

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

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*This article explores the role of environmental justice as a transformative tool in litigation to enforce socio-economic rights in South Africa. 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. To demonstrate the transformative potential of environmental justice, I discuss its origins and its incorporation into South African law. I then demonstrate that, despite having been incorporated into our law, environmental justice has failed to capture the imagination of lawyers engaged in socio-economic rights litigation. Sustainable development and human rights discourses have been the dominant voices, at the expense of environmental justice, and its transformative potential. Through an analysis of *Mazibuko v City of Johannesburg* 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. To conclude, I consider the potential of environmental justice in socio-economic rights litigation to challenge poverty and effect transformation in the lives of poor people in South Africa.*

I INTRODUCTION

In post-1994 South Africa, litigation involving the enforcement of socio-economic rights 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, drinking water, health care and sanitation.¹ These lived realities of the poor represent a failure of the Constitution of the Republic of South Africa, 1996 to achieve its transformative mandate, particularly through the enforcement of socio-economic rights.²

* This article draws on my LLM dissertation of the same title (University of Pretoria, 2014) available at <http://repository.up.ac.za/handle/2263/41187>.

¹ These are the Constitutional Court’s descriptions of the living conditions of the poor in *Government of the Republic of South Africa & others v Grootboom & others* 2001 (1) SA 46 (CC) para 3 (‘Grootboom’), *Occupiers of 51 Olivia Road, Berea Township and 197 Main Street, Johannesburg v City of Johannesburg* 2008 (3) SA 208 (CC) para 8 (‘Olivia Road’), *Joseph & others v City of Johannesburg & 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 below. Where I refer to socio-economic rights litigation, I adopt Danie Brand’s conception that this 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* (LLD dissertation, Stellenbosch University, 2009) 78).

² See for example, Sandra Liebenberg *Socio-Economic Rights Adjudication under a Transformative Constitution* (2010) 24–5, where she refers to Karl Klare ‘Legal culture and transformative constitutionalism’ (1998) 14 *SAJHR* 146 at 150 and a number of

When these intolerable, appalling and desperate living conditions are regarded as part of ‘the environment’, and water, housing and electricity are regarded as ‘gifts of nature’,³ it becomes apparent that South Africa’s poor experience extreme ‘environmental injustice’ and ‘negative environmental consequences’,⁴ including the unjust distribution of environmental benefits and burdens, ‘disproportionately visited upon the poor’, that are ‘the end product or outcome of systematic race and class discrimination’.⁵ Environmental justice is the antithesis. It entails, among other things, 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’.⁶ It is therefore an inherently transformative and redistributive concept.⁷

subsequent publications that have ‘elaborated on and explored the implications of “transformative constitutionalism” in various areas of constitutional law’.

³ I prefer to describe components of environment as ‘ecological gifts’ rather than resources. See D Takacs ‘The public trust doctrine, environmental rights, and the future of private property’ (2008) 16 *NYU Environmental LJ* 711 at 718 and 765. 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 s 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) 48, the idea of the environment as ‘a place apart, separate from human experience is a distortion’.

⁴ I discuss a number of examples of deepening inequality in post-1994 South Africa below.

⁵ Helen Stacey ‘Environmental justice and transformative law in South Africa and some cross-jurisdictional notes about Australia, the US and Canada’ 1999 *Acta Juridica* 36 at 60–1. A more detailed discussion on the meaning of environmental injustice is set out below.

⁶ Manuel 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. On the evolution of the concept of environmental justice, see D Scholsberg ‘Theorising environmental justice. The expanding sphere of a discourse’ (2013) 22 *Environmental Politics* 37.

⁷ 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.

In this article I argue that the notion of environmental justice is recognised by s 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.⁸ 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, focusing our courts' minds on questions of justice and equity in the context of hitherto unjust environmental decision-making.

Environmental justice has this potential, first, because it treats people as the intended beneficiaries of environmental benefits held in trust by the state, as opposed merely to them being consumers of commodities owned by the state. Secondly, its focus is 'the substance of the conditions in which people find themselves',⁹ as well as the underlying reasons for those conditions. Thirdly, environmental justice can help to ensure that decision-making processes in relation to the environment that poor South Africans occupy are more participatory and fair. I argue that the concept could breathe much-needed life into our socio-economic rights litigation by challenging the neo-liberal capitalist paradigm that Brand and others argue is currently subverting the transformative mandate of the Constitution.¹⁰ A neo-liberal capitalist paradigm permits dominant market participants to 'operate freely and without restriction to generate wealth' on the basis that once generated, wealth 'will "trickle down" to impoverished people over time' so as to achieve the just distribution of resources without state interference.¹¹ The problem with this paradigm is that it is based on the false assumptions that the market is ideologically neutral and made up of participants who are equally placed to advance their interests.¹² It emphasises commodification, commercialisation and privatisation,¹³ and 'ignores the role of entrenched, systemic

⁸ 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 goldfields' (2013) 43 *Revue générale de droit* 65. Oliver Njuh Fuo 'The transformative potential of the constitutional environmental right overlooked in *Grootboom*' (2013) 34 *Obiter* 77 and Dugard & Alcaro op cit note 6.

⁹ David Bilchitz 'Is the Constitutional Court wasting away the rights of the poor?' *Nokotyana v Ekuhuleni Metropolitan Municipality* (2010) 127 *SALJ* 591 at 598.

¹⁰ Paul O'Connell 'The death of socio-economic rights' (2011) 74 *MLR* 532 at 534. See further Brand op cit note 1 who discusses, in detail, the impact of subversive neo-liberal capitalist paradigms in socio-economic rights litigation.

¹¹ Brand op cit note 1 at 177.

¹² *Ibid* at 178–9.

