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The Silent Right: Environmental Rights in the Constitutional Court of South Africa

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ABSTRACT: Environmental rights are recognised in s 24 of the Constitution, but the Constitutional Court has not engaged with these in a meaningful manner in the last decade. *Fuel Retailers,* handed down in 2007, was the last case to engage s 24 fully. Although it used the concept of sustainable development to give content to the right, the case has been criticised for its economic focus and the lack of certainty in its approach. The resulting precedent may have been difficult to follow, creating a barrier for potential environmental cases in more recent years. However, a challenge prior to the interpretation of environmental rights in the court room is that environmental issues do not always make it to court. The three cases analysed in this piece reflect matters in which environmental rights were relevant, but neither argued by the parties nor raised by the Court. This may be attributed to the complexity of environmental matters, or to difficulties related to competing priorities and legal standing. More particularly, the challenges faced by the environment in getting to court are akin to the difficulties faced by children in having their rights vindicated – both must be represented by others. The three cases discussed in this article suggest that the Court has something of an environmental blindspot. This can be likened to the gender blindspots that have existed in past cases, and arguably still exist. Having made the case for an environmental blindspot, this article considers an array of tools that might address the problem. Internationally, independent environmental agencies and specialised environmental courts have been created, but these may not be the best fit for the South African context. Instead, this article suggests that existing legal tools may be used for the realisation of s 24's environmental rights. The Constitutional Court may make use of its broad powers to pick up on environmental issues even where these have not been explicitly identified by the parties. While this may be contrary to established procedure, the Constitutional Court does adopt a flexible approach when it believes that specific rights or provisions in the Constitution are essential to ventilate and to resolve the issues raised in a matter. This flexibility may allow the court to bypass the challenges facing s 24, enabling the development of this important constitutional right. Finally, this article suggests a proactive approach to s 24, formalising an upper guardian for the environment to accelerate the development of the right's content.

KEYWORDS: Section 24, environmental rights, sustainable development, complexity, legal standing, procedural rules, upper guardian

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I INTRODUCTION

24. Environment
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 use of natural resources while promoting justifiable economic and social development.

It has been more than a decade since the Constitutional Court last engaged with environmental rights in a meaningful manner. In 2007, *Fuel Retailers* attempted to flesh out the content of s 24 using the concept of sustainable development.[1] However, the absence of engagement in the interim should not be understood as an absence of Constitutional Court cases in which environmental rights were relevant. In fact, s 24 could have been applied in a range of cases. Taking creative liberty with the influential work of Rachel Carson, it appears that s 24 has become a silent right.[2]

The ongoing silence exists despite South Africa's clear and commendable commitment to the global environmental consciousness that was created by actors such as Carson.[3] In fact, following the recognition of sustainable development at global moments such as the Brundtland Commission in 1987,[4] and the UN Conference on Sustainable Development in 1992,[5] South Africa was the host of the World Summit on Sustainable Development in 2002.[6] Furthermore, South Africa is a signatory to a number of international environmental treaties,[7] and is constitutionally obliged to consider both binding and non-binding international law in any case.[8]

The silence surrounding s 24 is therefore a strange phenomenon, and all the more so given the number of cases since *Fuel Retailers* in which environmental rights have been implicated. Nevertheless, there has been no significant further engagement with s 24 – at most these

1 *Fuel Retailers Association of Southern Africa v Director-General: Environmental Management, Department of Agriculture, Conservation and Environment, Mpumalanga Province & Others* 2007 (6) SA 4 (CC)('*Fuel Retailers*').

2 R Carson *The Silent Spring* (1962). Carson's book on environmental science recorded evidence of the environmental damage linked to pesticide use. The title warns of a year in which spring comes but there are no birds – so that a usually cheerful, chirpy season would be silent. I am very grateful to Carson for this pivotal environmental work, and hope that she would not have objected to the creative liberties I took in referencing her work slightly out of context. My reference is less to physical silence as a consequence of environmental harm, and more to discursive silence as a cause of such harm.

3 H Khondker 'From "the Silent Spring" to the Globalisation of the Environmental Movement' (2015) 6 *Journal of International and Global Studies* 25 at 28.

4 United Nations 'Report of the World Commission of Environment and Development' (YEAR?), available at http://www.un-documents.net/wced-ocf.htm

5 UNESCO 'The Rio Declaration on Environment and Development (1992)', available at http://www.unesco.org/education/pdf/RIO_E.PDF.

6 Department of Environmental Affairs and Tourism 'Promoting a Global Sustainable Development Agenda', available at https://www.environment.gov.za/sites/default/files/docs/15yearreview_global_developmentagenda.pdf.

7 Ibid.

8 The Constitution of the Republic of South Africa, 1996 ('Constitution'), s 39(1)(b); E de Wet & A du Plessis 'The Meaning of Certain Substantive Obligations Distilled from International Human Rights Instruments for Constitutional Environmental Rights in South Africa' (2010) 10 *Africa Human Rights Law Journal* 347.

cases contained brief references to the right. For example, the case of *Mazibuko* turned on the right to water in terms of s 27,[9] but the close link of this right to environmental rights was not acknowledged. Similarly, *Merafong Municipality* concerned the pricing of water,[10] but the relevance of this issue to s 24 was not discussed. Water was also at the centre of *Aquarius Platinum*,[11] and though this case did mention s 24, it did not take the matter further. Several cases have discussed mining without considering its environmental impact, such as *Bengwenyama*,[12] and *AgriSA*.[13] *Maccsand*[14] did slightly better in its discussion of mining, as it mentioned both s 24 and the National Environmental Management Act 107 of 1998 (NEMA). However, *Maccsand* fell short of providing substantive guidance on the application of environmental rights in the context of mining. Then, the *Biowatch* case – despite being 'only about costs awards'[15] – clearly acknowledged that these costs awards are connected to 'environmental justice'.[16] But it did no more than place the full text of s 24 in a footnote, without discussing its relevance.[17] Various cases have considered the powers of different levels of government with regard to town planning and land use planning, without acknowledging the implication of such decisions for land management and therefore environmental rights.[18] Recently, the Constitutional Court in *NSPCA*[19] acknowledged that a link exists between animal welfare and s 24, but did not explain the nature or importance of the link.

One possible source of the silence is that *Fuel Retailers* – as the most significant engagement with s 24 to date – may have failed to provide certainty as to the content of the right. While the Court did engage meaningfully with sustainable development by suggesting that this concept be used to give meaning to s 24,[20] its approach is vague and confusing. As further discussed below, the precedent created is arguably difficult to follow in further cases.

[9] *Mazibuko & Others v City of Johannesburg & Others* [2009] ZACC 28, 2010 (4) SA 1 (CC)('*Mazibuko*').

[10] *Merafong City Local Municipality v AngloGold Ashanti Ltd* [2016] ZACC 35, 2017 (2) SA 211 (CC)('*Merafong Municpality*')

[11] *Minister for Environmental Affairs & Another v Aquarius Platinum (SA) (Pty) Ltd* [2016] ZACC 4, 2016 (5) BCLR 673 (CC)('*Aquarius Platinum*').

[12] *Bengwenyama Minerals (Pty) Ltd & Others v Genorah Resources (Pty) Ltd & Others* [2010] ZACC 26, 2011 (4) SA 113 (CC)('*Bengwenyama*').

[13] *Agri South Africa v Minister for Minerals and Energy* [2013] ZACC 9, 2013 (4) SA 1 (CC)('*AgriSA*').

[14] *Maccsand (Pty) Ltd v City of Cape Town & Others* [2012] ZACC 7, 2012 (4) SA 181 (CC)('*Maccsand*').

[15] *Biowatch Trust v Registrar Genetic Resources &Others* [2019] ZACC 14, 2009 (6) SA 232 (CC)('*Biowatch*') para 1.

[16] Ibid at para 9.

[17] Ibid at fn 9.

[18] *City of Johannesburg Metropolitan Municipality v Gauteng Development Tribunal & Others* [2010] ZACC 11, 2010 (6) SA 182 (CC); *Minister of Local Government, Environmental Affairs and Development Planning of the Western Cape v Lagoonbay Lifestyle (Pty) Ltd & Others* [2013] ZACC 39, 2014 (1) SA 521 (CC); *Pieterse NO & Another v Lephalale Local Municipality & Others* [2016] ZACC 40, 2017 (2) BCLR 233; *Tronox KZN Sands (Pty) Ltd v KZN Planning and Development Appeal Tribunal & Others* [2016] ZACC 2, 2016 (3) SA 160 (CC); *Walele v The City of Cape Town & Others* [2008] ZACC 11, 2008 (6) SA 129 (CC).

