

THE INTERDEPENDENCE OF LABOUR AND ENVIRONMENTAL RIGHTS IN SOUTH AFRICA

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Labour and environmental rights in South Africa both originated in reaction to particular and important societal problems. Labour law has traditionally been concerned with inequalities of bargaining powers, whilst environmental law was historically concerned with protection of the biophysical environment. At first glance the two rights therefore appear to be unrelated. In view of arguments that fundamental human rights cannot be achieved in isolation. This article explores the potential relationship between the two rights. It begins by providing an overview of the intersection between labour and environmentalists during the struggle against Apartheid as a basis for identifying the priorities of both sectors in advocating for the two rights and how the divide between the two narrowed. That overview provides a backdrop for the discussion which follows regarding how the intersection between the rights has played out both within the traditional and expanded conceptualisations of labour law. The study finds that the two rights do have a dependence and that the environmental arena has provided the basis for the continuation of the fight to ensure social justice for both the traditional and extended reconceptualized approach to labour law.

Keywords: labour law; environmental law; interrelationship; labour rights; environmental rights; purpose of labour law.

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Introduction

The rights enshrined in the South African Constitution¹ represent a watershed for democracy. After decades of struggle, all South Africans were afforded the means to secure social justice through legal mechanisms for the first time. Breathing life into these rights so that they become a reality for the people who are intended to benefit from them requires, amongst other things, an understanding of how the package of rights coheres. In this regard, Scott cautions that “values seen as directly related to the full development of personhood cannot be protected and nurtured in isolation.”² Support for this view is also be found in Quane’s work where they state that the doctrine of the interdependency of rights

suggests that there is a mutually reinforcing dynamic between different categories of rights in the sense that the effective implementation of one category of rights can contribute to the effective implementation of other categories of rights and vice versa.³

Understanding how rights interconnect in practice, however, is not always an easy task. Scott provides a useful entry point for conducting enquiries by making a distinction between two types of interdependence in human rights law: “organic interdependence” and “related interdependence.”⁴ Organic interdependence occurs

¹ Constitution of the Republic of South Africa, 1996 [No. 108 of 1996].

² Craig Scott, *The Interdependence and Permeability of Human Rights Norms: Towards a Partial Fusion of the International Covenants on Human Rights*, 27(3) *Osgoode Hall L.J.* 769, 786 (1989).

³ Helen Quane, *A Further Dimension to the Interdependence and Indivisibility of Human Rights?: Recent Developments Concerning the Rights of Indigenous Peoples*, 25(1) *Harvard Hum. Rts. J.* 49, 49 (2012).

⁴ Scott 1989, at 779–786.

when the jurisprudence treats one right as integrated within another right – an example being the incorporation of socio-economic rights such as the right to health care within the scope of the right to life.⁵ Related interdependence on the other hand involves questioning whether the rights in question are mutually reinforcing or mutually dependent, but distinct. In this case, the two sets of rights are treated as separate but complementary.⁶ In the case of civil and political rights this is illustrated by the interdependence between the right to equality and human dignity;⁷ whereas the interdependence of the right to housing and the rights to health and family life are examples of the interdependence of socio-economic rights.⁸

This article explores the interdependence of two socio-economic rights that are enshrined in Sections 23 and 24 of the South African Constitution: the right to fair labour practices and the right to an environment which is not detrimental to health and well-being. Although it is striking that these two provisions are situated next to each other in the Constitution, they ostensibly serve different aims. It is accordingly not immediately obvious that the two rights are interdependent, as is the case with labour rights and the right to social security, or the environmental right and the right to water where the relationship has been considered by the courts on several occasions.⁹

The discussion below begins with an overview of the intersection between labour and environmentalists during the struggle against Apartheid as a basis for identifying the terrain and priorities of both sectors in advocating for the two rights. It then explains the nature of the rights that are enshrined in the South African Constitution and how they should be interpreted in the context of constitutional transformation. That explanation is a backdrop for the discussion which follows regarding how the intersection between the rights has played out both within the traditional and expanded conceptualisations of labour law.

1. Looking Back, Looking Forward – The Struggle for Labour and Environmental Rights Pre-democracy

Understanding the context of how labour and environmental rights came about sheds light on the issues which they were intended to remedy. While it is beyond the

⁵ *R v. Secretary of State for Social Security ex parte Joint Council for the Welfare of Immigrants*, [1996] 4 All E.R. 385.

⁶ *Id.* at 783.

⁷ *Harksen v. Lane NO and Others*, 1998 (1) S.A. 300 (C.C.) (S. Afr.).

⁸ *Social and Economic Action Centre and the Centre for Economic and Social Rights v. Nigeria*, 10 I.H.R.R. 282 (2003) (Afr. Commission).

⁹ *Rustenburg Platinum Mine v. SAEWA obo Bester and Others*, 2018 (5) S.A. 78 (C.C.) (17 May 2018) (S. Afr.) (in the context of labour rights); *Escarpment Environment Protection Group and Another v. Department of Water Affairs and Others*, (A666/11, 4333/12, 4334/12) [2013] Z.A.G.P.P.H.C. 505 (20 November 2013) (S. Afr.) (in the context of environmental rights).

scope of this article to discuss the various ways in which Apartheid resulted in gross inequalities in both the labour and environmental spaces, a brief overview of the interactions between the two streams of struggle offers insights to commonalities and divergences which can be used to review how the relationship has unfolded post democracy.

The struggle for labour rights pre-dated efforts to secure environmental justice. While both were very much on the struggle agenda by the time there was a shift to democratic government in 1994, efforts to secure environmental and labour rights followed separate and parallel paths for many years. A key reason for this was that while the struggle for workers' rights focused on issues such as equality and social justice, the focus of environmental advocacy was grounded in what Cock refers to as an "authoritarian conservation perspective" which was directed at the preservation of nature areas and the protection of particular species.¹⁰ This meant that labour mobilisation was predominantly undertaken by the working class with the aim of securing social justice in the context of their own lives whereas environmental issues were driven by a limited number of the middle class who aimed to secure change in an environment mostly external from their own immediate surrounds and experiences.

On the face of it, the two issues accordingly had very different agendas and audiences¹¹ and it is not surprising that environmental issues remained outside the mainstream of the broader struggle for democracy. To the contrary, they were often viewed with negativity and hostility because they were seen as being insensitive and in opposition to the real hardships that many poor people experienced. In the case of the rural poor who were sometimes forcibly evicted to make way for the establishment of protected areas, Clasey explains the disjuncture between the two as follows:

If conservation means losing water rights, losing grazing and arable land and being dumped in a resettlement area without even the most rudimentary infrastructure and services, as was the case when the Tembe Elephant Park (near Kosi Bay) was declared in 1983, this can only promote a vigorous anti-conservation ideology among the rural communities of South Africa.¹²

The division between the two agendas, began to narrow in the late 1980s with the emergence of non-governmental organisations (NGOs) such as Earthlife Africa who expanded the environmental agenda to include pollution (brown) related matters and linked environmental causes to social justice ones. The basis that this

¹⁰ Jacklyn Cock, *Going Green at the Grassroots – The Environment as a Political Issue in Going Green: People, Politics and the Environment in South Africa 1, 1–2* (Jacklyn Cock & Eddie Koch eds., 1991).

¹¹ *Id.* at 1–2.

¹² As cited in *Id.* at 2.

laid for building a bridge between labour and environmentalists gained momentum by 1990 when environmental groups, trade unions, local peasants and farmers formed a rainbow coalition which exposed and protested against the activities of Thor Chemicals – a British owned company that imported mercury waste into South Africa and whose poor environmental practices lead to water contamination as far as 25 kilometres downstream of the plant and the death of several workers.¹³

By the early 1990's, so-called greens (environmentalists) and reds (labour) continued to collaborate in rainbow coalitions on other issue-based protests. In 1992, for example, Earthlife Africa and the Transport and General Workers Union jointly protested against hazardous waste shipments and in the mid-1990s, there was co-operation on conservation-related issues when the South African Dolphin Action and Protection Group and the Food and Allied Workers Union protested against the use of gill nets and treatment of South African workers by Taiwanese trawlers in South African waters.¹⁴

These joint actions lead to increasing interaction between labour and environmentalists and expanded into dialogue about synergies, challenges and the setting of strategic agendas. As a result, many union leaders began expressing the need to include environmental issues in the labour agenda.¹⁵ The interests of the workers was explained by Shirley Miller, the health, safety and environmental officer for the Chemical Workers Industrial Union at the time, as follows –

We don't see the workplace as separate from the environment. For workers it is their environment. ... Over 5 million [chemicals] are already in use. Workers are the first to experience the toxic effects of these chemicals. They are the guinea pigs of society.

