon the earth. This material may be a toxic gaseous hydrocarbon with long-lasting effects on an organism ingesting it or perhaps an irritant that may cause similar problems.²

Simply put, air pollution is the release of substances into the air some of which can cause problems for humans, plants and animals.

The health of human beings may be affected by air pollution in a number of ways. Some of the short-term effects of air pollution are irritation to the eyes, nose and throat, and upper respiratory infections such as bronchitis and pneumonia. Other symptoms can include headaches, nausea and allergic reactions. The medical conditions of individuals with asthma and emphysema can also be aggravated by short-term air pollution. For example, four thousand people died in a few days due to the high concentrations of pollution in the great "Smog Disaster" in London in 1952.³

¹ Cap 204 of The Laws of Zambia, Section 35

² R.D. Ross, *Air Pollution and Industry*, Van Nostrand Reinhold Co., New York, 1972, p. 1

³ *What is Air Pollution*: <http://www.lbl.gov/Education>

Long-term health effects can include chronic respiratory disease, lung cancer, heart disease, and even damage to the brain, nerves, liver or kidneys. The lungs of growing children are affected by continual exposure to air pollution which may also aggravate or complicate medical conditions in the elderly.⁴

Therefore, air pollution is a phenomenon that needs urgent attention. It adversely affects the people's quality of life. Whether people will enjoy their rights fully will depend to a large extent on the response to issues related air pollution.

2. Environmental Rights

Apart from first-generation and second-generation rights such as the right to life and the right to work, respectively, there are also third generation rights. The right to a healthy environment is a third generation right.⁵

2.1 Guarantee of the Right to a Clean and Healthy Environment

Human beings have a right to a clean and healthy environment. In this regard Article 24 of the African Charter on Human and Peoples' Rights provides that "All peoples shall have the right to a general satisfactory environment favourable to their development."

Article 12 of the International Covenant on Economic, Social and Cultural Rights (1966) states that the "States Parties to the present Covenant recognise the right of everyone to the enjoyment of the highest standard of physical and mental health." The Covenant places an obligation on States Parties to take steps necessary for the improvement of all aspects of environmental and industrial hygiene.

⁴ Ibid

⁵ C. Anyangwe, *Introduction to Human Rights and International Humanitarian Law*, UNZA Press, Lusaka, 2004. p27

It is unfortunate however that in the Zambian Constitution the State's responsibility to provide a clean and healthy environment is only in Directive Principles of State Policy⁶. Therefore, one cannot seek redress in the Zambian courts on the basis of the Constitutional provisions relating to the right to a clean and healthy environment as Directive Principles of State Policy are not justiciable.⁷

2.2 Nature of Environmental Rights

Human rights, the right to a healthy environment inclusive, are interdependent and indivisible. David Hunter, et al⁸, states that human rights and environmental protection are interdependent, complementary and indivisible.⁹ The exploitation of resources may lead to pollution therefore a balance has to be struck between the enjoyment of economic, social and cultural rights on the one hand and environmental rights on the other. A person cannot claim his or her environmental rights immediately and absolutely. The enjoyment of environmental rights also entails the expenditure of resources. They are therefore costly rights.¹⁰

Environmental rights are both individual and collective. The African Charter¹¹ recognising the collective nature for example states that all peoples have a right to a general satisfactory environment. Article 11 of the Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights recognises the individual nature of environmental rights by providing that "everyone"

⁶Cap 1 of the Laws of Zambia, Article 112

⁷ Ibid Article 111

⁸ *International Environmental Law and Policy*, New York Foundation Press, New York, 1998, p.1308

⁹ p.1308

¹⁰ Supra note 5. pp 24-26

¹¹ Supra p.2

shall have the right to live in a healthy environment. Therefore, an individual who has had his or her environmental rights violated may seek legal redress alone. A group of people may also bring an action for the violation of their collective right to a clean and healthy environment.

3. Principles of environmental Law

Environmental law has been defined as an ensemble of norms, including common or civil law principles, statutes, treaties and administrative regulations designed to ensure or facilitate the rational management of natural resources and human intervention in the management of natural resources for sustainable development.¹²

Up to the late 1960s environmental issues were not considered as important as they are today. However, since the 1970s beginning with the United Nations Stockholm Declaration on the Human Environment, 1972 states have increasingly sought to reduce pollution. This is evident in the large number of international instruments-bilateral and multilateral promulgated in this area of law since the Stockholm Declaration. At national level many states have passed pieces of legislation dealing with the environment. Therefore, a number of principles of environmental law have developed over the past three to four decades.

3.1 The principle of prevention

¹² C.O Okidi, "Reflection on Teaching and Research on Environmental Law in African Universities" (1988) 18 *Journal of Eastern African Research Development*, p 132 (quoted in F, Mudenda, *General Principles of Environmental Law*, Paper presented at LAZ Seminar, Livingstone, 2006, p.2)

States have a duty to prevent air pollution. Usually, this is achieved by the imposition and enforcement of positive duties intended to prevent the occurrence of harm. At the national level, this takes the form of licensing or approval mechanisms, generic prohibitions, and a variety of regulations linked to specific technical norms and standards applicable to dangerous substances or activities.”¹³ Compliance with this principle in Zambia is intended to be achieved by the requirement to acquire a license by any person carrying out activities involving emission of a pollutant that is likely to cause air pollution.¹⁴ Furthermore, the Air Pollution Control (Licensing and Emission Standards) Regulations have been passed which contain emission standards intended to ensure pollution is prevented. This is extremely important for pollution control.¹⁵ The principle of prevention has also led to the requirement that Environmental Impact Assessment be undertaken to ensure environmental consequences are recognised early and taken into account in project design and implementation.¹⁶

At international level- bilateral, regional or global similar preventive schemes involving positive duties, prohibitions, technical norms, and supervisory mechanisms are emerging. Although states are obliged to provide compensation for environmental damage for environmental damage caused beyond their boundaries, greater emphasis is being placed on the preventive norms and control mechanisms.¹⁷

Pollution or environmental harm is intrinsically long lasting and has irreversible detrimental effects upon people and the environment. Therefore prevention is less costly

¹³ *Emerging Principles and Rules for the Prevention and Mitigation of Environmental Harm*: <http://www.unu.edu>

¹⁴ Sections 42 and 43

¹⁵ Findley, R.W and Farber, D.A, *Environmental Law in a Nutshell*, 4th Ed., West Publishing, Minnesota, 1996, p.91

¹⁶ *National Policy on Environment (Final Draft)*, Republic of Zambia, Lusaka, 2005, p.31

¹⁷ Supra note 13

than reparation both in economic and social terms. Consequently, “more importance has been given in international environmental law to the principles of prevention and mitigation than to reparation.”¹⁸ Granted, the principle of liability does have a deterrent effect on environmental harm, but preventive and mitigative measures have an even more direct and effective deterrent effect.¹⁹

3.2 The principle of mitigation

In case pollution occurs persons undertaking or the State in whose jurisdiction the activities giving rise to pollution are carried on should immediately take appropriate measures to control the pollution. By controlling the pollution further damage to the environment is prevented. Therefore, this principle reinforces the principle of prevention. Zambia has incorporated the principle of mitigation in the Act which provides in Section 40(1) that in the case of an emergency involving very hazardous pollutants, the Inspectorate shall take and advise on appropriate measures to be taken for the protection of persons and the environment. In line with the principle the defendant in the case of **Environmental Council of Zambia v. Crushex (Z) Limited 2005 HC/HP/06 (Unreported)** was required upon cessation of quarry activities to clean up the quarry area and remedy any damage caused to the environment and immediate areas. In that case the defendant was held liable for causing dust pollution in the Sihoto Village of Sesheke District due to activities at its quarry. However, the operation of the principle is largely inhibited by Zambia’s lack of technological capacity to destroy pollutants. Where

¹⁸ Supra note 13

¹⁹ Ibid

hazardous reduction technologies do exist, the equipment is either operating below capacity or not working at all. Some industries characterized by the emission of hazardous dust particles do not have functional capturing devices; therefore, they expose their workers to toxic fumes and dusts.²⁰

Furthermore, states that become aware of an emergency situation or other change of circumstances giving rise to an atmospheric interference or significant risk thereof causing or likely to cause harm in an area under the jurisdiction of another State or in an area beyond the limits of national jurisdiction, should immediately take the appropriate measure to control the cause of the emergency situation and immediately notify other States affected or likely to be affected by such an atmospheric interference. The principle of mitigation is important in ensuring the damage resulting from pollution is kept at the lowest possible level.

