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BEYOND LITIGATION: THE NEED FOR CREATIVITY IN  
WORKING TO REALISE ENVIRONMENTAL RIGHTS

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## ARTICLE

# BEYOND LITIGATION: THE NEED FOR CREATIVITY IN WORKING TO REALISE ENVIRONMENTAL RIGHTS

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# 1

## INTRODUCTION

South Africa is one of the jurisdictions in the world which enjoys the benefit of a justiciable constitutional environmental right.<sup>1</sup> The significance of the existence of this right was recorded in the early judgment of *Director: Mineral Development, Gauteng Region and Another v Save the Vaal Environment and Others* where South Africa's Supreme Court of Appeal noted that:

Our Constitution, by including environmental rights as fundamental, justiciable human rights, by necessary implication requires that environmental considerations be accorded appropriate recognition and respect in the administrative processes in our country. Together with the change in the ideological climate must also come a change in our legal and administrative approach to environmental concerns.<sup>2</sup>

However, in comparison to other rights in the South African Constitution, there has been relatively little jurisprudence on the environmental right.<sup>3</sup> It has been

suggested that some of the possible reasons for this include the novelty of the subject matter, a lack of judicial familiarity with environmental law and a failure by litigating lawyers to raise the environmental right.<sup>4</sup> In addition, many of the cases which can be categorised as environmental cases are not cases brought in the public interest.<sup>5</sup> There has certainly been criticism of the public interest legal community for not using both the framework of environmental justice and the environmental right itself in the courts.<sup>6</sup> In this article I would like to respond to this criticism by addressing a slightly different point which is why, in practice, litigation is not an ideal strategy for communities seeking to realise either environmental rights or environmental justice. Instead, I introduce some non-litigious strategies emerging out of a civil society campaign to protect the Mapungubwe World Heritage Site in South Africa, for consideration and critique.

1 Section 24 of the Constitution of the Republic of South Africa, 1996 reads as follows:

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.

2 1999 (2) SA 709 (SCA) [20].

3 The right has only really been considered in a handful of cases. These include *Fuel Retailers Association of Southern Africa v Director-General: Environmental Management, Department of Agriculture, Conservation and Environment, Mpumalanga Province and Others* 2007 (6) SA 4 (CC), *HTF Developers (Pty) Ltd v The Minister of Environmental Affairs and Tourism* (2006) 5 SA 512 (T), *BP Southern Africa (Pty) Ltd v MEC for Agriculture, Conservation, Environment and Land Affairs* 2004 (5) SA 124 (W), *Hichange Investments (Pty) Ltd v Cape Produce Co Ltd t/a Peltis Products* 2004 (2) SA 393 (E), *Save the Vaal Environment* (n 2), *Minister of Health and Welfare v Woodcarb (Pty) Ltd* 1996 (3) SA 155 (N) and *Minister of Public Works & Others v Kyalami Ridge Environmental Association* 2001 (3) SA 1151 (CC).

4 L Ferris, 'Constitutional Environmental Rights: An Under-Utilised Resource' (2008) 24 SAJHR 29, 38; A du Plessis, 'South Africa's Environmental Right (Generously) Interpreted: What is in it for Poverty?' (2011) 27 SAJHR 279, 289. See also T Madebwe, 'Carving Out a Greater Role for Civil Litigation as an Environmental Law Enforcement Tool in Zimbabwe's 2013 Constitution' (2015) 11 (2) Law, Environment & Development Journal 106, 108 where the author comments on the dearth of environmental cases brought before the courts in Zimbabwe.

5 Consider for example, the *Fuel Retailers* case (n3) in which the Constitutional Court pronounced definitely and in detail on the principle of sustainable development. This case was brought by a fuel company seeking to build a petrol station. This dearth of public interest environmental litigation is despite the fact that South African standing provisions in environmental cases are extremely generous. See for example T Murombo, 'Strengthening Locus Standi in Public Interest Environmental Litigation: Has Leadership Moved from the United States to South Africa?' (2010) 6 (2) Law, Environment & Development Journal 163 and M Kidd, 'Public Interest Environmental Litigation: Recent Cases Raise Possible Obstacles' (2010) 13 (5) PER 27.

6 M Murcott, 'The Role of Environmental Justice in Socio-economic Right Litigation' (2015) SALJ 875 and J Dugard and A Alcaro, 'Let's Work Together: Environmental and Socio-economic Rights in the Courts' (2013) 29 SAJHR 14. Dugard and Alcaro argue at 31 that 'environmental organisations have been playing it safe; going for the winnable points in court and not really pushing the boundaries of s 24 of the Constitution, let alone venturing into the brown and red components contained in the socio-economic rights clauses'.

