Tales from the Trenches: The Unfulfilled Promise of the Constitutional Environmental Right in South Africa[1]

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The environmental right contained in section 24 of South Africa's Constitution, which provides for an environment not harmful to health or wellbeing and for the environment to be protected for future generations, came into being at a time of great political optimism and legal progression in South Africa. In the decade or so thereafter, that right gave rise to the exponential development of a comprehensive legislative regime covering general environmental management,[3] biodiversity,[4] water,[5] protected areas,[6] air quality,[7] waste management[8] and integrated coastal management.[9] Yet neither the Constitutional right nor the environmental laws that aim to give effect to that right have come close to living up to their promise.

This paper examines the extent of and reasons for the disappointing performance of the environmental right in realising its potential for South Africans, and – based on a review of more successful strategies – suggests areas of exploration for public interest lawyers to enhance and escalate realisation of this precious right.

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[1] Paper for New York Law School Workshop on "Constitutional Rights, Judicial Independence and the Transition to Democracy: Twenty Years of South African Constitutionalism," November 13-16, 2014

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[3] National Environmental Management Act, 1998 (Act 107 of 1998)

[4] National Environmental Management: Biodiversity Act, 2004 (Act 10 of 2004)

[5] National Water Act, 1998 (Act 36 of 1998) and the Water Services Act, 1997 (Act 108 of 1997)

[6] National Environmental Management: Protected Areas Act, 2003 (Act 57 of 2003)

[7] National Environmental Management: Air Quality Act, 2004 (Act 39 of 2004)

[8] National Environmental Management: Waste Act, 2008 (Act 59 of 2008)

[9] National Environmental Management: Integrated Coastal Management Act, 2008 (Act 24 of 2008)

A right in decline? The scope of the failure to realise section 24

For the purpose of this paper, I shall limit my comments in this section to two of the most immediate aspects of the environmental right, namely those related to clean air, clean water and environmental health. By doing so I inevitably exclude many other compelling aspects of the environmental right, including pressures on biodiversity and heritage resources,[10] and climate change mitigation[11] and adaptation – topics for another paper.

Struggling to breathe: air quality and environmental justice

Ongoing frustration with poor air quality and the industrial facilities causing air pollution was one of the primary reasons for the rapid growth of the environmental justice movement in South Africa in the late 1980s and 1990s.[12] The collective struggles of communities in the Vaal,[13] Free State, south Durban and Cape Town grew into a broader environmental justice movement[14] that played a vital role in achieving early milestones like the Consultative National Environmental Policy Process, which resulted in the 1996 Green Paper[15] and the 1997 White Paper on Environmental Management Policy[16] that, in turn, formed the

[10] As at 24 October 2014, 899 rhinos had been poached in South Africa in 2014. https://www.environment.gov.za/mediarelease/indictmentofsafricans_usarhinopoachingrelatedoffence

[11] Accoding to the Department of Environmental Affairs' Greenhouse Gas Inventory published in 2014, South Africa's greenhouse gas emissions have increased by 25% over the past decade: http://www.iol.co.za/scitech/science/environment/sa-greenhouse-emissions-up-25-1.1716684

[12] Peek, B. 2014 "History of air quality in South Africa" in Hallowes, D. (ed). 2014. *Slow Poison: Air pollution, public health and failing governance.* groundWork.

[13] The Steel Valley community's struggle for environmental justice is described in Munnik, V. 2012. "Discursive power and Environmental Justice in the new South Africa: The Steel Valley struggle against pollution (1996-2006)" PhD thesis, University of the Witwatersrand.

[14] Key roleplayers in this movement were the South Durban Community Environmental Alliance (www.sdcea.co.za) and Vaal Environmental Justice Alliance (http://vaalenvironmentalnews.blogspot.com/) (arising out of the Steel Valley Crisis Committee), and non-government organisations like the now defunct Environmental Justice Network Forum, and groundWork (www.groundwork.org.za). In 2000, the award-winning South Durban Basin Multi-Point Plan, one of the first and most effective examples of a monitoring and reduction plan for emissions from industrial facilities, was established and managed by the eThekwini municipality at local level, and remains a high water mark in a receding tide for air quality governance.

[15] Green Paper on an Environmental Policy for South Africa, October 1996 available at https://www.environment.gov.za/sites/default/files/legislations/environmental_policy.pdf

[16] July 1997, available at https://www.environment.gov.za/sites/default/files/legislations/environemtal_management.pdf

foundation for the National Environmental Management Act[17] (NEMA) promulgated in 1998.

The National Environmental Management: Air Quality Act[18] was promulgated in 2004 as a specific environmental management Act under NEMA "generally to give effect to section 24(b) of the Constitution in order to enhance the quality of ambient air for the sake of securing an environment that is not harmful to the health and well-being of people".[19] In 2006, the first priority area for air pollution was declared in the Vaal Triangle Airshed, followed by the Highveld in eastern Gauteng and western Mpumalanga in 2007, and the Waterberg in Limpopo in 2012.

After these initial achievements in building new air quality management architecture, progress in improving air quality has stalled, and some aspects threaten to come unhinged.[20] Levels of particulate matter, caused by both industrial pollution (particularly coal-fired power generation, mining and transport) and domestic coal burning remain unacceptably high; and levels of sulphur oxides and nitrogen oxides remain high, particularly in some areas, and particularly in certain seasons. Inevitably, vulnerable groups like children, the aged and people with existing conditions like asthma or tuberculosis suffer disproportionately from these conditions.

The health impacts of high levels of particulate matter, sulphur oxides and nitrogen oxides – all typical of South Africa's pollution hotspots - are significant. A 2000 study published in 2007[21] estimated that:

[17] Act 107 of 1998
[18] Note 7 above.
[19] Section 2(b)
[20] Hallowes, D. (ed). 2014. *Slow Poison: Air pollution, public health and failing governance.* groundWork.
[21] Norman, R. et al and the Comparative Risk Assessment Collaborating Group (2007): Estimating the burden of disease attributable to indoor air pollution from household use of solid fuels in South Africa in 2000. South African Medical Journal, August 2007, 97(8): 764-771. Norman, R. et al and the South African Comparative

- outdoor air pollution causes 3.7% of total mortality from cardiopulmonary disease in adults aged 30 years and older, 5.1% of mortality attributable to cancers of the trachea, bronchus, and lung in adults, and 1.1% of mortality from acute respiratory infections in children under 5 years of age.

- Exposure to indoor air pollution was associated with a number of health outcomes, including chronic obstructive pulmonary disease, lung cancer, nasopharyngeal cancer, tuberculosis, cataracts, asthma, birth defects, and acute lower respiratory infections (ALRI) among children younger than 5 years. ALRIs were the leading cause of death of children under 5 years worldwide, and similarly, fourth highest in South African children. The total acute lower respiratory infection burden on children under 5 years was 24% in 2000, attributable to indoor air pollution from household fuel use. For chronic obstructive pulmonary disease, the female population experienced more than double the male attributable burden. Indoor air pollution from household fuel use was responsible for 2 489 deaths, or 0.5% of the total health burden on the individual, and resulted in the loss of 60 934 disability adjusted life years, or 0.4% of the total burden.

Despite these warnings made in a study published in 2007, significant improvements in air quality are not yet evident in the declared priority areas. Figures 1 and 2 below show seven year trends for concentrations of particulate matter 2.5 micrometers or less in diameter (PM2.5), in the Vaal Triangle Airshed Priority Area, and particulate matter 10 micrometers or less in diameter (PM10) in the Highveld Priority Area, respectively. These graphs illustrate the extent to which concentrations of particulate matter – both PM10 and the more dangerous

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Risk Assessment Collaborating Group (2007). "Estimating the burden of disease attributable to outdoor air pollution in South Africa in 2000". *South African Medical Journal*, August 2007, 97 (7): 782-790.