3.3 The Principle of Limited Territorial Sovereignty and State Responsibility

The fundamental norms and principles of international environmental law are embodied in customary law regarding the use of a state's territory.²¹ The principle of limited territorial sovereignty as expressed in the Roman law maxim "sic utere tuo ut alienum non laedas" means that states cannot use or permit the use of their territories to the detriment of the rights and legitimate interests of other states. In this regard states are responsible for the damage that they cause to other states. The principle of limited territorial sovereignty has been invoked in the trans-frontier pollution context by

²⁰ *Toxic Waste Dumping in Zambia*: <http://www.unsystem.org/ngls>

²¹ *Ibid*

international tribunals such as *Trail Smelter Arbitration*.²² In that case, the United States of America, inter alia, contended that Canada was liable for past losses and obliged to ensure that the injury arising from pollution of air currents by sulphur dioxide fumes from a Canadian smelter built in a valley which was in both Canada and the United States of America should be abated in the future. This contention was upheld. It was stated that under principles of international law no State has the right to use or permit the use of its territory in such a manner allowing harm to another State.

The principle was also incorporated in principle 21 of the Stockholm Declaration on Human Environment:

States have, in accordance with the Charter of the United Nations and the principle of international law, the sovereign right to exploit their own resources pursuant to their own environmental policies, and the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction.

Due to limited state sovereignty states ensure that pollution is prevented. Where pollution occurs states bear the responsibility to mitigate its effects and to compensate those affected by the pollution. This is therefore interconnected to the principles of prevention, mitigation and compensation. And as will be shown below this principle and the principle of informing affected persons are linked.

²² 3 UNRIAA (United Nations, Reports of International Arbitral Awards) 1905, 1038 (1938 and 1941)

3.4 The Principle of Informing Affected Persons

Individuals have the right to know and have access to current information on the state of the environment and natural resources, the right to be consulted and to participate in decision-making on activities likely to have a significant effect on the environment.²³ The principle of informing affected persons has been incorporated in Zambia by placing upon the Environmental Council of Zambia an obligation to “advise on the need for, and embark upon, general educational programmes for the purpose of creating an enlightened public opinion regarding the environment and an awareness of individuals and the public on their role in the protection and improvement of the environment”.²⁴

Anyone embarking upon a project that is likely to have a significant impact on the environment is required to prepare an environmental impact statement and must, prior to the submission of the environmental impact statement to the Council, take all measures necessary to seek the views of the people in the community which will be affected by the project. In seeking the views of the community such person must publicise the intended project, its effects and benefits, in the mass media, in a language understood by the community, for a period of not less than fifteen days and subsequently at regular intervals throughout the process.²⁵

At international level states are required to inform others about any intended actions that may result in pollution to the other states. This helps to prevent disputes from arising in the trans-frontier pollution context between the ‘acting’ state and the ‘affected’ state by providing the affected state with pertinent information of the planned activities of the

²³ Supra note 8

²⁴ S. 6(2)(i) of the Act

²⁵ The Environmental Protection and Pollution Control (Environmental Impact Assessment) Regulations, 1997, Regulation 10

acting state and with chances to reach an amicable solution to the potential problem between them.”²⁶ The requirement to inform other states is evidence that states have limited sovereignty and are responsible to other states for their actions. After being informed states may undertake preventive and mitigative measures to abate the effects of pollution. They may also seek compensation. Compensation on the other hand will be based on the fact that the acting state has limited territorial sovereignty and bears the responsibility to prevent pollution. The interconnectedness of these principles is therefore manifest.

3.5 The Principle of Cooperation in Scientific Research and Systematic Observations

Since pollution knows no boundaries states usually cooperate in scientific research to identify the nature and the extent of the problems. “The principle of cooperation in scientific and in systematic observations is widely used in international instruments for confronting global environmental change.”²⁷ Under the United Nations Framework Convention on Climate Change for example, States Parties have a commitment to

Promote and cooperate in scientific, technological, technical, socio-economic and other research, systematic observation and development of data archives related to the climate system and intended to further the understanding and to reduce or eliminate the remaining uncertainties regarding the causes, effects, magnitude and

²⁶ Supra note 13

²⁷ Ibid

timing of climate change and the economic and social consequences of various response strategies.

Cooperation helps the Contracting parties determine future specific control measures in any particular situation by helping to provide them with increasing scientific knowledge and expertise.²⁸ The Vienna Convention for the Protection of the Ozone Layer is an example. In Article 3 the states Parties agreed, directly or through competent international bodies, to initiate and cooperate in the conduct of research and scientific assessments on such issues as the physical and chemical processes that affect the ozone layer and on alternative substances and technologies. In addition they agreed to promote or establish joint or complementary programmes systematic observations of the state of the ozone layer and other relevant parameters. In recognition of this principle the Act provides that the Environmental Council of Zambia should advise the Government on co-operation between national and international organisations on environmental matters.²⁹ Furthermore, the Environmental Council of Zambia is required to initiate and encourage international co-operation in matters of air pollution, especially with neighbouring countries.³⁰

Cooperation is needed for the principle of informing affected persons to operate properly. It is easy for cooperating states to exchange information on pollution. States may only inform others adequately when they have access to current information on the environment. By cooperation states are also able to prevent and mitigate the effects of pollution through the use of the scientific knowledge that they exchange. This principle is in this regard linked to the principles of prevention and mitigation.

²⁸ Ibid

²⁹ S. 6 (2) (h)

³⁰ S.36(e) of the Act

3.6 The Principle of Liability and Adequate Compensation

Despite putting in place measures to avoid air pollution sometimes it does take place. If the threat of air pollution is real States are required to ensure that potential victims may be able to take protective measures. Due proceedings should then be open to them.³¹

There is a duty upon States to provide for adequate compensation and a forum for environmental damage claims, without discrimination based on the nationality or residence of the claimants.³² Persons causing pollution are required to recompense victims of their pollution causing activities.

This entails the recognition of the right to legal remedies and redress for those "whose health or environment has been or may be seriously affected" by air pollution; all such persons are to be granted by states "equal access, due process and equal treatment in administrative and judicial proceedings"³³ Zambia recognises the principle of compensation. In this regard a "guiding principle of environmental management will be the polluter to pay".³⁴ Victims or potential victims of air pollution may seek a number of legal remedies when they have suffered or are likely to suffer damage from such pollution. In an action for the tort of nuisance the court may grant an injunction or damages. Where one seeks judicial review of a decision or action of a public officer or body that may lead to air pollution, the court may issue an order of certiorari, prohibition or mandamus. The court may also issue a declaration, injunction and/or grant damages to

³¹ Supra note 15

³² Ibid

³³ Weiss E.B (ed)., *Environmental Change and International Law: New Challenges and Dimensions*, UNEP, Tokyo, 1992

³⁴ Supra note 16, p.17

the applicant. In the alternative a victim of pollution may seek the prosecution of anyone causing air pollution. Section 91 of the Act criminalizes pollution by providing that “a person who pollutes the environment ... shall be guilty of an offence and liable upon conviction to a fine not exceeding fifteen thousand penalty units or to imprisonment for a term not exceeding three years or to both.”

