Article

Specialised Environmental Courts as a Driver of Environmental Protection in South Africa

Abimbola Olowa
https://orcid.org/0009-0002-4941-3538
University of Pretoria, South Africa
abimbola.olowa@up.ac.za

Loretta Feris
https://orcid.org/0000-0002-3952-8991
University of Pretoria, South Africa
loretta.feris@up.ac.za

Abstract

The judiciary plays a vital role in advancing environmental protection. This article critically examines three key roles played by the judiciary towards the achievement of environmental protection—the development of environmental jurisprudence through the interpretation and application of the substantive environment right, the enforcement of environmental laws and the promotion of compliance with environmental laws. It evaluates the extent to which general courts in South Africa have fulfilled these key roles and argues that specialised environmental courts are more appropriately positioned to execute these roles effectively. Using the Environment and Land Court of Kenya, the Land and Environment Court of New South Wales and Hermanus Environmental Court as case studies, it explores the potential benefits of specialised environmental courts in strengthening these roles in South Africa. The analysis underscores the contributions of these specialised environmental courts to the development of environmental jurisprudence and the advancement of environmental protection.

Keywords: compliance; courts; enforcement; environmental jurisprudence; environmental law; environmental protection; specialised environmental courts; sustainable development

UNISA university of south africa PRESS
Southern African Public Law
Volume 40 | Number 2 | 2025 | #17371 | 28 pages
https://doi.org/10.25159/2522-6800/17371
ISSN 2522-6800 (Online), ISSN 2219-6412 (Print)

Introduction

In 2002, the judges participating in the Global Judges Symposium on Sustainable Development adopted the Johannesburg Principles on the Role of Law and Sustainable Development.[1] They affirmed that:

> [a]n independent Judiciary and judicial process is vital for the implementation, development, and enforcement of environmental law, and that members of the Judiciary, as well as those contributing to the judicial process at the national, regional, and global levels, are crucial partners for promoting compliance with, and the implementation and enforcement of, international and national environmental law.[2]

This statement was reaffirmed at the World Congress on Justice, Governance and Law for Environmental Sustainability (World Congress), held 10 years after the adoption of the Johannesburg Principles.[3] The Congress noted the following:

> the importance of the Judiciary in environmental matters [has] increased and resulted in a rich corpus of decisions, as well as in the creation of a considerable number of specialized courts and green benches, and a lasting effect on improving social justice, environmental governance, and the further development of environmental law, especially in developing countries.[4]

The judiciary, therefore, plays a crucial role in the interpretation, implementation and enforcement of environmental law, which ultimately enhances environmental protection and shapes the development of environmental jurisprudence. Whether the dispute is initiated by governmental departments seeking to enforce laws against non-compliant individuals and organisations, environmental non-governmental organisations striving to ensure proper implementation and enforcement of environmental legislation by the government, or developers and companies challenging decisions made by government administrators—these stakeholders may eventually resort to approaching the courts to resolve the environmental dispute and enforce the environmental law.

Collins, in highlighting the vital role of the judiciary in environmental protection, argues that '[j]udges have a unique capacity to protect ecosystems (including human and non-

1 The Johannesburg Principles on the Role of Law and Sustainable Development, adopted at the Global Judges Symposium 2002 <www.eufje.org/images/DocDivers/Johannesburg%20Principles.pdf> accessed 3 April 2024.

2 United Nations Environmental Programme (UNEP), 'Report of the Global Judges' Symposium on Sustainable Development and the Role of Law' presented at the 22nd session of the Governing Council/Global Ministerial Environment Forum (2003) UNEP/GC.22/INF/24, 4 <digitallibrary.un.org/record/484610?ln=en> accessed 3 April 2024.

3 UNEP, Rio+20 Declaration on Justice, Governance, and Law for Environmental Sustainability in 'Advancing Justice Governance and Law for Environmental Sustainability' (2012) 3 <https://www.unep.org/resources/report/advancing-justice-governance-and-law-environmental-sustainability-rio20-and-world> accessed 3 April 2024.

4 ibid 2.

human health) through the development, interpretation, and enforcement of environmental law principles.'[5] Kotzé and Du Plessis express a similar sentiment when they explain that the essential role of an independent and impartial judiciary is that of interpreting, applying and enforcing the substantive environmental right.[6] Feris articulates another perspective of the role of the judiciary in relation to the executive. In her view, the judiciary plays an important role in enforcing constitutional rights in a constitutional democracy. Accordingly, it must exercise its powers of judicial review to assess the actions and conduct of the legislature and the executive for consistency with the Constitution.[7]

The courts in South Africa are not oblivious to their role in advancing environmental protection. In *Fuel Retailers Association of SA (Pty) Ltd v Director-General, Environmental Management, Mpumalanga and Others (Fuel Retailers),*[8] which concerned the balance between socio-economic development and environmental protection as envisaged in section 24 of the Constitution, Ngcobo J affirmed that '[t]he role of the courts is especially important in the context of the protection of the environment and giving effect to the principle of sustainable development.'[6] He further went on to state that courts have a crucial role to play in the protection of the environment and should not hesitate to intervene to protect the environment when the need arises.[9]

However, and despite the extensive body of environmental legislation in South Africa, the development of environmental jurisprudence through the general courts remains in its infancy.[10] This limited progression is largely attributable to the courts' tendency to

5 Caiphas Brewsters Soyapi, 'A Multijurisdictional Assessment of the Judiciary's Role in Advancing Environmental Protection in Africa' (2020) 12 Hague Journal on the Rule of Law 307, 308, citing Lynda Collins 'Judging the Anthropocene: Transformative Adjudication in the Anthropocene Epoch' in Louis Jacobus Kotzé (ed) *Environmental Law and Governance for the Anthropocene* (Hart 2017) 9.

6 Louis Jacobus Kotzé and Anel du Plessis, 'Some Brief Observations on Fifteen Years of Environmental Rights Jurisprudence' (2011) 3:1 Journal of Court Innovation 157, 158; Brian John Preston, 'The Role of the Judiciary in Promoting Sustainable Development: The Experience of Asia and the Pacific' (2005) 9:2–3 Asia Pacific Journal of Environmental Law 109, 114, quoting Donald Kaniaru et al, '[t]he judiciary plays a critical role in the enhancement and interpretation of environmental law and the vindication of the public interest in a health [sic] and secure environment'; Irene Villanueva Nemesio, in 'Strengthening Environmental Rule of Law: Enforcement, Combatting Corruption, and Encouraging Citizen Suits' (2015) 27 Georgetown International Law Review 321, 325 also states that '[t]he judiciary also plays an important role in implementing the environmental rule of law by providing remedies to environmental harms and upholding constitutional rights to the environment.'

7 Loretta Feris, 'Constitutional Environmental Rights: An Under-Utilised Resource' (2008) 24:1 SAJHR 29, 37.

8 [2007] ZACC 13 para 102.

9 ibid para 104.

10 Melanie Murcott, 'Minding the Gap: The Constitutional Court's Jurisprudence Concerning the Environmental Right' (2023) Constitutional Court Review 147, 148.

focus on procedural compliance judicial review[11] rather than engaging substantively with the merits of the environmental dispute before them.[12] In many instances, the courts tend to remain in what Murcott refers to as their 'judicial comfort zone' preferring to hand down remedies such as setting aside the decision and remitting the matter to the relevant environmental authority for reconsideration which is generally easier to enforce.[13]

Compounding this challenge is the fact that general courts are overburdened with general civil and criminal cases and, as such, environmental matters often receive limited judicial attention amid competing priorities.[14] This not only hampers the advancement of environmental justice but also contributes to the slow resolution of environmental disputes. For instance, in the case of *City of Ekurhuleni Metropolitan Municipality v New Star Technology cc and Another,*[15] the City of Ekurhuleni sought an interdict to stop the continued operation of a waste recycling facility operating without the requisite Atmospheric Emission Licence and Waste Management Licence and polluting the environment with its illegal activities—the interdict proceedings were instituted in February 2021 but only finalised in September 2022—a period of 19 months during which time the defendant continued to pollute the environment. However, when considering the relatively swift adjudication of cases by the New South Wales' Land and Environment Court (LEC), the advantage of having environmental cases heard by a specialised court becomes apparent. In ***Sader v Elgammal,***[16] **a civil enforcement matter**[17] **in which the applicant sought an order to restrain the respondent from** a series of construction works pursuant to a Development Consent, t**he court heard the matter in June 2022 and delivered its decision in August 2022—a period of two months.**

11 In a judicial review, the focus is on determining if the environmental authority's decision complies with the procedural aspects that constitute just administrative action. The right to just administrative action is provided for in section 33 of the Constitution: '(1) Everyone has the right to administrative action that is lawful, reasonable, and procedurally fair. (2) Everyone whose rights have been adversely affected by administrative action has the right to be given written reasons.'

