

# THE ROLE OF ENVIRONMENTAL JUSTICE IN SOCIO-ECONOMIC RIGHTS LITIGATION

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## SUMMARY

In this dissertation I argue that the notion of environmental justice is recognised by section 24 of the Constitution, forms part of our law, and could play a role in South African socio-economic rights litigation as a transformative tool. I assert that because environmental justice recognises the intrinsic links between the distribution of basic resources and the environments in which poor people continue to find themselves in post 1994 South Africa, it has the ability to enhance and strengthen the enforcement of socio-economic rights. Environmental justice can do so by, among other things, focussing the court's mind on questions of justice and equity in the context of previous unjust environmental decision-making.

In chapter 1, I explore the origins of environmental justice as a conceptual framework and as a movement that first emerged in the United States, and was subsequently embraced in the early post-apartheid era in response to immense environmental injustices experienced by South Africa's poor black majority as a result of apartheid. I discuss how many of these injustices not only 'linger on' in post 1994 South Africa, but have also arguably become more entrenched, representing a failure on the part of the hopeful environmental justice movement of the early post-apartheid era. I highlight some of the reasons for this failure, which include the fragmented nature of the environmental justice movement, changes in government policy in relation to environmental issues, and the inadequate implementation of environmental laws intended to ensure public participation.

In spite of these set backs, I argue in chapter 2 that there remains room for environmental justice to play a role in transformative constitutionalism. I then demonstrate that, despite environmental justice having been incorporated into our law, it has failed to capture the imagination of lawyers engaged in socio-economic rights litigation. Sustainable development and human rights discourses have thus far been the dominant voices in socio-economic rights litigation, at the expense of environmental justice, and its transformative potential.

In chapter 3, I analyse *Mazibuko v City of Johannesburg*, which concerned the right to free basic water under section 27 of the Constitution. In my analysis of *Mazibuko*, I align myself with those who criticise the court's approach as anti-transformative. I do so by demonstrating that the court

‘technicised’, ‘personalised’, ‘proceduralised’ and so, ‘depoliticised’ the applicants’ challenge to the government’s policy. In this way, the court endorsed the ‘commodification’ of water, and a ‘neo-liberal paradigm’ towards access to basic water. I point to how linking environmental justice to the right to access to basic water could have encouraged the court to adopt a more redistributive and transformative approach.

Finally, in chapter 4, I conclude by considering the future role of environmental justice in socio-economic rights litigation to enhance the ability of the environmental right to challenge poverty and effect transformation in the lives of poor people in South Africa.

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It was through a course on Sustainable Development and Environmental Law presented by Prof. Humby at the Nelson Mandela Institute of the Wits School of Law that I first began to appreciate the transformative potential of environmental law. Prof. Humby planted the seed for this dissertation in my heart and mind, and encouraged me to let it grow. I am indebted to Prof. Tracy Humby and her colleague, Lisa Chaimberlain, for their inspiring course.

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## DECLARATION OF ORIGINALITY

I, Melanie Jean Murcott (student number 12367207), declare that:

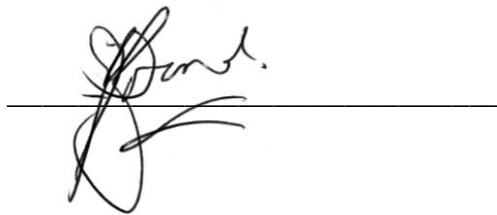
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**Date:** 11 November 2013

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## Introduction

In post 1994 South Africa, litigation involving the enforcement of socio-economic rights so as to ensure access to basic resources reveals that the poor continue to live in ‘intolerable’, ‘appalling’ and ‘desperate’ living conditions, and still lack access to basic resources such as housing, electricity, water, health care and sanitation.<sup>1</sup> These lived realities of the poor represent a failure of Constitution of the Republic of South Africa, 1996 to achieve its transformative mandate, particularly through the enforcement of socio-economic rights.<sup>2</sup>

When these ‘intolerable’, ‘appalling’ and ‘desperate’ living conditions are regarded as part of ‘the environment’, and basic resources such as water, housing and electricity are regarded as environmental benefits,<sup>3</sup> it becomes apparent that South Africa’s poor experience immense ‘environmental injustice’: ‘negative environmental consequences’,<sup>4</sup> including the unjust distribution of environmental benefits and burdens, ‘disproportionately visited

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<sup>1</sup> These are the Constitutional Court’s descriptions of the living conditions of the poor in *Government of the Republic of South Africa and Others v Grootboom and Others* 2001 (1) SA 46 (CC) para 3 (hereafter *Grootboom*), *Occupiers of 51 Olivia Road, Berea Township and 197 Main Street, Johannesburg v City of Johannesburg* 2008 (3) SA 208 (CC) para 8, *Joseph and Others v City of Johannesburg and Others* 2010 (4) SA 55 (CC) para 9 respectively. Examples from beyond the courtroom of the living conditions experienced by the poor in South Africa are discussed in chapter 1 below. Where I refer to socio-economic rights litigation, I adopt Danie Brand’s conception that it concerns those cases ‘in which the interests which socio-economic rights are intended to protect – access to basic resources for impoverished people...play an explicit role’ (see Danie Brand *Courts, socio-economic rights and transformative politics* (unpublished doctoral thesis, Stellenbosch University, 2009) at 78).

<sup>2</sup> See for example, Sandra Liebenberg *Socio-Economic Rights Adjudication under a Transformative Constitution* (2010) at 24–5, where she refers to K Klare ‘Legal culture and transformative constitutionalism’ (1998) 14 *SAJHR* 146 at 150 and a number of subsequent publications that have ‘elaborated on and explored the implications of “transformative constitutionalism” in various areas of constitutional law’.

<sup>3</sup> This is indeed how the environment ought to be construed when regard is had to the National Environmental Management Act 107 of 1998 (NEMA) which defines ‘environment’ in section 1 as

- the surroundings within which humans exist and that are made up of –
  - (i) the land, water and atmosphere of the earth;
  - (ii) micro-organisms, plants and animal life;
  - (iii) any part or combination of (i) and (ii) and the interrelationships among and between them; and
  - (iv) the physical, chemical, aesthetic and cultural properties and conditions of the foregoing that influence human health and well-being.

Moreover, human experience occurs within environments, and as has been argued by Jacklyn Cock *The War Against Ourselves: Nature, Power and Justice* (2007) at 48, the idea of the environment as ‘a place apart, separate from human experience is a distortion’.

<sup>4</sup> I discuss a number of examples of deepening inequality in post 1994 South Africa in chapter 1 below.

upon the poor’, that are ‘the end product or outcome of systematic race and class discrimination’.<sup>5</sup> ‘Environmental justice’ is the antithesis of this. It entails the just distribution of environmental benefits and burdens, taking into account past systemic race and class discrimination.

Accordingly, environmental justice seeks to respond to unjust living conditions and the unjust distribution of environmental benefits and burdens in society, as ‘an all encompassing notion that affirms the use value of life, all forms of life, against the interests of wealth, power and technology’.<sup>6</sup> It is therefore an inherently transformative, and redistributive concept.<sup>7</sup>

In this dissertation I aim to demonstrate that the notion of environmental justice is recognised by section 24 of the Constitution, forms part of our law, and could play a role in South African socio-economic rights litigation as a transformative tool.<sup>8</sup> Because environmental justice recognises the intrinsic links between the distribution of basic resources and the environments in which poor people continue to find themselves in post 1994 South Africa, it has the ability to enhance and strengthen the enforcement of socio-economic rights. Environmental justice can do so by, among other things, focussing the court’s mind on questions of justice and equity in the context of previous unjust environmental decision-making.

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<sup>5</sup> Helen Stacey ‘Environmental justice and transformative law in South Africa and some cross-jurisdictional notes about Australia, the United States and Canada’ (1999) *Acta Juridica* 36 at 60–1. A more detailed discussion on the meaning of environmental injustice is the subject of chapter 1 below.

<sup>6</sup> M Castells *The Power of Identity The Information Age Economy, Society and Culture* (1997) 132 quoted in Jackie Dugard & Anna Alcaro ‘Let’s work together: Environmental and socio-economic rights in the courts’ (2013) 29 *SAJHR* 14 at 18.

<sup>7</sup> Jacklyn Cock ‘Connecting the Red, Brown and Green: The Environmental Justice Movement in South Africa (2004) *Globalisation, Marginalisation & New Social Movements in Post-Apartheid South Africa* (unpublished paper) available at <http://ccs.ukzn.ac.za/default.asp?6,20,10,1809>, accessed on 28 October 2013.

<sup>8</sup> The idea of environmental justice as a transformative tool first occurred to me when preparing a reaction paper on the topic of environmental justice in Prof. Humby’s course on Sustainable Development and Environmental Law at the Nelson Mandela Institute of the Wits School of Law earlier this year. It was then that I first engaged with the issues raised, as well as some of the materials on which I rely in this dissertation. Thanks to these insights, I now associate myself with a growing academic movement that recognises the intrinsic links between social, economic and environmental issues, such that the environmental right has transformative potential, and ought to be considered a socio-economic right. See for example: Anél Du Plessis ‘South Africa’s Environmental Right (Generously) Interpreted: What is in it for poverty?’ (2011) 27 *SAJHR* 279 at 282, who adopts the position (with which I agree) that the environmental right ‘is a socio-economic right in as far as it aims to secure, like other socio-economic rights, for all members of society a basic quality of life and to afford entitlements to the material (including environmental) conditions for human welfare’. See also Tracy-Lynn Humby ‘Environmental justice and human rights on the mining wastelands of the Witwatersrand gold fields’ (2013) forthcoming in *Ottawa L Rev*, Oliver Njuh Fuo ‘The Transformative Potential of the Constitutional Environmental Right Overlooked in *Grootboom*’ (2013) 34(1) *Obiter* 77 and Dugard & Alcaro (note 6 above).



Environmental justice has this potential first, because it treats people as the intended beneficiaries of environmental resources held in trust by the state, as opposed merely to consumers of commodities owned by the state. Secondly, its focus is ‘the substance of the conditions in which people find themselves’,<sup>9</sup> as well as the underlying reasons for those conditions. Thirdly, environmental justice could help to ensure that decision-making processes in relation to the environment that poor South Africans occupy are more participative and fair. Viewed in this way, the concept could breathe much-needed life into our socio-economic rights litigation by challenging the neo-liberal capitalist paradigm that seems currently to be subverting the transformative mandate of the Constitution.<sup>10</sup> Rather than mourning ‘the death’ of transformative socio-economic rights litigation therefore,<sup>11</sup> this dissertation seeks to identify environmental justice as a new strategy that could help to resuscitate it.<sup>12</sup>

I begin, in chapter 1, by exploring the origins of environmental justice as a conceptual framework and as a movement that first emerged in the United States, and was subsequently embraced in the early post-apartheid era in response to immense environmental injustices experienced by South Africa’s poor black majority as a result of apartheid. I discuss how many of these injustices not only ‘linger on’ in post 1994 South Africa,<sup>13</sup> but have also arguably become more entrenched, representing a failure on the part of the hopeful environmental justice movement of the early post-apartheid era. I highlight some of the reasons for this failure, which include the fragmented nature of the environmental justice movement, changes in government policy in relation to environmental issues, and the inadequate implementation of environmental laws intended to ensure public participation.

In spite of these set backs, I argue in chapter 2 that there remains room for environmental justice to play a role in transformative constitutionalism. I then

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<sup>9</sup> David Bilchitz ‘Is the Constitutional Court wasting away the rights of the poor? *Nokotyana v Ekurhuleni Metropolitan Municipality*’ (2010) 127(4) SALJ 591 at 598.

<sup>10</sup> Brand (note 1 above) discusses, in detail, the impact of subversive neo-liberal capitalist paradigms in socio-economic rights litigation.

<sup>11</sup> See for example Paul O’Connell ‘The death of socio-economic rights’ (2011) 74(4) *The Modern Law Review* 532–554.

<sup>12</sup> I agree with the view of Redson Kapindu ‘The desperate left in desperation: A court in retreat – *Nokotyana v Ekurhuleni Metropolitan Municipality* revisited’ (2010) 3 CCR 201 at 202 that:

We as socio-economic rights commentators in the legal academe are part of a wider web of lobbyists for practical reform in the extant judicial reasoning on socio-economic rights aimed at fostering radical social change so as to better the lot of the mass of South Africans and all those that live in it.

<sup>13</sup> Phia Steyn ‘The lingering environmental impact of repressive governance: The environmental legacy of the apartheid era for a new South Africa’ (2005) 2(3) *Globalizations* 391.

demonstrate that, despite environmental justice having been incorporated into our law, it has failed to capture the imagination of lawyers engaged in socio-economic rights litigation. Sustainable development and human rights discourses have thus far been the dominant voices in socio-economic rights litigation, at the expense of environmental justice, and its transformative potential.

In chapter 3, I analyse *Mazibuko v City of Johannesburg*, which concerned the right to free basic water under section 27 of the Constitution.<sup>14</sup> I have chosen to analyse this case because water is the most significant and obvious environmental resource. This was something the Constitutional Court acknowledged at the outset of its judgment,<sup>15</sup> only to uphold a free basic water policy that leaves the most vulnerable in our society without access to sufficient water. Viewed as an environmental benefit ‘to be managed by communities and states for the public good’, water clearly implicates both environmental and social justice issues.<sup>16</sup> In *Mazibuko*, however, the environmental right did not feature. Instead, access to water was assessed in a technical manner, through the lens of reasonableness and ‘as a commodity to be managed by market forces’.<sup>17</sup>

In my analysis of *Mazibuko*, I align myself with those who criticise the court’s approach as anti-transformative.<sup>18</sup> I do so by demonstrating that the court ‘technicised’, ‘personalised’, ‘proceduralised’ and so, ‘depoliticised’ the applicants’ challenge to the government’s policy.<sup>19</sup> In this way, the court

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<sup>14</sup> *Mazibuko v City of Johannesburg* 2010 (4) SA 1 (CC) (hereafter *Mazibuko*).