The remedies stated above may be said to flow from the principles of environmental law. An injunction restraining a person from causing pollution may be said to be premised on the principle of prevention. The principle of mitigation may be behind the court’s order of mandamus commanding a public body to clean up a polluted area while the grant of damages is premised on the principle of compensation.

The remedies available to victims and potential victims of harm resulting from air pollution will be discussed in the next chapter.

CHAPTER TWO

RELIEF IN ENVIRONMENTAL CASES

Although more emphasis is being placed on preventive norms and operational schemes, compensatory remedies retain their importance, both as deterrent as well as to repair harm once it has occurred. Various mechanisms are used in national legal systems to ensure compliance with safety norms and affirmative obligations. In addition to the threat of civil liability, there exist injunctive tools addressed to individuals, writs to compel action by public officials and public entities, and finally criminal law with its panoply of preventive and punitive instruments.”¹ The source of the remedies in judicial review is Order 53 of the Rules of the Supreme Court which provides that the court may grant an injunction, declaration, certiorari, prohibition, mandamus and damages.² Case law is the source of remedies in nuisance while the Environmental Protection and Pollution Control Act is the source of the remedies in criminal law. It provides in Section 91 that a person guilty of pollution may be imprisoned or fined.

In this chapter the remedies under judicial review will be discussed first due to their potential to prevent pollution at an early stage, that is, before a potential polluter is given a license. Then, the remedies in the law of nuisance will be discussed followed by the remedies available under criminal law.

4. Judicial Review

¹ E.B Weiss (Ed), *Environmental Change and International Law: New Challenges and Dimensions*, United Nations University Press, Tokyo, 1992, p.357

² rules (1) and (3)

written document capable of being removed into the High Court for the purpose of quashing. No public body may lawfully make a decision and take action on it if it is not authorized by law to do so or the act may not be construed as being reasonably incidental to its authorized activities. Certiorari lies where there has been want or excess of jurisdiction, that is, where a body has acted on a matter which it had no power to deal with. In the case of *Bulaya & Ors. v. The Attorney General & Ors.*,⁵ the applicants, inter alia, applied for an order of certiorari to remove into the High Court for the purpose of quashing the decision of the Minister whereby he decided to allow the appeal by a potential polluter against the decision of the ECZ refusing its proposed integrated iron and steel project at Kafue to proceed. But certiorari was not granted as the Minister's decision was held to be intra vires. When a public body is making a decision there must be no bias and both sides must be heard. Error of law on the face of the record also results in the grant of certiorari.⁶

4.2 Prohibition

Prohibition lies to prevent a public body from exceeding its jurisdiction, or infringing the rules of natural justice. It will issue to prohibit future decisions or actions of some public bodies. It does not lie when nothing remains to be done, that is, when the final decision has been given. Prohibition is available to prevent a wrong from being done. It can also be issued as an interim relief. In *Florite Ltd v. Chimambo & Ors.*⁷, the applicant, inter alia applied for an order of prohibition to restrain the second respondent from making any constructions and cutting down trees in a forest as this would cause environmental

⁵ 2005/HP/1113

⁶ D. Keenan, *Smith and Keenan's English Law*, 11th Edn., Pitman Publishing, London, 1995, p. 53

⁷ Appeal No. 85 of 2003

deterioration. However, prohibition did not issue because the second respondent's actions were lawful.

4.3 Mandamus

This order may be issued against any person or body commanding them to carry out some public duty. Mandamus lies where there is a legal right but no specific legal remedy for enforcing it.⁸ For mandamus to issue the public body must have a legal duty to perform what the applicant seeks and the applicant must have requested its performance by the public body, which request was met by a refusal. Refusal may be implied from conduct. The public body's duty must be a positive one such as a duty to carry out an environmental impact study. In the *Chimambo* case the first respondent also sought mandamus against the third respondent directing it to perform its statutory duties under the Act. The Supreme Court however quashed an order of mandamus issued by the High Court on the basis that the action had been commenced by the wrong procedure. Mandamus may only be issued when the public body has the capacity to carry out the duty as the courts will not issue orders that are incapable of being complied with.

4.4 Declaration

A declaration may be asked for by a person aggrieved by a decision of a public body so that the High Court can state the legal position of the parties. Defiance of a declaratory judgment is not contempt of court and there is no method by which it can be enforced.

⁸ Ibid

However, disobedience could result in a later action for an injunction or damages in which the law would already have been decided leaving only the facts to be proved. A declaration that an administrative act was ultra vires will make it void and of no effect. For example, the applicants in the *Bulaya* case sought a declaration that the impugned decision of the Minister was void and of no effect as it was ultra vires. This contention was not upheld by the Court which said the decision was intra vires.

These remedies are complementary. When properly utilized they may prevent environmental harm. The decisions of the ECZ, being a public body, are subject to judicial review. Among other things the ECZ has the responsibility to identify projects or types of projects, plans and policies for which environmental impact assessment are necessary and undertake or request others to undertake such assessments for consideration by the Council, and consider and advise, on all major development projects at an initial stage and monitor trends in the use of natural resources and their impact on the environment.⁹ Failure to carry out its duties may lead to any of the remedies above being issued against the ECZ upon an application for judicial review. The Council must therefore carry out its statutory functions with due diligence to avoid legal action being taken against it. In the case of *Integrity Foundation v. ECZ & Ors.*,¹⁰ for example, the applicant, inter alia, seeks an order of mandamus compelling the ECZ to carry out an Environmental Impact Assessment (EIA) study in the Lower Zambezi National Park and an order of prohibition to restrain the respondents from allowing any further developments to be undertaken in the National Park without the said EIA study.

There are, however, a number of issues that affect the grant of the remedies in judicial

⁹ Section 6 of the Act

¹⁰ 2003/HP/0321. This case is ongoing

review.

4.6 Issues Affecting the Remedies in Judicial Review

Judicial review can only be sought by persons with the requisite locus standi.¹¹

Applications for judicial review must be made expeditiously. If an application for judicial review was not made promptly or within three months of the impugned action as prescribed by Order 53 of the Rules of the Supreme Court the judge may not grant leave to continue an action unless the applicant had a good reason for delay. One also needs to obtain leave to issue the judicial review process. In the case of *Florite Ltd. v. Chimambo & Ors.*,¹² the applicant, inter alia, sought an order of mandamus against the third respondent (ECZ) to perform its statutory duties imposed on it under the Act, namely, to carry out an Environmental Impact Assessment study before allowing the first respondent to undertake a project likely to have adverse effects on the environment. An order of mandamus issued by the High court was quashed by the Supreme Court because no leave was granted by the lower court. This rule of procedure deprives applicants of the remedies in judicial review.

Zambian courts also insist on strict adherence to the rules regarding commencement of an application for judicial review. In the *Chimambo* case the order of mandamus was also quashed because the applicant commenced the action using the wrong process. In the same case the applicant sought review against the second and third respondents which are public bodies. The first respondent, a private entity, applied to be joined to the action. The court refused to grant relief on the basis that judicial review can not be sought against a private entity. This was unfair to the applicant as the first respondent only

¹¹ Locus standi will be discussed in the next chapter

¹² Supra note 6

joined the action and the court could have granted the relief sought against the public bodies, and not the first respondent. It should have considered the circumstances under which the first respondent became a party to the action.

