

Fatal Flaws in South Africa's Constitution, Uncovered through Socio-Economic, Environmental and Intergenerational Rights Activism

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Abstract

South Africa's 1996 Constitution is widely lauded as the world's most liberal, yet it was marred by its context: democratisation that occurred alongside the accumulation of excessive corporate power and the adoption of neoliberal public policy. The 1990s transition period generated, in turn, even worse inequality, poverty, unemployment and uneven development than during apartheid. The Constitution thus became a distraction from vital battles by poor and working-class people, including the first use of its celebrated socio-economic rights in unsuccessful interventions in healthcare (kidney dialysis in 1997), housing (in 2000), and water (in 2009). On the one hand, defensive courtroom postures were maintained with the document's help (e.g. anti- eviction injunctions) and occasional offensive victories were registered (e.g. AIDS medicines for pregnant women to halt HIV transmission to babies). But the overall impact was to direct those entering a legal alleyway, with great expectations, into a cul-de-sac where a satisfactory exit was blocked by property rights. The disgust with the Constitution's socio-economic rights clauses often expressed by activists amounts to a charge of tokenism. The only way out has been much more explicit direct action, rather than community activists wasting further time, effort, resources, and strategic credibility by promoting the Constitution.

Keywords

Constitution, socio-economic rights, intergenerational justice, juristic personhood, tokenism



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1. Introduction

My confidence to contribute to the debate here is drawn from an enormous respect that comes from working with some of your own Turfloop-trained lawyers and grassroots organisations, conservationists and environmental justice activists in recent years, as an allied researcher. And the topic I'll conclude with – the Musina Makhado Special Economic Zone, entailing litigation and regulatory disputes that continue to bedevil this megaproject – also reflects my respect for your conference, knowing well that a gathering of lawyers able to ask these difficult questions means that this is both a house of power and a site for critical self-reflection.

We can sense your power in this region, especially since 2018, because Limpopo Province – probably even just within a 200-kilometre area around where we are now – has given us President Cyril Ramaphosa, Central Bank Governor Lesetja Kganyago, the late Finance Minister Tito Mboweni, Deputy Finance Minister David Masedo, and two enormously talented opposition politicians – Julius Malema and Floyd Shivambu. And even if the current reputation and underlying integrity of Limpopo politicians is not at the highest level today, I still think that if we take the tradition of Critical Legal Studies seriously, and if we look at a conference of this sort where the best lawyers in the province are thinking through the strengths and the weaknesses of our Constitution, we can rebuild that reputation and rebuild the power, but this time in a way that the South African Constitution mandates and society deserves.

To me, the 'best constitution' narrative can be critically unpacked by considering four problems: first, juristic personhood, which is central to interpreting the power of capital, given that this feature of the Bill of Rights grants corporations overarching rights that trump human and social rights. Second, everyone at this conference will, in one way or another, refer to the durability of property rights – because many of you are working on that constraint to redistributive justice, teaching it, and thinking especially about its implications for overdue land reform. However, there are two other malign clauses that are specific to most socio-economic rights in the Bill of Rights. The third problem is the Treasury's imagined fiscal constraints, termed by the Constitution's drafters as 'within available resources'. And the fourth problem is the 'progressive realisation' clause in many Bill of Rights paragraphs. To me, these last two represent what can be termed 'weasel words', referring to an animal that moves around very cleverly and in a slippery way.

These four problems – juristic personhood, property rights, artificial fiscal constraints and progressive realisation – are, in my experience, devastating to the three socio-economic rights cases we can look at briefly: *Soobramoney v Minister of Health (Kwazulu-Natal)*¹ in 1997 over access to kidney dialysis; *Government of the Republic of South Africa and Others v Grootboom*² in 2000 over the right to shelter; and *Mazibuko and Others v City of Johannesburg*³ in 2009 over the enforced installation of pre-paid water meters and the inadequate amount that a person is expected to be able to claim as a right to water.

1 1997 (12) BCLR 1696 (CC).

2 2000 (11) BCLR 1169 (CC).

3 2010 (3) BCLR 239 (CC).

The working-class plaintiffs in these three cases have been undermined by those four features of the neoliberal constitution, as well as by an additional problem: the division of labour within our state and government, which disempowers judges when it comes to making forceful interventions. Hence, when it comes to this celebratory feeling we've had this year, and that we'll have again when the Constitution turns 30 in mid-2026, I don't think it's deserved.

Once I can cover that argument, I will flag another current case, involving Shell – the big Dutch-British oil company – and its local black economic empowerment partner, Impact Africa, led by a very well-known entrepreneur, casino operator, media baron and hotel chain owner: Johnny Copelyn. That case arises from a High Court decision in 2022,⁴ was confirmed by the Supreme Court of Appeal in 2024,⁵ and is currently before the Constitutional Court.⁶

What I will need to do, in order to bridge the problems in the existing Constitution with that particular case involving oil and gas exploration offshore, as well as the coal-centric Musina-Makhado Special Economic Zone, is to flag 'rights of future generations.' This Constitution is blind to these rights. To address this, we may consider narratives in which progressive lawyers can explore the field of environmental economics. If they set their minds to addressing future generations' rights, lawyers and environmental economists may have much in common and, even at a technocratic level, begin to construct that bridge to the future. However, we will need to repeatedly turn to the politics of social mobilisation to ensure that legalism and technicism do not undermine the driving force behind constitutional reform: an angry society.

2. The context of a *neo-liberal* transition to democracy

Let me begin by assessing whether our constitution is fit for purpose. In the Constitution's codification, the October 1996 explanatory note said:

The final constitution is legitimate, credible and accepted by all South Africans. To this extent, the process of drafting the constitution involved many South Africans in the largest public participation program, resulting in an integration of ideas from ordinary citizens, civil society, and political parties. This constitution therefore represents the collective wisdom of the South African people.⁷

President Cyril Ramaphosa managed that process, just at the time he lost the battle to become Mandela's successor and was redeployed to racially integrate the commanding heights of the private sector. While there is all due respect for that drafting process, it is vital to look at the

4 *Sustaining the Wild Coast NPC and Others v Minister of Mineral Resources and Energy and Others* 2022 (6) SA 589(ECMk).

5 *Minister of Mineral Resources and Energy and Others v Sustaining the Wild Coast NPC and Others* 2024 (5) SA 38 (SCA).

6 *Sustaining the Wild Coast NPC and Others v Minister of Mineral Resources and Others* Case Number: CCT 194/24 (2025-09-16).

7 Government of South Africa *Constitution of the Republic of South Africa, 1996: Explanatory Memorandum* <<https://www.gov.za/documents/constitution-republic-south-africa-1996-explanatory-memorandum>> accessed 5 June 2025.

downside of the constitutional consultations that Ramaphosa managed. To put it simply, the power balance during the transition from apartheid to representative democracy wasn't optimal for thoroughgoing participatory democracy, and especially for economic justice. Far too much power was left in the hands of a neoliberal fraction of capital.⁸

Indeed, more broadly, the influence of the capitalist class – which had been making enormous profits from what we would all agree was a crime against humanity – was reflected in the collective decision to refuse to repay black South Africans for that crime; i.e., to offer to pay reparations at the Truth and Reconciliation Commission (TRC). Remember that Archbishop Desmond Tutu tried to squeeze some measure of humility from the big barons of capital during TRC hearings but failed. The power balance didn't allow for a wealth tax, as proposed by Sampie Terreblanche, who came from the old guard as a Broederbond member and as a leading economist at Stellenbosch. He wrote a very persuasive statement to the TRC advocating a wealth tax, and reissued it shortly before his death in 2018, but it was not taken seriously.⁹

And yet, the power balance allowed not only property rights to be codified, but also a concept that I believe needs further thought in this conference, because it hasn't come up sufficiently in the critical literature: *juristic personhood*, which comes at the very outset of the Bill of Rights and applies to corporations, giving them unusual powers. Why did big capital want juristic personhood codified in the law of the land? I learnt about the dangers of this over-reach from Ralph Nader, the leading public-interest lawyer in the United States, a two-time presidential candidate, and a guru of critical law – to be sure, a liberal, not a socialist, certainly not trying to overthrow US capitalism but instead to smooth the rough edges.¹⁰

Thanks to juristic personhood, as manifested in *Citizens United v Federal Election Commission* in the US Supreme Court a dozen years ago;¹¹ companies gained the right to buy politicians without any campaign contribution restrictions.¹² In the US context, notwithstanding the long-standing power of capital, the drafters of their constitution didn't, at that stage, have sufficient foresight to do what capitalists in this country did: write into the core document that a business enterprise has foundational rights as a juristic person, equivalent to those of a human being. The US corporations won them through incremental litigation, case by case, culminating in *Citizens United*, which makes it extremely unlikely that the likes of Bernie Sanders or Alexandria Ocasio-Cortez can ever launch the kind of left-populist third party that would compete with paleo-conservative Republicans or corporate-liberal Democrats.