[19] *National Society for the Prevention of Cruelty to Animals v Minister of Justice and Constitutional Development &Another* [2016] ZACC 46, 2017 (1) SACR 284 (CC)('*NSPCA*').

[20] *Fuel Retailers* (note 1 above) paras 44–62.

To help fill the gap, various commentators have suggested alternative or complementary approaches that might give greater substance and coherence to s 24.[21] Tladi and Feris each devised a flexible set of tools which require the conscious choice of a normative direction for interpreting s 24.[22] De Wet and Du Plessis have suggested that we might find useful principles for the application of environmental rights in international legal frameworks.[23] Zooming in rather than out, Fuo developed an argument for a greater role for local government.[24] Du Plessis cautioned that environmental rights cannot be understood, or responsibly applied, without an understanding of poverty.[25] Recently, Blackmore connected the public trust doctrine with environmental rights interpretation.[26]

These suggestions by commenters are likely to prove invaluable when the Court is called upon to give meaning to s 24. However, prior to any court room engagement with environmental rights, a larger issue is that environmental issues may not be making it to the courts. In the cases mentioned above, environmental rights were absent from the pleadings. Further, the Court failed to identify the relevance of s 24, despite its wide powers and the fact that at times the Court has provided relief beyond what has been pleaded before it. Much like gender blindspots in other cases, the Court may have an environmental blindspot. The cases mentioned above might have been argued differently if environmental rights had been pleaded and considered. This could have changed their outcome, or else would have contributed to a stronger jurisprudence to protect people, nature and sustainability in the future.

In developing the argument in this paper, I will give a brief synopsis of *Fuel Retailers* and where I see possible failings. I will then reflect upon the problem I see today – the post-*Fuel Retailers* silence surrounding s 24 – by taking a closer look at three more recent cases in which s 24 would have been relevant. I then make suggestions about the effect that a consideration of s 24 might have had on these three matters. I will argue, however, that any failings of *Fuel Retailers* are only part of the story. A greater problem is that environmental rights cases simply do not appear to be reaching the Court. I will briefly consider possible explanations for this absence on the docket. More space will be devoted, however, to suggestions as to how institutions could be created or adapted to expand the protection offered to South Africans through environmental rights. Foreign legal systems provide some assistance, but I ultimately suggest alternative approaches that may be better suited to South Africa's particular context.

[21] L Feris 'Sustainable Development in Practice: *Fuel Retailers Association of Southern Africa v Director-General Environmental Management, Department of Agriculture, Conservation and Environment, Mpumalanga* Province' (2008) 1 *Constitutional Court Review* 235 ('Feris 1'); L Feris 'Constitutional Environmental Rights: an Under-utilised Resource?' (2008) 24 *South African Journal on Human Rights* 29 at 41 ('Feris 2'); D Tladi '*Fuel Retailers*, Sustainable Development and Integration: a Response to Feris' (2008) 1 *Constitutional Court Review* 255 ('Tladi 1'); de Wet & du Plessis (note 8 above) at 346; A du Plessis 'South Africa's Constitutional Environmental Right (enerously) Interpreted: What is in it for Poverty?' (2010) 10 *African Human Rights Law Journal* 289.

[22] Feris 1 (note 21 above); Tladi 1 (note 21 above).

[23] de Wet & du Plessis (note 8 above).

[24] O Fuo 'Role of Courts in Interpreting Local Government's Environmental Powers in South Africa' (2015) 18 *Commonwealth Journal of Local Governance* 17, 33.

[25] Du Plessis (note 21 above).

[26] A Blackmore 'Rediscovering the Origins and Inclusion of the Public Trust Doctrine in South African Environmental Law: A Speculative Analysis' (2018) 27 *Wiley Reciel* 187.

II THE CONSTITUTIONAL COURT'S LAST MEANINGFUL ENGAGEMENT WITH ENVIRONMENTAL RIGHTS

As already noted, the Court last engaged with environmental rights in meaningful manner in *Fuel Retailers*. In brief, this case concerned an application which was granted by the provincial environmental authorities in Mpumalanga for the opening of a filling station in White River.[27] The decision was challenged by the Fuel Retailers' Association of Southern Africa on the grounds that the environmental authorities did not consider the socio-economic impact of the proposed filling station.[28]

The matter, which was decided in 2002, turned on an Environment Impact Assessment (EIA) which considered the feasibility of the proposed filling station, as well as various social issues: noise, visual impact, traffic, the effect on municipal services, safety and crime, and cultural and historical sites.[29] The papers before the Court included a geotechnical report which concluded that a subterranean aquifer beneath the proposed filling station might need protection from pollution if the Department of Water Affairs and Forestry thought so.[30] In that case an impermeable base layer should be laid down beneath the station.[31] Crucially for this case, however, the EIA did not consider the potential economic impact on existing filling stations in the area.[32]

The applicants' case before the Court was built on this failure to consider the economic impact the filling station would have, primarily, on other filling stations in the area. What was supposedly lacking was summarised as the consideration of need, desirability and sustainability.[33] The environmental authorities countered that these issues were part of the analysis by the town planning authority for rezoning eight years previously.[34] And so, battle lines were drawn.

Writing on behalf of the majority, [35] Ngcobo J started by providing a useful synopsis of the development of the concept of sustainable development.[36] In turning to the scope of s 24, he identified both the inherent tension between development and environmental protection, and the need to reconcile the two for the purposes of sustainability. However, a better explanation of both sustainable development and s 24 was needed. Sustainable development is inherently complex, made up as it is of three interlinked pillars[37] and overlain with systems dynamics.[38] There is no one right pathway to achieve sustainability, and to insert the concept as an objective measure has little meaning. In fact, Tladi argues,[39] it leaves the

[27] *Fuel Retailers* (note 1 above) para 1.
[28] Ibid at para 5.
[29] Ibid at paras 9, 14.
[30] Ibid at paras 10–13.
[31] Ibid.
[32] Ibid at paras 15–17, 22–24.
[33] Ibid at para 15–17.
[34] Ibid 22–24.
[35] Feris 1 (note 21 above) at 240–244. My account draws on Feris' summary.
[36] *Fuel Retailers* (note 1 above) at paras 44–62.
[37] Feris 1 (note 21 above) at 250.
[38] R Kates 'What Kind of a Science is Sustainability Science?' (2011) 108(49) *Proceedings of National Assembly of Sciences* 19449, 19450.
[39] D Tladi *Sustainable Development in International Law: An Analysis of Key Enviroeconomic Instruments* (2007) 58, 80 ('*Tladi 2*').

Court open to value-based decision-making – without clear or conscious acknowledgement of these potentially unhelpful values.

Nevertheless, Ngcobo J went on to apply his understanding of sustainable development to the facts. He recognised the relationship between socio-economic factors and the environment, and cautioned that a proliferation of filling stations in one area could have a negative impact on the environment.[40] In particular, he found that if there were too many filling stations some would close down, and the land would need to be rehabilitated.[41] In terms of administrative structures, he found that the assessment that was done by town planning authorities had been insufficient. This was both because it had been done over eight years prior to the creation of the filling station,[42] and because those authorities fulfilled a different function than that required of environmental authorities.[43] Ultimately, he found for the Fuel Retailers Association and directed the matter to be sent back to the High Court for the relevant socio-economic issues to be properly considered.[44]

Ngcobo J's analysis did not engage with sustainability in an appropriate manner, which suggests that his view of the related concept of environmental rights is limited. His primary argument revolved around the economic sustainability of other filling stations in the area.[45] While relevant, it cannot be the only consideration in a sustainability analysis, as it is only one element of the complex human-environment system being considered for land-use change.[46] Further, while Ngcobo J's concern about rehabilitation may appear to refer to the natural world, I would argue that it also turns on economic considerations. Otherwise the argument is nonsensical. The environmental damage leading to a need for rehabilitation does not spring into being when a filling station closes. It is present throughout the life of the filling station, but generally it is only dealt with when the land needs to be prepared for another use. However, it is true that there are cost implications associated with land rehabilitation which only come up when a filling station closes – that is surely what Ngcobo J was referring to. His concern is economic, not ecological.

In the minority judgment, Sachs J's analysis was more holistic. It made explicit the need to consider social and environmental impacts alongside economic impacts.[47] However, this is only when there is in fact a negative impact on social and environmental systems, and Sachs J found that none existed.[48] This weakness in his judgment reflects his limited understanding of social and environmental effects. It considers only the immediate, local level impact of a filling station on the land, water and air. This analytical framework falls short of the systems understanding needed for sustainability.[49] Blackmore suggests that while mining rights are not public goods

[40] *Fuel Retailers* (note 1 above) paras 71–83.