Workers' families usually live closest to industrial complexes and thus again experience first hand the effects of industrial complexes. Struggles for health and safety in the environment therefore begin at the workplace and unions are the first line of defence in the fight for a safe environment.¹⁶

¹³ See Mark Butler, *Lessons from Thor Chemicals: The Links Between Health, Safety and Environmental Protection in The Bottom Line: Industry and Environment in South Africa* 194 (Lael Bethlehem & Michael Goldblatt eds., 1997).

¹⁴ Peter Lukey, *Health Before Profits: An Access Guide to Trade Unions and Environmental Justice in South Africa* 17 (1995).

¹⁵ See, e.g., Rod Crompton & Alec Erwin, *Reds and Greens: Labour and the Environment in Going Green: People, Politics and the Environment in South Africa*, *supra* note 10, at 78. Alec Erwin was a national executive officer of the National Union of Metal Workers who became the first Deputy Minister of Finance and then the Minister of Trade and Industry. Rod Crompton was the General Secretary of the Chemical Workers Industrial Union.

¹⁶ Shirley Miller, *Health, Safety and Environment in Hidden Faces: Environment, Development, Justice: South Africa and the Global Context* 96 (David Hallows ed., 1993).

In exploring what incorporating environment issues into the main agenda meant for the labour movement, union responses mainly centred on advocating for powers inside the factory fence. These included the right to know, the right to act and the right to refuse unsafe or hazardous work.¹⁷ The jobs versus environment debate in terms of which the two social justice issues were pitted against each other as alternatives also featured during these discussions. Compton and Erwin criticised this reality and explained it as follows:

If we look a little more closely at what workers are doing, we find that they are dumping toxic waste, polluting rivers or facilitating the emission of tons of pollutants into the air. Workers actually do these things with their own hands – they are not done by the employers. Why do the workers do this? Why don't they object or refuse? The simple answer is that they need to keep their jobs. The laws of apartheid are stacked heavily in favour of employers: ... to refuse to carry out and employer's "legitimate instruction" can lead to instant dismissal. ...

Business usually puts forward the following simplistic formula:

pollution control = job losses

therefore

jobs = pollution.¹⁸

What this brief history aims to demonstrate is that by the time the elections took place in 1994, labour had accepted that the right to a healthy environment was integral to realising the rights of workers. It's arguably rapid acceptance, however, meant that there was much to be done to mainstream environment into the daily negotiations in the workplace as well as the broader agenda of the unions. In this regard, Magane *et al.* pointed out weaknesses in the union approach at the time such as reactive responses to incidents like Thor Chemicals not being translated into proactive long term strategies or campaigns largely because health, safety and environmental issues were marginalised from the collective bargaining process.¹⁹

2. The Introduction of Constitutionally Entrenched Labour and Environmental Rights

The culmination of these struggles was the inclusion of the two rights in the Constitution. The labour right states that:

¹⁷ Crompton & Erwin 1991, at 82; Mopholosi Morokong, *Statement on the Role of Trade Unions in Environmental Protection in Hidden Faces: Environment, Development, Justice: South Africa and the Global Context*, *supra* note 16, at 91.

¹⁸ Crompton & Erwin 1991, at 87–88. See also Pelelo Magane et al., *Unions and the Environment – Life, Health and the Pursuit of Employment in The Bottom Line: Industry and Environment in South Africa*, *supra* note 13, at 177.

¹⁹ Magane et al. 1997, at 181.

- (1) Everyone has the right to fair labour practices.
- (2) Every worker has the right –
 - (a) to form and join a trade union;
 - (b) to participate in the activities and programmes of a trade union; and
 - (c) to strike.
- (3) Every employer has the right –
 - (a) to form and join an employers' organisation; and
 - (b) to participate in the activities and programmes of an employers' organisation.
- (4) Every trade union and every employers' organisation has the right –
 - (a) to determine its own administration, programmes and activities;
 - (b) to organise; and
 - (c) to form and join a federation.
- (5) Every trade union, employers' organisation and employer has the right to engage in collective bargaining. National legislation may be enacted to regulate collective bargaining. To the extent that the legislation may limit a right in this Chapter, the limitation must comply with section 36(1).
- (6) National legislation may recognise union security arrangements contained in collective agreements. To the extent that the legislation may limit a right in this Chapter, the limitation must comply with section 36(1).

And the environmental right provides that:

- 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.

Labour rights are primarily granted to workers, employers and their organisations. The use of the term "worker" rather than "employee" in subsection (2) of the right is significant as "worker" has a more general definition than the word "employee."²⁰ The term "worker" thus can encompass persons who fall outside of the employment

²⁰ Section 213 of the Labour Relations Act 66 of 1995 (LRA) defines an employee as "(a) any person, excluding an independent contractor, who works for another person or for the State and who receives, or is entitled to receive, any remuneration, and (b) any other person who in any manner assists in carrying on or conducting the business of an employer, and 'employed' and 'employment' have meanings corresponding to that of 'employee'."

relationship but are in work relationships “akin” to the employment relationship governed by a contract of employment.²¹ A generous interpretation of the term “worker” protects not only these workers, but other dependent and subordinate workers who might currently lack protection under the existing statutory framework. Strikingly, Section 23(1) grants the right to fair labour practices to “everyone”. The Constitutional Court has held that Section 23(1) engages “broadly speaking, the relationship between the worker and employer.”²² Although this embedding of Section 23(1) within the employment relationship curtails the reach of the term “everyone,” the Court’s characterisation of the right’s ambit as “broadly speaking” encompassing the employment relationship is an indication that the parameters of the right could be extended.²³ Arguably, such an interpretation could therefore encompass the interests of persons outside of the employment relationship who have an interest in labour practices, such as in the case where environmental interests are effected by labour practices. The reference to “workers” and “employers” and their organizations indicates that the rights are primarily concerned with the relationship between private citizens. Nevertheless, the extension of the right to fair labour practices to “everyone” indicates that the right may work to the benefit of those outside of the employment relationship.

While much of the labour right has a strong procedural character, the environmental right has a more substantive nature. The first part of the environmental right is directly executable. The second is not and requires government to operationalize it by passing appropriate legislation and by giving effect to it in its decision-making activities. However, it is the second part of the right which provides the most obvious clue to the potential interdependence of labour and environmental rights. This is because it formally introduced the concept of sustainable development into South African law for the first time. The term is not defined in the Constitution, but it is in the National Environmental Management Act, 1998 (NEMA) which was passed to give effect to the right.²⁴ In terms of that definition, sustainable development means:

[T]he integration of social, economic and environmental factors into planning, implementation and decision-making to ensure that development serves present and future generations.²⁵

²¹ *South African National Defence Union v. Minister of Defence & Another*, 1999 (4) S.A. 469 (C.C.), para. 24 (S. Afr.); Halton Cheadle, *Labour Relations in South African Constitutional Law: The Bill of Rights 18-4-18-7* (Halton Cheadle & Denis Davis eds., 2005).

²² *NEHAWU v. UCT*, (2003) 24 I.L.J. 95 (C.C.), para. 40 (S. Afr.) [hereinafter *NEHAWU Case*].

²³ Carol Cooper, *Labour Relations in Constitutional Law of South Africa 53-5* (Stu Woolman et al. eds., 2nd ed. 2014).

²⁴ Act 107 of 1998.

²⁵ Sec. 1.

The definition resonates with the Brundtland Report in which the term was first coined²⁶ and it therefore asserts the internationally accepted premise that sustainable development rests on three pillars – social, environmental and economic and that these need to be integrated and balanced in decision-making processes. In early jurisprudence by the Constitutional Court this was expressed as follows:

The nature and the scope of the obligation to consider the impact of the proposed development on socio-economic conditions must be determined in the light of the concept of sustainable development and the principle of integration of socio-economic development and the protection of the environment. Once it is accepted, as it must be, that socio-economic development and the protection of the environment are interlinked, it follows that socio-economic conditions have an impact on the environment. A proposed filling station may affect the sustainability of existing filling stations with consequences for the job security of the employees of those filling stations.²⁷

In addition to this, the Constitution requires the courts to take international law into account when adjudicating disputes.²⁸ This will therefore include the Sustainable Development Goals (SDG) which were adopted as part of the outcome-based document titled *Transforming Our World: The 2030 Agenda for Sustainable Development* at the 2015 United Nations Sustainable Development Summit;²⁹ one of which is SDG 8: “Promote sustained, inclusive and sustainable economic growth, full and productive employment and decent work for all.” The environmental right accordingly provides the entry point for optimising the interdependence of labour and environmental concerns.