¹³ O'Connell op cit note 10 at 534.

inequality in access to basic resources such as education, information, livelihood and political voice and power',¹⁴ which render self-advancement for the majority of South Africans a fiction. Through *Mazibuko v City of Johannesburg*,¹⁵ I illustrate how our neo-liberal capitalist paradigm serves 'fundamentally [to] undermine socio-economic rights'.¹⁶

However, rather than mourning 'the death' of transformative socio-economic rights litigation, as others have done,¹⁷ this article seeks to identify environmental justice as a new legal strategy that could challenge anti-transformative neo-liberal capitalist approaches to socio-economic rights litigation and thus breathe new life into it.¹⁸

First, this article explores the origins of environmental justice as a conceptual framework and as a movement that first emerged in the United States, and which 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 in post-1994 South Africa,¹⁹ but have arguably become more entrenched, representing a failure on the part of the 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 the second part of this article, I argue that despite these setbacks, there remains room for environmental justice to play a role in transformative constitutionalism. However, I demonstrate that, despite environmental justice having been incorporated into our law, lawyers engaged in socio-economic rights litigation have not yet recognised its full potential. Sustainable development and human rights discourses have thus far been the dominant voices at the expense of environmental justice and its transformative potential.

In the third part of this article, I analyse *Mazibuko*, which concerned the right to free basic water under s 27 of the Constitution. I analyse this case because water is the most significant and obvious environmental gift. This was something the Constitutional Court acknowledged at the outset of its

¹⁴ Brand op cit note 1 at 179 referring to Sampie Terreblanche *A History of Inequality in South Africa 1652–2002* (2000) 58–9.

¹⁵ *Mazibuko v City of Johannesburg* 2010 (4) SA 1 (CC) ('*Mazibuko*').

¹⁶ O'Connell op cit note 10 at 534.

¹⁷ See for example O'Connell *ibid*.

¹⁸ 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 '[w]e 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'.

¹⁹ 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.

judgment;²⁰ yet the court went on to uphold a free basic water policy that leaves the most vulnerable in our society without access to sufficient water. Water, when viewed as an environmental benefit ‘to be managed by communities and states for the public good’, clearly implicates both environmental and social justice issues.²¹ In *Mazibuko*, however, the environmental right did not feature at all. 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’.²²

In my analysis of *Mazibuko*, I align myself with those who criticise the court’s approach as anti-transformative.²³ I do so by illustrating that the court ‘technicised’, ‘personalised’, ‘proceduralised’ and so, ‘depoliticised’ the applicants’ challenge to the government’s policy.²⁴ I thus develop Brand’s pre-*Mazibuko* critique of a number of other, earlier South African socio-economic rights cases by illustrating the ways in which his criticism applies to the Constitutional Court’s reasoning in *Mazibuko*. I argue that through its anti-transformative approach, the court endorsed the commodification of water,²⁵ and a neo-liberal paradigm towards access to basic water.²⁶ I point to

²⁰ The court noted in para 1 that ‘[w]ater 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.’

²¹ Cock op cit note 3 at 88.

²² Ibid.

²³ Works that critique *Mazibuko* broadly speaking from the perspective of transformative constitutionalism include: Liebenberg op cit note 2 at 470–80; O’Connell op cit note 10; Murray Wesson ‘Reasonableness in retreat? The judgment of the South Africa Constitutional Court in *Mazibuko v City of Johannesburg*’ (2011) 11 *Human Rights LR* 390–405; Lucy A Williams ‘The justiciability of water rights: *Mazibuko v City of Johannesburg*’ (2010) 18 *Williamette J International L & Dispute Resolution* 211; Stuart Wilson & Jackie Dugard ‘Taking poverty seriously: The South African Constitutional Court and socio-economic rights’ (2011) 22 *Stellenbosch LR* 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 *Stellenbosch LR* 639.

²⁴ These are terms used by Brand op cit note 1 in criticising other socio-economic rights litigation, which I invoke in my critique of *Mazibuko*.

²⁵ 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) 19.

²⁶ O’Connell op cit note 10 at 551. As O’Connell states (quoting David A McDonald & Greg Ruiters ‘Introduction: From public to private (to public again?)’ in McDonald & Ruiters (eds) op cit note 25 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 op cit note 23.

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.

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. I do so tentatively, in the knowledge that the notion of environmental justice as a transformative tool is in its infancy. Thus, this article by no means sets out to establish, in detailed terms, the potential for environmental justice in socio-economic rights litigation. 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 if the concept were to be explicitly invoked as an aspect of the environmental right.

II THE ORIGINS OF ENVIRONMENTAL JUSTICE

(a) *A 'quest for environmental civil rights' in the US*

An environmental justice movement emerged in the US in the 1970s as an 'extension' of the civil rights movement of the 1960s.²⁷ 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'.²⁸

Some regarded environmental justice as the conceptual framework required to address 'environmental racism' in the US; 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'.²⁹ 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'.³⁰

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'.³¹ In this quest for

²⁷ R. Gregory Roberts 'Environmental justice and community empowerment: Learning from the civil rights movement' (1998) 48 *American University Rev* 229, where he draws parallels between the environmental justice movement and the civil rights movement, at 230–1.

²⁸ *Ibid.*

²⁹ The concept is attributed to Dr Benjamin Chavis: see Richard J Lazarus 'Pursuing "environmental justice": The distributional effects of environmental protection' (1992–1993) 87 *Northwestern ULR* 787 at 790n13.

³⁰ *Ibid.*

³¹ Roberts *op cit* note 27.

environmental civil rights,³² the environmental justice movement adopted the same kinds of ‘organizational structures, civil disobedience approaches, and litigation strategies’ as those invoked by the civil rights movement in the US.³³

Thus, the origins of environmental justice can be traced to ‘the disproportionately high numbers of polluting industrial sites in urban black neighbourhoods in the US’.³⁴ The political, legal and economic struggles that ensued in response to this phenomenon in the aftermath of the civil rights movement acted as a launch-pad for environmental justice struggles.³⁵

(b) *A vision of environmental justice in post-apartheid South Africa*

In contrast with the US, where *minorities* suffered environmental injustice, the *majority* of South Africans (mostly black and coloured)³⁶ have been, and continue to be exposed to unjust environmental outcomes, exclusion from environmental decision-making and forced removals from their land.³⁷ Despite this significant minority/majority distinction between the experiences of environmental injustice in the US and South Africa, the origins of the South African environmental justice movement resemble those of the US in two important respects. First, environmental justice in South Africa gained momentum in the 1990s at the end of apartheid: a moment of radical

³² Ibid.

³³ Sheila Foster ‘Justice from the ground up: Distributive inequities, grassroots resistance, and the transformative politics of the environmental justice movement’ (1998) 86 *California LR* 775 at 789n10.