<sup>15</sup> The court noted in para 1 that:

Water is life. Without it nothing organic grows. Human beings need water to drink, to wash and to grow our food. Without it, we will die. It is not surprising then that our Constitution entrenches the right of access to water.

<sup>16</sup> Cock (note 3 above) at 88.

<sup>17</sup> Ibid.

<sup>18</sup> Works that critique *Mazibuko* broadly speaking from the perspective of transformative constitutionalism include: Liebenberg (note 2 above) at 470–480; O’Connell (note 11 above); Murray Wesson ‘Reasonableness in Retreat? The Judgment of the South Africa Constitutional Court in *Mazibuko v City of Johannesburg*’ (2011) 11:2 *Human Rights Law Review* 390–405; Lucy A. Williams ‘The Justiciability of Water Rights: *Mazibuko v. City of Johannesburg*’ (2010) 18 *Williamette J. Int’l L. & Dis. Res.* 211; Stuart Wilson & Jackie Dugard ‘Taking Poverty Seriously: The South African Constitutional Court and Socio-economic Rights’ (2011) 22 *SLR* 664; Pierre De Vos ‘Water is life (but life is cheap)’ 13 October 2009 available at <http://constitutionallyspeaking.co.za/water-is-life-but-life-is-cheap/> accessed on 29 October 2013. On criticisms of reasonableness review as a means to protect the poor in socio-economic litigation more generally, see: David Bilchitz *Poverty and Fundamental Rights: The Justification and Enforcement of Socio-Economic Rights* (2007) 143 and Geo Quinot & Sandra Liebenberg ‘Narrowing the Band: Reasonableness Review in Administrative Justice and Socio-Economic Rights Jurisprudence’ (2011) 22 *SLR* 639.

<sup>19</sup> Brand (note 1 above).

endorsed the ‘commodification’ of water,<sup>20</sup> and a ‘neo-liberal paradigm’ towards access to basic water.<sup>21</sup> I point to how linking environmental justice to the right to access to basic water could have encouraged the court to adopt a more redistributive and transformative approach.

Finally, in chapter 4, I conclude by considering the future role of environmental justice in socio-economic rights litigation to enhance the ability of the environmental right to challenge poverty and effect transformation in the lives of poor people in South Africa.<sup>22</sup>

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<sup>20</sup> See David A. McDonald & Greg Ruiters ‘Theorizing water privatization in Southern Africa’ in David A. McDonald & Greg Ruiters (eds) *The Age of Commodity: Water Privatization in Southern Africa* (2005) at 19.

<sup>21</sup> O’Connell (note 11 above) at 551. As O’Connell states (quoting David A. McDonald & Greg Ruiters ‘Introduction: From public to private (to public again?)’ in David A. McDonald & Greg Ruiters (eds) *The Age of Commodity: Water Privatization in Southern Africa* (2005) at 3), the term ‘commodification’ is to be understood as ‘the transformation of all social relations to economic relations, subsumed by the logic of the market and reduced to the crude calculus of profit’. See also De Vos (note 18 above).

<sup>22</sup> I do so tentatively, in the knowledge that much like my academic career, the notion of environmental justice as a transformative tool, is in its infancy. Thus, this dissertation by no means sets out to establish, in detailed terms, the potential for environmental justice in socio-economic rights. For example, I do not consider whether and, if so, how, environmental justice could feature in the court’s reasonableness inquiry. My aims are more modest: to demonstrate that a *role* exists for environmental justice in socio-economic rights litigation, and what difference the concept could make at the level of paradigm.

## Chapter 1: The origins of environmental justice

In this chapter I trace the origins of environmental justice as a concept that emerged in the United States in the 1970s, and gained momentum in South Africa in the early 1990s. I draw parallels between the environmental justice movements of the United States and South Africa, both of which arose from struggles for civil and political freedom. I highlight some of the important gains of the environmental justice movement in early post-apartheid South Africa, consistent with a politicised environment discourse that emerged at that time. I then contrast the experiences of environmental *injustice* in the United States and apartheid South Africa. I do so to demonstrate that the injustices experienced in South Africa were more pervasive, implicating not only the inequitable distribution of pollution, but also access to basic resources. Finally, I discuss continued and heightened experiences of environmental injustice in South Africa in post-apartheid South Africa, representing a failure of our environmental justice movement.

The overall purpose of this chapter is to establish the ‘struggle credentials’ of environmental justice so that it can properly be understood as a transformative tool in South Africa’s future socio-economic litigation.

### A ‘quest for environmental civil rights’ in the United States

The environmental justice movement emerged in the United States in the 1970s as an ‘extension’ of the civil rights movement of the 1960s.<sup>23</sup> It was a response to the realisation that ‘toxic-waste dumps, municipal landfills, garbage incinerators and similar noxious facilities [were] not randomly dispersed throughout the country, but tend[ed] to be located in poor, minority communities’.<sup>24</sup>

Some regarded environmental justice as the conceptual framework required to address ‘environmental racism’ in the United States, that is:

the tendency of government and business to locate in minority communities hazardous waste disposal treatment, storage, and disposal facilities, and industries that emit toxic pollutants.<sup>25</sup>

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<sup>23</sup> R. Gregory Roberts ‘Environmental justice and community empowerment: Learning from the civil rights movement’ (1998) 48(1) *American University Rev* 229–267, where he draws parallels between the environmental justice movement and the civil rights movement, at 230–1.

<sup>24</sup> *Ibid.*

<sup>25</sup> *We Speak for Ourselves: Social Justice, Race and Environment* Winter 1991, 12 (book review) referred to in Richard J. Lazarus ‘Pursuing “Environmental Justice”: The distributional effects of environmental protection’ 1992-1993 87 *Nw U L Rev* 787 at 790 (footnote 13).

At the time, seemingly politically neutral environmental laws in America were found by racial minorities not ‘adequately [to] reflect minority interests and, in some instances, even [to] perpetuate racially discriminatory policies’.<sup>26</sup>

More broadly, the movement aimed to address the ‘social injustice and patterns of institutional discrimination’ evident in unjust environmental decision-making, to pursue ‘environmental civil rights’.<sup>27</sup> In this ‘quest for environmental civil rights’,<sup>28</sup> the environmental justice movement adopted the same kinds of ‘organizational structures, civil disobedience approaches, and litigation strategies’ as those invoked by civil rights movement in the US.<sup>29</sup>

The origins of environmental justice can thus be traced to ‘the disproportionately high numbers of polluting industrial sites in urban black neighbourhoods in the United States’,<sup>30</sup> and the political, legal and economic struggles that ensued in response to this phenomenon in the aftermath of the civil rights movement, which acted as a launch-pad for environmental justice struggles.<sup>31</sup>

As Foster pointed out in the late 1990s:

The [environmental justice] movement has emerged from a primarily local, grassroots response to the presence and continued siting of hazardous waste facilities in poor communities and communities of color [in America]. For the last two decades, these communities have fought back against the injustice they perceive permeates environmental decision-making. In doing so, they seek justice in environmental policy-making and administration.<sup>32</sup>

### A vision of environmental justice in post-apartheid South Africa

In contrast with the United States, where *minorities* suffered environmental injustice, the *majority* of South Africans (who are black and coloured) have, and continue to be exposed to unjust environmental outcomes, exclusion from environmental decision-making and forced removals from their land.<sup>33</sup> Despite this significant distinction between the experiences of environmental

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<sup>26</sup> Lazarus (note 25 above) at 790.

<sup>27</sup> Gregory (note 23 above).

<sup>28</sup> Ibid.

<sup>29</sup> Sheila Foster ‘Justice from the ground up: Distributive inequities, grassroots resistance, and the transformative politics of the environmental justice movement’ (1998) 86 *Cal L Rev* 775 at 789 (footnote 10).

<sup>30</sup> Stacey (note 5 above) at 37.

<sup>31</sup> Lazarus (note 25 above) at 789.

<sup>32</sup> Foster (note 29 above) at 776.

<sup>33</sup> See Stacey (note 5 above) at 68 and 37, where she describes the environmental justice movement in South Africa as ‘unique...because of the different empirical reality that the majority of the population are black and coloured people’.

injustice in the United States and South Africa, the origins of the South African environmental justice movement resemble those of the United States in two important respects. First, it gained momentum in the 1990s at the end of apartheid: a moment of radical transformation in our history comparable to the end of the civil rights movement.<sup>34</sup> Secondly, the movement was the response to immense environmental injustice and racism experienced by black people in both countries.<sup>35</sup> I will discuss each of these issues in turn. Thereafter, I discuss how the continuing, and in some instances, heightened environmental injustices experienced by poor black South Africans more than two decades after the end of apartheid represent a failure on the part of the environmental justice movement, and point to some of the causes of that failure.

In South Africa, as in the United States, the environmental justice movement gained momentum in the wake of a struggle for civil and political freedom. In both countries, the radical transformation brought about by these struggles had the effect of re-politicising environmental discourse in the realisation that overcoming oppression requires significant social and economic transformation, not just formal equality or a right to vote.<sup>36</sup> In the words of former President Nelson Mandela:

A simple right to vote, without food, shelter and health care is to use first generation rights as a smokescreen to obscure the deep underlying forces which dehumanise people. It is to create the appearance of equality and justice, while by implication socio-economic inequality is entrenched.<sup>37</sup>

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<sup>34</sup> Farieda Khan, in David A. McDonald (ed) *Environmental Justice in South Africa* (2002) at 27, comments on the 'close similarities' between the history of the environmental movements in the United States and South Africa respectively. She explains that: In both countries a history of racial discrimination, institutionalized black poverty, and political powerlessness are central to the environmental discourse. This factor, together with the nature-orientated and preservationist approach of the mainstream environmental movement, made it inevitable that for much of the twentieth century the main focus of black people in both countries was political liberation, not environmental conservation. In the USA, when environmental issues were couched in a civil rights context and the right to a healthy environment began to be included as an integral part of a basic civil rights program, African Americans began to become actively involved in the environmental problems affecting their communities. Similarly, in South Africa it was only when the political scene began to undergo radical changes and major transformation began to take place within the environmental sphere that black South Africans began to grapple with environmental issues in larger numbers than ever before.

<sup>35</sup> As I discuss below, the effects of the injustice have been more pernicious in South Africa, in that they have led to the deprivation of access to basic environmental resources, such as water, land and air.

<sup>36</sup> McDonald (note 34 above) at 27–8.

<sup>37</sup> N R Mandela 'Address: On the occasion of the ANC's Bill of Rights conference' in *A Bill of Rights for a Democratic South Africa: Papers and Reports of a Conference*

McDonald describes how at the end of apartheid a broadening of the definition of ‘the environment’<sup>38</sup> to include the working and living conditions of black South Africans meant that ‘environmental initiatives were akin to other post-apartheid, democratic objectives’ to the extent that they were aimed at achieving social justice and equality for all South Africans.<sup>39</sup> Thus, as in the United States, where civil rights activists began, in the aftermath of the civil rights movement, to advance their environmental justice movement, in post-apartheid South Africa:

trade unions, nongovernmental organisations, civic associations, and academics quickly adopted the new environmental discourse [including the discourse of environmental justice]. Within a few short years these bodies began to challenge the environmental practices and policies of the past.<sup>40</sup>

Some<sup>41</sup> of the most significant gains of this post-liberation movement included that:

- grass roots groups emerged who tried to resolve specific and localised environmental issues and run ‘single issue campaigns’ in relation to, for example, ‘the siting of hazardous waste landfills, incinerators and nuclear facilities in specific areas, the combating of urban, industrial and mining pollution, and the mining of conservation areas’;<sup>42</sup>
- there was recognition by trade unions that ‘industrial health and occupational safety were legitimate environmental issues and therefore of concern to them in their commitment to creating working areas that were safe for both workers and surrounding communities’;<sup>43</sup>
- a number of environmental activist organisations were established such as Earthlife Africa and the Environmental Justice Networking Forum (EJNF), which have sought to further the environmental justice agenda;<sup>44</sup>

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*Convened by the ANC Constitutional Committee, May 1991 (1991) 9–14 at 12 in Liebenberg (note 2 above) at 9.*

<sup>38</sup> See note 3 above.

<sup>39</sup> McDonald (note 34 above) at 2.

<sup>40</sup> Ibid.

<sup>41</sup> These are discussed in detail in Jacklyn Cock & David Fig ‘The impact of globalization on environmental politics in South Africa, 1990 – 2002’ (2001) 5(2) *African Sociological Review* 15–35 at 18–20 and in McDonald (note 34 above) at 25–30.

<sup>42</sup> Cock & Fig (note 41 above) at 18–19.

<sup>43</sup> McDonald (note 34 above) at 29.

<sup>44</sup> Ibid at 29–30. As Humby (note 8 above) at 4–5 explains, the ENJF, ‘a “loose alliance” of over 550 non-profit organisations’ that ‘drew attention to the embeddedness of the environmental in socio-political struggles’, was one of the powerful participants in South Africa’s post-apartheid environmental justice movement. It advocated that:

Environmental justice is about social transformation directed toward meeting basic human needs and enhancing our quality of life – economic quality, health

- there was a shift in the policy and direction of certain organs of state in relation to environmental issues, including the South African National Parks' (previously the National Parks Board), which adopted a new approach towards black communities neighbouring national parks, and access to natural resources within the parks; and that<sup>45</sup>
- an environmental right, and environmental legislation that gives both implicit and explicit recognition to environmental justice were introduced.<sup>46</sup>

These gains were consistent with the ANC's stance on environmental issues at the time, as reflected in early versions of the ANC's Reconstruction and Development Programme:

Noting that "poverty and environmental degradation have been closely linked" in South Africa, the ANC made it clear that social, economic, and political relations were also part of the environmental equation and that environmental inequalities and injustices would be addressed as an integral part of the party's reconstruction and development mandate.<sup>47</sup>

Moreover, this kind of environmental discourse represented an important shift from that of apartheid, when the environmental movement was racially

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care, housing, human rights, environmental protection and democracy. In linking environmental and social justice issues the environmental justice approach seeks to challenge the abuse of power which results in poor people having to suffer the effects of environmental damage caused by the greed of others. ... In recognizing that environmental damage has the greatest impact on poor people, EJNF seeks to ensure the right of those most affected to participate at all levels of environmental decision-making.