The Minister has wide powers under the Act such as the power to overrule decisions of the ECZ in relation to the grant of a license. Experience has shown that this power may be used regardless of strong scientific evidence in support of the ECZ's refusal to grant a license. In the case of *Bulaya & Ors. v. The Attorney General & Ors.*¹³ the order of certiorari and declaration applied for by the applicants were not granted by the High Court as it was of the view that the Minister's action was *intra vires* and the applicants had failed to show that the decision was unreasonable. This was despite an Environmental Impact Assessment relating to the same project showing that the pollution from the plant would include dusts, carbon monoxide, sulphur dioxide and nitrogen oxides; all these pollutants are dangerous to health and lead to environmental harm. That the plant will be located near human dwellings, schools and a hospital makes it even worse.

The *Bulaya* case shows that the Minister, a politician and not necessarily an expert in environmental law may not be the best person to decide appeals against decisions of the ECZ. The High Court would be better placed to handle such appeals. It must be emphasized, however that the High Court also needs to be conversant with environmental issues to make the best determination.

The ability of persons to obtain relief in judicial review is adversely affected by the foregoing.

5. Nuisance

¹³ Supra note 5

The Act does not have any provisions relating compensation for persons who have or are likely to suffer harm due to pollution. One can not claim compensation for loss resulting from pollution on the basis of the Act. In the case of *National Hotels Development Corporation T/A Fairview and Ibrahim Motala*¹⁴, for example, the plaintiff relied on the common law tort of nuisance to restrain the defendant from making excessive noise. And in *Vortex Refrigeration Company Limited v. Kroupwood Company & Others*¹⁵ the plaintiff seeks to restrain the defendant from producing noxious gas harmful to the environment by an action in nuisance. Victims of pollution therefore have to rely mostly on the common law for redress.

The traditional method of environmental protection is the action in nuisance. Nuisance is that branch of the law of tort most closely concerned with protection of the environment.¹⁶ Nuisance is a common law tort. It is one of the oldest causes of action known to the common law.¹⁷ There are two types of nuisance: Private nuisance may be described as unlawful interference with a person's use or enjoyment of land, or some right over, or in connection with it¹⁸ while public nuisance is a common law offence in which injury, loss or damage is suffered by the local community as a whole rather than by individual victims.¹⁹ A public nuisance is crime while a private nuisance is only a tort. Civil liability in nuisance may result in the grant of damages and/or an injunction to the plaintiff.

¹⁴ SCZ Judgment No. 10 of 2002

¹⁵ 2004/HP/0777

¹⁶ W.V.H Rogers .*Winfield and Jolowicz on Tort*, 16th Edn. London: Sweet &Maxwe112002 p.503

¹⁷ www.wikipedia.org

¹⁸ Supra note 15 at p 508

¹⁹ Ibid

5.1 Injunction

An injunction is an equitable remedy in the form of a court order that either compels or prohibits a party from continuing a particular activity²⁰. Injunctive relief is likely to be given where the threat of harm is imminent or harmful activity is ongoing.²¹ The issue of an injunction is in the discretion of the court and the remedy cannot be demanded as of right. At the core of injunctive relief is the recognition that monetary damages cannot solve all problems.²² An injunction issued at the conclusion of trial upon the merits is called a perpetual injunction; a provisionally issued injunction, that is, until the hearing of the case on the merits is an interim injunction.

On application for an interim injunction the court does not profess to anticipate the final outcome of the action as a condition of the grant.²³ A claimant need not establish a prima facie case but merely that there is a serious question to be tried. The court should then decide whether the balance of convenience lies in favor of granting or refusing interim relief. Next, the court considers all the circumstances of the case, particularly whether damages are likely to be an adequate remedy for the claimant, whether the claimant's undertaking in damages gives the defendant adequate protection if the claimant fails at trial and whether the preservation of the status quo is important enough to demand an injunction.

Whether the harm is irreparable, the practicability of compliance, threat to public and the financial effect on the defendant are also considered. In the case of *Integrity Foundation Zambia Trust Ltd. v ECZ & Ors.*²⁴ the applicant sought an interim injunction to

²⁰ Supra note 16

²¹ D. Shelton & A. Kiss. *Judicial Handbook on Environmental Law*, UNEP, New York, 2005. p.54

²² Supra note 16

²³ *Turnkey Properties v. Lusaka West Ltd. & Ors.* (1984) ZR 8

²⁴ 2003/HP/0321

restrain the ECZ from granting a license or permit without an approved Environmental Impact Assessment study. The Court stated that interim orders are a necessary mechanism in the course of doing justice to conflicting interests by ensuring at the earliest possible time that further damage does not occur. In that case an interim injunction was not granted as the court thought the plaintiff would not suffer irreparable damage if the interim relief sought was refused. However, in the case of *Vortex Refrigeration Company Limited v. Kroupwood Company & Others*²⁵ where the plaintiff, inter alia, seeks an injunction restraining the defendant from producing noxious gas an interim injunction restraining the defendant from producing noxious dust was granted by the High Court as the plaintiff was thought to be likely to suffer irreparable harm if the activities of the defendant continued. A perpetual injunction may be issued when the plaintiff proves that there has been an unlawful interference with his or her use or enjoyment of land, or some right over, or in connection with it in an action for private nuisance. In public nuisance an injunction may be issued upon proof that the defendant caused injury, loss or damage to a community as a whole rather than to individual victims unless such individuals suffered special injury not suffered by the rest of the community. In the case of *Amoco Production Co. v. Village of Gambell, AK*²⁶ the grant of oil and gas leases covering tracts offshore Alaska was in issue. The environmental effects on Alaskan lands allegedly required the use of special procedures designed to protect the interests of Alaskan Natives. No environmental injury was present therefore no injunction was issued. The court however stressed that environmental injury by its nature can seldom be adequately remedied by money damages and is often permanent or at least of long duration. If such injury is

²⁵ This case is ongoing. It is cited to show what the courts consider before granting an interim injunction

²⁶ (S.ct. 1987)

sufficiently likely, therefore, the balance of harms will usually favor the issuance of an injunction. This is what the Zambian courts should follow when deciding whether or not to issue an injunction.

5.2 Damages

Damages are the pecuniary compensation, obtainable by success in an action for a wrong which is a tort, the compensation being in the form of a lump sum awarded at one time, unconditionally and generally.²⁷ When one person causes harm of any kind to another person -whether it is personal injury, damage to property or financial loss- the normal remedy which the law gives... is a right to recover damages.²⁸ The damages in a nuisance action should be such as to compensate for whatever loss results to the plaintiff as a foreseeable consequence of the defendant's wrongful act.²⁹ Where nuisance causes damage to property, the general rule is that the measure of damages is the difference between the money value of the plaintiffs interest in the property before the damage and the money value of his interest after the damage. Loss of profits or other expense consequential on the wrongful act is also recoverable. Where nuisance has caused personal injuries or damage to chattels, damages for those are assessed in the ordinary way.³⁰

Generally, there are three kinds of damages: general damages, special damages and exemplary damages. Special damages are enumerable or quantifiable monetary costs or losses suffered by the plaintiff, or compensation therefore. For example medical costs, costs for repair or replacement of damaged property, lost wages, lost earning potential,

²⁷ H. McGregor, *McGregor on Damages*. 16th Edn. London: Sweet & Maxwell. 1997, p.1.