8 Bond, P *Elite Transition: From Apartheid to Neoliberalism in South Africa* (2nd Ed., Pluto Press 2014).

9 Terreblanche, S 'South Africa's Dangerous Triangle of Race-Class Inequality' *City Press*, January 2018 <<https://www.ekon.sun.ac.za/sampieterreblanche/wp-content/uploads/2018/04/Terreblanche-op-ed-on-wealth-inequality-and-TRC-City-Press-January-2018.pdf>> accessed 5 June 2025.

10 Marcello, PC *Ralph Nader: A Biography* (Greenwood Press 2004).

11 *Citizens United v Federal Election Commission* 558 U.S. 310 (2010).

12 Teachout, Z *Corruption in America: From Benjamin Franklin's Snuff Box to Citizens United* (Harvard University Press 2014).

According to Robert Weissman, who in 1996 was Nader's main lieutenant, and today directs the NGO Public Citizen:

The extension of fundamental rights to juristic persons frequently entails simultaneous weakening of, and prejudice to, and even derogation from the fundamental rights of natural persons. The extension to corporations of freedom of political expression, negative free speech rights, and rights of privacy has undermined the constitutional rights of natural persons to freedom of expression, freedom of association and organs of civil society, access to information, the rights to life, security of person, and a safe environment. What is required, and what the final constitution of South Africa does not adequately provide, is express recognition of the principle that where the constitutional rights of juristic persons conflict with the constitutional rights of natural persons, the rights of the latter will prevail.¹³

The codification of corporate personhood in the Constitution was contested in the 1996 certification case before the Constitutional Court. Several of us, supported by Nader, made that case, but we failed to persuade the judges that they needed to excise that clause.¹⁴ As Roederer and Moellendorf put it, that case against the juristic personhood rights of corporations is '[a]n example of the law serving to stabilise capitalist property relations. The final constitution contains no assurance that when the rights of juristic persons conflict with those of natural persons, the right of the latter shall prevail.'¹⁵

3. Juristic personhood in practice: FIFA trumped political rights at the 2010 World Cup

Along with colleagues at the University of KwaZulu-Natal (UKZN) Centre for Civil Society, I experienced this in July 2010. The name Sepp Blatter will still be familiar, because the international soccer federation FIFA was so ethically challenged that his colleagues Jack Warner and Chuck Blazer could draw \$10 million from our taxpayer funds for bribery, in order that South Africa would win the Caribbean and North American votes in the 2004 election to host the World Cup in 2010.¹⁶ (Although there has been no prosecution in South Africa, certainly the FBI's capture of numerous FIFA executives in 2015 at a board meeting in Zurich was an indication that Danny Jordaan was right to stay home and miss that event.) July 2010 was when we learnt what Blatter and his team would do to corrupt the greatest game we all love: soccer.

13 Weissman, R 'Corporate Rights in South Africa' *Multinational Monitor*, 1 November 1996 <<https://www.thefreelibrary.com/Corporate+rights+in+South+Africa.-a019528162>> accessed 5 June 2025.

14 Bond, P 'Constitutionalism as a Barrier to the Resolution of Widespread Community Rebellions in South Africa' (2014) 41(3) *Politikon* 461.

15 Roederer, CJ & Moellendorf, D *Jurisprudence* (Juta 2004).

16 Bond, P 'World Soccer Corruption, Africa's "Illicit Financial Flows" and Elite Silences' *CounterPunch*, 3 June 2015 <<https://www.counterpunch.org/2015/06/03/world-soccer-corruption-africas-illicit-financial-flows-and-elite-silences/>> accessed 5 June 2025.

The UKZN team was handing out leaflets against xenophobia on the Durban beachfront – the most democratic space in this country, in my opinion. We did so on 2 July, which was a pivotal day, as the Ghanaian team had nearly reached the quarterfinals. But they were prevented from getting further by the Uruguayans, who stopped the crucial goal from going in by blocking with a handball. The cheater who did so, Luis Suárez, is better known for biting the ears of opposing players. That particular moment, when South Africans gave moral support to the African team that had advanced the farthest of any in the World Cup, coincided with a terrible anger in society – often manifesting as xenophobia – and especially in many of Durban’s shack settlements and townships. These furious citizens had been shut out of World Cup benefits and could only watch the glamour from afar on television and at the Fanfest site, given the exorbitant price of tickets.

The clear sense that Durban activists were getting from township sources was that, as soon as the World Cup was over, it would be time to kick out immigrants. Durban’s progressive community felt it vital to hold an anti-xenophobia rally at City Hall the next day, 3 July, and a leaflet to advertise it at the Fanfest was prepared. But the juristic personhood of Sepp Blatter and FIFA prevented that. We were arrested and prevented from – as the charge sheet put it – ‘ambush marketing’ at the Fanfest on the Durban beachfront, between the two games that night, just after Ghana was defeated. That taught us a sobering lesson about the durable power of capital, especially when being arrested on 2 July and again the next day, for simply handing out anti-xenophobia leaflets in a public space, Durban’s North Beach, a space that Blatter and FIFA claimed they owned for those four weeks in mid-2010.¹⁷

17 The incident was recounted in *Pambazuka News* on 8 July:

Police detention while exercising freedom of expression at our favourite Durban venue - the wonderful South Beach Fan Fest - on the weekend, followed by (taped) discussions with police, together leave me worried. They should worry you, too. Police officials say they received orders from City Manager Mike Sutcliffe that FIFA’s property rights overrule our foundational Constitutional rights in a vast area stretching from Moses Mabhida across the beachfront.

“We can charge you and detain you until the 11th of July, FIFA is over!” shouted a top officer during my interrogation on Saturday.

And politely questioning Sutcliffe about whether we could use City Hall steps for Saturday’s anti-xenophobia rally, my CCS colleague Baruti Amisi (a Congolese refugee) received this email reply last Thursday: “It appears you are not a South African and are clearly uninformed about the role of FIFA. In brief, we are an independent country and except for the stadium precinct, FIFA have no role in running the city.”

Getting permission for the rally was, as ever, like pulling teeth. The police were informed in writing on June 19 but it was last Friday afternoon before rally approval was granted to a coalition that included the KZN Refugee Council, Diakonia and the Durban Social Forum.

A group quickly brought 1000 fliers to the beach to let people know. Minutes later, visiting doctoral candidate and filmmaker Giuliano Martiniello, research student Samantha Sencer-Mura and I were accused of ambush marketing and incitement.

I was detained for hours during both early games’ half-times, missing (thank goodness) the pain of seeing my favourite Latin American teams clobbered by Europeans. The top-heavy security force included police generals, Crime Intelligence, the Commercial Branch and even the National Intelligence Agency.