[41] Ibid at para 71.

[42] Ibid at paras 94–96.

[43] Ibid at paras 84–85.

[44] Ibid at paras 105–106.

[45] Tladi 1 (note 21 above) at 258.

[46] B Turner II & P Robbins 'Land-Change Science and Political Ecology: Similarities, Differences and Implications for Sustainability Science' (2008) 33 *Annual Review of Environmental Resources* 295, 307–309.

[47] *Fuel Retailers* (note 1 above) at para 113.

[48] *Fuel Retailers* (note 1 above) at 114.

[49] R Kates, W Clark, R Corell, J Hall, C Jaeger, I Lowe, J McCarthy, Hans Joachim Schellnhuber, B Bolin, N Dickson, S Faucheux, G Calloprn, A Grübler, B Huntley, J Jäger, N Jodha, R Kasperson, A Mabogunje, P Matson, H Mooney, B Moore III, T O'Riordan & U Svedin 'What Kind of a Science is Sustainability Science?' (2001) 292 *Proceedings of the National Academy of Science* 241, 242.

that would be subject to the public trust doctrine, they must be seen holistically as there are associated impacts of mining that do impact other public goods.[50] Similarly, filling station themselves may have a low impact on social and environmental systems. However, when they are viewed holistically they enable fossil fuel use, which has been clearly linked to climate change and general air quality problems.[51] In South Africa it is often poor communities that experience the health risks of mines and factories producing the fuel used at filling stations like the one in question.[52] Sachs J had the chance to make a point about environmental rights in the context of fuel production, and more generally about South Africa's development trajectory, but he did not do so. He did acknowledge the irony of an environmental issue being raised by such a polluting industry,[53] but failed to tie this insight into his more general analysis.

Ultimately, the guidance provided by *Fuel Retailers* regarding the application of s 24 is limited. As a reasoning tool, sustainable development is useful but vague, and raises more questions than it answers. In this case it appears to have allowed for an understanding of sustainability that does not depart from the economic focus of the status quo. Tladi[54] and Feris reached this conclusion over a decade ago.[55] Today, however, we can see the effect of *Fuel Retailers* on subsequent cases – or the lack thereof. In the next section, I will briefly unpack three cases in which s 24 was not considered, although it was relevant. I will then offer some thoughts as to how the outcome might have been different if s 24 had in fact been considered.

III AFTER *FUEL RETAILERS*: THREE CASES WITH ENVIRONMENTAL RELEVANCE

A *Lagoonbay*

Lagoonbay[56] dealt with an application for the subdivision and rezoning of a large piece of land for a property development in the Southern Cape.[57] The application was considered together with ss 16 and 25 of the Land Use Planning Ordinance 15 of 1985 (LUPO), which gave provinces the authority to refuse subdivision and rezoning decisions for land, respectively. Following LUPO, applications by Lagoonbay Lifestyle Estate (Pty) Ltd (Lagoonbay) for subdivision and rezoning were granted by the local authority but then refused by the provincial authority. Lagoonbay challenged the decision of the provincial authority, claiming it was acting *ultra vires* in terms of the functional competencies of provinces and municipalities set out in the Constitution.[58]

The application was dismissed in the High Court but upheld in the Supreme Court of Appeal. In the Constitutional Court, the application was upheld in part and dismissed in part. In a unanimous judgment written by Cameron J, the Court declined to consider the

[50] Blackmore (note 26 above) at 196–197.
[51] J Rockstrom 'A Safe Operating Space for Humanity' (2009) 461 *Nature* 472.
[52] T Madihlaba 'The Fox in the Henhouse: The Environmental Impact of Mining on Communities' in D McDonald (ed) *Environmental Justice in South Africa* (2002).
[53] *Fuel Retailers* (note 1 above) at para 109.
[54] Tladi 1 (note 21 above).
[55] Feris 1 (note 21 above).
[56] *Lagoonbay* (note 18 above)
[57] Ibid at para 1.
[58] Constitution, Schedules 4–5.

constitutionality of ss 16 and 25, in part as this issue had not been raised in the lower courts.[59] It found a direction in the 1988 Circular which transferred powers from municipalities to provinces, and rezoning was among these. The provincial authority was therefore vindicated as far as rezoning was concerned.[60] However, the same was not true for their subdivision decision. The province itself issued scheme regulations in terms of LUPO in 1988, and these left no room for provincial control of subdivision applications.[61] There was an amendment of the scheme regulations in 2009, but this gave municipalities the power to decide whether they would make a subdivision decision, or whether it would be left to the province.[62] Accordingly, the Court found that the provincial authority had not had the authority to refuse Lagoonbay's subdivision application, but had had the authority to refuse the rezoning application.

B *AgriSA*

AgriSA[63] dealt with the question of whether the Mineral and Petroleum Resources Development Act 28 of 2002 (MPRDA) allowed for the expropriation of mineral rights that had been held under the Minerals Act 50 of 1991. Before the MPRDA, mineral rights belonged to the owners of a piece of land, although they were severable.[64] In terms of the MPRDA, however, mineral rights vested in the state, and there were transitional arrangements that allowed previous right holders (now holders of 'old order rights') to convert their rights so that they were recognised under the MPRDA.[65] Seeking to defend the mineral rights of its members, Agri South Africa (Agri SA) launched a court application, using the company Sebenza (Pty) Ltd (Sebenza) as a test case.[66] Sebenza had bought coal rights from the liquidators of Kwa-Zulu Collieries, but could not convert their old order rights as the colliery could not pay the fees to apply for prospecting and mining authorisations under the MPRDA.[67] Agri SA asserted that the MPRDA allowed for the expropriation of mineral rights.

The application was successful in the High Court, but failed in the Supreme Court of Appeal.[68] In the Constitutional Court, the majority judgment written by Mogoeng CJ found that, while there was a deprivation of rights, it did not amount to expropriation. The Court cautioned that s 25 property rights should not be overemphasised in view of the need for transformation.[69] It also listed the requirements for expropriation: '(i) compulsory acquisition of the rights in property by the state, (ii) for a public purpose or in the public interest, and (iii) subject to compensation.'[70] The analysis failed at the first requirement, as the state did not acquire the mineral rights according to Mogoeng CJ. It became the holder, but only to enable their equitable distribution and use.[71] In the specific case of Sebenza, the Court held

[59] *Lagoonbay* (note 18above) at para 40.
[60] Ibid at paras 50–52.
[61] Ibid at para 53.
[62] Ibid at para 54.
[63] *AgriSA* (note 13 above).
[64] *AgriSA* (note 13 above) at paras 7–12.
[65] Ibid at paras 2, 27–30.
[66] Ibid at paras 16.
[67] Ibid at paras 13–15.
[68] Ibid at paras 18–20.
[69] Ibid at paras 62–64, 70.
[70] Ibid at para 67.
[71] Ibid at paras 68–71.

that the transitional arrangements would have allowed it to convert its old order rights – only its own financial position prevented this conversion.[72] However the Court did consider the importance of the various purposes of the Act: to facilitate equitable access to the mining industry, to promote sustainable development, and to eradicate discriminatory practices in the mining sector.[73]

C *Merafong Municipality*

Merafong Municipality[74] came to Court following a decision by Merafong City Local Municipality (Merafong) to add a surcharge to the industrial and domestic water use of AngloGold Ashanti Limited.[75] This action by the municipality was in accordance with their exclusive constitutional competence in terms of s 156(1) of the Constitution, read with s 1 of the Water Services Act 108 of 1997.[76] However, AngloGold appealed to the Minister of Water Affairs and Forestry (the Minister), who was empowered to decide such an appeal in terms of s 8(4) of the Water Services Act.[77] The Minister overturned the surcharge levied for industrial use, and ruled that the domestic water use tariff should be negotiated by the relevant actors.[78] Merafong subsequently received legal advice, however, to suggest that they did not have to comply with the Minister's ruling.[79] They therefore threatened to turn off AngloGold's water unless they paid the surcharge, and the company had no choice but to comply.[80] They did, however, launch a court application to compel Merafong to comply with the Minister's ruling.[81]

The application was upheld in both the High Court and the Supreme Court of Appeal.[82] Merafong gained leave to appeal to the Constitutional Court. Here, Merafong contended that where a public official makes a decision that is outside the scope of their powers, this decision may be ignored until there is an attempt to enforce it, and at this point the nullity of the decision may be raised.[83] Cameron J, writing for the majority, disputed the Supreme Court of Appeal's finding that a collateral challenge may only be raised by an individual, not an organ of state, and found that reactive challenges have always been treated flexibly in our law, depending on context.[84] Following the lower courts in considering the cases of *Oudekraal*[85] and *Kirland*,[86] Cameron J then went on to confirm that Merafong should have either followed the Minister's decision or challenged it in court, rather than resorting to self-help – this conclusion flows from the Court's understanding of good constitutional citizenship.[87] That said, Cameron J

