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EVALUATION OF THE PUBLIC PARTICIPATION PROCESS IN PROMOTING BETTER ENVIRONMENTAL DECISION-MAKING

By

1680085

Submitted in partial fulfilment of the requirements for the degree of

Master of Laws by Coursework and Research Report

at the University of the Witwatersrand, Johannesburg

Date: 24 February 2023

DECLARATION

I, student number 1680085, declare that this Research Report is my own unaided work. It is submitted in partial fulfillment of the requirements for the degree of Master of Laws (by Coursework and Research Report) at the University of the Witwatersrand, Johannesburg. It has not been submitted before for any degree or examination in this or any other university.

I have submitted my final Research Report through TurnItIn and have attached the report to my submission.

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ABSTRACT

Public participation gives interested and affected parties a chance to engage in environmental governance issues. The NEMA principles state that:

'The participation of all interested and affected parties in environmental governance must be promoted, and all people must have the opportunity to develop the knowledge, skills, and capacities necessary to achieve equitable and effective participation, and participation by vulnerable and disadvantaged persons must be ensured'.

This study assesses the effectiveness of the public participation process in promoting better environmental decision making and analyses South Africa's environmental legislative framework to determine whether the country has good law or if existing law needs to be revised to promote effective public participation. Environmental decisions made by administrators have recently been challenged in court, raising the possibility that these decisions are not always consistent with good environmental governance. Good environmental governance would entail considering the role of each participant who has an impact on the environment, from the state to NGOs, civil society, and the private sector. Achieving good governance will necessitate a collaborative effort, paving the way for long-term development. The case of *Sustaining the Wild Coast* was selected for analysis to demonstrate that the environmental legislative framework appears sufficient to promote effective public participation; however, the challenge lies in the implementation, where the competent authorities and project proponents seems hesitant to genuinely engage with the affected and interested parties. The case also demonstrates that for interested and affected parties to be successful in advancing sustainable projects, they need substantial funding because they will need to gather scientific evidence; without such evidence, their chances of failure are increased. This was demonstrated in the *Border Deep Sea Angling Association* case, which the applicants lost due to a lack of exhaustive scientific evidence. The case of *South Durban Community Environmental Alliance* highlighted the issue of access to administrative and judicial proceedings. If NGOs are penalised with cost orders despite the sincerity of their litigation, the proceedings may prove costly. Poverty-stricken communities will not be able to afford access to legal instruments and this renders public participation ineffective. As a result, sustainable development will not be realised. The study concludes by proposing techniques for improving the effectiveness of the public participation process.

LIST OF ACRONYMS

CBD	Convention on Biological Diversity
EIA	Environmental Impact Assessment
MPRDA	Mineral and Petroleum Resources Development Act
NEMA	National Environmental Management Act
NGO	Non-Governmental Organisation
PAJA	Promotion of Administrative Justice Act
PAIA	Promotion of Access to Information Act
SEMA	Specific Environmental Management Acts
UN	United Nations
UNECE	United Nations Economic Commission for Europe
UNEP	United Nations Environment Programme
UNFCC	United Nations Framework Convention on Climate Change
UNGA	United Nations General Assembly

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1 INTRODUCTION

Public participation is a process in which stakeholders, experts, the state, and business collaborate to make sound decisions than if they had acted individually.[1] As a concept, allowing citizens a voice in government operations has been around for a while. South Africans traditionally hold meetings known as *imbizo*, *lekgotla*, or *bosberaad* to solicit input from the public. African communities can still benefit from these spaces, as they provide a forum for discussing issues that have a direct bearing on their lives. In some ways, the democratic processes in which the public take part are examples of participatory democracy.[2] A comprehensive public participation process can result in improved decisions that may simplify implementation because the decisions will reflect the interests and values of stakeholders and, as a result, foster a greater understanding among stakeholders.[3] Effective public participation depends in part on the developer's willingness and capacity to include communities in decision-making processes. The public must also develop their participation skills for participation to be effective.[4] There is a proven relationship between acceptable environmental governance and environmental rights, and the fulfilment of these rights is a component of good environmental governance.[5] One of the important features for a successful environmental management in our country is good governance[6] and the process of decision-making must be open to public scrutiny if ethical environmental governance and behaviour are to be achieved. [7] The preamble of the National Environmental Management Act (the NEMA) appreciates that law must set up measures and institutions to advance and encourage consultation in environmental governance.[8] Environmental rights are reflected in the principles of environmental management and other sections of the NEMA which are founded on public participation and inclusion.[9] The NEMA

[1]C Muthukarapan 'Public Participation Report' (2021) available at *https://sahris.sahra.org.za/sites/default/files/additionaldocs/1396_PPR_Public%20Review.pdf,* accessed on 10 January 2023.

[2]*Doctors for Life International v Speaker of the National Assembly* 2006 (12) BCLR 1399 (CC) para 101.

[3]S Kandil 'Public Participation Guide: Introduction to Public Participation' *United States Environmental Protection Agency* available at *https:www.epa.gov/international-cooperation/public-participation-guide-introduction-public-participation*, accessed on 21 January 2023.

[4] Ibid.

[5]L Feris 'The role of good environmental governance in the sustainable development of South Africa' (2010) 13 *PELJ* at 3.

[6]W Mngoma, P Pillay & PS Reddy 'Environmental governance at the local government sphere in South Africa' (2011) 4 *African Journal of Public Affairs* at 106 - 7.

[7]*BP Southern Africa (Pty) Ltd v MEC Agriculture, Conservation & Land Affairs* 2004 (5) SA 124 (W) para 11.1.3.

[8]Preamble of Act 107 of 1998.

[9]Ibid.

stipulates that the public participation of interested and affected parties must be encouraged, and that people should be given a chance to grow their skills, capacity, and comprehension as this will enable them to achieve equitable and effective public participation. Communities that are particularly at risk and in need of support should be actively sought out and encouraged to get involved in decision making processes that stand to benefit or adversely impact them.[10] The state holds the environment for the benefit of its people, and environmental resources should be utilised in a manner that serves the public interest. The environment should be protected because it is part of the heritage of the people.[11]

The Environmental Impact Assessment (the EIA) is largely recognised as a significant instrument for promoting sustainable development. It is an integrated system that relies on input from numerous stakeholders, including the public and industry professionals. The EIA, with its preventive features, is now a globally proven method for ensuring that decision makers reduce or eliminate the negative environmental impacts of projects.[12] This process requires procedural fairness, and one of the procedural fairness' central tenets is the observance of the *audi alteram partem* principle, which in the context of environmental law requires that interested and affected parties be given a chance to object to or comment on the activity at the earliest possible phase of the project. The EIA is a process predicated on the importance of public participation, and it cannot achieve its goals without the input of those seemingly to be impacted by the planned project or listed action.[13] Ecological awareness is on the rise, and many people are wary of the dangers posed by a secretive and unresponsive corporate and government culture.[14] The legislature, following the lead of global trends in environmental protection, is giving environmental consultations and public interaction top priority.[15] It should be noted that the EIA procedure includes the right to administrative justice.[16]

[10]Section 2(4) *(f)* of the National Environmental Management Act 107 of 1998.
[11]Section 2(4) *(o)* of Act 107 of 1998.
[12]L Kohn 'The anomaly that is Section 24G of NEMA: An impediment to Sustainable Development' (2012) 19 *SAJELP* at 2.3.
[13]Ibid.
[14]*Company Secretary of Arcelormittal South Africa Ltd v Vaal Environmental Justice Alliance* 2015 (1) SA 515 (SCA) para 1.
[15]A Weaver, J Pope, A Morisson-Saunders & P Lochner 'Contributing to sustainability as an environmental impact assessment practitioner' (2008) 2 *Impact Assessment and Project Appraisal* at 92.
[16]Section 33 Constitution of the Republic of South Africa, 1996.