## 2 THE CHALLENGES OF PUBLIC INTEREST LITIGATION IN THE ENVIRONMENTAL SECTOR

Although mitigation is sometimes possible, environmental degradation is often irreversible.<sup>7</sup> This means that there is usually a small window of time in which to prevent permanent environmental harm and exercise principles of environmental good governance like the precautionary principle.<sup>8</sup> Litigation however, is not known for its speed. Preparing court papers and securing a hearing date from over-burdened courts are time-consuming exercises, and the timeframes involved are typically much longer than the time available to prevent environmental damage that cannot later be undone.

These time-sensitive issues are further complicated by the fact that there are often multiple levels of judicial, or quasi-judicial processes to go through. In South Africa for instance, before a party can review a decision to grant environmental authorisations and mining rights before a court, it is necessary to first go through an internal administrative appeal process.<sup>9</sup>

This is not to suggest that there are not legal mechanisms which try to address this very problem. Courts can be approached on an urgent basis for

remedies like an interdict.<sup>10</sup> Interim interdicts are specifically designed to buy the time needed to resolve other legal disputes (like the resolution of administrative appeals for example). Nevertheless, interim interdict proceedings pose a different kind of challenge when litigating environmental issues, particularly in a public interest context. In South Africa, one of the requirements for successfully obtaining an interim interdict is proving that the 'balance of convenience' favours the party asking for the interdict.<sup>11</sup> Essentially this requires the applicant to convince the judge that, on balance, there will be more harm to the applicant if the interdict is *not* granted than the harm caused to the respondent if the interdict *is* granted.

Let us consider for a moment what this might look like in practice. Say for instance a multinational mining company is planning to construct a new coal mine in rural South Africa, and has obtained a mining right from the South African Department of Mineral Resources. The community currently living on the land above the minerals may face the risk of relocation, polluted air and water which could result in health problems and loss of livelihoods, as well as the possible destruction of ancestral graves and other sacred sites. The mining company is not required to obtain the consent of the community in order to mine legally. It is however, required to consult them.<sup>12</sup> Let us assume

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7 See M Kidd, *Environmental Law* (Juta 2nd ed 2011) 37 discussing the framework principles contained in section 2 of the National Environmental Management Act, 1998.

8 This is one of the foundational principles of global environmental governance which is enshrined in many international legal instruments such as principle #15 of the Rio Declaration on the Environment and Development (1992) which provides that '[i]n order to protect the environment, the precautionary approach shall be widely applied by States according to their capabilities. Where there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation'. It is also contained in section 2(4) of the National Environmental Management Act 1998.

9 National Environmental Management Act 1998, s43; Mineral and Petroleum Resources Development Act 2002, s96.

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10 An interdict is referred to as an injunction in many jurisdictions.

11 *Hix Networking Technologies v System Publishers (Pty) Ltd* 1997 1 SA 391 (SCA). The requirements for obtaining an interim interdict are: firstly, a *prima facie* right in terms of substantive law must be established (*Eriksen Motors (Welkom) Ltd v Protea Motors Warrenton* 1973 3 SA 685 (AD) and *Knox D'Arcy Ltd v Jamieson* 1996 4 SA 348 (SCA)); secondly, there must be a reasonable apprehension that the continuation of the conduct will cause irreparable harm to the applicant if the interim relief is not granted (*Setlogelo v Setlogelo* 1914 AD 221 227 and *Braham v Wood* 1956 1956 1 SA 651 (D)); thirdly, the balance of convenience must favour the granting of the interim interdict (*LF Boshoff Investments (Pty) Ltd v Cape Town Municipality, Cape Town Municipality v LF Boshoff Investments (Pty) Ltd* 1969 1 All SA 430 (C)) and lastly there must be no other satisfactory remedy available to the applicant (*Van Niekerk v Van Rensburg* 1959 2 SA 185 (I) and *Candid Electronics (Pty) Ltd v Merchandise Buying Syndicate (Pty) Ltd* 1992 2 SA 459 (C)).

12 Mineral and Petroleum Resources Development Act 2002, s10 & 23.

that, as is so often the case,<sup>13</sup> the company has consulted with a small fraction of the community that the rest of the community claim do not legitimately represent them. The bulk of the community is either outright opposed to mining in the area, or opposed to mining unless they receive some tangible benefit like permanent, secured jobs or a guaranteed share of the profits. Unlike many communities in this situation, this community manages to access pro bono legal assistance from a local NGO, who lodge an appeal with the relevant authorities against the granting of the mining right. In order to prevent any further construction on site, the NGO acting on behalf of the community also launches an application for an interim interdict seeking an order that construction be stopped until the mining right appeal is resolved. They must now satisfy the elements of an interim interdict, including the 'balance of convenience' requirement mentioned above.

For the mining company to prove the prejudice it will experience if the interdict is granted, is probably a fairly straightforward process. The company is likely to have entered into a number of contracts with construction sub-contractors, each of which may have a penalty clause in the event of contractual default (which will kick in if construction is halted). In addition, the company will presumably have done thorough economic feasibility modelling exercises before applying for the mining right and will therefore be able to quantify its projected loss of profit fairly quickly. Furthermore, it is likely to be able to make arguments based on possible job losses necessitated by a halt in construction. All of this can probably be done in a matter of days by actuaries and other experts that the company has on retainer already.

