# PART X:

# ENVIRONMENTAL ADJUDICATION

# Chapter 25: Environmental Justice and Litigation

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## 1 Introduction

Compliance (adherence to legal norms or requirements) and enforcement (actions in response to non-compliance) are essential in the field of environmental law, in which prevention is the golden rule, both for ecological and economic reasons.[1] Several compliance and enforcement measures are available to ensure environmental protection. Apart from environmental litigation in courts as enforcement measures, several compliance mechanisms are available in the pre-litigation phase, starting with administrative measures such as permits, licences, notices and directives. Statutory environmental law provides for a variety of compliance and enforcement measures. In cases where conflicts arise, methods of alternative dispute resolution may by appropriate instead of or prior to court proceedings, which can play an important role in terms of remedial action to protect the environment or to secure compliance, especially when it comes to cases concerned with criminal prosecution or the recovery of damages.

## 2 Environmental Justice and Advocacy

Today, both in the industrialised and developing parts of the world, a growing body of evidence demonstrates that poor and other disenfranchised groups have been the greatest victims of environmental degradation. The poor and marginalised often still lack access to justice, especially environmental justice. The North-South divide also still needs to be bridged in this respect.[2] The social impact of degradation increases the vulnerability of specific groups and populations. This vulnerability has become a key element in human rights discussions. Rights and responsibilities regarding the utilisation of environmental resources need to be distributed with greater fairness among communities – globally, regionally and domestically. Therefore, human rights movements increasingly apply a rights-based strategy to confront global environmental devastation and to protect ecological habitats and the planet for future generations.[3]

Environmental justice as a concept embraces two objectives. The first is to ensure that rights and responsibilities regarding the utilisation of environmental resources are distributed with greater fairness amongst communities. This entails ensuring that poor

1 Kiss / Shelton (2004:151).
2 Beyerlin (2006:259-296).
3 Kiss / Shelton (2004:12ff.).

and marginalised communities do not suffer a disproportionate burden of the costs associated with the development and exploitation of resources, while not enjoying equivalent benefits from their utilisation. The second is to reduce the overall amount of environmental damage, again globally and domestically.[4] Recognition of the link between the abuse of the human rights of various vulnerable communities and related damage to their environment is expressed in the concept environmental justice. The scale and urgency of environmental justice are beyond past challenges: solving them will perhaps mean destabilising and reorienting global economic growth.[5]

Environmental justice includes two complementary dimensions: *procedural* and *substantive*. The procedural dimension is divided into three rights: the right to information, the right to participate in decision-making, and the right of access to justice in environmental matters. Environmental rights still face a multitude of challenges of procedural nature. To what extent these challenges are relevant depends, amongst others, on the following:

The question of whether and under what conditions an individual, organisation or state has the right to commence action regarding a right to environment needs to be addressed. The issue of *locus standi* is of great relevance in respect of judicial enforcement of the right to environment and needs specific attention. The Indian experience with the establishment of public interest litigation has shown that environmental concerns can be advanced more efficiently by enabling any citizen to appeal directly to the Supreme Court.[6]

Another focal point deals with the question of who the proper addressee of claims would be dealing with a right to environment, and whether a right to environment is to be enforced vertically between individuals and/or horizontally between individuals and states. Moreover, the question whether environmental rights can be enforced at the national or international level is of particular interest in the globalising world, also with regard to the concept of regional integration, which is playing an increasingly important role in sub-Saharan Africa.[7]

Namibia is at the dawn of environmental advocacy, which refers to the act of speaking out in favour of, supporting, and defending the environment with the aim of having an impact on a decision or policy. Environmental advocates seek to preserve the

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4 Ibid.

5 Thus, the issue of climate change prompts significant questions about justice and distribution. There is an acute need for intelligent collective action focusing on the human suffering that climate change will cause in future. As a matter of law, the human rights of individuals need to be viewed in terms of state obligations: it is the state that is responsible for human rights fulfilment. This assignation of such responsibility may seem inadequate in the context of climate change, where social and economic rights in poor countries are threatened primarily by actions undertaken elsewhere. The special responsibility of wealthy countries to mitigate climate change remains – and is widely accepted. See also Kiss / Shelton (2004:12ff.).