12 A merit review involves the consideration of all the evidence with the purpose of deciding on what the correct outcome is. See George Pring and Catherine Pring, *Environmental Courts and Tribunals; A Guide for Policymakers* (UNEP 2016) 45.

13 Melanie Murcott, 'Problematic Trends in the Adjudication of Environmental Law Disputes' in *Transformative Environmental Constitutionalism* (Brill 2022) 89, 102.

14 Melissa Fourie, 'How Civil and Administrative Penalties Can Change the Face of Environmental Compliance in South Africa' (2009) South African Journal of Environmental Law and Policy 93, 95.

15 [2022] ZAGPJHC 769; 2023 (3) SA 579 (GJ) (23 September 2022). The interdict was awarded on 22 September 2022.

16 **[2022] NSWLEC 107.**

17 The term 'civil enforcement' in the LEC means seeking orders that stop people breaking the law; require people to obey the law or remedy damage or harm caused by breaking or failing to obey the law. See New South Wales LEC 'Judicial Review and Civil Enforcement' <https://lec.nsw.gov.au/types-of-cases/judicial-review-and-civil-enforcement/judicial-review-and-civil-enforcement.html> accessed 2 June 2025.

Delays in environmental litigation within the general court system can sometimes be attributed to the technical complexity and volume of environmental matters, compounded by the lack of specialised expertise among judges in this field.[18] For instance, in the case of *South Durban Community Environmental Alliance v MEC for Economic Development, Tourism and Environmental Affairs: Kwazulu-Natal Provincial Government and Another (South Durban Community Environmental Alliance)*,[19] where the appellant had instituted action in the High Court seeking to set aside the environmental authorisation issued by the KwaZulu-Natal Department of Economic Development, Tourism and Environmental Affairs to the second respondent to construct a logistics park after the dismissal of their appeal to the MEC (first respondent), Vahed J highlighted the complexities of the case before him as one of the factors that led to the delay in delivering judgment.[20]

A further concern is the relatively low conviction rate for environmental criminal matters prosecuted by the National Prosecuting Authority (NPA). Despite numerous cases investigated and handed over to the NPA, the National Environmental Compliance and Enforcement Report (NECER) consistently reports a comparatively low number of convictions.[21] This stands in stark contrast to the high conviction rates reported by the Department of Justice and Constitutional Development (DOJCD) for general crimes prosecuted in the High Court[22] and Regional Magistrates' Courts,[23] and complex commercial crimes that boast a conviction rate of 90 per cent.[24] Although the NPA reports a conviction rate of 96.7 per cent for environmental crimes, comprising 926 convictions out of a planned 958, it is unclear how these statistics have been computed because it is at variance with the statistics reported in the NECER—66 convictions.[25] It is argued that an intentional focus on environmental crimes with

18 Scott C Whitney, 'The Case for Creating a Special Environmental Court System' (1973) William and Mary Law Review 473, 504; Ian Sampson, 'The Time Is Now to Find Each Other to Control Pollution' (2022) 32:2 Clean Air Journal 7, 8.

19 [2020] ZASCA 39 (17 April 2020).

20 The case was heard on 13 December 2017 and the judgment was delivered on 19 December 2018 while the review application was launched in July 2016. The Supreme Court of Appeal (SCA) when considering the application for leave to appeal to the SCA raised the concern of delay in the delivery of the judgment in the High Court (n 19) para 52.

21 In the latest NECER for the 2023/2024 financial year, 258 finalised criminal investigations were handed over to the NPA with 66 convictions reported. It will be seen that the conviction rate achieved is relatively low compared with the number of criminal matters handed over to the NPA for prosecution—Department of Forestry, Fisheries and the Environment NECER (2023/2024) 5.

22 DOJCD Annual Report (2023/2024) 99. A conviction rate of 91 per cent was reported against a planned target of 87 per cent.

23 DOJCD Annual Report (n 22) 99. A conviction rate of 82 per cent was reported against a planned target of 74 per cent.

24 DOJCD Annual Report (2023/2024) (n 22) 99.

25 NPA Annual Report (2023/2024) 72, 55. In the NECER, 258 criminal investigations were handed over to the NPA in 2023/2024 by the Environmental Management Inspectors (EMIs)—NECER 2023/2024 (n 21). It seems that the NPA and the EMIs gather statistics from different perspectives so there is a lack of data on environmental crime cases in South Africa—Abimbola Olowa 'Making

specific reporting targets and categorisation as a serious crime will not only see an improvement in the enforcement of environmental crimes but will also see more resources deployed towards upskilling prosecutors who prosecute environmental crimes.

Given the limitations identified in the handling of environmental matters by general courts, this article argues that the establishment and use of specialised environmental courts (SECs) in South Africa presents a more effective approach to resolving environmental disputes and advancing environmental protection. The article begins with an overview of SECs. It then critically examines the three roles played by the judiciary in the advancement of environmental protection, assessing how three specialised environmental courts—the Environment and Land Court of Kenya, New South Wales LEC and Hermanus Environmental Court—have fulfilled these roles in comparison to general courts in South Africa. The article concludes by summarising key findings and offering recommendations on the establishment of an SEC in South Africa.

Specialised Environmental Courts

Specialisation in the judiciary refers to functional specialisation defined in terms of case type—generalist judges hear a wide range of cases while specialist judges hear a narrow range of cases linked to a particular area of law and possess expertise in that area of law.[26] SECs are therefore established to concentrate judicial expertise and facilitate the implementation and enforcement of environmental law.[27] They are empowered to specialise in resolving environmental, natural resources, land use development, and related disputes in ways that are responsive to environmental problems while at the same time promoting environmental justice.[28] There are different models of SECs. They can be the operationally independent environmental court model,[29] decisionally

a Case for the Establishment of Specialised Environmental Courts in South Africa' (Unpublished thesis, University of Pretoria 2024) 175–176.

26 Lawrence Baum, 'Probing the Effect of Judicial Specialization' (2009) 58 Duke Law Journal 1667, 1671; Heike Gramckow and Barry Walsh, *Developing Specialized Court Services: International Experiences and Lessons Learned* (Justice and Development Working Paper Series 2013) 3.

27 Gitanjali Nain Gill, 'A Green Tribunal for India' (2010) 22:3 Journal of Environmental Law 461.

28 Brian Preston, 'The 2023 Sir Ninian Stephen Lecture' (Lecture delivered at the University of Newcastle School of Law and Justice, 4 August 2023); George Pring and Catherine Pring, 'Specialized Environmental Courts and Tribunals: The Explosion of New Institutions to Adjudicate Climate Change and Other Complex Environmental Issues' (Paper presented at the 2nd Global Conference on Environmental Governance and Democracy, 2010); George Pring and Catherine Pring, *Greening Justice: Creating and Improving Environmental Courts and Tribunals* (2009) ix.

29 This is a specialised environmental court established under the judicial arm of the government. It is independent of the other two arms of government and has its own budget with legally trained and expert judges. It hears only environmental cases and is able to make use of non-legal, scientific or technical experts as commissioners or assessors who work with legally trained judges. See George Pring and Catherine Pring, *Environmental Courts and Tribunals; A Guide for Policymakers United Nations Environmental Programme* (UNEP 2016) 20; Linda Yanti Sulistiawati et al, *Environmental*

independent environmental courts (green courts),[30] general court judges assigned to environmental cases[31] and general court judges trained in environmental law.[32] The choice of model is largely dependent on several factors including the existing legal framework, the potential costs of establishing and operating the SEC as well as the current caseload.[33]

SECs offer several advantages. Firstly, they allow for the fast-tracking of environmental litigation because they are focused on environmental cases and do not have to adjudicate any other types of cases.[34] Secondly, judges in the specialised environmental courts develop the expertise to decide disputes more efficiently and expeditiously when compared to the judges in the general courts.[35] Thirdly, they promote the establishment of integrated jurisdiction over relevant laws, enabling a specialised environmental court judge to assess the environmental aspects of decisions related to land use, natural resources, climate change and land development. This approach also allows for the consolidation of cases that arise from different technical causes of action.[36] Fourthly, a well-resourced specialised environmental court is capable of managing scientific and technical expert evidence through both internal (court-appointed) experts and external (parties' retained) experts, thus enabling the court to access the most reliable and unbiased evidence available.[37] This includes the use of expert scientific-technical decision-makers who serve as co-judges or commissioners.[38] It further includes the appointment of expert-and-lay commissioners who are responsible for ensuring compliance with a court order.[39] Fifth, specialised environmental courts also serve as forums for innovations in environmental public interest litigation.[40]

Courts and Tribunals—2021: A Guide for Policymakers (UNEP 2022) 44; in Pring and Pring (2009) (n 28) 22–23, they are also referred to as specialised courts.