<sup>45</sup> Ibid at 33–4.

<sup>46</sup> As Tracy-Lynn Field argues in 'Sustainable development versus environmentalism: Competing paradigms for the South African EIA regime' (2006) 123 *SALJ* 409, 415 & 419 discussed in Michael Kidd *Environmental Law* 2<sup>nd</sup> ed (2011) at 301, the environmental right, by including the concept of sustainable development, 'has at its heart the idea of equity' (or justice), since sustainable development 'embraces not only the concepts of inter- and intra-generational equity, but also includes the [substantive] idea of meeting basic human needs' and 'notions of transformation and redress'. Further, the principles contained in section 2 of NEMA, intended, among other things, to guide the interpretation and administration of NEMA and any other law concerned with the protection and management of the environment, and to serve as guidelines by reference to which organs of state exercising functions or taking decisions concerning the protection of the environment make explicit provision for environmental justice. First, in section 2(4)(c), they provide that '[e]nvironmental justice must be pursued so that adverse environmental impacts shall not be distributed in such a manner as to unfairly discriminate against any person, particularly vulnerable and disadvantaged persons', and secondly, in section 2(4)(d) they provide that equitable access to environmental resources, benefits and services to meet basic human needs and ensure human well-being must be pursued and special measures may be taken to ensure access thereto by categories of persons disadvantaged by unfair discrimination. This will be discussed further in chapter 2.

<sup>47</sup> ANC *The Reconstruction and Development Programme* (1994) at 38 in McDonald (note 34 above) at 2.



polarised,<sup>48</sup> and environmental concerns were depoliticised and divorced from the struggles of black South Africans.<sup>49</sup> Khan points out that during apartheid, mainstream environmental organisations voluntarily implemented the government's racial policies, including by excluding black membership and adopting colonial and racist attitudes towards black people.<sup>50</sup> For example, the African National Soil Conservation Association (ANSCA) was established:

as a means of taking the soil conservation message to Africans, without antagonizing the government (on whom it was dependent for financial support) or its members, many of whom were white farmers with extreme right-wing views.<sup>51</sup>

Against this backdrop, it is not hard to understand why, during apartheid, the South African environmental movement was 'apolitical and conservation-focussed'.<sup>52</sup> Most environmental Non-Governmental Organisations (ENGOS) prioritised good relations with the apartheid government over the daily struggles of black South Africans.<sup>53</sup> As Steyn remarks, during apartheid:

The non-governmental sector of the South African environmental movement continued to focus predominantly on the conservation of fauna and flora, and of particular areas that were fenced in to ensure the continuation of their existence. These protected areas became symbols of responsible stewardship of the natural environment for the South African government, the National Parks Board, the provincial nature conservancies, a number of ENGOS and a large segment of the white people in the country. However, the management of these areas as separate entities that allowed little interference from the outside ensured that conservation measures remained divorced from the everyday life of the public in general. It was thus very difficult – almost impossible – to establish an environmental perspective in which humans were seen as being totally dependent on a healthy natural environment in South Africa, and to promote an environmental agenda that included pertinent issues such as pollution control, the unhealthy state of black townships, environmental degradation in the homelands, and the environmental dangers of uncontrolled development.<sup>54</sup>

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<sup>48</sup> McDonald (note 34 above) at 19.

<sup>49</sup> Steyn (note 13 above) at 393.

<sup>50</sup> McDonald (note 34 above) at 23.

<sup>51</sup> Ibid.

<sup>52</sup> Steyn (note 13 above) at 393.

<sup>53</sup> Ibid.

<sup>54</sup> Ibid at 394. As Khan argues in McDonald (note 34 above) at 19, the roots of the exclusion of black South Africans from the environmental movement can be traced further back to the colonial era when 'conservation was rigidly interpreted to mean the protection of wildlife, and Africans were perceived as environmentally destructive'.

In contrast, the environmental justice movement of the early 1990s in South Africa, with its 'roots' in 'the enormous socio-political changes that took place in the post-apartheid period of transition...when there was a discernable shift in attitudes towards, and perceptions of, the environment', was focussed on overcoming de-politicization and 'racial polarization of environmentalism' in South Africa.<sup>55</sup> As Cock states:

During the apartheid regime, environmentalism effectively operated as a conservation strategy and neglected social needs. The notion of environmental justice represents an important shift away from this traditional authoritarian concept of environmentalism which was mainly concerned with the conservation of threatened plants, animals and wilderness areas, to include urban, health, labour and development issues. Environmental justice is linked to social justice as an all-encompassing notion that affirms the value of life – all forms of life – against the interests of wealth, power and technology.<sup>56</sup>

Sadly, as I discuss later in this dissertation, the new environmental discourse, and the nascent environmental justice movement that emerged in the early 1990s, have thus far failed to fulfil their transformative potential in litigation to enforce of socio-economic rights.<sup>57</sup> This is unfortunate, especially given the immense environmental injustice experienced by poor black South Africans, to which the movement (like the movement emerging from the success of the civil rights movement of the 1960s and 1970s) has the potential to respond. I now give a brief description of the main forms of environmental injustice experienced in the United States and contrast them with what was experienced by poor black people in South Africa during apartheid. I then highlight how, in South Africa, this injustice has continued, and in some instances heightened, almost 20 years into our democracy.

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<sup>55</sup> McDonald (note 34 above) at 27–8.

<sup>56</sup> Jacklyn Cock 'Green capitalism or environmental justice? A critique of the sustainability discourse' (2010) Unpublished paper presented on 13 June at the XVI SASA Congress, University of Fort Hare at 48.

<sup>57</sup> Whilst 'the environmental law fraternity', particularly in response *Mazibuko*, has sought to draw links between access to water under section 27 of the Constitution and environmental justice, this discourse does not yet appear to have begun to influence our courts or those immersed in the enforcement of socio-economic rights, as I argue in chapters 3 below. This was argued in Du Plessis (note 8 above) at 289 with reference to Louis J Kotzé 'Phiri, the plight of the poor and the perils of climate change: time to re-think environmental and socio-economic rights in South Africa' (2010) 1 *J of Human Rights and the Environment* 135; Linda Stewart & Debra Horsten 'The role of sustainability in the adjudication of the right to access to adequate water' (2009) 24 *SA Public Law* 486 and Anél Du Plessis 'A Government in Deep Water? Some Thoughts on the State's Duties in Relation to Water Arising from South Africa's Bill of Rights' (2010) 19 *R of European Community and Int Environmental L* 316.

## Differing experiences of environmental injustice in the United States and apartheid South Africa

The focus of the environmental justice movement in the United States was on 'the siting of locally undesirable land uses (LULUs) such as waste disposal sites and industries emitting hazardous emissions...disproportionately in neighbourhoods which have, on average, a higher percentage of racial minorities, and which are poorer than communities which do not have LULUs'.<sup>58</sup> Lazarus, in his discussion on studies in relation to the distribution of environmental hazards in the United States, notes that one study in 1983 found that '[b]lack make up the majority of the population in three of the four communities where the landfills are located',<sup>59</sup> whilst another study in 1987 revealed that '[a]lthough socio-economic status appeared to play an important role in the location of commercial hazardous waste facilities, race still proved to be more significant'.<sup>60</sup> Yet a further study in 1992 'concluded that minorities have disproportionately greater "observed and potential exposure" to environmental pollutants', caused by first, 'a greater concentration of minorities in urban areas where emission densities tend to be greatest, and accordingly, where air pollution is usually the most hazardous', secondly, 'the physical proximity of minority populations to hazardous waste sites', thirdly, 'minority consumption of contaminated food', and finally, 'minority farmworker exposure to pesticides'.<sup>61</sup>

Although in South Africa, like the United States, 'in the typical pattern of environmental racism, many landfill sites where most waste ends up are located near townships',<sup>62</sup> the environmental injustices were experienced by the majority of South Africans. Further, apartheid policies led not only to inequitable distribution of pollutants, but also to the pervasive deprivation of access to basic resources.

Stacey argues that the principle cause of environmental injustice in South Africa was 'the wide-scale appropriation of land during the colonial and apartheid periods', causing 'migration of black and coloured poor to cities in search of work' and squatting by people rendered landless by the

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<sup>58</sup> Kidd (note 46 above) at 293.

<sup>59</sup> US General Accounting Office *Siting of hazardous waste landfills and their correlation with racial and economic status of surrounding communities* (1983) in Lazarus (note 25 above) at 801.

<sup>60</sup> United Church of Christ Commission for Racial Justice *Toxic Waste and Race in the United States* (1987) in Lazarus (note 25 above) at 801–2.

<sup>61</sup> Environmental Equity Workgroup, Office of Policy, Planning and Evaluation, United States EPA *Environmental Equity: Reducing Risk for All Communities, Workgroup Report to the Administrator* (June 1992) in Lazarus (note 25 above) at 805–6.

<sup>62</sup> Cock (note 3 above) at 101.

appropriation of land.<sup>63</sup> Steyn's comments on apartheid's 'tremendous environmental toll' reinforce this view.<sup>64</sup> Steyn paints a vivid picture of overcrowded and under-developed homelands which saw the migration of black South Africans to urban areas lacking in infrastructure.<sup>65</sup> She reveals how this in turn ensured that black South Africans experienced immense environmental injustice, as:

a lack of drinking water, waste removal and sanitation services, proper housing and electricity...combined to make townships a hazard to both human health and the natural environment.<sup>66</sup>

Thus, in contrast with the experience and focus of the environmental justice movement in the United States:

Environmental justice in South Africa...extends far beyond protesting inequitable distribution of pollution. It also included an emphasis on access to basic resources such as land and water and the participation of communities in decision making.<sup>67</sup>

Some of the disturbing environmental injustices experienced by South Africa's black majority as a result of apartheid policies include that:

- 'Apartheid spatial planning led to environmentally unsustainable cities, with glaring disparities in the allocation of municipal resources, disturbingly inefficient transportation systems, and urban insecurity on a massive scale',<sup>68</sup>
- Sewage and sanitation systems were under-developed in our townships, with the result that 6,67 million people in 1994 lacked access to adequate sewage and sanitation, and 2 million of these people were reliant on the bucket system for toilets;<sup>69</sup>
- Roughly 20% of the people living in townships had 'minimal access to water, with an average of two to three households sharing a water tap in many of the townships bordering the larger cities';<sup>70</sup>
- Housing shortages caused by poor town planning in townships resulted in approximately 5 and 7.7 million people living in informal housing (shacks) by 1993;<sup>71</sup>

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63 Stacey (note 5 above) at 42–3.

64 Steyn (note 13 above) at 395.

65 Ibid.

66 Ibid.

67 Cock & Fig (note 41 above) at 18.

68 Ibid at 17.

69 Steyn (note 13 above) at 395.

70 Ibid.

71 Ibid at 396.

- ‘A general lack of electricity in the townships played havoc with the natural environment through abnormally high levels of visible air pollution’ caused by ‘[o]pen fires and coal stoves’.<sup>72</sup> This lack of electricity in turn caused a greater proportion of children in townships to suffer asthma and chest colds than children elsewhere in the country.<sup>73</sup>

### Heightened experiences of environmental injustice, representing a failure of the environmental justice movement in South Africa

Although massive strides have been taken to rectify the patently unjust living conditions described above, South Africa remains one of the most unequal societies in the world.<sup>74</sup> Social inequality has deepened since 1994 representing a failure of the environmental justice movement.<sup>75</sup>

Cock and Fig identify some of the key reasons for the environmental justice movement’s lack of success in South Africa: first, the fragmented nature of the broader environmental movement in South Africa,<sup>76</sup> secondly, government’s change in policy in respect of environmental issues,<sup>77</sup> and thirdly, the exclusion of communities from environmental management and environmental decision-making.<sup>78</sup> I discuss each reason further below.<sup>79</sup>

The fragmented nature of South Africa’s environmental movement is described by Cock and Fig in their commentary on environmental politics in South Africa from 1990 to 2002:

Collective action in the name of environmentalism in South Africa is extremely diverse and reflects the social divisions of class, race, ideology, geographic location and gender. These diverse forms never constituted a social movement in the sense of a co-ordinated formal alliance that is mass based and has a shared vision and set of objectives. Neither was there an environmental movement in South Africa in the sense that Giddens regards as a social movement as a “collective attempt to further a common interest or secure a common goal, through collective action outside of the sphere of established institutions”. Nor did collective action constitute a social movement as “a collective actor constituted by individuals who understand themselves to

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<sup>72</sup> Ibid.

<sup>73</sup> Ibid.

<sup>74</sup> Cock (note 56 above) at 47.

<sup>75</sup> Cock (note 3 above) at 91.

<sup>76</sup> Cock & Fig (note 41 above) at 15–16.

<sup>77</sup> Ibid at 24–6.

<sup>78</sup> Ibid at 22–3. Another reason, discussed at 23–4, is the ‘demobilisation of civil society’. However, despite this demobilisation, public interest law firms have continued to litigate on behalf of the poor. Unfortunately, in doing so, they have not engaged with the discourse of environmental justice, as I will discuss in chapters 2 and 3 below.

<sup>79</sup> See also McDonald (note 34 above) at 4–6.

common interests and, for at least some significant part of their social existence, a common identity”. However...there has emerged an informal partial, fragmented network of environmental initiatives of diverse social composition and with inchoate ideologies of varying shades of “green” and “brown”. In combination, their multiple voices involve what Castells has called “a creative cacophony”.<sup>80</sup>

This fragmentation has meant that the environmental justice movement has been unable to entrench itself in South Africa’s struggle for social justice, particularly, as I will argue in chapters 2 and 3 below, in litigation to enforce socio-economic rights.