³⁴ Stacey op cit note 5 at 37.

³⁵ Lazarus op cit note 29 at 789. See also Foster op cit note 33 at 776 who pointed out the following 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.’

³⁶ According to Statistics South Africa ‘Mid-year population estimates 2014’ (31 July 2014), available at <http://beta2.statssa.gov.za/publications/P0302/P03022014.pdf> it is currently estimated that approximately 80.3 per cent of South Africa’s population is black and 8.7 per cent are coloured.

³⁷ See Stacey op cit note 5 at 37 and 68, 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’. Extensive litigation against government in opposition to unlawful evictions illustrates that South Africans continue to be unjustly displaced from their homes in post-apartheid South Africa. See for example *Port Elizabeth Municipality v Various Occupiers* 2005 (1) SA 217 (CC), *Residents of the Joe Slovo Community, Western Cape v Thubelisha Homes* 2009 (9) BCLR 847 (CC) and *Olivia Road* supra note 1. More recently, it was reported that ‘[t]he violent removal of people and structures from Sanral-owned land in Cape Town resembled removals during apartheid, an affected resident said in Lwandle on Tuesday’ in ‘Lwandle eviction was traumatic: Cape Town couple’ *The New Age* 29 July 2014, available at http://www.thenewage.co.za/133191-1007-53-Lwandle_eviction_was_traumatic_Cape_Town_couple, accessed on 4 August 2014.

transformation in our history comparable to the end of the civil rights movement.³⁸ Secondly, the movement was the response to immense environmental injustice and racism experienced by black people in both countries.³⁹ 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 environmental, social and economic transformation, not just formal equality or a right to vote.⁴⁰

Khan describes how a broadening of the definition of 'the environment'⁴¹ at the end of apartheid had particular objectives. Including 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.⁴² Thus, as in the US where civil rights activists began 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

³⁸ See Farieda Khan 'The roots of environmental racism and the rise of environmental justice in the 1990s' in David A McDonald (ed) *Environmental Justice in South Africa* (2002) 27, where the author comments on the 'close similarities' between the history of the environmental movements in the US and South Africa respectively. She explains: '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.'

³⁹ 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 ecological gifts that facilitate the provision of basic resources, such as water, land and air.

⁴⁰ Khan op cit note 38 at 27–8. As former President Nelson Mandela said in this regard in 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 Convened by the ANC Constitutional Committee, May 1991* (1991) 9 at 12, cited in Liebenberg op cit note 2 at 9: '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.'

⁴¹ See note 3 above.

⁴² David A McDonald 'What is environmental justice?' in McDonald (ed) op cit note 38 at 2.

of environmental justice]. Within a few short years these bodies began to challenge the environmental practices and policies of the past.⁴³

Post-liberation, the environmental justice movement in South Africa⁴⁴ made a number of important strides,⁴⁵ most significantly the entrenchment of an environmental right, and environmental legislation that gives both implicit and explicit recognition to environmental justice.⁴⁶ These strides were consistent with the African National Congress's stance on environmental issues at the time, as reflected in early versions of the ANC's Reconstruction and Development Programme.⁴⁷

⁴³ Ibid.

⁴⁴ As Humby op cit note 8 at 4–5 explains, instrumental in this movement was the ENJF, 'a "loose alliance" of over 550 non-profit organisations' that 'drew attention to the embeddedness of the environmental in socio-political struggles', and was one of the powerful participants in South Africa's post-apartheid environmental justice movement. It advocated that '[e]nvironmental justice is about social transformation directed toward meeting basic human needs and enhancing our quality of life — economic quality, health 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.'

⁴⁵ These are discussed in detail in Jacklyn Cock & David Fig 'The impact of globalization on environmental politics in South Africa, 1990–2002' (2001) 5 *African Sociological Review* 15–35 at 18–20 and in Khan op cit note 38 at 25–30.

⁴⁶ As Tracy-Lynn Field argues in 'Sustainable development versus environmentalism: Competing paradigms for the South African EIA regime' (2006) 123 *SALJ* 409, 415 and 419, 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 s 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 s 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 s 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. See further Michael Kidd *Environmental Law* 2 ed (2011) 301 and the next part of this article.

⁴⁷ See ANC *The Reconstruction and Development Programme* (1994) 38 in Khan op cit note 38 at 2: '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

Moreover, this kind of environmental discourse represented an important shift from that of apartheid, when the environmental movement was racially polarised,⁴⁸ and environmental concerns were depoliticised and divorced from the struggles of black South Africans.⁴⁹ By contrast, the environmental justice movement of the early 1990s, 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 focused on overcoming de-politicisation and ‘racial polarization of environmentalism’ in South Africa.⁵⁰

Sadly, 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 socio-economic rights.⁵¹ This is unfortunate, especially given the immense environmental

inequalities and injustices would be addressed as an integral part of the party’s reconstruction and development mandate.’

⁴⁸ Khan op cit note 38 at 19.

⁴⁹ See Steyn op cit note 19 at 393–4 where she comments on the ‘apolitical and conservation-focussed’ nature of the environmental movement during apartheid, when most environmental non-governmental organisations (‘NGOs’) prioritised good relations with the apartheid government over the daily struggles of black South Africans. See further Khan op cit note 38 at 23 who 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. 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’.

⁵⁰ Khan op cit note 38 at 27–8. See further 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 who 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.’

⁵¹ Whilst ‘the environmental law fraternity’, particularly in response to *Mazibuko*, has sought to draw links between access to water under s 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 below. This was argued in Du Plessis op cit note 8 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

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. The main forms of environmental injustice experienced in the US may be contrasted with that which was experienced by poor black people in South Africa during apartheid, but in South Africa, this injustice has continued and in some instances has heightened, some 20 years into our democracy.