30 This involves the creation of a specialised chamber, bench, panel of judges or a judge within the general court to hear environmental cases. It may be formally established or it may be an ad hoc arrangement in which a judge is temporarily assigned to adjudicate over environmental cases. The advantages are that it does not need special legislation to be promulgated for its creation or a separate budget to operate. See Pring and Pring (2016) (n 29) 24; Sulistiawati et al (n 29) 45; in Pring and Pring (2009) (n 28) 23, they are also referred to as specialised green chambers.

31 Pring and Pring (2016) (n 29) 29; Sulistiawati et al (n 29) 6, 50; in Pring and Pring (2009) (n 28) 24, they are also referred to as green judges.

32 Pring and Pring (2016) (n 29) 32; Sulistiawati et al (n 29) 54; in Pring and Pring (2009) (n 28) 25.

33 Antony Altbeker, *Justice Through Specialisation? The Case of the Specialised Commercial Crime Court* (Institute for Security Studies, Monograph 76, 2003) 26; Gramckow and Walsh (n 26) 9–10, 16; Pring and Pring (n 28) 5.

34 Pring and Pring (2009) (n 28) 14; Gramckow and Walsh (n 26) 6; Whitney (n 18) 476.

35 Markus B Zimmer, 'Overview of Specialized Courts' (2009) 2:1 *International Journal for Court Administration* 1.

36 Pring and Pring (2010) (n 28) 10–11.

37 Pring and Pring (2009) (n 28) 14.

38 Brian John Preston, 'Characteristics of Successful Environmental Courts and Tribunals' (2014) 26 Journal of Environmental Law 365, 377–378.

39 Pring and Pring (2010) (n 28) 13.

40 Preston (n 38) 391.

While general courts may be able to provide some of these advantages, their broad jurisdiction over a wide array of legal matters often constrains their capacity to effectively and comprehensively adjudicate environmental cases. In contrast, SECs, by concentrating exclusively on environmental cases, are better positioned to deliver these benefits effectively. The following sections examine three key roles essential to advancing environmental protection and the development of environmental jurisprudence. It is argued that placing these roles within the framework of SECs may lead to more effective environmental protection and foster the development of robust environmental jurisprudence.

Developing Environmental Jurisprudence Through the Interpretation and Application of the Substantive Environmental Right

The judiciary is instrumental in shaping environmental jurisprudence by interpreting and applying laws, establishing legal precedents and upholding the Constitution. However, the development of environmental jurisprudence in South Africa has been relatively slow. For instance, the Constitutional Court has not extensively engaged with section 24 (the environment right) beyond two cases—*Fuel Retailers*[41] and *National Society for the Prevention of Cruelty to Animals v Minister of Justice and Constitutional Development and Another* (NSPCA CC).[42] Kruger and Murcott observe that the Constitutional Court's limited engagement with environment rights cannot be attributed to an absence of relevant cases.[43] On the contrary, section 24 could have been invoked in a range of cases that came before the Constitutional Court, but was not.[44] However, as Kruger notes, one of the key reasons environmental issues have not been adequately

41 *Fuel Retailers* (n 8).

42 [2016] ZACC 46, 2017 (1) SACR 284 (CC); Ruth Kruger, 'The Silent Right: Environmental Rights in the Constitutional Court of South Africa' (2019) 9 Constitutional Court Review 474, 475; Murcott (n 10) 152.

43 Kruger (n 42) 475; See also Murcott (n 10) 152.

44 Kruger (n 42) 477. Kruger cited the following cases to buttress her argument: *Mazibuko and Others v City of Johannesburg and Others* [2009] ZACC 28, which turned on the right to water in terms of section 27 although the court did not acknowledge its close link to the right to an environment; *Merafong Municipality v AngloGold Ashanti Limited* [2016] ZACC 35, which was about the pricing of water yet its relevance to the right to an environment was not discussed; and *Minister for Environmental Affairs and Another v Aquarius Platinum (South Africa) (Pty) Ltd* [2016] ZACC 4, where water was central to the dispute but section 24 received only a cursory mention, with no attempt to explore its deeper relevance. Murcott cited the following cases to support her argument: *MEC: Department of Agriculture, Conservation and Environment and Another v HTF Developers (Pty) Ltd* [2007] ZACC 25, 2008 (2) SA 319 (CC), which involved a challenge to a directive preventing the clearing of an ecologically sensitive area for a housing development. The Constitutional Court did engage with section 24 of the Constitution but focused on the Promotion of Administrative Justice Act 3 of 2000 and procedural fairness, see Murcott (n 10) 155; and *Normandien Farms (Pty) Limited v South African Agency for Promotion of Petroleum Exportation and Exploitation SOC Limited and Others [2020] ZACC 5, which turned on procedural* defects in the application for an exploration right under the Mineral and Petroleum Resources Development Act 28 of 2002, with no consideration of the right to an environment as the court focused instead on the right to administrative justice.

ventilated in the Constitutional Court is that they were not frequently included in the pleadings of cases where section 24 of the Constitution was clearly implicated.[45] Consequently, the Constitutional Court has had limited opportunities to engage extensively with section 24 of the Constitution, particularly given that the High Court serves as the court of first instance for environmental civil litigation in South Africa.[46]

A key challenge with environmental cases litigated in the High Court is that they are predominantly assessed through the lens of just administrative action, with courts placing emphasis on procedural compliance rather than engaging with substantive environmental issues thereby limiting the development of environmental jurisprudence.[47] For instance, in *Earthlife Africa (Cape Town) v Director-General: Department of Environmental Affairs and Tourism and Another*[48] (*Earthlife Cape Town*), where Earthlife Africa sought to set aside the decision of the Director-General to grant an environmental authorisation to Eskom (second respondent) for the construction of a 110-megawatt-class pebble bed modular reactor at the Koeberg Nuclear Power Station, the court based its decision on administrative law considerations. It held that the applicant had not been afforded an opportunity to make representations on new facts that pertained to the final environmental impact report that the Department had considered when issuing the environmental authorisation to Eskom.[49] The court, however, did not think it 'necessary to deal with the two subsidiary review grounds, namely, that the [Director-General] failed properly to address the problems posed by nuclear waste at the proposed PBMR, and that the [Director-General] abdicated his responsibility properly to consider safety issues by deferring to the National Nuclear Regulator.'[50] This highlights a missed opportunity to understand how section 24 protects both humans and the natural environment from nuclear waste.

Similarly in *Mfolozi Community Environmental Justice Organisation and Others v Minister of Minerals and Energy and Others* (*Mfolozi*),[51] the applicants sought to have three decisions reviewed and set aside—the awarding of mining rights by the Director-General to the fourth respondent, Tendele; the approval of the Environmental Management Programme by the Regional Manager; and the appeal decision by the

45 Kruger (n 42) 477.

46 Section 34H of the NEMA.

47 In a judicial review, the focus is on determining if the environmental authority's decision complies with the procedural aspects that constitute just administrative action while a merit review involves the consideration of all the evidence for the purpose of deciding on what the correct outcome is. See Pring and Pring (2016) (n 29) 45. The right to just administrative action is provided for in section 33 of the SA Constitution: '(1) Everyone has the right to administrative action that is lawful, reasonable, and procedurally fair. (2) Everyone whose rights have been adversely affected by administrative action has the right to be given written reasons.'

48 2005 (3) SA 156.

49 ibid para 62.

50 ibid para 77.

51 [2022] ZAGPPHC 305.

Minister of Minerals and Energy dismissing the applicants' internal appeal.[52] They contended that their constitutionally guaranteed rights to an environment that is not harmful to their health or well-being and not to be deprived of property had been undermined.[53] The court, in making its decision, did not consider the contention relating to the infringement of the applicants' environmental right and only focused on the right to property highlighting that 'without informed consent the objective aimed at by our Constitution of communities deciding what happens to their land in which they have an interest is undermined.'[54] It was on this basis that it declared the Director-General's decision in awarding the mining right and the Regional Manager's decision in approving the Environmental Management Programme invalid and set aside the appeal decision remitting the matter back to the Minister for reconsideration.[55]

It is our view that SECs would offer a more effective forum for advancing environmental jurisprudence in South Africa because these courts typically possess comprehensive jurisdiction that includes civil, criminal and administrative matters and have judicial and merit review powers. Arguably these comprehensive powers provide the basis for merit as opposed to procedural scrutiny.

