

Commentary

The time is now to find each other to control pollution

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The paradox of pollution and the law

Environmental laws are designed and purposed to manage and control and, hopefully, reduce pollution caused through anthropocentric means. It is generally recognised and accepted that environmental degradation continues to escalate through all environmental media, as evidenced, for example, through scientifically accepted climate change leading to natural disasters of increasing magnitude and frequency. At the same time the number and complexity of environmental laws being introduced in an effort to counter this, continues to rise, leading in turn to an exponential rise in environmental litigation.

The current reality is therefore that there is an escalation in environmental pollution and degradation, while at the same time there is an increase in environmental litigation, and therein lies the apparent paradox. One would assume that the two would be inversely proportional: increasing environmental laws and litigation leading to a reduction in environmental pollution and degradation, and yet both continue to rise.

Albert Einstein's statement that "*insanity is doing the same thing over and over and expecting different results*", seems applicable here. Are we achieving anything, or at best are we achieving pollution reduction quickly enough, by simply increasing, year on year, the number of environmental cases we take to court? That is not to say that we can or should replace the option of using courts to resolve environmental disputes. There will always be situations that cannot be resolved through other means, or where a judicial pronouncement on a particular issue or legal principle is desirable, for example in order to establish a precedent. However, if we want to achieve real and faster reductions in the impacts caused by pollution, it may be time to look at alternative solutions that are more constructive in an effort to break the cycle so that dispute resolution improves the environment. Time may be our greatest enemy; we are simply running out of it to reduce adverse environmental impacts. Now, perhaps more than ever before, we need to look for alternative ways to find each other in terms of understanding seemingly irreconcilable differences, and identifying compromises that are realistic and achievable and which will provide momentum to improving the environment and reversing the harm we have done.

Is environmental law an ass?

South Africa is a modern constitutional democracy, and one of only a few countries which has an entrenched constitutional environmental

right from which a plethora of contemporary environmental legislation has evolved since 1996. From the overarching National Environmental Management Act, to the numerous media and sector specific laws and standards regulating air, water, waste, biodiversity, the marine environment and protected areas. This is in turn supported by a web of enforcement officials in all three spheres of government. So, it seems, at least at first glance, unfair, and perhaps unrealistic, to suggest as Charles Dickens' character Mr Bumble did in *Oliver Twist*, that our body of environmental law is an ass in terms of its application.

Yet the increase in the prosecution of pollution offenders for "low hanging fruit" offences such as air emission exceedances, (often using the offenders' own data to convict them), suggests an over rigid application of the letter of the law which may be contrary to common sense.

We aren't talking about offenders who deliberately dump chemical waste onto an open field, for example, or who negligently leave a valve open so that harmful effluent pours into a river, or who fail to conduct repairs to broken effluent infrastructure so that raw sewage enters the environment for months. These offenders should face the full might of the criminal justice system both to punish and to set a clear example to others. But to drag offenders to court because they exceed an emission limit set in a licence a couple of times a year, is lazy, counter-productive and leads to grudge compliance by the "offender". These "crimes" are often not prosecuted in other jurisdictions. They don't go unpunished, but rather administrative fines are levied as opposed to criminal prosecutions. Even then, in a country desperate for economic upliftment, an attempt at least by the authorities to sit down with the offender and establish if there is a means through which improvements can be made to reduce emissions exceedances, may be more constructive and desirable. The legislative "stick" is always still there is that fails.

Similarly holding on rigidly, (and unreasonably), to a conservative definition of "waste" by officials when their own National Environmental Management: Waste Act and National Waste Management Strategy, dictates otherwise – that to reduce waste streams and waste disposal, raw materials should be used to their full extent and be classified as waste as a last resort – again suggests an overly rigid and destructive application of our law.

The body of South African environmental law is clearly not an ass, but its application can be.

Environmental justice

Communities and environmental activists in South Africa enjoy, and are increasingly using, their right to challenge government or private decisions or actions which they believe harm the environment and impinge on their use and enjoyment of it. Over the last ten or fifteen years there have been a number of important cases taken before our courts by private parties to protect their rights and interests, several of which have set important precedents, but several of which haven't.

