

TOWARDS THE REALISATION OF THE RIGHT TO A NON-HARMFUL ENVIRONMENT: EPISODES FROM AFRICAN JUDICIARIES.

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Greetings-

In this brief paper I review developments in Environmental justice in a few countries in Southern Africa in the recent past. My focus will be on the smaller African region known as the Southern African Development Countries (SADC). I have narrowed my area of focus to Water Law as a sub-class of Environmental Law. I explore whether and how the judiciaries in this African region, have given content to rights to an environment that is not harmful to life in general and human lives in particular.

Some of the countries within the sub-Saharan region are particularly endowed with mineral resources. On the other hand it is widely acknowledged that the entire sub-Saharan region is particularly water deficient. Concerns about water risks continue to grow. Water availability and usage in one country sometimes has serious impact on its neighbour(s).

South Africa shares 15 major rivers with other SADC countries. For example the Orange River Basin traverses Lesotho, South Africa, Botswana and Namibia.

Water then becomes a strategic resource that is critical for social and economic development in many of these countries. In this context international agreements such as the UN Convention on the Law of the non-navigational uses of International water courses (1997) (UN Watercourses Law) becomes one of the legal instruments that will hopefully play an important part in the regulation of the impact of the rapid increase in demand for water and the effect thereof on international watercourses.

Given the different countries and concomitant administrations in the countries traversed by rivers within the SADC region It is concerning that the right of access to water is entrenched in the constitutions of only three of the 15 SADC countries; being South Africa, Zimbabwe and the Democratic Republic of Congo. The Zimbabwean Constitution protects the right to 'safe, clean and potable water'; the South African Constitution grants everyone the right of access to sufficient food and water and it imposes on the state a duty to take reasonable legislative and other measures, within its means to achieve the progressive realisation of these rights. And the Congolese Constitution protects the right of 'access to drinking water'. In other countries such as Namibia the right to water is only provided for in national legislation.

The concern remains however, that where these rights are not given prominence in the constitutions of the countries their enforceability and justiciability might be compromised. There is even argument that constitutionalising the right to water in Southern Africa could lead to improvement in water security within the region.

Apart from the constitutions of the different countries and relevant National legislation the SADC countries are signatories to a number of treaties in which the right to water is specifically provided for. They therefore have a duty to honour their commitments under these agreements. For eg, The Chapter 16 of the African Charter on Human and Peoples' Rights provides for the right to the 'highest attainable mental and physical health'.

How then have the judiciaries in this region employed the tools or legal instruments at their disposal to give meaning to the right of access to water? What has been the ripple effect of the meanings given to the right of access to water, if any?

In South Africa the meaning of the constitutional right of access to water was articulated by the constitutional court in the case of *Mazibuko & Ors v City of Johannesburg & Ors*. In this case the residents of the City of Johannesburg challenged the decision by the City of Johannesburg to supply 6 kilolitres of free water to every accountholder in the city and the introduction of prepaid water meters. This policy became as the 'free basic water policy'.

Some residents challenged this policy as an affront to their Constitutional rights of access to sufficient water and their right to dignity and equality. In interpreting s27(1)(b) of the Constitution in which this right is protected the Constitutional Court highlighted the context facing the City of Johannesburg; its exponential growth; the large number of poor households, about half of them with an income of less than R1 600 per month (about USD100 pm) with no sanitary services, or a water tap within 200km of their homes; the court also took into account the need to improve the quality of life for all citizens; all within the semi-dry context on the country. It emphasized that the government's responsibility required careful management and balancing of a scarce resources

on one hand and the realisation of the constitutional promise to sufficient water on the other. In the end the court said that the 6 kilolitre free basic water that the city was supplying to each account holder was reasonable. Notably the city refused to make its own pronouncement on how much water satisfies the right of access to sufficient water.

