Compendium of Judicial Decisions on Matters Related to Environment

NATIONAL DECISIONS

Volume II

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I INTRODUCTION

This publication has been developed in pursuance of the aims of Agenda 21, particularly chapter 8 which recognizes, among other things, the need to facilitate information exchange, including the dissemination of information on effective legal and regulatory instruments in the field of environment and development. This will encourage their wider use and adoption.

Consequently, the *Compendium of Judicial Decisions* was devised with two objectives. First, it aims to create awareness and enthusiasm among lawyers and non-lawyers alike on the current trends in the jurisprudence related to environmental matters. Second, it aims to provide resource materials for reflecting on specific pieces of court decisions from the point of view of courts of different perspectives, grounded as they are in the unique legal traditions and circumstances of different countries and jurisdictions.

The promotion of sustainable development through legal means at national and international levels has led to recognition of judicial efforts to develop and consolidate environmental law. The intervention of the judiciary is necessary to the development of environmental law, particularly in implementation and enforcement of laws and regulatory provisions dealing with environmental conservation and management. Thus an understanding of the development of jurisprudence as an element of the development of laws and regulations at national and international levels is essential for the long term harmonization, development and consolidation of environmental law, as well as its enforcement. Ultimately this should promote greater respect for the legal order concerning environmental management. Indeed, when all else fail, the victims of environmental torts turn to the judiciary for redress. But today's environmental problems are challenging to legislators and judges alike by their novelty, urgency, dispersed effect and technical characteristics.

Over the last two decades many countries have witnessed a dramatic increase in the volume of judicial decisions on environmental issues as a result of global and local awareness of the link between damage to human health and to the ecosystem and a whole range of human activities. In many countries the judiciary has responded to this trend by refashioning legal, sometimes age-old, tools to meet the demands of the times, with varying degrees of success or, indeed, consistency. But such practice is still firmly to take root in Africa where not much by way of judicial intervention has been in evidence.

The complexity of environmental laws and regulations makes it necessary for today' legal practitioners, particularly from Africa, urgently to assimilate and understand the concepts and principles rising from the developing jurisprudence. This is because the rate of growth of the corpus of modern statute law in the environmental field is singularly rapid in Africa. In most countries awareness of the potential of judicial intervention in the environmental filed has grown largely because citizens have instituted proceedings in courts. But in other countries the effectiveness of the judicial mechanisms is still weak because of lack of information and a dearth of human and material resources. This is compounded by weaknesses in the institutions in charge of environmental law enforcement.

Needless to say, inconsistent or incoherent enforcement of such laws inevitably will undermine the legal order in the environmental field. This necessitates exposure of law enforcement officers in general and the judiciary in particular to comparative jurisprudence as a basis for interpreting local issues. This *Compendium* is produced in the belief that the provision of information, such as is contained in the *Compendium* can contribute to the repertoire of knowledge which judicial officers and law enforcers can call on in their efforts to give meaning to the enforcement issues facing them. Thus, it is intended to be a resource for training and awareness creation, and a source of inspiration as enforcement officers grapple with day to day issues of environmental management.

Given the novelty of environmental law, the *Compendium* is a unique opportunity for practitioners, particularly those from Africa, where case law is still scarce, to raise their level of awareness and sensitivity to ecological concerns and to share their experiences on possible approaches to resolving environmental disputes.

The *Compendium* is divided into *National Decisions* and *International Decisions*, volumes I of which were published in December 1998. At the time it was anticipated that subsequent volumes would be published as availability of materials and resources permitted, and if the response to the publication of Volume I indicated that a demand existed. This publication therefore constitutes Volume II of the *Compendium on National Decisions* for which sufficient material is available.

In this Volume the introductory discussion on "Background to Environmental Litigation" which was published in Volume I is reproduced because it forms a useful substantive background to the texts which follow. The reason is that Volume I may not easily be available to the reader. Consequently, it is desirable that, as far as is possible, each Volume should be a stand alone self-contained document.