6 Rosencranz / Jackson (2003:228).

7 Ruppel (2009c:277ff.).

natural and man-made environment, and to protect the relationships that people have with their environment. Cities, villages, communities and individuals can experience a wide array of threats to the environment that may require advocacy. Business interests may be moving forward with a development project such as a dam, without addressing the needs and interests of the communities that will be affected by it. A factory may be polluting air or water, thereby posing risks to public health; or the Government or other resource users might be proposing an activity that threatens humans and wildlife alike. Many problems can potentially be addressed through environmental advocacy. Through environmental advocacy, environmental rights can be strengthened. Through more public participation in environmental affairs and more participatory democracy,[8] environmental justice is more likely to be achieved. Unfortunately, more often than not, the people who suffer from violations of their environmental rights are incapable of instituting litigation due to a number of factors, including poverty, access to information, and access to justice.[9]

## 3 Administrative Procedures for Compliance and Enforcement

Administrative procedures play a major role in terms of compliance and enforcement. Some examples of administrative compliance and enforcement measures will be highlighted in the following.

One of the core mechanisms to secure adherence to environmental legal norms or requirements is the system of permits or licences. Specific activities with an impact on the environment may only be carried out, if a permit or licence is granted by the competent authority as required by many environmental statutes. Specific examples of licences under statutory environmental law include the following:

An environmental clearance certificate as required by the Environmental Management Act No. 7 of 2007 (EMA) for activities having an impact on the environment can be seen as a licensing mechanism to ensure that the general principles of environmental management as laid down in Section 3 of the Act are applied.

The Water Act No. 54 of 1956 for example requires a licence for the abstraction of subterranean water. Similarly, the Water Resources Management Act No. 11 of 2013, which will repeal the Water Act, requires licences to abstract or use water and to discharge effluents. Drilling or construction of boreholes or wells is also subject to a licence issued by the Minister.

Specific licences are needed for prospecting and mining activities according to the Minerals Prospecting and Mining Act No. 33 of 1992 such as reconnaissance licences, exclusive prospecting licences, mining licences or mineral deposit retention licences.

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8 Ruppel / De Klerk (2009:2-4).
9 Ferris (2009).

To ensure environmental protection, the Forest Act No. 12 of 2001 provides that unless authorised by the Act or a licence, it is not allowed to cut, destroy, or remove vegetation as defined by the Act. The Act furthermore demands specific licences with regard to the use of forest or forest produce, e.g. to harvest, to graze or to carry on agricultural activities, to carry out mining activities, or to construct roads or buildings.

Directives or compliance orders are further effective mechanisms to secure compliance with regulatory frameworks. Environmental officers for example, who are appointed to help enforcing the Environmental Management Act, have the competence to issue compliance orders if there is reason to believe that a person has contravened the Environmental Management Act or violated a condition of an environmental clearance certificate issued under the Act. The penalty for a failure to obey a compliance order issued under Section 20 of the EMA is a fine of up to N$ 500,000 or imprisonment for up to 25 years, or both.

The Water Resources Management Act provides for various forms of directives, which can be given by the Minister, e.g. to water service providers who fail to comply with a licence (Section 43) or directives related to measures for the prevention of water pollution (Sections 68 and 89) or in cases of failure to comply with a licence to discharge effluents (Section 83). For the purpose of promoting the sustainable use and protection of aquifers the owner or occupier of land may be directed by the Minister to seal off any borehole situated on the land (Section 66). Furthermore, the Minister may give directives in cases of risks related to the safety of dams (Section 95).

## 4 The Role of Namibian Courts in Environmental Matters

Environmental litigation can play an important role in shaping and preserving the quality of life. Namibia has enacted numerous statutes designed to improve air and water quality, better cope with waste, protect the wildlife and endangered species, and establish rules for the management of land and marine resources. These statutes are deemed to become more and more subject in lawsuits, filed by affected industry, state and local governments, indigenous groups, conservation groups and private citizens. Environmental litigation entails a variety of highly specialised legal fields, *inter alia*:[10]

- Global climate change litigation;
- environmental criminal litigation;
- civil environmental enforcement litigation;
- insurance recovery for environmental liabilities; and
- natural resource damages litigation.

10 Perlman (2009).

Courts have various functions related to matters concerned with environmental protection. On the one hand, courts are involved in classical litigation. On the other hand, courts play a vital role when it comes to the implementation of environmental laws.