[72] Ibid at para 72.
[73] Ibid at paras 64–65, 73.
[74] *Merafong Municipality* (note 10 above).
[75] Ibid at para 5.
[76] Ibid at paras 1 and 2.
[77] Ibid at paras 2 and 9.
[78] Ibid at para 1.
[79] Ibid at para 10.
[80] Ibid.
[81] Ibid at para 13.
[82] Ibid at paras 14–15.
[83] Ibid at para 17.
[84] Ibid at paras 55–56.
[85] *Oudekraal Estates (Pty) Ltd v City of Cape Town* [2004] ZASCA 48, 2004 (6) SA 222 (SCA)(*'Oudekraal'*).
[86] *MEC for Health, Eastern Cape v Kirland Investments (Pty) Ltd* [2014] ZACC 6, 2014 (3) SA 481 (CC)(*'Kirland'*).
[87] *Merafong Municipality* (note 10 above) at paras 59–64.

went on to consider whether Merafong's belated 'conditional counter-application' did raise a substantive challenge to the Minister's decision.[88] Ultimately, he held that Merafong should have the chance to justify its delay in seeking judicial recourse and so remitted the matter to be considered again by the High Court.[89]

IV WOULD SECTION 24 HAVE CHANGED THE OUTCOME OF THESE CASES?

The absence of judicial appraisal of environmental rights in the three cases above is not important, however, unless it leads to some harm. In this section, I will therefore assess whether the consideration of s 24 would have changed the outcome of the cases. First, I will set up an argument regarding the relevance of s 24 to the three cases described above – all of which occurred after *Fuel Retailers*. I will then make suggestions as to how environmental rights might have been applied. Finally, even where s 24 would not have altered the outcome of a case in a meaningful manner, I will suggest that application of s 24 would have assisted in building a stronger environmental jurisprudence in Constitutional Court litigation.

In *Lagoonbay*, the issue was one of a large land development, and land use is an environmental issue. Inappropriate land use may lead to land degredation, an issue of such importance that one of the UN's three major environmental conventions is dedicated to it.[90] In the proceedings before court here, it appears that the environmental link was acknowledged to some extent, as a local environmental organisation was admitted as respondent (the Cape Windlass Environmental Action Group). However, the organisation's submissions do not appear to have had a meaningful impact on the Court's decision as none of these interventions were mentioned in the judgment. Further, one of the arguments put forward in favour of the Provincial Minister was that the size of the development meant it needed to be considered in terms of strategic provincial planning. This argument is in line with the approach favoured by the Department of Environmental Affairs (DEA). The DEA has in the past called for larger and land-focused Strategic Environmental Assessments when planning across a larger area, as opposed to smaller and project-focused Environmental Impact Assessments.[91] However, the Provincial Minister's argument was not taken up by the Court, or placed in the context of s 24. If it had been, then the Court might have considered environmental factors to arrive at its decision. Rather than considering government competences as they are, the Court might have considered what they should be. It might have considered what capacities are necessary for responsible decisions to be made about land management, and what level of government has those capacities. This approach might have favoured provincial competences over subdivision and rezoning where a large piece of land is concerned – in line with DEA policy, as described above. Alternatively, there would at least have been a more extensive enquiry into what is needed for environmentally responsible decisions, perhaps considering issues of scale, resources and relevant skills.

AgriSA concerned mining rights, an area of economic activity whose potential environmental impacts are large – both in terms of ecological and human systems.[92] Some of the social

[88] Ibid at para 65.

[89] Ibid at paras 66–82.

[90] United Nations 'Convention to Combat Desertification' (n.d.), available at https://www.unccd.int/.

[91] Department of Environmental Affairs and Tourism 'Strategic Environmental Assessment' (2004), available at https://www.environment.gov.za/sites/default/files/docs/series10_strategic_environmental_assessment.pdf.

[92] T Madihlaba 'The Fox in the Henhouse: The Environmental Impact of Mining on Communities' in D McDonald (ed) *Environmental justice in South Africa* (Athens, Ohio: Ohio University Press, 2002)

challenges led to the need for the MPRDA, which aims to reform the mining industry to ensure that all South Africans benefit from it.[93] The question of who has access to mining rights was certainly relevant in this case – as emphasised by the Court – but so is the question of how the mining is done. If the exercise of mining rights means that nearby communities are constantly subjected to dust or polluted air that leads to illness such as asthma,[94] or if acid mine drainage pollutes groundwater,[95] or if migrant labour leaves hollow, unsustainable settlements behind in rural areas,[96] then there is a clear infringement of environmental rights. These problems were not at issue before the Court, but what was at issue was the constitutionality of the state's role in relation to mining rights. The matter specifically engaged the process whereby people gain access to mining rights under the new legislation. I would suggest that a proactive Court would have considered this constitutionality in terms not only of property rights, but also in terms of environmental rights. Had the Court taken this approach, it may nevertheless have dismissed the necessity of compensation, but might have suggested more meaningful environmental rights requirements in the authorisation processes for mining rights. Had the state been asked to take on a stronger environmental rights role, the justification of its powers under the MPRDA would have been stronger – particularly given the clear reference to environmental protection in the preamble of the Act. If the state has control over mineral rights to reform the mining sector, it need not stop at patterns of ownership and employment. It is similarly in the interests of justice for mining not to infringe on environmental rights, and the Court might have recognised the potential of the MPRDA as a tool for this. This question may not have been directly before the court, but I would suggest that it is relevant to the constitutionality of the transitionary arrangements in the MPRDA. A proactive court might have incorporated the issue into the judgment, or at least provided an *obiter dictum* that would have strengthened an environmental rights jurisprudence that is currently very thin.

Merafong Municipality involved a surcharge on water. Water is an important environmental good, particularly in South Africa, which receives just over half of the world's average rainfall,[97] at 497 mm per year.[98] These challenges have recently been thrown into stark relief in Cape Town, which may yet become the first major city in the world to run out of water.[99] Therefore, the management of water in South Africa is both important and quite obviously connected to environmental rights. After all, a lack of sufficient water is clearly harmful to one's health and well-being, and the nature of its use may lead to pollution and ecological degradation. *Merafong Municipality* deals with water directly, but appears to have a blindspot regarding the implications of its decision for environmental rights. The industrial surcharge was summarily

[93] *AgriSA* (note 13 above) paras 25–26.

[94] V Nkosi, J Wichmann, V Kuku 'Mine Dumps, Wheeze, Asthma, and Rhinoconjunctivitis among Adolescents in South Africa: Any Association?' (2015) 25(6) *International Journal of Environmental Health Research* 583.

[95] J Durand 'The Impact of Gold Mining on the Witwatersrand on the Rivers and Karst System of Gauteng and North West Province, South Africa' (2012) 68 *Journal of African Earth Science* 24, 24–43.

[96] W Beinart 'A Century of Migrancy from Mpondoland' (2014) 73(3) *African Studies* 387.

[97] Rainfall is measured using rainfall gauges at a fixed location over a period of time. Average annual precipitation is calculated as the mean of rainfall depth from all available rainfall data worldwide in a given year. It is a very broad measure, but here may usefully demonstrate South Africa's low rainfall levels.

[98] Department of Water Affairs 'Rainfall Atlas – More About South African Rainfall' (n.d.), available at http://edmc1.dwaf.gov.za/dwaf/rain/about.htm.

[99] Amy Fallon 'A Perfect Storm: The Hydropolitics of Cape Town's Water Crisis' (2018) *Global Water Forum* available from http://www.globalwaterforum.org/2018/04/17/the-hydropolitics-of-cape-towns-water-crisis-a-perfect-storm/.

dismissed, while the levy for domestic water use was left open for negotiation.[100] This is an anomaly because of the well-established causal link between industrial water use and pollution, and therefore environmental rights.[101] A tax or surcharge on industrial water use might be used for better environmental management, or it might be a so-called 'sin tax' designed to improve the efficiency and sustainability of industrial water use.[102] But neither the Minister nor the Court considered these possibilities. On the other hand, the taxation of domestic water use was allowed, despite its relationship to the right to water in s 27 of the Constitution. It would have been useful and appropriate for the Court to place this decision in the context of s 24. A rights-based consideration might have led the court to alter its decision so as to allow a surcharge on industrial water but not domestic water. Failing this, the question of environmental impact would have been more clearly established as a relevant factor where decisions on water are concerned, and particularly where they relate to mining.