Participation of the public is regarded as a general legal principle.[17] Despite the fact that governments have accepted the significance of public participation, it is asserted that the application of public participation provisions in national legislation is problematic. In most instances, the legal provisions on public participation are not implemented in decision-making. Moreover, state authorities typically consult those who are expected to be affected late in the decision-making process, after the most crucial steps have already been taken.[18]

This study evaluates the effectiveness of public participation in fostering better environmental decision-making. To achieve this, the study will analyse the South African environmental legal framework and assess if it is able to promote effective public participation. It will also explore the role of good governance in promoting public participation. The study would further investigate the significance of effective public participation by analysing the obstacles that impede its realisation. The concept of participatory democracy and environmental justice are linked to public participation in environmental decision-making. Recently, a global participation upsurge has arisen, and the concept that the governed should be involved in their governance is advancing equally in law and practise.[19] As an additament, this study will also examine international instruments designed to promote public participation in decision-making. This report will in conclusion examine three recent court cases that dealt with issues of public participation. The rationale of selecting these cases is to show that public participation in South Africa remains a challenge in terms of its implementation.

1.1 Research problem and background

Local communities could have their voices heard on public issues or projects that will affect them through public participation. This procedure is deemed essential for many reasons, though projects and activities are likely to experience delays if the opinions of local communities are disregarded. In addition, public participation exerts pressure on administrators to adhere to pertinent and mandatory administrative procedures.[20] Nonetheless, public participation could also be viewed as an impediment to effective decision-making and as a reason for the delay of

[17]J van Bekhoven 'Public participation as a general principle in international environmental law: Its current status and real impact' (2016) 11 *National Taiwan University Law Review* at 222.

[18]Ibid at 248- 9.

[19]A du Plessis 'Public participation, good environmental governance and fulfillment of environmental rights' (2008) 11 *PELJ* at 171.

[20]T Mokale & T Scheepers *An Introduction to Developmental Local Government in SA: A Handbook for Councillors and Officials* (2006) 27.

activities intended to promote necessary social and economic development.[21] Consequently, some administrators abuse their administrative authority by disregarding the legislative directives designed to guide their decision-making.[22] In *Petro Props (Pty) Limited v Barlow and Another*,[23] the High Court reaffirmed that no decision making authority is immune to public scrutiny and that the court will not support any position that causes affected parties to fear raising environmental objections.[24] Recent cases demonstrate that gaping holes remain in the implementation of administrative environmental due process, despite the apparent certainty in this area of law.

(a) Research questions and objective

The research objective is to evaluate the effectiveness of the public participation process with respect to promoting better environmental decision-making. The two research questions that form the basis of this study's investigations are: *To what extent does the South African environmental legal framework encourage effective public participation? What role does good environmental governance play in promoting public participation?*

The study will examine the environmental legislative framework to determine if South Africa has an acceptable environmental law that promotes effective public participation or if the existing law must be revised. In addition, case law will be utilised to assess the quality of environmental governance.

(b) Research methodology

This study implements a research methodology that assesses the effectiveness of existing legislative frameworks for encouraging public participation in EIAs. Relevant materials, such as statutes, regulations, articles, reports, and judicial decisions, will be considered in this evaluation. It appears that EIA is a participatory process, and best practises advocate for even more inclusive decision-making processes.[25] To fully comprehend this participatory process, it is necessary to delve deeper into the notion of public participation in South Africa.

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[21]JM Verschuuren 'Public participation regarding the elaboration and approval of projects in the EU after the Aarhus Convention' in T. F. M. Etty, & H. Somsen (Eds.), *Yearbook of European environmental law* (2004) 29-48.

[22]*Mining and Environmental Justice Community Network of South Africa v Minister of Environmental Affairs* (2019) 1 All SA 491 (GP).

[23]2006 (5) SA 160 (W).

[24]Ibid at para 73.3

[25]JR Palerm 'An empirical-theoretical analysis framework for public participation in Environmental Impact Assessment' 2000 (43) *Public Participation in Environmental Impact Assessment* at 581.

2 PUBLIC PARTICIPATION IN SOUTH AFRICA

2.1. The meaning of 'public participation'

The NEMA defines the public participation process as an occasion for interested and affected parties to voice out on issues relating to an environmental authorisation application.[26] This definition demonstrates that public input is an essential aspect of this procedure.[27] Stakeholders with a stake in the matter are permitted to comment and influence decisions that touch their lives. It is also worth noting that these stakeholders typically have distinct interests.[28] This procedure must be viewed to arrive at generally accepted decisions after considering a variety of factors.[29]

2.2 The importance of 'meaningful public participation'

Meaningful participation requires government and businesses to collect feedback from diverse stakeholders, regardless of race, colour, sexual orientation, nationality, or income; to balance their perspectives and concerns; and to inform these stakeholders of how their ideas were considered during decision-making.[30] In *Merafong Demarcation Forum and Others v President of the Republic of South Africa and Others,*[31] the Constitutional Court outlined the requirements for consultation as 'the free expression of views and the willingness to take those views into account'.[32] In *Maqoma v Sebe NO and Another,*[33] the meaning of consultation was considered in terms of section 2 of Administrative Authorities Act which did not give the definition of 'consultation'.[34] The court in *Maqoma* held that:

> 'It seems that 'consultation' in its normal sense, without reference to the context in which it is used, denotes a deliberate getting together of more than one person or party… in a situation of conferring with each other where minds are applied to weigh and consider together the pros and cons of a matter by discussion or debate.'[35]

It is submitted that meaningful public participation can result in a number of benefits for the stakeholders, the most pertinent of which are discussed below.

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[26]Section 1 of Act 107 of 1998.
[27]Muthukarapan op cit note 1 at 1.
[28]Kandil op cit note 3.
[29]Ibid.
[30]Ibid.
[31]2008 (5) SA 171 (CC).
[32]Ibid at para 53.
[33]1987 (1) SA 483 (Ck).
[34]37 of 1984 (Ck).
[35]*Maqoma v Sebe NO and Another* at para 491F-H.