PM2.5 – exceed the current national ambient air quality standards[22] (which are significantly less stringent than World Health Organisation recommendations), and far exceed the stricter ambient standards which are to come into effect in 2015:

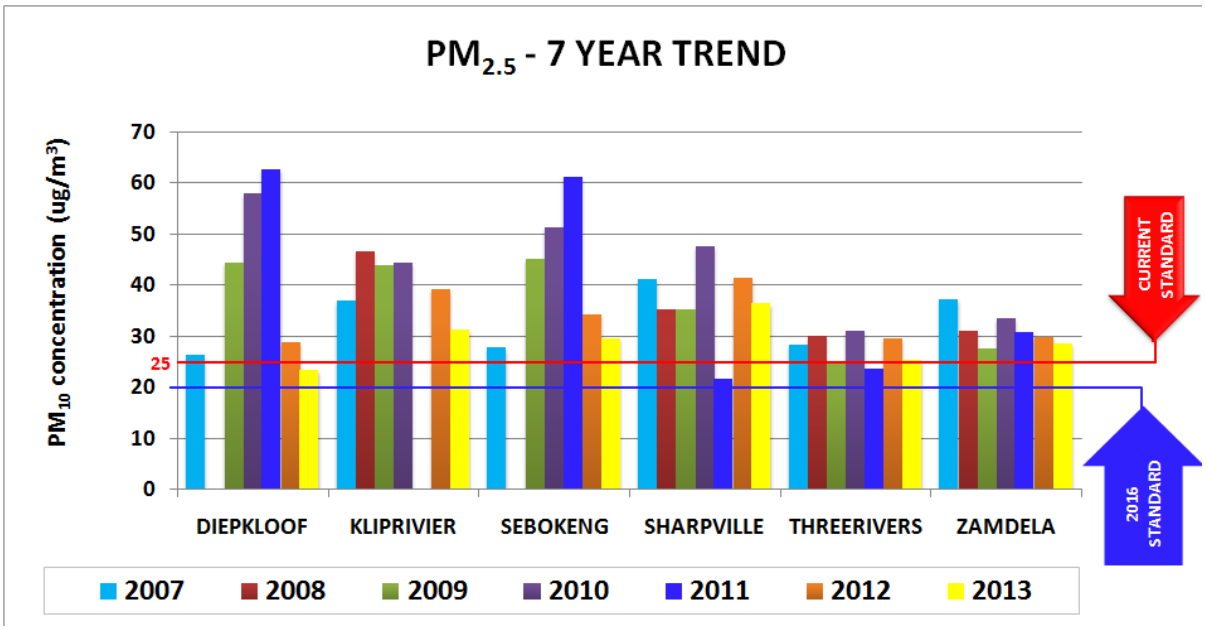

Figure 1: Seven year trend in PM2.5 measured at monitoring stations in the Vaal Triangle Airshed Priority Area (Source: 2014 State of the Air Report)

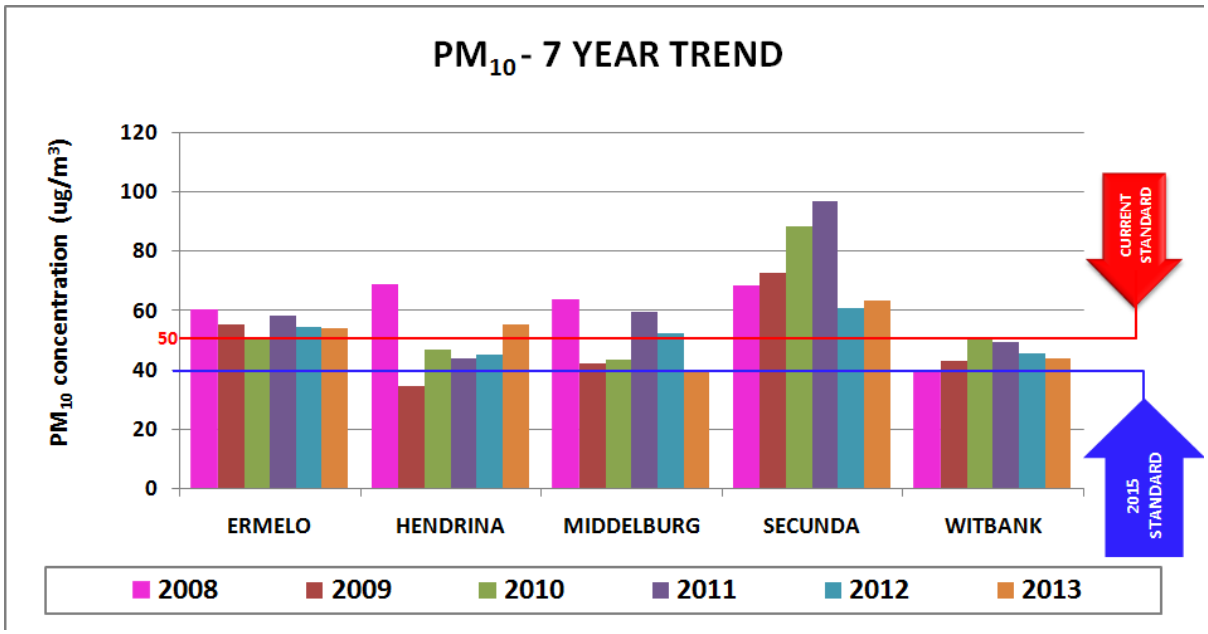

Figure 2: Seven year trend in PM10 measured at monitoring stations in the Highveld Priority Area (Source: 2014 State of the Air Report)

[22] National Ambient Air Quality Standards as contemplated in section 9(1) of the Air Quality Act.

In April 2015, minimum emission standards for a wide range of industrial processes resulting in polluting emissions are scheduled to come into effect.[23] These standards, a vital component of any effective air quality management system, were published by the Minister in 2010 after several years of consultation with non-government organisations and industry. In late 2013, large industries like energy utility Eskom, oil and chemical giant Sasol, steelmaker ArcelorMittal and others started to submit applications for postponement of compliance from those standards to the National Air Quality Officer. These applications have been made without doing any detailed assessments of the health impacts of further delaying emissions reductions – one of the primary grounds of opposition to the applications by civil society organisations.[24] In the case of Eskom, an access to information request by civil society organisations resulted - in June 2014 - in the release of previously undisclosed health impact studies commissioned by Eskom, proving that the health and mortality impacts of emissions from its coal-fired power stations were known to Eskom as long ago as 2006.[25]

To make matters worse, in May 2014, Sasol and its NATREF refinery instituted review proceedings against the State to set aside the publication of the minimum emission standards altogether. Those proceedings are opposed by the Minister and the National Air Quality Officer, and two groups of NGOs have requested permission to intervene as *amici curiae*.[26]

Over and above these concerted efforts from industry to avoid and postpone the capital expenditure necessary to reduce air pollution, as at time of writing we are still waiting for Cabinet to approve the publication of a draft strategy to address air pollution in dense low-

[23] List of activities which result in atmospheric emissions which have or may have a significant detrimental effect on the environment, including health, social conditions, economic conditions, ecological conditions or cultural heritage (as contemplated in section 21(1)(a) of the Air Quality Act and Minimum Emission Standards for those activities as contemplated in section 21(3)(a) and (b) of the Air Quality Act) (GN 893, Government Gazette no. 37054 of 22 November 2013).
[24] http://cer.org.za/virtual-library/eskoms-applications-to-delay-compliance-with-aqa-minimum-emissions-standards
[25] http://cer.org.za/virtual-library/letters/eskoms-health-studies
[26] http://cer.org.za/programmes/pollution-climate-change/legal-proceedings

income settlements – the other major source of air pollution undermining section 24 of the Constitution.

Death and disease: Water, sanitation and environmental health

Despite section 24 and the right to sufficient water in section 27(1)(b), and comprehensive statutes dealing with water resources and provision of water services in the National Water Act[27] and the Water Services Act[28] respectively, implementation of these Acts since promulgation has been poor. By way of example, there has been widespread failure to determine the ecological and basic human needs reserve for most of South Africa's water management areas, as required by the National Water Act.[29] In the National Water Resources Strategy 2nd Edition published in 2013,[30] the Department of Water and Sanitation states belatedly:

> *"The need for the determination and preservation of the ecological Reserve and the classification of our river fresh water systems will be a priority. This will assist to determine the nature and the extent of pollution in order to provide appropriate rehabilitation solutions."*[31]

According to that same document, South Africa's water ecosystems "are not in a healthy state":

> *"Of the 223 river ecosystem types, 60% are threatened, with 25% of these critically endangered. Less than 15% of river ecosystems are located within protected areas, many of which are threatened and degraded by upstream human activities. Of 792*

[27] Note 5 above
[28] Note 5 above
[29] Section 16(1) of the National Water Act requires that "[a]s soon as reasonably practicable after the class of all or part of a water resource has been determined, the Minister must, by notice in the *Gazette*, determine the Reserve for all or part of that water resource."
[30] http://www.dwaf.gov.za/nwrs/LinkClick.aspx?fileticket=u_qFQycClbI%3d&tabid=91&mid=496
[31] At p.8

wetland ecosystems, 65% have been identified as threatened and 48% as critically endangered. Acid mine drainage (AMD) has also been reported from a number of areas in South Africa, including the Witwatersrand Gold Fields, the Mpumalanga and KwaZulu-Natal Coal Fields and the O'Kiep Copper District.

