

# A Review of the 2013 Constitutional Environmental Rights Clause, Policy Developments and Judgements for the Protection of the Environment

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## Abstract

The 2013 Constitution has an environmental rights clause. The clause protects and promotes environmental rights as human rights and help in addressing the negative impacts of climate change. However, the realization and fulfilment of the environmental rights clause is dependent on the enactment of laws, adoption of policies and setting up of institutions. This chapter assesses the laws that have been enacted, the policies that have been adopted and the institutions that have been put in place by the Government of Zimbabwe since 2013 in support of the environmental rights clause and how these have helped in the protection and promotion of environmental rights as human rights and addressing the negative impacts of climate change.

## 1 Introduction

The year 2022 marks the 10<sup>th</sup> anniversary of the adoption of a new Constitution in Zimbabwe.<sup>3</sup> The Constitution enshrines the right to an environment that is not harmful to one's health and well-being as well as the right to have the environment protected for the benefit of present and future generations through reasonable legislative and other measures.<sup>4</sup> The constitutional environmental right builds on the foundation laid by the Environmental Management Act of 2002.<sup>5</sup> As the Government of Zimbabwe reflects on a decade of constitutionally enshrined environmental rights, the world gathered for the Stockholm + 50 International Meeting under the theme "A healthy Planet for the Prosperity of All – Our Responsibility, Our Opportunity".<sup>6</sup> The meeting was timely as it took place 50 years after the first United Nations Conference on the Human Environment (UNCHE) also known as the Stockholm Conference which was held in 1972. The conference's conclusions, which are commonly referred to as the Stockholm Declaration, provided a set of principles aimed at giving a guide on how humans can preserve the environment for their own economic development. The UNCHE eventually led to the evolution and adoption of the concept of sustainable development, which is based on three pillars namely the economic, social and environmental spheres.<sup>7</sup> It is described as "a conceptual framework for achieving economic development that is socially, equitable and protective of the natural resources base on which human activity depends"<sup>7</sup>.

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<sup>3</sup> Government of Zimbabwe. Constitution of Zimbabwe (No.20). 2013 <[www.constituteproject.org/constitution/Zimbabwe\\_2013.pdf](http://www.constituteproject.org/constitution/Zimbabwe_2013.pdf)> (accessed 23 January 2023).

<sup>4</sup> *Ibid.*, Section 73.

<sup>5</sup> *Ibid.*, Section 4.

<sup>6</sup> United Nations General Assembly, *Stockholm +50: A Healthy Planet for the Prosperity of All – Our Responsibility, Our Opportunity*. A/CONF.238/3,2022. <[documents-ddsny.un.org/doc/UNDOC/GEN/K22/117/97/PDF/K2211797.pdf?OpenElement](https://documents-ddsny.un.org/doc/UNDOC/GEN/K22/117/97/PDF/K2211797.pdf?OpenElement)> (accessed 23 January 2023). <sup>7</sup> J. C. Dernbach, 'Sustainable Development as a Framework for National Governance', 49 (1) *Case Western Reserve Law Review* (1998).

<sup>7</sup> UN General Assembly, Resolutions 2994/XXIII,2995/XXVIII and 2996 XXII(1972),p.11.

The Stockholm Declaration laid the foundation for the Brundtland Report,<sup>8</sup> the United Nations Conference on Environment and Development<sup>9</sup>, the World Summit on Sustainable Development<sup>10</sup> and the United Nations Conference on Sustainable Development.<sup>11</sup>

It is, however, important to note that since 1972, environmental challenges in the form of biodiversity loss, climate change and pollution, have increased. In November 2022, the world gathered in Egypt for the Conference of the Parties 27 (COP27) to reflect on one of the most existential threats facing the world today – climate change. Climate change continues to pose serious environmental problems globally, and approaches dealing with the phenomena must be given serious consideration. Environmental rights protection in the Environmental Management Act and enshrined in section 73 of the Constitution are all based on the concept of sustainable development. Hence, the need to pause and reflect on what has been achieved and the opportunities that are there to further develop the protection of environmental rights and the negative effects of climate change.

The growing importance of framing environmental rights as human rights and the need to address the climate crisis is reflected in several multilateral environmental agreements (MEAs), declarations and resolutions. These include the United Nations Framework Convention on Climate Change (UNFCCC), the Rio Declaration on Environment and Development, Sustainable Development Goals (SDGs), the African Charter on Human and Peoples' Rights, the Kyoto Protocol, and the Paris Climate Agreement. In 2021, the Human Rights Council adopted a resolution on “the human right to a clean, healthy and sustainable environment”.<sup>12</sup> The resolution urges member states to adopt policies for the enjoyment of the right to a clean, healthy, and sustainable environment as appropriate including with respect to biodiversity and ecosystems.<sup>13</sup> In 2022, the United Nations Assembly adopted a resolution on the same topic.<sup>14</sup>

Zimbabwe, as a member of the international community, is required to adopt policies and enact legislation at the national level to fulfil its commitments and obligations at the international level reflected in various MEAs, declarations and resolutions.<sup>15</sup> Zimbabwe is one of the countries that has adopted the concept of sustainable development which is reflected in several laws and policies. These include the adoption of a Constitution that recognises environmental

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<sup>8</sup> UN General Assembly, *Report of the World Commission on Environment and Development: Our Common Future*, A/42/427, 1987 <digitallibrary.un.org/record/139811#record-files-collapse-header> (accessed 23 January 2023).

<sup>9</sup> The meeting was held in Rio de Janeiro, Brazil from the 3-14 June 1992 and is also known as the Rio Earth Summit and came up with Agenda 21 as an action plan

<sup>10</sup> The meeting was held in Johannesburg, South Africa from 26 August-4 September, 2002 and came up with the Johannesburg Declaration on Sustainable Development and the Plan of Implementation of the World Summit on Sustainable Development

<sup>11</sup> This meeting was held in Rio de Janeiro, Brazil from the 20 -22 of June, 2012 and is also known as the “Future We Want”.

<sup>12</sup> UN General Assembly, *The human right to a clean, healthy and sustainable environment*, A/HRC/RES4813, 2021, <documents-dds-ny.un.org/doc/UNDOC/GEN/G21/289/50/PDF/G2128950.pdf?OpenElement> (accessed 23 January 2023).

<sup>13</sup> *Ibid.*, 4 (c).

<sup>14</sup> UN General Assembly, *The human right to a clean, healthy and sustainable environment*, A/76/L.75, 2022 <digitallibrary.un.org/record/3982508?ln=en> (accessed 23 January 2023).

<sup>15</sup> Government of Zimbabwe, *supra* note 3, Section 327. *See also* Government of Zimbabwe, *Constitution of Zimbabwe Environmental Management Act Chapter 20:27, 2005*, <ucaz.org.zw/wpcontent/uploads/2019/08/ENVIRONMENTAL-MANAGEMENT-ACT.pdf> (accessed 23 January 2023). <sup>17</sup> Government of Zimbabwe, *supra* note 3, Section 73. <sup>18</sup> Chapter 20:27, *supra* note 16.

rights as human rights<sup>17</sup> and incorporated the Environmental Management Act<sup>18</sup>. The objective of this research paper is to assess executive, legislative and judicial developments and measures that have taken place since the adoption of the 2013 Constitution to promote and strengthen environmental rights as human rights and respond to the climate crisis.

### ***1.1 Justification and Relevance***

This review is very important because the realisation of environmental rights is progressive<sup>16</sup> rather than immediate and, therefore, depends on supportive measures that the government takes. Without these measures, the constitutional right to a clean and healthy environment will remain a pipeline dream. This has become even more urgent and necessary considering the triple threat that the planet faces because of climate change, increased environmental degradation and biodiversity loss and pollution. Climate change is no longer regarded as an environmental issue only but a human rights issue which has the potential to and is undermining the realisation of human rights that are provided for and protected under national, regional, and international law. Such rights include the right to food, water, health, shelter, life, and development among others. Hence, the question is, has Zimbabwe made progress since 2013? This can only be determined by analysing legal, policy and institutional measures that have been put in place by the Government of Zimbabwe since the adoption of the Constitution in 2013 to determine the effectiveness of their implementation and court judgements.

The review is based on existing laws, policies and institutional frameworks and proposed legal and policy reforms that have implications on the environment and climate change. These laws and policies include the Renewable Energy Policy, Energy Policy, the National Environmental Policy and Strategies, Integrated Solid Waste Management Plan, National Climate Policy, Wetlands Policy, Zimbabwe Climate Change Response Strategy, Zimbabwe's National Development Strategy 1, Zimbabwe 's Long Term Low Greenhouse Gas Emissions Development Strategy (2020-2050) and Nationally Determined Contributions under the Paris Agreement. There are also ongoing legal and policy reforms. These include the amendment of the Parks and Wildlife Act, the Environmental Management Act, the review of Zimbabwe's Wildlife Policy of 1992, the Mines and Minerals Amendment Bill, the development of a Climate Change Act and the National Forest Policy. There are also several judiciary pronouncements that have implications on environmental rights and climate change. There are also conversations about establishing specialised environmental courts. These will be analysed to determine if they promote environmental rights as human rights and help in the fight against the climate crisis.