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13 See for example the experience of the Bakgaga Ba-Kopa community discussed in a publication by the Centre for Environmental Rights entitled 'Community Case Book on Mining and Environmental Rights' (February 2014) at 19 <<http://cer.org.za/wp-content/uploads/2014/03/CER-Casebook-on-Mining-Final-Web.pdf>> accessed 9 February 2017 and the discussion of consultation in a report by the Centre for Applied Legal Studies entitled 'The Social and Labour Plan Series Phase 1: System Design Trends Analysis Report' (March 2016) <<https://www.wits.ac.za/media/wits-university/faculties-and-schools/commerce-law-and-management/research-entities/cals/documents/programmes/environment/resources/Social%20and%20Labour%20Plans%20First%20Report%20Trends%20and%20Analysis%2030%20March%202016.pdf>> accessed 9 February 2017.

On the other side of the fence, the community is required to show what prejudice it will suffer if construction continues.<sup>14</sup> This means having to demonstrate the value of their connection to the land. When that connection is one rooted in culture and spiritual significance, this is a very difficult thing to do. Putting a monetary value on something so sacred can also sometimes be an undesirable, if not abhorrent, process.<sup>15</sup> On the ecological front, proving possible harm resulting from pollution is also extremely difficult. Causation issues in environmental cases are notoriously challenging – especially in cases involving water and air pollution. In addition, to make this kind of argument convincingly in court, it is advisable for the community to have contracted some scientific experts to assess impact. Even assuming that they are able to commission such experts (which is unlikely and is a further challenge which will be discussed in more detail below), impact assessments take time and the community is unlikely to have had the time necessary for a credible impact assessment. Remember that they are applying for an *urgent* interim interdict. In addition, in the midst of the antagonism which characterises litigation, the mining company is unlikely to allow the community's experts access to the site itself in order to conduct what will be perceived by the company as a 'rival' impact assessment.

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14 In determining whether the balance of convenience favours the granting of the order the court must weigh up the prejudice to the applicant if the interdict is not granted against the prejudice to the respondent if it is granted (*Dorbyl Vehicle Trading & Finance Company (Pty) Ltd v Northern Cape Tour & Charter Service CC* 2001 1 All SA 118 (NC)). The exercise of the court's discretion usually resolves itself into a consideration of the prospects of success and the balance of convenience: the stronger the prospects of success the less need for such balance to favour the applicant whereas the weaker the prospects of success then the greater the need for it to favour the applicant (*Olympic Passenger Service (Pty) Ltd v Ramlagan* 1957 2 SA 382 (D)).

15 For a discussion on environmental economics in the South African context, see HA Strydom and ND King (eds), *Fuggle and Rabie's Environmental Management in South Africa* (Juta 2009) 44 – 51. Sharife and Bond warn that if we relegate the environment to mere natural capital, what follows is to convert value into price and then to sell nature on the market in K Sharife & P Bond, 'Payment for Ecosystem Services versus Ecological Reparations: The 'Green Economy' Litigation and a Redistributive Eco-debt Grant' (2013) 29 SAJHR 144, 150.

So how then does the community quantify projected environmental harm in order to satisfy the requirements for an interdict and convince a judge to grant them the relief that they seek? Quantifying environmental degradation is extremely complex. Although it is an emerging area of expertise and there are promising developments in this field, there are still very few experts equipped to perform this kind of analysis, at least in South Africa.

The process of securing scientific experts is a further reason why litigation in the environmental context is very difficult, at least from a community and civil society perspective. In South Africa, scientific experts work on a consultancy basis. This means that most of them earn their living working for the corporate sector i.e. for developers. As an NGO, it is therefore very difficult to find an expert willing to work on behalf of a community. Firstly, communities and civil society organisations rarely have the kind of funds necessary to pay consultants at the going rate. Even if they do, the second and more insurmountable problem, is that, in CALS' experience, very few experts are willing to go on record in a case opposing a large development (like a mine) for fear of being 'blacklisted' by industry and thereby cutting off future work streams. Even though in theory consultants act independently and so who they work for shouldn't matter because the science is neutral, the reality is that it does. In CALS' experience, the result is that typically there are a handful underpaid and overworked experts trying to assist all civil society litigation in the environmental context.

One possible solution to this problem is to turn to universities in order to source experts. Experts working at universities are usually more amenable to working pro bono or on reduced rates, and are also less likely to be concerned about 'conflict of interest' because their consultancy work is not their only income stream. The risk however, is that university-based experts may be more academically inclined and lack the practical experience enjoyed by fulltime consultants. When litigation gets ugly, this is exactly the kind of thing that a company will use in an attempt to discredit inconvenient expert reports.