Courts can for example be approached to obtain interdicts, which are important mechanisms in terms of the conservation of the environment in that they put a temporary or final stop present or future infringements, which might have negative impact on the environment.[11] An interdict secures the termination of offending actions or conduct, or the abandonment or alteration of offending procedures. Interdicts can also require the performance of a particular action.[12] Upon application, the court can grant an interdict provided that the applicant can cumulatively satisfy the following requirements: (1) a clear right; (2) an unlawful interference with that right; (3) the absence of any other satisfactory remedy.[13]

Courts are also approached in environmental matters for judicial review of administrative decisions. Such enforcement mechanisms of administrative law nature are contained in various environmental law statutes with the Environmental Management Act leading the way. Appeals can, for example, be brought to the High Court if a person feels aggrieved by a decision of the Minister related to the review of decisions of the Environmental Commissioner or to compliance orders (Section 51 of the Environmental Management Act). In the appeal, the High Court only considers legal questions but not facts. Similarly, the Minerals Prospecting and Mining Act No. 33 of 1992 provides for a right to appeal to the High Court if a person feels aggrieved by a decision of the Minerals Ancillary Rights Commission (Section 113).

Deciding on matters regarding compensation for environmental damage also falls into the responsibility of Namibian Courts. An example for this can be found in the Water Resources Management Act No. 11 of 2013, which provides that the court by which a person is convicted may upon a written request[14]

> after enquiry into the nature and extent of the damage, order the person convicted to pay, in addition to any other penalty that may be imposed, compensation to the person for the damage suffered or, in the case of damage to a water resource, compensation to the Minister representing the actual or expected cost of restoring or rehabilitating the water resource or its dependent ecosystems.

Further invaluable environmental law enforcement mechanisms exercised by courts relate to criminal offences.

11 Du Plessis *et al*. (2013:121).
12 Ibid.
13 Amoo (2014:198).
14 Section 128.

## 5 Criminal Law

The role of criminal law for environmental protection is significant. Environmental crimes (potentially) harm the environment including all natural resources and/or the health and well-being of people and criminal law ensures that non-compliance with environmental legal standards results in criminal consequences such as fines or even imprisonment. Cancellation of environmental licences can also result from a conviction. Criminal law has a deterrent effect and can therefore contribute to environmental protection. All statutes in the ambit of Namibian environmental legislation contain provisions with criminal sanctions. The teeth of environmental legislation in terms of offences are sharp. However, relatively few criminal sanctions are being applied vigorously.

The Environmental Management Act as the main environmental framework legislation contains extensive provisions pertinent to crimes, penalties and forfeiture. The magistrate's court has jurisdiction to impose any penalty provided for in terms of the EMA as laid down in Section 53.

It is a crime under the EMA if waste is disposed anywhere else than at a waste disposal site (Section 5). With regard to environmental clearance certificates, the EMA stipulates that is a crime to proceed with activities listed in the EMA without an environmental clearance certificate or not to comply with conditions set out in the environmental clearance certificate. To forge an environmental clearance certificate; to give false information or to withhold relevant information in an application for an environmental clearance certificate are further crimes relating to environmental clearance certificates (Sections 27, 34, 37 and 43). Moreover, certain activities hindering environmental officers to perform their duties are qualified as crimes under the EMA, such as giving false information to an environmental officer or refusing to answer questions asked by an environmental officer, unless there is a lawful excuse (Section 22). Criminal prosecution of directors, members, managers, trustees and other officers for crimes for which a legal entity is responsible is anchored in Section 53 of the EMA, another important enforcement mechanism in view of major environmental transgressions – especially pollution – by corporations. Section 54 of the EMA contains provisions regarding forfeiture with the aim to remove the incentives to commit a crime. Any item related to the commission of a crime might have to be forfeited to the State.

Similar provisions are contained in other environmental statutes such as the Marine Resources Act No. 27 of 2000 which for example states in Section 54(1):

> Where a court convicts a person of an offence under this Act the court may, in addition to any other penalty
>
> (a) order any marine resource, fishing gear, vessel. vehicle or item in respect of which the offence was committed or which was used in connection with the commission thereof, to be forfeited to the State, subject to paragraph (c);
>
> (b) cancel or suspend, for such period as the court may consider fit, any licence or other authorization issued or given to such person under this Act; or

(c) where the marine resources, fishing gear, vessel or item have been released under section 55(4), order the amount guaranteed in respect of the value thereof under that section to be forfeited to the State.

The penalties in the EMA vary and range from fines up to N$ 500,000 or imprisonment up to 25 years or both. According to Section 27, fines paid under the EMA as well as financial resources resulting from forfeiture are paid into the Environmental Investment Fund of Namibia, which is established under the Environmental Investment Fund Act No. 13 of 2001. These financial resources are used for measures aiming at environmental conservation.