²⁸ J. Munkman, *Damages for personal Injuries and Death*. 10th Edn. London, Butterworths, 1996

²⁹ Lord Hailsham, *Halsbury's Laws of England* 4th Ed. Vol. 34. Butterworths, London, 1980, Para. 1138

³⁰ Ibid

loss of business, loss of irreplaceable items, loss of support, etc. General damages are items of harm or loss suffered, for which only a subjective value may be attached. Examples of such include personal injury, physical or emotional pain and suffering, loss of companionship, loss of consortium, disfigurement, loss of reputation, loss or impairment of mental or physical capacity, loss of enjoyment of life, etc. Generally, exemplary damages are not awarded in order to compensate the plaintiff but in order to reform or deter the defendant and similar persons from pursuing a course of action such as that which damaged the plaintiff. Exemplary damages are awarded only in special cases where the conduct was egregiously invidious, and over and above the amount of compensatory damages. Great judicial restraint is expected to be exercised in their application.³¹

In the event that air pollution takes place, causing harm to the environment and the plaintiff, he or she may seek damages. In the case of *Vortex Refrigeration Company Limited v. Kroupwood Company & Others*³² the plaintiff seeks damages for injury to its workers and property resulting from the defendant's pollution. An award of damages operates to compensate for the full losses suffered to the environment and the services it provides as well as the expenses that have been incurred due to the environmental harm.³³ In environmental cases an award of damages entails giving of economic value to losses suffered. However not all parts of the environment can easily be valued. Clean air for example does not have market value because it is not openly traded.³⁴ Therefore,

³¹ Supra note 14

³² Supra note 25

³³ Supra note 19 p. 55.

³⁴ "Environmental Jurisprudence, Judgments and Remedies in Environmental Cases": Paper Presented by Hon. Mr. Justice Charles Kajimanga at the Environmental Law Workshop, Siavonga, 2005.

difficulty is faced in ascertaining the measure of damages to be awarded to plaintiffs in environmental cases. However, it has been stated that where the tort itself is of such a nature as to preclude the ascertainment of the amount of damages with certainty it would be a perversion of fundamental principles of justice to deny all relief to the injured person, and thereby relieve the wrongdoer from making any amend for his acts. In such a case, while the damages may not be determined by mere speculation or guess, it will be enough if the evidence shows the extent of damages as a matter as a matter of just and reasonable inference, although the result may be only approximate.³⁵ Scientific evidence is therefore important in environmental cases. "So far as money can do it, the injured person should be put in the same position as he would have been in if he had not sustained the wrong, namely if the tort had not been committed."³⁶

5.2.1 Principles Applied by Zambian Courts in Awarding Damages

According to the case of *Soko v The Attorney General*³⁷ in which the plaintiff sought damages for personal injuries caused by the defendant's servant, the test for measuring in money, the compensation to be accorded a given amount of physical pain or mental suffering should be what the common man in Zambia would regard as a fair sum. The task of measuring human suffering in terms of cash is not an easy one, but the court tries to award fair and adequate compensation. No money can ever fully compensate for serious physical harm and no yardstick exists for measuring in money the compensation to be accorded a given amount of physical pain or mental suffering because the loss is

³⁵ Trail Smelter Arbitration 3 UNRIAA (United Nations, Reports of International Arbitral Awards) 1905, 1938 (1938 and 1941)

³⁶ Supra note 27, Vol. 12, Para. 1129

³⁷ (1989) SCZ Judgment No.2

imponderable in cash. Zambian courts consider it unwise "to follow the very high awards in England. It is necessary to do justice in the individual cases on the merits and to have regard to current money values. Inflation is therefore taken into account. But inflation can be taken into account only up to the date of assessment in the court below. Inflation between the date of trial and the date of appeal is not taken into account."³⁸ This may deprive litigants of substantial amounts of money regard being had to the slow pace of litigation in Zambia and the recurrent fluctuation of the Kwacha. Furthermore, it is not just a matter of multiplying awards by the amount to which the Kwacha has been devalued. Courts also take into account the general cost of living and the real value that will be received.

With regard to awards for general damages, where there is continuing pain and suffering and disability, no definite calculation of damages for pain and suffering can be made over any period and such damages are usually taken into account in a global award. This was held in the case of *Mutale v. Crushed Stone Sales Ltd*³⁹ in which the appellant claimed damages in respect of continuing pain and suffering which he suffered as a result of an accident caused by the defendant. Damages for items of special damage continuing at the date of trial are calculated down to that date and awarded as a separate sum which is referred to as special damages. This is according to the case of *Corrigan v. Tiger Ltd. & Anr*⁴⁰ where the appellant sought special damages arising from injuries suffered by him in an accident caused by the respondent's employee. In so far as it is proved, or may be inferred from what has been proved, that such special damage will continue thereafter, a further sum, which is estimated to be the fair compensation for the prospective loss which will ensue therefrom, is included and merged in the lump sum of damages awarded.⁴¹ In

³⁸ Ibid

³⁹ (1994) SCZ Judgment No. 17

⁴⁰ (1981) ZR 60

⁴¹ Ibid

*Miller v. The Attorney General*⁴² the appellant sustained severe injuries due to the negligence of the defendant's servant. He sought damages for pain and suffering and loss of amenities, future medical expenses and loss of future earnings. It was held that the final award must fully compensate the plaintiff while taking into account all the relevant considerations and reasonable contingencies. In assessing pain, suffering and loss of amenities the adopting of a modest figure should strike a reasonable balance between a too low and a too high figure. In assessing loss of future earnings the degree of disability, age of the plaintiff and tax deductions must be taken into account. Actuarial evidence is important in assessing a plaintiff's financial future.⁴³ By careful application of these rules substantial compensation may granted to victims of pollution.

However, there is inconsistency in the courts' approach to the period for which damages are recoverable. Sometimes courts award damages "since the issue of the writ"⁴⁴. At other times damages are awarded "from the date the cause of action arose". In the case of *Bank of Zambia v Anderson & Anr*⁴⁵ the first respondent was injured in an accident caused by the negligence of the servant of the appellant. It was held that in calculating the amount due the court would, inter alia, take into account the pain and suffering since the date of the accident, that is, the date the cause of action arose. This is the better practice because the grant of damages since the issue of the writ deprives victims of pollution of considerable damages. Therefore, courts should award damages from the date the cause of action arose.

Pollution victims' ability to obtain compensation is further affected by "liabilities

⁴² (1983) ZR 66

⁴³ Ibid

⁴⁴ Supra note 34

⁴⁵ (1993-1994) ZR47

agreements" entered into between the State and potential polluters. For example the Zambian Government (GRZ) agreed with Konkola Copper Mines (KCM) that "GRZ undertakes to and covenants with KCM under this Deed to indemnify and hold harmless KCM against any and all environmental losses suffered or incurred by it....⁴⁶ It is common knowledge that the State usually does not settle or delays in settling its liabilities. But justice delayed is justice denied. Furthermore, a judgment creditor can not execute judgment against the State.⁴⁷ In certain cases this is mitigated by the grant of interest to the judgment creditor. However, as is the case for damages, the courts sometimes grant interest from the date of the writ and not from the date of the cause of action.⁴⁸ Again, this deprives victims of pollution of considerable amounts of interest.

6.0 Criminal Sanctions

Section 91 of the Act criminalizes pollution. It provides that "a person who pollutes the environment shall. . . be guilty of an offence and liable upon conviction to a fine not exceeding fifteen thousand penalty units or to imprisonment for a term not exceeding three years or to both." Although the court will usually enjoin the pollution complained of thereby protecting the victims of pollution from further harm there are only two penalties for the crime of pollution under the Act: imprisonment and payment of a fine.

6.1 Imprisonment

Large-scale pollution is usually caused by large corporations. By their very nature corporations can not be incarcerated. Consequently imprisonment does not apply to corporations. However, where an individual causes environmental harm, he or she may be imprisoned upon conviction.

⁴⁶ Environmental Liabilities Agreement 2000, Clause 3.1

⁴⁷ The State Proceedings Act, Cap 71 of the Laws of Zambia

⁴⁸ Supra note 34

6.2 Fines

Fines are usually the only penalty against corporations. An individual may also be ordered to pay a fine. Fines are however not intended for the victim of pollution. They belong to the State. Unfortunately, the Act does not provide for compensation to the victim of pollution. This position deprives victims of pollution of compensation.

In Kenya the court may in addition to any sentence imposed on the offender order him or her to compensate any third parties affected by the pollution.⁴⁹ This takes helps the victim of pollution avoid the need to bring an action in a civil court for compensation. The Zambian Act should therefore be amended to provide for the compensation of victims of pollution upon the conviction of a polluter.