## **2 Legal Developments Since 2013**

There have been many developments that have changed the legal, policy and institutional framework of environmental management in the country over the last decade. Most of the notable legal developments that have taken place since the inclusion of environmental rights in section 73 of the Constitution in 2013 have been through Statutory Instruments (SIs). Pollution and poor management of waste including the transboundary movement (TBM) of plastic waste

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<sup>16</sup> Government of Zimbabwe, *supra* note 3, Section 73(2).

and the environmentally sound management of plastic waste (ESM) is a major challenge in Zimbabwe.<sup>17</sup> These challenges are reflected in the National Development Strategy 1 (NDS 1) 2021-2025. The NDS1 set environmental protection, climate change and the sustainable use of natural resources as key priority areas. It is estimated that Zimbabwe generates about 1.9 million tonnes of waste annually.<sup>18</sup> Plastic as well as other hazardous and domestic waste are sources of pollution, and this affects the realisation of environmental rights that are provided under the Environmental Management Act and the Constitution.

### ***2.1 Environmental Management Regulations on Prohibition and Control of Ozone Depleting Substances and Greenhouse Gas Dependent Equipment***<sup>19</sup>

The regulations give effect to the provisions of the Montreal Protocol under the Vienna Convention to which Zimbabwe is a signatory. The regulations recognise that, as a signatory, Zimbabwe must mitigate the emission of ozone-depleting substances (ODSs) and ODS-dependent equipment that destroy the ozone layer. Through the regulations, the Ozone Office in the Ministry of Environment, Climate, Tourism and Hospitality Industry controls the importation and use of such substances and equipment through permits. Although not present at border posts, the Ozone Office works in collaboration with the Zimbabwe Revenue Authority (ZIMRA) and the Environmental Management Agency (EMA) in screening imports destined for Zimbabwe or transits through the country. Although not directly affected by the depletion of the Ozone layer, Zimbabwe has an obligation to act due to the common but differentiated responsibility principle.

### ***2.2 Environmental Management Regulations on Control of Hazardous Substances***<sup>23</sup>

The ESM of chemicals and their waste is critical in promoting the realisation of environmental rights.<sup>24</sup> The poor management of chemicals has demonstrated negative effects on human health and the environment owing to their toxicity, persistence, long-term environmental impacts and ability to bioaccumulate. It is against such a background that global action has been taken in terms of the Basel, Rotterdam and Stockholm (BRS) and Minamata Conventions to restrict or ban the use of highly hazardous chemicals. In order to fully realise the benefits of such actions they, however, need to be domesticated or contextualised in the country's individual legislation. To this end, Statutory Instrument 268/2018 attempts to include key elements of global action through the consolidation of several prior amendments to the principal regulations. The amendment not only sought to capture changes in terms of the ESM of chemicals in MEAs but also sought to capture changes in the functional currency after the adoption of the United States Dollar in 2009. License fees under the regulation are pivotal for the implementation of the "polluter pays principle". The regulation repealed a notable number

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<sup>17</sup> Environmentally Sound Management of Plastic Waste is defined as the taking of all practical steps to ensure that hazardous wastes or other wastes are managed in a manner which will protect human health and the environment against adverse effects which may result from such wastes

<sup>18</sup> Government of Zimbabwe, 'Integrated Solid Waste Management Plan, 2021'.  
<https://www.ema.co.zw/agency/ziswmp>

<sup>19</sup> FAO, *Environmental Management (Prohibition and Control of Ozone Depleting Substances, Greenhouse Gases, Ozone Depleting Substances and Greenhouse Gases Dependent Equipment) Regulations*, 2016. Statutory Instrument 131 of 2016, [CAP. 20:27]. <[faolex.fao.org/docs/pdf/zim203470.pdf](http://faolex.fao.org/docs/pdf/zim203470.pdf)> (accessed 23 January 2023). <sup>23</sup> FAO, *Environmental Management (Control of Hazardous Substances) (General) Regulations*, 2018. Statutory Instrument 268 of 2018, [CAP. 20:27]. <[faolex.fao.org/docs/pdf/zim187704.pdf](http://faolex.fao.org/docs/pdf/zim187704.pdf)>. (accessed 23 January 2023). <sup>24</sup> Health Safety Executive, 'Background: Globally Harmonized System (GHS)'. <[www.hse.gov.uk/chemicalclassification/legal/background-directives-ghs.htm](http://www.hse.gov.uk/chemicalclassification/legal/background-directives-ghs.htm)> (accessed 23 January 2023).

of SIs that provided the general framework for the management of chemicals in Zimbabwe. The repealed SIs include the following:

- Environmental Management (Hazardous Substances, Pesticides, and other Toxic Substances) Regulations, 2007.
- Environmental Management (Importation and Transit of Hazardous Substances and Waste) Regulations, 2009; and
- Environmental Management (Hazardous Substances, Pesticides, and other Toxic Substances) (Amendment) Regulations, 2011.

The regulation also incorporated the Globally Harmonized System (GHS) for the classification and labelling of chemicals, a key requirement for identifying and communicating the risks associated with a chemical. Such information is critical in chemical screening at ports of entry as well as for informing emergency preparedness and responses in the event of a chemical spill or incident. In the Plan of Implementation of the World Summit on Sustainable Development held in Johannesburg, South Africa, in 2002, countries were encouraged to implement the GHS as soon as possible with the goal to have the system fully operational by 2008.<sup>20</sup>

In keeping with the prior informed consent (PIC) requirement of the BRS and Minamata Conventions, the regulation provides an inclusive list of chemical substances that are considered dangerous and that, as a result, require to be licensed prior to importation, transportation, storage, use and sale. Given the infinite number of chemical formulations that are possible, this presents an operational challenge in terms of the implementation of the regulation, notwithstanding the footnote to the Third Schedule of SI 268/2018 that reads:

The list of hazardous substances provided in this Schedule is non-exhaustive. Any substance not specifically covered under the list will be identified and licensed or labelled in accordance with the characteristics or hazard posed by the substance as provided in this Schedule<sup>21</sup>

Notable additions included in the SI 268/2018 include PIC from the Environmental Management Agency before the manufacture, storage, sale, use, import, transport, distribution or transit of derivatives of cyanide and mercury in particular. Cyanide and mercury are predominantly used for the extraction of gold in the mining sector. The leading source of mercury in Zimbabwe is artisanal mining in the amalgamation sector. The regulation, in keeping with the Minamata Convention on Mercury, therefore, seeks to ensure that mercury imports are regulated given the public health and environmental risks associated with exposure. A survey conducted by the World Health Organisation (WHO) in 2014 indicated that chronic mercury intoxication is likely to have been one of the top 20 hazards for the population health in Zimbabwe<sup>27</sup>.

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<sup>20</sup> SAICM, 'Pilot Project to support African Countries in overcoming barriers in implementing the UN GHS', <[saicmknowledge.org/projects/pilot-project-support-african-countries-overcoming-barriers-implementing-un-ghs](http://saicmknowledge.org/projects/pilot-project-support-african-countries-overcoming-barriers-implementing-un-ghs)> (accessed 23 January 2023).

<sup>21</sup> Environmental Management (Control of Hazardous Substances) (General) Regulations, 2018 p2853 <sup>27</sup> Steckling, N., Bose-O'Reilly, S., Pinheiro, P. *et al.* The burden of chronic mercury intoxication in artisanal small-scale gold mining in Zimbabwe: data availability and preliminary estimates. *Environ Health* **13**, 111 (2014). <https://doi.org/10.1186/1476-069X-13-111>

### ***2.3 The Environmental Management Regulations on the Control of Alluvial Mining<sup>22</sup>***

Statutory Instrument 92/2014 created a legal framework that regulates riverbed mining, also known as alluvial mining, and gives further support to the need to conduct an environmental impact assessment (EIA) beforehand. Alluvial mining has been proven to harm aquatic ecosystems which in turn affected their ability to continue to offer ecological services. The ecological services that such ecosystems produce include water for irrigating crops and for drinking by farm animals and communities. Where water courses are diverted or polluted, this affects the livelihood of communities and spurs further environmental damage. The principal regulation sought to initially protect water courses and wetlands by creating a 200-meter buffer from the highest flood level in which mining, processing plants, washing plants, ore stockpiles and slimes dams would not be allowed. Further restrictions imposed in the buffer zone include banning the use of the highly toxic chemicals mercury and cyanide. In addition, the regulation in section 5(4) empowered a magistrate to direct that remedial action should be taken to restore degraded ecosystems during alluvial mining, at any point of cessation and upon mine closure.