In summary then, a consideration of s 24 might have changed the *ratio decidendi* of the three cases that are unpacked here. It might have introduced new focus points. It might even have changed the outcome. The *Lagoonbay* Court might have found both subdivision and rezoning of land to be provincial competences, or would at least have considered the strategic competences necessary to make broader decisions about land use. In *AgriSA*, environmental rights would have most likely only strengthened the finding that the MPRDA does not allow for expropriation, adding to the need for government oversight of mineral rights. A conscientious Court might have questioned the requirements needed for the granting of a mining authorisation, and ordered that these be reconsidered in terms of s 24 – or at least remarked upon this need in an *obiter dictum*. This might have improved the sustainability of mining in South Africa, or at least would have strengthened the environmental rights jurisprudence, adding to the protection of those whose rights will be violated in the future. In *Merafong Municipality*, the Court would likely still have remitted the case to the High Court. But it might have done so with the proviso that water management – and particularly industrial water use – should be considered in terms of s 24. It might also have established environmental impact as a factor to consider in future cases surrounding the management of water.

V WHY THE SILENCE OF SECTION 24?

So far, I have sought to demonstrate that proper consideration of environmental rights is missing from the Court's deliberation in cases that have a bearing on environmental issues such as land use, water supply and the effects of mining. I have suggested that the absence of a consideration of s 24 is a function of *Fuel Retailers'* vague construction of the right, which allows for a narrow focus on economic sustainability. However, a more significant problem may be that environmental cases are not making it to the Court. In this section, I will briefly consider some of the possible reasons for this silence: complexity, competing priorities and standing.

Regarding the complexity of environmental rights, the concept of sustainability is novel and continues to evolve.[103] It was in the early 1980s that the concept of sustainable development

[100] *Merafong Municipality* (note 10 above) at para 1.

[101] Centre for Environmental Rights 'Zero Hour' (2016), available at https://cer.org.za/wp-content/uploads/2016/06/Zero-Hour-May-2016.pdf.

[102] P Rauber 'Hating the Sin' (2008) 93(1) *Sierra* 22; R Green 'The Ethics of Sin Taxes' (2011) 28(1) *Public Health Nursing* 68.

[103] Kates (note 39 above) at 19449.

emerged with the development of several international policy documents such as the Brundtland Report called 'Our Common Future'.[104] It took several more decades for a scientific field to be established. A mere eight years ago, in 2011, Bettencourt and Kaur's study brought together evidence from the publication record to demonstrate that the practice of sustainability science did in fact exist.[105] This was just before the three cases discussed above were decided, in 2013, 2014 and 2016, respectively. Bettencourt and Kaur's study also pointed to the fast-growing nature of the practice – not yet a field – which was extending into non-traditional geographic and thematic areas in response to new environmental challenges.[106] A court may not have full comprehension of the complexities of the practice, and would likely be hesitant to engage with environmental issues. Further, the legal framework surrounding sustainability – environmental rights – is nebulous,[107] and novel not only in South Africa but across the world.[108] It is new not only in jurisprudence, but in public discourse, and that may be part of the reason that neither the Court nor the parties to the three cases outlined above raise or address environmental rights arguments.

If there is still comparatively little recognition of or knowledge about environmental issues, this lack of awareness likely extends to the connection between ecological and social sustainability.[109] Courts – and parties – may see the social side of an issue, but not the relevance of its environmental implications. Further, they might not fully appreciate the importance of environmental issues, if they view these in isolation and not as components of a complex socio-ecological system.[110] A more system-oriented view of environmental issues would recognise that these issues must be resolved for the proper functioning of human systems,[111] and therefore might give them greater weighting. However, such thinking has not been fully mainstreamed.[112] It may be particularly challenging in a context such as South Africa, where poverty and inequality[113] mean that there are many competing priorities.

In this regard, it may be useful to consider a parallel to gender mainstreaming. Courts have traditionally failed to recognise the gendered nuances in cases, and have therefore ruled incorrectly at times. One example is the standard of reasonableness used to test for a legal duty. It was traditionally dubbed the 'reasonable man' test, although it was supposedly objective. Today, the test refers to the 'reasonable person', but it has been argued that it has not lost its

[104] L Bettencourt & J Kaur 'Evolution and Structure of Sustainability Science' (2011) 108(49) *Proceedings of the National Academy of Sciences of the United States of America* 19540; World Commission on Environment and Development *Our Common Future* (1987) 19540 at 19544–19545.

[105] Ibid.

[106] Ibid.

[107] Feris 2 (note 21 above) at 38–39.

[108] de Wet & du Plessis (note 8 above)

[109] The thinking surrounding the connection between social and ecological sustainability is novel and evolving. For a new approach see in J Buckles *Education, Sustainability and the Ecological Social Imaginary: Connective Education and Global Change* (Palgrove Macmillan, 2018).

[110] F Berkes & C Folke *Linking Social and Ecological Systems: Management Practices and Social Mechanisms for Building Resilience* (1998); G Gallopı´n, P Gutman & H Maletta 'Global Impoverishment, Sustainable Development and the Environment: a Conceptual Approach' (1989) *International Social Science Journal* 375–397.

[111] Kates (note 39 above) at 19450.

[112] R Noe, B Keeler, M Kilgore, S Taff & S Polasky 'Mainstreaming Ecosystem Services in State-level Conservation Planning: Progress and Future Needs' (2017) 22(4) *Ecology and Society* 1.

[113] In 2014, the World Bank measured South Africa's GINI coefficient at 0.63. World Bank 'GINI index (2019) (World Bank estimate)', available at https://data.worldbank.org/indicator/SI.POV.GINI?locations=ZA.

gendered nature.[114] To consider the test objectively, when in fact it is gendered, is arguably an ongoing failure of the courts in identifying all relevant nuances of a case. Another example of a gender blindspot is the case of *Masiya*.[115] Here, the Court extended the definition of rape to include anal penetration of a female, but refused to make the definition gender neutral. Phelps and Kazee have argued that this decision sends the highly problematic message that females are both more vulnerable and more deserving of protection, and further that the ruling violates the equality provision of the Constitution.[116] The Court here considered the effect of its ruling on the common law, but did not see the connection of this ruling to gender issues. The legislature has since intervened to extend the definition of rape,[117] but the fact remains that this recent case demonstrates a clear gender blindspot at the Court. Similarly, I have suggested here that the Court has an environmental blindspot. Where there are environmental ramifications in the cases pleaded before it, they may not be identified by the Court, or indeed the parties. The resulting silence was seen in *Lagoonbay*, *AgriSA* and *Merafong Municipality*.

The final reason for the absence of s 24 from courtrooms is connected to legal standing. It has been suggested that the vindication of environmental rights is limited by the fact that the environment cannot go to court.[118] It is necessary for humans to go to court on behalf of the environment, and this is reflected in the construction of environmental rights. Even in Ecuador, the first country to give the environment itself subjective legal rights,[119] the vindication of these rights must be at the hands of those of us with opposable thumbs. There is simply no other way. South Africa, by contrast, has taken an anthropocentric approach to environmental rights – the environment is protected through its connection to humans.[120] This is an open acknowledgement of the human role in defending environmental rights, and underlines the fact that the environment depends on human action for its protection. However, the fact remains that access to court for environmental issues may be hampered as they are filtered through human interests. Even where there is an attempt to take environmental issues to court, human actors may lack standing to do so. This additional difficulty will be unpacked below.

In considering this final point, it may be useful to draw a parallel to children's rights. Children must be assisted in going to court, much as the environment must be. Their legal capacity is limited at best, while the environment is not a legal person in South African law, and therefore has no legal capacity at all. Both children and the environment may have legitimate interests in a case, but their interests are unlikely to be taken into account unless recognised legal persons intervene on their behalf. For both, this status may be disempowering. In South Africa, lawmakers appear to have been very aware of this challenge as regards children, specifying that a child's interests are 'of paramount importance in every matter concerning the child', per s 28(2) of the Constitution. To meet the imperative, the Children's Act sets up a

[114] L Bender 'A Lawyer's Primer on Feminist Theory and Tort' (1988) 38(3) *Journal of Legal Education* 3.

[115] *Masiya v Director of Public Prosecutions*, *Pretoria (The State) &Another* [2007] ZACC 9, 2007 (5) SA 30 (CC) ('*Masiya*')

[116] K Phelps & S Kazee 'The Constitutional Court gets Anal about Rape – Gender Neutrality and the Principle of Legality in DPP v Masiya' (2007) 20(3) *South African Journal of Criminal Justice* 341, 344–347.

[117] Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007.