Lastly, even assuming that our hypothetical community has managed to overcome all of the obstacles discussed above, their lawyers remain faced with the challenge of translating complex and technical scientific subject-

matter (such as groundwater models and biodiversity offsets) into language accessible for a judge, who may not have any background in environmental issues.<sup>16</sup> So if litigation is not the answer, or at least not the whole answer, what is? Several alternative strategies are discussed in the next section.

## 3 ALTERNATIVE STRATEGIES: LESSONS FROM MAPUNGUBWE<sup>17</sup>

### 3.1 Background to the Campaign

In 2010, an Australian company called Coal of Africa Limited (CoAL) was granted a license to build an opencast and underground coal mine in northern South Africa a few kilometres away from a place called Mapungubwe. Mapungubwe is a UNESCO World Heritage Site and a place of enormous cultural and

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16 K J Park 'Judicial Utilization of Scientific Evidence in Complex Environmental Torts: Redefining Litigation Driven Research' 7 *Fordham Environmental Law Review* (2011) 483, 484; T Greiber (ed) 'Judges and the Rule of Law: Creating the Links: Environment, Human Rights and Poverty' IUCN Environmental Policy and Law Paper No. 60 (2006) 8-9; United Nations Environmental Programme 'UNEP Global Judges Programme' (2005) <<http://www.doe.ir/portal/file/?116502/Unep-Global-Judges-programme.pdf>> 54 and G Pring & C Pring 'Specialised Environmental Courts and Tribunals: the Explosion of New Institutions to Adjudicate Environment, Climate Change and Sustainable Development' invited paper at 2<sup>nd</sup> Yale-UNITAR Global Conference on Environmental Governance and Democracy (17-19 September 2010) 12.

17 Much of this material is derived from a publication by the Centre for Applied Legal Studies entitled 'The Mapungubwe Story: A Campaign for Change' <<https://www.wits.ac.za/media/wits-university/faculties-and-schools/commerce-law-and-management/research-entities/cals/documents/Mapungubwe%20Report%20Updated%2019%20March%202015.pdf>> accessed 30 March 2017. I am indebted to my colleagues Louis Snyman and Robert Krause – the primary authors of that publication – for their contribution to this article in this regard.



ancestral significance for large numbers of people from Southern Africa.<sup>18</sup> Mapungubwe is also located in an extremely water scarce area and sits atop rich mineral deposits. In response to CoAL's proposed mining development, a group of civil society organisations concerned about the impact of the proposed mine in this sensitive and sacred place, formed themselves into a coalition<sup>19</sup> and secured legal representation.<sup>20</sup>

Over the next few years, CoAL, the Save Mapungubwe Coalition and the various government regulators involved<sup>21</sup> would work – sometimes against each other and sometimes collaboratively – to answer the question of what kind of development was appropriate in this sensitive area, and who would benefit from such development. This journey is not a unique one as sensitive areas increasingly come under threat in the growing global drive towards mineral extraction. The events that unfolded at Mapungubwe hold many lessons, including about the use of litigation in the environmental context, and about the array of alternative strategies available.

### 3.2 Connecting the Dots Between an Advocacy Campaign and Company Share Price

In the early stages of the campaign, the Coalition launched several prongs of litigation. These included

an administrative appeal against the granting of the mining right, an appeal to the Water Tribunal against the granting of a water use license, an administrative appeal against the (retrospective) granting of environmental authorisations, and an interim interdict to halt construction of the mine pending resolution of the legal battles.<sup>22</sup> Ultimately this litigation paved the way for the parties to enter into negotiations. But it also provided content for press releases and media coverage in a way that would turn out to be immensely significant. As highlighted by McCann, legal mobilisation can provide 'leverage to supplement other political tactics'.<sup>23</sup>

At the beginning of the campaign, CoAL's share price on the Johannesburg Stock Exchange was 1455 points. Then began a pattern that looked something like this: every time CoAL was awarded a license by one of the government regulators, it would issue a press statement to announce that. Its share price would spike as a result. The Coalition would then issue a counter press release indicating either that they had lodged an appeal against the license concerned, or intended to. The share price would dip a little in response. CoAL would then sometimes respond with a further press release indicating that such an appeal does not suspend the validity of the license - meaning business as usual. Their share price would then sometimes recover slightly.<sup>24</sup> This pattern repeated in response of many of the licenses involved in this case.

The net result was a steady decline in share price. By February 2015, CoAL's share price was down to 35 points.<sup>25</sup> While this steady decline occurred due to a

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18 For more on Mapungubwe see <<http://whc.unesco.org/en/list/1099>> accessed 5 May 2017; N Swanepoel & M Schoeman 'Mapungubwe Matters' South African Archaeological Bulletin 65 (191): 1–2, 2010.

19 Consisting of the Mapungubwe Action Group, the Endangered Wildlife Trust, WWF South Africa, the Association of Southern African Professional Archaeologists, Birdlife South Africa and the Wilderness Foundation.