We are, of course, lovers of World Cup soccer and haters of FIFA, like most people who give this distinction a moment's consideration. The Zurich crew will take home R25 billion in profits, pay no taxes, ignore exchange controls, trickle nothing down, commercialise all aspects of the game, copyright words like "World Cup", overcharge for everything, declare 'exclusion zones' that stretch for miles, muffle journalists with no-criticism accreditation requirements, and trample on our freedom of expression.

Moreover, many bitter players and fans believe Sepp Blatter's main legacy is the quaint - or, hinted Lord David Triesman of the English Football Association a few weeks ago, bribe-friendly? - refusal to adopt goal-line technology needed to correct egregious referee errors. (Blatter instead, apparently, focuses all FIFA's camera-power on potential ambush-marketers in the crowd.)

Illustrating how constrained our rights are, I asked one police superintendent (name withheld), "What if I say 'Viva Argentina!' in the fan park? No problem? What if I say 'Phansi FIFA phansi!'"

"Then you're wrong," he answered. "You can't say, 'Phansi FIFA phansi'"

Sutcliffe's control fetish appears to be the central barrier. As a police superintendent put it, "He's the one who has instructed us that we must enforce. He comes in our meetings."

"And what does he say? He says he doesn't want any anti-xenophobia?"

The police superintendent replies, "No distribution of pamphlets, especially which mention xenophobia."

Ah, the underlying problem had emerged. The reason the pamphlet was banned was not just procedural, it was political. "You are reminding [people] of xenophobia. Even myself I had forgot about that thing, but now you write it down."

"Do you think it is not a problem?," I asked. Surely Durban police know that a city councilor is amongst those still being tried for the xenophobic murder of a Tanzanian and Zimbabwean last year, and that the streets and worksites are thick with tension and insults against immigrants and refugees.

His rebuttal "It happened. Then government stopped it there."

"I'm sure you know that Jacob Zuma said xenophobia's a problem," I replied, and that after meeting his national executive in May, the president "said the ANC branches must work against xenophobia," I reminded the superintendent.

"There is no xenophobia," he insisted - but nervously.

Such denialism parrots ANC spokesperson Jackson Mthembu's written statement earlier that day: "The reported xenophobic attacks by South Africans on foreign nationals, particularly from the African continent, after the conclusion of the 2010 FIFA World Cup in South Africa, is baseless and without any rational" (sic).

And yet the army is occupying the town of Denoon precisely because the threat could explode into 2008-type violence.

Behind Sutcliffe's arrogance in declaring such a large a Constitution-free zone, is the Constitution drafters' ambiguity, with the Bill of Rights potentially interpreted as allowing corporate property rights to trump human rights. Section 8(4) gives foundational rights to 'juristic persons', i.e., institutions including for-profit businesses like FIFA.

In 1996, alongside former ANC Member of Parliament Langa Zita and Darlene Miller (a sociologist at the Human Sciences Research Council), we formally warned a Constitutional Court certification hearing that this provision could "undermine the constitutional rights of natural persons to freedom of expression, freedom of association in organs of civil society, access to information, the rights to life, security of the person, and a safe environment."

So it seems we were right, sadly. Likewise, in the US, a similar degeneration of political rights occurred this year when the Supreme Court lifted limits on corporate spending to influence elections.

Bond, P 'When "Phansi FIFA, Phansi" is Forbidden Speech' *Pambazuka News*, 8 July 2010 <<https://pambazuka.org/when-%E2%80%98phansi-fifa-phansi%E2%80%99-forbidden-speech>> accessed 5 June 2025.

4. Socio-economic justice denied

In 1997, it was very much in the same geographical area that I just described that an earlier attack on constitutional rights occurred: Addington Hospital on the south side of the Durban beachfront.¹⁸ A working-class black man who visited there regularly was dying: Thiagraj Soobramoney. He needed kidney dialysis; with it, he could live longer. His lawyers reminded an emergency hearing of the Constitutional Court that no one may be refused emergency medical treatment, and that everyone has the right to life. But Judge Arthur Chaskalson, writing the majority opinion, disagreed, writing:

[T]he obligations imposed on the state by Sections 26 and 27 in regard to access to housing, healthcare, food, water, and social security are dependent upon the resources available for such purposes, and that the corresponding rights themselves are limited by reason of the lack of resources.¹⁹

The first really foundational statement by Chaskalson on behalf of the Constitutional Court in 1997 was about the limits of socio-economic rights. The day after that ruling, they pulled the plug on the dialysis machine, and Soobramoney died. At a UCT law conference some years later, I asked Chaskalson: did he not feel he was bringing back the death penalty? He was shaken by that question. Perhaps no one had put it to him that the death penalty – for the crime of poverty – now formally existed, because of the way that judgment was phrased.

However, socio-economic rights were again celebrated in society in 2000, with Irene Grootboom's case, an apparent victory for housing rights. It's the crucial case regarding the constitutionally mandated division of powers within the South African state. Grootboom, who was homeless in a Western Cape township, Wallacedene, had sued the housing minister, arguing that the existing policy was unconstitutional.²⁰ The policy was put in place by a man who was dying of cancer at the time, in December 1994, but whom no one can deny had the interest of South Africa's poor at heart: Joe Slovo, the democracy's first housing minister and the longstanding leader of the South African Communist Party.²¹

Slovo's first housing policy – strongly influenced by the World Bank – was issued just weeks before he passed away, in January 1995.²² It made provisions for a market-orientated policy, because he wanted to, as the *White Paper* insisted, 'normalise the market' in housing finance, after nearly a decade's worth of bond boycotts – refusals to pay mortgage bonds – by township housing activists who were angry about poor-quality construction or who were unable to pay fast-rising interest rates.²³

18 *Soobramoney v Minister of Health (Kwazulu-Natal)* 1997 (12) BCLR 1696 (CC).

19 *Ibid* para 11.

20 *Government of the Republic of South Africa and Others v Grootboom and Others* [2000] ZACC 19; 2001 (1) SA 46 (CC); 2000 (11) BCLR 1169 (CC) <<https://www.saflii.org/za/cases/ZACC/2000/19.html>> accessed 5 June 2025.

21 Bond, P "We've got the state. Where's the Power?": Debilitating contradictions in the South African Communist Party leadership since 1994' (forthcoming 2026) *Review of African Political Economy*.

22 Bond, P *Cities of Gold, Townships of Coal* (Africa World Press 2000).

23 *Government of South Africa A New Housing Policy and Strategy for South Africa White Paper, 1994* <<https://www.gov.za/documents/white-papers/new-housing-policy-and-strategy-south-africa-23-dec-1994>> accessed 5 June 2025.

And so, housing policy ultimately ended up with developers guiding provincial housing boards and financiers determining whether a project could go ahead. As a result, as Constitutional Court Judge Richard Goldstone said, the *Grootboom* judgment was unique, to be remembered as '[t]he first building block in creating a jurisprudence of socioeconomic rights.'²⁴ Grootboom's victory apparently gave legal muscle to the poorest of the poor because, as her lawyer, Ismael Jamie, convincingly explained to the judges, Slovo's housing policy was unconstitutional since it didn't provide for the poorest. But then Irene Grootboom died in 2008, homeless. Why? The victory contained no remedies because of the Constitutional Court's incapacity to actually change the executive's policy, to solve the problem, or even provide the embarrassment effect that judgments often do, in order to force the state to do something. Grootboom died homeless. As Jamie put it at the time of Grootboom's death:

The fact that she died homeless shows how the legal system and civil society failed her. I'm sorry we didn't do enough following up after the judgment was given in her favour. We should have done more. I feel a deep regret today.²⁵