A further point to be noted in understanding the nature of the rights is that, underpinning both rights is the common purpose of all of the constitutional rights. South Africa’s Constitution is transformative in nature.³⁰ In *Bato Star Fishing (Pty) Ltd. v. Minister of Environmental Affairs and Tourism and Others*³¹ – a judgment involving

²⁶ World Commission on Environment and Development, United Nations Report of the World Commission on Environment and Development: Our Common Future 41 (1987).

²⁷ *Fuel Retailers Association of Southern Africa v. Director-General: Environmental Management, Department of Agriculture, Conservation and Environment, Mpumalanga Province and Others*, (CCT67/06) [2007] Z.A.C.C. 13 (S. Afr.).

²⁸ Secs. 231–233.

²⁹ U.N. General Assembly, *Transforming Our World: The 2030 Agenda for Sustainable Development*, 21 October 2015, A/RES/70/1.

³⁰ *Bato Star Fishing (Pty) Ltd. v. Minister of Environmental Affairs and Tourism and Others*, 2004 (4) S.A. 490 (C.C.) (S. Afr.).

³¹ *Id.* paras. 73–74. See also *S v. Makwanyane*, 1995 (3) S.A. 391 (C.C.), para. 262 (S. Afr.); *Minister of Finance v. Van Heerden*, 2004 (6) S.A. 121 (C.C.), para. 142 (S. Afr.); *City of Johannesburg v. Rand Properties (Pty)*

a dispute over the allocation of fishing rights which is regularly cited by other courts – the court explained the need for transformation as follows:

South Africa is a country in transition. It is a transition from a society based on inequality to one based on equality. ... The Preamble to the Constitution “recognises the injustices of our past” and makes a commitment to establishing “a society based on democratic values, social justice and fundamental rights.” This society is to be built on the foundation of the values entrenched in the very first provision of the Constitution. These values include human dignity, the achievement of equality and the advancement of human rights and freedoms.

This is consistent with a previous statement by the court in *Government of the Republic of South Africa v. Grootboom* when it stated that:

[t]he people of South Africa are committed to the attainment of social justice and the improvement of the quality of life for everyone. The Preamble of the Constitution records this commitment.³²

It is for this reason that the Constitution requires that

[w]hen interpreting the Bill of Rights, a court, tribunal or forum must promote the values that underlie an open and democratic society based on human dignity, equality and freedom.³³

The requirements of transformation when interpreting rights have also been considered by scholars. Klare, in perhaps the most renowned article on the history of South African public law, describes transformative constitutionalism as “an enterprise of inducing large-scale social change through nonviolent political processes grounded in law.”³⁴ At its core, transformative constitutionalism requires non-formalist, non-legalist and non-literalist approaches to the interpretation of the Constitution and arguably other statutes. In his critique of Klare’s thesis, Roux summarises the thesis as follows:³⁵ It is possible to interpret the Constitution in a number of different ways in terms of conventional legal reasoning.³⁶ A post-liberal

Ltd., 2007 (1) S.A. 78 (W.), paras. 51–52 (S. Afr.); *Rates Action Group v. City of Cape Town*, 2004 (5) S.A. 545 (C.), para. 100 (S. Afr.).

³² 2001 (1) S.A. 46 (C.C.), para. 1 (S. Afr.).

³³ S. Afr. Const., Sec. 36(1)(a).

³⁴ Karl Klare, *Legal Culture and Transformative Constitutionalism*, 14(1) S. Afr. J. Hum. Rts. 146, 153 (1998).

³⁵ See Theunis Roux, *Transformative Constitutionalism and the Best Interpretation of the South African Constitution: Distinction Without a Difference?*, 2009(2) Stellenbosch L. Rev. 259 (2009).

³⁶ *Id.* at 261.

interpretation is one such possible interpretation.³⁷ A post-liberal reading is different from other readings because it does *better* interpretive justice to the Constitution.³⁸ The Constitution requires us to reimagine legal method, analysis and reasoning to be consistent with its transformative goals.³⁹ The only correct method of constitutional interpretation is one that is politically engaged and transparent.⁴⁰ A progressive legal culture is a precondition for the Constitution's vision of transforming society.⁴¹

While Apartheid has been described as the primary problem which the Constitution must answer,⁴² it is nevertheless also true that the Constitution ought to be construed in a way that takes heed of current and future societal problems.⁴³ Therefore, although it is trite that social justice broadly does not prevail in South African society, it may be argued that environmental concerns, including those such as climate change, present a particular problem and obstacle to the achievement of social justice and a society based on the values of human dignity, equality and the advancement of human rights and freedoms. The discussion below accordingly explores examples of how labour law can advance, or has advanced, an environmental agenda and *vice versa*.

3. Canaries in the Goldmine and the Traditional Purpose of Labour Law

One way of exploring how the two rights have intersected and exerted a mutually reinforcing, or otherwise, pressure on each other is to consider the interaction between the two through the lens of the traditional approach to labour law. In this regard, it is noted that at the dawn of the industrial age two primary relationships existed. The independent contractor was regulated by means of contract. The mutual rights and responsibilities of the parties to the master and servant relationship, employees and employers, were judicially included in the relationship according to tradition or public policy. The relationship, however, came into existence through agreement.⁴⁴ During the eighteenth and nineteenth centuries the industrial bourgeoisie searched for a more integrated and disciplined workforce than was

³⁷ Roux 2009, at 261.

³⁸ *Id.* at 262.

³⁹ *Id.* at 263 and Klare 1998, at 156.

⁴⁰ Roux 2009, at 265.

⁴¹ *Id.* at 270 and Klare 1998, at 170.

⁴² *Qozoleni v. Minister of Law and Order*, 1994 (3) S.A. 625 (E.) 634I-635C (S. Afr.).

⁴³ Lourens M. du Plessis, *Interpretation of the Bill of Rights in Constitutional Law of South Africa*, *supra* note 23, at 32-1, 32-169.

⁴⁴ Marius Olivier, *Die Belang van Status en Kontrak vir die Diensverhouding*, 1993 J. S. Afr. L. 17, 19 (1993).

provided by independent contractors. They wanted workers to be subjected to the same sort of control as servants, whose position was regulated by virtue of their status, and because it was clear that the continuous (or open-ended) nature of the employment relationship could not be adequately regulated by contract alone.⁴⁵

The contract of employment was created to allow the old master-servant relationship to be built into a construct of contract as part of the *naturalia* of the contract.⁴⁶ For employees the law of contract ironically embodied values of freedom, equality, self-government and legal competence, and was seen as liberating and facilitative.⁴⁷ The employer's traditional duty to attend to the welfare of employees was not included within the contract of employment. According to Kahn-Freund the main object of labour law has traditionally been held to be a countervailing force to the inequality of bargaining power that exists between the employers and employees.⁴⁸ He states that:

[T]he relation between an employer and an isolated employee or worker is typically a relation between a bearer of power and one who is not a bearer of power. In its inception it is an act of submission, in its operation it is a condition of subordination, however much the submission and subordination may be concealed by that indispensable figment of the legal mind known as the "contract of employment." The main object of labour law has always been, and we venture to say will always be, to be a countervailing force to counteract the inequality of bargaining power which is inherent and must be inherent in the employment relationship.⁴⁹

The purpose of labour law is therefore to attempt to *mitigate* this disequilibrium.⁵⁰ It is largely because of the failure of the common-law contract of employment to recognise the true nature of the employment relationship that labour law developed.

According to Kahn-Freund's theory of collectivism, labour law must be framed as "an accommodation arising out of the conflict between the collective forces in

⁴⁵ Adrian Merritt, *The Historical Role of Law in the Regulation of Employment – Abstentionist or Interventionist*, 1(1) *Austl. J.L. & Soc'y* 56, 57 (1982).

⁴⁶ Rochelle le Roux, *The Regulation of Work: Whither the Contract of Employment? An Analysis of the Suitability of the Contract of Employment to Regulate the Different Forms of Labour Market Participation by Individual Workers* (2008) (unpublished Ph.D. thesis, University of Cape Town) (on file with author); Olivier 1993, at 21-2.

⁴⁷ Philip Selznick, *Law, Society and Industrial Justice* 53 (1969).

⁴⁸ Paul L. Davies & Mark R. Freedland, *Kahn-Freund's Labour and the Law* 18 (3rd ed. 1983).

⁴⁹ Otto Kahn-Freund, *Labour and the Law* 8 (1972); *Sidumo v. Rustenburg Platinum Mines*, 2008 (2) S.A. 24 (C.C.), para. 72 (S. Afr.) (holding that "[t]he relationship between employer and an isolated employee and the main object of labour law is set out in [this] now famous dictum").