20 From the Centre for Applied Legal Studies (CALs) at the University of the Witwatersrand and the Centre for Environmental Rights. This dual legal representation model was one of the key successes of the campaign. Unfortunately discussion of this model is beyond the scope of this article but it is outlined in CALs' publication 'The Mapungubwe Story: A Campaign for Change' (n 17).

21 Which included the Department of Mineral Resources, the Department of Water Affairs (as it then was), the Department of Environmental Affairs, the Department of Agriculture, Forestry and Fisheries, the South African Heritage Resources Agency, South African National Parks and two municipalities.

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22 The Mapungubwe Story: A Campaign for Change (n17) 49.

23 M W McCann, *Rights at Work: Pay Equity Reforms and the Politics of Legal Mobilisation* (University of Chicago Press 1994); J Dugard 'Rights, Regulations and Resistance: The Phiri Water Campaign' (2008) 24 SAJHR 593, 611.

24 The Mapungubwe Story: A Campaign for Change (n17) 50–52 and Centre for Applied Legal Studies, 'Changing Corporate Behaviour: the Mapungubwe Case Study' (2014) 25–28 <<https://www.wits.ac.za/media/wits-university/faculties-and-schools/commerce-law-and-management/research-entities/cals/documents/Changing%20corporate%20behaviour-The%20Mapungubwe%20case%20study.pdf>> accessed 9 February 2017.

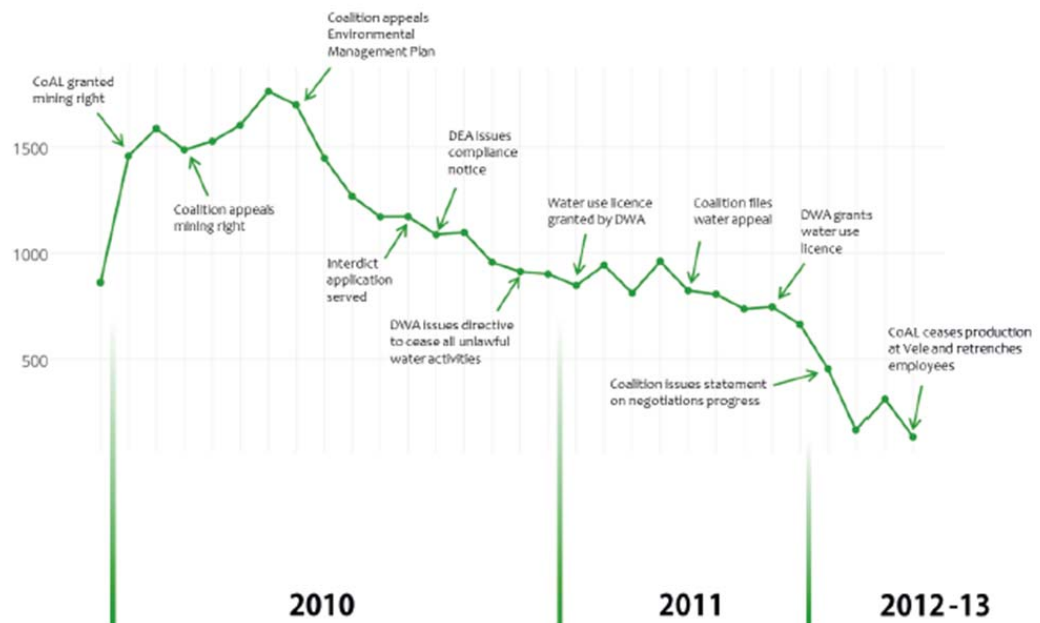
25 <<http://www.coalofafrica.com/investors-and-media/share-price-information>> accessed 5 May 2017.

range of factors including a weak global coal market, CoAL's overestimation of the quality of the coal in the area, and enforcement action taken by government, the Coalition's campaign contributed to the cauldron of troubles undermining confidence in the company. The Mapungubwe campaign thus provides some evidence that unsustainable practices by companies compromise their profitability.<sup>26</sup>

The two main links between unsustainable practices and lost profits are the threat of mine closure and reputational damage. There are two primary agents who can bring these threats to fruition: regulators who can take enforcement action and civil society who can litigate and conduct advocacy campaigns generating negative publicity. The graph below is an illustration of the effects which both positive and negative publicity

had on CoAL's share price. The influence of both state and non-state actors is clearly evidenced by the volatile nature of CoAL's share price and the correlation between dips in the share price and damaging information. An example is evident in the cumulative impact of negative events resulting from the combination of government enforcement and litigation by civil society that occurred between 28 April and 23 August 2010. This four month period saw the Coalition lodging its appeal against the approval of CoAL's Environmental Management Plan and sending out associated press releases, and the successive issuing by the Department of Environmental Affairs of pre-compliance and compliance notices, with the latter publically reported. This same period saw CoAL's share price drop from 1696 to 911 points on the Johannesburg Stock Exchange.