7.0 Constitutional Protection of the right to a Clean and Healthy Environment

There is need for constitutional protection of environmental rights. In Zambia the State's responsibility to provide a clean and healthy environment is only contained in Directive Principles of State Policy.⁵⁰ Therefore, one can not seek redress in the Zambian courts based on the Constitutional provisions relating to the right to a clean and healthy environment as Directive Principles of State Policy are not justiciable.⁵¹

The claim by Zambian Government that it is unrealistic and utopian to provide for justiciable rights to a clean and healthy environment is unjustifiable. Its fear that the courts will be flooded with frivolous and vexatious environmental actions is unfounded.

Adequate safeguards to prevent such actions exist in the Zambian legal system.

Moreover, the cost of litigation is so high that very few persons are willing to commence

⁴⁹ The Environmental Management & Coordination Act, 1999

⁵⁰ Cap 1 of the Laws of Zambia, Article 112

legal actions. The poor are particularly unwilling to bring actions against polluters which are usually huge corporations that can afford the best legal services to protect their interests. An increase in meritorious environmental cases is in fact needed in Zambia as this branch of the law is still in its infancy in the country.

Zambia should emulate African countries that guarantee environmental rights to persons in their jurisdictions. Every person in Kenya is entitled to a clean and healthy environment.⁵² In South Africa, on the other hand, everyone has the right to an environment that is not harmful to their health or well-being and to have the environment protected for the benefit of present and future generations.⁵³ Human rights guaranteed in constitutions are often capable of immediate enforcement in national courts.⁵⁴ Therefore, guarantee of environmental rights in the Constitution may improve access to environmental justice.

However, victims of pollution may only be granted remedies if they have access to the courts of law. This largely depends on whether they have the necessary standing to bring an action. Locus standi will therefore be discussed in the next chapter.

⁵² Supra note 40, S.3(1)

⁵³ Constitution of the Republic of South Africa, S.24

⁵⁴ F. Mudenda, "Human Rights and Environmental Law", Paper presented at Environmental Law Workshop, Siavonga, 2005, p.11

CHAPTER 3

LOCUS STANDI IN ENVIRONMENTAL CASES

The doctrine of locus standi determines whether a person can bring a competent action before a court of law.¹ In other words, locus standi “relates to the ability of the plaintiff to bring the type of suit he has filed before a court.”² In the absence of standing, the court may not hear the plaintiff’s case. Standing is said to be necessary to discourage busybodies and those who seek publicity through litigation.³ Therefore, it is a general requirement that a party who brings an action must have sufficient interest in the outcome of the case. The plaintiff must have suffered or is likely to suffer some injury which could be traced to the alleged conduct of the defendant.⁴

Locus standi is important because it determines who may obtain relief in the courts of law. Without the requisite standing, one cannot obtain the remedies discussed in the previous chapter. Locus standi will therefore be discussed in this chapter. First, the locus standi required for a person to bring a competent action under nuisance and judicial review will be discussed because these two types of action are the most used in cases involving harm to the environment. The need for reform in the legal regime on locus standi will then be discussed. Lastly, locus standi in cases involving trans-boundary environmental harm will be discussed.

¹ P.K Tunoi, “*Environmental Jurisprudence: Advancing Frontiers of Environmental Law*”, Paper presented at the Sub-Region Train the Trainers Course for the Judiciary, Kenya, 2005, p.5

² Hunter, D., et al, *International Environmental Law and Policy*, New York Foundation Press, New York, 1998, P.1449

³ Supra note 1

⁴ C, Kajimanga “*Environmental Jurisprudence, Judgments and Remedies in Environmental Cases*”: Paper Presented at the Environmental Law Workshop, Siavonga, 2005, p.4

Locus standi is seen as basic to people's right to access to justice. "Access to justice as a procedural right is concerned with that area of the law that deals with the enjoyment of legal claims. It sets out the form of action a claimant may invoke in order to enforce his or her legal rights. Procedures define the regime of rights and duties of value to those that invoke them. They provide for the right for a particular procedure and the obligations to facilitate it."⁵

Access to justice serves as a mechanism for civil society to challenge government actors who fail to follow the rules that govern how the public should be consulted thus enforcing access to information and public participation.⁶ It is also in some cases a way for persons to challenge other private parties or businesses that have failed to comply with the laws.⁷ With regard to environmental justice, Zambia has undertaken to ensure that "effective access to judicial and administrative proceedings including redress and remedy shall be provided."⁸

Whether or not a person has locus standi depends on the nature of the action one has commenced in a court of law. Various branches of the law have different requirements on locus standi. A claimant therefore needs to determine whether he or she has the necessary locus standi before commencing a particular action.

⁵ R. Mwebaza. "Improving Environmental Rights in Uganda": www.ecolex.org

⁶ Ibid

⁷ Ibid

⁸ Principle 10, 1992 UN Conference on Environment and Development

8.1 Nuisance

As stated in the previous chapter nuisance may be either public or private. The type of nuisance determines who has the requisite locus standi to sue when a particular set of facts exist.

8.1.1 Private Nuisance

To sue in private nuisance one must have an interest in the land which is affected by the nuisance. He alone has a lawful claim for private nuisance who has suffered an invasion of some proprietary or other interest in land.⁹ In the case of *National Hotels Development Corporation T/A Fairview and Ibrahim Motala*,¹⁰ the respondent was granted an injunction restraining the appellant from making excessive noise because he had an interest in the land neighbouring the appellant's property. A person who does not have an interest in the land affected by a nuisance does not have the locus standi to sue for private nuisance. This has the effect of depriving victims of pollution of remedies for the injury they have suffered or may suffer.

8.1.2 Public Nuisance

Generally, an action for public nuisance may only be brought by a community at large, having suffered the effects of a nuisance which is usually widespread in its range and

⁹ W.V.H Rogers. *Winfield and Jolowicz on Tort*. 16th Edn. London: Sweet & Maxwell 2002 p.505

¹⁰ SCZ Judgment No. 10 of 2002

indiscriminate in its effects. Therefore, no individual that could not claim to have suffered any damage, loss or inconvenience greater in quality than the others may bring an action unless the whole community joins forces.¹¹ According to the case of *Amos & Ors. v. Shell BP Petroleum Development Co. & Anr.*¹² the only instance where an individual may bring an action is when he or she has suffered special damage. In that case, the plaintiffs sought damages for public nuisance resulting in damage to a creek. It was held that since the creek was a public waterway, its blocking was a public nuisance and no individual could recover damages unless there was proof that he had suffered special damage peculiar to himself from interference with a public right. So long as the public only or some section of it is injured, no civil action can be brought by a private individual for public nuisance.¹³ “The requirement that an individual needs to prove peculiar damage...makes it difficult for complainants to have remedies in courts, for it may not be easy to prove peculiar damage especially in cases of nuisance.”¹⁴

8.2 Judicial Review

Standing in judicial review proceedings is governed by the rule that the applicant must have sufficient interest in the matter to which the application relates. Order 53, rule 3(7) of the Rules of the Supreme Court provides that the Court shall not grant leave unless it considers that the applicant has sufficient interest in the matter to which the application relates. An applicant who has a direct personal interest in the matter to which the

¹¹ M.P Sekoai. *Procedural Issues in Environmental Cases*: www.ecolex.org

¹²PHC/45/1972

¹³ Supra note 9, p.506

¹⁴ Supra note 11 p.5

application relates will very likely be considered as having sufficient interest. One who does not have such interest on the other hand is unlikely to have the requisite locus standi to seek judicial review. This position is undesirable.