⁵⁰ Kahn-Freund 1972, at 15-18.

society” and the role of the state is to “recognise and encourage the idea of self-determination in the law.”⁵¹ According to this model, the primary way in which the employment relationship was to be regulated was therefore collective bargaining. The International Labour Organization has defined collective bargaining as

a process in which workers and employers make claims upon each other and resolve them through a process of negotiation leading to collective agreements that are mutually beneficial. In the process, different interests are reconciled. For workers, joining together allows them to have a more balanced relationship with their employer. It also provides a mechanism for negotiating a fair share of the results of their work, with due respect for the financial position of the enterprise or public service in which they are employed. For employers, free association enables firms to ensure that competition is constructive, fair and based on a collaborative effort to raise productivity and conditions of work.⁵²

The purpose of legislation in this context has primarily been to serve an “auxiliary function” where legislation is used to support an autonomous system of collective bargaining.⁵³ Within this traditional conception of labour law, the focus on the environment is arguably largely within the proverbial factory fence – as was the case with the priorities that labour adopted pre-1994 in South Africa.

In this regard, the red-green coalition which emerged during the late 1980’s and early 1990’s continued into the early days of democracy when opportunities for participating in policy and legislation reform were ripe. Representatives of labour worked alongside those of NGOs, community based organisations and business in several government environmental policy and legislation processes.⁵⁴ Similarly, environmental issues were introduced in the National Economic Development and Labour Council’s scope of work which commissioned several research projects on environmental issues such as the implications climate change and of introducing the Globally Harmonised System of Classification.⁵⁵

⁵¹ Jon Clark, *Towards a Sociology of Labour Law: An Analysis of the German Writings of Kahn-Freund in Labour Law and Industrial Relations: Building on Kahn-Freund* 80, 97 (Lord Wedderburn ed., 1983).

⁵² International Labour Organization, *Organizing for Social Justice – Global Report Under the Follow-up to the ILO Declaration on Fundamental Principles and Rights at Work* 7 (2004).

⁵³ Otto Kahn-Freund, *Industrial Relations and the Law – Retrospect and Prospect*, 7 *Brit. J. Indus. Rel.* 301, 301–316 (1969).

⁵⁴ These include, for example, the Consultative National Environmental Policy Process (CONNEPP) which was initiated by the Deputy Minister and which laid the basis for some of the law reform which ensued. Industry was also part of these forums.

⁵⁵ Personal knowledge of Jenny Hall who participated in these projects. NEDLAC is established by the Economic Development and Labour Council Act 35 of 1994.

The receptivity of government at the time to public participation resulted in several strides being taken and the beginnings of a narrowing of the traditionally separate areas of labour and environment regulation occurred. For example, in what was arguably the first case of environmental considerations being introduced inside the factory fence, regulations passed in terms of the Occupational Health and Safety Act, 1993 required the waste management provisions of the Environment Conservation Act, 1989 to be adhered to.⁵⁶

Much of the focus of these efforts was on workers' dualistic relationship with the environment regarding being the first to be exposed to hazards and potentially being responsible for creating them. In other words, they are a sector which both undermines the environmental right in their activities and one whose environmental right can be infringed. This duality was given recognition in the NEMA which included provisions to increase worker's rights to address such situations. Section 2 of the Act includes a set of principles⁵⁷ that "unpack" the requirements of sustainable development and which must guide decision-making by all officials involved in environmental matters. Two are particularly relevant regarding the intention to integrate worker and environmental rights. These are found in subsection (4)(e) and (j) which state that:

(e) Responsibility for the environmental health and safety consequences of a policy, programme, project, product, process, service or activity exists throughout its life cycle; ...

(j) The right of workers to refuse work that is harmful to human health or the environment and to be informed of dangers must be respected and protected.

Although these principles do not create direct obligations for employers, they have an indirect effect as they must be internalised in the decisions of officials which affect employers. In addition, the second of these principles is amplified in two subsequent sections of the Act. Section 29 provides for the right and protection of workers to refuse to do environmentally hazardous work where they believe that that work would result in an "imminent and serious threat to the environment." Protection for their refusal to work in these situations extends to criminal and civil liability as well as to protection from dismissal, disciplinary procedures, prejudice and harassment. In addition, the section prohibits any person from offering an advantage to a worker for not to exercising this right. This provision accordingly gives legislative protection which can be used to overcome the union concern

⁵⁶ Regulations for Hazardous Chemical Substances, G.N.R. 1179 in G.G. 16596, 25 August 1995; Environment Conservation Act 73 of 1989.

⁵⁷ *Id.* Sec. 2.

mentioned previously that workers are under threat of dismissal when they assert environmental requirements as well as the “the work now; complain later” approach which the unions felt was rife.⁵⁸

Section 29 is complemented by Section 31 which provides for the protection of whistle-blowers. Subsection (4) states that:

Notwithstanding the provisions of any other law, no person is civilly or criminally liable or may be dismissed, disciplined, prejudiced or harassed on account of having disclosed any information, if the person in good faith reasonably believed at the time of the disclosure that he or she was disclosing evidence of an environmental risk and the disclosure was made in accordance with subsection (5).

Although the section refers to persons generally, it is clear that workers are contemplated as falling within the scope of the section because – like Section 29 – it includes a prohibition against dismissal and discipline for exercising the right.

While these sections afford workers’ rights, the other side of the dualistic nature of workers’ experience with the environment inside the factory fence is implicitly recognised in the criminal provisions. In this regard, Section 34(6) states that:

Whenever any manager, agent or employee does or omits to do an act which it had been his or her task to do or to refrain from doing on behalf of the employer and which would be an offence under any provision listed in Schedule 3 for the employer to do or omit to do, he or she shall be liable to be convicted and sentenced in respect thereof as if he or she were the employer.

It could be anticipated that the liability provision may exert pressure on workers to exercise their rights in terms of Sections 29 and 31 and as a means of addressing the power dynamic in the workplace. Although it is not known how much this occurs in practice, and it must be acknowledged that the reality of the dynamics in the workplace may prevent the optimal use of these provisions, the provisions have only been considered by the courts on one occasion, namely, in the matter of *Potgieter v. Tubatse Ferrochrome & Others*.⁵⁹ That case related to the circumstances surrounding Potgieter’s dismissal and was ultimately considered by the Labour Appeal Court (LAC). Of relevance to this discussion is that, between his dismissal and (internal) appeal, Potgieter released information to the media about Cr6+ pollution which was caused by the employer’s smelting plant. In the arbitration proceedings, the arbitrator found that reinstatement was impracticable because of this disclosure

⁵⁸ Personal knowledge of Jenny Hall. Labour used this expression frequently in policy negotiations.

⁵⁹ (2014) 35 I.L.J. 2419 (L.A.C.) (S. Afr.) [hereinafter the *Potgieter Case*].

which, in all probability, had a vindictive motivation. The Labour Court upheld the arbitrator's decision. In his appeal to the LAC, Potgieter claimed that his disclosure was protected by both the Protected Disclosure Act, 2000 (PDA)⁶⁰ and NEMA. In laying the basis for its findings, the court emphasised the need for whistle-blowing protection when it noted that

the fostering of a culture of disclosure is a constitutional imperative as it is at the heart of the fundamental principles aimed at the achievement of a just society based on democratic values.⁶¹

After considering the evidence, it held that Potgieter's disclosure was motivated by a desire to inform the public of the environmental dangers which the employer's operations were posing; a fear of personal liability in terms of Section 34(6) of NEMA and a belief that the disclosure was protected by NEMA and the PDA.⁶²

The Court then considered the triangular relationship between the employer, employee and needs of the public to be apprised of environmental concerns and in doing so blurred the traditionally rigid boundary of the factory fence. In this regard, the employer argued that the information that was disclosed was of a sensitive nature – presumably because of the potential liability which it was potentially exposed to as a result of the employer's non-compliance with environmental legislation. The court interpreted this as implying that the fact that the information was sensitive automatically implied that the employment relationship was intolerable – one of the exceptions listed in the Labour Relations Act, 1995 (LRA) where the court does not have to order reinstatement.⁶³

The court agreed that the information constituted sensitive information, but held that

I am not persuaded that the sensitivity of information disclosed ought to, without more, deny the whistle-blower of the protection granted by the prescripts already alluded to.⁶⁴

It then stated that:

While due regard must be paid to the reputational damage that an organisation may suffer as a result of disclosure of adverse information which

⁶⁰ Act 26 of 2000.

⁶¹ *Potgieter Case*, para. 14.

⁶² *Id.* para. 25.

⁶³ Act 66 of 1995.