Statutory Instrument 92/2014 was subsequently amended by the Environmental Management (Control of Alluvial Mining) (Amendment) Regulations, 2018 (No. 1), published in Statutory Instrument 258 of 2018 which was in turn repealed by the Environmental Management (Control of Alluvial Mining) (Amendment) Regulations, 2021 (No. 2) published in Statutory Instrument 92 of 2014. The amendment introduced the following key provisions in a bid to foster the conservation of watercourses and wetlands:

- The no mining buffer was increased from 200 meter to 500 meter; and
- mining operations were permitted to only go as deep as the original bed of the water system and not deeper than the distances specified in the geological report of the water system.

There are also a number of strategies that have been developed since 2013 that relate to waste management. These include the Harare Integrated Solid Waste Management Strategic Plan (2021-2025) and the Draft National Strategy for the Environmental Sound Management of Plastic Waste in Zimbabwe (2022-2025). These strategies will address waste management including plastic waste which is a big threat to the realisation of the right to a clean environment as provided for in the Constitution and the Environment Management Act.

### **3 Policy Developments Since 2013**

Equally, there are a number of important policy developments that have taken place since 2013. While policies, by their nature, are not enforceable in a court of law, they are a statement of intent that can be harnessed or marshalled for the realisation of environmental rights depending on political will.

#### ***3.1 The National Development Strategy (NDS 1)***

The NDS1 recognises environmental protection and climate resilience as key enablers for the attainment of vision 2030 and the SDGs.<sup>23</sup> If climate change and its impacts on human rights

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<sup>22</sup> FAO, *Environmental Management (Control of Alluvial Mining) Regulations, 2014*. Statutory Instrument 92 of 2014, [CAP. 20:27], <faolex.fao.org/docs/pdf/zim170806.pdf> (accessed 23 January 2023).

<sup>23</sup> Government of Zimbabwe, 'National Development Strategy 1, January 2021-December 2025. Towards

are not addressed, then it will affect the realisation of environmental rights as envisaged by the Constitution. The relevance of NDS1 to the promotion and protection of environmental rights as human rights is very evident under strategies to achieve improved climate action. These include the improvement of pollution and waste management, land and ecosystems management and protection, strengthening capacity building and awareness on climate change adaptation and mitigation and promoting low emission development pathways and the reduction of GHG and alternative energy sources.

### ***3.2 The Zimbabwe National Climate Change Response Strategy (NCCRS)***

This strategy was developed as a response to the acknowledgement that Zimbabwe is experiencing climate change and variability.<sup>24</sup> Its objectives is to coordinate Zimbabwe's efforts to respond to climate change through mitigation and adaptation. This is reflected in its vision, mission, and goal. The goal of the NCCRS is to mainstream climate change adaptation and mitigation strategies in economic and social development at national and sectoral levels through multistakeholder engagements.<sup>25</sup> The strategic objectives of the NCCRS lay a very strong foundation for developing laws, policies and strategies that can help the country to respond to the climate crisis and its impacts on human rights including environmental rights.

### ***3.3 The National Environmental Policy and Strategies (NEPS)<sup>26</sup>***

The NEPS is a national environmental policy that is recognizes environmental rights as human rights and the climate crisis. This is provided under its key policy principle provisions.<sup>27</sup> The provisions are the same as the ones under section 73 of the Constitution and section 4 of the Environmental Management Act. The policy recognises the importance of energy to Zimbabwe's economic development but is also recognizes the contribution of the energy sector to climate change especially one generated from coal-fired power stations, hydro petroleum products, propane gas and wood fuel. It notes that "coal-fired power stations release greenhouses to the atmosphere and gases that form acid rain. These and other emissions from fossil fuels may initiate climate change"<sup>28</sup>. To address climate change problems that may be caused by the use of fossil fuels that emit GHGs, the policy calls for the promotion of renewable sources of energy through the introduction of appropriate incentives and investments.<sup>29</sup> Furthermore, it calls on the government to observe and support international conventions and protocols designed to promote the use of more energy-efficient and environmentally friendly energy sources.<sup>30</sup>

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Prosperous and Empowered Upper Middle-Income Society by 2030', 2020, p.205  
<[www.dpcorp.co.zw/assets/national-development-strategy-1\\_2021---2025\\_goz.pdf](http://www.dpcorp.co.zw/assets/national-development-strategy-1_2021---2025_goz.pdf)> (accessed 23 January 2023).

<sup>24</sup> Government of Zimbabwe, Ministry of Environment and Natural Resources Management. 'Zimbabwe National Climate Change Response Strategy', 2013,  
<[swwprogramme.info/documents/20142/407481/ZWE\\_MI\\_WE\\_20141231.pdf/00ca1677-6620-cce6-5fb3367a57cfe71b?version=1.0&t=1626442737947&](http://swwprogramme.info/documents/20142/407481/ZWE_MI_WE_20141231.pdf/00ca1677-6620-cce6-5fb3367a57cfe71b?version=1.0&t=1626442737947&)>(accessed 23 January 2023).

<sup>25</sup> *Ibid.*, Goals 1-3, p. 9.

<sup>26</sup> Government of Zimbabwe, Ministry of Environment and Natural Resources Management, 'National Environmental Policy and Strategies', 2009.  
<[swwprogramme.info/documents/20142/407481/ZWE\\_PO\\_WE\\_20090630.pdf/28c96ebd-e12e-5248-5cb97b22781e6782?t=1626442767886](http://swwprogramme.info/documents/20142/407481/ZWE_PO_WE_20090630.pdf/28c96ebd-e12e-5248-5cb97b22781e6782?t=1626442767886)> (accessed 23 January 2023).

<sup>27</sup> *Ibid.*, Section 3.1.

<sup>28</sup> *Ibid.*, Section 6.2.5.

<sup>29</sup> *Ibid.*, Section 6.2.5.

<sup>30</sup> *Ibid.*, Section 6.2.5

It further recognises that oil and gas operations can result in environmental pollution, including air pollution that contributes to climate change. Based on this understanding, the policy calls for the consideration of sustainability, biodiversity, and ecology to counteract environmental impacts, including climate change. The policy lays a broad foundation for the development of laws and policies to deal with climate change thereby protecting and promoting environmental rights as human rights.

### ***3.4 The National Climate Policy***

The objective of the National Climate Policy is to “guide climate change management in the country, enhance the national adaptation capacity, scale up mitigation actions, facilitate domestication of climate related global policies and ensure compliance with to the global mechanisms”<sup>31</sup>. It also further provides an overarching framework for the country in form of basic principles and guidance under which the National Climate Change Response Strategy (NCCRS) and other climate related strategies can be implemented.<sup>32</sup>

### ***3.5 The Renewable Energy Policy***

This policy framework provides a pathway of how Zimbabwe can move away from fossil fuels that are among the major contributors of GHG emissions that cause climate change. The good thing is that Zimbabwe has an abundance of renewable energy sources that can be harnessed as alternatives to create a sustainable energy portfolio in the country. The Renewable Energy Policy thus builds on the priorities and aspirations of the Zimbabwe National Climate Policy and the country’s efforts to reduce GHG emissions.<sup>33</sup> One of the policy's primary objectives is setting overall targets for renewable energy based on the Nationally Determined Contributions (NDCs) interventions.

### ***3.6 The National Wetlands Policy***

Wetlands play a very important role in the realisation and protection of environmental rights including the right to water. It is against this background that the Government of Zimbabwe adopted a Wetlands Policy.<sup>34</sup> The policy aim to “establish an effective and efficient institutional and legal framework for integrated management and wise use of wetlands which will provide an enabling environment for the participation of all stakeholders”.<sup>35</sup> The policy is based on a number of principles that are all at the core of sustainable development. These include integration, precautionary, polluter pays, collaborative and participatory and global dimension.<sup>42</sup> To improve and enhance wetlands management, the Government of Zimbabwe adopted the National Wetlands Management Guidelines.<sup>36</sup>

## **4 Institutional Arrangements**

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<sup>31</sup> Government of Zimbabwe, Ministry of Environment, Water and Climate, *National Climate Policy*, 2017.

<sup>32</sup> *Ibid.*, p. 2.

<sup>33</sup> Government of Zimbabwe, Ministry of Environment, Water and Climate, *supra* note 37.

<sup>34</sup> Government of Zimbabwe, Ministry of Environment, Climate, Tourism and Hospitality Industry, *Zimbabwe Wetland Policy*, 2020.

<sup>35</sup> *Ibid.*, Section 5.

<sup>42</sup> *Ibid.*, Section 6.

<sup>36</sup> Ministry of Environment, Climate, Tourism and Hospitality Industry, *National Wetlands Management Guidelines*, 2021.