2.3 The benefits of public participation

When public participation is executed thoroughly, the time and effort invested can result in tenable and sustainable decisions.[36] Public participation can serve to ensure environmental law compliance and enforcement. Additionally, it can incorporate local knowledge into environmental decisions and help hold parties, particularly the appropriate authorities, answerable for their decisions and conduct.[37] The incorporation of better available scientific information and the expertise of various stakeholders can improve decision-making. These stakeholders may place a higher value on the project and be more likely to view decisions influenced by the public participation process as legitimate and, consequently, less challenging.[38] When stakeholders are invited to participate in the public participation process, it becomes challenging for them to simply observe; instead, they attempt to understand the issues and contribute to more deliberate decisions.[39] The process of public participation allows communities to build their capacity to address difficult social encounters.[40] There are several ways to build community capacity, including training community leaders and other stakeholders' representatives in public participation and communication skills, focusing on vulnerable and marginalised communities, providing technical assistance to communities to improve their understanding of technical information, partnering with community leaders or groups and providing mentorship during the planning process, and developing documents that serve as guidelines to the process.[41] Community members can share a platform with their traditional heads or choose their own representatives through public participation. This can inhibit uninformed decisions from being made or illegitimate representatives from asserting to act for community.[42] It is critical that proponents of the decision adequately inform the public about their rights to participate as a way of motivating the public to voice out regarding decision-making process.

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[36]Kandil op cit note 3.

[37]UNGA 'Environmental Rule of Law: First Global Report' (2018) at 116, available at *https://www.universal-rights.org/wp-content/uploads/2019/10/UNEP-Environmental_rule_of_law.pdf,* accessed on 16 January 2023.

[38]Ibid at 4.

[39]Ibid at 5.

[40]Kandil op cit note 3.

[41]Ibid.

[42]Legal Resources Centre 'A practical guide for mining-affected communities' at 15, available at *https://cer.org.za/wp-content/uploads/2016/05/LRC-2016_Mining_affected_communities_Eng.pdf,* accessed on 17 January 2023.

2.4 Tools for informing the public about the process of public participation

The project proponents are required to notify all interested and affected parties about the application, which is subject to public participation. This can be accomplished by advertising in at least one local newspaper, advertising in at least one provincial or national newspaper if the project's impact extends past the borders of the municipality in which the project would be executed, or using any other sound alternative approaches decided upon with the competent authorities where the person is not capable of participating in the normal procedures due to illiteracy, disability, or any other difficulties.[43] If interested and affected parties come from historically disadvantaged communities or have special needs, some of the tools that can be used to overcome potential limitations include advertising on local radio stations in a local language, holding public meetings at times and locations that are convenient for those people, holding separate meetings with them, and providing them with simplified platforms for accessing information.[44]

2.5 Registration of interested and affected parties

The project proponent must establish and maintain a register of those who are interested or affected, and this register must be submitted to the applicable authorities. The applicant must ensure that comments of registered persons are logged.[45] When a competent authority decides on an application, it must inform the applicant and give reasons for the decision, and the applicant must give access to the decision to all registered persons.[46]

2.6 What is 'effective public participation'?

A person's willingness to participate and their capacity to do so are two factors that can promote effective participation. A non-governmental organisation (the NGO) is a good example of an entity with a strong willingness to participate but insufficient means to do so.[47] The following are significant barriers to effective public participation:

[43]Department of Environmental Affairs South Africa 'Public Participation guideline in terms of NEMA EIA Regulations' (2017) at 10, available at *https://www.dffe.gov.za/sites/default/files/docs/publicparticipationguideline_intermsofnemaEIAregulations.pdf*, accessed on 17 January 2023.
[44]Ibid.
[45]The Environmental Impact Assessment Regulations of 2014 GN 326 GG 40772 reg 44 (1) - (2).
[46]Ibid reg 4 (1) - (3).
[47]Palerm op cit note 25 at 589.

(a) Interested and affected parties lacking the expertise to understand information provided to them.[48]

(b) Poor information provision, information accessibility, and lack of fairness. Failure to identify all affected and impacted parties and the late provision of information.[49]

(d) Mistrust of the industry when project developers fail to disclose all project details.[50]

(f) Failure to influence the decision-making process when majority of those affected are not convinced that their contributions are regarded in the decision-making process.[51]

(g) Lack of two-way information exchange where communities would question how meetings were organised and conducted.[52]

(h) Before submitting the EIA application there is no binding obligation for any public participation. Accordingly, the applicants are completely justified to exclude the community during this phase.[53]

Scholars and practitioners have identified some elements of effective public participation based on years of research and experience.[54] These elements are explained briefly immediately below:

(a) Late involvement of the interested and affected parties regarding the proposed project. If the public is invited at a later stage, the community is merely informed and not involved.[55]

(b) Being culturally irrelevant when project developers fail to respect cultural customs and exclude the indigenous people. This represent a lack of good governance practice since indigenous groups have a right to free, prior, and informed consent.[56]

(c) Failure to record and respond to comments. This would normally serve as a record in case the final decision is challenged. Some countries would even request that agencies

[48]N Hartley & C Wood 'Public participation in environmental impact assessment – Implementing the Aarhus Convention (2005) 25 *Environmental Impact Assessment Review* at 333.
[49]Ibid at 333– 4.
[50]Ibid at 334.
[51]Ibid at 335.
[52]Ibid.
[53]Ibid.
[54]UNGA op cit note 37 at 116.
[55]Ibid at 117.
[56]Ibid.

prepare a document of formal responses to comments as proof that comments were addressed. This is one area in which the majority of states fall short of best practices.[57]

(d) Lack of training and resourcing of public officials tasked with implementing public participation strategies.[58]

It is submitted that it may be necessary to reinforce civil society and communities' capacity to give them an opportunity to participate meaningfully in the public participation process. This is because they may not have technical expertise or resources to work on highly complex projects involving fundamental scientific or engineering questions.[59] The importance of public participation in democratic governance is normally clear. However, it is essential to understand how and why public participation is connected to the concept of environmental governance.[60]

3 ENVIRONMENTAL GOVERNANCE

3.1 What is 'environmental governance'?

The 1980s saw fundamental changes in public policies both globally and in South Africa, resulting in a shift from the previous centralised technocratic embodied approach to a new governance system based on sound democratic principles.[61] To this end, Mngoma, Pillay and Reddy submit that the new South African environmental legislative and administrative arrangements are consistent with the constitutional visualisation of social justice and enhanced quality of life for everyone.[62] The concept of 'environmental governance' consists of those rules, policies, practices and organisations that model how human beings interact with the environment.[63] It is a well-established legal concept internationally and locally.[64] However, the environmental decisions reached by administrators are continually challenged in court and this

[57]UNGA op cit note 37 at 117.
[58]Ibid at 118.
[59]Ibid.
[60]du Plessis op cit note 19 at 8.
[61]Mngoma, Pillay & Reddy op cit note 6 at 106.
[62]Ibid.
[63]UNEP 'Environmental Governance' (2009) UNFCCC Conference in Cophagen.
[64]Feris op cit note 5 at 1.

provides an indication that they are not always consistent with the expectations of good environmental governance. There is a rise in opposition to decisions regarding environmentally hazardous projects. This is evidenced by the public protest actions initiated by NGOs and the environmental court cases that are on the rise.[65] Good environmental governance requires taking into consideration the roles of all participants with an impact on the environment, beginning with the state and extending to business, NGOs, and civil society. It is a collaborative effort to realise effective governance, which has the potential to propel us into a more sustainable future.[66] The central mandate for South African environmental governance stems from s 24 of the Constitution which provides for environmental rights.[67] The rise in protests and legal challenges appears to be the evidence that officials are prioritising economic growth over environmental protection. Good governance is founded on a set of principles, and these demonstrations and legal challenges can contribute to the development of these principles.[68]

3.2 The fundamental principles of good environmental governance

Participation, accountability, transparency, consensus-oriented, rule of law, equity and inclusiveness, effectiveness and efficiency are the principles that form the foundation of good governance.[69] These are explained briefly below:

(a) Participation – this can happen directly, or through well founded institutions or representatives.