The Environment and Land Court (ELC) of Kenya,[56] with its judicial and merit review powers has been quite instrumental in developing robust jurisprudence on environmental sustainability and protection of the right to a clean and healthy environment. In the case of *Moffat Kamau and 9 Others v Aelous Kenya Limited and 9 Others (Wind Farm Project),*[57] the first respondent was granted a licence to develop a 30-megawatt wind farm, which was later expanded to 60 megawatts without undergoing a new environmental impact assessment.[58] The claimants argued that the wind farm violated their right to a clean and healthy environment by transforming their agrarian landscape into an industrial site for electricity generation.[59] The respondents contended that the project was supported by the government and was aligned with Kenya's economic blueprint document (Vision 2030).[60] They also argued that it was a green project that would produce green energy and benefit the Kenyan economy.[61] The ELC declared that the failure to abide by the Environmental Impact Assessment (EIA) regulations violated the petitioners' right to a clean and healthy environment and pointed out that it would not hesitate to identify mistakes where they have occurred and to demand adherence to proper procedures, regardless of the project's significance because

52 ibid para 1.
53 ibid para 1.
54 ibid para 70.
55 ibid para 84.
56 The ELC was established in terms of section 162(2)(b) of the Constitution of the Republic of Kenya, 2010 making it the first specialised environmental court to be established in terms of a constitution.
57 [2016] KEELC 565 (KLR).
58 ibid para 3.
59 ibid para 7.
60 ibid para 41.
61 ibid para 22.

the court's greater duty is to safeguard the environment for present and future generations.[62] Further even though the EIA regulations were silent on the need for a new EIA Study Report before an EIA variation licence could be issued, the ELC invoked Regulation 28 of the EIA Regulations and held that where there is substantial change that goes to the substance of the project, it should be deemed as a new project which requires a new EIA licence, meaning that a fresh EIA must be carried out.[63]

In *African Centre for Rights and Governance and 3 Others v Municipal Council of Naivasha* (*ACRAG*),[64] the respondent had been using a piece of land as a dumpsite for disposal of solid waste generated within the Naivasha Municipal Council.[65] The applicant approached the ELC seeking a declaratory order that 'the violation of Article 42 of the Constitution, 2010, by the respondent has resulted in a denial of the right to a clean and healthy environment to the petitioners and residents of Naivasha Municipality' and a mandatory injunction for the relocation of the dumpsite as well as a prohibitory injunction to cease any dumping of waste.[66] The ELC conducted an on-site inspection and indicated that where evidence—even if not conclusive—shows risks to health as the consequence of the operation of the illegal dumping site, this may be sufficient to find the right to a clean and healthy environment violated and declared that the right to a clean and healthy environment had been violated.[67] The court chose not to order the closure of the dumpsite, taking into account the lack of an alternative site for waste disposal, and ordered that the respondent ensure daily collection and incineration of plastic bags, apply for the requisite licence from NEMA to use the site as a dumpsite, undertake a thorough EIA and consider an option of having a landfill instead of an open dumpsite.[68]

In the landmark decision of *Kelvin Musyoke and 9 others v The Hon Attorney General and 7 others (Musyoke)*,[69] the ELC gave judgment in favour of the petitioners and declared that the Owino Uhuru community was entitled to their right to a clean and healthy environment, right to the highest attainable standard of health and right to clean and safe water guaranteed by Article 43 of the Constitution and right to life as guaranteed by the provisions of Article 26 of the Constitution.[70] The court also granted the petitioners compensation to the amount of Kshs 1.3 billion for personal injury and loss of life, payable by the Government of Kenya and the two companies whose industrial activities had resulted in lead poisoning, which had negatively affected both persons and the environment.[71] Further, the court directed the respondents to clean up

62 ibid para 95.
63 ibid para 83.
64 Petition No 50 of 2012 [2017] eKLR.
65 ibid para 1.
66 ibid para 2.
67 ibid para 33.
68 ibid para 43.
69 [2020] eKLR.
70 ibid para 168.
71 ibid para 171.

the soil and water and remove any waste deposited within the settlement within four months of the date of judgment.[72]

These Kenyan LEC cases demonstrate that when a court is granted a specific mandate—namely, the authority to adjudicate environmental and land use matters based on merit rather than solely administrative procedures—it is more likely to examine the potential infringement of constitutionally protected environmental rights. Although the outcomes may not always favour environmental concerns, this thorough scrutiny enhances the understanding of the scope and limitations of constitutional protections for the environment, while simultaneously developing the expertise of the court.

Similarly, the LEC of New South Wales, Australia, has developed substantial environmental jurisprudence because of its specialised knowledge and extensive jurisdiction, which covers merit review function, judicial review function, civil enforcement, criminal enforcement and appellate function.[73] The majority of the cases before the LEC are merit review cases, which has contributed to the development of a robust environmental jurisprudence.[74] It developed jurisprudence on the precautionary principle, one of the key principles of ecologically sustainable development in relation to biodiversity. In *Leatch v National Parks and Wildlife Service*,[75] the Director-General of the National Wildlife Service issued a licence to the Shoalhaven City Council to take or kill protected fauna in the course of carrying out a road development project.[76] The LEC held that the scarcity of scientific knowledge about the population, habitat and behavioural patterns of two threatened fauna species and the impacts of a proposed road on the species justified the refusal of a licence to take or kill the species.[77] The court also emphasised that the refusal of a licence application should not be assumed to be the end of the proposal because further information on the endangered fauna and advances in scientific knowledge may lead to the granting of the licence in future.[78]

The LEC has also developed environmental jurisprudence on public trust in relation to national parks and protected land. In *Willoughby City Council v Minister Administering*

72 ibid para 171.

73 Brian John Preston, 'The Land and Environment Court of New South Wales: A Very Short History of an Environmental Court in Action' (2020) 94 Australian Law Journal 631, 638.

74 LEC of New South Wales, 'Class 1: Environmental planning and protection appeals' <https://lec.nsw.gov.au/types-of-cases/class-1---environmental-planning-and-protection-appeals.html> assessed 21 February 2025; proceedings in Class 1 involve merits review of administrative decisions of local or state government under various planning or environmental laws.

75 (1993) 81 LGERA 270 (Leatch). See also *Nicholls v Director-General v National Parks and Wildlife* (1994) 84 LGERA 397; *Telstra Corporation Limited v Hornsby Shire Council* [2006] 146 LGERA 10 where the LEC explained that where the precautionary principle is activated, there is a shifting of an evidentiary burden of proof to the person who is proposing the economic or other development plan, programme or project to show that the threat does not, in fact, exist or is negligible.

76 Leatch (n 75) 270.

77 ibid 286–287.

78 ibid.

the National Parks and Wildlife Act (Willoughby),[79] the respondent had approved a lease for a building on national park land at Middle Harbour on the north shore of Sydney, and the construction had commenced without the consent of the local council and in breach of the National Parks and Wildlife Act. The LEC declared that national parks are held in trust by the state and ordered that the building that had been built in the national park be demolished.[80] The LEC wading in on the issue of environmental impact assessment in *Prineas v Forestry Commission of NSW*[81] established the test for the adequacy of an environmental assessment document, emphasising that it must be comprehensive, objective and not superficial or non-informative.[82]

The Kenyan and Australian examples offer valuable lessons for South Africa. This approach to 'greening the judiciary' by way of SECs appears to encourage increased engagement with the substantive merits of environmental cases. This fosters the development of environmental jurisprudence and helps ensure that judges acquire specialised expertise in environmental law, the absence of which can sometimes lead to a reluctance to engage fully with substantive environmental issues.

Enforcement of Environmental Law

The courts play an important role in enforcing environmental law. Most countries, including South Africa, have adopted the command-and-control approach, with criminal sanctions serving as the primary enforcement mechanisms. When administrative enforcement mechanisms fail, administrators approach the courts for criminal prosecution in pursuit of the penalty provisions in the environmental legislation.[83]

79 (1992) 78 LGRA 19; see also *Conservation of North Ocean Shores Inc v Byron Shire Council* [2009] NSWLEC 69, where the LEC declared as invalid a development consent granted by the respondent allowing for development of private land zoned as being for Habitat Protection; *Save Little Manly Beach Foreshore Incorporated v Manly Council (No 2)* [2013] NSWLEC 156, where the LEC held that Manly Council (the respondent) was restrained from selling, exchanging or otherwise disposing of land classified as community land.

80 ibid 38.

81 (1983) 49 LGRA 402; see also *Gray v The Minister for Planning and Ors* [2006] NSWLEC 720, where the applicant successfully challenged the validity of the decision by the NSW Director-General of Planning to accept for public display the environmental assessment prepared by Centennial Coal Company Limited regarding a mine on the basis that Centennial did not include an assessment of the impacts of burning the coal on the environment and, as such, the environmental assessment failed to comply with the direction from the Director-General's environmental assessment requirement to include a 'detailed greenhouse gas assessment.'

82 ibid 417.