The institutional framework is important in the environmental rights agenda since it raises awareness in communities concerning their rights and because it supports them to be able to effectively participate in the management of the environment and to take action through litigation where necessary.<sup>37</sup> In this context, it is noteworthy that the key institutions ensuring the monitoring of environmental rights from a regulatory standpoint, include the Environment Management Agency (EMA), the Zimbabwe Parks and Wildlife Authority (ZIMPARKS) and the Forestry Commission. The mandate of these institutions is outlined in their respective enabling Acts. The sections that follow will discuss the evolution of the institutional framework over the last decade including funding mechanisms and programmes implemented that raise awareness and enhance the capacity of communities to uphold their environmental rights in terms of section 73 of the Constitution.

#### ***4.1 Environmental Management Agency***

The role of the EMA appears to primarily focus on coordination as espoused in section 10(1) of the Environmental Management Act. The function of the agency includes the formulation of quality standards on air, water, soil, noise, vibration, and waste management; and assisting and participating in any matter on the management of the environment. In addition, the Act extends EMA's mandate to:<sup>38</sup>

- the preparation of guidelines for the preparation of a National Environmental Action Plan (NEAP);
- regulating the disposal of environmental discharges and wastes;
- overseeing the Environmental Impact Assessment (EIA) process;
- develop model environmental bylaws;
- coordinate the state of the environment formulation; and
- Undertake work deemed necessary for the protection of the environment.

Although many SIs have been enacted to regulate various areas that include chemicals and waste, namely SI 10/2007 & SI 268/2018, water and solid waste (SI 6/2007), air pollution (SI72/2009), and ecosystems (SI 7/2007), SI 61/2009, it is through institutions such as Environmental Management Agency that they are implemented. In order to facilitate the work of the agency, the Environmental Management Act in section 42 establishes funding mechanisms that include grants from parliament and the government, donations, the proceeds of Carbon Tax and any other funds that may accrue from its operations. These sources of funding are meant to establish a predictable source of financial resources to sustain the operations of the agency. In its annual report<sup>39</sup>, the agency indicated that the bulk of its revenue in 2020 accrued from environmental licence fees and penalties. Additional support was granted from the treasury for the capital projects that included the purchase of a state-of-the-art emergency response van. Although additional support is provided as grant funding through projects sponsored under MEAs there is still a need for additional resources to cater for capitalintensive projects such as the reclamation and rehabilitation of disused mines in terms of section 10(1)(b)(xii) of the EMA Act.

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<sup>37</sup> T. Madebwe, 'A rights-based approach to environmental protection: The Zimbabwean experience', 15(1) *African Human Rights Law Journal* (2015), 110-128.

<sup>38</sup> Environmental Management Act [CAP20:27] Section 10

<sup>39</sup> Environmental Management Agency, "Annual Report", 2021

Despite the limitations in funding, notable milestones in the capacity-building of the agency over the last decade include:<sup>40</sup>

- the accreditation of the agency's laboratory to ISO17025 in 2012 and expansion of its analytical capacity from 12 methods to 34 methods covering flora, fauna, water and soil samples - a key enabler for producing data on environmental quality;
- roll-out of vehicular emissions and point source monitoring programmes in 2013;
- establishment of a biomonitoring programme to monitor variations in biota as a result of water pollution episodes in 2014;
- establishment of a specialised Environmental Law Enforcement Unit in collaboration with the Zimbabwe Republic Police (ZRP) to expedite the opening and processing of dockets for environmental offences and ticket follow-ups
- expansion of the ambient water monitoring programme to monitor dam and lake water quality in 2021;
- enhanced chemical emergency capacity through the procurement of a state-of-the-art HAZCHEM response vehicle and training of responders in 2021;
- development of several guidelines including the Wetland Utilisations Policy and Guide, draft guidelines for the design and operation of landfills, guidelines for the Local Environmental Action Plans (LEAPs);
- establishment of an ambient air quality monitoring system for particulate pollution focusing on PM<sub>10</sub> and PM<sub>2.5</sub> in 2022.

#### ***4.2 Environmental Management Board***

The Environmental Management Act established an Environmental Management Board.<sup>41</sup> The board controls and manages the functions of the Environmental Management Agency including giving guidance on the promotion and protection of environmental rights as human rights. The board also has access to all the ministers when carrying out its mandate which means that it can approach any minister on environmental rights and environmental issues whenever it deems it necessary. This is very important in promoting integrated decision making and cooperative governance. The board also has the authority to hold hearings on any matter and it can sit as a court.<sup>42</sup> The board is further required to consult experts on technical issues which can include problems related to environmental rights as human rights as well as to climate change.<sup>43</sup> An Audit and Risk Committee was established under the board in order to align the agency's operations with the corporate governance tenets.

#### ***4.3 National Environmental Council***

The establishment of the National Environmental Council (NEC) is provided for in terms of section 7 of the Environmental Management Act. The NEC plays an important role in facilitating the enjoyment of communities' right to a clean, safe and healthy environment. The duties of the NEC, in terms of section 8, are to advise the minister on policy formulation and give directions on the implementation of the Environmental Management Act, national goals

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<sup>40</sup> Environmental Management Agency, "Annual Report", 2022

<sup>41</sup> Government of Zimbabwe, *supra* note 16, Section 11.

<sup>42</sup> *Ibid.*, Section 27

<sup>43</sup> *Ibid.*, Section 26

and objectives and determine policies and priorities for the protection of the environment. The NEC was set up and constituted in 2013.

#### ***4.4 The Standards Enforcement Committee ( SEC )***

The Committee was established under section 55 of the Environmental Management Act. As a committee of the board, its functions as provided in section 56 include the following:

- a) To advise the board on how to come up with criteria and procedures for the measurement of water quality; and
- b) To recommend to the board minimum water standards

While the committee's constitution is currently biased towards water which is good in that water quality is a key component of the realisation of environmental rights, it should be broadened to include other aspects of environmental rights as human rights. Although the Act provides for the SEC it has not been constituted as a result affecting the formulation of environmental quality standards that should otherwise form the basis of setting pollution reduction targets. The ambient water standards adopted for benchmarking water quality are derived from the discharge standards set in terms of the SI 6/2007.

#### ***4.5 Parliamentary Portfolio Committee on Environment, Climate and Tourism***

Another important institution is the Parliamentary Portfolio Committee on Environment, Climate and Tourism. The committee has an oversight role over the Executive that includes the following:

- a) To consider and review all international treaties , conventions and agreements relevant to it , which are from time to time negotiated , entered or agreed upon
- b) To monitor , investigate , inquire , or make recommendations relating to any aspect the legislative programme or policy or any other matter it may consider relevant to government departments falling within the category of affairs assigned

The Committee's oversight role is broad enough to include issues that may relate to environmental rights as human rights and climate change.

#### ***4.6 Climate Change Management Department***

To facilitate the coordination and mainstreaming of climate change programmes in the country, the Government of Zimbabwe established a Climate Change Management Department in the then Ministry of Environment, Water and Climate. The department has overseen the development of several climate-related policies and strategies which are key for mitigating the effects of climate change. Furthermore, the policy is a key enabler for accessing multilateral funds from the Global Environmental Facility and other sources of climate finance.

### **5 Judicial Developments Since 2013 That Reflect Judicial Awareness of Environmental Rights**

One of the ways of assessing the constitutional environmental rights clause and its role in promoting environmental rights as human rights is through judicial developments that have

taken place since 2013. The protection and promotion of environmental rights entails finding a balance between developmental and environmental issues for which courts play a crucial role.<sup>44</sup> Similar to other rights, constitutional environmental rights mean nothing if they are not adjudicated, enforced and developed by courts.<sup>45</sup> It is through the interpretation by courts that the right to a clean and healthy environment can promote environmental conservation and sustainable development. The way the courts interpret and adjudicate environmental rights as human rights, provides guidance to both the executive and the legislature. This is particularly useful as they attempt to balance two important competing demands, namely economic development and environmental protection.<sup>46</sup>

This balance is usually achieved through the concept of sustainable development. Sustainable development is defined as a conceptual framework for achieving economic development that is socially equitable and protective of the natural resource.<sup>47</sup> The concept of sustainable development is made up of a number of principles that derive largely from the Rio Declaration on Environment and Development.<sup>48</sup> These include the polluter-pays-principle<sup>49</sup>, the precautionary principle,<sup>50</sup> EIA,<sup>51</sup> and access to information and public participation.<sup>52</sup> The protection of property rights, *locus standi*, the awarding of costs and the role of the judiciary in developing the law, are also among some important principles that can be used to determine how the constitutional environmental rights have been promoted and advanced by the judiciary in Zimbabwe since the adoption of the 2013 Constitution. This section consequently reviews and analyses environmental jurisprudence that has been developed through court decisions since the adoption of the new Constitution. Several cases have been brought before the courts based on section 73 of the Constitution which builds on section 4 of the Environmental Management Act.