(b) Accountability – the state, civil society groups and private sector must account to those persons who will be impacted by their actions and decisions.

(c) Transparency – this implies that information must be communicated in a simplified way and through appropriate media to the persons concerned.

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[65]Feris op cit note 5 at 1.

[66]UNEP op cit note 63.

[67]Section 24 of the Constitution states that:

'Everyone has the right -

(a) to an environment that is not harmful to their health or well-being; and

(b) to have the environment protected, for the benefit of present and future generations, through reasonable legislative and other measures that -

(i) prevent pollution and ecological degradation

(ii) promote conservation; and

(iii) secure ecologically sustainable development and use of natural resources while promoting justifiable economic and social development.'

[68]Mngoma, Pillay & Reddy op cit note 6 at 106.

[69]UNEP 'Introduction to Environmental Governance' (2017) available at: *https://www.unep.org/news-and-stories/story/introduction-environmental-governance-free-online-course-informea*, accessed on 19 January 2023.

(d) Rule of law – which consists of legal frameworks that are fair and can be applied without bias. Observance of the rule of law call for courts and executive authorities to be independent and incorruptible.

(e) Consensus oriented – refers to a decision that has widespread support and bearing in mind the concerns of the entire community to reach consensus.

(f) Equity and inclusiveness – involve being in the service of everyone, including the most vulnerable and minority groups, and not just focusing on the community's majority.

(g) Effectiveness and efficiency - are concerned with processes and institutes that yield successful outcomes that meet the demands of the community while maximising available resources.

Feris observed that effective environmental governance will also consider the prerequisites for sustainable development.[70]

3.3 Public participation and the principle of sustainable development

Public participation is typically incorporated into sustainable development policies to help decision-makers to find the uncertainties and risks associated with deeds.[71] In 1990, the Rio Declaration gave a green light to the notion of sustainable development.[72] It is acknowledged that to realise sustainable development, environmental protection must be built into the development process.[73] In the 2001 General Assembly Resolution on the right to development, the importance of public participation to sustainable development was clearly acknowledged, and it was stated that truthful participation by communities is one of the principal characteristics of sustainable development.[74] Public participation is linked to the standard of evaluating environmental effects because these evaluations typically include consultations with local people regarding the proposed project.[75] Public participation is an important feature of the EIA procedure and Wood notes that without consultation and participation, the EIA cannot be the

[70]Feris op cit note 5 at 3.
[71]van Bekhoven op cit note 17 at 234.
[72]Feris op cit note 5 at 4.
[73]Rio Declaration on Environment and Development 1992. UN Doc A/Conf.151/26. Ten years after the United Nations Conference on Environment and Development (the Rio conference) the 2002 Johannesburg World Summit on Sustainable Development (WSSD) was held. It added little in terms of the development of the concept, focusing instead on the now more challenging matter of implementation Principle 4.
[74]Resolution 55/108 4(f) (March 13,2001)
[75]van Bekhoven op cit note 17 at 234.

EIA.[76] [77] Furthermore, there are international claims stating that wide consultation in decision-making processes is one of the vital preconditions for achieving sustainable development.[78]

4 PUBLIC PARTICIPATION AND THE INTERNATIONAL LAW

The public participation process grants communities the ability to voice out and influence decisions. The UN World Charter for Nature supports the right of every person, in line with their national laws, to participate as individuals or with others in decision making that impact the environment directly. Additionally, they shall have right to compensation in case the environment is damaged or degraded.[79] Principle 10 of the Rio Declaration on Environment and Development (the Rio Declaration) defines the principle of public participation 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.'[80]

This definition demonstrates that this declaration is comprised of three components: participation in environmental decision-making processes, access to environmental information, and participation in administrative and judicial proceedings. These are referred to as the three pillars of environmental democracy.[81] While it is a feature of international environmental law, the consultation principle has roots in human rights law.[82] The right to engage in governance is included in the International Covenant on Civil and Political Rights,[83] the American Convention

[76]Hartley & Wood op cit note 48 at 319.
[77]CM Wood *Environmental Impact Assessment: A comparative review*, 2nd ed (2002) 277.
[78]The United Nations World Commission on Environment and Development (WCED) Report on Sustainable Development (the Brundtland Report) of 1987 principle 6 and of the Earth Charter of 2000 principle 13(b).
[79]UNGA 'UN World Charter for Nature' (1982) A/RES/37/7 at para 23.
[80]United Nations Conference on Environment and Development, Rio Declaration on Environment and Development, U.N. Doc. A/CONF.151/26/Rev.1 (Vol. I), annex I (Aug. 12, 1992) Principle 10.
[81]van Bekhoven op cit note 17 at 229.
[82]Ibid at 235.
[83]Article 25 of the International Covenant on Civil and Political Rights, 1966.

on Human Rights,[84] and the African Charter on Human and Peoples' Rights.[85] The Aarhus Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters (Aarhus Convention) is the first piece of European legislation that comprehensively addressed the public participation principles focusing on environmental issues.[86] It is fundamentally grounded on the principle of public participation as espoused in Rio Declaration Principle 10 and thus takes into account all three components of the principle of public participation.[87] Although the Aarhus Convention is regionally applicable, its significance is international.[88] The Convention on Biological Diversity (the CBD) and the United Nations Convention to Combat Desertification in Those Countries Suffering from Severe Drought and/or Desertification, Particularly in Africa (the Desertification Convention) are examples of well-known global environmental agreements that comprise provisions on consultation in environmental decision-making.[89] The CBD focuses mainly on the involvement of indigenous persons in decision-making and gives consideration to indigenous peoples' traditional knowledge,[90] whereas the Desertification Convention places responsibility on governments to promote participation.[91] In its 1997 General Recommendation No. 23 on indigenous peoples, the Committee on the Elimination of Racial Discrimination (the Committee) urged states to ensure that indigenous people have the same rights to engage in public life and emphasised that decisions affecting the indigenous persons must be taken bearing in mind their informed consent. The Committee also emphasised the duty of governments to ensure that the right of these persons to free, prior, and informed consent is respected in the planning and execution of projects affecting land and resource usages. This is referred to as the non-discrimination principle.[92] Indigenous persons have the right to get involved in matters affecting their rights, using their preferred representatives, as well as to grow their own indigenous decision-making

[84]Article 23 of the American Convention on Human Rights, 1969.
[85]Article 13 of the African Charter on Human and People's Rights, 1981.
[86]Aarhus Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters, 1998.
[87]van Bekhoven op cit note 17 at 244.
[88]Aarhus Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters, 1998.
[89]van Bekhoven op cit note 17 at 239.
[90]Ibid.
[91]Ibid at 240.
[92]Office of the High Commissioner for Human Rights 'Free, Prior and Informed Consent of Indigenous Peoples' Palais des Nations, CH-1211 Geneva 10, Switzerland Sept 2013.

organisations.[93] The majority of governments now acknowledge the significance of public participation, and South Africa is one of them.[94]

Without an agreed definition of public participation, Barton provides factors that would typically shape the type of participation in the majority of states. Barton claims that:

'Public participation is a matter of a nation's legal, political, and administrative arrangements, and therefore closer to the heart of national sovereignty than many other issues in international environmental law. How a nation wishes to conduct its public affairs is a very political matter.'[95]

The study will now turn to defining how the South African legislative framework for environmental decision-making evolved over time.

