Environmental Governance, Hollow Environmentalism, and Adjudication in South Africa

CB Soyapi*

Online ISSN
1727-3781

P·E·R

Pioneer in peer-reviewed, open access online law publications

Author

Caiphas B Soyapi

Affiliation

North-West University, South Africa

Email

Brews.soyapi@nwu.ac.za

Date Submitted

18 September 2023

Date Revised

6 November 2023

Date Accepted

6 November 2023

Date Published

23 November 2023

Guest Editors

Prof AA du Plessis
Prof LJ Kotzé

Journal Editor

Prof C Rautenbach

How to cite this contribution

Soyapi CB "Environmental Governance, Hollow Environmentalism, and Adjudication in South Africa" *PER / PELJ* 2023(26) - DOI http://dx.doi.org/10.17159/1727-3781/2023/v26i0a16884

DOI
http://dx.doi.org/10.17159/1727-3781/2023/v26i0a16884

Abstract

In this paper my thought experiment leads me to posit that South Africa's environmental governance often results in what I term "hollow environmentalism". This term describes the inevitable long-term outcome of promulgating laws and policies that are idealistic and seem symbolic and that at times fail to achieve their intended objectives or environmental promise. On a narrower scale, hollow environmentalism can also manifest when such symbolic environmental laws and policies lead to judicial decisions that lack substantive ecological justifications, perhaps even resembling symbolic judgments. I substantiate this argument through four key considerations. I commence with a reality check on environmental governance, emphasising that the state is not a neutral actor, necessitating closer scrutiny of state decisions. This leads me to the conclusion that governance stands at a critical juncture. I argue that the symbolic nature of our environmental laws, broadly speaking, often makes it challenging for the state to fully meet the lofty ideals it presents, thereby also complicating court decisions in these matters. Next, I align my thoughts with recent literature on adjudication in the context of the climate crisis. This literature stresses the need for courts to be bold and innovative in their judicial roles, given the precarious nature of stabilising environmental disputes. In the penultimate section I bring the discussion to a close by suggesting two interconnected possibilities to address hollowness in the face of climate change: "sunsetting" and "substitution".

Keywords

Environmental governance; hollow environmentalism; adjudication; sustainability; climate change; symbolic laws.

.....

1 Introduction

The South African academic world has experienced remarkable growth in recent decades, making it increasingly rare for many individuals to achieve canonical status in their respective fields. However, one such individual who has arguably attained this level of reverence and significantly impacted on my academic journey is Willemien du Plessis. For me, Willemien du Plessis has been both a mentor and a co-lecturer in our Environmental Law module at North-West University, serving as the linchpin that has sustained my interest in environmental law in the context of South Africa.

Despite Willemien's notable contributions to South African environmental law,[1] I sense a shared concern among Willemien and other scholars regarding the state of environmental governance, particularly as it pertains to South Africa. In my limited engagement with this field, I too have become increasingly apprehensive. Humanity currently faces challenging times characterised by global pandemics and, most notably, the urgent and pressing issue of climate change.[2] On a global scale, the discourse has shifted towards the concept of planetary boundaries, which revolves around defining safe operating spaces within which humanity can function, all while respecting ecological limitations and realities.[3] In such discourse law plays a central role, serving as a tool to "prevent our cumulative actions from undermining ecosystem functionality".[4]

* Caiphas Brewsters Soyapi. LLB LLM LLD (NWU). Faculty of Law, North-West University (Potchefstroom Campus), South Africa; Humboldt postdoctoral fellow at the Max Plank Institute for Comparative Public Law and International Law, Heidelberg, Germany. Email: brews.soyapi@nwu.ac.za. ORCID: https://orcid.org/0000-0002-1155-1428. I am grateful for the financial support provided by the Alexander von Humboldt Foundation. I also thank the Max Planck Institute for Comparative Public Law and International Law, whose hosting arrangement enabled this research. Lastly, I thank the anonymous reviewers for their comments and suggestions for improving the paper. All errors remain my own.

1 In addition to having published widely in environmental law, Willemien has also supervised and mentored generations of academics, many of whom are now established names in the field.

2 COVID-19 was a recent pandemic which is believed to have spilled over from nature, considering that it is a zoonotic disease. Rockström and Stern "Science, Society and a Sustainable Future" 4; Tigre 2021 *Rutgers Journal of Law and Religion* 224.

3 See for example the recent collected volume French and Kotzé *Research Handbook*, as well as Henry, Rockström and Stern *Standing up for a Sustainable World*.

4 Woolley *Ecological Governance* 5.

However, it is essential to recognise that context matters significantly, especially in the realm of law.[5] In countries like South Africa unique contextual realities shape the landscape of governance, resulting in a somewhat convoluted path to good environmental governance. For example, South African society is widely recognised as one of the most unequal in the world.[6] Additionally, the country is currently grappling with escalating energy shortages,[7] despite having abundant renewable and fossil fuel resources within its borders.[8] These socioeconomic and energy-related challenges have been influential factors shaping the overall landscape and direction of environmental governance in South Africa. For this reason my thought experiment in this paper leads me to the conclusion that South Africa's environmental governance often experiences what I term "hollow environmentalism". This term describes the inevitable long-term outcome stemming from the practice of promulgating laws and policies that appear symbolic and idealistic, yet sometimes fail to achieve their intended objectives or environmental promise. On a narrower scale, hollow environmentalism can also manifest when such symbolic and idealistic environmental laws and policies lead to judicial decisions that lack substantive ecological justification, perhaps even resembling symbolic judgments.

I present my argument in four main sections. Section two begins with a reality check on environmental governance, highlighting that the state is far from a neutral actor. This necessitates a close scrutiny of state decisions. This exploration leads us to the conclusion, detailed in section three, that we stand at a pivotal juncture in environmental governance. In this section I argue that the symbolic nature of our environmental laws (broadly speaking) is such that the lofty ideals they present cannot always be met by the state. This dilemma occasionally places courts in a predicament when deliberating on such matters, risking rendering their judgments mere formalities, or *brutum fulmen.* Transitioning to section four, I then concur with recent literature that the current era of the climate

5 *R v Secretary of State for the Home Department, ex parte Daly* [2001] UKHL 26 para 28, where the famous statement "in law, context is everything" was uttered.

6 World Population Review 2023 https://worldpopulationreview.com/country-rankings/wealth-inequality-by-country.

7 Loadshedding is the term of art for energy rationing, and it has its roots in poor governance and corruption. See discussions in Harding 2023 https://www.bbc.com/news/world-africa-65671718#., OUTA 2017 https://static.pmg.org.za/171018OUTA_report.pdf.

8 As of February 2022, South Africa was the top exporter of mineral resources on the African continent, Al Jazeera Staff 2022 https://www.aljazeera.com/news/2018/2/20/mapping-africas-natural-resources.

crisis demands a more assertive role for courts in adjudication, which in turn hinges on the enhanced accountability of other branches of government. The penultimate section proposes two interconnected strategies to counter the perceived shallowness in the face of climate change: the concepts of sunsetting and substitution. Lest I be accused of being too generic, I want to emphasise that my perspective throughout this discussion maintains a bird's eye overview of the discussion.