## 6 Understanding Section 73 of the Constitution

Since the analysis of the court decisions will be based on section 73 of the Constitution, it is worthwhile to reflect on its provisions. The environmental rights provision in the Constitution of Zimbabwe is modelled after those of Kenya, Uganda and South Africa.<sup>52</sup> Section 73 provides as follows:

- (1) Every person has the right
  - (a) to an environment that is not harmful to their health or wellbeing; and
  - (b) to have the environment protected for the benefit of present and future generations through reasonable legislative and other measures that –

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<sup>44</sup> L.J. Kotze, 'The constitutional court's contribution to sustainable development in South Africa', 6 (2) *Potchefstroom Electronic Law Journal* (2003).

<sup>45</sup> C.B. Soyapi, 'The role of the judiciary in advancing the right to a healthy environment: eastern and southern African perspective', PhD Thesis. (Northwestern University, 2018).

<sup>46</sup> F. Ndhlovu, 'An appraisal of the judicial enforcement of environmental protection in Zimbabwe', Master Thesis, (Northwestern University, 2021).

<sup>47</sup> Dernbach, *supra* note 7.

<sup>48</sup> United Nations General Assembly, Report of the United Nations Conference on Environment and Development, A/CONF.151/26 (Vol. I), 1992.

< [www.un.org/en/development/desa/population/migration/generalassembly/docs/globalcompact/A\\_CONF.151\\_26\\_Vol.I\\_Declaration.pdf](http://www.un.org/en/development/desa/population/migration/generalassembly/docs/globalcompact/A_CONF.151_26_Vol.I_Declaration.pdf)> (accessed 24 January 2023).

<sup>49</sup> *Ibid.*, Principle 16.

<sup>50</sup> *Ibid.*, Principle 15.

<sup>51</sup> *Ibid.*, Principle 17.

<sup>52</sup> *Ibid.*, Principle 10

<sup>52</sup> Soyapi, *supra* note 52.

- (i) prevent pollution and ecological degradation
- (ii) promote conservation; and
- (iii) secure ecologically sustainable development and use of natural resources while promoting economic and social development.<sup>53</sup>

(2) The State must take reasonable legislative and other measures, within the limits of the resources available to it, to achieve the progressive realisation of the rights set out in this section.<sup>54</sup>

It is important to note that while this provision is justiciable, its realisation is progressive and some have argued that this may explain why significant progress in the realisation of environmental rights has not been achieved even though a decade has passed since the enactment of the 2013 Constitution.<sup>55</sup> Section 73 of the Constitution builds on the provisions of section 4 of the Environmental Management Act. Its provisions are as follows.<sup>64</sup>

Both the constitutional and EMA provisions are based on the concept of sustainable development. With regards to the enforcement of the fundamental human rights and freedoms, under which section 73 falls, the Constitution provides as follows:

- (1) Any of the following persons, namely –
  - (a) any person acting in their own interests
  - (b) any person acting on behalf of another person who cannot act for themselves
  - (c) any person acting as a member, or in the interests, of a group or class of persons
  - (d) any person acting in the public interest
  - (e) any association acting in the interests of its members

is entitled to approach a court, alleging that a fundamental right or freedom enshrined in this Chapter, has been, is being or is likely to be infringed, and the court may grant appropriate relief, including a declaration of rights and an award of compensation.<sup>65</sup>

The expanded *locus standi* which is provided for in section 85 is very important when it comes to environmental rights and their role to address the negative effects of climate change. It is important to note that environmental rights, as provided in section 73, are not absolute but are subject to limitation. With regards to the limitation of rights, section 86 of the Constitution provides as follows that “[t]he fundamental rights and freedoms set out in this Chapter must be exercised reasonably and with due regard for the rights and freedoms of other people”.<sup>56</sup> This means that the rights and freedoms, including environmental rights as human rights, can be limited in those cases where they infringe on other people’s rights including property rights.

## 7 Analysis of Court Decisions

In analysing the constitutional environmental right since its implementation in 2013, it is important to note that there are limited cases that have been brought before the courts based on section 73. As Soyapi observes “[t]here is little scholarship and commentary on the right to a healthy environment in Zimbabwe or on the cases in which the right has been an issue (both before and after the 2013 Constitution)”<sup>57</sup>. Soyapi further argues that there is a dearth of scholarship analysing the development, or lack thereof, of the right to a healthy environment

<sup>53</sup> Section 73(1)(a)(b), p.37

<sup>54</sup> Section 73 (2)

<sup>55</sup> M. Dhliwayo, ‘A critical examination of the scope, content and extent of environmental rights in the Constitution of Zimbabwe’ Master Thesis (Midlands State University, 2016). <sup>64</sup> See section 4 of the Environmental Management Act <sup>65</sup> *Ibid.*, Section 85.

<sup>56</sup> Government of Zimbabwe, *supra* note 3, Section 86(1).

<sup>57</sup> Soyapi, *supra* note 52.

<sup>68</sup> *Ibid.*

in relation to the work of the courts.<sup>68</sup> While Soyapi's observations are correct in that there are limited cases that have been adjudicated by the courts based on section 73 for a number of reasons, there is evidence that there is an increasing interest, to test its justiciability, from stakeholders that include civil society organisations, residents associations, the Environmental Management Agency and community-based organisations and individuals alike. Several cases have been brought before the Administrative Court, the High Court and the Supreme Court.

### **7.1 The Concept of Sustainable Development**

In the case of *Harare Wetlands Trust and Newlands Residents Association v New Life Covenant Church and Others*<sup>58</sup>, the judiciary had an opportunity to make a pronouncement on the concept of sustainable development. The first respondent New Life Covenant Church was building a superstructure on area which is a wetland. The applicants averred that the development would result in detrimental and irreparable harm to the environment in violation of sections 73 and 4 of the Constitution and the Environmental Management Act respectively which provides for the right to a clean and health environment which is not harmful to one 's health and encompassing sustainable development. Justice Chinamora pointed out the need to strike a balance between development and sustainable environmental management which is at the heart of the concept of sustainable development. He articulated the concept by noting as follows:

in each individual case the particular economic and benefits of planned action must be assessed and weighed against the environmental costs, alternatives must be considered which would affect the balance of values.<sup>59</sup>

Based on the need to strike a balance between economic development and environmental protection, the court was able to grant both a declaratory order and an interdict that was sought by the applicants. This judgement shows that judges are increasingly becoming aware of the importance of environmental rights as human rights.

### **7.2 Environmental Impact Assessment**

In *RCM Civil (Private) Limited v. Petrotrade (Private) Limited*,<sup>60</sup> the issue centred on the construction of a service station without obtaining an Environmental Impact Assessment ( EIA ) certificate from the Environmental Management Agency as required by the Environmental Management Act. The construction was stopped by the EMA. In his ruling the judge pointed out that the defendant had begun construction of the service station without an EIA certificate which was in direct violation of section 97 of the Environmental Management Act. Under the first schedule of the Act, petrochemical projects including service stations, are among the projects that should not be implemented in the absence of an EIA certificate. The plaintiff was trying to recover costs from the defendant. The judge noted that the plaintiffs knew the requirements of the law. Furthermore, they had employed a specialist consultant whose services they ignored when he advised on the need to obtain an EIA certificate before the commencement of the project. He concluded by saying that:

any project to do with fuel or petroleum products is potentially hazardous to the environment and the community. It would not in my view be in the interests of public policy to allow the plaintiff to recover under

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<sup>58</sup> See *Harare Wetlands Trust and Newlands Residents Association v. New Life Covenant Church and Others*, HC 3440/19.

<sup>59</sup> *Ibid.*,p.1

<sup>60</sup> See *RCM Civil (Private) Limited v. Petrotrade (Private) Limited* , HH 34-20 , 2020.

circumstances where it has brazenly acted in violation of the law. To do so would be to send the wrong signal to would be offenders.<sup>61</sup>

This shows judicial understanding and consciousness about environmental issues.

The importance of an EIA certificate before the commencement of activities was also reinforced in the case of *Debsham (Private) Limited v. The Provincial Mining Director for Matabeleland South and the Provincial Mining Director for Matebeland North and Others*.<sup>62</sup> In that case, the respondents had been granted mining permits and rights in the absence of an EIA certificate. This was based on the wrongful understanding and assumption that an EIA certificate was not a prerequisite for the issuance of a mining certificate. Issuing mining licences, certificates and permits in the absence of an EIA certificate is in violation of sections 97 and 100 of the Environmental Management Act. The respondents argued that the EIA certificate was only required for the commencement of mining operations or activities and not before. In granting the declaratory order against mining authorities, the judge pointed out that trying to get an EIA certificate after the granting of mining licences, certificates and permits is like trying to close the gate after the horse has bolted. The judge noted that the Environmental Management Act, based on the first schedule, has a requirement for an EIA certificate before mineral prospecting, mineral mining or processing and concentrating and quarrying can be undertaken.