5 PUBLIC PARTICIPATION AND THE NATIONAL LEGISLATIVE FRAMEWORK

In recent years, the South African legislature started to integrate public participation in environmental decision-making laws. This was primarily due to the new democratic regime that took effect in 1994.[96] The South African Constitution, the NEMA, and the Mineral and Petroleum Resources Development Act[97] (the MPRDA) are the three primary pieces of legislation that will be examined in this study.

5.1 The constitutional framework

The consultation process protects our democracy and the independence of the courts.[98] This is in line with the founding values of openness, accountability, and responsiveness, which are

[93]United Nations (General Assembly) 'Declaration on the Rights of Indigenous People' 2007, Article 18.
[94]van Bekhoven op cit note 17 at 237.
[95]B Barton 'Underlying concepts and theoretical issues in public participation in resources development' in DN Zillman et al (eds) *Human Rights in Natural Resource Development Public Participation in the Sustainable Development of Mining and energy Resources* (2002) at 84.
[96]du Plessis op cit note 19 at 16.
[97] Act 28 of 2002.
[98]P de Vos 'Ful proposes changes to appointment of Chief Justice' (2011) available at, *https://constitutionallyspeaking.co.za/ful-proposes-changes-to-appointment-of-chief-justice/,* accessed on 20 January 2023.

enshrined in s 1(*d*) of the Constitution.[99] The Constitution calls for a public administration that is governed by the democratic principles and values safeguarded in the Constitution which are amongst others accountability, public participation, efficiency and transparency.[100] Preceding the enactment of s 24 of the Constitution, environmental rights were excluded; however, these rights now occupy their rightful place in the Constitution.[101] [102] One of the objectives of the Constitution is to 'heal the divisions of the past and establish a society based on democratic values, social justice and fundamental human rights'.[103] It is submitted that we must keep in mind that environmental issues are intertwined with social issues, and that the effects of environmental dilapidation disproportionately impact those who are already experiencing socioeconomic challenges. Given the entrenched socioeconomic divisions in South African society, environmental governance should address issues of equity and justice.[104] The right to a just administrative action and the right to information are additional rights that are relevant to the way the government must act to safeguard the environment. [105] [106] The right of access to information, as assured by s 32 of the Constitution, has been called the cornerstone of public participation, and the Promotion of Access to Information Act[107] (the PAIA) was legislated to

[99]Section 1*(d)* of the Constitution.
[100]Section 195 of the Constitution.
[101]Section 24 of the Constitution.
[102]*BP Southern Africa (Pty) Ltd v MEC for Agriculture, Conservation, Environment and Land Affairs* 2004 (5) SA 124 (W) 143.
[103]Preamble of the Constitution.
[104]Feris op cit note 5 at 2.
[105] Section 33 of the Constitution stating that:
(1) Everyone has the right to administrative action that is lawful, reasonable and procedurally fair.
(2) Everyone whose rights have been adversely affected by administrative action has the right to be given written reasons.
(3) National legislation must be enacted to give effect to these rights, and must -
(a) provide for the review of administrative action by a court or, where appropriate, an independent and impartial tribunal;
(b) impose a duty on the state to give effect to the rights in subsections (1) and (2); and
(c) promote an efficient administration..
[106] Section 32 of the Constitution stating that:
(1) Everyone has the right of access to -
(a) any information held by the state; and
(b) any information that is held by another person and that is required for the exercise or protection of any rights.
(2) National legislation must be enacted to give effect to this right, and may provide for reasonable measures to alleviate the administrative and financial burden on the state.
[107] Act 2 of 2000.

give effect to the s 32 right.[108] Additionally, the constitutional framework is reinforced *inter alia* by the NEMA, the Promotion of Administrative Justice Act[109] (the PAJA) and the PAIA.[110]

5.2 The NEMA's regulatory framework

The NEMA was legislated to ensure the fulfilment of the environmental right contained in s 24 of the Constitution.[111] The EIA process is established under s 24(4) *(b)* of the NEMA and the EIA operates as a preventive tool.[112] The main purpose of doing an EIA before project development is to identify and consider the negative environmental effects of a project and to investigate options for minimising or preventing environmental damage.[113] Various environmental principles are enumerated in s 2 of the NEMA, making it South Africa's primary law governing environmental management framework. It provides that:

'The participation of all interested and affected parties in environmental governance must be promoted, and all people must have the opportunity to develop the understanding, skills and capacity necessary for achieving equitable and effective participation, and participation by vulnerable and disadvantaged persons must be ensured.'[114]

This principle is further supported by the following NEMA principle:

'Decisions must take into account the interests, needs and values of all interested and affected parties, and this includes recognising all forms of knowledge, including traditional and ordinary knowledge.'[115]

Since the advent of our constitutional democracy, various Specific Environmental Management Acts (SEMAs) have been enacted, and they are all subsumed by the NEMA. To date, five SEMAs have been passed thus far, namely – the National Environmental Management: Protected Areas Act 57 of 2003, National Environmental Management: Biodiversity Act 10 of 2004; National Environmental Management: Air Quality Act 39 of 2004, National

[108] Aarhus Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters, 1998.
[109] Act 3 of 2000.
[110] du Plessis op cit note 19 at 17.
[111] Kohn op cit note 12 at 2.3.
[112] Ibid at 2.2.
[113] Kohn op cit note 12 at 2.3
[114] Section 2 (4) *(f)* of Act 107 of 1998.
[115]Ibid at S2 (4) *(g).*

Environmental Management: Integrated Coastal Management Act 24 of 2008; and National Environmental Management: Waste Act 59 of 2008.[116]

EIA is conducted prior to project execution to give information to decision-makers regarding the results of the projected act. South Africa was the first African country to consider EIA integration. An EIA system is a mixture of the regulatory framework and the abilities of those who must perform their duties in order to realise EIA objectives. A regulatory framework is important for an EIA system since it provides guidance on how to conduct an EIA. It also provides a set of rules that govern how the system must function and provides guidance on how licences and permits should be granted.[117] The capabilities of those working in the EIA system would have an impact on the regulatory framework. For example, the establishment, enactment, and implementation of EIA legislation are defined by the political will and commitment of leadership. Because the EIA system is a mixture of legal framework and people within that framework, its performance can be split into procedural and substantive performance. The assessment of procedural performance is concerned with establishing if the EIA processes comply with the national EIA statute, whereas substantive act is concerned with determining whether the EIA objectives are met. Substantive performance is dependent on the abilities of the individuals within the EIA system.[118] Although EIA is now a global concept, it is carried out differently in each region. EIA systems, for example, perform better in developed states compared to developing states. Dissimilarities in the performance and effectiveness of the EIA system can also be seen between states in the same region. Some African states, like Ghana, South Africa, and Egypt, have excellent EIA systems, particularly in terms of regulatory framework quality.[119] South Africa largely has one of the most developed EIA systems globally and numerous studies have shown that the South African EIA system does commendably.[120] The effectiveness of EIA in supporting sustainable development in the energy sector was also evaluated, and it was established that South Africa has a reasonably robust legal framework for

[116]A Muir and C Galliers 'National environmental management: specific environmental management Acts' (2007) available at *http://www.enviropaedia.com/topic/default.php?topic_id=312#:~:text=Known%20by%20the%20abbreviation%20of,being%20Waste%20Act%20in%202008,* accessed 23 January 2023.