2 The reality of environmental governance

2.1 Governing for sustainability

It would be overly simplistic to assume that all our environmental actions can be completely mitigated, yet this should not deter humanity from taking proactive steps to regulate our collective impact on the environment. As the entity entrusted with a monopoly on governance, the state assumes a trusteeship role,[9] where its primary responsibility is to consider a comprehensive approach to environmental protection. This approach acknowledges the finite nature of our planet and recognises its carrying capacity, which must be respected. This is where the significance of laws and policies becomes evident. However, it is crucial to acknowledge that laws and policies often convey aspirational ideals, representing the envisioned best-case scenario a government aims for.[10] This is why some laws and policies are often framed in open-ended terms and are subject to various interpretations. These complexities are exemplified, for example, in concepts like "sustainable use". Sustainable use suggests that it is possible to utilise resources in a manner that does not lead to overexploitation. Unfortunately, this notion can be exploited to justify otherwise unsustainable development pathways.[11] As such, sustainability as a concept is sometimes employed "as an ideal of how

9 Various laws in South Africa note that the state is the public trustee of natural resources and of the environment. See, for example, s 3 of the *National Water Act* 36 of 1998; s 3 of the *Mineral and Petroleum Resources Development Act* 28 of 2002; s 2(4)(o) of the *National Environmental Management Act* 107 of 1998 (NEMA); s 3 of the *National Environmental Management: Biodiversity Act* 10 of 2004.

10 Indeed, in certain instances policies can hold significant weight and qualify as binding on the state. Policies are not always mere aspirational documents but can have legal and practical implications. Moreover, even statements or practices by government authorities can be considered as policy if they reflect a consistent and established approach. However, "a statement qualifies as policy only if it is clear, unambiguous and devoid of relevant qualification". *R (on the Application of Friends of the Earth Ltd) v Heathrow Airport Ltd* [2020] UKSC 52 para 106.

11 See the discussion in Paterson "Sustainable Consumption?" 115-119; Woolley *Ecological Governance* 25.

development should be conducted rather than as an endpoint towards which it is desired that natural systems should evolve".[12] Consequently, the practical application of sustainability remains a policy choice made by state agents who, as detailed below, act in ways aligned with their goals and objectives.[13] They do so primarily through environmental governance.

At a basic level, and without getting into the finer details, environmental governance in the narrow sense[14] goes beyond the promulgation of legislation but includes the making of policies and decisions that have an impact on the environment or that are meant to regulate and inform our interactions with the environment.[15] Environmental governance involves deliberate processes of goal-oriented intervention in society.[16] For environmental governance to achieve any meaningful outcomes, there is a need for strategic goals and objectives to be set as bedrocks for environmentalism in a state. The South African government, for example, must be able to define its vision for environmental sustainability, and once defined, its actions must align with the set vision and its strategic objectives.

Consequently, for governance to operate effectively it relies on the presence of several key elements: a subject and an objective (a specific relationship between them), an intent to drive change, and a social context in which this intent can be realised.[17] In the context of South African environmental governance the subject (we as individuals and society) is intrinsically connected to the object (the environment), primarily from an anthropocentric perspective.[18] The environment provides the essential

12 Woolley *Ecological Governance* 71.

13 Butt "Law, Governance, and the Ecological Ethos" 54.

14 The broader dimension of environmental governance encompasses not only the formulation of laws and policies but also the establishment of institutions responsible for governance and enforcement.

15 Butt "Law, Governance, and the Ecological Ethos" 52.

16 Glasbergen "Question of Environmental Governance" 2; Lemos and Agrawal 2006 *Annual Review of Environment and Resources* 298.

17 Glasbergen "Question of Environmental Governance" 2. Glasbergen goes on to discuss the models of environmental governance, which are beyond the scope of this discussion.

18 The South African environmental right, as articulated in s 24 of the *Constitution of the Republic of South Africa*, 1996 (the Constitution), is indeed anthropocentric in its wording. It speaks of "everyone", emphasising a human-centric conceptualisation of the right. However, this anthropocentric focus does not imply the absence of environmental duties and responsibilities. For example, s 28 of NEMA imposes a duty of care on individuals and entities engaged in activities that have the potential to impact or harm the environment. So, while the environmental right in s 24 of the Constitution may be anthropocentric in its language, South African environmental law recognises the interconnectedness of human activities

space in which we can exist, thrive and carry out our activities. Furthermore, the government has expressed its intent to protect and preserve the deteriorating environmental space, as outlined in section 24 of the *Constitution of the Republic of South Africa*, 1996, along with other legislative initiatives aimed at environmental conservation.[19] Lastly, the social context in which this intent must be put into practice is complex, challenging, and characterised by issues such as poverty and inequality.[20] This creates a precarious operating environment. Despite these challenges the state remains at the core of governance in South Africa, tasked with reconciling these various elements to effectively address environmental concerns and promote sustainable development.

2.2 The state as a non-neutral actor in governance

On a global scale it is evident that the environmental challenges we face have arisen largely from activities conducted in individual states, and in some cases, even actions undertaken by states themselves. This indictment becomes more pronounced when considering that states are institutions that act with intent and authority. Far from being altruistic and without responsibility, states are often implicated in environmentally detrimental actions because they wield significant regulatory power. States possess the capacity to establish and enforce rules, and they have a monopoly on the legitimate use of force, which enhances the enforceability of their regulations more effectively than other institutions.[21] These regulations largely govern how individuals, as well as other entities like corporations, interact with the environment. In essence, states play a central role in shaping the environmental landscape, both domestically and internationally, through their regulatory authority and the influence they exert over the behaviour of various actors.

Consequently, the idea that states are merely neutral agents facilitating and providing an operating space for other institutions and peoples is not defensible. At times states actively endorse actions that are evidently

with the environment and imposes responsibilities to ensure its protection and sustainability.

19 See the discussion under section 3 below.

20 Presidential Climate Commission 2022 https://pccommissionflow.imgix.net/uploads/images/A-Just-Transition-Framework-for-South-Africa-2022.pdf 2.

21 Finger "Which Governance for Sustainable Development?" 35. Finger describes it in this way: "[m]ore precisely, industrial development—the root cause of today's ecological problems of global and systemic proportions—is a dynamic process fueled by a combination of (militaristic) values, cheap non-renewable energy, a certain type of (cheap fuel-consuming) technology, and modern institutions, among which the institution of the nation-state plays the most prominent role".

contrary to the principles of conservation or environmental protection. Criticising such practices in the United States of America, Woods contends that

> in nearly every statutory scheme, the implementing agency has the authority-or discretion-to permit the very pollution or land destruction that the statutes were designed to prevent. Rather than using their delegated authority to protect crucial resources, nearly all agencies use their statutes as tools to affirmatively sanction destruction of resources by private interests.[22]

An illustrative example of the state's non-neutral role can be seen in the aftermath of the *Earthlife Africa Johannesburg v Minister of Environmental Affairs* case,[23] which marked South Africa's first "climate case". In this instance the Minister of Forestry, Fisheries, and the Environment, acting on behalf of the state, reapproved a decision related to coal production without providing well-reasoned arguments. The rationale offered was that "the harms that would be established from new coal-fired facilities … were outweighed by the benefit to the country of having additional energy generation capacity".[24] These actions clearly indicate that the state is not a neutral actor but an institution with specific objectives, which are consistently implemented through its agents, such as environmental authorities.[25] This highlights the importance of understanding the state's position in relation to other actors and institutions, particularly those with less power and influence in shaping governance through policy and action. The state's decisions can significantly impact the direction of

---

22 Wood 2009 *Environmental Law* 54.

23 *Earthlife Africa Johannesburg v Minister of Environmental Affairs* 2017 2 All SA 519 (GP).

24 Appeal Decision Reference in LSA 142346 of Minister of Environmental Affairs 2018 https://cer.org.za/wp-content/uploads/2018/01/Thabametsi-Appeal-Decision-30-January-2018-2.pdf. Obviously, some technical documents probably assisted in the decision, but on the decision communicated, they were not granulated for public understanding.