83 For instance, section 49A read with section 49B of the National Environmental Management Act 107 of 1998 (NEMA); section 89 of the National Environmental Management Protected Areas Act 57 of 2003; section 101 read with section 102 of the National Environmental Management Biodiversity Act 10 of 2004; section 67 read with section 68 of the National Environmental Management Waste Act 59 of 2008 and section 51 read with section 52 of the National Environmental Management Air Quality Act 39 of 2004 make provision for offences and penalties in the respective legislation. It must, however, be noted that the prosecution of offenders in South Africa ultimately lies with the NPA because the competent authority or the environmental management inspectors cannot directly

Similarly, when members of the public seek to compel the government or private sector organisations to ensure that their decisions and/or actions further the protection of the environment, they approach the courts seeking suitable civil remedies.[84]

The Johannesburg Principles acknowledge that the fragile state of the global environment requires the judiciary, as the guardian of the rule of law, to boldly and fearlessly implement and enforce applicable international and national laws.[85] This is because a lack of enforceability allows governments to evade their responsibility in protecting the environment, which may deprive affected individuals of access to remedies for violations of their right to a clean and healthy environment.[86] The role of the courts in enforcing environmental law is particularly crucial now that the right to a clean, healthy, and sustainable environment has been recognised as a human right.[87] Its recognition as a human right at the international level facilitates its effective incorporation into international law and enhances its domestic implementation.[88]

The integral role played by the judiciary in the enforcement of environmental law and, ultimately, the protection of the environment is evidenced by the fact that in the National Environmental Management Act (NEMA),[89] the final 'enforcer' of the provisions in NEMA (and in the Specific Environmental Management Acts)[90] is the court through the

prosecute an offender. See section 34H of the NEMA which states that '(1) Notwithstanding anything to the contrary in any other law, a magistrate's court shall have jurisdiction to impose any penalty prescribed by this Act or any specific Environmental Management Acts; (2) Where a competent authority is of the view that a more severe penalty could be considered than those penalties referred to in section 49B, the competent authority may request the NPA to institute the criminal proceedings in the High Court.' However, the EMIs are empowered to conduct criminal investigations and thereafter hand over the docket to the NPA for prosecution. See Frances Craigie, Phil Snijman and Melissa Fourie, 'Environmental Compliance and Enforcement Institutions' in A Paterson and LJ Kotzé (eds) *Environmental Compliance and Enforcement in South Africa: Legal Perspectives* (Juta 2009) 98.

84 Sec 32 of the NEMA.

85 Johannesburg Principles (n 1) 5.

86 Soyapi (n 5) 326.

87 On 8 October 2021, the UN Human Rights Council adopted resolution 48/13 recognising that a clean, healthy, and sustainable environment is a human right <digitallibrary.un.org/record/3945636?lnF=en> accessed 4 March 2024; The UN General Assembly adopted the resolution, recognising the right to a clean, healthy and sustainable environment as a human right. Paragraph 1 of Resolution A/76/L.75, adopted on 28 July 2022 <digitallibrary.un.org/record/3982508?ln=en> accessed 4 March 2024.

88 Yann Aguila, 'The Right to a Healthy Environment' <www.iucn.org/news/world-commission-environmental-law/202110/right-a-healthy-environment> accessed 8 March 2024.

89 Act 107 of 1998; NEMA is the main environmental governance framework legislation in South Africa.

90 In terms of section 1 of NEMA, specific Environmental Management Acts refer to: (a) the Environment Conservation Act, 1989 (Act 73 of 1989); (b) the National Water Act, 1998 (Act 36 of 1998); (c) the National Environmental Management: Protected Areas Act, 2003 (Act 57 of 2003); (d) the National Environmental Management: Biodiversity Act, 2004 (Act 10 of 2004); (e) the National Environmental Management: Air Quality Act, 2004 (Act 39 of 2004); (f) the National Environmental Management: Integrated Coastal Management Act, 2008 (Act 24 of 2008); (g) the

offences and penalty provisions.[91] The intrinsic nature of environmental law, together with the inherent complexity of environmental crimes,[92] underscores the need for experienced judges to adjudicate environmental cases and specialised prosecutors to successfully prosecute environmental cases.[93]

In the past three years, the Environmental Management Inspectors (EMIs) have referred a significant number of environmental criminal investigations to the NPA for prosecution.[94] In the 2021/2022 financial year, the NPA received 391 criminal investigations with 58 convictions reported as having been achieved in the year[95] while in the 2022/2023 financial year, a total of 359 criminal investigations were handed over to the NPA with 90 convictions reported as having been achieved in the year.[96] In the 2023/2024 financial year, 298 criminal investigations were handed over to the NPA with 66 convictions reported as having been achieved in the year.[97] Overall, the conviction rate remains relatively low. One reason for this is that prosecutors often lack the necessary technical skills to effectively prosecute environmental crimes.[98] Furthermore, environmental cases compete on the court roll with other general crimes,

National Environmental Management: Waste Act, 2008 (Act 59 of 2008); or (h) the World Heritage Convention Act, 1999 (Act 49 of 1999), and includes any regulation or other subordinate legislation made in terms of any of those Acts. Section 5(2) provides that the Climate Change Act 22 of 2024 is also a specific Environmental Management Act.

91 See n 83.

92 Environmental crimes can generally be defined as illegal activities or actions that directly harm the environment in Environmental Investigation Agency, 'Environmental Crimes a Threat to Our Future' (2008) 1 <globalinitiative.net/wp-content/uploads/2017/12/EIA-Environmental-Crime-A-Threat-to-Our-Future.pdf> accessed 14 May 2024. White defines environmental crime as 'an act committed with intent to harm or with a potential to cause harm to ecological and/or biological systems and for securing business or personal advantage' in Rob White, 'Environmental Crime and Problem-solving Courts' (2013) 59:3 Crime, Law, and Social Change 267, 273; Clifford and Edwards define it as 'an act that violates an environmental protection statute' in Mary Clifford and Terry D Edwards, 'Defining Environmental Crime' in Mary Clifford (ed), *Environmental Crime: Enforcement and Social Responsibility* (Aspen, 1998) 26. According to the Department of Forestry, Fisheries and the Environment's NECER 2023/2024 xii, environmental crime is 'the violation of a common law or legislative obligation related to the environment which triggers a criminal sanction.'

93 Craigie et al (n 83) 98; David M Uhlmann, 'Environmental Crime Comes of Age: The Evolution of Criminal Enforcement in the Environmental Regulatory Scheme' (2009) 4 Utah Law Review 1223, 1232.

94 NECER 2023/2024 16.

95 ibid.

96 ibid.

97 ibid.

98 Kola O Odeku and Simbarashe R Gundani, 'Accentuating Criminal Sanctions for Environmental Degradation: Issues and Perspectives' (2017) 8:2 Environmental Economics 28 <https://doi.org/10.21511/ee.08(2).2017.03> accessed 22 February 2024; other reasons for the low conviction rate include the fact that the finalisation of prosecutions spans over a couple of years so some cases handed over in a particular year might not necessarily be finalised in that same year, see Fourie (n 14) 100.

and some prosecutors are unwilling to prosecute what they view as 'victimless' and 'low priority' offences.[99]

We argue that an SEC, staffed with expert prosecutors in environmental law, will enhance the conviction rate of environmental crime. The Hermanus Environmental Court (Hermanus Court) serves as a relevant example in this context. This environmental court was established in Hermanus, South Africa in 2004 to provide for the effective and speedy prosecution of poaching syndicates and to fast-track the trials of criminal offenders, particularly abalone poachers.[100] The Hermanus Court in its inception year heard 74 cases and was able to successfully prosecute 51 of these cases.[101] During the Hermanus Court's first 30 months of existence,[102] it had a conviction rate of about 80 per cent with 266 convictions out of a total number of 333 cases that were finalised.[103] During the last 12 months of its operation, the Hermanus Court achieved an 85 per cent conviction rate.[104] The success of the court can be attributed, in part, to the presence of prosecutors with expertise in environmental law, as well as the prioritisation of environmental cases, which were consistently placed on the court roll.[105]

In addition to prioritising environmental criminal cases and achieving higher conviction rates, an SEC is able to develop and implement appropriate sanctions and remedies[106] that extend beyond traditional penalties such as imprisonment or fines. For instance, the New South Wales' LEC can impose sanctions including ordering the offender to take specified action to publicise the offence (including the circumstances of the offence) and its environmental and other consequences and any other orders made against the person;[107] ordering the offender to carry out a specified project for the restoration or

99 Syeda Mehar Zehra, 'Environmental Crime Investigations and Financial Intelligence' **(2019)** Acams Today <https://www.acamstoday.org/environmental-crime-investigations-and-financial-intelligence> **accessed 21 November 2022.**

100 DOJCD 'Annual Report 2003/2004' 28; Cases relating to other environmental issues such as the illegal trade in rhinoceros horns, water pollution and other marine offences were also heard in the Court, see PJ Snijman, 'Hermanus' Environmental Court: Does It Protect the Environment?' (2005) News and Views for Magistrates 3.

101 Kelly Rosencrans, 'Environmental Courts Prove to Be Effective' Stop Illegal Fishing Case Study 02 (2011) <stopillegalfishing.com/publications/environmental-courts> accessed 5 March 2022.

102 The Hermanus Court, which was originally meant to be a permanent institution, was closed in 2007 following a high-level political decision that was taken to close a number of specialised courts that lacked legislative mandates, see Rosencrans (n 104).

103 Snijman (n 100) 2.

104 Prior to the establishment of the Hermanus Court, the conviction rate for environmental crimes in South Africa was around 10 per cent, see Rosencrans (n 101).