### COAL OF AFRICA SHARE PRICE POINTS CHANGES OVER TIME



Source of Information: <http://www.coalofafrica.com/investors-and-media/share-price-information>

<sup>26</sup> The Mapungubwe Story: A Campaign for Change (n17) 50-52 and Changing Corporate Behaviour: the Mapungubwe Case Study (n24) 24.

These linkages are illuminating for all those involved in development projects. For human rights lawyers, and their community partners, this is a signal that speaking the language of profit and reputation can be far more effective in practice than human rights discourse. For mining companies and their investors, the lesson is one of vulnerability – a small group of people with fairly limited resources can leverage government enforcement action and bad publicity in a way which has a serious impact on company bottom line.

### 3.3 Community Learning Exchanges

At the heart of the unequal experience of mining lies a power imbalance.<sup>27</sup> Companies have ready access to a team of lawyers, a dedicated public relations office to manage public image and the resources to build and maintain relationships with government decision-makers. Communities often cannot afford legal representation and will certainly not have a dedicated communications office. Members of rural communities may have to travel far to reach government officials. Further, the culture of secrecy in the mining sector means that it is very difficult for the public to access information about planned developments and their environmental impacts.<sup>28</sup>

The result of these asymmetries of knowledge and resources is that the conditions of a true contract – equality of arms and access to the same information – are not typically present in engagements between mining companies and communities. Many of these resource disparities are rooted in centuries of

exploitation and systemic inequality<sup>29</sup> meaning that trying to disrupt them can be quite overwhelming. However, that does not mean that there is not scope for communities and civil society organisations to be creative in trying to reduce the asymmetries of knowledge that otherwise keep them on the back foot.

NGOs involved in environmental justice work tread a precarious line between trying to provide communities affected by mining with the knowledge to make informed choices on the one hand, and improperly trying to influence community responses to mining development on the other hand. Specifically, mining offers the potential for job creation which often means that it is welcomed by local communities, notwithstanding the environmental price they may pay down the line.<sup>30</sup> What is important is that a community's agency to decide for themselves whether they will support or oppose a proposed development is respected and deferred to. One of the ways for NGOs to do so with integrity, whilst still chipping away at the information asymmetry described above, is by facilitating community learning exchanges.

The concept of a community learning exchange is that a community likely to be affected by mining in the near future is introduced to a community which has already been affected by mining. In this way, those best placed to comment – people that have lived through the experience themselves – can *directly* share their knowledge about what it means to live near and/or work for a mine. Importantly, such exchanges can also include a site visit so that 'yet-to-be-affected communities' can see first-hand what a mine looks like and what kind of impact it can have on the surrounding area, whether positive or negative.

This can facilitate an exchange of insights into the impacts of mining, strategies for engaging with companies and government regulators, and success

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27 John Knox, UN Special Rapporteur on Human Rights and the Environment, has emphasised the particular vulnerability to environmental damage experiences by indigenous peoples. See 'Report of the Independent Expert on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment' December 2012.

28 See for example Centre for Environmental Rights 'Turn on the Floodlights: Trends in Disclosure of Environmental Licenses and Compliance Data (March 2013) <<http://cer.org.za/wp-content/uploads/2013/03/Turn-on-the-Floodlights.pdf>> accessed 9 February 2017. See also the series of Shadow Reports produced by the Promotion of Access to Information Act Civil Society Network available at <[http://www.saha.org.za/projects/national\\_paia\\_civil\\_society\\_network.htm](http://www.saha.org.za/projects/national_paia_civil_society_network.htm)> accessed 5 May 2017.

29 B Meyersfeld, 'Empty Promises and the Myth of Mining: Does Mining Lead to Pro-Poor Development?' 2007 2(1) Business and Human Rights Journal 31.

30 A du Plessis, 'South Africa's Environmental Right Generously Interpreted: What is in it for Poverty?' 2011 (27) 2 South African Journal of Human Rights 279. See also Centre for Environmental Rights 'Zero Hour: Poor Governance of Mining and the Violation of Environmental Rights in Mpumalanga' <<http://cer.org.za/wp-content/uploads/2016/06/Zero-Hour-May-2016.pdf>> accessed 30 March 2017.

stories to inspire soon-to-be-affected communities. The ultimate objective is to support communities grappling with mining to access information with which they can become more powerful in their engagements with state and corporate repositories of power.<sup>31</sup> Importantly, community learning exchanges also have the advantages of limiting the intermediary role often occupied by NGOs and instead placing value on the knowledge that exists within communities.

At the time of writing, a number of community learning exchange had taken place in the context of the Mapungubwe campaign.<sup>32</sup> Through this exchange of peers, communities were able to share learning, information and ways of attenuating the exploitation of mining companies.<sup>33</sup> These are groups who, historically, had neither engaged nor organised as a collective and these exchanges have provided the platform for them to do so. In fact, some of the communities involved have gone on to organise additional exchanges on their own initiative, without the need for facilitation by lawyers or NGOs. From both a sustainability, and an agency perspective, this is a most welcome outcome.