The fact that criminal law is an important component of compliance and enforcement can be seen in respective provisions in the various environmental statutes, which all link certain penalties to non-compliance. Some examples of criminal law implications of statutory environmental law are sketched in the following:

Section 20 of the Nature Conservation Ordinance No. 4 of 1975 as amended provides that illegal hunting is an offence and a fine not exceeding R200,000 or imprisonment for a period of not exceeding twenty years or both may be imposed (for illegal hunting of elephants or rhinos; the fines for hunting other specially protected game range from R20,000 to five years imprisonment or both; the Ordinance contains various other provisions regarding illegal hunting). Further offences specified in the Ordinance relate among many others to the illegal entering of game parks and nature reserves (Section 18); illegal picking of indigenous plants (Section 24); import and export of game and wild animals and their skins (Section 49) and illegal catching of fish in inland waters (Section 71).

The Water resources Management Act contains a catalogue with water related offences (Section 127) *inter alia* stating that it is an offence to abstract and use or dispose water otherwise than in accordance with a licence under the Act or to cause a water resource to be polluted by any act or omission unlawfully and intentionally or negligently.

Part VIII of the Aquaculture Act No. 18 of 2002 deals with offences and penalties and stipulates that a person commits an offence who without written permission introduces into any Namibian waters any species of aquatic organisms or any genetically modified aquatic organism or transfers any species of aquatic organisms from one aquaculture facility to another. To engage in aquaculture without a licence is also considered an offence (Section 39).

Examples of offences under the Forest Act (see Section 45 for a catalogue of offences) relate to damage or destruction of vegetation in a protected area or the destruction or removal of living trees, bushes or shrubs growing within 100 metres of a river, stream or watercourse.

# 6 Conflict Resolution

## 6.1 Environmental Litigation

Disputes relating to environmental issues are often characterised by a blurring of boundaries requiring professional expertise, time-consuming processes, high costs and irreversible damage to the environment or to public health. In the case of matters relating to the development and construction of infrastructure, for example, the advantages of development are almost always accompanied by heavy social and public costs. The production of goods almost inevitably (and the provision of employment) pollutes air, water and soil, the construction of roads takes place at the expense of open spaces, the lack of a clear suburbanisation policy results in unwanted urban sprawl, imposing strain on the municipal systems. There are many other examples. In a nutshell: environmental disputes usually occur where different interests collide.

Litigating, for example, industries and corporations that cause environmental damage can be quite demanding. Many businesses prefer cheaper methods of production, but these are far more often than not the ones' that produce more pollution. Even in the face of strict regulation, companies sometimes act against the law. Taking these companies to court can prove to be a challenging endeavour. In order to prepare a successful case, plaintiffs must be able to link the damage to the alleged source. For the lawsuit to make it to court, the plaintiff must have credible evidence that he/she was exposed to, for example harmful substances. A resident may develop cancer and sue a nearby chemical manufacturer, but to prove it was that specific chemical in the water or in the air that caused the cancer, as opposed to, e.g. a genetic predisposition, requires substantial scientific evidence.

Moreover, taking a large corporation to court can be expensive. Whenever corporations' profits and public perceptions are at stake, these are often quite willing pay for highly skilled (and expensive) legal teams to preclude an unwanted negative outcome. One strategy is to draw the trial out as long as possible, as the prospect of spending years in court can wear plaintiffs down. Defence teams often use this strategy to bully victims to agree to 'more favourable' out-of-court settlements.

In Namibia, environmental litigation, with few exceptions, has not yet been an issue. For this purpose, lawyers need to be trained in the theory and practice of environmental litigation. Environmental litigation is an integral part of the environmental regulatory instruments and the designing of environmental policy. The role of lawyers in environmental litigation should become clearer when it comes to effective project planning, consultation and sound environmental management practices. Lawyers need to be familiarised with specific litigation strategies, the litigation process and in particular the use of expert witnesses. Environmental litigation is not only a means to enforce the law by private individuals using common law and statutory avenues. Environmental

litigation can also be used against Government decisions and by Government, including civil litigation and criminal prosecutions.

## 6.2 Alternative Dispute Resolution (ADR) in the Field of Environmental Conflict

### 6.2.1 General Features of ADR

ADR is an important set of mechanisms, which are beneficial to conflicts related to the environment. Although litigation plays an important role when it comes to environmental disputes, ADR methods are increasingly being used to address environmental conflicts. Even environmental statutes provide for ADR mechanisms to resolve certain disputes.