This understanding and interpretation are also reinforced in the recent case of *Shangani Holistic (Pvt) Ltd v. Pearline Mineral Exploration (Pvt) Ltd*.<sup>63</sup> In this case, the High Court through Justice Musuthu granted an interim interdict to the applicant prohibiting Pearline Mineral Exploration from conducting an aeromagnetic over the applicant's property before carrying out and obtaining an EIA certificate from the Environmental Management Agency as required by section 62 the Environmental Management Act. The judge correctly noted that, in terms of section 97 of EMA, it was unlawful for one to carry out mineral prospecting. The judge had this to say:

The mere fact that one had obtained an Exclusive Prospecting Order (EPO) under s90(2) of the Mines and Minerals Act does not in exempt them complying with section 97 (1) of the EMA Act. It follows that the respondent conducted the mineral prospecting in violation of the law.<sup>64</sup>

He further noted that exploration had the potential to cause harm to the environment. The importance of this case with regards to EIA is aptly captured by Mitsi when he noted that:

[t]he statement by the judge with regards to the requirement for EIA before commencement of mining related activities should be closely looked at by mining companies as an indication of how the judiciary is likely to look at future cases brought on an urgent basis for interdicts. Mining companies should make efforts to comply with environmental legislation as they invest in the mining sector. Failure to comply may delay projects or affect their projects leading to financial loss. The case is a flashpoint on litigating environmental rights and mining rights.<sup>65</sup>

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<sup>61</sup> *Ibid.*, p. 4

<sup>62</sup> See *Debsham (Private) Limited v. The Provincial Mining Director for Matabeleland South and the Provincial Mining Director for Matebeland North and Others*, HB 11/17, HC 538-16 , 2017.

<sup>63</sup> See *Shangani Holistic (Pvt) Ltd v. Pearline Mineral Exploration (Pvt) Ltd.* , HH 4074/22, 2022.

<sup>64</sup> *Shangani Holisitic (Pvt) Ltd v. Pearline Mineral Exploration (Pvt ) Ltd*

<sup>65</sup> S. Mtisi, 'Environmental Impact Assessment at the Mining and Environmental Litigation Flashpoint', *Africa Institute for Environmental Law* (2022).

Similarly, in the case of *Fidelis Chima and Zimbabwe Environmental Law Association v. Zimbabwe Zhongxin Mining Group Tongmao Coal Company (Pvt) Ltd and Others*<sup>66</sup>, the court upheld the need to conduct an EIA and obtain a certificate before carrying out mining activities that include exploration, prospecting, and drilling in the Sinamatella Camp of Deka Safari Area within the Hwange National Park. The respondents had obtained a Special Mining Grant and had commenced exploration without an EIA certificate as required by the EMA Act.

In the *Hillside Residents Association v Glorious All Time Functions (Private) Limited and Others*<sup>67</sup> case, the applicant wanted to establish/build a function or a wedding venue on a wetland without an EIA certificate. In granting the order to stop the construction of the venue without EIA certification, the judge exemplified that the applicant Hillside Residents Association was representing the public interest, specifically residents' rights to protection of Harare's natural resources in terms of section 73, 77 and section 4 of the Environmental Management Act.

Such cases also help to promote the concept of sustainable development. More often than not, projects have been approved based on economic considerations at the expense of the environment. In some cases, a cost-benefit analysis through a Strategic Environmental Impact Assessment (SEIA) may show that it would be better to not proceed with the project taking into account the irreparable environmental and ecological damage that it would cause.

### **7.3 Precautionary Principle**

The precautionary principle is aptly demonstrated in the case of *The Cosmo Trust and Others v. City of Harare and Others*.<sup>68</sup> The case pertained to the awarding of a development permit by the City of Harare for the construction of 121 clusters houses on part of stand within a wetland called Meadows of Monavale which attracts a range of birds and mammals. It was argued during the hearing that the wetland attracts a diverse range of migratory birds from as far as Europe, Cameron, Kenya and the Democratic Republic of the Congo for breeding purposes. However, there were no scientific studies that determined what attracted these birds to this wetland. In that case, Justice Mandeya relied heavily on the Ugandan case of *Amooti Godfrey Nyakaana v. National Environmental Management Authority and 6 Others*<sup>69</sup> to provide an understanding of the concept of the precautionary principle. He noted that the precautionary principle alongside the polluter-pays principle is at the core of the concept of sustainable development. He defined it as requiring the State to anticipate, prevent and attack the causes of environmental degradation. Consequently, where there is a serious threat of serious and irreversible damage, lack of scientific certainty should not be used as a reason for postponing measures to prevent environmental degradation.

In this case, all the parties agreed that the proposed area for the construction of the housing units was a wetland. However, the scientific studies that had been conducted were not clear on the potential impact of the construction of houses on the wetland and the bird habitat. The court correctly reasoned that this was a proper case for the application of the precautionary principle

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<sup>66</sup> See *Fidelis Chima and Zimbabwe Environmental Law Association v. Zimbabwe Zhongxin Mining Group Tongmao Coal Company (Pvt) Ltd and Others*, HH 4888/20, 2020.

<sup>67</sup> See *Hillside Residents Association v. Glorious All Time Functions (Private) Limited and Others*, SC 327/19, 2019.

<sup>68</sup> See *The Cosmo Trust and Others v. City of Harare and Others*, AC3/19, 2019.

<sup>69</sup> See *Amooti Godfrey Nyakaana v. National Environmental Management Authority and 6 Others*, CA 5/11, 2011.

as allowing the project could result in massive degradation and irreparable destruction of the wetland thereby affecting the bird habitat and the natural water processes performed by a wetland.

The same reasoning regarding the precautionary principle was applied in the case of *Munyaradzi Mutsai and Others v. City of Harare and Others*.<sup>70</sup> This case was concerned with the construction of Rhodesville Holding Bay. The respondents argued that the holding bay was not being constructed on a wetland. The court held that “in the absence of any scientific certainty that the Holding Bay is not being constructed on a wetland, it is prudent to err on the side of caution by granting a provisional order”<sup>71</sup>. The court’s reasoning in these two cases on the precautionary principle is admirable and is comparable to the reasoning by the court in the South African case of *Fuel Retailers Association of Southern Africa v. Director General Environmental Management, Department of Agriculture, Conservation and Environment, Mpumalanga and 11 Others*.<sup>72</sup>

#### **7.4 Public Participation and Access to Information**

One of the ways of promoting environmental rights is through access to information and encouraging public participation. In their rulings, the courts have tried to promote both publication participation and access to information. The cases in which projects have been stopped because of failure to carry out an EIA before their commencement, promote public participation and access to information. During the EIA process, interested and affected stakeholders are consulted which contributes to a participatory policy and decision-making process related to environmental rights. Stakeholders also have the opportunity to object to projects during the EIA process. The EIA process also provides access to information as provided for in section 62 of the Constitution and section 4 of the Environmental Management Act. During that, EIAs stakeholders are informed about projects that they may not be able to know about in the absence of an EIA. With this vital access to information, they are able to participate effectively in the policy and decision-making process and hold duty bearers accountable for the violation of their environmental rights.

In the case of *Community Water Alliance v. Environmental Management Agency and Minister of Environment, Tourism and Hospitality Industry*,<sup>73</sup> the Community Water Alliance, an organisation with vested interests in service delivery and the right to water which relates to the preservation of wetlands, tried to gain access to EIA reports from the Environmental Management Agency. While unsuccessful, this was an attempt to promote accessibility of information as provided for under section 4 of the EMA Act and section 62 of the Constitution. They were challenging section 108 of the Environmental Management Act which restricts members of the public from making copies or reproducing copies of the EIA reports. They argued that this restriction infringed the right to access information that is provided for under the Constitution. They further argued that the provisions of SI 7 of 2007<sup>74</sup>, which required the payment of 3000 Zimbabwean dollars to gain access to the EIA reports for inspection, also effectively limits the access to information. The applicant was seeking a declaratur to have

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<sup>70</sup> See *Munyaradzi Mutsai and Others v. City of Harare and Others*, HH 835/17, 2017.

<sup>71</sup> *Ibid.*, p.129.

<sup>72</sup> 2007(6) SA 4 (CC )

<sup>73</sup> See *Community Water Alliance v. Environmental Management Agency and Minister of Environment, Tourism and Hospitality Industry*, HH258/19, 2019.