As was done in Volume I this Volume too is divided into parts, reflecting emerging themes in environmental litigation. The themes provide only a loose grouping, and there are no strict dividing lines between them. Indeed, themes recur in various cases across the groupings. Finally, the cases in this Volume are drawn from the common law jurisdiction and the combined common law and Roman Dutch jurisdiction of South Africa while the cases in Volume III include a combination of cases from the common law jurisdiction as well as cases from the civil law jurisdictions. The decisions are of significance to lawyers from both jurisdictions even thought the common law jurisdiction emphasizes the value of precedent while the civil law jurisdiction emphasizes the value of jurisprudence.

As is now established practice cases are drawn from a diverse range of countries and, where possible, are reproduced in the original language. Translations from the original language are in all cases unofficial translations, and the texts are reproduced in the form in which they were received, with minimal editorial changes.

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II BACKGROUND TO ENVIRONMENTAL LITIGATION IN COMMON LAW JURISDICTIONS

1. THE LEGAL BASIS OF CIVIL ACTION

Judicial intervention in environmental issues arises when persons resort to court action to seek redress for a grievance. Court action can be either civil action or criminal action. Civil action is resorted to typically by private parties while criminal action tends to be the preserve of public authorities. However, the boundaries are not at all seamless: there are many instances of public authorities bringing civil action, and of private individuals initiating criminal proceedings (i e. private prosecutions). These tend, however, to be exceptional. Unlike the case with Volume I this Volume has also focused on criminal actions in addition to civil actions, especially on enforcement.

The traditional position has been that, whereas a public authority may take action explicitly to protect the environment, a private litigant can only take court action to seek redress for a private injury. Any environmentally protective effect resulting from the private action would be purely incidental. Where the private individual wishes to bring action to redress an injury to the public he has to seek the permission of the Attorney General to use his name in an action known as a "relator action."

The traditional position found expression in the jurisprudence of the courts in common law and civil law jurisdictions alike. **Gouriet v Union of Post Office Workers** [1978] AC 435 is a leading English authority on the point. The House of Lords stated the position as follows:

> ... the jurisdiction of a civil court to grant remedies in private law is confined to the grant of remedies to litigants whose rights in private law have been infringed or are threatened with infringement. To extend that jurisdiction to the grant of remedies for unlawful conduct which does not infringe any rights of the plaintiff in private law is to move out of the field of private law into that of public law with which analogies may be deceptive and where different principles apply. (p. 500).

A private individual could however bring action in his name on the basis of an interference with a public right in two situations: where the interference with the public right also interferes with some private right of the person concerned or where, in the absence of any interference with a private right, the person concerned has suffered damage peculiar to himself, which is additional to that suffered by the rest of the public.

The basis of a civil law claim is a "cause of action." This arises when an injury is caused to a person or property. If the injury is caused by a public body in the context of the exercise of public powers or the performance of a public duty the cause of action is in public law, whereas if it is caused by a private person the cause of action is in private law. The causes of action in public law are *ultra vires*, natural justice and error of law. The remedies for their redress are *certiorari*, prohibition, *mandamus*, and declaration. The causes of action in private law are trespass, nuisance, the rule in **Rylands v Fletcher** (the strict liability rule) and negligence. The remedies for their redress are an award of dam-ages, injunction and a declaratory judgement.

A civil law action in public law is designed for challenging the legal validity of the decisions and actions of public bodies. This is the common law process of "judicial review." It is now largely provided for by statute. Judicial review is not to be confused with action taken in private law to redress private wrongs, and one may not seek judicial review instead of taking action in private law simply because the defendant happens to be a public authority. The remedy is specifically designed for challenging the exercise of public power or the performance or failure to perform a public duty. Where the dispute with the public body does not relate to the exercise of public power (or the performance of a public duty), redress cannot be sought through a judicial review application; the public body must be sued through an action in private law, like any other wrongdoer.