[118] T Murombo 'Strengthening *locus standi* in Public Interest Environmental Litigation: has Leadership Moved from the United States to South Africa?' (2010) 6(2) *Law, Environment and Development Journal* 165, 172.

[119] M Akchurin 'Constructing the Rights of Nature: Constitutional Reform, Mobilization, and Environmental Protection in Ecuador' (2015) 40(4) *Law & Social Enquiry* 937.

[120] Feris 2 (note 21 above) at 49.

supporting role for social workers, a family advocate and psychologists,[121] and further creates the institution of Children's Courts.[122] In addition, the High Court is established as the upper guardian of children's rights in terms of s 45(4) of the Children's Act. In this role, the High Court must raise issues that are in the interests of children whether or not they have been raised by the parties. Had the Court acted in such a manner in the three cases examined above, it might have identified the relevant environmental issues, even though the parties had not. As it is, however, the environment failed to gain access to court.

There are therefore a number of barriers that environmental issues may face in reaching the courts. Among these are the novelty and complexity of environmental issues, the fact that South African society faces many competing priorities, and the issue of legal standing. In attempting to understand the silence surrounding s 24 rights, I have suggested that useful parallels may be drawn to the treatment of gender in the courts, and the challenges of ensuring access to court for children.

VI CREATING LEGAL CONDITIONS TO BREAK THE SILENCE

In this section, I will consider tools that might be used to encourage greater access to court for environmental rights issues. I will first consider international approaches, and then make suggestions as to how some of the existing legal tools in South Africa might be useful.

A Environmental agencies and legal standing

The first international approach that deserves attention is the creation of a specified agency with the purpose of promoting appropriate environmental governance. One of the best-known examples of this approach is possibly the Environmental Protection Agency ('EPA') in the USA,[123] and similar institutions exist in other countries, such as the Umweltbundesamt ('UBA') in Germany.[124] Theoretically, the existence of such a body might be a solution to the legal standing challenge mentioned above, improving access to court for environmental issues. This is the case not because human mediators are no longer necessary, but rather because there is a specified group of human mediators who are mandated to ensure that environmental issues are considered.

However, in practice it appears that environmental agencies may not function directly to address the issue of legal standing. In the case of the EPA, this organisation appears to act primarily in the legislative space,[125] and by achieving settlement agreements with groups challenging environmental interests.[126] While this commendable work might be usefully emulated in other countries, it may not assist in defeating the challenge of legal standing.

This point finds further support in one of the USA's most prominent cases on the environment and legal standing, *Massachusetts v EPA*.[127] The case followed a decision by the

[121] The Children's Act 38 of 2005, ss 21, 23(3), 28(3), 29(5), 33(5), 34, 49, 62, 63.

[122] Ibid at Chapter 4.

[123] Available at https://www.epa.gov/.

[124] Available at https://www.umweltbundesamt.de/en.

[125] EPA 'Our Mission and What We Do' (2018), available at https://www.epa.gov/aboutepa/our-mission-and-what-we-do.

[126] Examples are the EPA's agreements with Chevron regarding safety at its refineries, and Fiat Chrysler regarding their infringements of air quality regulations. See: EPA 'Civil Cases and Settlements' (2018), available at https://cfpub.epa.gov/enforcement/cases/.

[127] 549 U.S. 497 ('*Massachusetts*').

EPA that it was not the body with the authority to regulate greenhouse gases, and that it declined to do so in any case, due to the scientific uncertainty surrounding climate change.[128] Various states, cities and private organisations challenged this decision, and the case reached the Supreme Court of the USA in 2007.[129] This court found that the state of Massachusetts did have legal standing, in part because of the 'special solicitude' that must be granted to federal states in recognition of their quasi-sovereignty.[130] This is a very important case regarding legal standing in environmental cases. It has been suggested that it loosens the formal standing test in the USA by emphasising purpose over form and lowering the threshold for sovereign states to achieve standing, particularly in the environmental context.[131] Further, the case has been used in constructing an argument for the relaxation of standing rules so that the interests of future generations can be better protected.[132] It is notable, however, that the EPA – the specified environmental agency – is the respondent, not the appellant. While *Massachusetts* allowed for a development of standing jurisprudence in the USA which may improve environmental governance significantly, this was not due to an intervention by the EPA. Rather, it was an action *against* the EPA with unexpected consequences.

It appears therefore that the existence of an environmental agency does not necessarily improve access to court for environmental issues. However, the principles surrounding legal standing in the USA are not identical to those in South Africa. It may not be advisable to treat lessons drawn from the experience in this country as entirely transferable. The way that standing functions in the USA is that three criteria must be met: '(1) a concrete and imminent injury (2) caused by the challenged action that would (3) likely be redressed by a favourable decision.'[133] This test was originally interpreted so that it was far easier to establish standing where the injury is personal in nature,[134] and later remained a significant barrier to climate litigation because of difficulties in proving causation and redressability.[135] Despite a proliferation of private environmental actions in the USA and the expectation of positive developments in this area,[136] the standing test remains a barrier to individuals and interest groups seeking to launch an environmental action.[137]

In contrast, South Africa's approach to standing should make it easier for a litigant to place an environmental issue before the courts – at least theoretically.[138] Prior to the advent of

[128] Control of Emissions from New Highway Vehicles and Engines, 68 Fed. Reg. 52,922, 52,922-52,923, 55,924, 52,931 (Sept. 8, 2003).

[129] *Massachusetts* (note 129 above) at 505 footnotes 2–4.

[130] Ibid at 520.

[131] N Fromherz & J Mead 'Equal Standing with States: Tribal Sovereignty and Standing after *Massachusetts v EPA*' (2010) 29 *Stanford Environmental Law Journal* 130,146–149.

[132] B Mank 'Standing and Future Generations: Does EPA v Massachusetts Open Standing for Generations to Come?' *Faculty Articles and Other Publications* Paper 272 at 93, available at http://scholarship.law.uc.edu/fac_pubs/272.

[133] *Lujan v Defenders of Wildlife* (1992) 504 U.S. 555, 560–561 ('*Lujan*') cited in N. Fromherz & J Mead 'Equal Standing with States: Tribal Sovereignty and Standing after *Massachusetts v EPA*' (2010) 29 *Stanford Environmental Law Journal* 130, 135.

[134] Ibid at 561–562.

[135] N Somasundram 'State Court Solutions: Finding Standing for Private Climate Change Plaintiffs in the Wake of *Washington Environmental Council v Bellon*' (2015) 42 *Ecology LQ* 1.

[136] G Ganguly, J Setzer & V Heyvaert 'If at First you Don't Succeed: Suing Corporations for Climate Change' (2018) 38(4) *Oxford Journal of Legal Studies* 841, 849–867.

[137] Ibid at 847–850.

[138] Murombo (note 120 above) at 170.

democracy in 1994, legal standing was only afforded to those whose interest in a matter was 'sufficient, direct and personal'.[139] This is similar to the injury and causation requirements of standing in the USA. The Constitution, however, explicitly states in s 38 that a broad number of individuals or groups has access to a court. Such persons may act in their own interest,[140] in the interest of others,[141] and even in the public interest.[142] In this way, very broad standing is provided with regards to constitutional rights, such as the environmental rights contained in s 24. Further, s 32(1) of the National Environmental Management Act 107 of 1998 (NEMA) essentially provides everyone with standing to approach a court about an issue related to the Act.[143] In particular, these provisions loosen the requirements regarding the nature of the interest a potential litigant must hold in the matter at hand. Regarding the causation requirement which has caused difficulties in the USA, this might also be less problematic in the South African context since the case of *Lee*.[144] Here the but-for test, traditionally used to establish factual causation,[145] was softened so that this element of a delict could be proven if it was *more probable than not* that the defendant caused the harm.[146] While the decision has been criticised for promoting uncertainty in the law of delict,[147] in the environmental sphere it may be a very useful development. Environmental issues such as climate change or biodiversity loss have composite causes, meaning that the strict but-for test – focused as it is on finding one factual cause – may not be satisfied by any one actor contributing to environmental damage. However, the contribution of such an actor may be an important element of the composite cause, and a flexible test is needed to accommodate this.

In summary, therefore, environmental agencies such as the EPA have assisted in mainstreaming environmental issues in other jurisdictions. It is not necessarily the case, however, that such an agency will assist in establishing legal standing for environmental litigation, as was the case in the USA. Further, the test for standing in the USA differs materially from South Africa's approach, where constitutional rights and the relaxation of common law principles should theoretically promote the cause of environmental action. The fact that they do not only adds to the anomaly of the silence of environmental rights as discussed above. It suggests that standing may not be the primary barrier in the South African context.