These cases generally have a common theme of mistrust and distrust between the parties with each believing the other has a hidden agenda. It's a winner takes all situation with the loser often left with expensive legal costs and a court order which they grudgingly and sparingly comply with, or where they feel let down by the judicial system.

The limitations of environmental litigation

There will always be a place for litigating environmental disputes, but the process comes with its limitations. Litigation is expensive, slow and positional rather than conciliatory. Environmental disputes can be scientifically complex and generally lawyers running the cases are not scientists, nor are the judges hearing them. The ability of the court to understand the case and arrive at the correct decision may therefore be a challenge.

By the time a decision is handed down, the environmental harm may have already occurred, or the where the challenged project or process is vindicated, the cost may have escalated, or the opportunity passed and with it the socio-economic benefit, or the reputational harm may have been done. In most instances, at least when it comes to climate change, the effect would in any event have continued all the while the matter was being adjudicated by our courts.

If the goal is to reverse or prevent environmental harm, then we are running out of time – time which we cannot, in many instances, afford to waste litigating for years.

We need to find each other

Environmental issues are emotive, especially where the impacts are becoming increasingly visible. This on its own can make it difficult for a party to a dispute to contemplate a compromise. Yet, if the parties were prepared to view the dispute in a different light; if they were prepared to shift from a positional engagement to an interest based one, the possibility for compromise becomes more realistic. Instead of adopting standpoints at the opposite end of the spectrum of environment only or profit only, can the parties consider each other's interests and can they contemplate balancing them? Instead of bargaining or haggling to get their way, can they consider problem solving for their mutual benefit by looking for options and agreeing to solutions?

Sometimes achieving a measure of improvement in the environment is better than no improvement at all, and can start a process that leads to more extensive gains. Solving a problem by tackling it one bite at a time, may lead to a longer term, more permanent and more sustainable outcome. It may be more constructive for parties in a dispute to collaborate to achieve a desired outcome, rather than

one forcing the other to capitulate. Instead of the environment only at all costs and no development, or profit only with minimalist compliance, what about finding a way for the environment and business to coexist? What if allowing a mining project to go ahead thus generating much needed investment and social upliftment, but in a way that not only keeps it out of the most sensitive areas, but also commits the mine to restoring and reconnecting the mined areas to the protected environment, leads to a net environmental gain in the long term?

Fora exist to explore these possibilities in environmental disputes.

Mediation in our law

There are at least three statutory mechanisms available to mediate environmental disputes.

Firstly Chapter 4 of the National Environmental Management Act 107 of 1998 provides an opportunity for disputes to be referred to conciliation or mediation to see whether they can be resolved. It permits an authority to direct, a court to order or a private party to request referral to conciliation. Where this occurs, the conciliator must endeavour to resolve the dispute by obtaining and considering all relevant information, mediating the differences or disagreements and making recommendations to the parties. Despite being available since 1998, it has not been widely used.

The second is section 150 of the National Water Act 36 of 1998 which the Minister may at any time and in respect of any dispute between persons relating to any matter in the Act, and at the request of a person involved or on the Minister's own initiative, direct that an attempt to settle the dispute through a process of mediation and negotiation, be made. Again, this is an avenue which has been available for over twenty years, but has not been well used.

Lastly and most recently, Rule 14A of the High Court Rules requires a plaintiff or applicant to file with their founding papers a notice indicating whether they agree to or oppose referral of the dispute to mediation. A defendant or respondent must in turn file a notice indicating whether they agree to or oppose mediation. The parties to the litigation can agree to mediate the dispute at any point prior to judgment in the matter being handed down.

The benefits? Apart from being voluntary and without prejudice, mediation is much quicker and cheaper; it's also more flexible and informal. The mediator, who must be independent and impartial, can also be selected by the parties to ensure that he or she is a subject expert and thus equipped to understand the technical nature of environmental disputes. Importantly the parties themselves determine the outcome of the process, making it constructive. Its human nature to be more committed to a solution that you have identified and bought into, than to one which was imposed upon you.

While not a panacea for solving all disputes, we stand on the precipice of so many failing environmental indicators that we need to try something different to slow the rate and reverse the harm. Finding a solution together may be one answer; it may be the only answer.