And yet, I think he was being too self-critical. The system broadly reflects the failure of the Constitution's division of powers to allow for the full implications of a judgment from the highest court, as the third case also demonstrates. This was the *Mazibuko and Others v City of Johannesburg* decision in 2009,²⁶ following positive decisions on behalf of Soweto plaintiffs in 2008, in the High Court and the Supreme Court of Appeal. But the 2009 Constitutional Court decision was written by Kate O'Regan, and went against Mazibuko and her Coalition Against Water Privatisation, made up of Johannesburg-area township civil society groups. The author of the City of Johannesburg's water policy was Suez Lyonnais des Eaux, a French firm that, between 1999 and 2006, had made Johannesburg its main guinea pig for installing pre-paid water meters.²⁷

The Constitutional Court was asked by the plaintiffs, advocate Wim Trengove, and their lawyer, Jackie Dugard, to cancel this system. That act had already been accomplished in Britain: even Tony Blair's neoliberal government had conceded that pre-paid water meters should be made illegal. The reason was the threat they posed to public health as a self-disconnection device.²⁸ But the Constitutional Court overruled the High Court and the Supreme Court's decisions, ruling in favour of those meters.²⁹ The other part of the decision considered whether the City of Johannesburg should allocate 50 litres per person per day as the free basic water allocation. The City of Johannesburg was offering only

24 'Irene Grootboom's Unbuilt House' Public Interest Legal Services, 2020 <<https://www.pils.org.za/irene-grootbooms-unbuilt-house/>> accessed 5 June 2025.

25 Joubert, P 'Grootboom Dies Homeless and Penniless' *Mail & Guardian*, 8 August 2008 <<https://mg.co.za/article/2008-08-08-grootboom-dies-homeless-and-penniless/>> accessed 5 June 2025.

26 2010 (3) BCLR 239 (CC).

27 Bond, P & Dugard, J 'The Case of Johannesburg Water: What Really Happened at the Pre-paid "Parish Pump"' (2008) 12(1) *Law, Democracy & Development* 1.

28 Naidoo, P *The Installation of Prepaid Water Meters in Phiri*, Soweto Centre for Civil Society Report No. 9, July 2005 <https://ccs.ukzn.ac.za/files/CCS_RASSP_0705_Report%209.pdf> accessed 5 June 2025.

29 *Mazibuko and Others v City of Johannesburg and Others* 2010 (3) BCLR 239 (CC).

25 litres, consistent with national policy. A failure to win that latter point suggested, once again, that the weasel words of ‘within available resources’ and ‘progressive realisation’ were debilitating, namely, that the state can provide one more tap this year than it provided last year and thereby comply.

There are plenty of other aspects of socio-economic rights litigation to consider. As disconnections increased, we began to see many community groups going to their public-interest lawyers and saying: please, we need injunctions against cut-offs. That was one of the most important short-term objectives, and it was often successful. Another illustrative case involved water rights and featured a woman named Thulisile Christina Manqele from Durban. She lived in a shack settlement in Chatsworth. At that point, in the late 1990s, there was an extraordinary effort led by the late sociologist Fatima Meer to unite Black African and working-class Indian communities in Chatsworth. They found that water was a common source of grievance. The municipality turned off Manqele’s water supply due to her inability to pay, a situation faced by many others. As argued by one of her lawyers, Heinrich Bohmke, the case was:

[a]n early warning for those who would hear it, of the dangers of making demands for the bare necessities of life in terms subject to constitutional adjudication. The case was lost, the Westcliff Flats Dwellers Association was demobilised while judgment was awaited and, in fact, came to think of itself as a collection of good if victimised citizens.³⁰

In other words, a social movement was firmly motivated to demand and to advocate for free basic water using the Constitution – and at that point, also using then-Minister Ronnie Kasrils’ promises of free basic water – but was told: just wait. Stop the protests. We’re going to go into the courts now. Manqele and her comrades were told, if you protest, the judges are not going to think highly of us. They think you’re just rabble-rousers, and you’re not serious about using the court system.

This comes up again and again. For those doing advocacy work with social movements, the temptation – if you’re a lawyer busy now in the courts, trying to have a respectable case – is to tell your constituents: shut up, don’t protest, don’t make a fuss, it’s going to make me look bad. And the dilemma, as some critical legal scholars – Tshepo Madlingozi, Joel Modiri, Daria Roithmayr and others – have argued, is that the court then becomes a site of demobilisation, a place to tame the social movements.³¹

In response, Sowetans have been illegally reconnecting water and fighting off City Council’s security men every time they’ve come to impose law and order, ever since 2009.

30 Bond, P ‘Two South African Enemies Die, Alongside our Right to Water’ *Pambazuka News*, 6 July 2011 <<https://pambazuka.org/two-south-african-enemies-die-alongside-our-right-water-%E2%80%A8%E2%80%A8>> accessed 5 June 2025.

31 Madlingozi, T ‘Post-Apartheid Social Movements and Legal Mobilisation’ in Langford, M, Cousins, B, Dugard, J & Madlingozi, T (eds) *Socio-Economic Rights in South Africa: Symbols or Substance?* (Cambridge University Press 2013) 92-130; Modiri, JM ‘Race, History, Irresolution: Reflections on City of Tshwane Metropolitan Municipality v Afriforum and the Limits of “Post”-Apartheid Constitutionalism’ (2019) 52 *De Jure Law Journal* 27; Roithmayr, D ‘Lessons from Mazibuko: Persistent Inequality and the Commons’ (2010) 3 *Constitutional Court Review* 317.

But from recent protests in Polokwane, we all know this friction is a major problem with electricity. The former head of Eskom, André de Ruyter, began his service in early 2020. In the middle of 2020, he instituted a controversial policy, 'load reduction', which means even if you've paid your electricity bill in an area supplied by Eskom, if too many of your neighbours have not, the entire area is disconnected. In the tradition of so many apartheid-era bosses, this policy represents collective punishment. De Ruyter imposed it in the middle of the winter of 2020, just as Covid-19's first wave was hitting society hard. This activity can be summed up in two words: energy racism. It's the title of a report produced by University of Johannesburg researchers.³²

And this policy is dividing the working class at the moment, as reflected in demands made by protesters in Polokwane in September 2024, calling for Eskom to disconnect people with illegal connections – an estimated 65% in some areas – so that they could resume uninterrupted supply.³³ So the characteristics of such disconnection processes – when the imposition of self-disconnecting pre-paid meters hasn't worked – again reflect the limits of constitutionalism. That is, as even Sandy Liebenberg conceded in terms of the *Mazibuko* judgment, a point at which the state avoids 'the substantive dimension of progressive realisation' in favour of a 'process-oriented meaning' and 'reduces the analytical work [of assessing socio-economic rights] ... to almost negligible proportions.'³⁴

An example of the distorted substantive logic of rights can be found in a more positive outcome of socio-economic rights litigation, brought to the courts by the Treatment Action Campaign. The Constitutional Court ruled in 2002 that because it would cost the state more to treat an HIV-positive child for the opportunistic infections than to spend R700 on Nevirapine treatment for the mother and then for the child to prevent infection at birth, a cost-benefit analysis would work in favour of recognising a constitutional right to health, including the next generation still to be born.³⁵

5. Do future generations have rights?

So, with that child-protection finding in mind, allow me to think through with you how the worst problem we are all facing in the coming decades – climate catastrophe – can be understood as a violation of inter-generational rights.³⁶ The South African Constitution

32 Maggott, T, Mbatha, S, Ceruti, C, Moyo, L, Mporo, A, Ngwane, T, Shezi, C & Sinwell, L 'Energy Racism: The Electricity Crisis and the Working Class in South Africa' (2022) <<https://www.uj.ac.za/wp-content/uploads/2022/04/energy-racism-csrp-web.pdf>> accessed 5 June 2025.

33 Siaga, T 'Hundreds of Limpopo Villagers March to Eskom to Demand an End to Load Reduction' *GroundUp*, 17 September 2024 <<https://groundup.org.za/article/more-than-200-limpopo-villagers-marched-to-eskom-to-demand-end-to-load-reduction/>> accessed 5 June 2025.