B Specialised environmental courts

The second international approach which may be considered is the creation of a specialised environmental court or tribunal ('ECT'). This is in fact becoming a dominant method of

[139] *Director of Education, Transvaal v McCagie & Others* 1918 AD 616, 623.

[140] Constitution, s 38(a).

[141] Ibid, s 38(b)–(c).

[142] Ibid, s 38(d).

[143] It should be noted, however, that similarly broad standing does not exist with regard to common or customary law dealing with environmental issues *Wildlife Society of Southern Africa & Others v Minister of Environmental Affairs and Tourism of the Republic of South Africa & Others* 1996 (3) SA 1095 (TkS) 1106.

[144] *Lee v Minister for Correctional Services* [2012] ZACC 30, 2013 (2) SA 144 (CC)('*Lee*').

[145] *Minister of Police v Skosana* 1977 (1) SA 31 (A).

[146] *Lee* (note 146 above) at para 55.

[147] A Price 'Factual Causation after *Lee*' 131(3) *South African Law Journal* 491, 492–493.

addressing environmental issues,[148] with 1 200 ECTs existing across 44 countries in 2016, and 1 500 by 1 March 2018.[149] One example is the Land and Environment Court of New South Wales in Australia, which has functioned for almost 40 years.[150] Another is the Agricultural and Environmental Court in Bolivia (Tribunal Agroambiental).[151] A new and relatively successful forum is the National Green Tribunal in India,[152] which through a number of decisions has clearly established the principle that environmental damage may violate fundamental rights.[153]

The preference for ECTs may be related to their potential for centralising environmental expertise,[154] so as to address the complexity of the issues mentioned above. Relatedly, they may also allow for a particular environmental issue to be addressed in a focused manner. For example, the Environmental Court in Hermanus, South Africa was established primarily to deal with abalone related offences.[155] This court had a very high success rate,[156] but it was closed down in 2006 and South Africa currently has no designated ECT. [157]

The fact that an ECT has already existed in South Africa might simplify the process of setting one up again, but the fact that it closed down so soon after it opened suggests that there may have been barriers to its functioning. While it is not clear why the court closed down, beyond the fact that the then Minister of Justice was given a 'proposal',[158] possible explanations may be made based on an experience in a similar context. Kenya's Environment and Land Court has faced challenges in negotiating the resource constraints and competing priorities of a postcolonial African country.[159] This is not an impossible barrier, and the court has been generally successful in starting to build a robust environmental jurisprudence.[160] However, the Kenyan experience – together with its similarities to South Africa's own postcolonial position – suggests that the closure of the Hermanus' Environmental Court may have been at least partly related to resource constraints.

[148] D Kaniaru 'Environmental Courts and Tribunals: The Case of Kenya' (2012) 29 *Pace Environmental Law Review* 566, 569–572; D Smith 'Environmental Courts and Tribunals: Changing Environmental and Natural Resources Law around the Globe' (2018) 36(2) *Journal of Energy and Natural Resources Law* 137.

[149] G Pring & C Pring 'Environmental Courts & Tribunals: A Guide for Policy Makers' (UN Environment Programme 2016) 1 note 1, 3, available at http://wedocs.unep.org/bitstream/handle/ 20.500.11822/10001/environmental-courts-tribunals.pdf?sequence=1&isAllowed=y.

[150] Land and Environment Court Act 204 of 1979 (N.S.W.) (Austl.); Land and Environment Court 'History' (2015), available at http://www.lec.justice.nsw.gov.au/Pages/about/history.aspx.

[151] Tribunal Agroambiental 'Institucional' (2016), available at http://www.tribunalagroambiental.bo/.

[152] National Green Tribunal 'Home' (2016), available at http://www.greentribunal.gov.in/.

[153] G Gill 'Environmental Justice in India: The National Green Tribunal and Expert Members' (2015) 5 *TEL* 2.

[154] B Preston 'Benefits of Judicial Specialization in Environmental Law: The Land and Environment Court of New South Wales as a Case Study' (2012) 29 *Pace Environmental Law Review* 396, 398.

[155] P Snijman 'Hermanus' Environmental Court: Does it Protect the Environment?' (2005) 12 *News and Views for Magistrates* 2.

[156] B Phakathi 'Bring Back the "Green Courts", Ministry Urges' (2018), available at https://www.businesslive.co.za/bd/national/science-and-environment/2018-08-14-bring-back-the-green-courts-ministry-urges/. Snijman (note 157 above) at 2.

[157] Phakathi (ibid).

[158] M Gosling 'Future of SA's green court in the balance' (2006), available at https://www.iol.co.za/news/south-africa/future-of-sas-green-court-in-the-balance-274307.

[159] Kaniaru (note 150 above) at 580–581.

[160] C Soyapi 'Environmental Protection in Kenya's Environment and Land Court' (2019) 31(1) *Journal of Environmental Law* 151.

If this is the case, it is an argument against the use of specialised environmental courts to address the silence surrounding s 24. A further argument is that such courts may not address the problem as presented above, the environmental blindspot at the Constitutional Court level. An environmental court would likely provide a forum for disputes that are clearly related to s 24, and some of these disputes might reach the Court. I would suggest, however, that an environmental court would not assist where cases are heard in other courts, and their environmental ramifications are not identified. This is what I argue occurred in the three cases discussed above. It is a failing that may not have been significant to the parties to the cases, but it was a lost opportunity to mainstream environmental issues and build a stronger environmental jurisprudence. This resulting gap is a problem for future parties who will face infringements of their environmental rights.

C Existing practices in South Africa

I have suggested above that the failure of the courts to identify environmental infringements may be connected to issues of complexity, conflicting priorities and standing. A possible consequence of these challenges is that environmental issues are often not pleaded before court, even though they might be relevant. This is a difficult practical issue, as it is well established that courts cannot address issues that are not placed before them. This is true even of the Constitutional Court, despite its wide jurisdiction.[161] The dynamic has led De Wet to comment that the Court has not yet had an opportunity to engage with s 24 sufficiently.[162]

However, there is inconsistency in the approach to procedural rules at the Constitutional Court. This can be demonstrated by considering various judgments written by Jafta J, the first of which is his minority judgment in *Rivonia Primary School*. The case concerned the powers of the provincial education department to instruct a public school to exceed the limits in its admissions policy so as to allow a little girl to attend the school closest to her home.[163] It was held that the provincial education department did have these powers, and was right to exercise them, although they did not do this in a manner that was procedurally fair.[164] Jafta J (together with Zondo J) concurred with the judgment in part, but also reminded the majority that the parties had not in fact referred to procedural fairness in their pleadings. Technically then, this issue should not have been decided – although it was.

Jafta J appears to set much store by correct judicial procedure. He uses a similar approach in the case of *KwaZulu Natal Joint Liaison Committe*e,[165] where he was again in the minority, writing with Mogoeng CJ. Here, the issue related to the payment of subsidies to private schools in KwaZulu Natal for 2009,[166] and the majority written by Cameron J held that additional payments were necessary.[167] However, Jafta J and Mogoeng CJ pointed to factual gaps in the pleadings, and argued that the Court should have only adjudicated the issue that was properly

[161] *Lagoonbay* (note 18 above) at paras 38–39.
[162] de Wet & du Plessis (note 8 above) at 346.
[163] *MEC for Education Gauteng Province & Others v Governing Body, Rivonia Primary School & Others* [2013] ZACC 34, 2013 (6) SA 582 (CC)(*'Rivonia Primary School'*) paras 9–15.
[164] Ibid at para 68.
[165] *KwaZulu Natal Joint Liaison Committee v MEC for Education, KwaZulu Natal &Others* [2013] ZACC 10, 2013 (4) SA 262 (CC)(*'KwaZulu Natal Joint Liaison Committee'*)
[166] Ibid at paras 1–8.
[167] Ibid at para 78.

set before it.[168] Their minority is clearly a response to Cameron J's somewhat flexible attitude to procedure. His majority again demonstrates that the Constitutional Court does not always follow its own established procedures to the letter.

