

Environmental justice in South Africa - a legal discussion with specific reference to the Fuleni case in northern KwaZulu-Natal

What is environmental justice and what does it mean in the South African and, more specifically, the Fuleni context? Few cases have sought to explore the relationship between environmental and socio-economic rights, particularly from a legal angle, as much as the Fuleni case.

According to David MacDonald¹ Environmental justice is about incorporating environmental issues into the broader intellectual and institutional framework of human rights and democratic accountability. The United States Environmental Protection Agency defines environmental justice as: “the fair treatment and meaningful involvement of all people regardless of race, color, national origin, or income, with respect to the development, implementation, and enforcement of environmental laws, regulations, and policies.”

The concept of environmental justice has changed over the years to become more than recognising the racial issues around pollution and industrial planning to incorporating concepts of eco-justice, human rights inclusive of the environmental right, social equity and legal issues.

It is submitted that environmental justice then:-

- Demands the right to ethical, balanced and responsible uses of land and renewable resources in the interest of a sustainable planet for humans and other living things.
- Calls for universal protection from extraction, production and disposal of toxic, hazardous wastes and poisons that threaten the fundamental right to clean air, land, water and food.
- Demands the fundamental right to political, economic, administrative, cultural and environmental self-determination for all people.
- Demands the right for people to participate at every level of decision-making including the assessment, planning, evaluation, implementation and enforcement.
- Demands the right to a healthy environment, without being forced to choose between an unhealthy livelihood and unemployment.
- Demands the fair treatment and meaningful involvement of all people, free from discrimination and bias, with respect to the development, implementation, and enforcement of environmental laws, regulations and policies.
- Call for the victims of environmental injustice to receive full compensation and reparations for damages.
- Considers governmental acts of environmental injustice a violation of the Bill of Rights as set out in the Constitution of the Republic of South Africa.

While there are a variety of meanings throughout the world, the consistent thread is that environmental rights and the rest of the rights in the Bill of Rights are intertwined when it comes to environmental justice issues.

According to Dugard and Alcaro² South African environmental case law overwhelmingly reflects a narrow definition of the environment that is not infused with social justice issues – with few studies properly exploring the relationship between environmental and socio-economic rights. This has prompted a call for the development of jurisprudence

¹ David. A. MacDonald, What is Environmental Justice? p3

² Jackie Dugard and Anna Alcaro, 2013: Let's Work Together: Environmental and Socio-economic Rights in the Courts in Climate Talk: Rights, Poverty and Justice, JUTA

aimed at 'clarifying the relationship between s24 and other human rights'.³ One of the few cases where environmental rights and socio-economic rights are dealt with is the Minister of Public Works v Kyalami Ridge Environmental Association 2001 (3) SA 1151 (CC) where the Court was asked to overturn, on environmental and other grounds, a decision by the government to provide temporary shelter for victims of flooding. The Court presented housing and environment as *conflicting* rights, with environmental rights applying to the richer property owners and housing rights applying to the poorer flood victims. This kind of approach is often the case in matters of environmental litigation. Other litigation dealing with environmental matters is often related to access to information and other administrative law issues such as reviewing a Minister's decision to grant an application.

The reasoning behind this reluctance can be summarised as follows:

1. There continues to be a certain amount of discomfort in integrating environmental rights with socio-economic and other human rights.⁴ While many cases seem to promote an integrated approach as part of the pleadings in litigation, none have really pursued an integrated approach in the final outcome. In Fuel Retailers Association of Southern Africa v Director General Environmental Management, Department of Agriculture, Conservation and Environment, Mpumalanga Province 2007 (6) SA 4 (CC) the CC showed a willingness to consider an inter-connected approach to environmental rights: "The Constitution recognises the interrelationship between the environment and development; indeed it recognises the need for the protection of the environment while at the same time it recognises the need for social and economic development. It contemplates the integration of environmental protection and socio-economic development. It envisages that environmental considerations will be balanced with socio-economic considerations through the idea of sustainable development. This is apparent from section 24(b)(ii) which provides that the environment will be protected by securing 'ecologically sustainable development and use of natural resources while promoting justifiable economic and social development.'" However, in spite of this there continues to be uncertainty as to how we should interpret sustainable development when faced with poverty and an obvious need for economic and social development.
2. A deliberate limiting of claims by the attorneys (and the litigants) to traditional, 'winnable' points of law. Obviously this is done to favour the chances of success, as Judges tend to rely on the way cases are framed. We, as attorneys are wary of taking risks when there is a narrower (usually administrative) and potentially more winnable point of law that can be taken instead. Case law reflects issues focussing on PAIA or PAJA applications or other forms of administrative law challenges such as judicial review. For example, in the Earthlife Africa case the crux of the case was a failure of audi alteram partem and the environmental nature of the administrative decision was not a critical aspect of the case or the decision.⁵ Interestingly, the legal team didn't raise any of the other broader impacting environmental issues (such as the potential harm to the environment and the health issues relating to nuclear power and the need for South Africa to invest in renewable energy) that are synonymous with Earthlife Africa.