34 Liebenberg, S *Socio-Economic Rights: Adjudication under a Transformative Constitution* (Juta 2010).

35 *Minister of Health and Others v Treatment Action Campaign and Others (No 2)* 2002 (10) BCLR 1033 (CC).

36 I am grateful to one of the leaders in this field for having introduced me to the concept: Di-Aping, L 'WATCH: The Global Climate Ghetto – The Environmental Crisis from the Perspective of the Global South' *Wrong Kind of Green*, 14 December 2019 <<https://www.wrongkindofgreen.org/2019/12/14/watch-the-global-climate-ghetto-the-environmental-crisis-from-the-perspective-of-the-global-south/>> accessed 5 June 2025.

has yet to close this gap and recognise the blind spot by understanding sustainable development. In 1987, Gro Harlem Brundtland and her main ally on the Brundtland Commission, Bernard Chidzero, the Finance Minister of Zimbabwe, argued that the most crucial of these future-generational rights is the recognition of our generation's ecological debt. There's an acknowledgement in the Brundtland Commission's main definition of sustainable development, which is 'meeting the needs of the present without compromising the ability of future generations to meet their needs.'³⁷

The ecological debt concept applies to me, because last night I flew here from Johannesburg, and I used about a quarter of a ton of emissions to make the flight here and then to return. What can be done to ensure I have some liability, some financial accountability, for my carbon footprint, as well as for my role in the depletion of natural resources, such as hydrocarbons, which could be much better used for other purposes than combustion in the process of airplane transport? (We all need those hydrocarbons for lubricants, pharmaceutical products, plastics and synthetic materials, tarmac and many other uses.) My inter-generational responsibilities include some awareness and action when it comes to ecological debt.

As the Nobel Prize-winning economist Robert Solow asked when he grappled with environmental economics: what should each generation give back in exchange for depleted resources if it wishes to abide by the ethic of sustainability? As Solow puts it: '[w]e owe to the future a volume of investment that will compensate for the withdrawal from the inherited stock.'³⁸ And you have, in this very Law School, a team dedicated to environmental critique and remedy. And you also have in Limpopo Province one of the world's greatest stocks of underground mineral and fossil fuel resources. I'll finish this lecture by reminding you of the abuse of coal in one of the most vital of those mining sites, namely, the Musina-Makhado Special Economic Zone.

So, as our local, provincial and national stocks of natural capital are depleted – as Limpopo Province coal, platinum group metals or other minerals are taken from the ground, typically by multinational corporations – the problem is not only the vast CO₂ emissions associated with coal combustion, deep mining and 'process emissions' from smelting and processing envisaged at the Musina-Makhado Special Economic Zone (MMSEZ). There are also often severely damaging instances of local pollution and environmental destruction to contend with. Let me focus, as a matter of environmental policy and law, on the cost of depleted non-renewable mineral wealth, because mining profits are typically not sufficiently reinvested at source; they're sent home to shareholders. The ability to instead use that stream of mining revenue for reinvestment in productive capital or human capital (education) investments is thus reduced, as the proceeds from natural capital depletion are whisked away.

37 World Commission on Environment and Development *Our Common Future* (1987) <<https://www.brundtland.co.za/wp-content/uploads/2022/08/Brundtland-Report-1987-Our-Common-Future.pdf>> accessed 5 June 2025.

38 Solow, RM 'The Economics of Resources or the Resources of Economics' (1974) 64(2) *American Economic Review* 1.

This was the concern of environmental economist John Hartwick, a student of Solow, who insisted on that sensible calculation, in ensuring natural capital decline would be compensated for by genuine investments in productive capital as well as human-capital improvements, such as tertiary education.³⁹ That way, unlike the case of gold mining that emptied the Witwatersrand of half the world's historic gold supply (leaving many of us in a city – one of the world's wealthiest ever – without a functioning water and sanitation system on many days of the year, and with what PwC consistently recorded in the 21st century as the world's worst site for 'economic crime and fraud'), the mineral wealth can contribute to development, including stewardship of overall wealth for the next generation, and not to under-development.⁴⁰

We all would desire more human-capital investments in the University of Limpopo School of Law and other sites of public interest education, and also in the productive capital that Limpopo lacks, especially for the manufacture of basic-needs commodities – clothing, textiles, footwear, appliances, electronics and other labour-intensive products – that the province's citizenry consumes once they are imported, often from East Asia. That will require a rethink of the current process by which mineral wealth is merely a drain, not an inter-generationally-sustainable source of investment.⁴¹

South Africa's national mineral wealth has been estimated at \$2.5 trillion nationally, and a large amount is here, since 85% of the world's platinum is found in an arc that runs from Limpopo down to North West Province.⁴² If you could force your provincial state agencies to compel mining firms to reinvest the revenues in higher levels of human capital and productive capital, then your depletion of natural capital would meet the conditions of the Hartwick Rule.

Is it possible to get South Africa's courts to think inter-generationally in the way that I've just described? As loyal residents of natural-resource-rich Limpopo, and indeed the others from around the country, none of us would dispute that our society does need to care much more for our children and for future generations, with more financial resources and personal dedication as well as state investments. Women, in particular, have a far higher stewardship consciousness than is typical in what we have inherited from apartheid capitalism, namely a white-centric, Western, male orientation, which is short-termist, profit-centric and uncaring about racism, sexism and environmental destruction. The prevailing approach, which relies upon a 'Gross Domestic Product' (GDP) measure created in 1937 by US economist Simon Kuznets in the throes of the Great Depression, does not include pollution, depletion, unpaid women's work and other features.⁴³

39 Hartwick, JM 'Substitution Among Exhaustible Resources and Intergenerational Equity' (1978) 45(2) *The Review of Economic Studies* 347.

40 Bond, P 'Grand Theft Sandton: Political Corruption and Corporate Crime as South African Capitalism' in Wiegratz, J (ed) *Capitalism and Economic Crime in Africa: The Neoliberal Period* (Routledge 2024) 187-205.

41 Bond, P 'Pitfalls of Resource-National Consciousness' *CADTM*, 5 February 2025 <<https://www.cadtm.org/Pitfalls-of-resource-national-consciousness>> accessed 5 June 2025.

42 Government Communication and Information System 'Mineral Resources' in *South Africa Yearbook 2012/13* (2013) <https://www.gcis.gov.za/sites/default/files/docs/resourcecentre/yearbook/2012/16%20Mineral%20Resources_0.pdf> accessed 5 June 2025.

43 Fioramonti, L *Gross Domestic Problem: The Politics Behind the World's Most Powerful Number* (Zed Books 2013).

Partly due to reliance on GDP and neglect of market externalities such as pollution, there is no ubuntu spirit in traditional economics. Ubuntu is a concept that, in assessing constitutional provisions, Nyane has written persuasively about.⁴⁴ Could we not find a way to insert more African values, inter-generational in character, that think of ubuntu as people-to-people, but also people-to-ecology (as does Christelle Terreblanche)?⁴⁵

Here, I think an African eco-feminist approach is appropriate. So, I'll turn now – before I conclude with the MMSEZ and some consideration of South Africa's other new resource discovery, offshore oil and gas – to a quote from the progressive advocacy group based in Johannesburg, but active across the continent, Women in Mining. This organisation had put together an agenda for their own research and advocacy, to:

[d]eepen efforts to foreground a feminist analysis of costs, showing that this places particular burdens on the cheap and unpaid labour of impacted women. We will grapple with the problem of costing damage and impacts immediately and on a cumulative basis to show that the extractivist model of development does not advance people and their economies, but rather destroys and immiserates them. We will show the intergenerational costs of extractivism. We will work to argue that Africa and African nations are losing sovereign wealth through extractivism and only becoming poorer. These efforts lay the basis for advocacy and campaigns to build wider popular and public consciousness, build the grounds for advocacy and development alternatives, as well as advocate and campaign to force the internalisation of real costs which would render the majority of projects unsustainable.⁴⁶

6. Hopeful constitutional litigation against fossil fuels

The ideas that I've been floating about constitutional limitations are perhaps most poignant when it comes to fossil fuel projects in the two financially poorest provinces: the Eastern Cape and Limpopo. In both, opposition is intense. First, we must contemplate judicial consideration of fossil fuels in the wake of a Makhanda High Court judgment on 1 September 2022, against proposed offshore oil and gas exploration by Shell and Johnny Copelyn's Impact Africa. The case was advanced by the NGO Sustaining the Wild Coast, the community movement Amadiba Crisis Committee and other grassroots allies. In its wake, there is greater hope that the justice system can address socio-ecological concerns. On largely procedural grounds – albeit not constitutional environmental rights, which were invoked but not firmly adjudicated – two of the three oil and gas companies, most active on the Indian and Ocean coastlines were deterred from exploration, including seismic blasting (the third being TotalEnergies).⁴⁷ Although appeals are still pending before the

44 Nyane, H 'Constitutional Morality in South Africa: Is It the Missing Link?' (2023) 39(2-3) *South African Journal on Human Rights* 154.