"The main contributors to water quality problems are mining (acidity and increased metals content), urban development (salinity, nutrients and microbiological), industries (chemicals and toxins) and agriculture (sediment, nutrients, agro-chemicals and salinity through irrigation return flows). Untreated or poorly treated wastewater is severely affecting the quality of water in many areas.

"Despite being a water-scarce country, South Africa faces high levels of water wastage and inefficient use. In municipalities, non-revenue water sits at more than 37% on average, and in many irrigation and municipal supply schemes it is worse, with estimated losses of up to 60%. As such, schemes often have no formal record or measurement of actual losses."[32]

The impacts of poor water resource management and pollution of water resources are increasingly being felt by residents. In early June 2014, three infants died from dehydration caused by diarrhoea during an outbreak of disease following contamination of drinking water by sewage in the town of Bloemhof.[33] The story sparked a public outcry, and led to the removal of the town's mayor by the ruling party and promises of investment in water treatment infrastructure. However, a month later the deaths of a further 15 children in the

[32] National Water Resources Strategy 2nd Edition, June 2013, at p.30.
[33] See http://cer.org.za/news/media-release-cer-calls-on-saps-and-npa-to-investigate-criminal-liability-for-deaths-of-three-infants-at-bloemhof-northwest and http://cer.org.za/news/joint-media-release-lhr-and-cer-ask-ministers-to-address-health-risks-posed-by-northwest-water-quality.

towns of Biesiesvlei and Sannieshof, also in Northwest province, were also attributed to sewage contaminated drinking water.[34]

Today, 20 years after our transition to democracy, children continue to die from contaminated drinking water in South Africa, with local authorities apparently unable to keep water treatment infrastructure operational; with inadequate warning systems and public health education in place; and with inadequate healthcare to treat people affected by water-borne diseases.

In response, in addition to various grant schemes made available to local government,[35] national government has introduced two certification systems to monitor and incentivise compliance of drinking water (the Blue Drop system[36]) and waste water treatment works (WWTW) (the Green Drop system[37]) with standards. To the extent that data is available, both systems show widespread non-compliance with standards. In September 2014, with 369 out of 896 WWTW nationwide reporting, average compliance with standards (looking at whether the WWTW was monitoring compliance at all, and assessing its chemical, microbial and physical compliance) was below 80% in all nine provinces in South Africa.

In the whole of Dr Ruth Mompati District Municipality in which Bloemhof is situated, only one of eight WWTW reported any monitoring under the Green Drop system in August and September 2014. In October 2014, the Minister of Water & Sanitation told Parliament that only 38 (23%) of the 167 WWTW in Mpumalanga are licenced, and only 125 (75%) are operational. 42 (25%) have not been operational since 2012.[38] As at August 2014, the Blue

[34] These are not the first or only instances of death of children or adults from drinking contaminated water in South Africa since 1994.
[35] The most important grants are the Municipal Infrastructure Grant (MIG), the Water Services Operating Subsidy, the Regional Bulk Infrastructure Grant (RBIG), the Municipal Water Infrastructure Grant (MWIG) and the Accelerated Community Infrastructure Programme (ACIP).
[36] http://www.dwaf.gov.za/dir_ws/DWQR/default.asp
[37] http://www.dwaf.gov.za/dir_ws/GDS/
[38] Question 1568 to Minister of Water & Sanitation in National Assembly, 1 October 2014

Drop system rated Mpumalanga as "water did not comply according to expected standard targets and inadequate monitoring".[39]

There is little sign of imminent improvements in the conditions described above, which constitute not only a violation of section 24, but also of other Constitutional rights like the rights to life and dignity, the right to access to sufficient water, and the rights of children.

A frank assessment: What is holding back realisation of section 24?

The reasons for the poor performance of our environmental right are complex, but not unexpected: a toxic cocktail of corporate political influence and interference, inappropriately resourced and short-sighted regulation, and lack of transparency in environmental governance that restricts civil society's ability to hold both government and corporations to account.

Corporate political connectedness and influence

Environmental governance is fundamentally challenged by corporate influence in regulatory decisions. This is particularly evident in the extractives industry, and the direct vested interests of the political elite in profits from mining.

The influence of the corporate sector in environmental governance plays is particularly evident when it comes to access to information. Generally speaking, and as detailed elsewhere in this paper, civil society and communities who wish to assert their environmental rights necessarily have to spend many months trying to access the basic information required for the exercise of their rights. In these lengthy access to information battles, of all the options available to authorities under the Promotion of Access to Information Act (PAIA)[40] to justify the refusal to disclose records, government bodies increasingly rely on the

[39] http://www.dwaf.gov.za/dir_ws/DWQR/Default.asp?Pageid=40&Provid=0
[40] Act 2 of 2000

mandatory protection of commercial information when refusing access to basic regulatory records like licences. More often than not, companies themselves also defer to the defence of "commercially sensitive" information when resisting disclosure.[41]

In the ongoing case of *Conservation South Africa v Department of Mineral Resources and De Beers Consolidated Mining*,[42] the non-profit conservation organisation Conservation South Africa used PAIA to request information about financial provision made for rehabilitation of mining impacts by De Beers at its Namaqualand Mines. When the Department of Mineral Resources refused to disclose this information citing the mandatory protection of commercial information under PAIA, Conservation South Africa instituted legal proceedings to compel disclosure. In response, the DMR conceded that the records were not "privileged" and agreed to release them; however, De Beers opposed the disclosure, following which the Department withdrew its undertaking to release the records, instead abiding the decision of the court. This leaves Conservation South Africa in opposed court proceedings against De Beers about the State's obligation to release records under PAIA. It is important to note that the records in question include records approved by the Department of Mineral Resources in fulfilment of its obligations under the Mineral and Petroleum Resources Development Act[43] (MPRDA) and section 24 of the Constitution.[44]

As at the time of writing, the eThekwini Municipality in Durban had just refused an appeal against a decision refusing to release the atmospheric emissions licences issued to two oil

[41] *Money Talks: Commercial interests and transparency in environmental governance* (forthcoming). Centre for Environmental Rights, 2014.
[42] Western Cape High Court, Case No. 3599/14
[43] Act 28 of 2002
[44] *Maccsand Pty Ltd v City of Cape Town & others* CCT 103/11 [2012] ZACC 7 at 5.

refineries[45] to a community organisation, citing the mandatory protection of commercial information. This appeal decision is likely to be challenged in court in the near future.

Perceived demand for large infrastructure programmes

Not unexpectedly, the post-democratic government has struggled to deliver on promises of economic development and service delivery. The reasons for this failure are not the topic of this paper, but it has created a groundswell of pressure on government to roll out large infrastructure projects and to cut down any constraints posed by environmental regulation to a minimum. This juggernaut has resulted in two important pieces of law reform: the 2014 Infrastructure Development Act[46] introduced by the Department of Economic Development, and the so-called "One Environmental System" for mining – the result of a forced marriage between the Departments of Environmental Affairs, Water and Sanitation and Mineral Resources.

In its earlier drafts circulated within government, the Infrastructure Development Bill, first published for comment in 2013, contained a complete exemption from environmental authorisations for all "strategic integrated projects" or "SIPs" – projects of "significant economic or social importance to the State" or that "would contribute substantially to any governmental strategy or policy relating to infrastructure development" or "is above a certain [prescribed] monetary value".[47] Fortunately, internal resistance from environment authorities resulted in that exemption being revoked, but the Infrastructure Development Act as promulgated in 2014 retains strict timeframes for authorisation of these large SIPs: the Act requires all authorisations to be completed in 250 days[48] – a period many practitioners

[45] Atmospheric emission licences are required for listed activities under the Air Quality Act.
[46] Act 23 of 2014
[47] Draft Infrastructure Development Bill published in Government Gazette GG 36143 on 8 February 2013.
[48] Schedule 2

believe to pose serious risk of poor assessment, planning, consultation and implementation of such projects.