⁶⁴ *Potgieter Case*, para. 30.

is prejudicial to its commercial interests, I am of the view that a finding that the mere disclosure of sensitive information renders the employment relationship intolerable would, in my view, seriously erode the very protection that the above-mentioned legal framework seeks to grant to whistle-blowers. It is accepted that public interest may, in certain instances, outweigh the interests of protecting the reputation of an organisation.⁶⁵

In reaching its findings, the court therefore engaged with a key concern that the unions had regarding the raising of environmental issues and the judgment is now a source of support for their approach.

Another priority for labour in the context of the traditional approach to labour law is job security. The constitutional right to fair labour practises and the protection provided by the LRA against unfair labour practices, unfair dismissal right and unfair discrimination are aimed at addressing this priority. The Constitutional Court has found that security of employment is a core value of the LRA and “essential to the constitutional right to fair labour practices.”⁶⁶ However, it will be recalled from the discussion above that during the struggle there were concerns that addressing environmental issues would be at the expense of workers’ jobs.

Given that all of the constitutional rights are considered to be on a par,⁶⁷ it would of course be an untenable position if the realisation of one right is to the detriment of others being fulfilled. The Constitution provides that “everyone” has the right to fair labour practices and to an environment that is not detrimental to their health or well-being and that every citizen has the freedom of trade, occupational and profession. It does not single out workers as a *sui generis* category who are denied the benefits of the environmental right once they become employed.

This jobs-versus-environment tension is not unique to South Africa.⁶⁸ Although several international studies indicate that in practice the introduction of more stringent environmental measures may induce changes but that the impact overall is not particularly negative,⁶⁹ the debate nevertheless can be a source of lingering tension. It is nevertheless an important consideration in South Africa as job creation is a strategic priority because of the high levels of unemployment and poverty.

⁶⁵ *Potgieter Case*, para. 31.

⁶⁶ *NEHAWU case*, para. 42.

⁶⁷ *BP Southern Africa (Pty) Ltd. v. MEC for Agriculture, Conservation, Environment and Land Affairs*, 2004 (5) S.A. 124 (W.) (S. Afr.).

⁶⁸ See, e.g., Dimitris Stevis et al., *The Labour-Nature Relationship: Varieties of Labour Environmentalism*, 15(4) *Globalizations* 439 (2018) and Richard D. Morgenstern et al., *Jobs Versus the Environment: An Industry-Level Perspective*, 43(3) *J. Envtl. Econ. Mgmt.* 412 (2002).

⁶⁹ See, e.g., Marc A.C. Hafstead & Robertson C. Williams, *Unemployment and Environmental Regulation in General Equilibrium*, 160(1) *J. Public Econ.* 50 (2018) and Roger Bezdek et al., *Environmental Protection, the Economy and Jobs: National and Regional Analyses*, 86(1) *J. Envtl. Econ. Mgmt.* 63 (2008).

It is therefore not surprising that job creation features in environmental policies. For example, the National Water Resource Strategy, 2013 sets out three objectives, namely:

Water supports development and the elimination of poverty and inequality; Water contributes to the economy and job creation; and Water is protected, used, developed, conserved, managed and controlled sustainably and equitably.⁷⁰

Notwithstanding this, the narrative of there being a choice between jobs or environmental protection is raised quite regularly in attempts to pit the two rights against each other, often by actual or potential employers. This is illustrated in the court papers which were filed in *Mining and Environmental Justice Community Network of South Africa and Others v. Minister of Environmental Affairs and Others*, which is not atypical of disputes involving decisions to grant or refuse environmental authorisation in terms of NEMA.⁷¹ The dispute in this instance related to two government Ministers' decision to grant permission to mine coal in a declared protected area.

In the lengthy answering affidavit that was filed on behalf of the project proponent, the deponent makes much of the creation of approximately 500 jobs that the project would generate and raised the point numerous times.⁷² For example, early in the affidavit the deponent states that the project will "provide welcome relief in terms of job creation and poverty alleviation."⁷³ They also link the development to national priorities by stating that:

... the proposed development would provide an opportunity to address the objectives of the National Development Plan in terms of the creation of decent jobs, sustainable resource management and speeding up inclusive growth in one of the most economically and socially depressed areas of Mpumalanga Province.⁷⁴

In two somewhat more revealing statements further down in the affidavit, the deponent indicates their view regarding the pecking order which exists *de facto* between rights where they state that:

⁷⁰ National Water Resource Strategy (2nd ed., June 2013), at 12 (Apr. 5, 2021), available at <https://cer.org.za/wp-content/uploads/2013/07/NWRS2-Final-email-version.pdf>.

⁷¹ (50779/2017) [2018] Z.A.G.P.P.H.C. 807 (S. Afr.) [hereinafter *Mining and Environmental Justice Case*].

⁷² Mabola Protected Environment, Centre for Environmental Rights (Apr. 5, 2021), available at <https://cer.org.za/programmes/mining/litigation/mabola-protected-environment>.

⁷³ *Mining and Environmental Justice Case*, para. 9.3.

⁷⁴ *Id.* para. 70.6.

... specialist studies concluded that the natural resources can be sustainably used with the recommended mitigation Measures in place; but in the final analysis the broader national, economic and social interests of South Africa to benefit from sue mining far outweigh the potential detriment to the environment (sic).⁷⁵

...

Creating jobs by means of responsible development, thereby contributing to the national economy, gives meaningful effect to anthropogenic environmental Management under the NEMA and to the constitutional right contained in section 24 of the Constitution (which is fundamentally a qualified anthropogenic right to development in balance with the environment).⁷⁶

These arguments were not sufficient to persuade the court and, for other reasons, the matter ultimately resulted in a strong rebuke by the court regarding the Ministers' approach in its decision to set aside the permission. However, the view that the interests of job security *de facto* enjoy a higher priority and exert a counter pressure on environmental decision-making features in other contexts too. In *Uzani Environmental Advocacy CC v. BP Southern Africa (Pty) Ltd.*,⁷⁷ for example, the views of the expert who testified about the nature of the application process involving *ex post facto* environmental authorisation in terms of Section 24G of NEMA were summarised as follows:

authorisation post-construction requires the receipt of a rectification report which accepts that refusing a s 24G application was not really an option because it could result in job losses. The process of sanctioning a post-construction application under s 24G is therefore qualitatively inferior to the more rigorous requirements required under an EIA.

Furthermore, in his research on plea and sentence agreements which relate to the illegal commencement of mining and industrial related activities, Murombo notes that employment was cited as a mitigating factor in several instances.⁷⁸

It is not suggested that raising the issue of job creation is misplaced. It is part of the sustainable development consideration and it is submitted that the Constitutional Court in *Fuel Retailers* mentioned above is correct in interpreting its application to decisions on environmental authorisations and the need to consider the impacts of a proposed development on job security.

⁷⁵ *Mining and Environmental Justice Case*, para. 70.9.

⁷⁶ *Id.* at para. 83.2.

⁷⁷ (CC82/2017) [2019] Z.A.G.P.P.H.C. 86 (S. Afr.).

⁷⁸ Tumai Murombo & Isaac Munyuki, *The Effectiveness of Plea and Sentence Agreements in Environmental Enforcement in South Africa*, 22(1) Potchefstroom Elec. Rev. 56 (2019).

What is problematic, however, is that these arguments are often raised somewhat opportunistically in a manner that suggests that the environmental right should yield to the interests of job creation by default. Because these discussions take place before the development is built and before workers are employed, they overwhelmingly appear to occur in the absence of labour's voice and opinions. The more progressive standpoint which labour advocated in the run up to democracy of "jobs and the environment" is, at best, left to others to raise.

4. Convergence or Divergence? Sustainable Development in the Context of an Expanded Approach to Labour Law

The discussion above shows that the labour agenda that was expressed pre-democracy can be co-opted by others in the sphere of environmental decision-making in a way in which there is an attempt to use labour "rights" to exert a negative influence on the realisation of the environmental right and to deny their interdependence. There is, however, another dimension that merits consideration if labour and environmental rights are viewed through the lens of the underlying goal of achieving social justice. In this regard, and in response to contemporary challenges regarding employment such the decline of union membership and the rise of atypical employment, Hepple has argued that there is a need for more legislative intervention to provide adequate protection for the growing number of workers working under non-standard work relationships.⁷⁹

Benjamin has argued that it is inescapable but for us to rethink the function of labour law in society beyond it merely mitigating the disequilibrium in the employment relationship.⁸⁰ Within the context of unemployment, inequality, skills shortage and the rise of atypical employment Benjamin is arguably correct that the normative purpose of labour law should be reconsidered. And so too is Weiss who states that labour law must respond to the dramatically changed reality of work and that labour law, a product of industrialisation, must therefore be developed in view of current social and economic realities.⁸¹ Claiming that the purpose of labour law is the mitigation of inequalities inherent in the labour relationship is therefore a thin and limited account of the discipline.⁸² As Arthurs notes, the focus on collective bargaining and economic conflict in the 19th and 20th centuries left many questions unresolved:

⁷⁹ Murombo & Munyuki 2019.