45 Terreblanche, C 'Ubuntu and the Struggle for an African Eco-Socialist Alternative' in Satgar, V (ed) *The Climate Crisis: South African and Global Democratic Eco-Socialist Alternatives* (2018) 168-189.

46 WiM-Africa *WoMin Five Year Strategy (2020-2024)* (2019) <<https://library.oapen.org/bitstream/handle/20.500.12657/29462/9781776143306.pdf>> accessed 5 June 2025.

47 Bond, P 'Resource Extraction Cost-Benefit Debates in South Africa: Contesting the Environmental Economics of Offshore Gas Extraction' (2023) 30(1) *Alternation* 35.

Constitutional Court, there is confidence that the Constitutional Court will confirm the failure of Copelyn's Environmental Impact Assessment team to arrange isiXhosa translation (he provided only English and Afrikaans translations), and hence that tokenistic community consultation is not acceptable.

Moreover, a narrative endorsed by the Makhanda High Court – based on the rights of Xhosa coastline dwellers' ancestors whose spirits reside in the Indian Ocean, offshore the Wild Coast – will allow Eastern Cape and KwaZulu-Natal residents to continue to offer a powerful spiritual argument against seismic blasting.⁴⁸ The ruling implicitly endorses the constitutional rights of *past generations* and the ways in which their influence (and peace) are vital to current and future generations. For future generations, the implications of fossil fuel extraction for the climate crisis were another feature of the explanations given by the two grassroots leaders – Sinegugu Zukulu and Nonhle Mbuthuma – when, in mid-2024, they were jointly awarded the 'Green Nobel' of grassroots environmentalism, the Goldman Prize.⁴⁹ They are also well known for litigating when resisting mining; Mbuthuma's Amadiba Crisis Committee had won a 2018 Pretoria High Court judgment against an Australian ilmenite mine on their traditional beach land.⁵⁰

The Supreme Court decision was not ideal, for it meant that while the Makhanda judges' authority was confirmed on some factors, Shell and Copelyn were granted permission to apply to return to the Wild Coast with seismic blasting and potential further exploration, and climate considerations were ignored. The Constitutional Court is now considering arguments advanced by Lawyers for Human Rights, Cullinan & Associates, the Centre for Environmental Rights and some of South Africa's leading environmental lawyers, who, like the plaintiffs, are hoping that the highest court takes a stand for future generations, for the rights of the environment, against a climate-catastrophic fossil fuel exploration.

7. The challenge to Limpopo lawyers

All this gives me a chance, in wrapping up, to remind you that Limpopo human rights lawyers can also be at the cutting edge of this jurisprudence, combining social and environmental litigation. I have not yet identified lawyers in Limpopo willing to make an inter-generational case, but I'm sure all of you in the house will agree that your fellow provincial residents also have past, present and future generational rights. We can see this challenge play out when it comes to the resource-depleting, climate-catastrophic character of the single biggest project currently underway in South Africa: the MMSEZ.⁵¹

Many of you would have heard about the case because a Chinese businessman named Ning Yat Hoi from Shenzhen Hoi Mor Resources Holdings Ltd visited here in the mid-2010s, and in 2017 was given permission to launch the South African Energy and

48 Solomon, J 'In the Wake of the Ancestors, Dreaming of a Sacred Sea' (2023) 30(1) *Alternation* 72-102.

49 Goldman Environmental Prize 'Sinegugu Zukulu & Nonhle Mbuthuma' <<https://www.goldmanprize.org/recipient/sinegugu-zukulu-nonhle-mbuthuma/>> accessed 5 June 2025.

50 *Baleni v Minister of Mineral Resources* [2018] ZAGPPHC 829.

51 Bond, P 'Trouble at the Tip of the Belt and Road: South Africa's Largest Industrial Mega-project Meets Eco-social Resistance' 14 January 2025 <<https://www.cadtm.org/Trouble-at-the-tip-of-the-Belt-and-Road-South-Africa-s-largest-industrial-mega->> accessed 5 June 2025.

Metallurgical Base Pty Limited (as MMSEZ operator) by Rob Davies, the then-Minister of Trade and Industry.⁵² The arrangement was to last 90 years, with a further 30-year extension possible. But apparently unknown to Davies (whose team did not do due diligence, e.g. Googling the principal and his firm), Ning was at the time on the Interpol Red List for having engaged in financial fraud against Zimbabwe's Bindura Nickel Corporation and Freda Rebecca Gold Mine. His liability was confirmed in the UK High Court in London in 2018.⁵³ Yet just before that ruling (while Ning remained on the Interpol list), Ramaphosa made a big pitch for the MMSEZ in Beijing in September 2018, at the Forum on China–Africa Cooperation, promising billions of dollars of investments upon his return.⁵⁴

In the course of these proceedings, Ning began extensive planning and corporate recruitment for the MMSEZ. He chose a large area 60km north of Makhado (Louis Trichardt), about 80km west of Khalavha – President Ramaphosa's traditional home village – at a baobab-filled site on the main N1 highway to Zimbabwe, about an hour south of the border. Two companies alone – China Huadian Hong Kong Company and Power China International Group – committed to invest more than \$9 billion, with up to \$22 billion rumoured to be available for the SEZ in 2018.⁵⁵ One obvious attraction was a 15% corporate tax rate, compared to 27% outside the SEZs.⁵⁶

But, in addition, the nearby area has vast coal reserves underground. The formerly locally owned MC Mining – extremely controversial for its 2009 to 2013 coal mining in a protected buffer zone adjacent to the Mapungubwe National Park (a UNESCO World Heritage Site) – had acquired large-scale mining rights in that area. From 2022 to 2024, MC Mining was chaired by Nhlanhla Nene, the former national Finance Minister who had resigned that post in 2018 after revelations about his meetings with the Gupta family became public.⁵⁷ By April 2024, after MC Mining had failed to begin long-awaited coking

52 Bloom, K 'Killing the Holy Ghost: Inside the R145bn Plan That Would Destroy the Limpopo River' *Daily Maverick*, 1 April 2020 <<https://www.dailymaverick.co.za/article/2020-04-01-killing-the-holy-ghost-inside-the-r145bn-plan-that-would-destroy-the-limpopo-river/>> accessed 5 June 2025.

53 Sole, S '#EarthCrimes – Limpopo's Dirty Great White Elephant' 7 April 2020 <<https://amabhungane.org/earthcrimes-limpopos-dirty-great-white-elephant/>> accessed 5 June 2025; and Hallows, D & Munnik, V 'The Elites Don't Care: People on the Frontlines of Coal, Covid and the Climate Crisis' GroundWork Report 2020, December 2020 <<https://groundwork.org.za/wp-content/uploads/2022/07/The-Elites.pdf>> accessed 5 June 2025.