(c) *Differing experiences of environmental injustice in the US and apartheid South Africa*

The focus of the environmental justice movement in the US 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'.⁵²

In South Africa, like the US, 'in the typical pattern of environmental racism, many landfill sites where most waste ends up are located near townships'.⁵³ However, unlike the US, environmental injustices were experienced by the *majority* of South Africans. Stacey argues that the principal cause of environmental injustice in South Africa was 'the wide-scale appropriation of land during the colonial and apartheid periods', causing the 'migration of black and coloured poor to cities in search of work' and squatting by people rendered landless by the appropriation of land.⁵⁴

Thus, in contrast with the experience and focus of the environmental justice movement in the US,

[e]nvironmental justice in South Africa . . . extends far beyond protesting inequitable distribution of pollution. It also included an emphasis on access to

in relation to water arising from South Africa's Bill of Rights' (2010) 19 *Review of European Community and International Environmental Law* 316.

⁵² Kidd op cit note 46 at 293. Lazarus op cit note 29 at 801, in his discussion of studies on the distribution of environmental hazards in the US, 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'. Further at 801–2 he refers to United Church of Christ Commission for Racial Justice *Toxic Waste and Race in the United States* (1987) which 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'.

⁵³ Cock op cit note 3 at 101.

⁵⁴ Stacey op cit note 5 at 42–3. See further Steyn op cit note 19 at 395 where she comments on apartheid's 'tremendous environmental toll'. 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. 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'.

basic resources such as land and water and the participation of communities in decision making.⁵⁵

Some of the disturbing environmental injustices experienced by South Africa's black majority as a result of apartheid policies include 'glaring disparities in the allocation of municipal resources',⁵⁶ and at the end of apartheid, that millions were reliant on the bucket toilet system, had minimal access to water and electricity and were forced to live in shacks.⁵⁷

(d) *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.⁵⁸ Social inequality has deepened since 1994, which represents a failure of the environmental justice movement.⁵⁹

In 2001 Cock & Fig identified 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;⁶⁰ secondly, government's change in policy in respect of environmental issues;⁶¹ and thirdly, the exclusion of communities from environmental management and environmental decision-making.⁶² These failures remain relevant today.⁶³ For instance, the fragmented nature of South Africa's environmental movement has meant that it has been unable to entrench itself in South Africa's struggle for social justice, particularly in litigation to enforce socio-economic rights. At the same time, the ANC's change in policy in relation to environmental issues after the 1994 elections has played an instrumental role in the failures of the environmental justice movement.⁶⁴ Subsequent policy has been heavily influenced by the 'ideological core of

⁵⁵ Cock & Fig op cit note 45 at 18.

⁵⁶ Ibid at 17.

⁵⁷ Steyn op cit note 19 at 395–6.

⁵⁸ Cock op cit note 50 at 47.

⁵⁹ Cock op cit note 3 at 91.

⁶⁰ Cock & Fig op cit note 45 at 15–16.

⁶¹ Ibid at 24–6.

⁶² 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 below. See also Khan op cit note 38 at 4–6.

⁶³ For a more recent discussion of the failures of South Africa's environmental movement highlighted by Cock and Fig, see Frances Craigie, Phil Snijman & Melissa Fourie 'Chapter 4: Environmental compliance and enforcement institutions' in Alexander R. Paterson & Louis J. Kotzé (eds) *Environmental Compliance and Enforcement in South Africa: Legal Perspectives* (2009) who comment on the challenges of implementation of South Africa's environmental legislation, specifically in the context of the conservation of biodiversity.

⁶⁴ Steyn op cit note 19 at 397.

globalisation', neo-liberalism,⁶⁵ and reinforces 'apartheid era policies that promoted economic development [now in the name of poverty reduction] with little consideration of the environmental impact thereof'.⁶⁶ At the level of governmental policy, therefore, environmental issues were compartmentalised from social and economic issues at an early stage in our constitutional democracy, and this remains the case under the National Development Plan 2030.⁶⁷ Furthermore, pursuant to the implementation of neo-liberal capitalist policies, the privatisation of goods and services, including ecological gifts such as water (generally referred to as natural resources), has become the norm.⁶⁸

Post-apartheid environmental legislation and policy was formulated through a participatory process, involving people from all over South Africa.⁶⁹ Following this participatory process,

[t]he 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.⁷⁰

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'.⁷¹

The fragmented nature of the early environmental justice movement in South Africa, the adoption of GEAR, and subsequent policies, and a failure to implement justice- and participatory-oriented environmental law and

⁶⁵ Cock & Fig op cit note 45 at 25.

⁶⁶ Steyn op cit note 19 at 397 in relation to GEAR.

⁶⁷ See for example, the World Wildlife Fund 'National Development Plan overlooks environmental imperative' available at <http://www.uwf.org.za/?6660/ndp-and-environment>, accessed on 6 August 2014, where it is stated that 'WWF is concerned that environmental issues are generally treated as if the environmental integrity of the water and food production systems of our country are somehow detached from, and in opposition to, our goals of social and economic development'.

⁶⁸ Danwood Mzikenge Chirwa 'Water privatization and socio-economic rights in South Africa' (2004) 8 *Law, Democracy & Development* 181 at 183.

⁶⁹ 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.

⁷⁰ Ibid at 21.

⁷¹ Ibid at 22–3. See further Robert Krause 'Mining communities are ignored' *Business Day* 12 March 2014, available at <http://www.bdlive.co.za/opinion/2014/03/12/mining-communities-are-ignored>, accessed on 7 August 2014; Louis J Kotzé 'The judiciary, the environmental right and the quest for sustainability in South Africa: A critical reflection' (2007) 16 *Review of European Community and International Environmental Law* 298; Anél du Plessis 'Public participation, good environmental governance and fulfilment of environmental rights' [2008] *PER* 12.

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 Africa⁷² include:

- 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',⁷³ 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';⁷⁴
- '[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.⁷⁵ 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;⁷⁶
- '[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';⁷⁷
- '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 Motherwell, 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.'⁷⁸

It is in the context of these and other environmental injustices — the legacy of apartheid's 'tremendous environmental toll'⁷⁹ — that I analyse *Mazibuko* below, and argue that environmental justice can fulfil an important role in South African socio-economic rights litigation. This is in spite of the challenges that the environmental justice movement has faced. Before doing so, I discuss in part III how one of the successes of the environmental justice movement of the early post-apartheid era — the recognition of environmental justice in our environmental laws — makes it possible to invoke the

⁷² For a discussion on deepening inequality in South Africa see, for example, Francis Wilson & Vaun Cornell (eds) *Overcoming Poverty and Inequality, Guide to Carnegie3 Conference* (March 2014) 1–7, whose analysis supports Cock's remarks below.