Even more problematic, though, is the inconceivably wide scope of the application if the Infrastructure Development Act: SIPs can be designated from a list of facilities that include: "national and international airports; communication and information technology installations; education institutions; electricity transmission and distribution; health care facilities; human settlements and related infrastructure and facilities; economic facilities; mines; oil or gas pipelines, refineries or other installations; ports and harbours; power stations or installations for harnessing any source of energy; productive rural and agricultural infrastructure; public roads; public transport; railways; sewage works and sanitation; waste infrastructure; water works and water infrastructure".[49] The consequence of this Act is to create options to exclude an incredibly wide range of projects from the ordinary environmental authorisation regime governed by NEMA.[50]

During the same period of pre-election law reform, a multi-year struggle between environment and mining authorities over the separate and unequal regulation of the environmental impacts of mining finally came to a head in Parliament. Two activist chairpersons of the then Water and Environmental Affairs Portfolio Committee and the Mineral Resources Portfolio Committee vowed to resolve the outstanding dispute over authority between environment and mining authorities, eventually resulting in the promulgation of a series of statutory amendments designed to bring mining under the regulatory ambit of NEMA (as opposed to the separate regime it enjoyed under the MPRDA.[51] While that step was a victory for environment authorities, the so-called "One Environmental System" has at least two extremely negative consequences for environmental

[49] Schedule 1
[50] As cited in note 3 above.
[51] As cited in note 43 above.

rights: one, the Department of Mineral Resources (with its appalling track record in compelling compliance with environmental provisions for mines[52]) retains the mandate for regulation of environmental impacts of mining, albeit under far better legislation: a mandate even wider than before, when environment authorities retained some authority over "associated activities" at mining sites like clearing of vegetation or building of roads; two, in the process of streamlining environmental authorisation for mining with its hegemonic position in the South African political economy, the contraction of timeframes for environmental impact assessment, authorisation[53] and appeals are now also applicable to all other developments. This means less public participation in new developments, less time for proper assessment of environmental impacts, and less opportunity to challenge decisions that violate environmental rights.[54]

Weakness in public service, and government's inability to compel compliance with environmental laws

Proper compliance monitoring and enforcement provisions were only incorporated into NEMA in 2003, 5 years after its promulgation in 1998. The first enforcement officials, known as Environmental Management Inspectors (EMIs) were only designated in 2005. Since then, the virtual Inspectorate has made strides of progress, not only undertaking important initial enforcement action, but also, crucially, producing frank annual reports on their work for, as at date of writing, seven years without fail. These reports, together with the

[52] http://cer.org.za/wp-content/uploads/2013/09/Joint-Submission-on-MPRDA-Amendment-Bill-6-Sept-2013-Appropriate-authority-for-environmental-regulation.pdf
[53] Proposed EIA Regulations now propose environmental authorisations to be finalised in 300 days.
[54] See extensive comments on these developments at www.cer.org.za.

work they represent, have slowly started to shift the perception that there are no consequences to violations of environmental laws.[55]

Despite these gains, there are a number of pivotal reasons why compliance with environmental legislation remains poor in South Africa, which fundamentally undermines realisation of section 24 of the Constitution.

As at March 2014, the virtual Environmental Management Inspectorate consisted of 1915 EMIs – responsible for all environmental compliance monitoring and enforcement for the entire country - employed by 16 different institutions[56] with no central reporting structure for EMIs. The mandate of EMIs exclude freshwater use and water pollution. Very little progress have been made within water authorities[57] to develop any meaningful compliance and enforcement programme.[58] And despite the fact that legislation coming into effect in late 2014 that will empower the appointment of environmental inspectors in the Department of Mineral Resources with powers over mining activities,[59] given the poor track record of mining authorities in enforcing environmental provisions in mining legislation, grave reservations remain regarding what actual compliance results will be achieved.

In addition, ongoing reliance on ponderous criminal prosecution with its heavy onus of proof for enforcement of compliance with environmental laws instead of following international trends of administrative penalties, weakens prospects of enforcement success and undermines the important deterrent effects of effective enforcement.

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[55] National Environmental Compliance and Enforcement Reports available at https://www.environment.gov.za/otherdocuments/reports#environment_compliance

[56] National Environmental Compliance and Enforcement Report 2013/14, available at https://www.environment.gov.za/otherdocuments/reports#environment_compliance

[57] Department of Water Services since 2014, the Department of Water Affairs since 2009, and the Department of Water Affairs and Forestry until 2009.

[58] P.10-13, *Stop Treading Water: What civil society can do to get water governance back on track*. Centre for Environmental Rights (2012). Available at http://cer.org.za/wp-content/uploads/2012/03/Stop-Treading-Water.pdf

[59] These officials will be known as Environmental Mineral Resource Inspectors.

More generally, having regard to the inequality, unemployment and poverty that still characterise South African society two decades after 1994, the public service struggles to cope with recruiting appropriate skills, retaining those skills, and achieving performance objectives for service delivery to almost 50 million people - a mammoth task. Political appointments into management positions in government (sometimes known as "cadre deployment" [60]) – does not generally promote effective public service management. With a few notable exceptions, interventions into instances of social injustice, both acute and chronic, tend to be too slow and cumbersome to be optimal.

Civil society, lack of transparency and political gatekeeping

South African civil society, so vital for ensuring accountability for rights realisation, is undermined by a number of factors – factors that will be familiar to many citizen groups around the world, but particularly so in developing countries. Not only are civil society groups perpetually under-resourced, but are also disempowered – some would argue intentionally so – by limited access to information. With one exception, for example, environmental licences – freely available in many jurisdictions[61] - are not publicly available in South Africa. It is even harder to access environmental compliance data, or monitoring data in a format that facilitates action when that data evidences non-compliance. This lack of easy access to regulatory environmental information is particularly relevant in a discussion about realisation of section 24, since our courts have held that not complying with environmental licensing requirements per se constitute a violation of section 24.[62]

[60] http://www.iol.co.za/news/politics/cadre-deployment-is-not-a-swear-word-1.1700557#.VE1PuxaDri0
[61] See the review of disclosure trends in the Centre for Environmental Rights 2013 publication *Turn on the Floodlights: Trends in Disclosure of Environmental Licences and Compliance Data* (March 2013) available at http://cer.org.za/wp-content/uploads/2013/03/Turn-on-the-Floodlights.pdf
[62] *Tergniet and Toekoms Action Group and Others v Outeniqua Kreosootpale (Pty) Ltd and Others* (10083/2008) [2009] ZAWCHC 6 (23 January 2009) at 39.

If interested and affected parties cannot access regulatory conditions or compliance data to assess compliance at a particular facility, in the absence of an environmental "smoking gun", it is much more difficult to prove a breach of section 24. This problem is, in turn, intensified by the inadequate compliance monitoring and enforcement by authorities described above, placing a significant burden on civil society to facilitate realisation of section 24, but without facilitating access to the necessary information and resources to do so.

It is also important to mention that, while many South Africans notice and understand environmental harm and degradation, awareness of environmental rights as human rights and the fact that environmental degradation constitutes a rights violation, is generally low. This impacts significantly on numbers of complaints lodged, to whom those complaints are lodged, and mobilisation when violations are not addressed.[63]

An even more immediate and compelling problem for communities affected – and rights organisations called upon to assist - is the role of politicians, particularly local politicians, who, as elected representatives, regard themselves as gatekeepers to communities. As articulated by Pieterse:

> *"Another common problem has been elite capture, a situation in which either ANC or civic leaders, or a combination, emerge as gatekeepers in development processes, and as a result those outside their sphere of largesse do not benefit. In other communities, it is not necessarily political elites that capture the development processes, but entrepreneurial interlocutors that can move between the formal registers of*

[63] See Dugard, J., MacLeod, J. and Alcaro, A. 2012. "A Rights-Based Examination of Residents' Engagement with Acute Environmental Harm across Four Sites on South Africa's Witwatersrand Basin" *Social Research* Vol. 79, No. 4 (2012) pp. 931-956. The findings of this research report accords with the experience of attorneys at the Centre for Environmental Rights.

developers and local government departments on the one hand, and the fluid, more informal registers of highly mobile residents on the other."[64]

This plays out not only as attempts to limit or control public interest organisations' access to those communities, but also as the assertion of influence on the distribution of access to resources, including those presented by private companies, such as employment opportunities. I cite some examples from our work and that of partner organisations below.

- In the Sannieshof/Biesiesvlei case of alleged deaths of children from sewage contaminated water described above, the father of one of the babies who died feared losing his job with the municipality after national and local government officials interrogated and accused him of fabricating allegations about contaminated water causing the death of his child.