105 Virtual interview with a former prosecutor of the Hermanus Court (30 November 2022).

106 White (n 92) 269; Evan Hamman, Reece Walters and Rowena Maguire, 'Environmental Crime and Specialist Courts: The Case for One-Stop (Judicial) Shop in Queensland' (2015) Current Issues in Criminal Justice 59, 63.

107 Section 250(1)(a) of the Protection of the Environment Operations Act 1997 No 156 (NSW); In *Environment Protection Authority v Central Coast Council* (*Central Coast Council*) [2024]

enhancement of the environment in a public place or for the public benefit;[108] ordering the offender to pay a specified amount to the Environmental Trust established under the Environmental Trust Act 1998, or a specified organisation, for the purposes of a specified project for the restoration or enhancement of the environment or for general environmental purposes;[109] requiring the offender to attend or cause employees or contractors of the offender to attend, a training or other course specified by the court;[110] or establishing a training course of a kind specified by the court for employees or contractors of the offender.[111] In the state of the Amazonas in Brazil, the judge in the Court of Environment and Agrarian Issues of Amazonas has imposed creative and innovative sanctions including community service directly related to the offence by sentencing waste dumpers to work in a recycling plant, illegal foresters to plant trees, wildlife poachers to work for wildlife recovery groups; and offending companies to provide community education through billboards on buses and environmental comic books.[112]

In the context of environmental civil litigation, South Africa's general courts are vested with the authority to grant innovative remedies.[113] However, the general courts when deciding on environmental civil litigation have generally adopted a cautious and procedural approach tending to favour traditional, procedural remedies of referring the matter back to the relevant authority for reconsideration. This in the main is attributed to their reluctance to breach the principle of separation of powers. For instance, in the *Minister of Environmental Affairs v The Trustees for the Time Being of Groundwork Trust and Others* (#DeadlyAir Judgment, Supreme Court of Appeal),[114] Groundwork Trust sought and obtained a declaratory order that the poor ambient air quality in the

NSWLEC 141, the defendant was ordered to publicise the offences and the orders made against it by posting the offence and orders on its Facebook wall, together with a hyperlink directly to the Court's judgment and tagging the Environment Protection Authority in the post; in *Environment Protection Authority v Hughes* [2024] NSWLEC 91, the defendant was ordered to publicise the offences and the orders made against it on its Facebook wall together with a hyperlink directly to the Court's judgment, and tagging the Environment Protection Authority in the post. In *Environment Protection Authority v Hughes* [2024] NSWLEC 91, the offender was ordered to publish a notice of the offence and conviction within the first 12 pages of the *Daily Telegraph* and the *Newcastle Herald*.

108 Section 250(1)(c) of the Protection of the Environment Operations Act 1997 No 156 (NSW); In *Central Coast Council* (n 107), the LEC ordered the defendant, at its own expense and to the value of at least AUD 151 900, to complete the Wetland Restoration project to improve water quality along Narara Creek catchment.

109 Section 250(1)(e) of the Protection of the Environment Operations Act 1997 No 156 (NSW). In *Environment Protection Authority v Sydney Water Corporation* [2024] NSWLEC 130, the Court ordered the defendant to pay $200 000 to the Environmental Trust established under the Environmental Trust Act 1998 (NSW), for the amount to be applied by the Trust to emergency pollution incidents and orphan waste dumping programmes.

110 Section 250(1)(f) of the Protection of the Environment Operations Act 1997 No 156 (NSW).

111 Section 250(1)(g) of the Protection of the Environment Operations Act 1997 No 156 (NSW).

112 Sulistiawati et al (n 29) 45.

113 Section 38 of the Constitution empowers courts to grant 'appropriate relief' where a right in the Bill of Rights has been infringed.

114 (549/2023) [2025] ZASCA 43 (11 April 2025).

Highveld Priority Area constituted a violation of section 24 of the Constitution. The High Court further ordered the Minister responsible for environmental affairs to prepare and publish regulations in terms of section 20 of the Air Quality Act, to implement and enforce the Highveld Air Quality Management Plan. On appeal, the Supreme Court of Appeal varied the High Court's judgment regarding the specific directions it had given on how the Minister should prepare the regulations, emphasising that such directions implicated the principle of separation of powers.[115]

In contrast to general courts, SECs, which are specifically designed to integrate legal, scientific and policy considerations, have proven not only more effective in penalising environment crimes, but also better positioned to issue and enforce innovative remedies. These include restorative orders, the mandating of public awareness programmes and the imposition of environmental rehabilitation measures. Such remedies have the potential to enhance environmental protection while expanding the court's capacity to advance the broader objectives of sustainable development. The approach is exemplified by the jurisprudence of the Kenyan ELC, particularly in cases such as *Wind Farm Project*, *ACRAG* and *Musyoke*, where the Court did not hesitate to issue detailed directives concerning both the manner and the timeframe within which specific actions were to be undertaken by the government authorities.

Promoting Compliance with Environmental Law

The third key role played by the judiciary is that of promoting compliance with environmental law. Weeramantry J, in his introduction to the *UN Environment Judicial Handbook on Environmental Law*, expresses that, 'the judiciary is one of the most valued and respected institutions in all societies. The tone that the judiciary sets through the tenor of its decisions influences societal attitudes and reactions towards the matter in question.'[116] He further observed that '[j]udicial decisions and attitudes can also play a great part in influencing society's perception of the environmental danger and of the resources available to society with which to contain it.'[117]

Thus, the judiciary's response to environmental problems can serve as a powerful catalyst for law reform and compliance with environmental law. For instance, the LEC's decision in *Bushfire Survivors for Climate Action Incorporated v EPA*[118] (*Bushfire Survivors*) led to the NSW Environment Protection Authority (EPA) releasing a Climate Change Policy and Plan 2023–2026 in response to the survivors' legal intervention and the introduction of the Environment Protection Legislation Amendment (Stronger

115 ibid para 51.

116 Dinah Shelton and Alexandre Kiss, *Judicial Handbook on Environmental Law* (United Nations Environment Programme 2005) xviii <wedocs.unep.org/handle/20.500.11822/8606> accessed 7 March 2022.

117 ibid xviii.

118 [2021] NSWLEC 92.

Regulation and Penalties) Act 2024.[119] The LEC found that the NSW Environment Protection Authority (NSW EPA) had a legal obligation to prepare policies that ensure environmental protection from climate change and accordingly directed it to develop environmental quality objectives, guidelines and policies.[120]

In *Kenya Association of Manufacturers and Another v Cabinet Secretary for Environment and Others,*[121] the ELC upheld a plastic bag ban, reinforcing the government's regulatory power to enforce environmental laws. The Court's decision ensured compliance by rejecting the petitioners' petition seeking a conservatory order suspending the implementation of a notice banning the use, manufacture and importation of all plastic bags used for commercial and household packaging. The ELC emphasised that the legal notice sought to secure the right to a clean environment of over 40 million Kenyans[122] and that granting the petition 'would mean that the offensive plastic bags continue to suffocate the environment to the detriment of the Kenyan population, while serving the commercial interests of a section of the plastic bags' dealers.'[123] In *Martin Osano Rabera and Another v Municipal Council of Nakuru and 2 Others,*[124] the petitioners had petitioned the ELC for a declaratory order that the National Environmental Management Authority (2nd respondent) and County Government of Nakuru (3rd respondent) had abdicated their responsibility thereby contravening the provisions of Article 42 of the Constitution of Kenya, 2010 (right to a healthy and clean environment). The petitioners also sought an order immediately stopping the County Government of Nakuru (3rd respondent) from allowing the dumping or disposing of any waste, refuse or solid matter at a dumpsite operated by the 3rd respondent.[125] The court, in granting the petition, ordered the 3rd respondent to apply for a waste disposal site licence.[126] It further mandated the 2nd respondent to ensure compliance with the court's orders and keep the court updated on compliance by the 3rd respondent.[127]

119 No 20 of 2024; the Environment Protection Legislation Amendment amended the Protection of the Environment Administration Act 1991 (NSW) to include 'taking action in relation to climate change' as an objective of the EPA; to allow the EPA to enter into arrangements and purchase property in relation to carbon neutrality and achieving net zero emissions; and clarify that the EPA's power to create development objectives, guidelines and policies to ensure environment protection extends to ensuring protection from climate change.

120 'NSW Doubles Penalties for Environmental Crime in Major Upheaval of Environmental Law' (Herbert Smith Freehills 2024) <https://www.herbertsmithfreehills.com/notes/environmentaustralia/2024-04/nsw-doubles-penalties-for-environmental-crime-in-major-upheaval-of-environmental-law> accessed 16 February 2025.

121 [2017] eKLR.

122 ibid para 32.

123 ibid.

124 [2018] KEELC 4040 (KLR).

125 ibid para 7.

126 ibid para 80.

127 ibid.