⁷³ Cock op cit note 50 at 49.

⁷⁴ Cock op cit note 3 at 91.

⁷⁵ Ibid at 94.

⁷⁶ Ibid at 95. See also McDonald & Ruiters op cit note 25 at 63–7.

⁷⁷ Ibid at 50.

⁷⁸ Ibid at 101.

⁷⁹ Steyn op cit note 19 at 395.

concept meaningfully, for instance, in pleadings and argument, as a transformative tool in socio-economic rights litigation.

III ENVIRONMENTAL JUSTICE UNDER SOUTH AFRICAN LAW

(a) *Recognising environmental justice*

South Africa's environmental right in s 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.'

Very little judicial attention has been given to the environmental right,⁸⁰ which remains an under-utilised resource, in spite of its transformative potential.⁸¹ 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.'⁸² 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 s 24 and the protective ambit of the right, including its utility for environmental justice struggles, remains unclear'.⁸³ My argument is focused on the potential for the courts interpreting the right to include as a foundation of it the notion of environmental justice, so that the concept 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

⁸⁰ 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 (E); and *Director: Mineral Development, Gauteng Region v Save the Vaal Environment* 1999 (2) SA 709 (SCA).

⁸¹ Loretta Feris 'Constitutional environmental rights: An under-utilised resource' (2008) 24 *SAJHR* 29.

⁸² Du Plessis op cit note 8 at 289.

⁸³ Humby op cit note 8 at 10.

needs'), which is patently a concept about meeting basic human needs in an equitable fashion.⁸⁴ 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 finite natural environment, and the desire to transform our human systems so as to be in harmony with that environment.'⁸⁵

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, as Field and others submit, the inclusion of sustainable development in the environmental right amounts to constitutional recognition of environmental justice.⁸⁶

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. Taken together with the rights to dignity (s 10) and equality (s 9) in the Constitution, and having regard to the values that underlie an open and democratic society in s 1, the environmental right must be construed as including the concept of environmental justice.⁸⁷ This position is supported

⁸⁴ Stacey op cit note 5 at 62 (notes omitted) drawing upon the definition of sustainable development articulated in World Commission on Environment and Development *Our Common Future* (1987). See also Field op cit note 46, and Kidd op cit note 46 at 303–4, where he supports the view that the environmental right could be utilised to remedy environmental injustice.

⁸⁵ Field op cit note 46 at 417.

⁸⁶ Ibid. See further Michael Kidd 'Chapter 24: Environment' in Iain Currie & Johan de Waal (eds) *The Bill of Rights Handbook* 6 ed (2013) 525, who argues that '[t]he poor not only carry out activities that affect the environment negatively (for example, using indigenous vegetation for firewood in an unsustainable manner), but simultaneously, more often than not, constitute that sector of society that bears the brunt of environmental human impacts such as pollution, lack of sanitation, etc. Addressing health and well-being concerns (as required by s 24(a)) consequently advances the objectives of s 24(b)'s concern with sustainable development.'

⁸⁷ As Humby op cit note 8 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 ss 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, '[t]he 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 environmen-

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

- 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*’.⁸⁸

This broad definition of the environment creates the potential for the infusion of principles of social justice.⁸⁹
- The ‘justice-oriented’ guiding principles in s 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.⁹⁰
- 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’, and that redress is required.⁹¹
- 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 nation’s water resources’,⁹² 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

tal degradation.’ See also Yvonne Burns & Michael Kidd ‘Chapter 8: Administrative law & implementation of environmental law’ in H A Strydom & N D 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 (ie a ‘proceduralist’ approach). The reliance on process relief under ss 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) 33, where he discusses the phenomenon of ‘proceduralisation’ of socio-economic rights.

⁸⁸ My emphasis.

⁸⁹ Dugard & Alcaro op cit note 6 at 31; Scholsberg op cit note 6 at 38–9.

⁹⁰ See ss 2(1), 2(2), 2(3) and 2(4)(c), (d), (f) and (g) in particular. Humby op cit note 8 at 8.

⁹¹ Preamble.

⁹² Section 2(b) and (c).

and used beneficially in the public interest, while promoting environmental values'.⁹³

- 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', and that redress is required.⁹⁴
- 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.⁹⁵
- The objective of the Marine Living Resources Act 18 of 1998 of restructuring the fishing industry so as to address historical imbalances and achieve equity within all branches of the fishing industry.⁹⁶

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 part I 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'.⁹⁷

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

(b) 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 tended to compete with, and in some instances to drown out, environmental justice as a paradigm connecting environmental and social justice concerns. This compartmentalisation of environmental

⁹³ Section 3(1) and (2).

⁹⁴ Preamble.

⁹⁵ Preamble.

⁹⁶ Section 2(j).

⁹⁷ Sandra Liebenberg 'The interpretation of socio-economic rights' in Stuart Woolman & Michael Bishop (gen eds) *Constitutional Law of South Africa* 2 ed (2006) 33-1. See also Du Plessis op cit note 8 at 281.

issues from social and economic issues can be attributed (at least in part) to the failures of the environmental justice movement discussed in part I. Sustainable development and human rights discourses have undermined the potential of environmental justice in socio-economic rights cases in a number of ways.

(i) *Sustainable development discourse*

Although 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 ecological gifts such as water for future generations it might sometimes be necessary to compromise the health and well-being of vulnerable, impoverished communities.⁹⁸ For instance, Kotzé argues as follows:

‘Where socio-economic rights adjudication is concerned, when it involves finite natural resources, such as water, which are set to become severely limited in the 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.’⁹⁹

Whilst I accept that sustainability entails that finite ecological gifts 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.¹⁰⁰ Moreover, 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:

‘[d]omestic [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.’¹⁰¹

Mining and agriculture, on the other hand, could be regarded as key threats to the sustainability of our water supply, and yet these activities continue unabated.¹⁰² As Lumby points out:

‘[t]he uncontrolled use of water by the mining industry has led to the depletion

⁹⁸ Stewart & Horsten op cit note 51 at 503 advocate for a more ‘context-sensitive approach’ to sustainability that does not ‘fundamentally compromise the health and well-being of a vulnerable community’.