<sup>74</sup> *Environmental Management ( Environmental Impact Assessment and Ecosystems Protection ) Regulations , 2007.*

section 108 declared unlawful and inconsistent with the constitutional provision on access to information and SI 7 of 2007 to be ultra vires section 62 of the Constitution. The court ruled as follows:

- a) Section 180 of EMA was held to be ultra vires section 62 to the extent it prohibited the reproduction in possession of EMA and was therefore null and void
- b) Members of the public were allowed to make inspections on the machine-readable record and make notes of the Environmental Impact Assessment report and copies thereof
- c) The Ministry of Environment, Climate, Tourism and Hospitality Industry was ordered to take reasonable measures to review the fees in line with reasonable standards to promote rather than impinge access to information.<sup>75</sup>

The decision by the court is a remarkable judgment of our time in the environmental justice sector. It is progressive and vindicates fundamental rights that are provided for under section 62 of the Constitution.<sup>76</sup> Access to information is a key anchor for effective public participation and a lack of it results in speculations, mistrust and, at times, conflicts.

Cases such as *The Cosmo Trust, Shangani Holistic (Pvt) Ltd v Pearline Mineral Exploration (Pvt) Ltd, RCM (Private) Limited v Petrotrade and Debshan (Private) Limited v The Provincial Mining Director Matebeland South and Others* must also be viewed from this perspective of promoting access to information.

## 7.5 Locus Standi

Before the adoption of the 2013 Constitution, one of the major drawbacks to promoting environmental rights as human rights was *locus standi*. Applicants were required to demonstrate that they had a direct and substantial interest in the case. This was meant to curb busy bodies who would bring cases to court for frivolous and vexatious reasons and a lot of cases were dismissed based on this technicality.<sup>77</sup> The respondents argued in this case that the applicants lacked *locus standi*, yet the judge ruled the contrary. While the judge made the correct decision on *locus standi*, he based it on international and foreign law. There was no need for that as the Constitution is very clear in terms of section 85 which provides for expanded *locus standi*. In this context, Dhlakama notes that:

[w]hile it went at length to look at the interpretation of standing for an environmental organization in a foreign jurisdiction, the question could swiftly have been answered based on section 85 of the Constitution. The Constitution incorporates environmental rights in section 73. This right is clearly subject to the expanded locus standi provision just like all other rights within the Declaration of rights.<sup>78</sup>

## 7.6 Property Rights and Environmental Protection

Property rights is another opportunity that the courts have had to deal with the constitutional right to a clean and healthy environment that is not harmful to one's health. The Constitution

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<sup>75</sup> *Community Water Alliance and Anor v. City of Harare and Anor*, HH 194-20

<sup>76</sup> R. Ncube, 'Case note – *Community Water Alliance v Environmental Management Agency* HH 258/19', 2019, <[zela.org/case-note-community-water-alliance-vs-environmental-management-agency-hh-258-19/](https://zela.org/case-note-community-water-alliance-vs-environmental-management-agency-hh-258-19/)> (accessed 24 January 2023).

<sup>77</sup> Dhliwayo, *supra* note 63.

<sup>78</sup> T.Dhlakama, J.Tsabara and M.Dhliwayo, '*Harare Wetlands Trust and Newlands Residents Association v. Life Covenant Church and Others*: A commentary on *Wetlands Conservation v Physical Development in Zimbabwe*', 2020, <[zela.org/download/harare-wetlands-trust-and-newlands-residents-association-v-life-covenant-church-and-others-a-commentary-on-wetlands-conservation-versus-physical-development-in-zimbabwe/](https://zela.org/download/harare-wetlands-trust-and-newlands-residents-association-v-life-covenant-church-and-others-a-commentary-on-wetlands-conservation-versus-physical-development-in-zimbabwe/)> (accessed 24 January 2023).

provides for concrete property rights.<sup>79</sup> While property rights are fundamental rights, the courts have had the opportunity to apply the limitation of rights and freedoms clause provided in section 86 of the Constitution with regards to property rights to promote environmental rights as human rights. This was very evident in the case of the *Cosmo Trust and Others v City of Harare and Others*.<sup>80</sup> In that case, Justice Mandeya relied heavily on the Ugandan case of *Amooti Godfrey Nyakaana v National Environmental Management Authority and 6 Others*. With regards to property rights and the environment, The Chief Justice of Uganda noted as follows:

A person cannot degrade a wetland and cause pollution to other citizens simply because he owns the land. This would defeat the whole purpose of the Constitution which requires that citizens may own land, but not cause pollution or degradation of the environment which may affect other people and the country as a whole.<sup>81</sup>

He further stated that “[t]he individual’s interest must be viewed in the context of the larger interest of society as a whole and in the context of the Constitution and the laws made there under”<sup>93</sup>.

Similar approaches of limiting property rights to promote environmental rights as human rights were used in the cases of *Harare Wetlands Trust and Another v. Life Covenant Church and Others*<sup>82</sup> and *Munyaradzi Mutsai and Others v. Harare City and Others*<sup>83</sup> respectively. In both cases, environmental rights triumphed over property rights.

### **7.7 Award of Costs**

This awarding of costs against the losing party have been a big stumbling block for the promotion and protection of the constitutional right to a clean and healthy environment. The promotion of this right is dependent on an active civil society that is able to litigate on matters of public interest related to the environment even if they lost. It is through public interest litigation that courts are able to give scope and content to the constitutional environmental right. However, if punitive costs are awarded to those that litigate in the public interest in environmental cases when they lose, this will discourage future public interest litigation.

This principle was evident in the case of *Harare Wetlands Trust and Newlands Residents Association v. Life Covenant Church and Others*. The court ruled that the costs application were to be borne by the defendant. This award was based on the manner in which the defendant defended its case as it lacked evidence. The defendant argued that the area was not a wetland despite the fact that an independent consultant, hired by the defendant, clearly stated in its EIA report that the area was a wetland. In awarding the costs against the defendant, Justice Chinamora said that “[t]he first respondent cannot escape an exemplary order of costs in defending these proceedings. The applicants have been put out of pocket by having to deal with an opposition which lacks merit”.<sup>84</sup>

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<sup>79</sup> Government of Zimbabwe, *supra* note 3, Section 71.

<sup>80</sup> See *Cosmo Trust and Others v. City of Harare and Others*, SC 172/19, 2019.

<sup>81</sup> *Ibid.*

<sup>93</sup> *Ibid.*

<sup>82</sup> See *Harare Wetlands Trust and Another v. Life Covenant Church and Others*, HH819/19, 2019.

<sup>83</sup> See *Munyaradzi Mutsai and Others v. Harare City and Others*, HH835/17, 2017.

<sup>84</sup> *Harare Wetlands Trust and Anor v Life Covenant Church and Others*, HH 819-2019, HC3440/19

<sup>97</sup> See *Silvermine Valley Coalition v. Sybrand van der Spuy Boerdrye and Others*, (1) SA 478 (C),

This approach by the courts where by costs are not awarded against those that brings cases that are in the public interest, helps to promote Public Interest Litigation (PIL). Zimbabwe courts can also further learn from South Africa courts on the awarding of costs in public interest environmental litigation. Exemplary cases include *Silvermine Valley Coalition v. Sybrand van der Spuy Boerdrye and Others*<sup>97</sup> and *Hichange Investments (Pty) Ltd v. Cape Products Company Ltd t/a Pells Products and Others*.<sup>98</sup>

### **7.8 Development of the Law by the Courts**

The court judgements have also resulted in the development of environmental law. In the case of *Shangani Holistic (Pvt) Ltd v. Pearline Minerals Exploration (Pvt) Ltd*, the respondent argued that the applicant should have approached the Environmental Management Agency for relief support in stopping prospecting activities as an alternative remedy as provided under section 97 (3) of the Environmental Management Act. In dismissing the argument for an alternative remedy, the judge said that:

The victim of the illegal exploration may well fold their arms, and wait for the Agency to issue the order referred to in section 97 (3) of the EMA Act. Such an argument is clearly unsustainable since a party, in the position of the applicant with all the massive investments at stake, would not choose to remain nonchalant while its rights were being trampled upon.<sup>85</sup>

Similar arguments of seeking an alternative remedy under the Environmental Management Act have been raised in the case of *Zimbabwe Environmental Law Association and Others v. Anjin Investments and Others*.<sup>86</sup> In that case, the plaintiffs wanted a declaratory order against the defendants who were discharging wastes into the Odzi, Singwizi and Save Rivers. The court rejected the arguments by the defendants regarding the need to exhaust remedies offered under the EMA Act pointing out that the High Court has the discretion to hear and offer relief when approached at the instance of an interested person.

These cases and the judgements by the High Court are help developing/advancing the law with regards to the constitutional environmental rights clause. One of the ways that rights are vindicated or claimed is through litigation including public interest litigation. Judgements such as these help stakeholders to develop trust in the law that assures them that when they approach courts for adjudication regarding violations of their environmental rights the courts are ready to hear their cases and where their rights have been violated, they will get remedy. One of the reasons for public interest in environmental litigation is to promote environmental justice and environmental jurisprudence. These two cases show that the courts are in the right direction.