25 As captured in the National Development Plan, 2030, the government is on an agenda to exploit its natural resources as a (perceived) means to reduce inequality and induce economic development. South African Government 2012 https://www.gov.za/sites/default/files/Executive%20Summary-NDP%202030%20-%20Our%20future%20-%20make%20it%20work.pdf 37. Also see below comments by the Minister of Mineral Resources and Energy, Gwede Mantashe where he categorically states that coal mining will not be stopped. On several occasions he has criticised litigants who have contested seismic surveying activities along the Wild Coast. As an example, he has been quoted as saying, "[w]e consider the objections to these developments as apartheid and colonialism of a special type, masqueraded as a great interest for environmental protection" and that the economic development had been "oppressed in the name of environmental protection". Bega 2021 https://mg.co.za/environment/2021-12-14-mantashe-comments-on-objections-to-shell-seismic-survey-astounding/.

environmental governance, and this power dynamic warrants careful consideration.[26]

Consequently, the absence of neutrality is defining in this instance, as it then magnifies the specific role of the government in either facilitating or regressing on environmental governance.[27] We already know, for example, that South Africa has been marred by the erosion of governance through "the loss of accountability and professional ethos linked to state capture";[28] at times completely unreasonable and irrational environmental administrative decisions;[29] and above all, a fracture between environmental law (or environmental promise) and practice.

3 Governance at a crossroads: hollow environmentalism

3.1 Symbolic laws and policies

Sustainability issues and environmental concerns have become prominent global themes and hot topics. The Sustainable Development Goals[30] have succeeded the Millennium Development Goals, and in 2022 the right to a clean, healthy, and sustainable environment was explicitly acknowledged by both the United Nations Human Rights Council[31] and the UN General Assembly.[32] However, it is worth noting that environmental rights have been recognized at the state level for many decades.[33] South Africa, for instance, formally recognised these rights in 1996 through section 24 of

26 Finger "Which Governance for Sustainable Development?" 42. The state has coercive powers which can be used to effect individual or group changes in behavior. See Butt "Law, Governance, and the Ecological Ethos" 53. It is an evident fact that states require networks that can translate their vision for the country into meaningful implementation. This is why governance theory acknowledges that the state is not the exclusive institution responsible for or even best positioned to govern. Non-state actors also play active and sometimes more focussed roles. However, the discussion here is primarily centred on the state.

27 Finger "Which Governance for Sustainable Development?" 39; Wood 2009 *Environmental Law* 44; Preston 2019 *JEL* 407.

28 Presidential Climate Commission 2022 https://pccommissionflow.imgix.net/uploads/images/A-Just-Transition-Framework-for-South-Africa-2022.pdf 3.

29 See for example *WWF South Africa v Minister of Agriculture, Forestry and Fisheries* 2019 2 SA 403 (WCC).

30 UN 2015 https://sdgs.un.org/goals. There are 17 goals which "recognize that ending poverty and other deprivations must go hand-in-hand with strategies that improve health and education, reduce inequality, and spur economic growth – all while tackling climate change and working to preserve our oceans and forests".

31 *Human Rights Council Resolution 48/13* UN Doc A/HRC/RES/48/13 (2021).

32 UN General Assembly Resolution on the Human Right to A Clean, Healthy and Sustainable Environment UN Doc A/RES/76/300 (2022).

33 See generally Boyd *Environmental Rights Revolution.*

the *Constitution of the Republic of South Africa*, which articulates the following:

> Everyone has the right-
>
> (a) to an environment that is not harmful to their health or well-being; and
>
> (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.

Despite the existence of elaborate provisions like section 24 in South Africa and globally that protect environmental rights and promote sustainability, environmental destruction persists in various forms. While there are undoubtedly multiple factors contributing to this ongoing issue, one significant reason can be traced back to the conceptualisation and implementation of symbolic laws and policies.

Symbolic laws and policies can share similarities with propaganda in that they often articulate aspirational goals and send specific messages but may not be realistically achievable in practice. They may be designed to create a favourable impression or signal commitment to particular ideals without necessarily providing the means for effective implementation.[34] Symbolic laws are sometimes described as "laws which despite their often ambitious officially declared objectives are designed to remain ecologically ineffective".[35] In practice, these symbolic laws and policies may serve more to manage environmental issues rather than genuinely resolve them.[36] Various factors, including socio-economic realities, can act as constraints to and barriers against the full realisation of legislative and policy goals related to the environment. As a result, these goals become ideals and incremental steps are often viewed as progress toward their fulfilment. This perspective can sometimes lead state agents to permit activities that may have proven long-term environmentally detrimental consequences under the belief that these consequences can be managed or mitigated within the framework of symbolic laws and policies. In

34 Wang 2018 *Environmental Law* 702.
35 Newig 2007 *Environmental Politics* 277.
36 Newig 2007 *Environmental Politics* 277.

essence, it highlights the gap between stated intentions and practical outcomes in environmental governance.

From a policy perspective, reform can also take on a symbolic nature.[37] For instance, when there are calls for a transition to renewable energy and a state allocates funds for renewable projects or a just transition[38] while simultaneously commissioning new coal-fired power plants or delaying the retirement of older ones,[39] this can be seen as a form of patent symbolic reform. It represents an illusion of action and commitment to sustainability and a court that finds itself faced with such issues might find it tricky to strike the sustainability balance without rendering existing sustainability laws and policies symbolic.[40] These kinds of circumstances create fertile ground for scenarios and outcomes that lead to what I term "hollow environmentalism".

3.2 Framing a hollow scenario

In a broader context, hollow environmentalism becomes evident when the state enacts progressive laws, such as section 24 and the *National*

37 Wang 2018 *Environmental Law* 710. Wang goes on to state that "[p]articularly in situations of relative uncertainty, symbolic reform can generate public belief in state legitimacy or buy the regime time before public perceptions of state legitimacy begin to suffer. This is reform as persuasion, convincing the public that the state is performing or at least taking steps necessary to achieve performance down the road. At the same time, the reform process can signal competence, commitment to the people, ideology, politico-legal legitimacy, and appeals to nationalism or tradition. The result is that symbolic reform can act as an insurance policy of sorts against the risks of declining functional performance, cushioning the state against the risks of weakening political legitimacy." Also see Newig 2007 *Environmental Politics* 282, where one hypothesis posed is that pressures within a state influence the creation of symbolic laws and policies.

38 See for example the approved *Framework for a Just Transition in South Africa*, where the Presidential Climate Commission has stated that "The nature of climate risks and the urgency of the transition is such that stakeholders must work intentionally, in concert". Presidential Climate Commission 2022 https://pccommissionflow.imgix.net/uploads/images/A-Just-Transition-Framework-for-South-Africa-2022.pdf 20.

39 Hunter 2023 https://www.news24.com/fin24/economy/breaking-ramaphosa-calls-urgent-cabinet-meeting-to-discuss-new-plan-for-old-coal-power-stations-20230419. Also see Nyathi 2023 https://mg.co.za/environment/2023-04-20-if-its-not-coal-then-go-for-nuclear-says-energy-department/.

40 At times, citizens are to blame in that they do not scrutinise government but take government's word on trust. Preston, for example, notes that in some instances there is pure citizen ignorance of how some projects' real worth is never evaluated: "[s]upporters inflate the local jobs the project would create but deflate the environmental impacts of the project. In this process, knowledge is sidelined in favour of appeal to culture": Preston 2019 *JEL* 402. I would add that at times, immediate socio-economic concerns can lead some communities to accept the sometimes grossly exaggerated promises of socio-economic development.