⁹⁹ Kotzé op cit note 51.

¹⁰⁰ Thus I endorse the views of Stewart & Horsten op cit note 51 at 503.

¹⁰¹ Cock op cit note 50 at 49.

¹⁰² Anthony Lumby ‘Government and sustainable development in South Africa: The environmental legislative framework in historical context’ (2005) 20 *SAJEH* 65.

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.¹⁰³

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'.¹⁰⁴

(ii) *Human-rights discourse*

The environmental right is still too often pitted against other socio-economic rights, rather than reinforcing them.¹⁰⁵ Environmentalism is too often treated as a white middle-class issue, unrelated to questions of social welfare and justice.¹⁰⁶ 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'.¹⁰⁷ So, in considering the relationship between the right to an environment and the right to housing, Van der Linde & Basson postulate that the provision of emergency housing following a natural disaster could have adverse effects on the natural environment, without mentioning the environmental implications for the people rendered homeless by the disaster.¹⁰⁸

Humby paints a dismal picture of the hopeful and synergetic relationship between human-rights discourse and the struggle for environmental justice of the 1990s, but which has regressed to one of disappointment and disjuncture at present.¹⁰⁹ 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, the

¹⁰³ Ibid at 70–1.

¹⁰⁴ Stacey op cit note 5 at 63.

¹⁰⁵ Humby op cit note 8. By way of example, in *Minister of Public Works & others v Kyalami Ridge Environmental Association & another* 2001 (7) BCLR 652 (CC) the right to housing was pitted against the right to an environment. As Dugard & Alcaro op cit note 6 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'.

¹⁰⁶ Rachel Wynberg & David Fig 'Realising environmental rights: Civil action, leverage rights and litigation' forthcoming book chapter in Malcolm Langford, Ben Cousins, Jackie Dugard & Tshepo Madlingozi (eds) *Symbols or Substance? The Role and Impact of Socio-Economic Rights Strategies in South Africa* (2015) 310.

¹⁰⁷ Morné van der Linde & Ernst Basson 'Environment' in Woolman & Bishop (gen eds) op cit note 97 at 50–4.

¹⁰⁸ Ibid.

¹⁰⁹ Humby op cit note 8 at 38.

focus is on access to socio-economic rights, to the exclusion of the environmental right, when 'what they need is *both*'.¹¹⁰ 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 socio-economic rights without simultaneously claiming the right to environment and *vice versa*.'¹¹¹

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 environmental right, in circumstances where environmental injustices are at stake, has detracted from the environmental justice movement.¹¹²

The challenges posed by Humby are all the more resonant when viewed in the context of accelerated global 'ecological breakdown' resulting in an increased scarcity and the commodification of ecological gifts.¹¹³ 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'.¹¹⁴ 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'.¹¹⁵

I now turn 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 the environmental right bestowed by s 24 of the Constitution, and specifically the concept of environmental justice, could be invoked to respond to some of the criticisms levelled at *Mazibuko*, and enhance socio-economic rights litigation.

IV ANALYSIS OF MAZIBUKO

(a) *Inequitable access to water in Phiri, Soweto*

In *Mazibuko*, residents of Phiri in Soweto launched an application to challenge the constitutionality of the City of Johannesburg's Free Basic Water

¹¹⁰ Ibid at 36.

¹¹¹ Ibid.

¹¹² Ibid.

¹¹³ Cock op cit note 50 at 47.

¹¹⁴ Ibid, referring to John Bellamy Foster 'The ecological revolution' *New York: Monthly Review Press* (2009) 260.

¹¹⁵ Ibid.

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.¹¹⁶

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.¹¹⁷ 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.¹¹⁸ 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.¹¹⁹

The applicants claimed that the policy breached their rights to access to basic water, administrative justice, and equality. In its widely criticised judgment, the Constitutional Court dismissed these challenges, and found that the policy fell within the bounds of reasonableness as required by s 27 of the Constitution and the Water Services Act 108 of 1997. The court ultimately found that the installation of pre-paid water meters in Phiri was lawful.¹²⁰

(b) *A critique of the paradigm in Mazibuko*

In *Mazibuko*, the court validated 'neo-liberal reforms, which are arguably inimical to the protection of socio-economic rights'.¹²¹ I show this by applying and developing Brand's assessment of the ways in which courts have previously limited substantive and transformative politics in socio-economic rights litigation through 'proceduralist' reasoning¹²² that 'technicises' and 'personalises' poverty,¹²³ and sees the gifts of nature which facilitate the provision of basic resources as 'commodities'.¹²⁴ 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. I look thirdly at the court's proceduralist 'retreat from substantive reasonableness'.¹²⁵ I then argue that through these mechanisms the court 'depoliticised' issues of access to water, and in so doing disguised what was in truth an inherently political judgment

¹¹⁶ Cock op cit note 3 at 92.

¹¹⁷ Para 6.

¹¹⁸ Para 81.

¹¹⁹ Para 11.

¹²⁰ Para 9.

¹²¹ O'Connell op cit note 10 at 550.

¹²² Wesson op cit note 23.

¹²³ Brand op cit note 1 at 64 and 67 respectively.

¹²⁴ O'Connell op cit note 10 at 551.

¹²⁵ Brand op cit note 87 at 33.

— one in which water was regarded as a commodity within a neo-liberal paradigm. This paradigm is problematic because it undermines South Africa's constitutional commitment to transformation, which entails that 'policymakers should pursue redistributive policies with the twin goals of fulfilling the Constitutional mandate to afford the South African people their socio-economic rights, and of moving South African society in a more egalitarian direction'.¹²⁶ By analysing *Mazibuko* through the lens of Brand's work on other socio-economic rights cases, I reveal the deeply anti-transformative approach apparent in the judgment: one which enabled the court 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 of an environmental benefit.¹²⁷

Significantly, the right to an environment was not explicitly mentioned in the judgment, and nor did environmental justice feature in the court's reasoning.¹²⁸ Though the court mentioned the vital role of water in our lives,¹²⁹ 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.¹³⁰ I shall argue that taking into

¹²⁶ Williams *op cit* note 23 at 243–4.

¹²⁷ 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 an ecological gift 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 *op cit* note 25 at 22–3.