At the same time, the ANC’s change in policy in relation to environmental issues after the elections has played an instrumental role in the failures of the environmental justice movement.<sup>81</sup> Steyn points out that:

the [pre-election Reconstruction and Development Policy (RDP)] declared that poverty and environmental degradation were closely related and that improvement in living conditions and access to services and land would all contribute to reducing the negative human pressures on the natural environment in our country...[but] the ANC left its pro-environment position behind shortly after coming to power and the RDP White Paper, published in September 1994, omitted the chapter on the environment that was included in the pre-election document.<sup>82</sup>

Subsequently, the ANC’s Growth, Employment and Redistribution strategy (GEAR), influenced by the ‘ideological core of globalisation’, neo-liberalism,<sup>83</sup> ‘made no reference to the need to accommodate environmental considerations in central economic and social planning’ and reinforced ‘apartheid era policies that promoted economic development [now in the name of poverty reduction] with little consideration of the environmental impact thereof’.<sup>84</sup> At the level of governmental policy, therefore, environmental issues were compartmentalised from social and economic issues at an early stage in our constitutional democracy. In addition, pursuant to the implementation of neo-liberal capitalist policies, the privatisation of goods and services, including environmental goods and services such as water (natural resources), became the norm.<sup>85</sup> Cock and Fig submit that

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<sup>80</sup> Ibid at 15–16 (references omitted).

<sup>81</sup> Steyn (note 13 above) at 397.

<sup>82</sup> Ibid.

<sup>83</sup> Cock & Fig (note 41 above) at 25.

<sup>84</sup> Steyn (note 13 above) at 397.

<sup>85</sup> Danwood Mzikenge Chirwa ‘Water privatization and socio-economic rights in South Africa’ (2004) 8(2) *Law, Democracy & Development* 181–206 at 183.

under GEAR ‘poverty and inequality are deepening’.<sup>86</sup> Further, GEAR has undermined environmental management through budget cuts and ‘the promotion of unsustainable development practices’.<sup>87</sup>

Post-apartheid environmental legislation and policy was formulated through a participatory process, involving people from all over South Africa.<sup>88</sup> Following this participatory process:

The principle of community involvement was incorporated into NEMA.... [NEMA] marked a significant shift away from traditional environmental management by giving those affected by environmental degradation an opportunity for redress through mechanisms for conflict resolution, fair decision-making, the protection of those reporting on environmental transgressions and recognition of people’s right to refuse to work in harmful environments.<sup>89</sup>

However, in the implementation of environmental legislation, this participatory, justice-oriented approach has not become a reality, representing ‘a weakness in state capacity, a lack of political will, the enhanced influence of the private sector over the state, and the demobilisation of popular [environmental] sectors in civil society’.<sup>90</sup>

The fragmented nature of the early environmental justice movement in South Africa, the adoption of GEAR, and a failure to implement justice- and participatory-oriented environmental law and policy shed light on the deepening inequality and environmental injustice experienced by poor black South Africans in post-apartheid South Africa. Pertinent examples of the deepening inequality in South Africa include that:

- More than half of South Africa’s domestic water consumption ‘goes to the largely white, affluent suburbs with their gardens, swimming pools and golf courses’,<sup>91</sup> whilst ‘[m]any women in rural areas still have to walk long distances to fetch water from rivers and dams with 20 litre buckets carried on their heads’, and lack access to water’;<sup>92</sup>

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<sup>86</sup> Cock & Fig (note 41 above) at 25–6. The authors attribute this phenomenon to ‘GEAR’s standard neo-liberal economic principles – deficit reduction, trade liberalisation, privatisation, and the shrinking of the state’.

<sup>87</sup> Ibid.

<sup>88</sup> Ibid at 20–1. As Cock & Fig discuss, this was thanks, in part, to the efforts of the Environmental Mission in 1993, with financial support from Canada and Denmark.

<sup>89</sup> Ibid at 21.

<sup>90</sup> Ibid at 22–3.

<sup>91</sup> Cock (note 56 above) at 49.

<sup>92</sup> Cock (note 56 above) at 91.

- '[R]esearch has demonstrated how the installation of pre-paid water meters as part of the post-apartheid state's policy of cost recovery has had devastating impacts on poor communities', including the outbreak of diseases such as cholera.<sup>93</sup> Impoverished families who cannot afford to pay for more than the basic allocation of free water of 6000 litres a month per household have been unable to sustain, for instance, subsistence farming activities, and barely have enough water to cook and clean.<sup>94</sup>
- '[A]lmost a quarter of households still lack adequate access to electricity, either due to the lack of infrastructure or unaffordable pre-paid meters', whilst Eskom supplies electricity 'to multi-nationals such as BHP Billiton at 12c a kilowatt hour – below the cost of electricity production';<sup>95</sup>
- 'Since 1994, formerly whites-only suburbs are still kept clean by street sweepers and regular door-to-door refuse collection, while most black township and rural area residents are forced to dump their refuse in open spaces or in unsealed communal skips. The landscapes of informal settlements like Orange Farm, near Johannesburg, and Mortherwell, outside Port Elizabeth are scarred with large volumes of uncollected waste. In Johannesburg, the Jukskei River is choked with waste where it runs through Alexandra township.'<sup>96</sup>

It is in the context of these and other environmental injustices – the legacy of apartheid's 'tremendous environmental toll'<sup>97</sup> – that I analyse *Mazibuko* in chapter 3, and argue that environmental justice can fulfil an important role in South African socio-economic rights litigation, in spite of the challenges that the environmental justice movement has faced. Before doing so, I discuss, in chapter 2, how one of the successes of the environmental justice movement of early post-apartheid era – the recognition of environmental justice in our environmental laws – makes it possible to invoke the concept as a transformative tool.

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<sup>93</sup> Cock (note 56 above) at 94.

<sup>94</sup> Ibid at 95.

<sup>95</sup> Cock (note 3 above) at 50.

<sup>96</sup> Cock (note 56 above) at 101.

<sup>97</sup> Steyn (note 13 above) at 395.



## Chapter 2: Environmental justice under South African law

In this chapter, I set out the recognition afforded to the concept of environmental justice in our environmental law, both under the Constitution and in various pieces of environmental legislation such that there remains room for environmental justice to play a role in transformative constitutionalism. Thereafter, I consider the relationship between an environmental right that seeks to give effect to environmental justice and other socio-economic rights included in the Constitution to help achieve South Africa's transformative mandate.<sup>98</sup> I argue that because it recognises environmental justice, the environmental right has the potential to reinforce the transformative aims of our Constitution, especially in socio-economic rights litigation concerning access to basic resources.<sup>99</sup> I point out, however, that this has not transpired. Instead, human rights and sustainable development discourse have emerged as competing with, and in some instance drowning out, environmental justice discourse. A compartmentalised approach to human rights, sustainable development and environmental justice can be attributed to the fragmented nature of the environmental justice movement, prevailing governmental policy in respect of social, economic and environmental issues, and the failure to properly implement participatory environmental legislation, as discussed in chapter 1 above.

### Recognising environmental justice

South Africa's environmental right in section 24 of the Constitution provides that:

Everyone has the right –

- (a) to an environment that is not harmful to their health or well-being;
- (b) to have the environment protected, for the benefit of present and future generations, through reasonable legislative and other measures that –
  - (i) prevent pollution and ecological degradation;
  - (ii) promote conservation; and
  - (iii) secure ecologically sustainable development and the use of natural resources while promoting justifiable economic and social development[.]

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<sup>98</sup> Liebenberg (note 2 above) at 45.

<sup>99</sup> Humby (note 8 above) at 10.

Very little judicial attention has been given to the environmental right,<sup>100</sup> which remains an ‘under-utilised resource’, in spite of its transformative potential.<sup>101</sup> As Du Plessis remarks,

the Constitutional Court has not to date comprehensively unpacked in any detail the meaning of the substantive environmental right per se.<sup>102</sup>

Humby underscores that the environmental right has not yet begun to achieve its transformative potential by pointing out that:

there is little interpretive depth to section 24 and the protective ambit of the right, including its utility for environmental justice struggles, remains unclear.<sup>103</sup>

My argument is focussed on the potential of the courts interpreting the right as including the notion of environmental justice, such that it could be utilised in the context of the enforcement of socio-economic rights. I argue that it is possible to interpret the environmental right as recognising environmental justice, since the right expressly provides for sustainable development (‘the human use of natural resources that will permit both present and future generations to meet their needs’), which is patently a concept about meeting basic human needs in an equitable fashion.<sup>104</sup> In this regard:

At the very core of the notion of sustainable development is the moral choice to pursue equity in the light of a certain consciousness of the linkages between human and natural systems in the context of past and continuing unsustainable practices. Equity, not environmental protection, is the absolute core of sustainable development, notwithstanding the concept’s origin in texts aimed at environmental protection. But equity requires, more than ever before, an enhanced understanding, consideration and respect for our precarious and

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<sup>100</sup> The environmental right has been considered in a handful of cases, most notably *Fuel Retailers Association of Southern Africa v Director General: Environmental Management, Department of Agriculture, Conservation and Environment, Mpumalanga Province* 2008 (2) SA 319 (CC), *HTF Developers (Pty) Ltd v The Minister of Environmental Affairs and Tourism* (2006) 5 SA 512 (T), *BP Southern Africa (Pty) Ltd v MEC for Agriculture, Conservation, Environment and Land Affairs* 2004 (5) SA 124 (W), *Hichange Investments (Pty) Ltd v Cape Produce Co Ltd t/a Pelts Products* 2004 (2) SA 393 and *Director: Mineral Development, Gauteng Region v Save the Vaal Environment* 1999 (2) SA 709 (SCA).

<sup>101</sup> Loretta Feris ‘Constitutional environmental rights: An under-utilised resource’ (2008) *SAJHR* 29.

<sup>102</sup> Du Plessis (note 8 above) at 289.

<sup>103</sup> Humby (note 8 above) at 10.

<sup>104</sup> Stacey (note 5 above) at 62 (footnote omitted) drawing upon the definition of sustainable development in *Our Common Future*, Gro Bruntland, World Commission on Environment and Development (1987). Field (note 46 above). See also Kidd (note 46 above) at 303–4, where he supports the view that the environmental right could be utilised to remedy environmental injustice.

finite natural environment, and the desire to transform our human systems so as to be in harmony with that environment.<sup>105</sup>

If it is accepted that equity and the idea of meeting basic human needs underpin sustainable development, particularly in the distribution of environmental burdens and benefits amongst current and future generations, then the inclusion of sustainable development in the environmental right amounts to constitutional recognition of environmental justice.<sup>106</sup>

In addition, environmental justice, in the sense of the just distribution of environmental benefits and burdens in our society, and equal participation in environmental decision-making, is further encapsulated in the idea that ‘everyone’ is entitled to an environment not harmful to their health or well-being. I submit that, taken together with the rights to dignity (section 10) and equality (section 9) in the Constitution, and having regard to the values that underlie an open and democratic society based on dignity, equality and freedom which are to be promoted when the environmental right is interpreted (section 39(1)), the environmental right must be construed as including the concept of environmental justice.<sup>107</sup>

This position is supported by the many provisions in legislation enacted to give effect to section 24 of the Constitution giving explicit and implicit recognition to environmental justice. These include:

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<sup>105</sup> Field (note 46 above) at 417.

<sup>106</sup> Ibid.

<sup>107</sup> As Humby (note 8 above) at 12 points out, currently, the most utilised rights in the environmental justice movement are the rights to access to information and administrative justice enshrined in sections 32 and 33 of the Constitution and given effect to in the Promotion of Access to Information Act 2 of 2000 and the Promotion of Administrative Justice Act 3 of 2000 respectively. Although the successful use of these legal instruments represents an important shift in the administrative approach to environmental issues:

The problem with these interventions...is that they have not instigated a deep and thorough going change in the way in which developers, their consultants and the government interact with communities affected by environmental degradation.

See also Y Burns & M Kidd ‘Chapter 8: Administrative Law & Implementation of Environmental Law’ in HA Strydom and ND King (eds) *Fuggle & Rabie’s Environmental Management in South Africa* 2 ed (2009).

A further problem with these kinds of legal instruments is that they are aimed at evaluating the process in terms of which decisions are made, rather than the outcomes of those decisions, which detracts from fundamental questions about whether substantively just outcomes are being achieved (i.e. a ‘proceduralist’ approach). The reliance on process relief under sections 32 and 33 of the Constitution in environmental rights litigation falls to be criticised on the bases put forward by Danie Brand ‘The Proceduralisation of South African Socio-Economic Rights Jurisprudence, or “What are Socio-Economic Rights for?”’ in H Botha, AJ van der Walt & J van der Walt (eds) *Rights and Democracy in a Transformative Constitution* (2004) at 33, where he discusses the phenomenon of ‘proceduralisation’ of socio-economic rights.

- Section 1 of NEMA, which defines the ‘environment’ to include ‘the *surroundings within which humans exist* and that are made up of –
  - (i) the land, water and atmosphere of the earth;
  - (ii) micro-organisms, plants and animal life;
  - (iii) any part or combination of (i) and (ii) and the interrelationships among and between them; and
  - (iv) the physical, chemical, aesthetic and cultural properties and conditions of the foregoing that influence *human health and well-being*’.<sup>108</sup>

This broad definition of the environment creates the potential for the infusion of principles of social justice.<sup>109</sup>

- The ‘justice-oriented’ guiding principles in section 2 of NEMA, which are required to inform all actions of the state that may significantly affect the environment, and which explicitly require the pursuit of environmental justice.<sup>110</sup> Humby points out in relation to the ‘justice oriented’ NEMA principles that:

the most explicit of these held that “[e]nvironmental justice must be pursued so that adverse environmental impacts shall not be distributed in such a manner as to unfairly discriminate against any person, particularly vulnerable and disadvantaged persons” and that “[e]quitable access to environmental resources, benefits and services to meet basic human needs and ensure human well-being must be pursued ...”. A number of principles also emphasized the need for participation of all interested and affected parties in environmental governance.<sup>111</sup>

- The recognition in the National Water Act 36 of 1998 (NWA) ‘that while water is a natural resource that belongs to all people, the discriminatory laws and practices of the past have prevented equal access to water, and use of water resources’, such that redress is required.<sup>112</sup>
- The inclusion in the purpose of the NWA of the need to promote equitable access to water and redress past racial and gender discrimination, and the requirement that ‘[a]s public trustee of the

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<sup>108</sup> My emphasis.