Environmental Management Act (NEMA), along with other related environmental management acts and policies, yet its actions, carried out by its agents, demonstrate a lack of genuine commitment to fully implementing these laws and policies. Criticising such actions can be a challenging task, especially when they are viewed in the light of the complex realities facing a country.[41] Nevertheless, it is essential to acknowledge that a crucial aspect of environmental governance involves assessing how closely the laws and policies on paper align with the practices on the ground.[42] A recent case that illustrates this alignment (or misalignment) at play is *Trustees for the Time Being of the Groundwork Trust v Minister of Environmental Affairs* (Deadly Air case).[43] This case centred on the obligation of the Minister of Environmental Affairs, Forestry, and Fisheries to develop regulations for managing a priority area which had been declared as such due to concentrated levels of air pollution.

The main legal provisions at issue in the Deadly Air case were sections 18, 19 and 20 of the *National Environmental Management: Air Quality Act* (NEM: AQA).[44] According to these provisions, first the Minister may declare an area as a priority area if there are reasons to believe that the air quality in that area has deteriorated to levels beyond what is

41 Writing on s 24 of the Constitution, Anel du Plessis, for example, premises her argument on the fact that the "decision-making practices and the acts of government budgeting, planning, procurement, monitoring, auditing, and so forth may not yet fully be attuned to what the constitutional environmental right demands of public authorities": Du Plessis 2018 *SAJHR* 193. Also, the competing interests are not always easy to balance. Consider the energy issue, for example: on the one hand, could one legitimately conclude that with the knowledge we now have, the commissioning of new coal-based power stations in South Africa runs foul of the commitment to reduce the country's greenhouse gase emissions and should legitimately be decried? Or should one guard against embellishing the role that precautionary measures (as arguments against coal-based power stations) could have in the face of other pressing socio-economic concerns, especially at a time when the country is mired with heavy load-shedding? These are not simple questions. See further discussion in Ireland and Burton 2018 https://www.africaportal.org/documents/18385/Microsoft_Word_-_ERC_Coal_IPP_Study_Report_Final_290518.docx.pdf.

42 Such determinations often encompass factors such as pollution reduction, sunsetting, substitution, and energy efficiency. While I will not delve into a detailed discussion of these processes here, I will provide a brief explanation of sunsetting and substitution below. It is important to note that, although I recognise the existence of constraints to effective governance, such as budgetary limitations, these should not be accepted as unquestionable justifications for governance failures. See for example, Twani and Soyapi 2022 *SAJHR* 110-111, where local governance failures in delivering mandated sanitation services are critiqued.

43 See for example the findings in the Deadly Air case: *Trustees for the Time Being of the Groundwork Trust v Minister of Environmental Affairs* (39724/2019) [2022] ZAGPPHC 208 (18 March 2022).

44 *National Environmental Management: Air Quality Act* 39 of 2004 (NEM: AQA).

acceptable.[45] Second, once such a declaration has been made, it mandates the development of an air quality management plan. This plan is essential for managing and improving air quality in the designated priority area.[46] Third, the Minister "may" then develop regulations for the implementation and enforcement of the air quality management plan.[47] The logical sequence of these provisions establishes a clear chain of actions initiated by a Section 18 declaration of an area as a priority area. However, the failure to follow through with the development of section 20 regulations results in a hollow legal framework. This hollowness is not due to a lack of clarity or substantive value in the legislation but stems from the failure of the responsible authority (in this case, the non-neutral actor) to fulfil the legislative commitment. In other words, the existence of a legislative framework that mandates environmental protection (section 24) and a specific environmental management act outlining the process for declaring a space a priority area seem to set clear objectives and a path to achieving those objectives. When this process fails, the legislation is rendered patently hollow.[48]

4 Adjudicating hollowness in a time of crisis

The discussion thus far highlights the fact that courts inevitably play a crucial role in environmental disputes, particularly when symbolic laws and policies are in question. To this end, and in a narrower sense, the concept of hollow environmentalism can also be applied to environmental judgments, including seemingly progressive ones, that may lack substantive worth. For example, when a court simply implies that a particular situation triggers the application of section 24 of the Constitution without providing a detailed explanation or rationale for how such an application should occur, or when a court asserts that environmental rights are immediately enforceable without adequately substantiating or scaffolding this claim with sufficient legal reasoning, as seen in the case of *Trustees for the Time Being of the Groundwork Trust v Minister of Environmental Affairs*,[49] this can lead to outcomes that are symbolically

45 Section 18 of NEM: AQA.
46 Section 19 of NEM: AQA.
47 Section 20 of NEM: AQA.
48 See similar reasoning concluded in Twani and Soyapi 2022 *SAJHR* 111, where they assert that if a functionary fails to comply with his legal obligations related to sanitation services, including indirect obligations, legal accountability should ensue.
49 See for example the findings in the Deadly Air case: *Trustees for the Time Being of the Groundwork Trust v Minister of Environmental Affairs* (39724/2019) [2022] ZAGPPHC 208 (18 March 2022) para 163. This may indeed be the first instance where s 24 of the Constitution was interpreted as immediately realisable.

positive but lack the necessary legal foundation to withstand critical scrutiny. In essence, while the use of section 24 (or similar provisions) in court decisions is commendable, findings of this kind may ultimately prove hollow because they are vulnerable to criticism and lack the ecological justifications required to sustain the court's decision over the long term. In a broader context, it is essential for the means (i.e. the court's reasoning) to align with the ends (i.e. the court's decision). This alignment could ensure that environmental judgments are grounded in ecological justifications.

The criticism of environmental judgments not being substantively robust is rooted in a specific context, and in countries like South Africa issues such as climate change often expose the tensions between political commitments, the actions taken and environmental imperatives. These tensions routinely lay bare the fractured lines between promise (legal and policies) and delivery. Scholars like Willemien du Plessis argue that South Africa may require an activist court to ensure that the country remains faithful to its commitments.[50] This perspective recognises that the climate change crisis poses significant challenges to the legal system and is "legally disruptive",[51] demanding an appropriate legal response. In the face of arguably one of the most significant global environmental emergencies, courts cannot simply adopt a neutral or laissez-faire approach to adjudication.[52] If we acknowledge the existence of an environmental crisis, then it follows that adjudication must adapt and evolve to address and mitigate this crisis effectively.

But there are serious concerns for this adjudicative role, not least because judges are obviously constrained by legislation, their function usually being limited to interpreting and applying such laws. Also, it is arguable that wherever possible courts will attempt to deliver judgments they assume to be enforceable as against either industry or the state, lest their decisions

50 Du Plessis 2018 *SAJELP* 201. When faced with climate and energy issues she asks, "What will the courts have to do?" and concludes that "South Africa needs an activist court – a court that will take climate change and energy efficiency issues, including measures as to how to address mitigation and adaptation, into account."

51 Fisher, Scotford and Barritt 2017 *MLR* 177; Weaver and Kysar 2017 *Notre Dame L Rev* 296. Although law is meant to thrive on stability, there will be an occasional crisis when innovation and perhaps even protest is necessary. Climate change is one such crisis.