¹²⁸ 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 as follows: '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 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.

¹²⁹ See note 20 above.

¹³⁰ 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 well-being (para 83).

account environmental justice could have shifted the court's focus away from questions of cost recovery towards the plight of the poor.

(i) *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'.¹³¹ 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.¹³² 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'.¹³³ 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'.¹³⁴

Secondly, the issue of water supply was 'bracketed' as technically complex, such that 'non-expert participants in the discourse on poverty' (the impoverished applicants in *Mazibuko*) were unable to engage in it.¹³⁵ In this regard, the court found that

'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.*'¹³⁶

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.¹³⁷ 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.¹³⁸ It is not suggested that the City was required to engage with the applicants 'as active participants in the process of

¹³¹ Brand op cit note 1 at iii.

¹³² See for example para 139.

¹³³ Para 102.

¹³⁴ Brand op cit note 1 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.

¹³⁵ Ibid.

¹³⁶ Para 61 (my emphasis). See also para 112 where the installation of pre-paid meters is described as 'an expensive and technically complex exercise'.

¹³⁷ Brand op cit note 1 at 66–7.

¹³⁸ Para 130–1.

interpretation of their needs, engaged in political action'.¹³⁹ Thus, the applicants' 'political engagement' on what the impacts of the City's Policy would be and whether there were alternatives was 'negated'.¹⁴⁰

(ii) *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 the Policy'.¹⁴¹ The court implicitly treated the applicants as separate and somehow morally inferior to those who are able to pay for water.¹⁴² Brand describes this approach as 'personalisation': attributing personal agency or responsibility to the poor for their conditions of poverty.¹⁴³

The court engaged in personalisation first by characterising the issues in *Mazibuko* as about the provision of free water to 'accountholders'.¹⁴⁴ As Williams points out, the provision of free basic water to 'accountholders' was

'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.'¹⁴⁵

Although it acknowledged that many stands (including that of Mrs Mazibuko, one of the applicants, occupied by 20 residents) were occupied by a number of households, usually with only one accountholder, the court did not believe that the City ought to be compelled to provide for non-accountholders in its Policy.¹⁴⁶ 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

¹³⁹ Brand op cit note 1 at 67.

¹⁴⁰ Ibid.

¹⁴¹ Ibid at 64.

¹⁴² Ibid.

¹⁴³ Ibid.

¹⁴⁴ Para 6.

¹⁴⁵ Williams op cit note 23 at 244.

¹⁴⁶ 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 benefit stands with fewer residents' (ie 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 Bilchitz op cit note 9 at 603 points out.

by [their] personal degeneracy and deviance'.¹⁴⁷ The implication is that these people are to blame for their position, and the City need not come to their assistance.¹⁴⁸

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',¹⁴⁹ and describing the applicants as 'defaulters'.¹⁵⁰

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.¹⁵¹

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 were unfairly discriminatory towards vulnerable people in our society.¹⁵² 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'.¹⁵³ What the court overlooked was that the alternative to this 'worrying measure'¹⁵⁴ 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.¹⁵⁵ Moreover, the court's description of the applicants as defaulters positions them as an abnormality, whose unsustainable economic behaviour is their own fault, and is therefore unrelated to any underlying systemic causes.¹⁵⁶ The court's approach ignores the fact 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'.¹⁵⁷

¹⁴⁷ Brand op cit note 1 at 65.

¹⁴⁸ Ibid.

¹⁴⁹ Para 137.

¹⁵⁰ Para 153.

¹⁵¹ Para 135.

¹⁵² Para 153.

¹⁵³ Ibid.

¹⁵⁴ Ibid.

¹⁵⁵ Cock op cit note 3 at 94–6.

¹⁵⁶ See Brand op cit note 1 at 67, where he discusses the Constitutional Court's treatment of the poor as an abnormality in other cases.

¹⁵⁷ Para 139. As De Vos op cit note 23 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

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

(iii) *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, which involved ‘a primarily process-oriented approach to reasonableness review’¹⁵⁸ in respect of the challenges to the City’s free basic water policy. As Brand has pointed out in relation to other socio-economic rights litigation, the problem with such an approach is that ‘[t]he 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’.¹⁵⁹

Through a highly deferential approach to the policy,¹⁶⁰ the court in *Mazibuko* found no ‘target evil’ to exist — in other words, by applying a process-oriented approach to reasonableness review, the court was able to find that there existed no arbitrary or exclusionary government action at all, despite the deprivation and hardship experienced by the applicants. Thus 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.

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’.¹⁶¹ 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

like the government wants us to be, we cannot all afford the basic necessities that would sustain our lives.’

¹⁵⁸ Brand op cit note 87 at 38–43.

¹⁵⁹ Ibid at 36.

¹⁶⁰ Wesson op cit note 23 at 405 describes the court’s approach as ‘unjustifiably deferential’.

¹⁶¹ Liebenberg op cit note 2 at 469.

kind of substantive reasonableness review in which it had engaged in earlier jurisprudence.¹⁶²

This proceduralist stance in *Mazibuko* is depoliticising because the court (as Brand claims it has done in other socio-economic rights litigation)

‘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, its steadfast refusal to adopt a particular political point of view, or a particular political philosophy.’¹⁶³

(iv) *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.¹⁶⁴ 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 [ecological gift], to be managed by communities and states for the public good’.¹⁶⁵ 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.¹⁶⁶ 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,¹⁶⁷ the court left the poor to the mercy of ‘neutral’ market forces.¹⁶⁸ The court proceeded on the assumption that poor people operate within a market that provides an equal opportunity to all for self-advancement,¹⁶⁹ whereas in truth, under a pre-paid system, the most vulnerable in our society are unable

¹⁶² Ibid at 468–70, where she describes the approach adopted in *Mazibuko* as a ‘retreat’ from the more ‘robust’ reasonable review that was undertaken *Grootboom*.

¹⁶³ Brand op cit note 1 at 187.

¹⁶⁴ Ibid at 177.

¹⁶⁵ See paras 79, 83, 139, 140, 141, 152, 153 and 155. See too Cock op cit note 3 at 88.

¹⁶⁶ Paras 111, 126 and 135. That the economic sustainability of the system was at issue is plain from the context of the text.