<sup>109</sup> Dugard & Alcaro (note 6 above) at 31.

<sup>110</sup> See sections 2(1), 2(2), 2(3) and 2(4)(c), (d), (f) and (g) in particular. Humby (note 8 above) at 8.

<sup>111</sup> Ibid (footnotes omitted).

<sup>112</sup> Preamble.

nation's water resources',<sup>113</sup> the state 'must ensure that water is protected, used, developed, conserved, managed and controlled in a sustainable and equitable manner, for the benefit of all persons and in accordance with its constitutional mandate', so as 'to ensure that water is allocated equitably and used beneficially in the public interest, while promoting environmental values'.<sup>114</sup>

- The acknowledgement in the National Environmental Management: Waste Act 59 of 2008 (NEMWA) that 'waste management practices in many areas of the Republic are not conducive to a healthy environment and the impact of improper waste management practices are often borne disproportionately by the poor', such that redress is required.<sup>115</sup>
- The recognition in the National Environmental Management: Air Quality Act 39 of 2004 (NEMAQA) that 'the burden of health impacts associated with polluted ambient air falls most heavily on the poor' such that legislation is necessary to ensure the enhancement of the quality of ambient air, for the benefit of all people.<sup>116</sup>

These provisions are the legacy of the nascent environmental justice movement of the early 1990s and the governmental support for a politicised environmental discourse at the time, discussed in chapter 1 above.

If it is accepted that the environmental right recognises environmental justice in the manner described here, the right has the potential to reinforce the transformative aims of our Constitution, especially in socio-economic rights litigation concerning access to basic resources. This is so because the environmental right, like other socio-economic rights, is 'concerned with material dimensions of human welfare', and its recognition, like other socio-economic rights,

stems from an acknowledgement that without food, water, shelter, health care, education and social security, human beings cannot survive, live with dignity or develop to their full potential.<sup>117</sup>

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<sup>113</sup> Section 2(b) and (c).

<sup>114</sup> Section 3(1) and (2).

<sup>115</sup> Preamble.

<sup>116</sup> Preamble.

<sup>117</sup> Sandra Liebenberg 'The Interpretation of Socio-Economic Rights' in S Woolman et al (eds) *Constitutional Law of South Africa* 2 ed (2006) 33–1. See also Du Plessis (note 8 above) at 281.

It is, however, only if lawyers and courts begin to see the links between environmental and social justice that the environmental right can begin to play a more meaningful transformative role in socio-economic rights litigation.

### Undermining environmental justice

Regrettably, in spite of the legal recognition afforded environmental justice under the environmental right, in practice, sustainable development and human rights discourse have emerged as competing with, and in some instances drowning out, environmental justice. This compartmentalisation of environmental issues from social and economic issues can be attributed (at least in part) to the failures of the environmental justice movement discussed in chapter 1. In this part I consider the ways in which sustainable development and human rights discourses have undermined the potential of environmental justice in socio-economic rights cases.

### Sustainable development discourse

Although, as I have argued above, the notion of sustainable development ought to be the basis for recognising environmental justice, it is sometimes invoked as a basis upon which to deprive people of their basic needs. This approach is premised on the (flawed) basis that in order to preserve natural resources such as water for future generations it might sometimes be necessary to compromise the health and well-being of vulnerable, impoverished communities.<sup>118</sup> For instance, Kotze argues that:

Where socio-economic rights adjudication is concerned, when it involves finite natural resources, such as water, which are set to become severely limited in future, a conservative approach might very well be warranted with respect to the satisfaction of immediate needs. Sustainability implies a conservative use of resources and while it also alludes to the promotion of socio-economic interests and immediate basic needs, this can be done only in so far as these resources will be available to satisfy future socio-economic demands.<sup>119</sup>

Whilst I accept that sustainability entails that finite natural resources must be managed and preserved to meet present and future needs, I reject the idea that meeting *basic* needs ought to be compromised in the process.<sup>120</sup>

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<sup>118</sup> Stewart & Horsten (note 57 above) at 503 advocate a more context 'sensitive approach' to sustainability that does not 'fundamentally compromise the health and well-being of a vulnerable community'.

<sup>119</sup> Kotzé (note 57 above).

<sup>120</sup> Thus I endorse the views of Stewart & Horsten (note 57 above) at 503.

Moreover, I submit that the real threat to the sustainability of our water supply is in any event not the provision of a minimum quantity of *free water to meet basic human needs*. This is highlighted by Cock's poignant observation that:

Domestic [water] consumption makes up about 12% of South Africa's water usage. More than half of this goes to the largely white, affluent suburbs with their gardens, swimming pools and golf courses...The basic allocation of 6,000 litres of free water monthly works out at 25 litres per person per day in an 8 person household, enough to flush the toilet twice. The amount should be compared to the average household consumption of 45 – 60,000 litres in the predominantly white suburbs.<sup>121</sup>

Mining and agriculture, on the other hand, could be regarded as one of the key threats to the sustainability of our water supply, and yet it continues unabated.<sup>122</sup> As Lumby points out:

The uncontrolled use of water by the mining industry has led to the depletion of ground water supplies and to the drying up of wetland systems, while mining has also contributed significantly to the pollution of both surface- and ground-water resources.<sup>123</sup>

By invoking sustainability as a basis upon which to restrict access to basic needs, issues of inequitable distribution, such as those highlighted above, are ignored. Rather, 'the definition of sustainability needs to be sharpened by an awareness of the distribution of negative environmental impacts [and benefits] and the need for a more nuanced reading of environmental equity'.<sup>124</sup>

### Human rights discourse

The environmental right is still too often pitted against (instead of reinforcing) other socio-economic rights.<sup>125</sup> Environmentalism is treated as a white middle-class issue, unrelated to questions of social welfare and justice.<sup>126</sup>

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<sup>121</sup> Cock (note 56 above) at 49.

<sup>122</sup> Anthony Lumby 'Government and sustainable development in South Africa. The environmental legislative framework in historical context' (2005) 20(1) *SAJEH* 65.

<sup>123</sup> *Ibid* at 70–1.

<sup>124</sup> Stacey (note 5 above) at 63.

<sup>125</sup> Humby (note 8 above). By way of example, in *Minister of Public Works and others v Kyalami Ridge Environmental Association and Another* 2001 (7) BCLR 652 (CC) the right to housing was pitted against the right to an environment. As Dugard & Alcaro (note 6 above) at 16 point out, 'this bifurcated, zero-sum gain approach is perhaps to be expected when environmental rights are deployed in defence of property values, as was the case in *Kyalami*...this is also so when environmental movements and even environmental justice movements litigate on environmental issues'.

<sup>126</sup> Rachel Wynberg & David Fig 'Chapter 13: Realising environmental rights: Civil action, leverage rights and litigation' forthcoming book chapter in Langford & Cousins et al (eds) *Symbols or substance: The role and impact of socio-economic rights strategies in South Africa* (2013) at 2.

The paradigm of environmental rights discourse frequently entails considering the effects of human life as something separate from, rather than a part of, a 'natural environment'.<sup>127</sup> So, in considering the relationship between the right to an environment and the right to housing, van der Linde and Basson postulate that the provision of emergency housing following a natural disaster could have adverse affects on the natural environment, without mentioning the environmental implications for the people rendered homeless by the disaster.<sup>128</sup>

Humby paints a dismal picture of the hopeful and 'synergetic' relationship between human rights discourse and the struggle for environmental justice of the 1990s, regressing to one of 'disappointment' and 'disjuncture' at present.<sup>129</sup> By analysing the grassroots struggle of Tudor Shaft Informal Settlement located at a uraniferous tailings dam on the Witwatersrand goldfields, Humby demonstrates that due to the desperate needs of communities like those living in the Tudor Shaft Informal Settlement, their focus is on access to socio-economic rights, to the exclusion of the environmental right, when 'what they need is *both*'.<sup>130</sup> She states:

Although the environmental justice literature in South Africa provides an established basis to view environmental justice issues as inclusive of such basic needs as housing and sanitation, there is still a prevailing tendency to parse the two apart, and the Constitution's distinction between the right to "environment" and the socioeconomic rights of access to housing, water and sanitation in fact encourages this. What the residents of Tudor Shaft desperately need is both: Adequate housing, sanitation and water in an environment that is not harmful to health or well-being and yet since 1994 the promise of housing has been the basis for their relocation from one damned site to the next on the Witwatersrand mining wasteland. There is a danger, then, in claiming socioeconomic rights without simultaneously claiming the right to environment and *vice versa*.<sup>131</sup>

Humby's analysis of the Tudor Shaft Informal Settlement demonstrates that quite apart from fostering environmental justice, an over-reliance and focus on socio-economic rights to housing, water, health care, to the exclusion of the

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<sup>127</sup> Morné van der Linde & Ernst Basson 'Environment' in S Woolman et al (eds) *Constitutional Law of South Africa* 2 ed (2006) at 50–44.

<sup>128</sup> *Ibid.*

<sup>129</sup> Humby (note 8 above) at 38.

<sup>130</sup> *Ibid* at 36.

<sup>131</sup> *Ibid.*



environmental right, in circumstances where environmental injustices are at stake, has detracted from the environmental justice movement.<sup>132</sup>

The challenges posed by Humby are more glaring when viewed in the context of accelerated global 'ecological breakdown' resulting in an increased scarcity, and the commodification of environmental resources.<sup>133</sup> The poor will invariably become even more marginalised, whilst 'the dominant classes will survive living in protected enclaves in what Foster calls a fortress world'.<sup>134</sup> As Cock argues, a fortress world 'already exists in South Africa – now [one of] the most unequal societ[ies] in the world – as the powerful and the privileged move into the growing number of gated communities and golf estates'.<sup>135</sup>

I now turn, in chapter 3, to consider how the environmental right, and specifically environmental justice, could have come to the assistance of the poor in *Mazibuko*. I do so with the aim of convincing socio-economic rights lawyers that going forward the right to an environment, and specifically environmental justice, could be invoked to respond to some of the criticisms levelled at *Mazibuko*, and enhance socio-economic rights litigation.

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Ibid.

133

Cock (note 56 above) at 47.

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Ibid, referring to John Bellamy Foster 'The Ecological Revolution' *New York: Monthly Review Press* (2009) at 260.

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Ibid.

### Chapter 3: Analysis of *Mazibuko*

In this chapter, I begin by summarising the facts of *Mazibuko*. In the analysis that follows, my point of departure is that *Mazibuko* fails to fulfil the Constitution's transformative mandate.<sup>136</sup> I argue that this is so because the court 'technicised', 'naturalised' and therefore, 'depoliticised', the applicants' challenge to the reasonableness of the government's policy,<sup>137</sup> and so endorsed the 'commodification' of water,<sup>138</sup> and a 'neo-liberal paradigm' towards access to basic water.<sup>139</sup> Thereafter, I seek to demonstrate the difference environmental justice could have made.

#### Inequitable access to water in Phiri, Soweto

In *Mazibuko* residents of Phiri in Soweto had launched an application to challenge the constitutionality of the City of Johannesburg's Free Basic Water Policy, including the indigent registration policy. This policy was the product of a public-private partnership with multi-national corporations to install and manage pre-paid water meters, aimed at making a profit.<sup>140</sup>

Under the policy the City was required to supply only 6000 litres of free water per month to every accountholder. The policy also permitted the installation of pre-paid water meters on the applicants' properties, which meant that their water supply would be cut-off once they had exhausted their free water allocation, and reconnected only on payment for more water.<sup>141</sup> The indigent registration policy, available to households with a combined income of less than twice the highest national government social grant plus R1, entitled qualifying indigent people who registered as such to an additional 4000 litres of free water monthly.<sup>142</sup> The policy replaced the deemed consumption system implemented during apartheid in terms of which the City charged people for water on the basis that they were deemed to consume 20 kilolitres of water per household per month.<sup>143</sup>

The applicants claimed that the policy breached their rights to access to basic water, administrative justice, and equality. In its widely criticised judgment,

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<sup>136</sup> See note 18 above for various works that critique *Mazibuko*, broadly speaking, from the same perspective.

<sup>137</sup> Brand (note 1 above) at 67–8.

<sup>138</sup> As set out in note 21, the term 'commodification' is to be understood as 'the transformation of all social relations to economic relations, subsumed by the logic of the market and reduced to the crude calculus of profit'.

<sup>139</sup> O'Connell (note 11 above) at 551 and De Vos (note 18 above).

<sup>140</sup> Cock (note 3 above) at 92.

<sup>141</sup> Para 6.

<sup>142</sup> Para 81.

<sup>143</sup> Para 11.

the Constitutional Court dismissed these challenges, and found that the policy fell within the bounds of reasonableness as required by section 27 of the Constitution and the Water Services Act 108 of 1997, and that the installation of pre-paid water meters in Phiri was lawful.<sup>144</sup>

### A critique of the paradigm in *Mazibuko*

In the analysis of *Mazibuko* that follows, I seek to demonstrate that the court validated ‘neo-liberal reforms, which are arguably inimical to the protection of socio-economic rights’.<sup>145</sup> I argue first that the court did so by ‘technicising’ the issue of access to basic water, and secondly by ‘personalising’ the applicants’ status of poverty.<sup>146</sup> I look thirdly at the court’s ‘proceduralist’<sup>147</sup> ‘retreat from substantive reasonableness’.<sup>148</sup> I then argue that through its technicisation, personalisation and proceduralisation, the court ‘depoliticised’, and in so doing disguised, what was in truth an inherently political judgment – one in which water was regarded as a commodity within a ‘neo-liberal paradigm’.<sup>149</sup> As such, the court was able to locate questions of the cost of water and cost recovery at the forefront of its mind, to the exclusion of questions of equitable distribution.<sup>150</sup>

Significantly, the right to an environment was not explicitly mentioned, nor did environmental justice feature in the court’s reasoning.<sup>151</sup> Though the court

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<sup>144</sup> Para 9.