[117]RO Mubanga and K Kwarteng 'A comparative evaluation of the environmental impact assessment legislation of South Africa and Zambia' (2020) 83 *Environmental Impact Assessment Review* at 1.

[118]Mubanga & Kwarteng op cit note 118 at 2.

[119] Ibid.

[120] Ibid.

environmental management. Based on this study, the EIA system in this sector meets the majority of the evaluation criteria. Existing literature also notes that South Africa has a good reputation regarding the EIA.[121] The 2014 EIA Regulations comprise a public participation process forming a part of the environmental authorisation application. If the information is non-confidential or safeguarded by law, the process must allow interested and affected parties to access all information concerning the application.[122] Furthermore, if there are substantial modifications to the consulted EIA report since the first public participation process, the reviewed EIA report must go through another public participation process.[123] It is asserted that South African EIA legislation has developed noticeably.[124] The primary tool for ensuring that proposed projects are sustainable is public participation contained by the scope of the EIA legislative system.[125] In Africa, however, EIA remains a contentious policy instrument, with power figures frequently referring to it negatively as a 'green hand break' in the development process, an 'unethical and anti-human policy tool,' and a 'development speed hump'. In part one of the case of *Sustaining the Wild Coast NPC v Minister of Mineral Resources and Energy,*[126] the South African Minister of Minerals and Energy Gwede Mantashe tweeted,

> 'The South African Government considers the objections to the seismic survey as apartheid and colonialism of a special type, masqueraded as a great interest for environmental protection'.[127]

This tweet came after Shell failed to stop the interdict of the seismic survey by the NGOs.

The public participation process must allow for all probable or registered interested and affected parties, also competent authorities, to submit their comments on various EIA reports.[128] Communities have blamed the state of circumventing the public participation phase of the EIA procedures despite the existence of these regulations.[129] It is important to note that for most countries, EIAs play a crucial role with regards to environmental decision-making of new projects. Even though there is great potential for public harm emanating from corrupt decision-

[121]Mubanga & Kwarteng op cit note 118 at 2.
[122]Reg 40 (2) of the EIA Regulations of 2014 GN982 GG 38282 of 4 Dec and amended by GN 326 of 7 April 2017.
[123]Reg 20 (1) (b) of the EIA Regulations of 2014
[124]Mubanga & Kwarteng op cit note 118 at 15.
[125]T Maphanga, K Shale, B Gqomfa & V Mduduzi 'The state of public participation in the EIA process and its role in South Africa: A Case of Xolobeni' 2002 *South African Geographical Journal* at 3.
[126](3491/2021) [2022] ZAECMKHC 55.
[127] Para 76.
[128]Reg 40 (1) of the EIA Regs of 2014 GN982 GG 38282.
[129] Maphanga *et al.* op cit note 126 at 3.

making linked to EIAs, there is not enough study conducted to investigate the corruption linked to the EIA process. Current empirical research tend to put forward a view that corruption is widespread in lots of nations' construction, procurement, and natural resource sectors, and all of these are applicable to the EIA process. Corruption has a potential to lessen the stringency and enforcement of environmental statute.[130] Insufficient public participation may lead to problems such as failure to garner support from local communities and an omission to customise projects in accordance with local needs and key concerns. It could also lead to unaccountability, giving rise to poor or incompetent job practices and corruption. Lack of communication may result in bitterness between local communities and business. Furthermore, it can lead to ignorance of local knowledge, and this could imply a likely missed prospect for making a decent project even superior.[131] This raises the question of whether EIA and community involvement for proposed projects are effective regarding sustainable development.[132]

Section 32(1) of the NEMA provides for the 'Biowatch Principle' which was set out in the *Biowatch Trust v Registrar Genetic Resources and Others*.[133] This principle protects parties who sincerely intend to defend constitutional rights but miss the mark. Nevertheless, the litigation must be genuine and non-frivolous.[134] It should be noted that s 2(4) *(c)* of the NEMA incorporates the notion of environmental justice and this section represents the first time that environmental justice has been codified in South African law.[135]

5.3 The MPRDA's regulatory framework

Mining contributes substantially to the South African economy. Mining companies are required to consult with South African communities, and this requirement has become contentious because of the escalating amount of court rulings regarding the legal implications of public participation.[136] The MPRDA[137] is the main piece of statute governing the South African mining

[130]Maphanga et al. op cit note 126 at 295.
[131]Ibid at 295- 6.
[132]Ibid at 3.
[133]2009 (6) SA 232 (CC).
[134]*South Durban Community Environmental Alliance v MEC for Economic Development, Tourism and Environmental Affairs: KZN Government* (2020) 2 All SA 713 (SCA) para 70.
[135]Section 2(4) *(c)* of Act 107 of 1998 and it states that: 'Environmental justice must be pursued so that adverse environmental impacts shall not be distributed in such a manner as to unfairly discriminate against any person, particularly vulnerable and disadvantaged persons.'
[136]A Jara 'What is consultation?' (2021) available at https://www.werksmans.com/legal-updates-and-opinions/what-is-consultation/, accessed on 22 January 2023.

business.[138] The MPRDA mandates that, within 14 days of accepting a mining right, prospecting right, or mining permit, the Regional Manager must notify interested and affected parties of the accepted application and invite them to submit comments within 30 days of the notice.[139] The MPRDA additionally obliges the state and the mine to promote consultations with the community.[140]

6 RELATED CASE LAW JURISPRUDENCE

Three cases were selected for analysis because they show that the implementation or practise of public participation in South Africa remains problematic.

6.1 *Sustaining the Wild Coast NPC v Minister of Mineral Resources and Energy*

This case involves a review of the Ministry of Mineral Resources and Energy's decision to award Shell an exploration permit which authorised Shell to conduct seismic surveys to explore for oil and gas along the Eastern Cape coastline.[141] The applicants contested the granting of the permit citing it to be unlawful due to insufficient consultation with the local communities and lack of environmental authorisation.[142] The court held that there was a lack of consultation with the indigenous communities because the identification of the interested and affected parties was executed without following a public process. Consultation was executed using a database of previous stakeholder analysis in the area, and moreover there was no proof that the affected communities were part of the database.[143] It was further held that communities are separate from traditional leaders and thus these leaders often not represent a community.[144] The court added that consultations must be conducted in *bona fide* with the goal of realising consensus, as opposed to merely checking off the appropriate boxes.[145] Inadequate notices were disseminated in a language unfathomable to majority of the local communities.[146] The only source of project

[137]Act 28 of 2002.
[138]Jara op cit note 137.
[139]Section 10 of the MPRDA.
[140]Sections 10(1) *(b),* S 16(4) *(b),* s 22(4) *(b),* s27(5) *(b)* and s 39 of the MPRDA.
[141] Paras 1- 3.
[142] Para 27.
[143] Para 90.
[144] Paras 92- 3.
[145] Para 95.
[146] Para 91.