2. JUDICIAL REVIEW

Judicial review is a remedy that may be used to:

(i) quash a decision (*certiorari*)
(ii) stop unlawful action (prohibition)
(iii) require the performance of a public duty (*mandamus*)
(iv) declare the legal position of the litigants (declaration)
(v) give monetary compensation
(vi) maintain the *status quo* (injunction).

Judicial review may be awarded where a public body has committed the following wrongful acts or omissions:

(i) where it has acted beyond its legal powers (i.e. *ultra vires*); a decision or an act of a public body may be *ultra vires* for reasons such as the failure to take into account relevant matters or taking into account irrelevant matters.
(ii) where it has acted contrary to the principles of natural justice, which require an absence of bias and a fair hearing in decision making.
(iii) where it has acted in error of law.

Judicial review is a remedy under both statute and the common law, and has been adopted by all the common law jurisdictions.

(a) Judicial review as a statutory remedy

Statutes typically provide that persons who are aggrieved with the decision of a public body may apply for a review to the courts. “Person aggrieved” was defined in a leading English authority **A.G (Gambia) v Njie** [1961] 2 All E.R. 540. Lord Denning said:

The words “person aggrieved” are of wide import and should not be subjected to a restricted interpretation. They do not include, of course, a mere busybody who is interfering in things that do not concern him, but they do include a person who has a genuine grievance because an order has been made which prejudicially affects his interests.

(b) Judicial review as a common law remedy

Quite apart from, and independently of, statutory provisions, judicial review is available as a common law remedy to which resort may always be had to challenge the decisions and actions of public bodies. In England, the Supreme Court Act 1981 and Order 53 of the Rules of the Supreme Court stipulate the procedure to be adopted in such cases. Similar procedures have been adopted by other common law jurisdictions.

Order 53 requires that the applicant seek leave of the court before filing the application. Leave is only granted if the court considers that the applicant has “sufficient interest” (or *locus standi*) in the matter in issue. Courts around the world have given varying interpretations to this concept, particularly in the context of environmental litigation. This has led to action in some countries, such as the Republic of South Africa, to introduce statutory provisions in the Constitution or elsewhere, widening the opportunities for access to the courts.

3. ACTION IN PRIVATE LAW

(b) Nuisance

There are two types of nuisance; public nuisance and private nuisance. Often the same act gives rise to both types of nuisance at the same time.

A public nuisance is an interference with the public’s reasonable comfort and convenience. It is an interference with a public right and constitutes a common law criminal offence, quite apart from providing a cause of action in private law. In the English case of **Attorney General v P.Y. A. Quarries Ltd** [1957] 2 Q.B. 169 Lord Denning said of public nuisance:

> It is a nuisance which is so widespread in its range and so indiscriminate in its effect that it would not be reasonable to expect one person to take proceedings on his own responsibility to put a stop to it, but that it should be taken on the responsibility of the community at large.

A private nuisance is an interference with an occupier’s use and enjoyment of his land. Not all interferences, however, amount to a nuisance. Nuisances are those interferences which are unreasonable, causing material and substantial injury to property or unreasonable discomfort to those living on the property. The liability of the defendant arises from using land in such a manner as to injure a neighbouring occupier. Thus nuisance imposes the duty of reasonable use on neighbouring occupiers of land. It is the cause of action most suited to resolving environmentally related disputes between neighbouring landowners.

The reasonableness, or unreasonableness, of the use giving rise to the complaint is determined on the basis of the locality in which the activity in issue is carried out. The English case of **Sturges v Bridgeman** (1879) 11 Ch.D. 852 is illustrative of this point. A confectioner had for more than twenty years used a pestle and a mortar in his back premises which abutted on the garden of a physician. The noise and vibration were not felt as a nuisance and were not complained of. But in 1973 the physician erected a consulting room at the end of his garden, and then the noise and vibration became a nuisance to him. His action for an