<sup>145</sup> O’Connell (note 11 above) at 550.

<sup>146</sup> Brand (note 1 above) at 67 & 64 respectively.

<sup>147</sup> Brand (note 107 above) at 33.

<sup>148</sup> Wesson (note 18 above).

<sup>149</sup> O’Connell (note 11 above) at 551.

<sup>150</sup> See for example, para 141. It is not my contention that cost recovery ought not to weigh into the reasonableness of government policies in relation to access to basic resources *at all*, merely that they ought not to weigh so heavily that questions of equity in relation to a policy that reinforces unjust distribution of a natural resource are overlooked. Considering questions of environmental equity could, for instance, entail a policy of greater cross-subsidisation by wealthy households who engage in hedonistic and unsustainable water consumption, to enable a free basic water allocation that did not leave the most vulnerable in our society with insufficient water to survive. The court rejected this out of hand on the basis that ‘[s]imply increasing the allocation of free water across the board would benefit wealthier households as well as smaller households at significant cost *without necessarily meeting the needs of the poor*’. It is difficult to imagine why more free water would not be of greater assistance to the poor than less free water. See further McDonald & Ruiters (note 20 above) at 22–3.

<sup>151</sup> I do not deny that issues of inequality, and inequitable access to water were highlighted in *Mazibuko*. For instance, most notably at the outset of the judgment (para 2) the court pointed out that:

Although rain falls everywhere, access to water has long been grossly unequal. This inequality is evident in South Africa. While piped water is plentifully available to mines, industries, some large farms and wealthy families, millions of people, especially women, spend hours laboriously collecting their daily supply of water from streams, pools and distant taps.... [D]espite the significant improvement in the first fifteen years of democratic government, deep inequality

mentioned the vital role of water in our lives,<sup>152</sup> the court failed to appreciate that a policy perpetuating the unjust distribution of water services in the context of past racist policies was fundamentally (environmentally) unjust.<sup>153</sup> In the final part of this chapter, I argue that taking into account environmental justice could have shifted the court's focus away from questions of cost recovery towards the plight of the poor.

### Technicisation

In its assessment of the reasonableness of the policy, the court described the plight of the applicants in terms that were 'technical rather than political in nature...implicitly legitimis[ing]...liberal capitalist views of impoverishment that insist that impoverishment is best addressed through the unregulated market': an approach which Brand describes as 'technicisation'.<sup>154</sup> The court did so, first, by casting the applicants in the role of consumers, in respect of whom the City was required to provide an efficient and economically sustainable solution to the technical water supply problem in Phiri.<sup>155</sup> The City, on the other hand, was cast in the role of technician, facing a 'dilemma' that it was required to solve using 'its administrative experience and information gained from research'.<sup>156</sup> The applicants' impoverishment was thus 'bluntly depicted as devoid of politics, a [technical] problem [to] be solved without the need to engage in political questions of redistribution and social justice'.<sup>157</sup>

Secondly, the issue of water supply was 'bracketed' as technically complex, such that 'non-expert participants in the discourse on poverty' were unable to engage in it.<sup>158</sup> In this regard, the court found that:

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remains and for many the task of obtaining sufficient water for their families remains a tiring daily burden. The achievement of equality, one of the founding values of our Constitution, will not be accomplished while water is abundantly available to the wealthy, but not the poor.

However, this historical context failed to translate into a finding by the court that a policy that reinforced inequitable distribution of water was unconstitutional. I seek to demonstrate that an environmental justice paradigm could have influenced the court's reasoning in this regard.

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See note 15 above.

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The court found that it was reasonable for the City to provide 6 kilolitres of free water 'to rich and poor alike' without touching on questions of equitable distribution of water or the right to an environment not harmful to health or wellbeing (para 83).

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Brand (note 1 above) at iii.

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See for example, para 139.

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Para 102.

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Brand (note 1 above) at 67. See for instance *Mazibuko* para 99, where the court characterises one of the government's witnesses as having had to 'grapple' with difficult questions concerning a universal as opposed to means-test approach to the provision of basic services.

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*Ibid.*

ordinarily it is institutionally inappropriate for a court to determine precisely what the achievement of any particular social and economic right entails and what steps government should take to ensure the progressive realisation of the right. *This is a matter, in the first place, for the legislature and executive, the institutions of government best placed to investigate social conditions in the light of available budgets and to determine what targets are achievable in relation to social and economic rights.*<sup>159</sup>

Thirdly, the court's technical approach justified the repositioning of the applicants as 'passive recipients' of free basic water, to be excluded from participating in how to solve the water crisis.<sup>160</sup> For instance, the court described the nature of the consultations that took place with the applicants as involving 'explaining' the pre-paid water meter system to the applicants, and 'informing' the applicants about it.<sup>161</sup> It is not suggested that the City was required to engage with the applicants 'as active participants in the process of interpretation of their needs, engaged in political action'.<sup>162</sup> Thus, the applicants' 'political engagement' on what the impacts of the City's Policy would be and whether there were alternatives was 'negated'.<sup>163</sup>

### Personalisation

In addition to 'technicising' the applicants' complaints in relation to the City's Policy, the court placed much of the blame for the applicants' deprivation and inability to access sufficient water on their own 'abnormality', rather than 'the social, political and economic forces that shape it'.<sup>164</sup> The court implicitly treated the applicants as separate and somehow morally inferior to those who are able to pay for water.<sup>165</sup> Brand describes this approach as 'personalisation': attributing personal agency or responsibility to the poor for their conditions of poverty.<sup>166</sup>

The court engaged in personalisation first by characterising the issues in *Mazibuko* as about the provision of free water to 'accountholders'.<sup>167</sup> As Lucy Williams points out, the provision of free basic water to 'accountholders' was

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<sup>159</sup> Para 61 (my emphasis). See also para 112 where the installation of pre-paid meters is described as 'an expensive and technically complex exercise'.

<sup>160</sup> Brand (note 1 above) at 66–7.

<sup>161</sup> Para 130–1.

<sup>162</sup> Brand (note 1 above) at 67.

<sup>163</sup> Ibid.

<sup>164</sup> Brand (note 1 above) at 64.

<sup>165</sup> Ibid.

<sup>166</sup> Ibid.

<sup>167</sup> Para 6.

based on the assumptions that the Western-style, nuclear family prevails throughout South Africa, and that each stand services a household. These assumptions are inconsistent with variations in family size and form in non-white South Africa, and with the fact that stands commonly service multiple households in townships.<sup>168</sup>

Although it acknowledged that many stands (including that of Mrs Mazibuko, one of the applicants, which was occupied by 20 residents) were occupied by a number of households, usually with only one an accountholder, the court did not believe that the City ought to be compelled to provide for non-accountholders in its Policy.<sup>169</sup> By accepting that the City's free basic water policy need not cater for backyard shack dwellers, the court ascribed to these people the status of 'undeserving poor', whose plight 'can only be explained by [their] personal degeneracy and deviance'.<sup>170</sup> The implication is that these people are to blame for their position, and the City need not come to their assistance.<sup>171</sup>

The second respect in which the court asserted the moral weakness of the poor was by characterising their inability to pay for water as 'a breach of their obligations',<sup>172</sup> and describing the applicants as 'defaulters'.<sup>173</sup>

The court did so first in the context of evaluating whether or not the City's decision to replace the deemed consumption system with a pre-paid system amounted to a negative violation of the duty to respect the right of access to sufficient water.<sup>174</sup>

Indigent persons were referred to as potential 'defaulters' in the court's assessment of the impact of pre-paid meters so as to determine whether they

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<sup>168</sup> Williams (note 18 above) at 244.

<sup>169</sup> When it considered the plight of backyard shack-dwellers (in paras 88–9), the court found itself unable to come to their assistance, on the curious basis that doing so would be 'expensive and inequitable, for it would disproportionately benefiting stands with fewer residents' (i.e. without vulnerable backyard shack-dwellers). This finding seems to be completely opposed to the court's confirmation in para 76 that in order to withstand constitutional scrutiny, a reasonable government policy aimed at realising a socio-economic right is one that does not ignore the needs of the most vulnerable (such as people in the position of backyard shack-dwellers or whose poverty necessitates that they accommodate backyard shack-dwellers on their stands in order to survive). This approach is also inconsistent with the court's caution in the case of *Fourie v Minister of Home Affairs* 2006 (1) SA 524 (CC) 'against an understanding of equality that would involve creating "equal disadvantage to all"', as pointed out by Bilchitz (note 9 above) at 603.

<sup>170</sup> Brand (note 1 above) at 65.

<sup>171</sup> Ibid.

<sup>172</sup> Para 137.

<sup>173</sup> Para 153.

<sup>174</sup> Para 135.

were unfairly discriminatory towards vulnerable people in our society.<sup>175</sup> In this assessment the court identified as an *advantage* of the pre-paid system that indigent people would not have to worry about being listed with the credit bureau as ‘defaulters’.<sup>176</sup> What the court overlooked was that the alternative to this ‘worrying measure’<sup>177</sup> for those unable to afford to top up their free basic water allocation – going without any water – is far worse.

As Cock points out, pre-paid meters have resulted in increased illness, and a number of other social problems, such as theft of water, the erosion of social cohesion and diminishing standards of hygiene.<sup>178</sup> Moreover, the court’s description of the applicants as defaulters in both contexts positions them as an abnormality, whose unsustainable economic behaviour is their own fault, and so unrelated to any underlying systemic causes.<sup>179</sup> The court’s approach ignores that the lived reality of the applicants is that due to their poverty they simply cannot afford to pay for water, and will be left without water once their free basic allocation has run out. It is by obscuring the systemic racial and class discrimination of the past to which the applicants were subjected, and the continuation and, in some cases, deepening of structural inequality in post-apartheid South Africa that the court is able to find that:

The high rate of non-payment...cannot be relevant to determining whether the supply of water under the new [pre-paid] system is retrogressive or not.<sup>180</sup>

What these examples of personalisation underscore is an acceptance by the court that the City ought not to be expected to set standards and formulate policy on the basis of ‘irregular’ or ‘unlawful’ conduct by poor people – including informally occupying backyards, and failing to pay for their water on time – even if such conduct is necessitated by the lived realities of the poor. In doing so the court posited a distorted picture in which those lived realities of the poor are *not* the norm. By embracing this distorted picture, the court asserted the abnormality of the applicants in *Mazibuko* as the cause of their deprivation, distancing the City’s neo-liberal political stance to free basic water

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<sup>175</sup> Para 153.

<sup>176</sup> Ibid.

<sup>177</sup> Ibid.

<sup>178</sup> Cock (note 3 above) at 94–6.

<sup>179</sup> Brand (note 1 above) at 67.

<sup>180</sup> Para 139. As De Vos (note 18 above) argues:

The judgment seems to be based on an assumption that people do not pay for water because they are bad or dishonest people: they want something for free when they need to (and can) pay for the water. It fails to take account of the fact that even if we all wanted to be good little capitalists like the government wants us to be, we cannot all afford the basic necessities that would sustain our lives.

from the lived realities of the applicants, and the systemic, political, causes thereof.

### Proceduralisation

The third way in which *Mazibuko* sought to depoliticise its determination in respect of the City's free basic water allocation was through its proceduralisation of the issues, involving 'a primarily process-oriented approach to reasonableness review' in respect of the challenges to the City's free basic water policy. As Brand points out, the problem with such an approach is that:

The target evil at which it is aimed could be read to be not deprivation and hardship and the state's failure to alleviate it, but arbitrary, inexplicable, unintelligible exclusionary government action.<sup>181</sup>

Through a highly deferential approach to the Policy,<sup>182</sup> the court in *Mazibuko* found nothing wrong with the government's action, such that there was no 'target evil' under scrutiny.<sup>183</sup> Simultaneously the court overlooked evidence of the applicants' deprivation and hardship. The court could do so because these lived realities of the poor were not, pursuant to the court's proceduralist strategy, the 'target evil' under scrutiny.<sup>184</sup>

Adopting a highly deferential approach, the court refused to place a 'burden of justification on the State...to show that its policy choices and prioritisation of resources [was] consistent with its constitutional commitments in respect of the realisation of socio-economic rights'.<sup>185</sup> From this vantage point, the court's role was 'merely to establish abstract standards of reasonable governance' against which to evaluate the government's policy, and not to set normative standards for the provision of water through the kind of substantive reasonableness review in which it had engaged in earlier jurisprudence.<sup>186</sup>

This proceduralist stance is depoliticising because the court

depicts its role in enforcing socio-economic rights as regulatory only – it must set down the limits within which the real actors (the state, market forces, individuals) may move, but it may not tell them how and where to move within those limits. The central theme in this image of itself is the Court's impartiality,

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<sup>181</sup> Brand (note 107 above) at 36.

<sup>182</sup> Wesson (note 18 above) at 405 describes the court's approach as unjustifiably deferential.

<sup>183</sup> Brand (note 107 above) at 36

<sup>184</sup> Ibid.

<sup>185</sup> Liebenberg (note 2 above) at 469.

<sup>186</sup> Ibid at 468–470, where she describes the approach adopted in *Mazibuko* as a 'retreat' from the more 'robust' reasonable review that was undertaken *Grootboom*.



its steadfast refusal to adopt a particular political point of view, or a particular political philosophy.<sup>187</sup>

### Commodification

In *Mazibuko* the depoliticising strategies of technicisation, personalisation and proceduralisation enabled the court to uphold a neo-liberal capitalist policy in which water is regarded primarily as a commodity. In this way, the court permitted government ‘to operate freely and without restriction to generate wealth’ from the sale of water.<sup>188</sup> By treating water as a commodity, the court was able to focus on the importance of the cost of water and the need to recover those costs. There are at least three significant respects in which the commodification of water influenced the court’s finding in *Mazibuko*.