information was a website which was inaccessible to local communities.[147] Consequently, the consultation process was deemed procedurally unfair.[148] The court further held that the ministry failed to take into account the potential harm to the fishermen's means of subsistence and the negative effects on their cultural and spiritual rights.[149] It was ruled that PAJA does not compel the applicants to file an internal appeal with the ministry because the minister was biased towards Shell.[150] In addition, it was determined that the MPRDA's provisions and regulations are subject to the Constitution and the PAJA.[151]

The three pillars of environmental democracy of the Rio Declaration and the Aarhus Convention are supported by the court's decision to reject the top-down consultation process. The court requires that community members must be directly consulted or there must be some level of assurance that the representatives are certainly tasked to represent those communities.[152] This case is amongst those in which the rights of local communities are afforded a meaningful effect within a regulatory framework that solely grants a superficial protection.[153] The case is also an admission that local communities must be involved in the early stage of the application process before a decision to grant an exploratory right is made.[154] This case set a crucial precedent because it ensured that the MPRDA regulatory framework is implemented in a way that promotes meaningful consultation with everyone who would be affected by the proposed project. This was the intention of this regulatory framework but it is unfortunate that historically, this intention was unfulfilled. However, this case might be the one to ensure that history does not repeat itself and it might inspire other global local communities as well as the courts.[155]

6.2 *Border Deep Sea Angling Association v Minister of Mineral Resources and Energy*[156]

The applicants in this case sought an interdict against Shell for planned seismic survey.[157] Following a review of the evidence presented by the applicants, court declined to grant an

[147] Para 101.
[148] Para 103
[149] Paras 114- 5.
[150] Para 81.
[151] Para 95.
[152] C Rankin 'Defending the Rights of Local Communities against Box-Ticking Exercises: An Analysis of Sustaining the Wild Coast NPC v Minister of Mineral Resources and Energy' (2023) *Business and Human Rights Journal* at 5.
[153] Ibid.
[154] Ibid.
[155] Ibid.
[156](2021) ZAECGHC 111.

interdict because the applicants failed to show irreparable harm to maritime species.[158] The court also found that the applicants were successful in demonstrating that they had a good chance of success despite the apparent absence of public participation.[159] Ultimately, the court rejected the application with costs.[160] The applicants were disgruntled with the court's decision to dismiss their case without allowing them to present additional expert testimony to address the issue of irreparable environmental damage. Due to Shell's misconduct and the ministry's inaction, it was impossible for the experts to compile detailed reports and affidavits because the application was filed on the basis of extreme urgency. They were also displeased with the court's judgment to award costs against them as an environmental NGO representing the public interest.[161] It is argued that this decision does not support the right of access to information because businesses and government can conceal information about potential projects for prolonged periods if they anticipate that communities and NGOs will vigorously oppose the project. This would render participation ineffective, as the aggrieved parties would lack adequate time to prepare for the case. Experts require time to generate credible reports and affidavits. In the absence of reliable data, both public participation and legal action will be futile.

Cost orders against NGOs undermine civil society's ability to hold the state to account. It hinders the NGOs' and individuals' ability to contribute to the country's democracy. Due to the prohibitive costs of legal representation, the vast majority of our country's poor population is effectively excluded from the judicial system. This means that only the wealthy and the privileged will access the justice system. The poor require the support of NGOs because these organisations provide a forum and tools for organising and pursuing legal action, both of which are necessary for the poor to gain access to the courts and achieve social justice.[162] NGO services are critical for promoting human rights and commanding human dignity and respect. If NGOs begin to fear the legal and financial repercussions of litigating, this has the potential to

[157] Paras 2-3.
[158] Para 35.
[159] Para 30.
[160] Para 42.
[161] Natural Justice 'Massive blow for the Wild Coast: Urgent interdict* denied' 3 December 2021, available at, *https://naturaljustice.org/massive-blow-for-the-wild-coast-urgent-interdict-denied/*, accessed 29 January 2023.
[162] S Ekambaram & M Marongo 'Cost order against NGO weakens democracy: The South African History Archive should be able to access documents exposing crimes under apartheid' 3 July 2018, available at *https://www.groundup.org.za/article/cost-order-against-ngo-weakens-democracy/*, accessed on 29 January 2023.

undermine rights enforcement, making the state less accountable and ignoring its legal obligations. Subsequently, our democracy will suffer. If people can access the courts and have their rights enforced, society as a whole will benefit, and not just those who pursued that particular litigation. Democracy would better be preserved in this manner. This does not mean that NGOs should be immune from incurring cost orders where the litigation is frivolous, vexatious, or blatantly inappropriate.[163] There are numerous examples in South Africa where NGOs and human rights defenders such as the environmental lawyers and environmental activists have played a significant part in promoting democracy. An example is the case of *Mineral Sands Resources (Pty) Ltd and Others v Reddell and Others*[164] where the environmental human rights defenders were taken to court by two mining companies for alleged defamation.[165] The defenders argued that the case constitute a Strategic Litigation Against Public Participation (known as SLAPP) suit.[166] This phenomenon is described as:

'Lawsuits initiated against individuals or organisations that speak out or take a position on an issue of public interest . . . not as a direct tool to vindicate a bona fide claim, but as an indirect tool to limit the expression of others . . . and deter that party, or other potential interested parties, from participating in public affairs.'[167]

The mining companies argued that SLAPP defense does not exist in South African law but court held that SLAPP suit defense is part of the South African law.[168] [169] It was further held that it would be Parliament's discretion to evaluate if there is a need to legislate a more comprehensive and specific SLAPP suit defense similar to that of Canada and the United States of America. This is because generally the Parliament is the institution primarily responsible for the law reform.[170] Regarding the cost order, the mining companies and their executives were ordered to pay 60% of human rights defenders' costs incurred in the Constitutional Court plus the costs of the two counsels. However, all parties were ordered to pay their own costs from the

[163]S Ekambaram & M Marongo op cit note 163.
[164] (CCT 66/21) [2022] ZACC 37
[165] Ibid para 3.
[166] Paras 4 & 7.
[167] *1704604 Ontario Ltd v Pointes Protection Association* 2020 SCC 22 449 DLR (4th) 1 (Pointes) at para 2.
[168] *Reddell and Others v Mineral Sands Resources (Pty) Ltd and Others* (CCT 67/21) [2022] ZACC para 11.
[169] (CCT 66/21) [2022] ZACC 37 para 21.
[170] Para 99.

High Court.[171] Because of this case, the human rights defenders managed to make some progress regarding the recognition of the SLAPP suit defense as part of our law. If Parliament decides to comprehensively legislate the SLAPP defense, NGOs and human rights defenders would gain more confidence to litigate such environmental protection cases. However, awarding of costs is still problematic because we do have many indigenous communities that would avoid public participation and litigation for fear of costs, adding to the existing problem.