The case of the *#DeadlyAir Judgment*[128] underscores the judiciary's pivotal role in promoting compliance with environmental law. The High Court unequivocally held that the poor air quality in the Highveld Priority Area constitutes a breach of the constitutional right of the residents to an environment that is not harmful to their health and well-being.[129] The Court further issued specific directions regarding the timeframes and manner in which the Minister should prepare the regulations.[130] However, such judicial interventions are relatively rare in South Africa.[131]

Conclusion

This article critically examined three key roles carried out by the judiciary in advancing environmental protection in South Africa: the development of environmental jurisprudence through the interpretation of the substantive environmental right, the enforcement of environmental law and the promotion of compliance with environmental law. The analysis revealed that the general courts seldom engage directly with the substantive environmental right, often preferring to adjudicate environmental matters through the lens of administrative justice.

This judicial preference constrains the development of robust environmental jurisprudence, despite the broad and flexible remedial powers afforded under section 38 of the Constitution of the Republic of South Africa. By contrast, the SECs discussed in this article are structurally and functionally better equipped to respond to the complexity of environmental disputes. Their judicial and merit review powers enable them to engage meaningfully with environmental issues and to issue innovative remedies that further the objective of environmental protection.

In relation to enforcement, general courts have faced significant challenges, including the lack of prosecutorial expertise in environmental matters, low prioritisation of environmental offences and overburdened court rolls—all contributing to low conviction rates. SECs, on the other hand, have achieved better enforcement outcomes, including higher conviction rates and the application of more nuanced sanctions beyond traditional penalties, supported by dedicated prosecutors and expert input.

With respect to promoting compliance, the general courts have adopted a relatively limited and reactive role. In contrast, the SECs examined have demonstrated a more

128 2022 JDR 1012 (GP).

129 ibid para 241.1.

130 ibid para 241.4–241.5; however, the SCA varied the High Court's order by excising the directions relating to the manner in which the regulations were to be prepared.

131 Centre for Environmental Rights, 'Why the #DeadlyAir High Court Judgment Matters' (13 April 2022) <https://cer.org.za/news/analysis-why-the-deadlyair-high-court-judgment-matters> accessed 6 June 2025.

proactive approach, employing judicial oversight, innovative remedies and compliance-oriented strategies to hold both public and private actors accountable.

While the primary objective of this article has been to demonstrate the value of SECs as an institutional mechanism for enhancing environmental protection in South Africa, it must be emphasised that any move towards establishing such a court must be carefully aligned with South Africa's constitutional and legislative framework. The choice of the SEC model must take into account institutional capacity and prevailing financial limitations.

Importantly, the effectiveness of an SEC will depend not only on its structural design but also on its jurisdictional scope. To fully realise the benefits of such a court, it should be vested with both judicial and merit review powers. Where it exercises both civil and criminal jurisdiction, it is imperative that its judicial officers possess demonstrable expertise in environmental law or, at the very least, are supported by scientific and technical experts to ensure that complex environmental matters are adjudicated with the requisite depth and rigour.

Although establishing an SEC may not immediately accelerate environmental protection or the development of environmental jurisprudence in South Africa, it would represent a forward-looking institutional reform with the potential to substantially advance environmental protection and give fuller effect to the environmental right enshrined in the Constitution of the Republic of South Africa.

Acknowledgements

To assist the writing process, Grammarly AI prompts—specifically 'Make it assertive' and 'Improve it'—were used.

References

Aguila Y, 'The Right to a Healthy Environment' <www.iucn.org/news/world-commission-environmental-law/202110/right-a-healthy-environment> accessed 8 March 2024.

Altbeker A, Justice Through Specialisation? The Case of the Specialised Commercial Crime Court (Institute for Security Studies Monograph 76, 2003).

Baum L, 'Probing the Effect of Judicial Specialization' (2009) 58 Duke Law Journal 1667.

Centre for Environmental Rights, 'Why the #DeadlyAir High Court Judgment Matters' (13 April 2022) <https://cer.org.za/news/analysis-why-the-deadlyair-high-court-judgment-matters> accessed 6 June 2025.

Clifford M and Edwards TD, 'Defining Environmental Crime' in M Clifford (ed) *Environmental Crime: Enforcement and Social Responsibility* (Aspen 1998) 5.

Collins L, 'Judging the Anthropocene: Transformative Adjudication in the Anthropocene Epoch' in LJ Kotzé (ed), *Environmental Law and Governance for the Anthropocene* (Hart 2017) 309.

Courts and Tribunals Judiciary, 'Judicial Review' <https://www.judiciary.uk/you-and-the-judiciary/judicial-review/> accessed 22 September 2022.

Craigie F, Snijman PJ and Fourie M, 'Environmental Compliance and Enforcement Institutions' in A Paterson and LJ Kotze (eds,) *Environmental Compliance and Enforcement in South Africa: Legal Perspectives* (Juta 2009) 65.

Department of Forestry, Fisheries and Environment, 'National Environmental Compliance and Enforcement Report 2023/2024.'

Department of Justice and Constitutional Development, Annual Report 2023/2024.

Department of Justice and Constitutional Development, Annual Report 2003/2004.

Environmental Investigation Agency, 'Environmental Crimes: A Threat to our Future' (2008) 1 <globalinitiative.net/wp-content/uploads/2017/12/EIA-Environmental-Crime-A-Threat-to-Our-Future.pdf> accessed 14 May 2024.

Feris L, 'Constitutional Environmental Rights: An Under-Utilised Resource' (2008) 24:1 South African Journal of Human Rights 29 <https://doi.org/10.1080/19962126.2008.11864946>

Fourie M, 'How Civil and Administrative Penalties Can Change the Face of Environmental Compliance in South Africa' (2009) South African Journal of Environmental Law and Policy 100.

Gill GN, 'A Green Tribunal for India' (2010) 22:3 Journal of Environmental Law 461 <https://doi.org/10.1093/jel/eqq014>

Gramckow H and Walsh B, Developing Specialized Court Services: International Experiences and Lessons Learned (World Bank 2013) < https://doi.org/10.1596/16677> accessed 1 March 2022.

Hamman E, Walters R, and Maguire R, 'Environmental Crime and Specialist Courts: The Case for One-Stop (Judicial) Shop in Queensland' (2015) 27:1 Current Issues in Criminal Justice 59 <https://doi.org/10.1080/10345329.2015.12036031>

Johannesburg Principles on the Role of Law and Sustainable Development (2002) <www.eufje.org/images/DocDivers/Johannesburg%20Principles.pdf> accessed 3 April 2024.

Kotzé LJ and du Plessis A, 'Some Brief Observations on Fifteen Years of Environmental Rights Jurisprudence' (2011) 3:1 South Africa Journal of Court Innovation 157.

Kruger R, 'The Silent Right: Environmental Rights in the Constitutional Court of South Africa' (2019) 9 Constitutional Court Review 474 <https://doi.org/10.2989/CCR.2019.0018>

Land and Environment Court of New South Wales, 'Class 1: Environmental Planning and Protection Appeals' <https://lec.nsw.gov.au/types-of-cases/class-1---environmental-planning-and-protection-appeals.html> assessed 21 February 2025.

Land and Environment Court of New South Wales, 'Types of Cases' <https://lec.nsw.gov.au/types-of-cases/judicial-review-and-civil-enforcement/judicial-review-and-civil-enforcement.html> accessed 2 June 2025.

Murcott M, 'Minding the Gap: The Constitutional Court's Jurisprudence Concerning the Environmental Right' (2023) 13 Constitutional Court Review 147 <https://doi.org/10.2989/CCR.2023.0007>

Murcott M, 'Problematic Trends in the Adjudication of Environmental Law Disputes' in *Transformative Environmental Constitutionalism* (Brill 2022) 89 <https://doi.org/10.1163/9789004509405_004>

National Prosecuting Authority, 'Annual Report (2023/2024).'

Nemesio IV, 'Strengthening Environmental Rule of Law: Enforcement, Combatting Corruption, and Encouraging Citizen Suits' (2015) 27 Georgetown International Law Review 321.

'NSW Doubles Penalties for Environmental Crime in Major Upheaval of Environmental Law' (4 April 2024) <https://www.herbertsmithfreehills.com/notes/environmentaustralia/2024-04/nsw-doubles-penalties-for-environmental-crime-in-major-upheaval-of-environmental-law> accessed 16 February 2025.

Odeku KO and Gundani SR, 'Accentuating Criminal Sanctions for Environmental Degradation: Issues and Perspectives' (2017) 8:2 Environmental Economics 28 <https://doi.org/10.21511/ee.08(2).2017.03> accessed 22 February 2024.

Olowa A, 'Making a Case for the Establishment of Specialised Environmental Courts in South Africa' (LLD thesis, University of Pretoria 2024).

Preston BJ, 'The Role of the Judiciary in Promoting Sustainable Development: The Experience of Asia and the Pacific' (2005) 9:2–3 Asia Pacific Journal of Environmental Law 109.