First, the court endorsed the commodification of water by characterising the applicants as consumers with a duty to pay for water as a commodity, rather than rights-holders entitled to receive water as ‘a commonly held resource, to be managed by communities and states for the public good’.<sup>189</sup> Secondly, the court supported the City’s policy on the grounds of its economic sustainability, something that the court prioritised ahead of the needs of the most vulnerable in society, who would be left without water once their free basic water allocation had run out.<sup>190</sup> Thirdly, by finding that a pre-paid water system was a more favourable policy than the deemed consumption policy, since pre-paid customers would pay less than those with credit meters for additional water to top up their free basic water allowance,<sup>191</sup> the court left the poor to the mercy of ‘neutral’ market forces.<sup>192</sup> The court proceeded on the assumption that poor people operate within a market that provides an equal opportunity to all for self-advancement,<sup>193</sup> whereas in truth, under a pre-paid system, the most vulnerable in our society are unable to top up their free basic water allowance, even at the lower rate afforded to them, and must go without.<sup>194</sup>

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<sup>187</sup> Brand (note 1 above) at 187.

<sup>188</sup> Ibid at 177.

<sup>189</sup> See paras 79, 83, 139, 140, 141, 152, 153 & 155. Cock (note 3 above) at 88.

<sup>190</sup> Paras 111, 126 & 135. That the economic sustainability of the system was at issue is plain from the context of the text.

<sup>191</sup> Para 152.

<sup>192</sup> Brand (note 1 above) at 178.

<sup>193</sup> Ibid.

<sup>194</sup> As McDonald & Ruiters (note 20 above) at 22–3 warned prior to *Mazibuko*, the treatment of water as a commodity in this way has ‘profound’ anti-transformative effects on water services, in that:

the social rationale for its production is submerged by a focus on exchange value, with “public good” service ethics and a commitment to professional values overrun by the necessity of turning a profit/surplus. Second, there is a rationalization of service delivery along industrial lines – the “Taylorization” of

### An alternative paradigm – incorporating environmental justice

The court's endorsement of the commodification of water runs counter to the strong redistributive and justice-oriented slant of South Africa's post-liberation water law, intended to give effect to environmental justice as required by our environmental right. In this regard, the NWA abolished riparian rights in South Africa.<sup>195</sup> In place of riparian rights the NWA 'recognises that water is a scarce and unevenly distributed [natural] resource, belonging to all people'.<sup>196</sup> The NWA also locates the government as the 'public trustee' over our water resources to ensure their equitable and sustainable allocation and use in the public interest.<sup>197</sup> The Water Services Act 108 of 1997, in giving effect to the right to access to water, draws a link in its preamble between water and 'an environment not harmful to health or wellbeing' and the supply of water in an 'equitable and (ecologically) sustainable' manner.<sup>198</sup>

The court's approach is also inconsistent with the NEMA principles, applicable throughout the country in respect of the conduct of organs of state with a 'significant impact on the environment'.<sup>199</sup> As I have already pointed out, the environment includes 'the surroundings within which humans exist and that are made up of...the physical, chemical, aesthetic and cultural properties and conditions of the foregoing that influence human health and well-being'.<sup>200</sup> As such, a policy with the impact of depriving people of access to water, with devastating impacts on their living conditions, ought to implicate the NEMA

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services – whereby service activities are cut into increasingly smaller, stand-alone functions, with less skilled tasks being conducted by less skilled and cheaper workers and more skilled tasks being increasingly automated.... Here we see corporatization as the logic of commodification par excellence: the compartmentalization of all hitherto integrated service functions into stand-alone, cost recovery units; the homogenization of measurement and reward structures; and the increasingly narrow focus on a financial bottom line.

<sup>195</sup> DD Tewari 'A detailed analysis of evolution of water rights in South Africa: An account of three and a half centuries from 1652 AD to present' (2009) 35(5) *Water SA* 693 describes how through the doctrine of riparian rights, access to water was linked to ownership of land, which was inequitable towards landless black South Africans.

<sup>196</sup> Ibid at 704.

<sup>197</sup> S 3 of the NWA. As Kidd (note 46 above) at 69 points out, the NWA is a 'ground breaking' piece of legislation intended to bring about reform in our water law 'to address the question of equitable access and to provide for the government to exercise management control over water resources'. See further Sean Flynn & Danwood Mzikenge Chirwa 'The constitutional implications of commercializing water in South Africa' in David A. McDonald & Greg Ruiters (eds) *The Age of Commodity: Water Privatization in Southern Africa* (2005) at 66, where the authors discuss point out that 'the achievement of social equity' is a factor to be taken into account in setting differentiated charges for water in terms of s 5(1) of the NWA.

<sup>198</sup> The Constitutional Court was alive to this provision of the Water Services Act (see para 3 footnote 1), but as I argue below, its focus was on economic sustainability rather than equity.

<sup>199</sup> Section 2(1) of NEMA.

<sup>200</sup> Section 1 of NEMA.

principles.<sup>201</sup> Relevant principles in the assessment of the City's free basic water policy would include that:

- 'Environmental justice must be pursued so that adverse environmental impacts shall not be distributed in such a manner as to unfairly discriminate against any person, particularly vulnerable and disadvantaged persons';<sup>202</sup>
- 'Equitable access to environmental resources, benefits and services to meet basic human needs and ensure human well-being must be pursued and special measures may be taken to ensure access thereto by categories of persons disadvantaged by unfair discrimination';<sup>203</sup>
- 'The participation of all interested and affected parties in environmental governance must be promoted, and all people must have the opportunity to develop the understanding, skills and capacity necessary for achieving equitable and effective participation, and participation by vulnerable and disadvantaged persons must be ensured';<sup>204</sup> and
- 'The environment is held in public trust for the people, the beneficial use of environmental resources must serve the public interest and the environment must be protected as the people's common heritage'.<sup>205</sup>

Through a 'neo-liberal paradigm' in which water was viewed purely as a commodity, the redistributive and justice-oriented paradigm of the water and environmental law described above – and with it the transformative mandate of our Constitution – were forgotten, both by the City and the Constitutional Court in *Mazibuko*.<sup>206</sup>

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<sup>201</sup> Cock (note 3 above) at 95–6, paints a vivid picture of some of the social and environmental impacts flowing from government's pre-paid water policy, with its aim of ensuring economic sustainability in relation to the supply of water when she states that:  
A 2003 research report by the Coalition Against Water Privatisation, which covered 192 households, demonstrated [the devastating health and social] impacts. Hygiene levels have been negatively affected in the households surveyed. A large proportion, 66 per cent, said that they bath less; 67 per cent said they wash dishes less; 57 per cent said they drink less and 66 per cent said they clean less. Nutrition is affected as people cannot afford to water vegetable gardens. The introduction of pre-paid meters has exacerbated divisions and generated social tensions in the household, as well as in the community. Relations of trust and reciprocity among neighbours have been affected. A large number (62 per cent of informants) said that problems with water increased domestic violence and 60 per cent said pre-paid increased work for women.

See also Kidd (note 46 above) at 39–40.

<sup>202</sup> Section 2(4)(c) of NEMA.

<sup>203</sup> Section 2(4)(d) of NEMA.

<sup>204</sup> Section 2(4)(f) of NEMA.

<sup>205</sup> Section 2(4)(o) of NEMA.

<sup>206</sup> O'Connell (note 11 above) at 551.

The invocation of environmental justice (made possible by recognising that environmental, social and economic issues are intrinsically linked, implicating the environmental right under section 24 of the Constitution) could challenge this neo-liberal paradigm, which sees environmental resources purely as commodities to be bought and sold. Indeed, once the environmental right is construed as entrenching the redistributive paradigm embodied by environmental justice, the links between environmental, social and economic issues come into focus, and devastating environmental and social impacts, which are the lived realities of the poor, cannot be as readily side-lined or ignored.<sup>207</sup>

From this perspective it also becomes apparent that the City's free basic water policy is a violation of the right to an environment not harmful to health and well-being, a right which requires the promotion of equitable access to environmental resources in response to the unjust distribution of past discriminatory practices.<sup>208</sup>

Had the environmental right been engaged in *Mazibuko* in the manner described above, it would have raised the question of whether the City's free basic water policy gave effect to environmental justice (in the sense of the just distribution of water as an environmental benefit), and served to counter the technicisation, personalisation and proceduralisation apparent in the court's reasoning.

First, by requiring participation and engagement in order to achieve just environmental decision-making, environmental justice promotes engagement with the poor, not merely as passive recipients of goods and services, but as active participants, whose environment is at stake.<sup>209</sup> Secondly, environmental justice recognises the systemic causes of poverty – race and class discrimination – and the unjust distribution of environmental benefits and burdens that flow from them. Thus, it militates against the personalisation poverty in a way that suggests that the poor are to blame for their desperate situation. Thirdly, with its redistributive paradigm, aimed at alleviating the impacts of unjust environmental decision-making, environmental justice has the capacity to encourage courts to adopt more rigorous substantive scrutiny

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<sup>207</sup> See note 201 above.

<sup>208</sup> As Du Plessis (note 8 above) at 291 argues, courts engaged in the enforcement of socio-economic rights:

ought to be sensitive towards and recognize, in the process of constitutional interpretation, the possible connection between a certain set of facts, issues relating to poverty, and the nature of the protection afforded by s 24...especially when questions of health, well-being and sustainable development are involved.

<sup>209</sup> This is the kind of participation envisaged by section 2(4)(f) of NEMA.

of government policies so as to overcome environmental injustices. It requires more than the compliance of government policies with good governance standards<sup>210</sup> because it demands the equitable distribution of environmental resources such as water.

Most significantly, environmental justice would entail seeing water not as a commodity to be regulated by 'neutral' market forces, but as an environmental good held in public trust for the people, to be distributed equitably in accordance with South Africa's reformed water and environmental laws.

In this chapter I have highlighted some of the flaws of *Mazibuko*, which rendered it an anti-transformative decision. I have demonstrated that the court depoliticised the issues surrounding the City's free basic water policy, and its devastating impacts on the poor, and consequently endorsed a neo-liberal paradigm in respect of the supply of water. Finally, I have suggested some of the ways in which an environmental justice paradigm could have challenged the neo-liberal paradigm endorsed in *Mazibuko*, so as to enable the scrutiny of the City's free basic water policy in accordance with the Constitution's transformative mandate. In my final chapter, I conclude by suggesting the way forward for environmental justice in South Africa's socio-economic rights litigation.

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<sup>210</sup> Good governance standards would include, for example, accountability, consistency and transparency, which though valuable, do not, on their own, lead to transformative decision-making.

## Conclusion – A way forward?

In this dissertation, with the aim of seeking to establish a role for environmental justice in socio-economic rights litigation, I began by seeking to establish the ‘struggle credentials’ of environmental justice, by tracing its origins as a political concept. So, in chapter 1, I explained that the concept of environmental justice served to re-politicise environmental discourse in early post-apartheid South Africa in the realisation that overcoming oppression requires significant social and economic transformation, not just formal equality or a right to vote.<sup>211</sup> At this time, a broadening of the definition of ‘the environment’<sup>212</sup> to include the working and living conditions of black South Africans meant that ‘environmental initiatives were akin to other post-apartheid, democratic objectives’ to the extent that they were aimed at achieving social justice and equality for all South Africans.<sup>213</sup> However, I pointed out that the environmental justice movement of the early 1990s faced a number of challenges, and failed to live up to its full potential. Notwithstanding these challenges, I demonstrated in chapter 2 that environmental justice is a component of our constitutional environmental right and the main environmental laws, and it is available to be utilised as a transformative tool in socio-economic rights litigation. I sought to establish that environmental justice could play a greater role in our socio-economic rights litigation if only a compartmentalised approach to environmental and social justice issues, and sustainable development and human rights discourse, were not drowning out its potential. In chapter 3, through my analysis of *Mazibuko* I set out to show how using environmental justice as a transformative tool could challenge the depoliticising strategies that currently pervade socio-economic rights litigation, and the endorsement of neo-liberal capitalism that they entail.<sup>214</sup>

Moving forward, if environmental justice is to be given a role in socio-economic rights litigation, the first step is for public interest lawyers and courts to recognise the intrinsic links between environmental, economic and social

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<sup>211</sup> McDonald (note 34 above) at 27–8.

<sup>212</sup> See note 3 above.

<sup>213</sup> McDonald (note 34 above) at 2.

<sup>214</sup> See Brand (note 1 above) who discusses, in depth, how these depoliticising strategies were invoked in a number of socio-economic rights cases, including *Grootboom, Minister of Health v Treatment Action Campaign* 2002 (5) SA 721 (CC), *Soobramoney v Minister of Health, KwaZulu-Natal* 1998 (1) SA 765 (CC), *Occupiers of 51 Olivia Road Berea Township and 197 Main Street Johannesburg v City of Johannesburg* 2008 (3) SA 208 (CC) and *President of the Republic of South Africa v Modderklip Boerdery (Pty) Ltd (Agri SA & others, amici curiae)* 2005 (5) SA 3 (CC).

issues.<sup>215</sup> By doing so, the environmental right, and environmental justice will be implicated in socio-economic rights litigation.

Having taken this first step, public interest lawyers and the courts might see the transformative potential of environmental justice as a component of the environmental right, and invoke its redistributive, participative principles in cases where class, race and environmental issues intersect.

Perhaps the seeds for the role of environmental justice in socio-economic rights litigation (sown in the early post-apartheid era, but largely lying dormant since) have already tentatively begun to germinate. For instance, recently, an environmental NGO, the Federation for a Sustainable Environment, and a public interest law firm, the Legal Resources Centre, partnered in socio-economic rights litigation against the state to secure access to basic water for residents of Silobela and Carolina, whose water supply had become contaminated by acid mine drainage.<sup>216</sup> In ordering the state to supply temporary potable water to the residents, the High Court tentatively recognised the links between environmental and social injustice, though unfortunately it did so without relying on, or mentioning, the environmental right. Instead, the court reasoned that an infringement of the right to water under section 27 of the Constitution also amounts to a breach of the state's obligation 'to ensure a healthy environment'.<sup>217</sup> The court then went onto find that:

The quality of water provided must be hygienic. In my view, there is no room for half measures in providing water. The respondents contended that there are no people dying and that the situation is exaggerated for political gain by the applicants but the water is fit for human consumption. We need not see people dying before we hold the respondents to comply with their constitutional imperatives.<sup>218</sup>

In addition, in weighing the interests of the community against those of the state (including the financial harm alleged by the state), the court held that the

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<sup>215</sup> Such recognition involves re-conceiving the environmental right as a socio-economic right, as opposed to a white middle class tool focused on conservation.