⁸⁰ Paul Benjamin, *Labour Law Beyond Employment*, 2012(1) *Acta Juridica* 21, 24–26 (2012).

⁸¹ Manfred Weiss, Conference Report, 17th ILERA World Congress: The Changing World of Work: Implications for Labour and Employment Relations and Social Protection (September 2015) (Apr. 5, 2021), available at http://www.ilera2015.com/dynamic/full/Manfred_Weiss_keynote.pdf.

⁸² Brian Langille, *Imagining Post "Geneva Consensus" Labor Law for Post "Washington Consensus" Development*, 31 *Comp. Lab. L. & Pol'y J.* 523, 550 (2010).

First: how to integrate collective bargaining outcomes with macro-economic policies? ... Second: how to address labour market issues that collective bargaining could not resolve because they affected workers before or after entering employment? ... And third: how to protect workers in non-union workplaces?⁸³

Collective bargaining can do little to address the plight of workers who find themselves in non-standard or atypical forms of employment as it is difficult to unionise these workers, and it is even more difficult for collective bargaining to address the plight of workers who find themselves outside of the work relationship entirely if certain foundational problems cannot be overcome.⁸⁴ The International Labour Organization has warned that organising atypical workers does not simply mean recruiting members. It also means connecting atypical workers with current members, potential members and other groups in society who do not share a commonality of interests.⁸⁵

Similarly Weiss has averred that the most pressing problem in the context of segmentation and fragmentation of the workforce is the challenge of establishing solidarity between diverse groups with diverse interests and how to organise efficient collective representation for these workers.⁸⁶ In times past, the interests of workers were homogeneous which was an ideal precondition for unionisation and protection by means of collective bargaining could be more easily achieved.⁸⁷ In modern times, however, unions must reconcile the unique interests of their potential members in order to successfully form a collective identity.⁸⁸

In view of these changes, many authors have attempted to recast the purpose of labour law. Debates about labour law have been recast into what can be called “labour market regulation.” According to Benjamin, labour law could be used as an instrument of economic policy, for instance to control inflation and to pursue economic growth and global competitiveness.⁸⁹ This includes matters that impact on the construction

⁸³ Harry W. Arthurs, *Labour Law After Labour in The Idea of Labour Law* 13, 15 (Guy Davidov & Brian Langille eds., 2011).

⁸⁴ Weiss, *supra* note 81, at 8.

⁸⁵ ILO, *Trade Unions and the Informal Sector: Towards a Comprehensive Strategy – Background Paper for the International Symposium on Trade Unions and the Informal Sector (1999)* (Apr. 5, 2021), available at https://www.ilo.org/actrav/events/WCMS_112432/lang-en/index.htm.

⁸⁶ Weiss, *supra* note 81, at 7.

⁸⁷ *Id.* at 1.

⁸⁸ Susanne Pernicka, *The Evolution of Union Politics for Atypical Employees: A Comparison Between German and Austrian Trade Unions in the Private Service Sector*, 26(2) *Econ. & Indus. Democracy* 205, 208 (2005).

⁸⁹ *Id.* at 31–32.

and governance of labour markets (such as social security, training and education, labour placement and mobility, job creation and immigration law).⁹⁰

Klare has also indicated that labour law has four purposes: promoting allocative and productive efficiency and economic growth; macroeconomic management; establishing and protecting fundamental rights and addressing imbalances in the bargaining powers of workers and employees.⁹¹ For Arthurs, labour law should be founded on and advance fundamental human rights,⁹² and empower workers by facilitating their capacities.⁹³ He also argues that the purpose of labour law has always been to enable workers to seek justice in the workplace.⁹⁴ He therefore argues for a new approach to labour law that will necessitate greater ambitions. Langille suggests that labour law should develop human capital,⁹⁵ Frazer argues that labour law should be reimagined as labour market regulation⁹⁶ and Davidov points out that there is a deliberate retreat from the identification of inequality as a distinguishing feature of the labour market that necessitates regulatory intervention.⁹⁷

The implication of these views is that labour lawyers need to rethink the reach of labour law and extend it to all policy domains that influence the work relationship and labour market, to all normative regimes that justify the ends and limit the means of concerted action; to all workers whether or not they qualify technically as employees under labour legislation and to all workers including unemployed workers and workers in the informal sector.⁹⁸

There may indeed be merit in doing so. In South Africa the link between the interests of the traditional workforce and poverty alleviation was acknowledged during the struggle for labour rights. And from an environmental justice perspective, the potential for expanding the traditional concept of labour law and union activities is evident in the more marginalised spaces where the poorest work or attempt to secure a livelihood. In this regard, the recent case of *Mshengu and Others v. Msunduzi Local Municipality and Others*⁹⁹ illustrates how the difficulties of these workers often go

⁹⁰ Benjamin 2012, at 25.

⁹¹ Karl Klare, *Countervailing Workers' Power as a Regulatory Strategy in Legal Regulation of the Employment Relation* 63, 68 (Hugh Collins et al. eds., 2000).

⁹² Arthurs 2011, at 23.

⁹³ *Id.* at 24.

⁹⁴ *Id.* at 27.

⁹⁵ Brian Langille, *Labour Law's Back Page in The Boundaries and Frontiers of Labour Law: Goals and Means in the Regulation of Work* 13, 34 (Guy Davidov & Brian Langille eds., 2006).

⁹⁶ Andrew Frazer, *Reconceiving Labour Law: The Labour Market Regulation Project*, 8(1) *Macquarie L.J.* 21, 21–44 (2008).

⁹⁷ Guy Davidov, *The (Changing) Idea of Labour Law*, 146(3–4) *Int'l Lab. Rev.* 311, 313 (2007).

⁹⁸ *Id.* at 311.

⁹⁹ (11340/2017P) [2019] Z.A.K.Z.P.H.C. 52 (S. Afr.) [hereinafter *Mshengu Case*].

hand in hand with the double burden of environmental injustice and environmental hardships.

In this instance the first two applicants were labour tenants. Labour tenants have a particular status, recognised by legislation, in terms of which the labour tenant acquires certain rights to land on a farm where they have historically resided (in addition to their ordinary entitlements to protection under labour legislation), including cropping or grazing rights, in exchange for providing labour to the farmer.¹⁰⁰ As noted in the judgment, labour tenants “are particularly poor and vulnerable and require special consideration.”¹⁰¹

The first applicant lived in a hand built mud house on a farm and was dependent on a communal tap on a neighbouring farm, 500 metres away, for his and his family’s access to water. The hardship involved in accessing water everyday is indicated by the court where it states that:

In order to collect water, Zabalaza and other farm occupiers and labour tenants have to push 25 litre cans down the hill on wheelbarrows, through the bush and haul them back up a gruelling upward ascent on their return.¹⁰²

The struggle that the first applicant faced in his daily life in meeting basic needs is brought home when one reads the opening paragraph of the strongly pro-poor judgment:

“Zabalaza” is the isiZulu word for ‘stand firm or plant oneself firmly on the ground or refuse to give way’. In the context of this application it is the first name of the first applicant Mr Mshengu, a centenarian who has since sadly passed away. He refused to give up the struggle for access to sufficient water, basic sanitation and collection of refuse for farm occupiers and labour tenants until he was called to rest on 13 August 2018 at the age of 104. In this judgment I shall refer to him by his first name not as a sign of disrespect, but because of its synonymity with his contribution to the struggle to ensure that the most vulnerable of farm residents have access to these aforementioned basic services.

¹⁰⁰ The definition of a labour tenant is found in Section 1 of the Land Reform (Labour Tenants) Act 3 of 1996 and reads as follows: “a person who has or has had the right to reside on a farm; has or has had cropping or grazing rights thereon, in consideration of which he provides labour to the owner or lessee; and whose parent or grandparent resided on the farm and had similar rights.” The interpretation of this definition and whether or when people fall within the category of labour tenants or farmer workers is controversial. It is an important distinction as if a person is considered to be a farm worker they do not qualify for the protections of the Labour Tenants Act. See Michael Cowling et al., *Research Report on the Tenure Security of Labour Tenants and Former Labour Tenants in South Africa* (2017) in this regard.

¹⁰¹ *Mshengu Case*, para. 69.