54 Mokone, T 'Ramaphosa Strikes Deals in China to Bring Jobs, Factories to Musina-Makhado Corridor' *SowetanLIVE*, 3 September 2018 <<https://www.sowetanlive.co.za/news/south-africa/2018-09-03-ramaphosa-strikes-deals-in-china-to-bring-jobs-factories-to-musina-makhado-corridor/>> accessed 5 June 2025.

55 Fossil Free South Africa 'China Confirms Cancellation of the Limpopo Musina-Makhado SEZ Coal-Fired Power Project and Commits to Supporting Green Economic Development in South Africa' 18 November 2021 <<https://media.business-humanrights.org/media/documents/China-cancels-giant-SA-coal-project.pdf>> accessed 5 June 2025.

56 Toussaint, E, Lesufi, I, Thompson, L & Bond, P 'Adverse International and Local Conditions for South Africa's Special Economic Zones' September 2019 <https://southafrica.fes.de/fileadmin/user_upload/ACCEDE_FES_Policy_Working_Paper_No.1_WEB.pdf> accessed 5 June 2025.

57 *Mining Weekly* 'Nene Steps Down as MC Mining Chair' 26 April 2024 <<https://www.miningweekly.com/article/nene-steps-down-as-mc-mining-chair-2024-04-26>> accessed 5 June 2025.

coal operations at the Makhado site, the company was acquired by Goldway Capital Investment and Kinetic Development Group from Hong Kong.⁵⁸ But they recorded substantial losses and began delisting the firm from the London Stock Exchange (though it retains listings in Sydney and Johannesburg).⁵⁹ It has already begun surface mining in the Makhado area, with enormous local ecosystem damage on the 125,000-hectare site anticipated, even though it is within one of just ten UNESCO-recognised biospheres in South Africa.⁶⁰

The MMSEZ's southern complex includes plans for ferrochrome and other smelters that will add 9% to South Africa's annual greenhouse gas emissions; or 14% if we include the original strategy to power the smelters with a 4600 MW coal-fired power plant.⁶¹ In 2021, Chinese leader Xi Jinping promised no new coal-fired power plants on the Belt & Road Initiative, but Zimbabwe has plowed ahead with this energy source, regardless, with no objection from Beijing.⁶²

This allows me to conclude by asking: if you are concerned about the rights of future generations, and if you're in Limpopo Province, including the Vhembe Biosphere where 50-degree days are going to be quite common, and where cyclones are even now drifting in from the middle of Mozambique where they are extremely deadly, causing thousands of fatalities in recent years – then can you oppose the MMSEZ's massive new sources of emissions on behalf of your own provincial residents, and indeed of global society as a whole, using the South African Constitution?⁶³

We don't know yet. The main case so far is at the other end of this province, Lephalale, and was known as Exxaro's Thabametsi coal-fired power plant. It was rejected by the

58 Mackenzie 'Goldway Receives Acceptances for Over 83% of MC Mining Shares' 8 April 2024 <<https://www.businesslive.co.za/bd/companies/mining/2024-04-08-goldway-receives-acceptances-for-over-83-of-mc-mining-shares/>> accessed 5 June 2025.

59 Kodari Magazine 'MC Mining 1H FY25 Financial Report Loss Amid Challenging Coal Market' 3 March 2025 <<https://kodarimagazine.com.au/mc-mining-1h-fy25-financial-report-loss-amid-challenging-coal-market/>> accessed 5 June 2025.

60 Bulbulia, T 'MC Mining Achieves Significant Development Milestones at Makhado' 30 April 2025 <<https://www.miningweekly.com/article/mc-mining-achieves-significant-development-milestones-at-makhado-2025-04-30>> accessed 5 June 2025; and Bega, S 'Coal Mining Threatens Vhembe Biosphere Reserve' *Mail & Guardian*, 18 November 2024 <<https://mg.co.za/news/2024-11-18-coal-mining-threatens-vhembe-biosphere-reserve/>> accessed 5 June 2025.

61 Bond, P 'Diversionary Post-Coal Politics in South Africa: A Chinese Solar-Powered Industrial Zone Controversy' (2024) 16(2) *Cosmopolitan Civil Societies: An Interdisciplinary Journal* 110.

62 Centre for Research on Energy and Clean Air (CREA) and People of Asia for Climate Solutions (PACS) 'Three Years after China's Coal Power Ban, 52 Power Plants with 49.5GW Capacity Remain in Development; incl. co. response and non-responses' Business & Human Rights Resource Centre, 15 October 2024 <<https://www.business-humanrights.org/en/latest-news/report-three-years-after-chinas-coal-power-ban-52-power-plants-with-495gw-capacity-remain-in-development-incl-cos-responses-and-non-responses/>> accessed 5 June 2025.

63 Kori, DS, Musakwa, W & Kelso, C 'Understanding the Local Implications of Climate Change: Unpacking the Experiences of Smallholder Farmers in Thulamela Municipality, Vhembe District, Limpopo Province, South Africa' (2024) 3(10) *PLOS Climate* e0000500 <<https://journals.plos.org/climate/article?id=10.1371/journal.pclm.0000500>> accessed 5 June 2025; and Scheiter, S, Gaillard, C, Martens, C, Erasmus, BFN & Pfeiffer, M 'How Vulnerable are Ecosystems in the Limpopo Province to Climate Change?' (2018) 116 *South African Journal of Botany* 86.

courts in 2015, mainly due to its contribution to the climate crisis and local pollution.⁶⁴ Yet the fossil addiction of the South African economy – specifically, the Minerals Energy Complex with its core mining and smelting operations in coal, platinum, gold, iron ore and manganese – means that debates over other carbon-intensive mega-projects are not theoretical, but very real, problems. Coal mining operations, coal-fired power plants and high-emissions smelters are already making villains out of the Limpopo, Mpumalanga and KwaZulu-Natal economies. In addition, with droughts and drying soils, wildfires, extreme flooding and cyclones (and locust plagues in the Eastern and Northern Cape provinces), once the weather patterns really change, we will all be victims.⁶⁵

But there is a way not to be a villain: by leaving fossil fuels underground so that the invaluable hydrocarbons they contain can be extracted and consumed by future generations, not for combustion but for more valuable uses. There is a massive amount of coal in the Waterberg alone, about 18 billion tons, identified 15 years ago as the basis for ‘Unlocking the Northern Mineral Belt with Waterberg as the Catalyst’.⁶⁶ Indeed, in 2011–2012, Jacob Zuma’s National Planning Commission, led by Trevor Manuel and Ramaphosa, made this the Presidential Infrastructure Coordinating Commission’s Strategic Integrated Project (SIP) Number 1. At one point, leading Eskom staff estimated it would incorporate R800 billion of investment.⁶⁷

But like much of the National Development Plan that relied upon Transnet, the first SIP didn’t take off, as cable thieves stole copper, as a Chinese supplier of locomotives corrupted the parastatal in subsequent years during the Gupta state capture era, and as the export of coal from Richards Bay dropped dramatically as a result, from 76.5 million tonnes at peak in 2017, to just 47 million tonnes in 2023 and 52 million in 2024.⁶⁸ Seen by many as a disaster for the economy, the reduction in South African coal exports is actually a boon, if we look at the full costs and benefits with future generations in mind, which after all is the whole point of the Just Energy Transition Partnership.⁶⁹

On the costs side, consider that for every tonne of coal burned, 2.6 tonnes of CO₂ are created.⁷⁰ In mid-2024, the ‘Social Cost of Carbon’ – the damage done by burning a tonne

64 *Earthlife Africa Johannesburg v Minister of Environmental Affairs and Others* [2017] 2 All SA 519 (GP).