ADR generally refers to informal dispute resolution processes with the involvement of a professional third party who assists to resolve the dispute in a way that is less formal than is done in the courts. The most common forms of ADR are conciliation, mediation, facilitation, negotiation and arbitration. These methods differ from each other in the degree of the parties' control over the process and the extent to which parties bind themselves to the outcome of the ADR proceedings.

Table 1: Forms of ADR

| | |
|---|---|
| Conciliation | Informal process in which a third party (the conciliator) who does not take part in the process itself brings disputing parties together in order for them to resolve their dispute. |
| Mediation | Consensual dispute resolution process.<br>Neutral third party (mediator) helps parties to identify issues, clarify perceptions and explore options for a mutually acceptable outcome.<br>Generally, the mediator offers the opportunity to expand the discussion beyond the issues in dispute and to focus on developing creative solutions instead of giving own opinions regarding outcomes of the dispute. |
| Facilitation | Process in which a neutral third party (facilitator) uses his/her skills to promote communication and understanding of negotiable issues.<br>Facilitator focuses purely on moderating the discussion among the parties. |
| Negotiation | Process whereby the parties involved in a conflict discuss options for resolution directly with each other.<br>The parties themselves control the decision-making and meeting processes. |
| Arbitration | Arbitration can be voluntarily or compulsory and is similar to court proceedings, but less formal and generally private.<br>The arbitrator, a third-party neutral, holds a confidential hearing with the disputing parties. Based on the facts and evidence presented, a legally binding award is rendered which may be subject to appeal. |

Source: Table compiled by the author.

General features which apply to all ADR methods include that the parties decide to resolve the dispute out of court and that the parties to the conflict decide upon the process and the result of dispute resolution themselves. Compared to litigation, ADR is based on more direct participation by the disputants, rather than being run by lawyers, judges, and the state. In most cases, ADR is voluntary, but may also be mandated by the law as a first step before parties can take a case to court. The objectives of ADR are to find a solution to the conflict agreeable for all parties and to resolve the dispute promptly and effectively. Compared to litigation, ADR can be less costly, less formal, less competitive, and less time-consuming. Specific benefits of ADR include the following:

- Increase in efficiency;
- reduction of time taken;
- encouragement of constructive approaches;
- sense of ownership by parties to the conflict;
- reduction of on-going disputation; and
- courts can still enforce decisions reached through ADR.

Private business actors are using mediation in many parts of the world with increased regularity in order to resolve commercial environmental disputes, such as those involving pollution indemnification or regulatory compliance. Mediation has also been used to address prosecutorial disputes between Government and business. Finally, and more surprisingly, parties are turning to mediation to address seemingly intractable disputes over deeply rooted values, which are often the source of the environmental conflict.

In the resolution of environmental disputes, adversarial processes (like litigation) are only advantageous under certain circumstances. This is the case, when there is an imbalance in power between disputants or when one or both parties aim to establish a precedent in an evolving area of the law. Consequently, litigation and mediation importantly remain complementary of one another.[15] Against this backdrop, there are numerous reasons why parties choose to mediate an environmental dispute, even where litigation is an option. Mediated processes, for example, help parties control dispute resolution costs that might otherwise escalate. These cost savings are advantageous regardless of whether a dispute concerns two businesses, a government prosecutorial action, or a citizen suit against developers. Mediated processes also allow people to maintain control over the dispute without delegating decision-making power to a third party or divulging confidential information. As a result, in mediation, parties can explore innovative means of dispute settlement that may offer joint gains for the parties involved, and also improve environmental quality. In mediated processes, parties are also more likely to develop parallel dispute and information management processes such as joint fact-finding sessions to navigate the inevitable scientific and technical

15 Ruppel (2007).

complexities and uncertainties that exacerbate environmental conflict. Mediation allows parties to sit around the negotiating table and create the solution together. However, an agreement reached through mediation should always be formally drawn up so that the agreement can be implemented and enforced.[16]

### 6.2.2 ADR in Namibian Statutory Law

Several Namibian environmental statutes contain mechanisms for out-of-court proceedings. Of particular relevance is the duty of the Ombudsman enshrined in the Constitution to investigate complaints "concerning the over-utilisation of living natural resources, the irrational exploitation of non-renewable resources, the degradation and destruction of ecosystems and failure to protect the beauty and character of Namibia".[17] To this end, the Constitution specifies that the Ombudsman makes use of various methods of ADR, particularly negotiation and compromise. The environmental mandate of the Ombudsman is dealt with in more detail in Chapter 27.