<sup>216</sup> *Federation for a Sustainable Environment and Others v Minister of Water Affairs and Others* (ZAGPPHC) unreported case no. 35672/12 (10 July 2012) (hereafter *FSE 1*) and *Federation for a Sustainable Environment and Another v Minister of Water Affairs and Others* (ZAGPPHC) case no. 35672/12 (26 July 2012) (hereafter *FSE 2*) (collectively, the *FSE* litigation).

<sup>217</sup> *FSE 2* para 13.

<sup>218</sup> *Ibid* para 23.

state ‘cannot suffer greater harm than that which will be suffered by the community in the form of health risk, to say the least’.<sup>219</sup>

In these ways, the court implicated the right to an environment not harmful to health or well-being, in spite of its failure to place any direct reliance on that right.

In addition, in evaluating the urgency of the matter, the court adopted a redistributive paradigm, aimed at redressing the injustices of apartheid, consistent with the features of environmental justice I have discussed above. It did so by recognising that Silobela ‘invariably still bears the brunt of the legacy of apartheid’ and is ‘under developed and under resourced’, and accordingly finding that the matter ought to be evaluated against the backdrop of the lived realities of the poor people of Silobela.<sup>220</sup> The court went on to hold that:

If the legacy of apartheid is ever to be eliminated, it requires that the Courts must also strive to encourage the national government and all its structures to boldly and with haste march towards the cherished objective encapsulated in the preamble [of the Constitution].<sup>221</sup>

The court’s approach in the *FSE* litigation is thus a step in the right direction towards recognising a role for environmental justice in socio-economic rights litigation. However, the ‘indivisibility’ of environmental and social justice issues in the *FSE* litigation was perhaps more apparent than in other socio-economic rights cases, because the water supply concerned had been polluted.<sup>222</sup> What remains to be seen is whether public interest lawyers and courts will be capable of identifying the interconnectedness of environmental and social justice issues in less obvious cases. Such cases could concern anything from litigation in which the right to education is invoked to challenge the state of unhygienic and unsafe schools lacking basic infrastructure (mud schools, for instance), to litigation to interdict the award of a tender to provide sanitation services in a poor community pending review proceedings intended to protect the right to just administrative action.<sup>223</sup> Once public interest

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<sup>219</sup> Ibid para 24.

<sup>220</sup> *FSE 1* para 9.

<sup>221</sup> Ibid para 17.

<sup>222</sup> Dugard & Alcaro (note 6 above) at 31.

<sup>223</sup> *WJ Building & Civil Engineering Contractors CC v Umhlathuze Municipality* (ZAKZDHC) unreported case no. 4139/2013 (6 May 2013) which concerned a tender to provide sanitation services to a community in desperate need, is an example of an administrative law case where environmental justice could have come to the assistance of the poor by influencing the way in which the court weighed the balance of convenience when deciding whether to grant an interim interdict to halt the tender award pending the outcome of review proceedings. See Danie Brand & Melanie



lawyers and courts begin to see the links between issues of environmental and social justice, and invoke environmental justice as a transformative tool in these cases, the concept has great potential to grow as a revitalising force in South Africa's socio-economic rights litigation.

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Murcott 'Administrative Law' (2013) 2 *JQR* at 2.5.2 for a more in depth review of that case.

## Bibliography

### Books:

- Bilchitz, D, *Poverty and Fundamental Rights: The Justification and Enforcement of Socio-Economic Rights* (2007)
- Cock, J, *The War Against Ourselves: Nature, Power and Justice* (2007)
- Kidd, M, *Environmental Law* 2 ed (2011)
- Liebenberg, S, *Socio-Economic Rights Adjudication under a Transformative Constitution* (2010)
- McDonald, D. A, (ed) *Environmental Justice in South Africa* (2002)

### Chapters:

- Brand, D, 'The Proceduralisation of South African Socio-Economic Rights Jurisprudence, or "What are Socio-Economic Rights for?"' in Botha, H, van der Walt, AJ & van der Walt, J (eds) *Rights and Democracy in a Transformative Constitution* (2004)
- Burns, Y & Kidd, M, 'Chapter 8: Administrative Law & Implementation of Environmental Law' in Strydom, HA & King, ND, (eds) *Fuggle & Rabie's Environmental Management in South Africa* 2 ed (2009)
- Flynn, S & Chirwa D. M, 'The constitutional implications of commercializing water in South Africa' in David A. McDonald & Greg Ruiters (eds) *The Age of Commodity: Water Privatization in Southern Africa* (2005)
- McDonald, D. A. & Ruiters, G, 'Theorizing water privatization in Southern Africa' in David A. McDonald & Greg Ruiters (eds) *The Age of Commodity: Water Privatization in Southern Africa* (2005)
- Liebenberg, S, 'The Interpretation of Socio-Economic Rights' in S Woolman et al (eds) *Constitutional Law of South Africa* 2 ed (2006)
- Van der Linde, M & Basson, E, 'Environment' in S Woolman et al (eds) *Constitutional Law of South Africa* 2 ed (2006)
- Wynberg, R & Fig, D, 'Chapter 13: Realising environmental rights: Civil action, leverage rights and litigation' forthcoming book chapter in Langford & Cousins et al (eds) *Symbols or substance: The role and impact of socio-economic rights strategies in South Africa* (2013)

### Legislation:

- Constitution of the Republic of South Africa Act 108 of 1996
- National Environmental Management Act 107 of 1998
- National Environmental Management: Air Quality Act 39 of 2004
- National Environmental Management: Waste Act 59 of 2008
- National Water Act 36 of 1998
- Promotion of Access to Information Act 2 of 2000
- Promotion of Administrative Justice Act 3 of 2000
- Water Services Act 108 of 1997

### Journal Articles:

- Bilchitz, D, 'Is the constitutional court wasting away the rights of the poor? *Nokotyana v Ekurhuleni Metropolitan Municipality*: notes' (2010) 127 *SALJ* 597
- Chirwa, D. M, 'Water privatization and socio-economic rights in South Africa' (2004) 8(2) *Law, Democracy & Development* 181–206
- Cock, J & Fig, D, 'The impact of globalization on environmental politics in South Africa, 1990 – 2002' (2001) 5(2) *African Sociological Review* 15–35
- Dugard, J & Alcaro, A, 'Let's work together: Environmental and socio-economic rights in the courts' (2013) 29 *SAJHR* 14
- Du Plessis, A, 'A Government in Deep Water? Some Thoughts on the State's Duties in Relation to Water Arising from South Africa's Bill of Rights' (2010) 19 *R of European Community and Int Environmental L* 316
- Du Plessis, A, 'South Africa's Environmental Right (Generously) Interpreted: What is in it for poverty?' (2011) 27 *SAJHR* 279
- Feris, L, 'Constitutional environmental rights: An under-utilised resource' (2008) *SAJHR* 29
- Field, T, 'Sustainable development versus environmentalism: Competing paradigms for the South African EIA regime' (2006) 123 *SALJ* 409

- Foster, S, 'Justice from the ground up: Distributive inequities, grassroots resistance, and the transformative politics of the environmental justice movement' (1998) 86 *Cal L Rev* 775
- Fuo, O. N, 'The Transformative Potential of the Constitutional Environmental Right Overlooked in *Grootboom*' (2013) 34(1) *Obiter* 77
- Humby, T, 'Environmental justice and human rights on the mining wastelands of the Witwatersrand gold fields' (2013) forthcoming in *Ottawa L Rev*
- Kapindu, R, 'The desperate left in desperation: A court in retreat – *Nokotyana v Ekurhuleni Metropolitan Municipality* revisited' (2010) 3 *CCR* 201
- Klare, K, 'Legal culture and transformative constitutionalism' (1998) 14 *SAJHR* 146
- Kotze, L. J, 'Phiri, the plight of the poor and the perils of climate change: time to re-think environmental and socio-economic rights in South Africa' (2010) 1 *J of Human Rights and the Environment* 135
- Lazarus, R. J, 'Pursuing "Environmental Justice": The Distributional Effects of Environmental Protection' 1992-1993 87 *Nw U L Rev* 787
- Lumby, A, 'Government and sustainable development in South Africa. The environmental legislative framework in historical context' (2005) 20(1) *SAJEH* 65
- O'Connell, P, 'The Death of Socio-Economic Rights' (2011) 74(4) *The Modern Law Review* 532–554
- Quinot, G & Liebenberg, S, 'Narrowing the Band: Reasonableness Review in Administrative Justice and Socio-Economic Rights Jurisprudence' (2011) 22 *SLR* 639
- Roberts, G. R, 'Environmental Justice and Community Empowerment: Learning from the Civil Rights Movement' (1998) 48(1) *American University Rev* 229–267
- Stacey, H, 'Environmental justice and transformative law in South Africa and some cross-jurisdictional notes about Australia, the United States and Canada' (1999) *Acta Juridica* 36
- Stewart, L & Horsten, D, 'The role of sustainability in the adjudication of the right to access to adequate water' (2009) 24 *SA Public Law* 486

- Steyn, P, 'The lingering environmental impact of repressive governance: The environmental legacy of the apartheid era for a new South Africa' (2005) 2(3) *Globalizations* 391
- Tewari, DD, 'A detailed analysis of evolution of water rights in South Africa: An account of three and a half centuries from 1652 AD to present' (2009) 35(5) *Water SA* 693
- Wesson, M, 'Reasonableness in Retreat? The Judgment of the South Africa Constitutional Court in *Mazibuko v City of Johannesburg*' (2011) 11:2 *Human Rights Law Review* 390–405
- Williams, L. A, 'The Justiciability of Water Rights: *Mazibuko v. City of Johannesburg*' (2010) 18 *Williamette J. Int'l L. & Dis. Res.* 211
- Wilson, S & Dugard, J, 'Taking Poverty Seriously: The South African Constitutional Court and Socio-economic Rights' (2011) 22 *SLR* 664

#### Case Law:

- *BP Southern Africa (Pty) Ltd v MEC for Agriculture, Conservation, Environment and Land Affairs* 2004 (5) SA 124 (W)
- *Director: Mineral Development, Gauteng Region v Save the Vaal Environment* 1999 (2) SA 709 (SCA)
- *Federation for a Sustainable Environment and Others v Minister of Water Affairs and Others (ZAGPPHC)* unreported case no. 35672/12 (10 July 2012)
- *Federation for a Sustainable Environment and Another v Minister of Water Affairs and Others (ZAGPPHC)* case no. 35672/12 (26 July 2012)
- *Fuel Retailers Association of Southern Africa v Director General: Environmental Management, Department of Agriculture, Conservation and Environment, Mpumalanga Province* 2008 (2) SA 319 (CC)
- *Government of the Republic of South Africa and Others v Grootboom and Others* 2001 (1) SA 46 (CC)
- *Hichange Investments (Pty) Ltd v Cape Produce Co Ltd t/a Pelts Products* 2004 (2) SA 393
- *HTF Developers (Pty) Ltd v The Minister of Environmental Affairs and Tourism* (2006) 5 SA 512 (T)

- *Joseph and Others v City of Johannesburg and Others* 2010 (4) SA 55 (CC)
- *Khosa v Minister of Social Development; Mahlaule v Minister of Social Development* 2004 (6) SA 505 (CC)
- *Mazibuko v City of Johannesburg* 2010 (4) SA 1 (CC)
- *Minister of Health, KwaZulu-Natal v Treatment Action Campaign (No. 2)* 2002 (5) SA 721 (CC)
- *Minister of Public Works and others v Kyalami Ridge Environmental Association and Another* 2001 (7) BCLR 652 (CC)
- *Nokotyana and Others v Ekurhuleni Metropolitan Municipality and Others* 2010 (4) BCLR 312 (CC)
- *Occupiers of 51 Olivia Road, Berea Township and 197 Main Street, Johannesburg v City of Johannesburg* 2008 (3) SA 208 (CC)
- *President of the Republic of South Africa v Modderklip Boerdery (Pty) Ltd (Agri SA & others, amici curiae)* 2005 (5) SA 3 (CC)
- *Soobramoney v Minister of Health, KwaZulu-Natal* 1998 (1) SA 765 (CC)

Other:

- Brand, D, *Courts, socio-economic rights and transformative politics* (unpublished doctoral thesis, Stellenbosch University, 2009)
- Brand, D & Murcott, M, 'Administrative Law' (2013) 2 JQR
- Cock, J, 'Connecting the Red, Brown and Green: The Environmental Justice Movement in South Africa (2004) *Globalisation, Marginalisation & New Social Movements in Post-Apartheid South Africa* (unpublished paper) available at <http://ccs.ukzn.ac.za/default.asp?6,20,10,1809>
- Cock, J, 'Green capitalism or environmental justice? A critique of the sustainability discourse' (2010) Unpublished paper presented on 13 June at the XVI SASA Congress, University of Fort Hare
- Pierre De Vos 'Water is life (but life is cheap)' 13 October 2009 available at <http://constitutionallyspeaking.co.za/water-is-life-but-life-is-cheap/>



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4. **Details of mini-dissertation**

Degree: LLM by coursework in Constitutional and Administrative Law

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5. **Statement by candidate**

I declare that this mini-dissertation, which I hereby submit for the abovementioned degree at the University, is my own work and has not been previously submitted by me for a degree at another university. Where secondary material is used, this has been carefully acknowledged and referenced in accordance with University requirements. I am aware of University policy and implications regarding plagiarism.

Signature: \_\_\_\_\_ Date: 11 November 2013

6. **Statement by supervisor**

I declare that I hereby approve that Melanie Jean Murcott may submit her mini-dissertation as well as the prescribed summary.

Supervisor

Date: 11 November 2013