¹⁰² *Id.* para. 2.

Similar to the first applicant, the second applicant lived in a dilapidated block and asbestos house, on a different farm, with no direct access to running water, toilets or waste removal together with eleven other households. It appears that the farm owner's representative actively prevented them from engaging in self-help as he stopped them building their own pit latrines. He also on occasion switched off the water supply to the two communal taps which the applicant and other households queued at to get water without notice.¹⁰³

The third applicant was an NGO which focuses on land issues and improving the life and livelihoods of poor rural communities. Although not expressly stated in the judgment, it is likely that the third respondent assisted the first two applicants in gaining access to the legal process and expanding it into a class action.

The applicants requested the court to grant three orders. The first was an order against the first three respondents i.e. the municipalities in whose jurisdiction they resided, declaring the municipalities' failure to provide access to basic sanitation, sufficient water and refuse collection to be inconsistent with the Constitution, including the environmental right and the water right (contained in Section 27 of the Constitution). The second was an order directing the respondents to provide access to water, waste and sanitation services and the third was a structural interdict in terms of which the respondents would be required to identify all farm occupiers and labour tenants in their respective areas of jurisdiction and, if they had access to services to indicate the nature of those services; or if they did not have access to services, a requirement to submit a measurable plan of how those services would be provided.

Although the farm owners were joined in the application, no order was sought against them. The judgment accordingly, and unfortunately, does not discuss their obligations to people who work for them on a labour tenant basis in any depth. It does note, however, that legislation prohibits the landowner from denying or depriving occupiers from access to water.¹⁰⁴ In addition, and in response to one of the respondent's arguments that the applicants' could assert their rights of access to water against landowners on the basis of the Extension of Security of Tenure Act, 1997¹⁰⁵ and the Land Reform (Labour Tenants) Act, the court stated that:

First respondent is the water services authority and as such the obligation to provide water and sanitation for farm occupiers and labour tenants rests on it, not on the landowners. The landowners have no direct statutory obligation to provide such services ...¹⁰⁶

¹⁰³ *Mshengu Case*, para. 5–6.

¹⁰⁴ *Id.* para. 60.

¹⁰⁵ Act 62 of 1997.

¹⁰⁶ *Mshengu Case*, para. 62.

The court expanded on the municipalities' obligations as follows:

It needs to be emphasised that the farm occupiers and labour tenants are vulnerable and poor, the majority of them are ignorant of their rights enshrined in the Constitution. It therefore behoves of the first, second and third respondents to be pro-active in ensuring that the farm occupiers and labour tenants have access to these services.¹⁰⁷

After rejecting the arguments of the respondents the court issued all three orders. It is worth noting that the granting of a structural interdict is a highly unusual order as the courts are traditionally reluctant to meddle in the decisions and operational activities of government. In this case it was granted largely because of the municipalities' tardiness in responding to the applicants' initial attempts at communication through letters and invitations to engage directly.

The judgment is an important one as it paves the way to making the living and working conditions of a number of labour tenants and farm occupiers more tolerable. In this way the environmental right and water right contributed to creating a synergistic effect with the labour right. However, because of the way the application was framed, the judgment does not advance discussions on the responsibilities of employers to consider worker's well-being where the line between the workplace and home is blurry. The circumstances surrounding the judgment accordingly suggest the potential for the expansion of the role of labour law as well as the potential, as suggested by the ILO, for linkages with external parties such as an NGO like the third applicant which focuses on assisting marginalised workers.

Another area where the relationship between labour and environment intersect in respect of poor communities is around access to biological resources. In this regard, a key concept of sustainable development – simplistically put – is that people should not be allowed to utilise biological resources beyond those resources' capacity to regenerate. Despite this, many biological resources are currently being over utilised which is resulting in significant biodiversity loss across the planet. Fish are one example of this. Fish stocks globally have been put under extreme pressure due to overfishing and South Africa is no exception. As Feris notes:

South African fisheries are in a similarly dire situation and many of South Africa's inshore marine resources are already overexploited or have collapsed, with a few being fully exploited. This is mainly due to the accessibility of the resources to a wide range of marine user groups including commercial fishers and recreational fishers, as well as all types of illegal harvesting or poaching.¹⁰⁸

¹⁰⁷ *Mshengu Case*, para. 75.

¹⁰⁸ Loretta Feris, *A Customary Right to Fish When Fish Are Sparse: Managing Conflicting Claims Between Customary Rights and Environmental Rights*, 16(5) *Potchefstroom Elec. Rev.* 555, 562 (2013).

Without downplaying the importance of the need to manage the utilisation of fish and marine resources in a sustainable way, it is also important to note that marine resources play an important role in meeting the food and income needs of many poor coastal communities in South Africa.¹⁰⁹ These communities have faced, and continue to face, many challenges in securing access to marine resources. Under Apartheid their access was criminalised and they were accordingly denied formal access to the resources.¹¹⁰ More recently, their access has had to compete (in instances) with other sectors such as tourism and mining which also seek access to coastal resources. In the case of mining, although the mining sector is obliged by legislation to put measures in place to address its negative social and environment impacts, Wynberg and Hauck point out that

mining companies have a history of disregarding the social impacts of mining operations, typically leaving communities more marginalised and worse off than they were before mining began, or implementing ineffective strategies to benefit them.¹¹¹

In support of this claim, and contrary to the job creation leverage used by the mining company in the *Mining and Environmental Justice Community Network of South Africa and Others* judgment discussed above, research on two coastal communities in South Africa found that the purported employment benefits of mining are “overshadowed by social, economic and ecological loss.”¹¹²

Subsistence fishers have therefore experienced hardships in being allowed to work from both tensions with other employers competing to access the resources and the environmental regulation of those resources. The inequality of the situation was recognised by government in 1994 and it commissioned work aimed at reforming the existing Sea Fisheries Act, 1988 which was the primary source of legislation regulating access to fish stocks.¹¹³

¹⁰⁹ See Rachel Wynberg & Maria Hauck, *Sharing Benefits from the Coast: Rights, Resources and Livelihoods* (2014).

¹¹⁰ See J.M. Harris et al., *The Process of Developing a Management System for Subsistence Fisheries in South Africa: Recognizing and Formalizing a Marginalized Fishing Sector in South Africa*, 24(1) S. Afr. J. of Marine Sci. 405 (2002).

¹¹¹ Wynberg & Hauck 2014, at 10.

¹¹² *Id.* at 5.

¹¹³ Act 12 of 1988. For a more in-depth discussion on the weaknesses of the Act for subsistence fishers see Moenieba Isaacs & Mafaniso Hara, *Backing Small-Scale Fishers: Opportunities and Challenges in Transforming the Fish Sector*, Report 2, Institute for Poverty, Land and Agrarian Studies Rural Status (2015) (Apr. 5, 2021), available at https://media.africaportal.org/documents/PLAAS_Rural_Report_Book_2_-_Mafa_-_Web_1.pdf.

The result of this process was the promulgation of the Marine Living Resources Act, 1998 (MLRA).¹¹⁴ As might be expected, the most obvious purpose of the Act is environmental in nature. This is indicated in Section 2 which refers to objectives such as the need to secure “optimum utilisation and ecologically sustainable development”; conserving resources for present and future generations and securing the conservation of ecological systems. However, it is also clear that the Act has a parallel purpose of addressing past inequities and transforming the profile of the sector as Section 2(j–l) refers to:

(j) the need to restructure the fishing industry to address historical imbalances and to achieve equity within all branches of the fishing industry;

(k) the need to promote equitable access to and involvement in all aspects of the fishing industry and, in particular, to rectify past prejudice against women, the youth and persons living with disabilities;

(l) the need to recognise approaches to fisheries management which contribute to food security, socio-economic development and the alleviation of poverty...

The Act appeared to be progressive – it provided a definition of subsistence fishers and afforded the Minister powers to regulate the sector and to prohibit fishing by others in areas designated as a subsistence fishing community. Subsistence fishers were defined as meaning

a natural person who regularly catches fish for personal consumption or for the consumption of his or her dependants, including one who engages from time to time in the local sale or barter of excess catch, but does not include a person who engages on a substantial scale in the sale of fish on a commercial basis.¹¹⁵

Young notes that the importance of the definition is that subsistence fishers are distinguished from commercial fishers and that this is important as the two should not be placed in competition over access to marine resources. She also notes that although the definition places an emphasis on subsistence needs, it does provide for economic activities beyond the “occasional sale or barter.”¹¹⁶

Unfortunately, as Sowman notes,

¹¹⁴ Act 18 of 2008.