52 Justice Brian Preston laments the fact that favourable climate decisions the world over are considered as the result of judicial activism, for this points to the fact that judges have been silenced too many times: Preston 2019 *JEL* 409. Yet, the urgency and magnitude of the environmental challenges, particularly in the context of climate change, necessitate a more proactive and assertive role for the judiciary in upholding environmental rights and promoting sustainability.

are rendered impotent. This leads to a yet more worrisome concern, that courts are expected to interpret potentially symbolic laws (which are likely the basis of associated administrative decisions) that were never meant to fulfil the promise for which they were created.[53] In such instances the erstwhile but often ignored idea that courts do make laws (usually as precedent) becomes all-important. The judiciary will need to rely, where the context requires, on values outside the bounds of a statute to meet new crises such as that wrought by the Anthropocene.[54] This is not to say that formal reasoning is cast out, but only that strict formalism should at least be avoided.[55] This approach is rooted in the recognition that there exist normative commitments that enjoy constitutional protection, and it falls upon the courts to ultimately determine whether these commitments are being upheld and specifically what outcomes are to be expected from such commitments.[56]

However, a counterargument to this narrow notion of "hollow environmentalism" in South Africa could point to instances where South African courts have taken an "activist" approach, going beyond existing legal prescripts to deliver judgments that appear to be driven by a strong environmental agenda. A notable example is the *Earthlife Africa Johannesburg v Minister of Environmental Affairs* case,[57] where the High Court interpreted the term "all relevant factors" to include climate considerations purposively. This approach was also affirmed in the *Sustaining the Wild Coast NPC v Minister of Mineral Resources and Energy* case,[58] where the High Court emphasised the need for comprehensive assessments in various environmental, mineral, and coastal-related laws. While these judgments may give the impression of the courts' having taken a robust environmental stance, it is argued that they may not fully address the issue of hollowness. My view is that these developments are more process-oriented than substantive in nature and

53 Newig 2007 *Environmental Politics* 277.

54 Collins "Judging the Anthropocene" 311.

55 Quinot 2010 *CCR* 116.

56 Liebenberg *Socio-Economic Rights* 45; Quinot 2010 *CCR* 117.

57 *Earthlife Africa Johannesburg v Minister of Environmental Affairs* 2017 2 All SA 519 (GP) paras 79-88.

58 *Sustaining the Wild Coast NPC v Minister of Mineral Resources and Energy* 2022 6 SA 589 (ECMk) para 125. The court makes the following observation, "[i]t seems clear from the aforegoing, even taking into account the contentions raised by the respondents, that, had the decision-maker had the benefit of considering a comprehensive assessment of the need and desirability of exploring for new oil and gas reserves for climate change and the right to food perspective, the decision-maker may very well have concluded that the proposed exploration is neither needed nor desirable".

do not advance expository justice. The latter is a form of an enhanced judicial role in which courts set norms and standards on specific judicial issues and in their decisions as a way of informing how actors should perform if they are to conform to fundamental values.[59] For instance, in the *Earthlife* case my view is that the core elements of what climate considerations should demand from states were not sufficiently explored. The legacy of the *Earthlife* case is seen as a testament to this viewpoint.[60] Consequently, with a colleague I have previously argued that courts, where appropriate, should have the authority to issue structural interdicts.[61] Such an order would compel administrators to provide justifications for their decisions and to demonstrate the substantive considerations behind those decisions. While this might be perceived as intruding into governmental powers, it is posited that the unique climate context demands a form of expository justice and accountability, which, historically, the South African government has struggled with.[62]

Indeed, ordering the government to conduct a climate impact assessment is a positive step in addressing environmental concerns, but it is argued that more needs to be done to define the substantive and justificatory content of such assessments. As further explored below, the concept of substitution could potentially help fill this gap.

5 Avoiding hollowness in a time of ecological crisis: sunsetting and substitution

The imperative of sidestepping, or at least making a justifiable effort to do so, from the trap of hollow environmentalism is more pressing now than ever, given the looming climate crisis. Tigre's analysis of this crisis contextualises the predicament in these terms: "[s]hould we continue with the same practices where nature is primarily a commodity? Or should we transition towards a new reality, where established concepts are further developed and strengthened to expand protection of natural resources?"[63] The latter course aligns aptly with contemporary realities. The climate

59 See discussion in Fisher, Scotford and Barritt 2017 *MLR* 198; Spann 1982 *U Pa L Rev* 586.

60 Minister of Environmental Affairs 2018 https://cer.org.za/wp-content/uploads/2018/01/Thabametsi-Appeal-Decision-30-January-2018-2.pdf.

61 Twani and Soyapi 2022 *SAJHR* 110-111.

62 Presidential Climate Commission 2022 https://pccommissionflow.imgix.net/uploads/images/A-Just-Transition-Framework-for-South-Africa-2022.pdf 3.

63 Tigre 2021 *Rutgers Journal of Law and Religion* 226. Also see Rockström and Stern "Science, Society and a Sustainable Future" 4; Wood 2009 *Environmental Law* 54.

crisis, a defining juncture, invites us to contemplate the exact role expected of the law during such a crisis, particularly if we are to avoid hollowness. So, what could be done then? I am of the view that in a country like South Africa, in which there are climate change commitments[64] and also a thirst for development projects, the climate crisis would require for example that there be sunsetting and substitution.

Sunsetting encapsulates the idea of gradually phasing out activities known to pose unacceptable environmental risks.[65] This process, however, should unfold over a defined span, guided by the understanding that "[p]hasing out activities is likely to provide a particularly effective stimulus for the development of new and more ecologically friendly products, processes, or other means of replacing them".[66] Consequently, effective environmental governance necessitates the establishment of timelines with a reasonable level of certainty, and government decisions should adhere to these timelines rather than undermine them.[67] Even industry is beginning to recognise this reality. Notably, Helge Hund, the leader of one of the world's largest oil and gas corporations, acknowledged the unsustainable trajectory of the world and stressed the need for change, coupled with an accelerated transition to cleaner energy sources.[68] In contrast, Minister Gwede Mantashe's emphatic assurance contradicts this trajectory, as he stated that "[m]any think that there will be no coal generation by 2030. I can assure you that there'll be a lot of coal generation by 2030".[69] While it is indeed a political statement, Minister

64 South Africa has even now established a Presidential Climate Commission whose purpose is "to oversee and facilitate a just and equitable transition towards a low-emissions and climate-resilient economy": Presidential Climate Commission date unknown https://www.climatecommission.org.za/about. As a developing country, South Africa's climate targets are obviously lower than those of developing countries. For an overview of the country's Nationally Determined Contribution, see Presidential Climate Commission 2021 https://www.climatecommission.org.za/publications/south-africas-ndc-targets-for-2025-and-2030.

65 Woolley *Ecological Governance* 77.

66 Woolley *Ecological Governance* 77.

67 South Africa plans to decommission old coal power plants by 2030, while also commissioning power plants with High Efficiency Low Emission technologies: GN 1359 in GG 42778 of 18 October 2019 12. It remains to be seen whether these objectives can be met.

68 Lund 2019 https://www.ft.com/content/5fb061d4-7a1d-11e9-8b5c-33d0560f039c.

69 Minister of Mineral Resources and Energy, Gwede Mantashe, at the 2022 Africa Energy Week, as cited in World Resources Institute 2022 https://www.wri.org/technical-perspectives/5-lessons-south-africas-just-transition-journey. This is the kind of action that Woods refers to as undue political influence which then invariably trickles down to administrative bodies who have wide discretionary powers: Wood 2009 *Environmental Law* 58. Others see this in terms of political divide where politicians create an "us" versus a "them", knowing very well how volatile emotions could be: Preston 2019 *JEL* 403.

Mantashe is a key decision-maker on activities with considerable ecological ramifications. Such officials should recognise the imperative of adhering to ecologically sensitive behavioural standards. This transformation undoubtedly comes with a price tag and requires the careful navigation between environmentally acceptable and unacceptable activities and modes of functioning. This is where the concept of substitution can play a pivotal role.