Furthermore, the second such exchange involved a community who are opposing another CoAL mine in another part of the country. This has meant that in addition to general learning about mining, the participating communities could also engage directly about the particular company involved, their business practices and what strategies are likely to be most successful with respect to this company in particular.<sup>34</sup>

Community learning exchanges are thus a potentially powerful and effective alternative (or complement) to the more traditional litigious mechanisms in environmental justice work.

### 3.4 Collaborative Compliance Monitoring: The Case of the EMC

After progressing through a litigation and negotiation phase (an analysis of which are beyond the scope of this article), the Mapungubwe Coalition embarked on the third and most interesting phase of the campaign: participation in a collaborative compliance-monitoring body. In South Africa, the monitoring of a mining company's compliance with its environmental and other licenses consists primarily of self-reporting by the company.<sup>35</sup> Occasionally, capacity permitting, the government regulators will send out inspectors to conduct a site visit.<sup>36</sup> But there are always many more mines than there are inspectors.

Against this backdrop, the model piloted in the Mapungubwe case is particularly significant, as a special body was established to monitor CoAL's compliance with its licenses. This body – which is known as the Vele Colliery Environmental Management Committee (EMC) - was formally established by the conditions of both the environmental licenses granted by the Department of Environmental Affairs, and the water use license granted by the Department of Water Affairs. The objective of the EMC is to monitor compliance with the provisions of these licenses, as well as to promote improved decision-making and environmental practices using the information gained from monitoring.<sup>37</sup> Its operations are informed by the work of two technical subcommittees –dealing with water, and heritage and biodiversity respectively.<sup>38</sup>

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31 For an example of similar methodology used in the water and sanitation sector in South Africa see <<http://livinglands.co.za/enviro-champs-workshop-community-learning-echange-from-mpophomeni-township-to-kayamandi/>> accessed 5 May 2017.

32 See <<https://www.wits.ac.za/cals/our-programmes/environmental-justice/community-learning-exchanges/>> accessed 9 February 2017,

33 Participating communities included the Machete, Vhangona, Tshivula, Mudimeli, Bessie, Balemba, MakgathoBathlabine and Tshikondeni communities in Limpopo province.

34 See T Muroombo, 'Regulating Mining in South Africa and Zimbabwe: Communities, the Environment and Perpetual Exploitation' (2013) 9 (1) Law, Environment and Development Journal 31, 38 where the author discusses the impact of mining on this particular community (the Mudimeli community).

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35 Mineral and Petroleum Resources Development Act 2002, s25.

36 These inspectors – colloquially known as the Brown Scorpions (for mining), the Green Scorpions (for environmental issues) and the Blue Scorpions (for water issues) are established in terms of the Mineral and Petroleum Resources Development Act 2002, s92 and the National Environmental Management Act 1998, s31A-31Q.

37 Vele Colliery Environmental Management Committee Terms of Reference, clause 2.

38 The designation of specialist sub-committees has allowed detailed, technical interrogation to take place in each subcommittee chaired by an expert in the field which then reports to the main EMC.

But what is most striking is how broadly representative the EMC is. On it sit a number of government departments<sup>39</sup> at both national and provincial level, local municipalities,<sup>40</sup> state agencies,<sup>41</sup> farmers' unions,<sup>42</sup> and for the first time in the history of the mining industry in South Africa: civil society.<sup>43</sup>

The Centre for Applied Legal Studies (CALs)<sup>44</sup> has represented the Save Mapungubwe Coalition on the EMC since 2011. It has not been an easy road, and the decision to join the EMC, and then repeated decisions to stay on it, have not been taken lightly.<sup>45</sup> However, during this time, the EMC has transformed from a body plagued by procedural issues (like membership and logos) into a dynamic watchdog that continues to hold CoAL accountable. Whilst impact on Mapungubwe has not been prevented, it has at least been mitigated. Along the way, many lessons have been learned.<sup>46</sup> Chief among these are that effective EMCs need trust, transparency and teeth.

### *3.4.1 Trust*

One of the most valuable attributes of this kind of collaborative body is that the broad range of stakeholders involved can bring very different skills and experience to the table. Unlike in litigation, this knowledge is collectively pooled rather than set up in opposition. To do this effectively requires trust. In the context of Mapungubwe, it was not easy for parties who had been litigating against each other, to change

the nature of their relationship into something more collaborative. Inevitably, it took time to build this kind of trust.<sup>47</sup> Anyone wishing to set up a collaborative compliance-monitoring body should therefore factor in considerable time at the beginning of the process to allow these relationships to develop.