The case of *Augur Investments v. Minister of Water and Climate and Environmental Management*<sup>87</sup> also encourages the advancement of environmental rights jurisprudence. In this case, the Minister of Environment declared an area a wetland through a general notice in terms of the Environmental Management Act. The applicant wanted the order to be declared a nullity. While the judge ruled in favour of the applicant by declaring it a nullity on the basis that the minister cannot declare a wetland outside of what is defined by the EMA Act as such, she made

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2002. <sup>98</sup> See *Hichange Investments (Pty) Ltd v. Cape Products Company Ltd t/a Pells Products and Others*, JDR00040, 2004.

<sup>85</sup> *Shangani Holistic (Pvt) Ltd v Pearline Minerals Exploration (Pvt) Ltd*, *supra* note 74, p.6

<sup>86</sup> See *Zimbabwe Environmental Law Association and Others v. Anjin Investments and Others*, HH523/15, 2015.

<sup>87</sup> See *Augur Investments v. Minister of Water and Climate and Environmental Management*, HH278/15, 2015.

<sup>102</sup> *Ibid.*

some observations that can be used to promote environmental rights as human rights. She observed as follows:

It is hoped that the citizens of Zimbabwe will vigorously pursue and enforce their rights as provided in terms of the Environmental Management Act, lest we be judged and found wanting, by future generations, for failing to play our part in preserving and protecting the environment.<sup>102</sup>

This is an encouragement by the judge for stakeholders like communities and civil society organisations to litigate in pursuit of their environmental rights as provided under the EMA Act and the Constitution. The essence of the judge's point here is that the more stakeholders litigate, the more the courts will have an opportunity to give life and meaning to environmental rights as provided in the Constitution and EMA Act, through their judgements. Although Soyapii is critical of the judge in that this was an opportunity for the court to give meaning to the right to a healthy environment by interpreting the Act in detail which it failed to do<sup>88</sup>, this must nonetheless be seen as a clarion call to public interest environmental litigation. Since the Augur Investment judgement, we have seen a steady increase on environmental litigation cases based on the EMA Act and constitutional provisions.

## **8 Ongoing and Proposed Legal and Policy Reforms**

There are ongoing legal and policy reforms that present an opportunity to further strengthen the protection and promotion of environmental rights as human rights and fight the climate crisis. The ongoing legal reforms include the amendments of the Mines and Minerals Act<sup>89</sup>, the amendment of the Parks and Wildlife Act<sup>90</sup> and the amendment of the Environmental Management Act<sup>106</sup>. Regarding climate change, the development of a Climate Change Act is in the process. The Climate Change Bill Principles have already been submitted and presented before the cabinet.

Concerning policies, the review of the Wildlife Policy of Zimbabwe and the National Forest Policy, present valuable/promising opportunities to establish clear policy directions on strengthening environmental rights as human rights and fighting the climate scourge.

## **9 Emerging Findings from the Analysis**

From the analysis, several findings with regards to the protection and promotion of environmental rights and the fight against the climate crisis are emerging. These are reflected in the legal and policy developments and provisions, institutional provisions, and court judgements.

Firstly, it is evident that Zimbabwe has adopted a number of laws, policies and institutional frameworks since the 2013 Constitution that are aimed at advancing and promoting environment rights as human rights and addressing climate change. Concerning climate change, Zimbabwe's actions primarily focuses on policies that are specific to climate change such as the Climate Policy and the Zimbabwe National Climate Change Response Strategy. An evaluation of said policies showed that there is a recognition and understanding of the threats

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<sup>88</sup> Soyapii, *supra* note 52.

<sup>89</sup> Government of Zimbabwe, Mines and Minerals Act Chapter 21:05, 2021, <[www.veritaszim.net/sites/veritas\\_d/files/Mines%20and%20Minerals%20Act%20Cap%202105%20updated%20to%201%20August%202021.pdf](http://www.veritaszim.net/sites/veritas_d/files/Mines%20and%20Minerals%20Act%20Cap%202105%20updated%20to%201%20August%202021.pdf)> (accessed 23 January 2023).

<sup>90</sup> Government of Zimbabwe, Parks and Wildlife Amendment Bill, 2021. *See also* the proposed Principles to amend the Parks and Wildlife Act, Chapter 2014 of 1975. <sup>106</sup> Environmental Management Amendment Bill (2021)

and risks that climate change poses to Zimbabwe's developmental ambitions as reflected in the NDSI. The responses include both adaptation and mitigation strategies. However, when it comes to laws, the response has been mainly through Statutory Instruments. While policies are needed, the next logical step for Zimbabwe to comprehensively deal with the human rights impacts of climate change, is to enact a Climate Change Act.<sup>91</sup> This is what Kenya, Uganda and Nigeria have done, with South Africa also being in the process of enacting one. Promisingly, momentum seems to be gathering in Zimbabwe towards the enactment of a Climate Change Act. Recently, the Minister of Environment, Climate Tourism and Hospitality Industry submitted a Memorandum to the cabinet on the Principles of The Climate Change Bill.<sup>92</sup>

Secondly, there are several institutions that have been put in place to advance environmental rights as human rights and address the negative impacts of climate change. However, while these institutions exist, there appears to be a general agreement that these could be improved through the establishment of a Climate Change Authority. Such an institutional body could be particularly valuable in an advisory role on climate change to conduct regular and specific commissioned reviews and research on climate change-related topics. Uganda has an Advisory Committee under its National Climate Change Law. Kenya has a National Climate Change Council. Therefore, as Zimbabwe works towards the enactment of a Climate Change Act, this is something that should be considered.

Thirdly, there is a general increase in environmental cases that are being brought before the courts, especially over the past five years, primarily focusing on wetlands and mining. Wetland cases are predominant in Harare spearheaded by Residents Associations while mining cases occur mainly in rural areas. Most cases are based on project proponents' failure to carry out an EIA before the commencement of projects. EIAs are a very important way of promoting environmental rights and the courts have generally ruled favourably in those cases where an EIA was not conducted. While the work by the judiciary in the last five years is commendable, it can further be enhanced through the establishment of specialised courts focusing on environmental crimes similar to other jurisdictions.<sup>93</sup> The Environmental Management Agency's Strategic Plan<sup>94</sup>, advocates for the establishment of such a specialised environmental court.

Fourthly, while climate change is a big threat to the realisation of environmental rights as human rights, none of the cases assessed dealt specifically with climate change. Climate change is implied through section 73 of the Constitution and section 4 of the EMA. With the lack of a Climate Change Act, issues related to it are currently embedded into the right to a clean and healthy environment. However, a specific Climate Change Act can help to spur specifically tailored litigation. In South Africa, where there is currently no Climate Change Act either, litigants have nonetheless addressed climate change through the inclusion in the mandatory EIAs. In the South African case of *Earthlife Africa Johannesburg v. Minister of Environmental Affairs and Others*<sup>95</sup>, it was argued that a climate change EIA was to be considered before the

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<sup>91</sup> M. Dhliwayo, 'The Urgent Need for a Climate Change Act in Zimbabwe', 2022, <[zela.org/the-urgent-need-for-a-climate-change-act-in-zimbabwe/](https://zela.org/the-urgent-need-for-a-climate-change-act-in-zimbabwe/)> (accessed 24 January 2023).

<sup>92</sup> *Minister of Environment, Climate, Tourism and Hospitality Industry, Honorable N.M Ndhlovu, MP "Memorandum to Cabinet on the Principles of the Climate Change Bill" (2021).*

<sup>93</sup> Africa Institute for Environmental Law, "Feasibility of the establishment of Special Environmental Courts in Zimbabwe", (2022).

<sup>94</sup> Republic of Zimbabwe, 'Environmental Management Strategic Plan 2021-2025', 2020.

<sup>95</sup> See *Earthlife Africa Johannesburg v. Minister of Environmental Affairs and Others*, 65662/16.

grant of an EIA certificate. A climate change impact assessment must be conducted before an environmental authorisation is granted. This aims to enable relevant decision makers to determine firstly whether the proposed activity, which was in this case the construction of a coal-fired power station, should be allowed at all. If allowed, this also ought to establish which conditions and safeguards should be imposed to limit the GHG emissions that contribute to climate change.

## **10 Conclusion**

From the analysis, it is evident that the Government of Zimbabwe has taken legal, policy and institutional measures to advance the protection and realisation of human rights that are provided for in the 2013 Constitution. After initial hesitation, there is evidence that the support and interest of stakeholders to vindicate the right to a clean and healthy environment that is not harmful to one's health has increased/grown over the past five years as reflected by the strengthening of environmental laws and policies as well as an increase in court cases, especially with regards to mining and wetlands protection. This contributes to cautious optimism among researchers and the broad public alike. While the courts are fulfilling their obligations to develop environmental jurisprudence, this can be greatly enhanced through the establishment of specialised environmental courts.