**The Silent Right[[1]](#footnote-1)**

The Constitutional Court as the Upper Guardian of Environmental Rights

Ruth Krüger

**Introduction**

In South Africa, case law is important. Legislation does not mean much until it has been tried out in a court room. That, as they say in these very courts, is trite. So then it is surprising that more than two decades into our democracy, environmental rights have only seen one meaningful engagement in the Constitutional Court. It is less surprising, however, if one considers that this one engagement did not leave us with clarity on how section 24 is to be applied – there is no replicable test. So what we have seen since then is a veritable phalanx of Constitutional Court cases where environmental rights should have been applied, but were not. In a clear but misguided attempt to apply the work of Rachel Carson, the court has created a silent right.

In what follows, I will describe how we got here and make suggestions for how we can move forward – how we can give section 24 a voice. I will first take a look at the one meaningful engagement that the Constitutional Court has had with environmental rights: *Fuel Retailers*.[[2]](#footnote-2) A consideration of the facts of this case will lead me inescapably to its failings, and the tension it left behind. I will then look at three of the cases which have fallen victim to this tension: *Lagoonbay*,[[3]](#footnote-3) *AgriSA[[4]](#footnote-4)* and *Merafong Municipality*.[[5]](#footnote-5) I will identify where section 24 is missing from these cases, and make suggestions for how it would have changed the outcome. Finally, I will consider what where replicable test for section 24 might be found. I will build on the very worthwhile work of Loretta Feris[[6]](#footnote-6) and Dire Tladi[[7]](#footnote-7) to do this. However, with the benefit of another decade’s worth of Constitutional Court jurisprudence, we can try to push their analysis a little further. Ultimately, I will make the argument that section 24 need not – and should not – be silent, and that the Constitutional Court should act as its upper guardian to ensure that it is not.

**The CC’s one engagement with environmental rights**

The *Fuel Retailers* case has already been summarised in an admirably clear and succinct fashion by Feris,[[8]](#footnote-8) and so I will not spend too much time on that here. In brief, this case concerns an application which was granted by the provincial environmental authorities in Mpumalanga for the opening of a filling station in White River. The decision is challenged here by the Fuel Retailers’ Association of Southern Africa on the grounds that the environmental authorities did not consider the socio-economic impact of the proposed filling station.

The decision in question was made on 9 January 2002, based on an EIA which considered the feasibility of the proposed filling station, as well as various social issues: noise, visual impact, traffic, and the effect on municipal services, safety and crime, and cultural and historical sites. There was also a geotechnical report which concluded – rather diplomatically – that there was a subterranean aquifer which *might* need protection from pollution *if* the Department of Water Affairs and Forestry thought so. In that case an impermeable base layer should be put in. Crucially for this case, however, the EIA did not consider the potential economic impact on existing filling stations in the area.

The applicants’ case in the Constitutional Court is built on this failure to consider economic impact. What was supposedly lacking was summarised as the consideration of need, desirability and sustainability. The environmental authorities countered that these issues were part of the analysis by the town planning authority for rezoning eight years previously. And so, battle lines were drawn.

***Fuel Retailers*: the judgment and its gaps**

Again, I do not want to duplicate Feris’ excellent summary of the judgment.[[9]](#footnote-9) So I will focus on where I see gaps in the judge’s reasoning. Ngcobo J wrote the judgment, starting by providing a good synopsis of the development of the concept of sustainable development. So far, so high school history essay. Admittedly, the history could have provided the judge with a useful basis from which to develop a meaningful application tool. In fact, he purports to give meaning to section 24 using sustainable development, identifying the conflict between development and the environment, as well as the need to reconcile the two for sustainability. However, more is needed. As things stand, a question has been answered with another question. Sustainable development is inherently complex, made up as it is of three interlinked pillars[[10]](#footnote-10) and overlain with systems dynamics.[[11]](#footnote-11) There is no one right pathway to achieve sustainability, and to insert the concept as an objective measure is almost meaningless. In fact, as argued by Tladi,[[12]](#footnote-12) it leaves the court open to value-based decision-making – without clear or conscious acknowledgement of these values.

Be that as it may, Ngcobo J does go on to apply his understanding of sustainable development to the facts. He recognises the interlinkages between socio-economic factors and the environment, and cautions that a proliferation of filling stations in one area may have a negative impact on the environment. He also suggests that if there are too many filling stations some will close down, and the land will need to be rehabilitated. In terms of administrative structures, he finds that the assessment that was done by town planning authorities was insufficient. This is both because it was done eight years ago, and because such authorities fulfil a different function to environmental authorities. Ultimately, he finds for Fuel Retailers and directs the matter to be sent back to the High Court for the relevant socio-economic issues to be properly considered.

The primary argument appears to revolve around the economic sustainability of other filling stations in the area.[[13]](#footnote-13) This is certainly a relevant consideration, but it cannot be the only consideration in a sustainability analysis worthy of the name – or even a narrower socio-economic analysis. It only considers one element of the complex human-environment system that is being considered for land-use change.[[14]](#footnote-14) Further, its rehabilitation concern may at first blush to be considering the natural world, but in fact it is also only concerned with economics. Otherwise the argument is nonsensical. The environmental damage leading to a need for rehabilitation does not spring into being when a filling station closes. It is present throughout the life of the filling station, but usually nothing is done about it until the land needs to be prepared for another use. However, there are cost implications associated with land rehabilitation which come up when a filling station closes – that is surely what Ngcobo J is referring to.