Section 121 of the Water Resources Management Act explicitly provides for mediation of disputes and is a good example of ADR in the area of environmental conflicts. Section 121 reads as follows:

> (1) If a dispute arises between two or more persons or between any person and the Minister, the Minister may, on the Minister's initiative or at the request of any party to the dispute, direct that the dispute be dealt with by way of mediation involving an independent mediator.
>
> (2) A directive under subsection (1) must specify the period within which the mediation process must commence, and request the parties to select by agreement an independent mediator and determine the place and time of the mediation proceedings.
>
> (3) If the parties fail to select a mediator, the Minister, by agreement with the parties, may appoint the mediator, who may be a staff member of the Ministry, if the Minister is not a party to the dispute.
>
> (4) The parties, by agreement, may at any time during the course of mediation proceedings appoint another person to act as mediator.
>
> (5) The contents of discussions and submissions made during the mediation proceedings are privileged and may not be used in evidence in any court of law, unless the parties agree otherwise.

## 7 Concluding Remarks

In Namibia, more than 30 years after Independence, a legal culture upholding environmental rights is still in the initial phase of being created. On paper, a broad variety of

16 Ibid.
17 Article 91(c).

laws directed at environmental protection exists; and in principle, these laws also provide for effective mechanisms to ensure compliance with and enforcement of these environmental laws. What, however, remains a challenge is the full implementation of these provisions. It seems essential to strengthen the Executive and the Judiciary in terms of manpower and know-how in order to ensure that the principles anchored within the broad field of Namibian environmental laws are implemented in due consideration of all aspects of good governance, including transparency, reliability, accountability, predictability and the rule of law.

The holistic fulfilment of the Constitution's environmental principles regarding state policy requires even more political will and public participation at different levels. There is also a need for the Namibian society as a whole, and individuals in particular, to pass on a healthy and viable environment to future generations. For this purpose, it is imperative that Namibia considers a healthy and viable environment to be (at least implicitly) a fundamental right of its citizens and is ready to reaffirm its international commitments regarding the protection of the environment. The right to information, public participation and the right of access to justice should also be underlined in this respect.

The courts' role in promoting environmental justice cannot be overestimated. Internationally, the experiences of courts that have been tasked to decide over cases dealing with environmental rights show that the judiciary is crucial when it comes to interpreting existing law in a way that takes into account recent developments incorporating environmental concerns. In the 2009 South African case of *Lindiwe Mazibuko and Others v City of Johannesburg and Others*, O' Reagan J held that[18]

> [t]he purpose of litigation concerning the positive obligations imposed by social and economic rights should be to hold the democratic arms of Government to account through litigation. In so doing, litigation of this sort fosters a form of participative democracy that holds Government accountable and requires it to account between elections [for] specific aspects of Government policy. When challenged as to its policies relating to social and economic rights, the Government agency must explain why the policy is reasonable.

Litigation concerning environmental rights cannot only lead to more environmental justice for the individual but will also exact more detailed accounting from Government and, with an attendant beneficial influence on the policy-making process. In this context, the Namibian judiciary will inevitably be confronted with the dilemma of 'judicial activism' versus 'judicial self-restraint'.[19] While the latter refers to a situation in which the judge tries to avoid developing the law beyond its clearly established parameters in order not to take over a lawmaker's function, judicial activism describes a

18 *Lindiwe Mazibuko and Others v City of Johannesburg and Others*, Case CCT 39/09, [2009] ZACC 28.

19 The term was coined by Mahoney (1990).

situation in which judges extend or modify certain legal provisions as living legal instruments by interpreting them in the light of present-day conditions.[20]

In this spirit it is hoped, that in the course of dealing with practical cases and a subsequent increase in environmental rights litigation and advocacy, Namibian courts gradually clarify the substance of those rights, while also drawing on international experiences.

Environmental mediation can be a flexible alternative permitting a wider view of the dispute and the reaching of agreements that extend the range of possible solutions (unlike a judicial process, which is usually characterised by its focus on a very limited aspect of the problem, and which is bound by procedural rules). After all, it is the complexity of environmental disputes that often requires an overall and comprehensive viewpoint and creative solutions.

20 Quansah / Fombad (2009).