- On the Mpumalanga Highveld, local councillors insist that their permission is required for meetings between communities and public interest lawyers in relation to environmental concerns; in one instance, the South African Police Service was deployed to "reprimand" an activist involved with organising community meetings. Councillors also allegedly advise mining companies on which community members to employ – thereby assuming a position of immense power in a context of high unemployment.

- Although direct links with the court case have not yet been established, in Carolina, Mpumalanga (scene of the case of *Federation for Sustainable Environment and Others v Minister of Water Affairs and Others*[65]), activists who make up the Silobela Concerned Community were left distraught and concerned for their own safety after

[64] Pieterse, E. "Rhythms, patterning and articulations of social formations in South Africa", Social Formations in South Africa. At 126.
[65] (35672/12) [2012] ZAGPPHC 128 (10 July 2012)

one of the activists died when his house was firebombed. Even institutions like a local church and a local childcare centre that offered to provide a venue for a meeting between lawyers and community members were allegedly threatened with closure by government officials. This kind of political interference has had a notable influence on rights organisations' ability to provide the legal support required to achieve accessible and safe drinking water for the Silobela community.

These political bullying measures, designed to intimidate and quell public dissent, fundamentally threaten the realisation of fundamental rights in South Africa. They also demonstrate how the democratic values of the South Africa Constitution threaten the political elite and the status quo, and provide strong motivation for increased support for civil society and community organisations attempting to enforce accountability for Constitutional obligations.

Statutory remedies that hamper public interest litigation

Although there is certainly more environmental jurisprudence than twenty years ago, proper public interest environmental litigation remains thin on the ground. Most of South Africa's most authoritative jurisprudence on section 24 arises from commercial and licensing disputes.[66] There are many reasons for this - some more obvious than others. But a major obstacle to such litigation lies in the comprehensive legislative framework itself.

One of the most immediate obstacles for public interest lawyers concerned about environmental rights violations is the complex set of legal remedies that inhibit urgent access to justice so often required in cases of environmental rights violations. Without a specific and express urgent and direct remedy for violations of section 24, litigants typically find

[66] See, for example, the cases of Fuel Retailers Association of Southern Africa v Director-General: Environmental Management, Department of Agriculture, Conservation and Environment, Mpumalanga Province and Others (CCT67/06) [2007] ZACC 13; also the case of Maccsand cited in note 44 above.

themselves in mandatory and prohibitory interdict proceedings. In cases where affected communities have lived with a particular environmental problem for months and years – more the norm than exception - it is particularly difficult to succeed with any arguments of urgency, and applicants often find it very hard to meet the requirement that the balance of convenience must favour the applicant for the interdict.[67]

Even worse, in all cases of granting of development rights, the most obvious remedy is judicial review, which must be preceded by conclusion of an internal appeal process that can very effectively frustrate attempts to get a hearing in a court. Coupled with the absence, in the MPRDA[68] and – until recently – NEMA,[69] of a provision automatically suspending the operation of the authorisation pending appeal and review, earthmoving equipment can violate rights with remarkable speed and effectiveness before access to courts can be achieved.

In the case of *Mapungubwe Action Group and others v Limpopo Coal Company Pty Ltd and another*,[70] a group of non-government organisations known as the Save Mapungubwe Coalition attempted to halt what it believed to be unauthorised activities associated with a new open-cast coal mine next to the Mapungubwe National Park and World Heritage Site in northern Limpopo, and to challenge the granting of the mining right to the mining company. The Coalition first launched appeals against the granting of the mining right and the approval of the environmental management programme for the mine in March and April 2010, in fulfilment of the requirement to exhaust internal remedies before instituting judicial review proceedings. (These appeals have never been decided.)

[67] Kidd discusses the inherent difficulties of meeting the common law requirement of interdict proceedings in environmental cases, and the application of NEMA's section 32(1) in Kidd, M. 2010. "Public interest environmental litigation: recent cases raise possible obstacles". PER/PELJ 2010 (13) 5.
[68] As cited in note 43 above.
[69] As cited in note 3 above. Pursuant to 2014 amendments to NEMA, section 43(7) now provides that an appeal under this section suspends an environmental authorisation, exemption, directive, or any other decision made in terms of this NEMA or any other specific environmental management Act, or any provision or condition attached thereto.
[70] South Gauteng High Court, Case no. 10/30146. This case was never heard in court.

In August 2010, the Coalition instituted interdict proceedings to prevent further development of the mine without authorisation, and pending appeal and review of the rights and approvals granted. By that time, the mine was largely complete. Since the interdict application could not be brought on an urgent basis, the mining company continued to delay the finalisation of the interdict application, while pulling out all stops to secure the outstanding authorisations. First, in March 2011, it secured its outstanding water use licence from the Department of Water Affairs, as it then was; when the Coalition appealed the licence and triggered the automatic suspension of the licence, the mining company successfully petitioned the Minister of Water Affairs to exercise her discretion to lift the suspension, and water use activities on the site continued despite the undecided appeal. (That appeal, too, has never been decided, due to the dysfunction of the Water Tribunal, the statutory appeal authority.) Furthermore, NEMA's section 24G provides for the *ex post facto* authorisation of unauthorised activities, and the mining company successfully lobbied the DEA to grant it such an authorisation 10 months later, after payment of an administrative fine of ZAR9 million.[71]

By October 2013, the mine – projected to have a life of mine of 20 years and promising to employ thousands of people in the impoverished Limpopo – had closed and remains under "care and maintenance",[72] awaiting further investment and development. Its scar on the UNESCO recognised Mapungubwe Cultural Landscape is not yet rehabilitated.

While the Save Mapungubwe Coalition's struggle was not without achievements, there can be no question that statutory remedies hampered instead of facilitated the necessary immediate intervention that could have prevent the extent of violation of the right "to have the environment protected, for the benefit of present and future generations, through reasonable legislative and other measures that prevent pollution and ecological degradation,

[71] All the court papers in this matter are available at http://cer.org.za/hot-topics/mapungubwe
[72] http://www.bdlive.co.za/business/mining/2013/10/16/retrenchments-follow-as-coal-closes-vele-mine-in-limpopo

promote conservation, and secure ecologically sustainable development and use of natural resources while promoting justifiable economic and social development."[73]

Fear of undoing "progress": No judicial activism

Unfortunately, South Africa does not have the culture of judicial activism of the sort we have seen in South Asia and South America. In fact, in some instances, judges have even been slow to utilise statutory provisions available in environmental legislation, choosing instead of rely on common law remedies and requirements.[74]

In addition, judges have proven extremely reluctant to dismantle developments or set aside decisions authorising inappropriate or illegal developments once those developments are already underway, despite procedural irregularities and significant detrimental environmental impacts. This is despite the fact that, in most instances, there is no automatic suspension of an authorisation pending the outcome of appeal and review, as referred to above. In the case of *Endangered Wildlife Trust v Gate Development Pty Ltd and others* (TPD Case No. 28761/05), the non-government wildlife organisation Endangered Wildlife Trust challenged the decision by authorities to authorise a golf course and trout fishing resort in a particularly sensitive part of Mpumalanga, relying on both procedural and substantive grounds of review under the Promotion of Administrative Justice Act. The judge "assume[d] in favour of the applicant that one or more of the review grounds relied upon is good and that the decisions of the [competent authorities] were therefor invalid". However, the judge then invoked his discretion not to set aside decisions he assumed to be invalid on the basis that the development was far advanced, and that the purchasers of stands would be substantially prejudiced were the authorisations to be set aside. He also held that:

[73] Section 24(b), Constitution of the Republic of South Africa
[74] See Kidd's article cited in note 67 above.

> *"…there is a public interest element in the finality of administrative decisions and the exercise of administrative functions. In my view it would not be in the public interest to undo what has been done, all of which obviously involved a huge effort by many public officials and by a number of experts in various fields. … I am furthermore of the view that considerations of pragmatism and practicality dictate against the setting aside of the… decisions*" (at 11)

In the case of *Magaliesberg Conservancy v MEC: Department of Agriculture, Conservation, Environment and Rural Development North West Provincial Government and others,*[75] the Supreme Court of Appeal refused the Conservancy's appeal against the High Court decision not to set aside the *ex post facto* authorisation of an illegally erected country lodge inside a conservancy, stating:

> *"Equally importantly, in considering the remedy of demolition, the image of wrecking equipment, bulldozers, earth moving machines and the like, with concomitant pollution and potential further harm to the environment cannot be ignored. Without knowing what the further devastating effects of acceding to such a remedy may be, it becomes even more problematic."* (at 52)

It will require persistence and activism on the part of civil society and public interest lawyers to facilitate a paradigm shift for judges in relation to environmental rights.