Interestingly, however, despite identifying inconsistencies in the Court's jurisprudence, Jafta J himself has not always adhered to procedural rules. The case of *Kirland*[169] concerned a defective provincial government decision to approve an application for the construction of a private hospital in the Eastern Cape.[170] A decision to refuse the application was not upheld by then Acting Superintendent-General, so that the application was improperly granted. Here, the majority (again written by Cameron J) held that the decision should be upheld – despite being unlawful – because government had made no formal application for it to be set aside.[171] Jafta J again wrote a minority judgment, but this time he challenged the adherence to procedural rules, arguing that the majority 'place[d] form way above substance'.[172]

It appears then that it is not always necessary for an issue to have been pleaded before the Constitutional Court for it to be taken up and considered by its judges. Jafta J has been astute in recognising moments in the jurisprudence where the court has loosened its procedural rules. However, at other moments Jafta J himself has adopted this approach. Boonzaier usefully identified that while Cameron J and Froneman J overlooked procedural rules in *KwaZulu Natal Joint Liaison Committee*, and Jafta J and Zondo J challenged this approach, the pattern was reversed in *Kirland*.[173]

While such inconsistencies may create uncertainty, they may also create spaces for judicial innovation and development. Boonzaier has suggested that this is how the Court's varying approach to procedure should be understood,[174] and the results may be positive. Devenish has praised the Court for bypassing procedure to give effect to constitutional rights in cases such as *Rivonia Primary School*.[175] Couzens has made a similar point regarding the child-focused jurisprudence of the Court in *C v Department of Health*.[176] She prefers the substantive approach of the majority to the Jafta J's literal approach in the minority.[177] Thus, the flexibility in the Court's approach to procedure may be an opening for the development of new techniques in rights-focused jurisprudence. In particular, it might be an opening for the development of a greater jurisprudence surrounding s 24, despite the many barriers which may prevent an environmental issue being raised in litigation. This would likely be in line with the 'proactive jurisprudence' suggested by Devenish[178], or the 'culture of rights' advocated by Langa J in *S*

[168] Ibid at paras 183–190.

[169] *Kirland* (note 87 above).

[170] Ibid at paras 6–26.

[171] Ibid at para 106.

[172] Ibid at para 50.

[173] L Boonzaier 'Good Reviews, Bad Actors: the Constitutional Court's Procedural Drama' (2015) 7 *Constitutional Court Review* 1, 17.

[174] Ibid at 26.

[175] G Devenish 'Proactive Jurisprudence – A Triumph for Co-operative Government and an Exercise in Partnership between Educational Role-Players' (2015) 36(2) *Obiter* 499, 506–508.

[176] *C & Others v Department of Health and Social Development, Gauteng & Others* [2012] ZACC 1, 2012 (2) SA 208 (CC)('*C v Department of Health*')

[177] M Couzens 'The Constitutional Court Consolidates its Child-focused Jurisprudence: The Case of *C v Department of Health and Social Development, Gauteng*' (2013) 130 *South African Law Journal* 672, 675–679.

[178] Devenish (note 177 above) at 499.

v Makwanyane.[179] Further, it may link well with the well-known concept of transformative constitutionalism, as introduced in the South African context by Klare,[180] and developed more recently and in a broader context by others such as Kibet and Fombad.[181]

If the court is to take on a more proactive role – or is doing so already – this may not be dissimilar to the High Court's position of upper guardian for children's rights. This was mentioned above, and means that the High Court is mandated to raise issues that are relevant to the promotion of children's interests, regardless of whether the parties have done so.[182] I would suggest that a similar institution might be useful in the environmental context – an upper guardian for the environment, perhaps. I have already discussed the similarity of challenges that children and the environment may face in getting to court, as well as being heard. I have also discussed the environmental blindspot, and its parallels to the past – and perhaps ongoing – gender blindspot seen in the courts. An upper guardian might assist in resolving these issues, with a mandate to consider the cases before it through an environmental lens, and identify the environmental implications of these cases when the parties fail to do so. Should an existing court be named upper guardian, this would side-step the challenges facing specialised environmental courts as discussed above. An existing court – the High Court, for example – would hear those cases whose environmental ramifications have not been identified by the parties, and could identify and comment on these. An existing court would also not need to be separately established, so that resource constraints are less likely to be a barrier.

In summary, therefore, it appears that the Constitutional Court at times makes use of its wide jurisdiction to decide issues even where they have not been fully pleaded before it. The Court may be developing new judicial techniques in this way, and these are to be welcomed where they allow for the realisation of constitutional rights. I have suggested that this flexibility may be particularly useful in the advancement of environmental rights, whose relevance may not always be recognised by the parties. In this way, the Court could make use of its existing judicial tools to further develop an environmental jurisprudence, without the necessity of an environmental agency or specialised court. However, in order to encourage this development, a specified institution within the existing framework of courts may be useful. I have suggested that we may draw lessons from children's rights, and consider the development of a court with the role of upper guardian for environmental rights. In this way, existing judicial tools may be expanded upon for the development of a more extensive jurisprudence surrounding s 24.

VII CONCLUSION

The last time the Constitutional Court engaged with constitutional environmental rights was in *Fuel Retailers* in 2007. Here, Ngcobo J established sustainable development as a guiding concept for environmental rights in South Africa. This is an idea with much international recognition, but it is also a novel and developing concept, so that its use by Ngcobo J means that a certain degree of uncertainty was inserted into s 24. The flexibility of the concept also

[179] *S v Makwanyane* [1995] ZACC 3, 1995 (3) SA 391 (CC) at para 222.

[180] K Klare 'Legal Culture and Transformative Constitutionalism' (1998) 14 *South African Journal on Human Rights* 146.

[181] E Kibet & C Fombad 'Transformative Constitutionalism and the Adjudication of Constitutional Rights in Africa' (2017) 17 *African Human Rights Law Journal* 340.

[182] The Children's Act, s 45(4).

meant that Ngcobo J could argue largely along the economic lines, while ignoring the social and environmental components of sustainability.

The uncertainty of the precedent set by *Fuel Retailers* may have contributed to the silence of s 24 in more recent years. There has been no other meaningful engagement with the right, and various cases came before the Court in which s 24 might have been relevant, but was not argued. Above, I have considered three cases in more detail, so as to illustrate the opportunities that the Court missed for the development of a sound environmental jurisprudence for the protection of s 24 rights. There are various possible reasons for this, beyond the difficulties related to *Fuel Retailers*, and I have suggested that some of these are related to complexity, competing priorities, and standing. Environmental issues are highly complex, and knowledge of them is quickly evolving, so that courts may be hesitant to engage with environmental rights. Further, environmental issues are closely related to social issues, and in an environment of resource constraints this may mean that a court must focus on the social elements of a system. This is despite the fact that a failure to address environmental challenges in a complex socio-ecological system is likely to mean that social action has limited usefulness. This failure to see the environmental ramifications of a development, be it water supply, mining or the position of a petrol station, may be likened to the gender blindspots that have been observed in the courts in other cases. Another barrier that may prevent environmental issues from reaching the courts is legal standing. Environmental issues have faced this challenge internationally, and it may be likened to the difficulty that children may face in getting to court. In South Africa, there are various systems in place to deal with this challenge and ensure that children have access to the courts.

In seeking to overcome these challenges, this article explored some of the tools that have been used internationally to improve access to court for environmental issues. Environmental agencies are well known to function in some jurisdictions, and these might be thought to represent the environment in judicial matters, and so defeat the challenge of legal standing. However, the well-established EPA in the USA has not necessarily acted in this manner, although it does further environmental interests in many other ways. In the context of South Africa, the challenge of legal standing is not in fact the most significant barrier, as citizens can bring an action based on any violation of constitutional rights, even if it does not affect them directly.

The second international tool considered is the establishment of a specialised environmental court or tribunal. Such courts have been very successful in other jurisdictions. However, it is notable that the specialised environmental court in Kenya has faced challenges related to resource constraints. Similar challenges might be seen in South Africa given the postcolonial positioning that it shares with Kenya. But beyond this, such a court might not be the best forum to address the environmental blindspot. Such a court will only hear explicitly environmental cases. It would not have the opportunity to contribute towards the mainstreaming of environmental issues by identifying cases where the relevance of s 24 has been overlooked.

Therefore, it may be that neither an environmental agency nor a specialised environmental court is the most suitable tool for breaking the silence on s 24. Neither would assist where environmental issues have not been pleaded before South African courts. In such cases, procedural rules would dictate that environmental issues cannot be considered, even if they exist. However, I have argued that the Court is inconsistent in its approach to procedural rules. Although this may inject uncertainty into its jurisprudence, the flexibility may also provide the Court with space to develop new judicial techniques for the realisation of constitutional

rights. In particular, the Court might use this space to develop its environmental rights jurisprudence. A more proactive approach might even be formalised in something akin to the upper guardian role of the High Courts, which currently exists for children's rights. This would provide the designated court with a clear mandate. If it were the High Court that was named the upper guardian for environmental rights, then this might also extend the Court's procedural flexibility to a broader range of cases. This flexibility would be appropriate for cases of environmental relevance, where there are various reasons that parties may not identify the environmental consequences that relate to a matter. In this way, there are tools within South Africa's existing judicial frameworks that may be developed to build a stronger environmental rights jurisprudence. These tools should be recognised and called into greater service, so that environmental rights can be fully realised.