In some of the SADC countries where the right of access to water is not granted at all but other basic rights are provided for the bold steps taken by the courts in giving meaning to the internationally recognised rights of access to water have been nothing short of remarkable. In Botswana the case of the Basarwa people of the San origin is a shining example of courts give lifesaving meaning to the right of access to water. The case is *Masithlanyane v The Attorney General of Botswana*. Generations of these communities had lived in the Central Kalahari Game Reserve. Initially the government of Botswana had recognised their right to live on this land and had reserved land within the game reserve for protection of wildlife resources with portions reserved for traditional community settlements. In 1986 the government changed the status of the game reserve to conservation status only. The people were urged to move to centres where services were provided. They came to depend on the mercies of cattle farmers who drilled boreholes within the game reserve. Some of the boreholes were maintained by mining companies. But to make continued human life in the game reserve impossible the government sealed the boreholes.

Although the communities were permitted to return to their ancestral land at some stage, they were not permitted to recommission the boreholes even when they wanted to do so at their own expense. They approached the high court seeking an order that they be permitted to recommission the boreholes. Their application was refused, with the high court holding that the government was

under no obligation under the Water Act of that country to provide the communities with water. But in a show of insight to giving true meaning to protection of socio-economic rights the Court of Appeal considered the act of sealing the boreholes to be degrading. It granted the community the relief they sought. Of significance for the purposes of this discussion is the approach of the Court of Appeal, relying on the right of occupiers of land to harness water therefrom, it ordered reinstatement of water supply to the applicants on the basis that failure to do so would render nugatory their right to occupation of the land which the government had recognised.

The Zambian High Court demonstrated similarly keen insight to the function of giving meaning to socio economic rights in enfolding the right of access to water within the constitutionally protected right to life. In *Nyasulu v Konkola Copper Mines PLC* – a mining company had discharged effluents into the stream, resulting in the stream water being highly acidic and acquiring a bluish to greenish colour. This resulted in fish dying and people eating the them. The rocks in the river were changing colour as a result of oxides in the water. The court found the mining company to have been grossly negligent. It also found that the mining company had been shielded from criminal prosecution by political connections and financial influence which put it beyond the pale of criminal justice. In this case as well the court found that the right to water that was not harmful to human life was included in the constitutionally protected right to life.

South Africa has also been plagued by waste management and pollution challenges emanating from the mining industry. Acid water drainage has been described as the most significant environmental problem facing the country. In the case of *Harmony Gold Mining Company Ltd v Regional Director: Free State*

Department of Water Affairs and others the Regional Director as the the environmental authority issued a directive in terms of s19(3) of the National Water Act that Harmony Gold Mining Co and other companies should take anti-pollution measures in respect of ground and surface water contamination caused by their gold mining activities. The section in terms of which the directive was issued places the responsibility for taking anti - pollution measures on the person who 'owns, controls, occupies or uses the land in question. In time Harmony was subsumed by another mining company and ceased to operate mines on its own in the region. It then approached the court for an order setting the directive aside because it no longer had connection to the land in question.

The court said that the section 19 responsibilities were grounded in the Constitutional right to an environment that is not harmful to the health and well-being; and the right to have the environment protected for the benefit of present and future generations. It highlighted the principles set out in the National Environmental Management Act, particularly the principle that the negative impact on the environment and on people's environmental rights must be anticipated and prevented. Where it cannot be altogether prevented, it must be minimised and remedied. And the costs of pollution, environmental degradation and consequent adverse health effects must be paid for by those responsible for harming the environment (the polluter pays principle). It held Harmony Gold liable for the cost of the anti-pollution measures.

It is clear therefore that the protection of environmental rights in the constitutions strengthens the justiciability of these rights. And it is also easier for people to recognise and seek enforcement of the rights in their own terms. But we also learn that even where there is no constitutional guarantee for these rights that is not the end of the road.

The extent to which the judges draw from colleagues plays a big role in enriching these interpretative exercises. Awareness of diverse approaches to interpretation of legal instruments in giving meaning to environmental rights other socio economic rights goes a long way towards realising these rights. The recent formation of the African Judicial Education Network in Environmental Law aimed at enhancing the capacity of African judges in interpreting environmental laws and improving environmental rule of law broaden even more the judges' interpretation skills and accelerate the journey to protection of the environment for present and future generations .

Thank you.