Building on success: New frontiers for realisation of environmental rights

A number of strategies stands out as being more successful in advancing realisation of environmental rights, and open pathways to for future exploration.

[75] Magaliesberg Protection Association v MEC: Department of Agriculture, Conservation, Environment and Rural Development, North West Provincial Government and Others (563/12) [2013] ZASCA 80

Delay caused by procedural challenges

The 2005 *Earthlife Africa* case against electricity utility Eskom[76] demonstrated the impact that the delays caused by dogged challenges of procedural matters could have on large development applications. In that case, a consultation process for the authorisation of a new pebble bed modular nuclear reactor that showed little regard for administrative justice created an opportunity for civil society organisation Earthlife Africa to take legal action to secure its right to be heard in the process. Earthlife's litigation encompassed both unsuccessful[77] access to information litigation as well as a successful review application based on procedural unfairness. The review explored the obligations of decision-makers to solicit public input in the multi-stage decision-making process typical of environmental impact assessment, and found that insufficient opportunities for input had been granted in this instance:

> *"In the present case, where the draft [Environmental Impact Report] was substantially overtaken by the final EIR, it is clear to my mind that new facts had indeed been placed before the decisionmaker on behalf of Eskom. In these circumstances, I am of the view that the applicant, as an interested party, was entitled, as part of its right to procedural fairness, to a reasonable opportunity to make representations to the DG on the new aspects not previously addressed in its submissions in relation to the draft EIR."* (at 95)

In this instance, the court set aside the environmental authorisation given to Eskom without pronouncing on Earthlife's substantive objections to the project. Some authors have argued

[76] Earthlife Africa (Cape Town) v Director General Department of Environmental Affairs and Tourism and Another (7653/03) [2005] ZAWCHC 7

[77] Despite losing its court application and incurring an adverse costs order, Eskom's lawyers inadvertently handed over the documents being sought to Earthlife. Although these document had to be returned, the contents entered the public domain.

that this avoidance does not bode well for future substantive challenges.[78] However, while there were other obstacles to the successful development of the particular nuclear reactor, the delay caused by Earthlife's successful review contributed to ultimate failure of the project.[79]

This particular strategy, a familiar one in many jurisdictions, is of course particularly suited to an uncertain policy or funding environment where projects are vulnerable to the costs of delay. In the next five years, it is expected that a number of regulatory and public expenditure decisions will be made in relation to energy generation in South Africa – all decisions that will follow on public statements of support for these energy options by the South African government.[80] This includes the granting of the first major exploration and production rights for shale gas using hydraulic fracturing, or fracking (which – if it goes ahead – will be largely privately funded, but may be subject to a "free carried interest" for the State);[81] the approval of environmental authorisations for at least one new nuclear facility (most likely largely publicly funded);[82] and a third new coal-fired power station known as Coal 3.[83] All of these developments are widely resisted within civil society and amongst organised labour in South Africa, and is likely to result in at least some litigation. Given the tumultuous political environment within and outside the ANC in South Africa since the May 2014 elections and the enormous cost associated with these projects, it is not impossible that delays caused by litigation may impact on the prospects of these big energy developments.

[78] See, for example, Du Plessis W (2009) "Earthlife Africa versus the Pebble Bed Modular Reactor: A Battle for Governance for Sustainability and Informed Decision Making in South Africa" in Bosselmann K, Engel R and Taylor P (eds) *Governance for Sustainability: Issues, Challenges, Successes* (IUCN Gland Switzerland 2008) 103-109.
[79] Fig, D. 2010. "Nuclear energy rethink? The rise and demise of South Africa's Pebble Bed Modular Reactor". ISS Paper 210 April 2010
[80] See President Jacob Zuma's State of the Nation Address, 2014 at http://www.thepresidency.gov.za/pebble.asp?relid=17570
[81] http://www.iol.co.za/business/news/fracking-to-move-ahead-shabangu-1.1641928
[82] http://www.sanews.gov.za/south-africa/government-decide-nuclear-procurement-process
[83] http://www.miningmx.com/page/news/energy/1639917-Govt-working-around-the-clock-on-Coal-3

Compelling compliance with Constitutional and statutory obligations, including obligations to disclose records

Despite its many challenges, South Africa has comprehensive legislation governing many aspects of natural resource governance. In the absence of well-capacitated government departments able to deliver on statutory mandates, and of strong and effective compliance monitoring and enforcement for all the reasons described above, it is not difficult to find violations of statutory obligations amongst both authorities and private entities. While this type of litigation is not without its own challenges, using the courts to compel compliance with statutory obligations is an under-utilised litigation strategy in the environmental rights sphere.

In October 2014, the KwaZulu-Natal High Court handed down a judgement in an application brought to compel compliance with a specific statutory obligation under one of South Africa's key environmental laws – the Biodiversity Act.[84] In the case of *Kloof Conservancy v Government of the Republic of South Africa*,[85] the non-profit group Kloof Conservancy had taken the Minister of Environmental Affairs to task for failing to publish lists of alien and invasive species by a particular date, as required by the Biodiversity Act (the Court also recognised alien and invasive species as "the single biggest threat to South Africa's biological diversity".

The High Court showed little sympathy for the Department of Environmental Affairs' efforts to resolve what it perceived as legal and other hurdles in order to finalise the lists, and declared the Department's failure to publish the lists "unlawful and unconstitutional":[86]

[84] As cited in note 4 above.
[85] Case No. 12667/2012, KwaZulu Natal Local Division, Durban
[86] At 140

> *"It seems to me that whatever the respondents may say about the challenges facing them, their approach to the problem can be categorised, in a general statement, as being one infected by an absence of any sense of urgency. Given that [the Biodiversity Act] required publication of the lists as long ago as by no later than 31 August 2006, the ultimate publication of those lists on 1 August 2014, seven years and eleven months later than required, renders hollow that assertion that the second respondent has acted reasonably and bona fide. … In a proper legal sense one cannot act reasonably when it concerns the failure to act within a legislated time frame. The time limit imposed by [the Biodiversity Act] was a constitutional obligation imposed… one that required performance without delay and diligently."*[87]

The Court ordered various government departments cited to "do all such things and take all such steps as are necessary" to ensure that all organs of state comply with their obligations under the particular sections of the Biodiversity Act, which includes – given the "prolonged dereliction of duty" of the Minister of Water and Environmental Affairs[88] – to "appoint and mandate, within six months… sufficient numbers of Environmental Management Inspectors in relation to Alien Invasive Species… to ensure compliance with the government's duties in relation to [invasive and alien species] under section 24 of the Constitution and chapter 5 of [the Biodiversity Act]…"[89] Moreover, the Court granted a punitive costs order against the government departments involved, citing the "unreasonable delay" and the departments' conduct in the application.[90]

While this judgement may still be appealed, it shows a High Court unimpressed by explanations of bureaucratic obstacles, and willing to hold government departments strictly to

[87] At 110-111
[88] At 129
[89] At 140
[90] At 138

their obligations under the "reasonable legislative measures", in this case the Biodiversity Act, passed to give effect to section 24 of the Constitution.