¹¹⁵ Sec. 1 of the MLRA. The definition was repealed by Section 1(e) of the Marine Living Resources Amendment Act 5 of 2014.

¹¹⁶ Michaela Young, *Achieving Equity in the Fishing Industry: The Fate of Informal Fishers in the Context of the Policy for the Small-Scale Fisheries Sector in South Africa*, 16(5) *Potchefstroom Elec. Rev.* 287, 293 (2013).

[t]he legal recognition of this new category of fishers was initially seen as a positive step. However, given government's historic focus on the commercial sector it was ill equipped to deal with this new sector ...¹¹⁷

As a result affected fishers began to organise in the Western Cape Province, using a range of strategies, including forming alliances with others which is summarised by Isaacs and Hara as follows:

The Artisanal Fishers Association, with Masifundise Development Trust, formed a popular movement to defend their sociopolitical right to decriminalise their livelihoods. They used political and social networks built during the anti-apartheid movement to lobby support for the plight of artisanal fishers in the post-apartheid reforms. Advocacy and lobbying also took place at provincial, national and international levels. The National Economic Development and Labour Council (NEDLAC), the national body on which both these organisations were represented as members of civil society, was also a key avenue for the fight for smallscale fishing rights. At provincial level, the organisations aligned themselves politically with the regional secretary of the Western Cape's Confederation of South African Trade Unions (COSATU) and were represented on the COSATU fishing desk. Both organisations were also represented on the Western Cape equivalent.¹¹⁸

These activities extended beyond advocacy efforts. In 2005 a coalition of small-scale fishers and an NGO, with the support of public interest lawyers and academics launched a class action which challenged the MLRA on the basis that it violated their constitutional rights, including the right to trade and food.¹¹⁹ As a result of these efforts, a series of court orders were issued which were reached by agreement between the parties. One of these agreements was that the Department would develop a policy which specifically addressed the inclusion of small-scale fishers. Another was that interim fishing licenses would immediately be implemented in terms of which small-scale fishers would be permitted to harvest an allocated amount of fish pending the adoption of the proposed policy.¹²⁰

As a result, the department held a small-scale fishers' summit in 2007 and established a national task team to head the development of a policy. Five years later the *Policy*

¹¹⁷ Merle Sowman, *Subsistence and Small-Scale Fisheries in South Africa: A Ten-Year Review*, 30(1) *Marine Pol'y* 60, 63 (2006).

¹¹⁸ Isaacs & Hara, *supra* note 113, at 11.

¹¹⁹ *George and Others v. Minister of Environmental Affairs and Tourism*, 2005 (6) S.A. 297 (EqC) (S. Afr.).

¹²⁰ Tsele Nthane et al., *Toward Sustainability of South African Small-Scale Fisheries Leveraging ICT Transformation Pathways*, 12(2) *Sustainability* 743, 747 (2020).

for the *Small-Scale Fisheries Sector in South Africa, 2012* was adopted.¹²¹ In addition, the MLRA was amended to give further effect to the policy and those amendments came into effect in 2016.¹²² The position now is that small-scale fishers can be granted collective community fishing rights with access to a range of marine resources.

The implementation of the policy is still likely to face challenges.¹²³ But, as Sowman notes

... the Equality Court ruling of 2007, together with support from NGOs and a more informed and empowered fisher group provided the space for bottom-up participatory processes, and the eventual promulgation of a broadly acceptable small-scale fisheries policy based on human rights principles.¹²⁴

Nevertheless, challenges involving the MLRA and its impact on marginal workers have been considered by the courts on several occasions. In *Foodcorp (Pty) Ltd. v. Deputy Director General: Department of Environmental Affairs and Tourism: Branch Marine and Coastal Management and Others*, for example, the applicant requested the court to set aside and substitute the Department's fishing quota allocations to it.¹²⁵ The court makes it clear that there were good grounds for doing so as, after the Supreme Court of Appeal had previously set aside the decision and referred it back to the Department, the Department had made a second decision which was unreasonable. However, one of the reasons why it declined to substitute the decision related to small scale fishers is expressed as follows:

The process of allocation of rights is a complex task affecting a number of different fishers. If applicant's proposal is accepted, it may well be that rights holders such as Lamberts Bay and SASP could be deprived unfairly of their right to exercise a personal trade-off choice. The proposal may affect other small pelagic fishers whose rights [and] interests have not been set before this court in a fashion which would allow this court to take on the task of making an allocation with any confidence.¹²⁶

¹²¹ Gen N 474 in GG 35455 of 20 June 2012 (*Policy for the Small-Scale Fisheries Sector in South Africa* (the Small-Scale Policy)).

¹²² Marine Living Resources Amendment Act 5 of 2014.

¹²³ See Merle Sowman et al., *Fishing for Equality: Policy for Poverty Alleviation for South Africa's Small-Scale Fisheries*, 46(1) *Marine Pol'y* 31 (2014) and Young 2013.

¹²⁴ *Id.* at 35–36.

¹²⁵ *West Coast Rock Lobster Association v. Minister of Environmental Affairs and Tourism* (532/09) [2010] Z.A.S.C.A. 114 (S. Afr.). See also *Bato Star Fishing (Pty) Ltd. v. Minister of Environmental Affairs and Tourism*, 2004 (4) S.A. 490 (C.C.) (S. Afr.); *Langklip See Produkte v. Minister of Environmental Affairs and Tourism*, 1999 (4) S.A. 734 (C.) (S. Afr.).

¹²⁶ 2006 (2) S.A. 199 (C.), paras. 15–16 (S. Afr.).

More recently the rights of subsistence fishers was considered by the Supreme Court of Appeal in *Gongqose and Others v. Minister of Agriculture, Forestry and Others; Gongqose and S.*¹²⁷ In this case, Gongqose (and the others) were part of a rural community who depended on fishing as a source of food and income – when surplus fish that they caught could be sold.¹²⁸ They were caught fishing in the marine protected area which is adjacent to their community and charged and convicted of transgressing the provisions of the MLRA relating to declared marine protected areas. In their defence they claimed that they had a customary right to fish. The court found in their favour and, in doing so, discussed the interaction between the constitutional rights to culture and environment – and by implication the needs of marginalised communities – as follows:

The high court's finding that to contend that a customary right negates unlawfulness on a charge under the MLRA would elevate the rights to culture in ss [Sections] 30 and 31 at the expense of the right to a healthy environment and to have the environment protected as envisaged in s 24 of the Constitution is likewise unsustainable. It is true that the right to culture cannot be exercised in a manner inconsistent with other rights, and that environmental protection and conservation mandated by s 24, self-evidently is a valid legislative concern. But that is not the end of the Constitution's protection of customary rights. It also protects them from interference, other than through specific legislation contemplated in s 211(3). The MLRA, prior to its amendment by Act 5 of 2014, was not such legislation. And the facts show that the exercise of the appellants' customary rights was not inconsistent with s 24 of the Constitution.¹²⁹

The discussion on marginal workers above suggests that attempts to place environmental protection in juxtaposition to the needs of labour are misplaced. In the example of the labour tenants, environmental legislation, including the right to water, came to their assistance. Even where tensions did emerge in the context of subsistence fishers, they were ultimately reconciled in a way in which the underlying environmental and social justice needs of both were accommodated.

Conclusion

The labour and environmental rights in the South African Constitution both originated in reaction to particular and important societal tribulations. The common denominator in their origins lies in the quest for social justice. Because of this, and the

¹²⁷ (1340/16, 287/17) [2018] Z.A.S.C.A. 87 (S. Afr.).

¹²⁸ *Id.* para. 28.

¹²⁹ *Id.* para. 66.

dualistic nature of worker's interactions with the environment, there is a synergistic relationship between the two rights. The labour right provides opportunities to scaffold and enhance the environmental right and the environmental right, particularly through the introduction of sustainable development, requires that the interests of labour be supported in environmental decision-making processes. The two rights are therefore mutually reinforcing or mutually dependent, albeit distinct.

The nature of this interdependence is not static. On the one hand, the interdependence has been visible in the context of the traditional approach to labour rights where environmental legislation and litigation has bolstered union calls for the right to know and act. On the other hand, the transformative nature of the Constitution provides a platform for responding to the more recent challenges which have arisen in respect of realising the rights such as the reality of informal and marginalised workers and the decline of the environmental resource base on which workers rely.

The discussion and examples referred to above suggest that the environmental arena has provided a terrain for continuing the struggle for securing social justice in the interests of an expanded and reconceptualised approach to labour law, which ought to also be beneficial to environmental justice. This is to be welcomed as the need to respond to challenges regarding the intersection of labour and environmental rights in the context of one of the world's most pressing problems – climate change – is set to heighten.

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