Substitution is the idea that when policy decisions are being made, policy makers must prefer pathways that present the least threat to the environment.[70] The governing idea is that

> [w]hen the science is clear as to the possibility of environmental harm …, then caution should take precedence over development, leading either to the preclusion of potentially harmful activities or the formulation and implementation of appropriate mitigation measures.[71]

In other words, if one were to use a scaling process, options that are considered to present the greatest harm to the environment would be ranked lower,[72] with such low ranking contributing towards the overall weighting for determining whether specific activities are to be undertaken. The key question then is not how beneficial an activity is to the economy, but how impactful it is to the environment, as "we should not use resources if the reasons for employing them can be met by other less ecologically stressful means".[73] There is no blueprint to how such considerations should unfold, but I am of the view that the NEMA[74] implicitly provides some guidance on substitution. For example, the NEMA requires authorities to consider "where appropriate, any feasible and

70 Woolley *Ecological Governance y* 74.

71 Kotzé and Soyapi 2021 *JEL* 281.

72 Woolley *Ecological Governance* 74. Granted, this would happen on a case-by-case basis, but a weighting process is not unheard of. See discussion in Kidd "Reasonableness" 203.

73 Woolley *Ecological Governance* 50. A valid question to consider is whether the courts are the most appropriate entities to determine this weighting process. It is important to note that the weight assigned to any particular issue should be determined on the basis of the specific factual circumstances before the court. However, the courts should not turn a blind eye to arguments that are otherwise indefensible or lack justification. See for example the comment in *Bangtoo Bros v National Transport Commission* 1973 4 SA 667 (N) 685D: "[t]ake a case, for example, where a factor which is obviously of paramount importance is relegated to one of insignificance, and another factor, though relevant, is given weight far in excess of its true value. Accepting that the tribunal is the sole judge of the facts, can it be said that it has in the circumstances postulated properly applied its mind to the matter in the sense required by law? After much anxious consideration I have come to the conclusion that the answer must be in the negative".

74 Section 24O(1)(b)(iv) of NEMA.

reasonable alternatives to the activity which is the subject of the application and any feasible and reasonable modifications or changes to the activity that may minimise harm to the environment". The High Court in *Earthlife Africa Johannesburg v Minister of Environmental Affairs*[75] considered section 24O(1)(b) to be peremptory, a finding that could prove material in future (in relation to this specific provision), particularly with the rise of climate litigation.

Consequently, while the decision to employ substitution remains a political one and the evaluation of potentially viable alternatives is also a matter of political choice, such decisions must be thoroughly justified.[76] The reasoning behind a decision that approves a fossil fuel-intensive activity, for instance, should include a rigorous balancing process that takes into account the nature of the crisis at hand.[77] This view finds support in the energy transition plans that South Africa has, and for which the Presidential Climate Commission has stated that "[e]ffective governance also requires far-sighted thinking, with due consideration of the imperatives of a just transition".[78] If indeed there is going to be an energy transition, the responsibility for directing this process and guiding development toward specific pathways falls on the authorities, rather than solely on the proponents of projects.[79] When the weighing process is conducted in this way, the consideration of alternatives can function as a form of due diligence to ensure that less environmentally taxing activities have been exhaustively assessed. The recent case of *South Durban Community Environmental Alliance v Minister of Forestry, Fisheries and The Environment*[80] illustrates how this dynamic played out in practice.

---

75 *Earthlife Africa Johannesburg v Minister of Environmental Affairs* 2017 2 All SA 519 (GP) para 79.

76 Woolley *Ecological Governance* 80.

77 Woolley says it this way: "[d]ecisions should be made with the statutory objectives of stress reduction and the lessening of risks that human activities will trigger regime change in mind, and should be based on information produced during alternatives assessment about the degree of ecological threat that an option presents": Woolley *Ecological Governance* 80.

78 Presidential Climate Commission 2022 https://pccommissionflow.imgix.net/uploads/images/A-Just-Transition-Framework-for-South-Africa-2022.pdf 20.

79 This will not always be a seamless process. The lure of satisfying immediate objectives could see the benefits of a proposed project being inflated, while the environmental impacts might be deflated, Preston 2019 *JEL* 401; Du Plessis 2018 *SAJHR* 203.

80 *South Durban Community Environmental Alliance v Minister of Forestry, Fisheries and the Environment* (17554/2021) [2022] ZAGPPHC 741 (6 October 2022) para 25.

For context, it is important to note that although climate change is not explicitly mentioned in the NEMA, when an activity has climate impacts those impacts must be taken into account. Some argue that these impacts should carry a negative weight in the decision-making process.[81] In essence, there is an inherent reason why such activities must be ecologically justified. This inquiry should, as a matter of necessity, align with and be guided by, if not bound by, the relevant governing laws and policies. In this regard I am of the view that the court in the case of *South Durban Community Environmental Alliance v Minister of Forestry, Fisheries and the Environment* made a correct judgment. Specifically, the court found that section 24O(1)(b)(iv) of the NEMA did not apply to the specific factual scenario presented. In that case, Eskom had obtained environmental authorisation for a mid-merit combined cycle gas power plant designed to operate when the national grid's baseload capacity was under strain, which is frequently the case currently. Consequently, the court's decision was grounded in the belief that the conditions attached to the environmental authorisation, the project's exigencies and its location did not warrant a consideration of alternatives. Arguably, the mid-merit combined cycle gas power plant was strategically and reasonably fit for purpose as a back-up power alternative. Its environmental impacts and expected lifespan would not be comparable to the same extent as a new coal-fired power plant, which was the focus in the *Earthlife* case.

In essence, the justificatory process outlined in this context was a deliberate effort to demonstrate proportionality, weighed against necessity, in order to support the decision-making process. Accordingly, as climate litigation continues to gain prominence, it is possible that a time will come when an administrative decision authorising a fossil fuel project is challenged and deemed insufficient due to the failure to consider viable alternatives. Until that point is reached, civil society and litigators must adopt a strategic approach by identifying specific legal and policy objectives (however aspirational or symbolic as they may be) and clearly illustrating how government actions fall short of these objectives. They may also need to explain why certain alternatives are more suitable in a given context. Only through such strategic and well-argued legal and

81 Warnock and Preston 2023 *JEL* 58. It is now established that climate legislation can either be direct (where there is specific mention) or indirect (where necessary implication requires consideration of climate issues). See Scotford and Minas 2019 *RECIEL* 69. See further Bell and Fisher 2023 *MLR* 228, who accept that whether direct or indirect, climate change is an issue that has legal implications, including the interpretation of legislation. I would add here that it has legal implications for policy as well.

policy advocacy could courts potentially render judgments that breathe life into what may appear as symbolic laws and actions, thus bringing about meaningful change in environmental governance and the pursuit of sustainability.

6 Concluding reflections

There is a need to be realistic about the environmental issues that confront us. While it is easy to sensationalise the competing issues, such issues often involve interests that extend beyond immediate parties, encompassing future generations and even the well-being of all humanity. If we acknowledge the culpability of human actions in global environmental degradation, we must also recognise the necessity of re-evaluating how governance operates to achieve ecological objectives more effectively.

In my view, due to the anthropocentric focus of our laws, there is an even greater need for environmental governance to prioritise ecological objectives as embedded in environmental laws. This means that concrete changes must be reflected in policy choices and the legal thinking that accompanies decisions arising from environmental disputes. Acknowledging this reality, the most significant risk of hollow environmentalism is that it can create the illusion of action, performance and a commitment to sustainability. Unfortunately, courts may inadvertently contribute to this illusion when they fail to delve into and fully granulate and articulate the essential substance of environmental laws and what precisely this substance requires from states. This is crucial, as legislation imposes specific obligations on regulators and adjudicators. These roles and responsibilities become increasingly critical in times of environmental crisis, as they play a pivotal role in ensuring that environmental laws are not merely symbolic but are translated into meaningful actions and outcomes that address the pressing challenges of our era.