Another area where this strategy of compelling compliance with statutory obligations has been used successfully is that of access to information, where civil society organisations have been able to compel compliance with obligations under PAIA, compliance with which is notoriously poor in South Africa,[91] against both the State and corporate entities. In a number of instances, both government departments and corporate entities have handed over records after institution of legal proceedings to compel compliance with obligations to release records under PAIA, and tendered costs.[92]

In the case of *Vaal Environmental Justice Alliance v ArcelorMittal South Africa*,[93] multinational steelmaker ArcelorMittal refused to recognise a community organisation's request for access to environmental reports on its facilities, alleging that the organisation could not demonstrate how access to those records was required for the exercise of its environmental right. The High Court expressly recognised a non-government organisation's right under section 24, stating that:

> *"… if I refuse this application this would hamper the Applicant in championing its cause, generating public opinion and consequently would dissuade public mobilisation when it has been clearly established that, the participation of public interest groups is vital before the protection of the environment. … I am of the view that Section 24 envisages, and even encourages, public campaigns of this sort.*" (At 14-15)

The court ordered the release of the records, and held that:

[91] See various reports available at http://cer.org.za/programmes/transparency.
[92] See, for example, http://cer.org.za/programmes/transparency/litigation
[93] South Gauteng High Court Case No. 39646/12

> *"…a community based, civil society organisation such as the Applicant, is entitled to monitor, protect and exercise the rights of the public at least by seeking the information to enable it to assess the impact of various activities on the environment and like-minded individuals must be encouraged to exercise a watch-dog role in the preservation and rehabilitation of our national resources*."[94]

On the other hand, employing the kind of litigation described above against the state is often as ungraciously received in environmental rights litigation as it is in other social justice litigation. In 2012, when two law clinics[95] represented the Silobela community and the Federation for Sustainable Environment respectively in legal proceedings to secure access to drinking water for residents of this Mpumalanga community, coupled with an order compelling the municipality to engage with local residents,[96] the then Minister of Water Affairs described the court action as a "war against the state"[97] – a sentiment well known to activists and public interest lawyers. In the *Silobela* case (in addition to the political reprisals described above) this sentiment manifested itself in what could only be described as an unconscionable legal response: first, the municipality appealed the judgement compelling the municipality to provide access to drinking water and to engage with local residents; when the applicants brought a successful application for the judgement to be implemented pending appeal, the municipality appealed that decision. Throughout, the applicants' attempts to reach out to the municipality for an amicable solution have been stonewalled. This is an unfortunate and immature response by authorities who apparently have interests other than those of the residents of Silobela at heart.

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[94] VEJA at 16. At the time of writing, this case had been appealed to the SCA.
[95] Lawyers for Human Rights and Legal Resources Centre
[96] *Federation for Sustainable Environment and Others v Minister of Water Affairs and Others* (35672/12) [2012] ZAGPPHC 128 (10 July 2012)
[97] http://www.bdlive.co.za/articles/2012/07/11/water-lawsuit-is-war-against-the-state

Unlike section 27 rights (being those concerned with food, water, healthcare and social assistance), section 24 is not subject to a "progressive realisation" requirement. Nevertheless, the principles of what constitutes "reasonable legislative and other measures" as determined by the Constitutional Court in the *Grootboom* case[98] of course apply, and particularly to the environmental right where so much legislation has been promulgated to give effect to this right:

> *"Legislative measures by themselves are not likely to constitute constitutional compliance. Mere legislation is not enough. The state is obliged to act to achieve the intended result, and the legislative measures will invariably have to be supported by appropriate, well-directed policies and programmes implemented by the executive. These policies and programmes must be reasonable both in their conception and their implementation. The formulation of a programme is only the first stage in meeting the state's obligations. The programme must also be reasonably implemented. An otherwise reasonable programme that is not implemented reasonably will not constitute compliance with the state's obligations."*[99]

This is directly applicable to some of the concerns raised in the first part of this paper, such as implementation of air quality legislation and ensuring proper drinking water treatment; it is also applicable to the measures implemented by the Department of Mineral Resources to employ and train approximately 30 Environmental Management Resources Inspectors to ensure compliance at approximately 1700 authorised mines (not even counting illegal mining sites).[100]

[98] Government of the Republic of South Africa and Others v Grootboom and Others (CCT11/00) [2000] ZACC 19.
[99] Note 98 at 42
[100] Operating mines and quarries and mineral processing plants in the Republic of South Africa, 2014. Directory D1. Directorate of Mineral Economics, Department of Mineral Resources.

As in all areas of social justice litigation, environmental rights litigation is also plagued by the challenges of achieving implementation of and compliance with court orders – and no doubt the Kloof Conservancy, just like the Federation for a Sustainable Environment and the Silobela community, will have difficulties getting full compliance with their court orders. However, despite these difficulties, it is likely that – as we have seen in other public interest sectors like health and education - litigation to compel the implementation of proper programmes aimed at realising the environment rights will have to be one the primary avenues public interest lawyers must explore going forward.

Collaboration between activists for environmental rights and socio-economic rights

Dugard and Alcaro[101] have argued, correctly in my view, that "environmental organisations have been playing it safe; going for the winnable points in court and not really pushing the boundaries of [section] 24 of the Constitution, let alone venturing into the brown and red components contained in the socio-economic rights clauses." They also correctly concede that socio-economic rights lawyers have similarly not reached out to assess how rights under section 24 can assist cases of violations of section 27 and related provisions. An interesting example of this, not cited by Dugard and Alcaro, is the Constitutional Court case of *Dudley Lee v Minister of Correctional Services*[102] which dealt with a claim for damages by a prisoner who contracted tuberculosis while in prison. Nowhere in that case was it argued that Mr Lee's right to an environment not harmful to health or well-being was violated by conditions in prison that allowed him to be infected with the disease.

[101] Dugard, J. and Alcaro, A. 20 "Let's work together: environmental and socio-economic rights in the courts", *South African Journal on Human Rights* vol. 29(1) pp. 14-31
[102] (CCT 20/12) [2012] ZACC 30

Those affected by rights violations rarely distinguish between different categories of rights, particularly where these rights are already so interconnected.[103] It is therefore indeed imperative that options for collaboration between social justice and environmental rights organisations be explored.

Support for criminal prosecution by the state

In a regulatory environment that relies very heavily on criminal sanctions but where poor compliance monitoring and enforcement results in many ongoing criminal violations, another option that arises for civil society organisations it that of criminal prosecution.[104] Although this is a strategy that requires great patience, persistence, political humility and some luck, the impact can be significant, since successful prosecution of environmental crimes is still relatively rare.

In 2012, two complaints by civil society organisations led to the prosecution, conviction and sentencing of two related mining companies on charges of violation of statutory environmental obligations. In both these cases, the Mpumalanga based complainant organisations worked closely with the National Prosecuting Authority (NPA) and environmental authorities (bypassing mining authorities) to achieve convictions. Both sentences – the subject of plea and sentence agreements between the accused and the NPA were extraordinary in that, until these cases, there were no known successful prosecutions of mining companies for environmental violations. In the case of *S v Golfview Mining Pty Ltd*,[105] Golfview (a company that shared a director with the accused in *S v Anker Coal and*

[103] It is also worth considering the application of the concept of "well-being" in section 24(a) to violations of other Constitution rights.
[104] Although section 33 of NEMA makes provision for private prosecution (i.e. not involving the National Prosecuting Authority), the procedural and other obstacles in using such a mechanism are such that civil society organisations have not yet taken up this opportunity in any meaningful way.
[105] Ermelo Regional Court Case: ESH 82/11, Ermelo CAS 462/07/2009

Mineral Holdings (Pty) Ltd[106]) was convicted of offences that included illegal mining in a wetland; the diversion of a watercourse; inadequate pollution control; and unauthorised transformation of three hectares of indigenous vegetation. The sentence required Golfview to rehabilitate the wetland, but also to pay ZAR1 million to each of the national and provincial environment departments, to the provincial parks agency, and to the Water Research Commission. Payment of a further fine of ZAR1 million was suspended for five years.[107]

Private corporate attorneys Webber Wentzel described the impact of the Golfview case as follows:

> *"The Golfview conviction is significant not only because of the large fine imposed by the court, but also because it demonstrates that non-governmental authorities and other private persons are prepared to institute criminal proceedings where the environmental authorities are slow or reluctant to do so, and that the prosecuting authority is pursuing prosecutions of companies and directors*."[108] (own underlining)

In January 2014, a community organisation took this course of action one step further in the case of *S v Blue Platinum Ventures 16 (Pty) Ltd and others*,[109] a complaint initiated in 2011 by a community organisation in Limpopo that resulted in a groundbreaking conviction and sentence of the managing director of a small mining company.

The criminal complaint against mining company Blue Platinum Ventures 16 (Pty) Ltd was made by community-based organisation Batlhabine Foundation in response to the company mining illegally outside of its authorised area, and rampant environmental degradation, especially erosion, caused by its mining activities. Despite the fact that an independent

[106] Ermelo Regional Court Case: ESH 8 /11, Sheepmoor CAS 26/06/2009
[107] http://cer.org.za/virtual-library/plea-and-sentence-agreements/s-v-golfview-mining-pty-ltd
[108] http://www.polity.org.za/article/criminal-convictions-and-fines-for-environmental-offences-2012-10-29
[109] Unreported judgement in the Naphuno Regional Court, Case no. RN126/2013

compliance report commissioned by the community and conducted by environmental specialists revealed that Blue Platinum was in contravention of at least 14 different environmental provisions of the MPRDA,[110] NEMA,[111] and the National Water Act,[112] to the community's knowledge mining authorities had failed to take effective action against Blue Platinum.[113]

As a result of the criminal complaint, Blue Platinum and its directors were charged by the NPA with all 14 counts of non-compliance. The NPA eventually accepted a plea of guilty by the company's managing directors, Matome Maponya, to the one contravention of NEMA that carried the highest penalty: commencing with listed activities without an environmental authorisation.