8.3 Constitutional Provisions

The Zambian Constitution has a narrow normative range. "There is no mention of third generation rights such as minority rights, right to peace, right to development, the right to a healthy environment, and the right to self determination...."¹⁵ Even the rights that are protected are subject to qualifications. It also has restrictive provisions relating to locus standi. Article 28 of the Constitution provides that a person who alleges that any of the provisions of Articles 11 to 26 has been, is being or is likely to be contravened in relation to him may apply to the High Court for redress. By this Article, only firmly interested persons may sue for human rights violations.

9.0 The Need for a Liberal and Wide Doctrine of Locus Standi

A strict doctrine of locus standi is still applied in Zambia. This position is reflective of a passed era in which private law dominated the legal system. The doctrine needs to be liberally and widely construed today as public law has now gained prominence. Zambia must move away from the traditional common law doctrine of locus standi which requires that a party who brings an action must have sufficient interest in the matter which is before the court.

¹⁵ C. Anyangwe, *Introduction to Human Rights and International Humanitarian Law*, UNZA Press, Lusaka, 2004, p.201

A number of countries have adopted a liberal and wide doctrine of locus standi. In the Philippines the Supreme Court was called upon, inter alia, to decide whether a group of minors could sue on behalf of generations yet unborn.¹⁶ The minors claimed that the Philippines natural forest was rapidly being depleted at a rate that would lead to the country being deprived of forest resources. They sought orders against the respondents cancelling all existing timber license agreements. It was held that the minors had the right to sue for themselves and on behalf of future generations. The Court stated that it found “no difficulty in ruling that they can, for themselves, for others of their generation and for the succeeding generations file a class suit.” The petitioners had argued that they had a right to a ‘balanced and healthful ecology’. Regarding this contention the Court stated:

The basic rights to a balanced and healthful ecology need not be even written in the constitution for they are assumed to exist from the inception of humankind. Now that they were explicitly mentioned in the fundamental charter, it was because of the well founded fear of its framers that unless the rights to a balanced and healthful ecology and to health were mandated as state policies by the constitution itself, thereby highlighting their continued importance and imposing upon the state a solemn obligation to preserve the first and advance the second, the day would not be too far when all else would be lost not only for the present generation but, also for those to come- generations which stand to inherit nothing but parched earth incapable of sustaining life.

¹⁶ Juan Antonio Oposa v. Secretary of State & Anr. [1993] 33 ILM 173 (1994)

In finding that the petitioners had standi to sue on behalf of future generations the Court relied on the principle of intergenerational responsibility. It said that their personality to sue on behalf of the succeeding generations can only be based on the concept intergenerational responsibility in so far as the right to a balanced and healthful ecology is concerned. The petitioners had a right to sue on behalf of the generations because every generation has a responsibility to the next to reserve the rhythm and harmony of nature for the full enjoyment of a balanced and healthy ecology.

This is indeed a progressive approach as it allows a class action to be brought which is likely to lead to more persons being able to obtain remedies in courts for environmental harm. Class actions should be permitted whereby one or more members of a group or class of persons who have either suffered a similar injury or share a similar cause of action can commence an action. Such actions may help in the enforcement of the right to a healthy environment.¹⁷ The recognition of the right to balanced and healthy ecology is also important in ensuring victims its violation has effective redress. This is because human rights are usually capable of wide interpretation and easy enforcement. In the case of *Lopez Ostra v. Spain*¹⁸ for example, in a town with a heavy concentration of leather industries, the tanneries had a plant for the treatment of liquid and solid waste, and emissions such as gas fumes, repetitive noise and strong smells from that plant caused serious health problems to a family that lived twelve metres away it was held that the family's right to respect of their home was violated. This was a wide interpretation of the right to privacy.

¹⁷ D. Shelton and A. Kiss, *Judicial Handbook on Environmental Law*, UNEP, New York, 2005, p. 44

¹⁸ 9 December, 1994: (1994) 20 EHRR 277.

The Philippine Supreme Court's recognition of the right to a balanced and healthy ecology as existing regardless of whether it is written in a constitution is extremely important for its enforcement. It should encourage courts in countries like Zambia where the Bill of Rights does not guarantee the right to a clean and healthy environment to desist from practicing a policy of avoidance of a matter on the ground of lack of locus standi or non-provision of the right in the Bill of Rights as the basis for refusing to grant redress to victims of environmental harm. Vigorous activism, and not excessive restraint and legalism, is needed on the part of the courts to enforce human rights.¹⁹ But to be certain of the effective protection of the right to a clean and healthy environment, the Zambian Bill of Rights must be amended to include this right.

Uganda is another country that has made progress in this area. Article 39 of the Constitution of the Republic of Uganda provides that every person has a right to a healthy environment. Furthermore, any "person who claims that a fundamental right or freedom guaranteed under the Constitution has been infringed or threatened is entitled to apply to a competent court for redress which may include compensation. Any person or organisation may bring an action against the violation of another person's or group's human rights."²⁰ These provisions are clearly liberal regarding locus standi. They have further been reinforced by the Ugandan National Environment Statute which provides in Section 72 that "...the court may, in any proceedings brought by any person, issue an environmental restoration order....It is not necessary for the plaintiff...to show he has a

¹⁹ Supra note 15, p. 212

²⁰ Article 50

right or interest in the property in the environment or land alleged to have been harmed.”

This provision has been held by the High Court of Uganda to give locus standi for class action and public interest litigation in environmental matters. It has also been held that this section removes once and for all restrictions on standing to sue that require a plaintiff to show a right or interest in order to sustain an action in law.²¹

The provisions in Ugandan law on locus standi show that the country has departed from the traditional restrictive doctrine of locus standi. A similar regime is needed in Zambia to foster environmental justice. Allowing class actions and public interest litigation will allow persons with the ability to bring actions in court to do so on behalf of those who cannot. Many Zambians are poor and may not be able to sue for environmental harm. It is therefore, necessary that persons and organisations that are able to sue on their behalf be allowed to do so. This will ensure access to justice for persons who suffer due to pollution. Where access to justice enabling persons to seek legal redress for environmental harm is guaranteed they will be better able to challenge government actors and other private parties who fail to follow or comply with the provisions of the law. It can therefore be said that a liberal and wide construction of locus standi will in fact enable people and organisations to assist government in the enforcement of laws and in ensuring respect for environmental rights.²²

²¹ Supra note 5

²² Ibid

94 Locus Standi in Trans-boundary Air Pollution

Borders do not limit pollution. Environmental harm may therefore occur in a country other than the one from which the pollution originates. Where such harm takes place, the country of origin should grant equal access to national remedies to all persons affected by the pollution. This entails affording equivalent treatment in the country of origin for trans-boundary and domestic victims of pollution, or those likely to be affected.²³ It is desirable that equal access is granted in the country of origin to avoid problems of service of process on foreign defendants, the reluctance to grant injunctive relief relating to activities in other States and difficulty in securing enforcement or recognition of foreign judgments.²⁴ Although Zambia can grant locus standi to trans-boundary victims of pollution unilaterally, it is desirable in line with the principle of cooperation that it enters into bilateral and multilateral treaties with other countries in the Southern African region granting locus standi in each of the State Parties to victims of pollution.