### *3.4.2 Transparency*

Natural resources are common goods and must therefore be managed in the public interest. Members of the public can only hold an EMC-type body accountable if they are aware of the manner in which it is addressing environmental issues. In addition, public scrutiny can create a sense of accountability as participants in an EMC want to be seen to be doing the right thing. A lack of readily available and sufficiently detailed information can lead to a number of misgivings about the role of an EMC, including concerns that it has been concealing non-compliance. It is therefore critical that the default position is one of transparency – which should apply to minutes of all meetings, as well as to as scientific and impact-related data. The Vele EMC has had some heated debates about whether raw data can be disclosed (as opposed to interpretations of that data) and remains divided on this issue.

### *3.4.3 Teeth*

An EMC is inherently a watchdog body. Its power is to observe, highlight any issues of concern, provide a forum in which those issues can be discussed and make recommendations to both the government regulators and the mining company. A body like this is not a regulator itself and cannot therefore take enforcement action. This is probably as it should be given the participation of non-government actors on this body.<sup>48</sup> However, the fact that the full range of government regulators is represented in the EMC is enormously useful as any instances of license non-

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39 Including the Departments of Mineral Resources, Environmental Affairs, Water and Sanitation and Agriculture, Forestry and Fisheries.

40 The Blouberg and Vhembe Municipalities.

41 Such as SANParks and the South African Heritage Resources Agency.

42 The Weipe Farmers' Cooperative.

43 In the form of the Save Mapungubwe Coalition and their legal representatives, the Centre for Applied Legal Studies.

44 A human rights organisation based at the School of Law at the University of the Witwatersrand in Johannesburg, South Africa.

45 In particular, CALs and the Coalition have had to regularly assess whether their participation in the EMC in any way legitimises inappropriate mining development at Mapungubwe.

46 See also 'The Mapungubwe Story: A Campaign for Change' (n17) Ch 11 which outlines suggested prerequisites for effective EMCs in more detail.

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47 Similar issues of trust have been discussed in the context of co-management of protected areas in South Africa. See for example T Kepe, 'Land Claims and Co-management of Protected Areas in South Africa: Exploring the Challenges' (2008) 41 *Environmental Management* 311.

48 Like the Save Mapungubwe Coalition and the Weipe Farmers Union.

compliance or other environmental issues of concern can be brought fairly quickly to the attention of the government department involved. It also provides an opportunity for different government departments, or different units within the same department, to put principles of co-operative governance into practice.

Another important component of ‘teeth’ is the necessity for institutional independence. Although EMCs can be established in terms of the conditions of government-issued licenses, they are designed to operate independently of the government departments that created them. Were this not the case, the functioning of an EMC would be severely hampered as EMCs are only effective if they can make recommendations without fear or favour.<sup>49</sup>

So the Vele EMC certainly presents a model for consideration. Whether it would be sustainable to use this kind of structure in relation to all mines is questionable, given the significant investment of resources required. Another, largely unexplored, issue which should be debated is how structures like this might address the cumulative impact of mining activity. Highly invasive activities like mining, especially when conducted on a large scale, have an impact on the socio-ecological environment that extends far beyond the project area. Further, mineral deposits (like coal seams) often cover a significant geographical area which means that there is the potential for a large number of mining projects in close proximity. Thus, while the individual impact of a particular mine on water, soil and air might seem moderate, the combined impact of all the potential mines in the area might lead to a state incompatible with health, well-being and livelihoods. If each mine had an EMC set up to monitor only its activities, the big picture of the cumulative environmental, economic and social impact of all the mines operating in a particular area, would be lost. One possibility is that where there is a real likelihood

of a concentration of mining projects in a particular geographical area, a regional EMC should be established. This approach could address both the sustainability problem and the cumulative impact issue.

## 4 CONCLUSION

Litigation is often part of the strategy to address human rights violations, and environmental rights violations are no exception. Yet litigation is not a strategy well suited to the environmental sector. Some of the reasons for this are applicable to human rights work generally, such as the difficulties that affected communities face in accessing legal representation. But there are peculiarities involved in addressing environmental issues in particular, which make environmental litigation challenging in fairly unique ways. These include the small window of time available in which to take action before irremediable environmental damage is caused, the difficulties in quantifying environmental harm, the challenges in securing scientific experts willing to work ‘against’ industry, and the need to translate complex technical data into a language accessible to a judge.

Those seeking to advance environmental rights must therefore look beyond litigation. The Mapungubwe campaign offers a number of alternative strategies for critique and discussion. This article has examined three of these: targeting company share price through media and other advocacy initiatives, the methodology of community learning exchanges, and the innovative piloting of a collaborative compliance monitoring model in the mining industry. What is clear is that communities affected by environmental harm, and the lawyers that support them, will have to devise and experiment with creative strategies outside of the conventional litigious box. The realisation of environmental rights depends on it.

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<sup>49</sup> One example of where this went wrong at Mapungubwe is when high level politicians who themselves did not participate in the EMC, overturned the EMC’s election of a Coalition representative as Chairperson. While the replacement Chairperson has done an excellent job, the principle to be conscious of, is that if this kind of political interference is possible with regards to the EMC’s choice of Chairperson, would it also be possible in relation to a more serious instance of environmental non-compliance?

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