Ideally, environmental justice cases must reflect ecological and social justice issues, meeting basic human rights *including environmental rights* in an interconnected manner as opposed to a conflicting one. While the Fuleni matter is

³ op cit p192

⁴ op cit p193

⁵ p204

a case of environmental justice in the true, integrated sense, this may not be the way it will be presented to a Court.

The application we are opposing has been made by Ibutho Coal (Pty) Ltd to the Department of Mineral Resources for an open cast coal mine in a rural Zululand community, on the border of the oldest Nature Reserve in Africa, the Hluhluwe-iMfolozi. The proposed mine is to be situated in the Fuleni area and will directly affect at least 7 villages, impact more than 1 600 households and between 12 600 and 16 000 people. Within these communities are areas of subsistence farming, homes, schools, clinics, graveyards, places of worship and areas of cultural significance.

The Fuleni area neighbours the famous Hluhluwe-iMfolozi Park, a premiere tourism destination and sanctuary for the threatened White Rhino. It is also an area rich in tradition and heritage for the Zulu people, where King Shaka lived as a boy with his Mthethwa uncle and grew into the formidable warrior that forged the Zulu nation. As a result, the matter has generated considerable local and international interest.

The right to access to information and the right to just administrative action continue to be contravened in the application process. The people who will be affected by the mine cannot obtain information asked for, cannot ask questions without being threatened, cannot get the various government departments to take their concerns seriously and have suffered administrative action that is unlawful, unreasonable and procedurally unfair.

It is safe to say that mining in this rural area will create the hardship and devastation it has in the Somkhele and Marikana precedents. Subsistence or commercial farming would be destroyed, removed or rendered useless, community rituals and practices lost and tracts of available plant life for the cultivation of indigenous plants, destroyed. The relocation of graveyards would mean the disturbance of burial sites thereby causing the disruption of or breaking links to ancestors. It is well understood that in terms of livelihoods and the health of the community, the co-operation of the ancestors is crucial.

The social welfare of the local community already suffers dramatically from the proposed project with all those opposed to the mine, who are unable to find a safe platform to raise their objections, being intimidated, defamed, sidelined and threatened with death. The community is in turmoil – anxious about the possibility of being relocated, having their rural livelihood taken away from them, having their already limited access to water removed and/or polluted, having their health threatened, having their access to communal property removed and having their lifestyles ruined without even the benefit of a proper and thorough informative discussion regarding the project, its implications and the realistic aspects of living anywhere between 500 metres and 2 kilometres from an open-cast coal mine.

The proposed mining activities are likely to have a significant impact on the way of life of the local people. These impacts are likely to include:-

1. The displacement of approximately over 1 000 people from 7 villages including, their cultivated land and/or communal grazing land;
2. The loss/pollution/depletion of the fresh water resources on which households and livestock depend;
3. Loss of food security through removal of land used for subsistence/communal farming;
4. The loss of access to communal resources such as firewood, wild plants and building materials;
5. Social impacts associated with the influx of outside employees, job seekers and infrastructure with the likely impact of increased crime and spread of diseases;
6. The breakdown of traditional and/or cultural norms and practices;

7. Deprivation of use and occupation rights;
8. Loss of schools, clinics and places of worship;
9. Severe impact of health and emotional wellbeing associated with coal dust, incessant noise, stress and pollution related to open cast coal mining.

The Constitution is the supreme law of South Africa – law or conduct inconsistent with it is invalid and the obligations imposed by it must be fulfilled. In applying the Bill of Rights to the Fuleni matter we focus on specifically:-

- the right for everyone to have their dignity respected;
- the right to an environment that is not harmful to their health or well-being;
- the right to property, in that no one may be deprived of property and property may only be expropriated for a public purpose or in the public interest and subject to adequate compensation;
- the right to sufficient food and water and social security.

ALL of these rights will be unjustifiably infringed upon if the proposed mining rights authorisation is granted.

In the past year there have been over 15 000 service delivery protests in South Africa – chiefly related to the inability of the government to provide water. By considering a mining rights application in a drought-stricken area where the people have no access to municipal water and rely on the natural water resources of the area, is tantamount to depriving the community of water altogether. Granting mining rights in the iMfolozi catchment will effectively deprive the whole community of their basic, fundamental human right to water. In the event that this mining right is granted, it will be necessary to appeal such a decision and ultimately take the decision on review.

With no water in the proposed mining area and a Protected Area on the border of the mining rights area we are able to show that tourism, wildlife and the economic benefits thereof will be far more sustainable and in the interests of all South Africans (not just a select few) indefinitely. Mining will be short-lived, economically unviable and will benefit less than 200 people. We will also be able to show that the rights set out in the Bill of Rights will outweigh any justification for mining that Ibutho Coal may put forward.

However, in spite of the strength behind our Constitutional arguments, the focus thus far has been to defend the community using tried and tested administrative law steps. We continue to respond to the administrative process of environmental impact assessments and mining rights applications. Ultimately, we will go to Court on the basis of a judicial review or using PAIA or PAJA – just as those before us have done. Why? Prudence, money, and risk.

What would be exciting would be to take the matter straight to the Constitutional Court instead dallying about with the administrative issues. By doing so we could create legal precedent on the issue of environmental justice and formulate new law in the process.

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