In East Africa the Memorandum of Understanding between the Republic of Kenya, the United Republic of Tanzania and the Republic of Uganda for Co-operation on Environment Management (MOU) was signed in 1998, inter alia, to grant locus standi to victims of trans-boundary pollution in all State Parties' courts. The member States undertook to develop policies and laws that will grant access, due process and equal treatment in administrative and judicial proceedings for all persons who are or may be affected by environmentally harmful activities in the territory of any partner States.²⁵

²³ Francioni, F. & T. Scovazzi (eds.), *International Responsibility for Environmental Harm*, Graham & Trotman, London, 1991, p.370

²⁴ Ibid p.371

²⁵ Article 16(d)

This article lays the foundation for locus standi...in environmental matters in East Africa because it not only enables the aggrieved party to seek redress in his or her home country but also in any of the partner states....The provisions of the MOU grant rights of access to the nationals or residents of the partner to judicial and administrative establishments to seek remedies for trans-boundary environmental damage.²⁶ The concept of locus standi in East Africa has traditionally been interpreted narrowly to limit access to justice only to the residents of a State in which the violation occurred. Any would-be complainants were also required to have a direct and distinct interest in the matter that was greater than the general public interest. But the MOU goes beyond the conventional confines of locus standi to open up the justice system to all persons within the partner States.²⁷

This is what Zambia and other countries in the southern African region need. By such an agreement both persons resident in Zambia and any other State Party will be guaranteed access to remedies for trans-boundary environmental harm. Granted, Zambia may decide unilaterally to allow trans-boundary pollution victims to have access to its courts but for reciprocity it is necessary for Zambia to enter into agreements with other countries. Such agreements are also evidence of the fact that environmental issues cannot be addressed by countries in isolation but rather in collaboration with others. A move to develop an instrument meant to promote access to national courts for trans-boundary environmental harm will help victims of such pollution to obtain remedies without too many difficulties. It is however important that such instrument be not only signed and ratified by Zambia but also domesticated so that it has the force of law in the national courts.

²⁶ Supra note 5

²⁷ Ibid

CHAPTER FOUR

CONCLUSION AND RECOMMENDATIONS

10.1 Conclusion

The need for environmental protection cannot be overemphasised. The quality of life of every nation's population is affected by the state of the environment. Pollution affects the health of human beings adversely. It may cause heart disease, chronic respiratory disease, lung cancer, and damage to the brain, nerves, liver and kidneys. The rights to life, health development and a clean and healthy environment are interdependent, complementary and indivisible. Growing awareness in environmental issues among peoples and nations has resulted in the development of principles of environmental law aimed at preventing, reducing and mitigating the effects of environmental harm and ensuring persons exposed to pollution receive effective redress. The protection of the environment is necessitated by the fact that everyone has a right to a clean and healthy environment. The principles of environmental law include the principle of prevention, the principle of mitigation, the principle of limited territorial sovereignty and state responsibility, and the principle of informing affected persons. Others are the principle of cooperation in scientific research and systematic observations, the principle of intergenerational equity and the principle of liability and adequate compensation. These principles are interconnected. Therefore, states must take all of them into account to achieve effective protection of the environment.

Despite steps to avoid pollution being taken, it may nonetheless occur. Persons suffering harm due to pollution are entitled to adequate compensation without discrimination based on the nationality or residence of claimants. Polluters must recompense victims of their pollution causing activities. Equal access, due process and equal treatment in administrative and judicial proceedings must be granted by states to all persons whose health or environment has been or is likely to be affected by pollution. Among the legal remedies available to victims and potential victims of pollution are an injunction and damages which are obtainable in both an action for the tort of nuisance and an application for judicial review. The other remedies obtainable in judicial review are certiorari, prohibition, mandamus and declaration. In criminal law a fine or imprisonment may be ordered against a polluter. An injunction is undoubtedly a very important remedy in environmental cases. This is because environmental injury by its nature can seldom be adequately remedied by money damages and is often permanent or long-lasting. By enjoining pollution, an injunction prevents such harm. Damages will however remain indispensable in ensuring that victims of pollution are adequately compensated.

In order to obtain relief, persons suffering or likely to suffer environmental harm should have access to the courts of law. One can only have access to a court of law if one has the requisite locus standi to bring a particular action. Locus standi is necessary to discourage busybodies and those seeking publicity from commencing frivolous and vexatious actions. But every person has the right to access to justice. Access to justice is needed by civil society to ensure that government actors and private parties act according to the law. Therefore, a liberal and wide doctrine of locus standi is needed. It should allow for public

interest litigation and class action. In a country like Zambia where over eighty percent of the population is poor and litigation is expensive, this is only reasonable. Class actions and public interest litigation will allow persons with the ability to conduct litigation to do so on behalf of those who cannot.

10.2 Recommendations

1. Adequate and Effective Compensation

Persons causing pollution must recompense victims of their pollution causing activities. This is in line with the principle of environmental law that the 'polluter must pay.' The government should therefore avoid entering into liabilities agreements which pass the liability of a polluter to it and may have the effect of depriving victims of pollution of remedies. This is due to the fact that a judgment creditor cannot execute a judgment against the State in Zambia and the government is in the habit of delaying to clear or not clearing its debts at all.

2. Damages

Every person that suffers harm as a result of pollution should be entitled to damages. The courts should be consistent in their approach regarding the assessment of the period for which damages are recoverable. They should grant damages from the date the cause of action arose and not from the date the writ was issued as the latter practice may deprive victims of pollution of considerable damages. This approach is also recommended where interest on a judgment debt has to be determined.

3. Injunction

In most cases environmental harm cannot be adequately remedied by money damages. Pollution usually has long-lasting and irreparable effects on the environment. Therefore, where such harm is likely the courts should issue an injunction restraining polluters from causing further pollution.

4. Compensation in Criminal Cases

At present the law requires a civil action to be brought by a victim of pollution against a person criminally liable for pollution in order to be compensated for such polluter's pollution. It is, however, unnecessary and time consuming for a victim of pollution to bring such a civil action since the polluter's liability will already have been determined by a court of law. Therefore, the Act must be amended to provide for the grant of compensation to victims of pollution upon the conviction of a polluter.

5. Provision of Remedies by Legislation

The Act is silent in relation to relief for pollution victims. There is therefore need to amend the Act so that it provides for legal remedies for persons who suffer or are likely to suffer harm due to pollution. It should grant every person the right to a clean and healthy environment. The Constitution should also be amended in order for the Bill of Rights to include the right to a clean and healthy environment. This may improve access to environmental justice as human rights provisions in constitutions are often capable of immediate enforcement in national courts.

5. Need for Activism by Courts

During the period the Constitution will remain without the guarantee of a justiciable right to a clean and healthy environment the courts must practice vigorous activism, and not excessive restraint, to ensure that environmental rights are respected. They should not practice a policy of avoidance of a matter on the ground of lack of locus standi or non-provision of the right in the Bill of Rights as the basis for refusing to grant redress to victims of environmental harm.

7. Review of the Minister's Powers under the Act

The Minister should not have the authority to overrule decisions of the ECZ despite such decisions of the ECZ being supported by scientific evidence. Furthermore, appeals against decisions of the ECZ should lie to the High Court and not to the Minister, then to the High Court if the applicant is not satisfied with the Minister's decision as the case is now. This will help in ensuring that appeals against decisions of the ECZ are determined faster.

8. Training in Environmental Law

Lawyers, magistrates and judges of the High Court and Supreme Court should be conversant with environmental law. Therefore, legal training should incorporate environmental law. In this regard, the School of Law at the University of Zambia should introduce a course in environmental law for undergraduate students of law.

9. Procedural Rules

Zambian courts should give priority to substantive justice. Strict insistence on procedural rules may deny justice to pollution victims. Therefore, if no injustice will be done to the defendant, the courts should not insist on strict rules of procedure such as those regarding commencement of actions.

10. Locus Standi

Zambia must depart from the traditional common law doctrine of locus standi which requires that a party who brings an action must have sufficient interest in the matter before the court. In order to improve access to justice it should adopt a liberal and wide doctrine of locus standi that will allow class actions and public interest litigation. Where trans-boundary environmental harm occurs, victims of such harm should be allowed to obtain redress in Zambia. They should be accorded equal treatment as domestic victims of pollution. In accordance with the principle of cooperation Zambia should also enter into bilateral and multilateral treaties with countries in the Southern African region granting locus standi in each of the State Parties to victims of pollution.

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