Preston BJ, 'Characteristics of Successful Environmental Courts and Tribunals' (2014) 26 Journal of Environmental Law 365 <https://doi.org/10.1093/jel/equ019>

Preston BJ, 'The Land and Environment Court of New South Wales: A Very Short History of an Environmental Court in Action' (2020) 94 Australian Law Journal 631.

Preston B, 'The Role of the Courts in Delivering Environmental Justice' (2023) Paper presented at the Sir Ninian Lecture, University of Newcastle School of Law and Justice.

Pring G and Pring C, *Greening Justice: Creating and Improving Environmental Courts and Tribunals* (United Nations Environmental Programme 2009).

Pring G and Pring C, 'Specialized Environmental Courts and Tribunals: The Explosion of New Institutions to Adjudicate Climate Change and Other Complex Environmental Issues' (2010) Paper presented at the 2nd Global Conference on Environmental Governance and Democracy.

Pring G and Pring C, *Environmental Courts and Tribunals; A Guide for Policymakers* (United Nations Environmental Programme 2016) <https://doi.org/10.4337/9781783478408.II.34>

United Nations Environment Programme, Rio+20 Declaration on Justice, Governance, and Law for Environmental Sustainability in 'Advancing Justice Governance and Law for Environmental Sustainability' (2012) 3 <https://www.unep.org/resources/report/advancing-justice-governance-and-law-environmental-sustainability-rio20-and-world> accessed 3 April 2024.

Rosencrans K, 'Environmental Courts Prove to Be Effective: Stop Illegal Fishing Case Study 02' (2011) <stopillegalfishing.com/publications/environmental-courts> accessed 5 March 2022.

Sampson I, 'The Time Is Now to Find Each Other to Control Pollution' (2022) 32:2 Clean Air Journal 7 <https://doi.org/10.17159/caj/2022/32/2.15282>

Shelton D and Kiss A, *Judicial Handbook on Environmental Law* (United Nations Environment Programme 2005).

Snijman PJ, 'Hermanus' Environmental Court: Does It Protect the Environment?' (2005) 2005(12) News and Views for Magistrates 2.

Soyapi CB, 'A Multijurisdictional Assessment of the Judiciary's Role in Advancing Environmental Protection in Africa' (2020) 12 Hague Journal on the Rule of Law 307 <https://doi.org/10.1007/s40803-019-00128-9>

Sulistiawati LY, Bouquelle F, Lin J, Lavrysen L, Ortega M, Pereira R and Tseng S, (2022) *Environmental Courts and Tribunals—2021: A Guide for Policymakers* (United Nations Environmental Programme 2022).

Uhlmann DM, 'Environmental Crime Comes of Age: The Evolution of Criminal Enforcement in the Environmental Regulatory Scheme' (2009) 4 Utah Law Review 1223.

UN Environmental Programme, 'Report of the Global Judges' Symposium on Sustainable Development and the Role of Law' presented at the 22nd session of the Governing Council/Global Ministerial Environment Forum (2003) UNEP/GC.22/INF/24 (2003) 4 <digitallibrary.un.org/record/484610?ln=en> accessed 3 April 2024.

UN General Assembly, Resolution 48/13 Recognising that a Clean, Healthy, and Sustainable Environment Is a Human Right, adopted 9 October 1993 <digitallibrary.un.org/record/3945636?ln=en> accessed 4 March 2024.

UN General Assembly, Resolution A/76/L.75, adopted 28 July 2022 <digitallibrary.un.org/record/3982508?ln=en> accessed 4 March 2024.

White R, 'Environmental Crime and Problem-Solving Courts' (2013) 59:3 Crime, Law, and Social Change 267 <https://doi.org/10.1007/s10611-013-9414-5>

Whitney SC 'The Case for Creating a Special Environmental Court System' (1973) 14(3) William and Mary Law Review 473 <scholarship.law.wm.edu/wmlr/vol14/iss3/2> accessed 13 March 2022.

Zehra SM, 'Environmental Crime Investigations and Financial Intelligence' **(2019)** <www.acamstoday.org/environmental-crime-investigations-and-finanical-intelligence> **accessed 21 November 2022.**

Zimmer MB, 'Overview of Specialized Courts' (2009) 2:1 *International Journal for Court Administration 1* <https://doi.org/10.18352/ijca.111>

Cases

Kenya

African Centre for Rights and Governance and 3 Others v Municipal Council of Naivasha Petition No 50 of 2012 [2017] eKLR.

Kelvin Musyoke and 9 Others v The Hon Attorney General and 7 Others [2020] eKLR.

Kenya Association of Manufacturers and Another v Cabinet Secretary for Environment and Others [2017] eKLR.

Martin Osano Rabera and Another v Municipal Council of Nakuru and 2 Others [2018] KEELC 4040 (KLR).

Moffat Kamau and 9 Others v Aelous Kenya Limited and 9 Others [2016] KEELC 565 (KLR).

Australia

Bushfire Survivors for Climate Action Incorporated v EPA [2021] NSWLEC 92.

Conservation of North Ocean Shores Inc v Byron Shire Council [2009] NSWLEC 69.

Environment Protection Authority v Central Coast Council [2024] NSWLEC 141.

Environment Protection Authority v Hughes [2024] NSWLEC 91.

Environment Protection Authority v Sydney Water Corporation [2024] NSWLEC 130.

Gray v The Minister for Planning and Ors [2006] NSWLEC 720.

Leatch v National Parks and Wildlife Service (1993) 81 LGERA 270.

Nicholls v Director-General v National Parks and Wildlife (1994) 84 LGERA 397.

Prineas v Forestry Commission of NSW (1983) 49 LGRA 402.

Sader v Elgammal [2022] NSWLEC.

Save Little Manly Beach Foreshore Incorporated v Manly Council (No 2) [2013] NSWLEC 156.

Telstra Corporation Limited v Hornsby Shire Council [2006] 146 LGERA 10.

Willoughby City Council v Minister Administering the National Parks and Wildlife Act (1992) 78 LGRA 19.

South Africa

City of Ekurhuleni Metropolitan Municipality v New Star Technology CC and Another [2022] ZAGPJHC 769; 2023 (3) SA 579 (GJ) (23 September 2022).

Earthlife Africa (Cape Town) v Director-General: Department of Environmental Affairs and Tourism and Another 2005 (3) SA 156.

Fuel Retailers Association of SA (Pty) Ltd v Director-General, Environmental Management Mpumalanga and Others [2007] ZACC 13.

Mazibuko and Others v City of Johannesburg and Others [2009] ZACC 28.

MEC: Department of Agriculture, Conservation and Environment and Another v HTF Developers (Pty) Ltd [2007] ZACC 25, 2008 (2) SA 319 (CC).

Merafong Municipality v AngloGold Ashanti Limited [2016] ZACC 35.

Mfolozi Community Environmental Justice Organisation and Others v Minister of Minerals and Energy and Others [2022] ZAGPPHC 305.

Minister for Environmental Affairs and Another v Aquarius Platinum [2016] ZACC 4.

Minister of Environmental Affairs v The Trustees for the Time Being of Groundwork Trust and Others (549/2023) [2025] ZASCA 43 (11 April 2025).

National Society for the Prevention of Cruelty to Animals v Minister of Justice and Constitutional Development and Another [2016] ZACC 46, 2017 (1) SACR 284 (CC).

Normandien Farms (Pty) Limited v South African Agency for Promotion of Petroleum Exportation and Exploitation SOC Limited and Others [2020] ZACC 5.

South African Human Rights Commission v Msunduzi Local Municipality and Others (8407/2020P) [2021] ZAKZPHC 35 (17 June 2021).

South Durban Community Environmental Alliance v MEC for Economic Development, [2020] ZASCA 39 (17 April 2020).

Trustees for the Time Being of Groundwork Trust and Another v Minister of Environmental Affairs and Others 2022 JDR 1012 (GP).

Wakkerstroom Natural Heritage Association v Dr Pixley Ka Isaka Local Municipality [2019] ZAMPMHC 20.

Legislation

Kenya

Constitution of Kenya, 2010.

Australia

Environment Protection Legislation Amendment (Stronger Regulation and Penalties) Act 2024 No 20 (NSW).

Protection of the Environment Administration Act 1991 No 60 (NSW).

Protection of the Environment Operations Act 1997 No 156 (NSW).

South Africa

Climate Change Act 22 of 2024.

Constitution of the Republic of South Africa, 1996.

Environment Conservation Act 73 of 1989.

National Environmental Management Act 107 of 1998.

National Environmental Management Air Quality Act 39 of 2004.

National Environmental Management Biodiversity Act 10 of 2004.

National Environmental Management Protected Areas Act 57 of 2003.

National Environmental Management Waste Act 59 of 2008.

National Environmental Management Integrated Coastal Management Act 24 of 2008.

National Water Act 36 of 1998.

World Heritage Convention Act 49 of 1999.