¹⁶⁷ Para 152.

¹⁶⁸ Brand op cit note 1 at 178.

¹⁶⁹ Ibid.

to top up their free basic water allowance, even at the lower rate afforded to them, and must go without.¹⁷⁰

(c) *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, which is intended to give effect to environmental justice as required by our environmental right. In this regard, the NWA abolished riparian rights in South Africa.¹⁷¹ In place of riparian rights the NWA 'recognises that water is a scarce and unevenly distributed [natural] resource, belonging to all people'.¹⁷² The NWA also locates the government as the 'public trustee' over our water to ensure their equitable and sustainable allocation and use in the public interest.¹⁷³ 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.¹⁷⁴

¹⁷⁰ As McDonald & Ruiters op cit note 25 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 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.'

¹⁷¹ D D 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 *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.

¹⁷² *Ibid* at 704.

¹⁷³ Section 3 of the NWA. As Kidd op cit note 46 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 McDonald & Ruiters (eds) op cit note 25 at 66, where the authors 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. For a discussion of the doctrine of public trusteeship in South Africa, see Elmarie van der Schyff 'Stewardship doctrines of public trust: Has the eagle of public trusteeship landed on South African soil?' (2013) 130 *SALJ* 369.

¹⁷⁴ The Constitutional Court was alive to this provision of the Water Services Act (see para 3 note 1), but as I argue above, its focus was on economic sustainability rather than equity.

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'.¹⁷⁵ 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'.¹⁷⁶ 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 principles.¹⁷⁷ 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';¹⁷⁸
- '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';¹⁷⁹
- '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';¹⁸⁰ 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.'¹⁸¹

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

¹⁷⁵ Section 2(1) of NEMA.

¹⁷⁶ Section 1 of NEMA.

¹⁷⁷ Cock op cit note 3 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: '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 op cit note 46 at 39–40.

¹⁷⁸ Section 2(4)(c) of NEMA.

¹⁷⁹ Section 2(4)(d) of NEMA.

¹⁸⁰ Section 2(4)(f) of NEMA.

¹⁸¹ Section 2(4)(o) of NEMA.

mandate of our Constitution — were forgotten, both by the City and the Constitutional Court in *Mazibuko*.¹⁸²

The invocation of environmental justice (made possible by recognising that environmental, social and economic issues are intrinsically linked, implicating the environmental right under s 24 of the Constitution) could challenge this neo-liberal paradigm which sees ecological gifts 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.¹⁸³

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 benefits in response to the unjust distribution of past discriminatory practices.¹⁸⁴

Had the environmental right been engaged in *Mazibuko* in the manner described above, it would have raised the question 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.¹⁸⁵ 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 of 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 impact of unjust environmental decision-making, environmental justice has the capacity to encourage courts to adopt a more rigorous substantive scrutiny of government policies so as to overcome environmental injustices. It requires more than the compliance of government policies with

¹⁸² O'Connell op cit note 10 at 551.

¹⁸³ See note 177 above.

¹⁸⁴ As Du Plessis op cit note 8 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'.

¹⁸⁵ This is the kind of participation envisaged by s 2(4)(f) of NEMA.

good governance standards¹⁸⁶ because it demands the equitable distribution of ecological gifts 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.

V CONCLUSION: A WAY FORWARD

The aim of this article was to seek 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 part I, 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.¹⁸⁷ At this time, a broadening of the definition of 'the environment'¹⁸⁸ 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.¹⁸⁹ 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 part II 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 part III, 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.¹⁹⁰

¹⁸⁶ Good governance standards would include, for example, accountability, consistency and transparency, which though valuable, do not, on their own, lead to transformative decision-making.

¹⁸⁷ Khan op cit note 38 at 27–8.

¹⁸⁸ See note 3 above.

¹⁸⁹ Khan op cit note 38 at 2.

¹⁹⁰ See Brand op cit note 1 who discusses, in depth, how these depoliticising strategies were invoked in a number of socio-economic rights cases, including *Grootboom* supra note 1; *Minister of Health v Treatment Action Campaign* 2002 (5) SA 721 (CC); *Soobramoney v Minister of Health, KwaZulu-Natal* 1998 (1) SA 765 (CC); *Olivia Road* supra note 1 and *President of the Republic of South Africa v Modderklip Boerdery (Pty) Ltd (Agri SA & others, amici curiae)* 2005 (5) SA 3 (CC).

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 issues.¹⁹¹ 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 then) 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.¹⁹² 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 s 27 of the Constitution also amounts to a breach of the state's obligation 'to ensure a healthy environment'.¹⁹³ The court then went onto find that

[t]he 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.¹⁹⁴

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 state 'cannot suffer greater harm than that which will be suffered by the community in the form of health risk, to say the least'.¹⁹⁵

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

¹⁹¹ Such recognition involves re-conceiving the environmental right as a socio-economic right, as opposed to a white middle class tool focused on conservation.

¹⁹² *Federation for a Sustainable Environment and Others v Minister of Water Affairs & others* (ZAGPPHC) unreported case no 35672/12 (10 July 2012) ('FSE 1') and *Federation for a Sustainable Environment and Another v Minister of Water Affairs & others* (ZAGPPHC) unreported case no 35672/12 (26 July 2012) ('FSE 2') (collectively, 'the FSE litigation').

¹⁹³ FSE 2 para 13.

¹⁹⁴ Ibid para 23.

¹⁹⁵ Ibid para 24.

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 some of 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 found that the matter ought to be evaluated against the backdrop of the lived realities of the poor people of Silobela.¹⁹⁶ The court went on to hold that

‘[i]f 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]’.¹⁹⁷

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 by acid mine drainage.¹⁹⁸ 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.¹⁹⁹ Once public interest 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 be a revitalising force in South Africa’s socio-economic rights litigation.

¹⁹⁶ *FSE 1* para 9.

¹⁹⁷ *Ibid* para 17.

¹⁹⁸ Dugard & Alcaro *op cit* note 6 at 31.

¹⁹⁹ *WJ Building & Civil Engineering Contractors CC v Umhlathuze Municipality* 2013 (5) SA 461 (KZD), 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 Murcott ‘Administrative law’ (2013) 2 *JQR* at 2.5.2 for a more in-depth review of that case.