6.3 *South Durban Community Environmental Alliance v MEC for Economic Development, Tourism and Environmental Affairs: KZN Government*[172]

The case concerned an appeal by the South Durban Community Environmental Alliance (the Alliance) under s 24 of the NEMA against the Member of the Executive Council for Economic Development, Tourism and Environmental Affairs: KZN Government's (the MEC) decision to award an environmental authorisation for the building of a logistics park.[173] The Alliance's internal appeal under s 43 of the NEMA was denied.[174] The Alliance approached the High Court for a judicial review of the MEC's resolution under s 6 of the PAJA. The court discharged the case because the Alliance was unsuccessful in providing evidence for their objections and claims regarding air quality deterioration.[175] Although the Alliance was litigating in the interest of local communities and claiming their right granted to them by s 24 of the Constitution to an environment that is clean and not harmful to their health or well-being, their appeal to the Supreme Court of Appeal was also discharged, and the Alliance was ordered to pay costs.[176] The case was dismissed because the Alliance failed to apply for an interdict before the commencement of the construction of the logistics park.[177] There is a parallel between this ruling and that of the *Border Deep Sea Angling Association* case. It is contended that effective public participation and good governance are imperilled by scientific evidence and cost orders against NGOs.

[171] Para 103.
[172](2020) 2 All SA 713 (SCA).
[173] Paras 1- 2.
[174] Paras 2- 3.
[175] Para 4.
[176] Para 54.
[177] Para 43.

7 COMMENTS AND ANALYSIS

This report investigated the idea of public participation. There is no doubt, referring to the discussed legal frameworks, that South Africa has a reasonable number of laws to address environmental concerns. The adoption of the five SEMAs since 1994 demonstrates that a number of laws addressing environmental issues have been legislated since the inception of our constitutional democracy. These SEMAs are more specific than the NEMA, which functions as the overarching piece of environmental legislation. In addition to the SEMAs, further legislation was enacted to back up the Constitution and the notion of public participation. The analysis reveals that South Africa's EIA legislation seems to be progressive but the struggle seems to lie with the authorities plus the project proponents and this tends to impede its implementation. The undesirable approach by the responsible authorities reveals that believably there is a possibility that socioeconomic factors are being promoted at the expense of the environment. An element of corruption might also be in existence even though a much detailed study would be required to investigate and confirm the possibilities of corruption within the EIA process. It is submitted that the current legislative framework seems adequate to promote effective public participation.

The three analysed cases demonstrate that ineffective participation is costly and slows development. Poor consultation is causing massive financial losses for project proponents. This was evinced in *Sustaining the Wild Coast*, where Shell lost enormous amounts of money due to project delays. Companies and competent authorities must recognise that the world is shifting towards participatory democracy and they cannot ignore this trend because there is already an explosion of public participation on a local and global scale. The NEMA, for example, is built around public participation and inclusion. South Africa is confronted with the issue of indigenous communities lacking the necessary capacity to deal with the science and engineering associated with these megaprojects. Thus, the government, business, and NGOs must consider investing in communities confronted with such projects, as well as training the people, particularly the leadership. They must, however, ensure that the representatives of the communities are verified to ensure that the correct individuals or institutions are representing the affected communities. This will avoid a situation similar to the one described in *Sustaining the Wild Coast*, in which monarchs lacked the authority to represent their subjects.

Applying the elements of good governance to the three cases discussed in this study, we can conclude that good governance is still lacking. The elements of accountability, transparency, consensus-building, equity, and inclusiveness are not met. Businesses are reluctant to answer to locals, information is not shared openly, residents learn about environmental issues through the media, and consensus becomes impossible to achieve if the public is not participating. Consequently, a lack of good governance will cause ineffective participation, which will adversely impact the projects' sustainability. Furthermore, communities are omitted from the public participation process because they fail to register on digital databases that are inaccessible to them. These communities also face significant language barriers because advertisements are mostly in English and Afrikaans, neither of which are the predominant dialects in the communities. The principles that form the foundation of good governance are being violated, and accordingly there can be no sustainable development without active participation.

It is submitted that ineffective participation is a violation of human rights, as evidenced by some of the international instruments discussed, including the International Covenant on Civil and Political Rights, the American Convention on Human Rights, and the African Charter on Human and Peoples Rights. This is because the principle of public participation is also linked to human rights. Cases that end up in court are a sign of ineffective participation because they do not reflect the decisions and inputs of interested and affected parties, implying a lack of consensus. Meaningful participation is still lacking because there is no gathering of minds, nor is there a collaborative weighing of pros and cons of a proposed action by all stakeholders. This implies that stakeholders are prohibited from participating in environmental decision-making process. Without effective participation, project proponents will struggle to incorporate local knowledge regarding environmental decisions. Failure to encourage and facilitate public participation is a violation of the bill of rights because the religious and cultural rights are protected by the Constitution.

The requirement of expert knowledge presents a threat to projects and the idea of sustainable development since it is an expensive exercise that indigenous communities would struggle to afford if they decide to approach courts. The availability of expert evidence was the difference between the outcomes of *Sustaining the Wild Coast* and *Border Deep Sea Angling Association* cases. Having access to extensive evidence increases the likelihood of winning the

case and the applicants succeeded in *Sustaining the Wild Coast* because they presented comprehensive evidence. Many barriers to effective participation were not overcome in the analysed cases. Barriers like lack of information, mistrust of the industry when the affected community refused to engage the minister due to his tweet, and the 'not in my backyard' syndrome. It is submitted that the failure by the court to administer the Biowatch Principle is concerning because it may deter potential litigants from approaching the courts even if they bear legal standing.

8 CONCLUSION

It appears that South Africa might still be facing implementation challenges regarding environmental concerns. From the analysed cases, it is possible to conclude that public participation remains ineffective and, as a result, fails to promote good governance and better environmental decision making. Existing legislation seems adequate to promote effective public participation and all that is required is a shift in attitude among government officials and businesses. The relevant officials must ensure that EIAs are conducted and carried out to completion. To achieve meaningful public participation, the government together with the private sector must pursue good governance. The element of corruption within the EIA process requires a comprehensive study since it could be influencing some of the ill informed decisions leading to exclusion of certain portions of the communities by the authorities and business. The courts must continue to promote meaningful public participation in environmental governance by holding business and the government accountable. In addition, the courts must be flexible regarding cost orders when dealing with NGOs, this will strengthen our democracy and also promote litigation pursued in good faith.

9 RECOMMENDATIONS

Regulatory constraints are amongst the obstacles to effective public participation. There is currently no legally binding requirement for project proponents to conduct public participation prior to submitting an exploration application. Thus, applicants for EIA permits have no

obligation to include communities during this early stage. This is a missed opportunity because communities are unable to participate in the problem resolution process before problems surface. Problems are currently resolved through the court system, which is costly and, at times, inaccessible to local communities. The early involvement step must be incorporated into the EIA process, and no authorisation application must be accepted unless proof of pre-application public participation is provided. Lastly, project applicants must be required to keep a record of public comments and the responses to those comments as part of the EIA process. If a business is sued and fails to produce evidence of what they were supposed to have properly recorded, this must be dealt with by imposing severe penalties under the NEMA and the SEMAs. In this way, businesses will be unable to ignore or mislead the public or officials about comments made and obvious information such as when meetings were held, who was in attendance, and if those people signed the attendance register. The interested and affected party who commented on the project must be given a platform to provide an indication of their awareness regarding the manner in which the business responded to their comments.

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