In the final analysis, when examined through the lens of an assessment of alternatives or the exploration of reasonable and viable modifications, substitution could conceivably emerge as a pivotal factor in evaluating the ecological viability of governmental policies or administrative determinations related to activities like coal extraction or oil exploration. This assertion holds true even in situations where, for instance, an energy deficit exists. Moreover, considering that administrative bodies already possess broad discretionary authority, a domain where the courts generally exercise deference, the practice of justification must be

embedded in the framework of judicial review inquiries. In this context the evaluation of alternatives (a process already legally permissible, if not obligatory) should constitute a foundational aspect of these justifications.

Building upon my earlier assertion that states aren't impartial actors and that political pressures are a tangible reality, I am led to the conclusion that administrative bodies cannot be entrusted with full-on independent discretion, solely due to the principle of comity of powers and judicial deference.[82] The inherent absence of neutrality mandates a more rigorous scrutiny of state actions and administrative determinations. Neglecting this approach could potentially undermine the judiciary's potential as a forum for holding entities accountable.

Bibliography

Literature

Bell and Fisher 2023 *MLR*
Bell J and Fisher E "The Heathrow Case in the Supreme Court: Climate Change Legislation and Administrative Adjudication" 2023 *MLR* 226-237

Boyd *Environmental Rights Revolution*
Boyd DR *The Environmental Rights Revolution: A Global Study of Constitutions, Human Rights, and the Environment* (UBC Press Vancouver 2011)

Butt "Law, Governance, and the Ecological Ethos"
Butt D "Law, Governance, and the Ecological Ethos" in Gardiner S and Thompson A (eds) *The Oxford Handbook of Environmental Ethics* (Oxford University Press New York 2017) 51-61

Collins "Judging the Anthropocene"
Collins L "Judging the Anthropocene: Transformative Adjudication in the Anthropocene Epoch" in Kotzé LJ (ed) *Environmental Law and Governance for the Anthropocene* (Hart Oxford 2017) 309-328

82 Wood is critical of the whole practice of judicial deference in environmental administrative decisions: "[i]n contrast to the nonadministrative realm of trial practice, where expert opinions are routinely examined for inherent bias,… the deference doctrine precludes courts from examining political motivations or conflicts of interest that may have inappropriately shaped the agencies' scientific conclusions": Wood 2009 *Environmental Law* 59.

Du Plessis 2018 *SAJHR*
Du Plessis A "The Promise of 'Well-being' in Section 24 of the Constitution of South Africa" 2018 *SAJHR* 191-208

Du Plessis 2018 *SAJELP*
Du Plessis W "Energy Efficiency: The Progress of Policy, Legislation, and the Role of the Courts in South Africa" 2018 *SAJELP* 175-203

Finger "Which Governance for Sustainable Development?"
Finger M "Which Governance for Sustainable Development? An Organizational and Institutional Perspective" in Park J, Conca K and Finger M (eds) *The Crisis of Global Environmental Governance: Towards a New Political Economy of Sustainability* (Routledge Oxon 2008) 34-57

Fisher, Scotford and Barritt 2017 *MLR*
Fisher E, Scotford E and Barritt E "The Legally Disruptive Nature of Climate Change" 2017 *MLR* 173-201

French and Kotzé *Research Handbook*
French D and Kotzé LJ *Research Handbook on Law, Governance and Planetary Boundaries* (Edward Elgar Cheltenham 2021)

Glasbergen "Question of Environmental Governance"
Glasbergen P "The Question of Environmental Governance" in Glasbergen P (ed) *Co-operative Environmental Governance: Public-Private Agreements as a Policy Strategy* (Springer Dordrecht 1998) 1-18

Henry, Rockström and Stern *Standing Up for a Sustainable World*
Henry C, Rockström J and Stern N *Standing Up for a Sustainable World: Voices of Change* (Edward Elgar Cheltenham 2020)

Kidd "Reasonableness"
Kidd M "Reasonableness" in Quinot G (ed) *Administrative Justice in South Africa: An Introduction* 2nd ed (Oxford University Press Cape Town 2021) 190-213

Kotzé and Soyapi 2021 *JEL*
Kotzé LJ and Soyapi CB "African Courts and Principles of International Environmental Law: A Kenyan and South African Case Study" 2021 *JEL* 257-282

Lemos and Agrawal 2006 *Annual Review of Environment and Resources*
Lemos MC and Agrawal A "Environmental Governance" 2006 *Annual Review of Environment and Resources* 297-325

Liebenberg *Socio-Economic Rights*
Liebenberg S *Socio-Economic Rights: Adjudication under a Transformative Constitution* (Juta Cape Town 2010)

Newig 2007 *Environmental Politics*
Newig J "Symbolic Environmental Legislation and Societal Self-Deception" 2007 *Environmental Politics* 276-296

Paterson "Sustainable Consumption?"
Paterson M "Sustainable Consumption? Legitimation, Regulation, and Environmental Governance" in Park J, Conca K and Finger M (eds) *The Crisis of Global Environmental Governance: Towards a New Political Economy of Sustainability* (Routledge Oxon 2008) 110-131

Preston 2019 *JEL*
Preston BJ "The End of Enlightened Environmental Law?" 2019 *JEL* 399-411

Quinot 2010 *CCR*
Quinot G "Substantive Reasoning in Administrative-Law Adjudication" 2010 *CCR* 111-139

Rockström and Stern "Science, Society and a Sustainable Future"
Rockström J and Stern N "Science, Society and a Sustainable Future" in Henry C, Rockström J and Stern N *Standing Up for a Sustainable World: Voices of Change* (Edward Elgar Cheltenham 2020) 3-9

Scotford and Minas 2019 *RECIEL*
Scotford E and Minas S "Probing the Hidden Depths of Climate Law: Analysing National Climate Change Legislation" 2019 *RECIEL* 67-81

Spann 1982 *U Pa L Rev*
Spann GA "Expository Justice" 1982 *U Pa L Rev* 585-661

Tigre 2021 *Rutgers Journal of Law and Religion*
Tigre MA "Exploring the Bedrock for Earth Jurisprudence" 2021 *Rutgers Journal of Law and Religion* 223-310

Twani and Soyapi 2022 *SAJHR*
Twani N and Soyapi CB "The Legal Accountability of Local Government in South Africa for the Failure to Deliver Sanitation Services" 2022 *SAJHR* 92-111

Wang 2018 *Environmental Law*
Wang A "Symbolic Legitimacy and Chinese Environmental Reform" 2018 *Environmental Law* 699-760

Warnock and Preston 2023 *JEL*
Warnock C and Preston BJ "Climate Change, Fundamental Rights, and Statutory Interpretation" 2023 *JEL* 47-64

Weaver and Kysar 2017 *Notre Dame L Rev*
Weaver RH and Kysar DA "Courting Disaster: Climate Change and the Adjudication of Catastrophe" 2017 *Notre Dame L Rev* 295-356

Wood 2009 *Environmental Law*
Wood MC "Advancing the Sovereign Trust of Government to Safeguard the Environment for Present and Future Generations (Part 1): Ecological Realism and the Need for a Paradigm Shift" 2009 *Environmental Law* 43-89

Woolley *Ecological Governance*
Woolley O *Ecological Governance: Reappraising Law's Role in Protecting Ecosystem Functionality* (Cambridge University Press Cambridge 2014)