As in the cases of Anker Coal and Golfview Mining described above, the conviction and sentence was the result of extensive engagement between the complainant community and prosecuting authorities with little involvement of mining authorities. The conviction and sentence were also facilitated by scientific expert reports obtained by the attorneys representing the complainant – evidence often not available to prosecutors because of the cost involved.

[110] Cited in note 43 above.
[111] Cited in note 3 above.
[112] Cited in note 5 above.
[113] A request in terms of the Promotion of Access to Information Act, 2000 (PAIA) later revealed that the DMR issued Blue Platinum with several directives ordering it to increase its financial provision, to amend its environmental management programme and to rehabilitate the unlawful damage it had inflicted in the receiving environment. As a result of the failure by Blue Platinum to adhere to these directives, Blue Platinum's mining right was ultimately cancelled by the Minister of Mineral Resources. However despite the right cancellation which explicitly provided that Blue Platinum was not absolved from fulfilling its environmental obligations, DMR failed to ensure that these were carried out following the issue of this notice. The DMR undertook no further enforcement steps against it.

After pleading guilty, Maponya was sentenced to five years' imprisonment by the Naphuno Regional Court, without the option of a fine, suspended for five years on the condition that he rehabilitates the mining area within 6 months of the court order.

As at time of writing, despite the expiry of the timeframe (which was extended by the Court on request of Mr Maponya), the mining area remains largely unrehabilitated, and enforcement of the court order has been left to the Batlhabine Foundation and environment authorities.[114] Until their land is fully rehabilitated, the eventual future imprisonment of Maponya does not vindicate the Tlhabine community's environmental rights. However, the conviction and unusual sentence has resulted in the case being cited widely as evidence of real personal risk to directors of all mining companies.[115]

Avoiding the traps of internal appeals, and exploring the options of a speedier remedy

More progress will have to be made with avoiding the traps created by the remedy of internal appeals that are never decided – either because no decisions are made, as in the case of the myriad of appeals to the Minister of Mineral Resources that remain undecided, or because the institutions that are mandated to make the decision on appeal have been dismantled. This has been the case with the Water Tribunal, which remains unable to function despite repeated court judgements criticising the Minister of Water Affairs for her failure to ensure a functioning Tribunal, but frustratingly falling short of ordering her to reconstitute the Tribunal.[116]

[114] Despite numerous requests from the Batlhabine Foundation for the DMR to monitor compliance the court order, it has failed to conduct even a single inspection. The DMR has also failed to request the NPA to approach court to put the suspended sentence into operation.
[115] See, for example: http://www.iol.co.za/business/companies/director-gets-jail-for-land-damage-1.1644299
[116] *Exxaro Coal v Minister of Water Affairs and Judicial Service Commission* NGHC 63939/2012; *Makhanya v Goede Wellington Boerdery Pty Ltd* (230/2012) [2012] ZASCA 205; *Le Grange N.O. and others v Minister of Water Affairs and others* SGHC 3599/13.

This situation can obviously be addressed through judicial review of the failure to make a decision.[117] However, since it has been difficult to obtain or maintain suspensions pending appeal and review, it is more likely that the courts may to be approached directly on the basis that an appeal decision within the prescribed timeframe is unlikely given the track record of undecided appeals – potentially relying on "exceptional circumstances" as provided in section 7(2)(c) of the Promotion of Administrative Justice Act.[118] The South Gauteng High Court has already recognised this need to bypass a dysfunctional internal appeal mechanism in a recent decision relating to an appeal that would ordinarily have been heard by the Water Tribunal.[119]

In the case of *Koyabe and others v Minister for Home Affairs and others*,[120] the Constitutional Court characterised internal remedies as "designed to provide immediate and cost-effective relief, giving the executive the opportunity to utilise its own mechanisms, rectifying irregularities first, before aggrieved parties resort to litigation."[121] However, the Court also held that:

> *"…the requirement [to exhaust internal remedies] should not be rigidly imposed. Nor should it be used by administrators to frustrate the efforts of an aggrieved person or to shield the administrative process from judicial scrutiny."*[122]

Another tentative avenue for exploration lies in the wording of section 33(1) of NEMA, which provides that:

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[117] Section 1(i) of the Promotion of Administrative Justice Act, 2000 (Act 3 of 2000).
[118] Act 3 of 2000
[119] *Le Grange N.O. and others v Minister of Water Affairs and others* SGHC 3599/13
[120] *Koyabe and others v Minister for Home Affairs and others (Lawyers for Human Rights as amicus curiae)* 2010 (4) SA 327 CC.
[121] At 35
[122] At 38

> *"Any person or group of persons may seek appropriate relief in respect of any breach or threatened breach of any provision of this Act, including a principle contained in Chapter 1, or of any provision of a specific environmental management Act, or of any other statutory provision concerned with the protection of the environment or the use of natural resources…"* (own underlining)

Although this provision appears under the heading "legal standing to enforce environmental laws" (own underlining) the question is whether it can be argued that this provision creates a *sui generis* remedy for violation of environmental rights that does not have to be subject to the South African common law requirements for interdicts. Albeit comments made in the context of whether the court can grant punitive Constitutional damages, it is worth noting the words of Ackerman J in the Constitutional Court judgement of *Fose v Minister of Safety and Security*:[123]

> *"Given the historical context in which the interim Constitution was adopted and the extensive violation of fundamental rights which had preceded it, I have no doubt that this Court has a particular duty to ensure that, within the bounds of the Constitution, effective relief be granted for the infringement of any of the rights entrenched in it. In our context an appropriate remedy must mean an effective remedy, for without effective remedies for breach, the values underlying and the rights entrenched in the Constitution cannot properly be upheld or enhanced. Particularly in a country where so few have the means to enforce their rights through the courts, it is essential that on those occasions when the legal process does establish that an infringement of an entrenched right has occurred, it be effectively vindicated. The courts have a*

[123] (CCT14/96) [1997] ZACC 6

particular responsibility in this regard and are obliged to "forge new tools" and shape innovative remedies, if needs be, to achieve this goal."[124]

The need for administrative or civil penalties

South Africa has, for historical reasons, chosen to deal with punitive measures in its environmental laws purely through criminal prosecution, and little progress has been made to move in the direction of civil or administrative penalties despite a wide international trend towards such penalties in environmental and other regulation.[125]

The only exception to this rule is an "administrative fine" provided for in section 24G of NEMA.[126] Unfortunately, the context of this provision for such a fine – being after the fact authorisation of illegal activities – has tainted this provision and created a poorly conceived perverse incentive to avoid costly delays of compliance.[127] However, this provision – and recent amendments to section 24G[128] – have opened the door to and given regulators a taste of the potential of administrative fines. It is essential for civil society organisations to use this foot in the door to push for the widespread use of proper administrative or civil penalties for violations of environmental laws in South Africa.

Conclusion

Given the acceleration in the deterioration of environmental quality indicators in South Africa, it is difficult to contend that enough has been achieved to give effect to section 24 of

[124] At 69.
[125] Fourie, M. 2009. "How civil and administrative penalties can change the face of environmental compliance in South Africa". 2009 (16) 2 *South African Journal on Environmental Law & Policy*. 93-127. Also see Hugo, R. "Administrative penalties as a tool for resolving South Africa's environmental compliance and enforcement woes". LLM Research Dissertation University of Cape Town (2014).
[126] As cited in note 3 above.
[127] September, L. A crucial analysis of the application of section 24G provisions of the National Environmental Managementy Act (NEMA) – the Gauteng Province experience. MA Mini-Dissertation Northwest University (2012)
[128] National Environmental Management Laws Amendment Act, 2013 (Act 30 of 2013).

the Constitution: in fact, insofar as recent legislative amendments are limiting basic principles of environmental impact management and governance, we may already be in violation of the international law principle of non-regression.

In response, this paper calls for more proactive, collaborative and experimental approaches by environmental public interest lawyers. With the extensive protection in South Africa law against adverse costs orders for environmental public interest litigation, litigation must be a key part of the strategy going forward. However, other measures more supportive of a capacity-constrained State, such as those described in this paper, should also be explored.