65 Johnston, P, Egbeyi, T, Zvobgo, L, Omar, SA, Cartwright, A & Hewitson, B *Climate Change Impacts in South Africa: What Climate Change Means for a Country and Its People* (2023) <https://web.csag.uct.ac.za/~cjack/South%20Africa_FINAL_22%20Jan_ONLINE.pdf> accessed 5 June 2025.

66 Bond, P ‘Theory and Practice in Challenging Extractive-Oriented Infrastructure in South Africa’ (2014) 29 *Research in Political Economy* 97.

67 Govender, P ‘Eskom Overview & National Development Plan SIPs’ Presentation, 2013 CESA Annual Conference, 12 November 2013 <https://www.cesa.co.za/sites/default/files/20131112_Poobie%20Govender%20-%20CESA%20Presentation_FINAL.pdf> accessed 5 June 2025.

68 Zadeh, J ‘South Africa’s Coal Exports Surge as Transnet Turnaround Delivers Results.’ *Discovery Alert*, 25 July 2025. <<https://discoveryalert.com.au/south-africa-coal-exports-2025-recovery-surge/>> accessed 25 July 2025.

69 Bond, P ‘Clean Energy Finance and Climate Sanctions applied to South Africa’ in Jäger, J and Dziwok, E (eds), *Understanding Green Finance* (Edward Elgar 2024) 200-214.

70 Moseman, A ‘How Can Burning One Ton of Fuel Create More Than One Ton of CO₂?’ MIT Climate Portal, 9 February 2023 <<https://climate.mit.edu/ask-mit/how-can-burning-one-ton-fuel-create-more-one-ton-co2>> accessed 5 June 2025.

of CO₂ – was estimated at the US National Bureau of Economic Research at \$1056.⁷¹ For economic ‘benefits’, in contrast, the global coal price rose spectacularly from \$50/tonne at the Covid-19 trough in 2020 to \$440 in mid-2022, and then soon crashed to the \$100–150 range in mid-2023.⁷² How, then, would the resulting \$135 billion of Social Cost of Carbon – i.e., damage caused by South Africa’s roughly 50 million tonnes of annual coal exports – compare to a coal mining company’s profits? Glencore’s massive coal mines carry a \$70/tonne cost of production and transport, leaving just \$35/tonne net profit at the mid-2025 price of \$105/tonne.⁷³ If this is typical for the South African coal export industry, the 2025 expected benefits of \$1.75 billion in coal company profits – as well as benefits from worker earnings and other expenditure – drawn from 50 million tonnes of coal exports is a small fraction of the costs of those exports due to climate damage from burning that coal, in what is termed Scope 3 emissions.

So, when advocating for the rights of future generations, I will argue that you must not only acknowledge that the massive threat of climate catastrophe will be amplified by the MMSEZ, adding 9% to South Africa’s emissions output as it is currently formulated. In addition, my argument rests on the rights of future generations, including the avoidance of resource depletion from non-renewable resources, such as hydrocarbons embedded in coal. Because if you can avoid coal being extracted from this area of Limpopo in the current context, can it then be used by future generations? Our descendants will not be so ignorant as to strip-mine coal for burning – i.e., for combustion that creates CO₂ and wrecks the climate – but instead will consider ecologically sensitive means of extraction and use for vital purposes. What would future generations use hydrocarbons in fossil fuels for? Everything in this laptop, for example. Synthetic materials, plastics, lubricants, tarmac, pharmaceutical products, perhaps through what Chinese scientists have already accomplished in a coal-based Methanol-to-Olefins conversion; in sum, there are all manner of other uses for future generations, who, unlike us, are not so stupid as to extract coal and burn it.⁷⁴

8. Conclusion

Let me conclude there, by challenging all of you, dear allies: that the capacity of your discipline to break barriers to serve the broadest public interest will require transcending the tendency of less forward-looking constitutional lawyers, who are punch-drunk backslappers about the ‘world’s best Constitution.’ Instead, I’m asking you to be as creative as the

71 Bilal, A & Känzig, DR ‘The Macroeconomic Impact of Climate Change: Global vs. Local Temperature’ NBER Working Paper No. 32450, May 2024, revised November 2024 <<http://www.nber.org/papers/w32450>> accessed 5 June 2025.

72 Statista ‘Monthly Coal Price Index Worldwide from January 2020 to April 2025’ April 2025 <<https://www.statista.com/statistics/1303005/monthly-coal-price-index-worldwide/>> accessed 5 June 2025.

73 Glencore plc ‘Preliminary Results 2023’ 21 February 2024 <<https://www.glencore.com/media-and-insights/news/preliminary-results-2023>> accessed 5 June 2025.

74 ‘How to Make Plastics Without Fossil Fuels’ *Industry Decarbonization Newsletter*, 30 August 2023 <<https://industrydecarbonization.com/news/how-to-make-plastics-without-fossil-fuels.html>> accessed 5 June 2025.

times demand, and to discover whether working together with some of the advocacy groups – such as Living Limpopo, EarthLife Africa, Dzomo La Mupo, the Endangered Wildlife Trust, All Rise Attorneys for Environmental and Social Justice, BirdLife Africa, the Vhembe Biosphere Reserve, Save Our Limpopo Valley, the Herd Reserve and many other opponents of the MMSEZ⁷⁵ – to provide the legal services that they require. Many community groups are now mobilising to object to ongoing ‘consultations’ and Environmental Impact Assessment processes that are as tokenistic as those Johnny Copelyn arranged on the Wild Coast.⁷⁶ What you and they can figure out in combination, for the benefit of all of us, is whether genuinely progressive constitutional lawyers can be, as I always expect the finest Limpopo residents to be, at the cutting edge of the public interest. Thank you very much.

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Bond, P ‘Fatal Flaws in South Africa’s Constitution, Uncovered Through Socio-Economic, Environmental and Intergenerational Rights Activism’ (2026) 6 *Turf Law Journal* 1-20.

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- 75 Centre for Environmental Rights ‘Musina-Makhado Special Economic Zone (MMSEZ)’ Key Correspondence <<https://cer.org.za/programmes/pollution-climate-change/key-correspondence/musina-makhado-special-economic-zone-mmsez>> accessed 5 June 2025; Earthlife Africa ‘Earthlife Africa Celebrates Victory as UNDP Compliance Unit Recommends Withdrawal from MMSEZ MoU’ 29 February 2024 <<https://earthlife.org.za/earthlife-africa-celebrates-victory-as-undp-compliance-unit-recommends-withdrawal-from-mmsez-mou/>> accessed 5 June 2025; Living Limpopo ‘The Campaign’ <<https://livinglimpopo.org/about>> accessed 5 June 2025; Van Zyl, A ‘New Coal Deal has Environmentalists Worried’ *Zoutpansberger*, 5 September 2024 <<https://www.zoutnet.co.za/articles/news/61072/2024-09-05/new-coal-deal-has-environmentalists-worried>> accessed 5 June 2025; Barnwell, G, Makaulule, M, Stroud, L, Watson, M & Dima, M ‘The Lived Experiences of Place Severing and Decolonial Resurgence in Vhembe District, South Africa’ (2021) 2(1) *AWRY: Journal of Critical Psychology* 49.
- 76 Van Zyl, A ‘Latest EIAs “A Push to Get Dirty Projects Approved”’ *Zoutpansberger*, 20 September 2024 <<https://www.zoutnet.co.za/articles/news/61162/2024-09-20/latest-eias-a-push-to-get-dirty-projects-approved>> accessed 5 June 2025; Van Zyl, A ‘Steamrolling the MMSEZ’ *Zoutpansberger*, 7 March 2025 <<https://www.zoutnet.co.za/articles/news/62020/2025-03-07/steamrolling-the-mmsez>> accessed 5 June 2025; Van Zyl, A ‘MMSEZ Needs a Rethink’ *Zoutpansberger*, 21 March 2025 <<https://www.zoutnet.co.za/articles/news/62105/2025-03-21/mmsez-needs-a-rethink>> accessed 5 June 2025.