Case law

Bangtoo Bros v National Transport Commission 1973 4 SA 667 (N)

Earthlife Africa Johannesburg v Minister of Environmental Affairs 2017 2 All SA 519 (GP)

R (on the Application of Friends of the Earth Ltd) v Heathrow Airport Ltd [2020] UKSC 52

R v Secretary of State for the Home Department, ex parte Daly [2001] UKHL 26

South Durban Community Environmental Alliance v Minister of Forestry, Fisheries and the Environment (17554/2021) [2022] ZAGPPHC 741 (6 October 2022)

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

Trustees for the Time Being of the Groundwork Trust v Minister of Environmental Affairs (39724/2019) [2022] ZAGPPHC 208 (18 March 2022)

WWF South Africa v Minister of Agriculture, Forestry and Fisheries 2019 2 SA 403 (WCC)

Legislation

Constitution of the Republic of South Africa, 1996

Mineral and Petroleum Resources Development Act 28 of 2002

National Environmental Management Act 107 of 1998

National Environmental Management: Air Quality Act 39 of 2004

National Environmental Management: Biodiversity Act 10 of 2004

National Water Act 36 of 1998

Government publications

GN 1359 in GG 42778 of 18 October 2019

International instruments

Human Rights Council Resolution 48/13 UN Doc A/HRC/RES/48/13 (2021)

UN General Assembly Resolution on the Human Right to A Clean, Healthy and Sustainable Environment UN Doc A/RES/76/300 (2022)

Internet sources

Al Jazeera Staff 2022 https://www.aljazeera.com/news/2018/2/20/mapping-africas-natural-resources

Al Jazeera Staff 2022 *Mapping Africa's Natural Resources* https://www.aljazeera.com/news/2018/2/20/mapping-africas-natural-resources accessed 20 September 2023

Bega 2021 https://mg.co.za/environment/2021-12-14-mantashe-comments-on-objections-to-shell-seismic-survey-astounding/
Bega S 2021 *Mantashe Comments on Objections to Shell Seismic Survey "Astounding"* https://mg.co.za/environment/2021-12-14-mantashe-comments-on-objections-to-shell-seismic-survey-astounding/ accessed 20 September 2023

Harding 2023 https://www.bbc.com/news/world-africa-65671718#
Harding A 2023 *South Africa Load-Shedding: The Roots of Eskom's Power Problem* https://www.bbc.com/news/world-africa-65671718# accessed 19 September 2023

Hunter 2023 https://www.news24.com/fin24/economy/breaking-ramaphosa-calls-urgent-cabinet-meeting-to-discuss-new-plan-for-old-coal-power-stations-20230419
Hunter Q 2023 *Ramaphosa Calls Urgent Cabinet Meeting to Discuss New Plan for Old Coal Power Stations* https://www.news24.com /fin24/economy/breaking-ramaphosa-calls-urgent-cabinet-meeting-to-discuss-new-plan-for-old-coal-power-stations-20230419 accessed 22 April 2023

Ireland and Burton 2018 https://www.africaportal.org/documents/18385/Microsoft_Word_-_ERC_Coal_IPP_Study_Report_Final_290518.docx.pdf
Ireland G and Burton J 2018 *An Assessment of New Coal Plants in South Africa's Electricity Future: The Cost, Emissions and Supply Security Implications of the Coal IPP Programme* https://www.africaportal.org/documents/18385/Microsoft_Word_-_ERC_Coal_IPP_Study_Report_Final_290518.docx.pdf accessed 12 April 2023

Lund 2019 https://www.ft.com/content/5fb061d4-7a1d-11e9-8b5c-33d0560f039c
Lund H 2019 *Why BP Supports a Fast Shift to Low Carbon* https://www.ft.com/content/5fb061d4-7a1d-11e9-8b5c-33d0560f039c accessed 2 April 2023

Minister of Environmental Affairs 2018 https://cer.org.za/wp-content/uploads/2018/01/Thabametsi-Appeal-Decision-30-January-2018-2.pdf
Minister of Environmental Affairs 2018 *Appeal Decision. Reference: LSA 142346* https://cer.org.za/wp-content/uploads/2018/01/Thabametsi-Appeal-Decision-30-January-2018-2.pdf accessed 12 April 2023

Nyathi 2023 https://mg.co.za/environment/2023-04-20-if-its-not-coal-then-go-for-nuclear-says-energy-department/
Nyathi M 2023 *If It's not Coal, then Go for Nuclear, Says Energy Department* https://mg.co.za/environment/2023-04-20-if-its-not-coal-then-go-for-nuclear-says-energy-department/ accessed 22 April 2023

OUTA 2017 https://static.pmg.org.za/171018OUTA_report.pdf
Organisation Undoing Tax Abuse 2017 *Unplugging Corruption at Eskom* https://static.pmg.org.za/171018OUTA_report.pdf accessed 19 September 2023

Presidential Climate Commission date unknown https://www.climatecommission.org.za/about
Presidential Climate Commission date unknown *About the Presidential Climate Commission* https://www.climatecommission.org.za/about accessed 11 April 2023

Presidential Climate Commission 2021 https://www.climatecommission.org.za/publications/south-africas-ndc-targets-for-2025-and-2030
Presidential Climate Commission 2021 *South Africa's NDC Targets for 2025 and 2030* https://www.climatecommission.org.za/publications/south-africas-ndc-targets-for-2025-and-2030 accessed 20 September 2023

Presidential Climate Commission 2022 https://pccommissionflow.imgix.net/uploads/images/A-Just-Transition-Framework-for-South-Africa-2022.pdf
Presidential Climate Commission 2022 *A Framework for a Just Transition in South Africa* https://pccommissionflow.imgix.net/uploads/images/A-Just-Transition-Framework-for-South-Africa-2022.pdf accessed 20 September 2023

South African Government 2012 https://www.gov.za/sites/default/files/Executive%20Summary-NDP%202030%20-%20Our%20future%20-%20make%20it%20work.pdf
South African Government 2012 *National Development Plan 2030: Our Future – Make It Work. Executive Summary* https://www.gov.za/sites/default/files/Executive%20Summary-NDP%202030%20-%20Our%20future%20-%20make%20it%20work.pdf accessed 20 September 2023

UN 2015 https://sdgs.un.org/goals
United Nations 2015 *17 Goals* https://sdgs.un.org/goals accessed 12 March 2023

World Population Review 2023 https://worldpopulationreview.com/country-rankings/wealth-inequality-by-country
World Population Review 2023 *Wealth Inequality by Country 2023* https://worldpopulationreview.com/country-rankings/wealth-inequality-by-country accessed 20 September 2023

World Resources Institute 2022 https://www.wri.org/technical-perspectives/5-lessons-south-africas-just-transition-journey
World Resources Institute 2022 *5 Lessons from South Africa's Just Transition Journey* https://www.wri.org/technical-perspectives/5-lessons-south-africas-just-transition-journey accessed 20 September 2023

List Of Abbreviations

CCR	Constitutional Court Review
JEL	Journal of Environmental Law
MLR	Modern Law Review
NEMA	National Environmental Management Act 107 of 1998
NEM: AQA	National Environmental Management: Air Quality Act 39 of 2004
Notre Dame L Rev	Notre Dame Law Review
OUTA	Organisation Undoing Tax Abuse
RECIEL	Review of European, Comparative and International Environmental Law
SAJELP	South African Journal of Environmental Law and Policy
SAJHR	South African Journal on Human Rights
U Pa L Rev	University of Pennsylvania Law Review
UN	United Nations