In the minority judgment, Sachs J’s analysis is more holistic. It makes explicit the need to consider social and environmental impacts alongside economic impacts.[[15]](#footnote-15) However, this is only when there is in fact a negative impact on social and environmental systems, and Sachs J finds that there is not.[[16]](#footnote-16) This is the failing of his judgment, because it is a very limited understanding of social and environmental impact. It perhaps considers only the immediate, local level impact of a filling station on the land, water and air. This falls short of the systems understanding needed for sustainability.[[17]](#footnote-17) Filling stations enable fossil fuel use, and this has been clearly linked to climate change and general air quality problems.[[18]](#footnote-18) Further, in South Africa it is commonly poor communities that experience the health risks associated with the mines and factories[[19]](#footnote-19) – those that produce the fuel used at filling stations like the one in question. Sachs J had the chance to make a point about environmental rights in the context of fuel production, and more generally about South Africa’s development trajectory. In fact, he acknowledged the irony of an environmental issue being raised by such a polluting industry,[[20]](#footnote-20) but failed to tie this into his analysis.

Ultimately, we are no nearer to knowing how to apply section 24 than we were before *Fuel Retailers.* Sustainable development raises more questions it answers, and appears in any case to have allowed for an understanding of sustainability that does not depart from the economic focus of the status quo. This was recognised a decade ago, by Tladi[[21]](#footnote-21) and Feris.[[22]](#footnote-22) Today, however, we can see the effect of *Fuel Retailers* on subsequent cases where environmental rights were relevant – or the lack thereof. In the next section, I will briefly unpack three cases where section 24 might have been considered but was not. I will then give some thought to how the outcome might have been different if section 24 had in fact been considered.

**What did the court do next?**

1. *Lagoonbay*

The *Lagoonbay* case[[23]](#footnote-23) deals with an application for subdivision and rezoning of a large piece of land for a property development in the Southern Cape.[[24]](#footnote-24) This is considered together with sections 16 and 25 of the Land Use Planning Ordinance (LUPO),[[25]](#footnote-25) which gave provinces the authority to refuse subdivision and rezoning decisions for land, respectively. Following LUPO, applications by Lagoonbay Lifestyle Estate (Pty) Ltd (Lagoonbay) for subdivision and rezoning were granted by the local authority but then refused by the provincial authority. Lagoonbay then challenged the decision of the provincial authority, claiming it was acting *ultra vires* in terms of the functional competencies of provinces and municipalities set out in the Constitution.[[26]](#footnote-26)

The application was dismissed in the High Court but upheld in the Supreme Court of Appeal. In the Constitutional Court, the application was upheld in part and dismissed in part. In a unanimous judgment written by Cameron J, the court declined to consider the constitutionality of sections 16 and 25, despite its wide jurisdiction, in part as this issue had not been raised in the lower courts.[[27]](#footnote-27) Further, it found a direction in the 1988 Circular which transferred powers from municipalities to provinces, and rezoning was among these. The provincial authority was therefore vindicated as far as rezoning was concerned.[[28]](#footnote-28) However, the same was not true for their subdivision decision. The province itself issued scheme regulations in terms of LUPO in 1988, and these left no room for provincial control of subdivision applications.[[29]](#footnote-29) There was an amendment of the scheme regulations in 2009, but this gave municipalities the power to decide whether they would make a subdivision decision, or whether it would be left to the province.[[30]](#footnote-30) Accordingly, the court finds that the provincial authority had not had the authority to refuse Lagoonbay’s subdivision application, but had had the authority to refuse the rezoning application.

1. *AgriSA*

The case of *AgriSA*[[31]](#footnote-31) dealt with the question of whether the Mineral and Petroleum Resources Development Act (MPRDA)[[32]](#footnote-32) allowed for the expropriation of mineral rights that had been held under the Minerals Act.[[33]](#footnote-33) Before the MPRDA, mineral rights belonged to the owners of a piece of land, although they were severable.[[34]](#footnote-34) With the MPRDA, however, mineral rights vested in the state, although there were transitional arrangements that allowed previous right holders (now holders of ‘old order rights’) to convert their rights so that they are recognised under the MPRDA.[[35]](#footnote-35) Seeking to defend the mineral rights of its members, Agri South Africa (Agri SA) launched a court application, using the situation of Sebenza (Pty) Ltd (Sebenza) as a test case.[[36]](#footnote-36) Sebenza had bought coal rights from the liquidators of Kwa-Zulu Collieries, but could not convert their old order rights as it could not pay the fees to apply for prospecting and mining authorisations under the MPRDA.[[37]](#footnote-37) Agri SA therefore launched their application, asserting that the MPRDA allowed for the expropriation of mineral rights.

The application was successful in the High Court, but failed in the Supreme Court of Appeal.[[38]](#footnote-38) In the Constitutional Court, the majority judgment written by Mogoeng CJ found that while there was a deprivation of rights, this did not amount to expropriation. The court cautioned that section 25 property rights cannot be overemphasised in view of the need for transformation.[[39]](#footnote-39) It also listed the requirements for expropriation: ‘(i) compulsory acquisition of the rights in property by the state, (ii) for a public purpose or in the public interest, and (iii) subject to compensation.’[[40]](#footnote-40) The analysis fails at the first requirement, as the state did not acquire the mineral rights – it became the holder, but only to enable their equitable distribution and use.[[41]](#footnote-41) In the specific case of Sebenza, the transitional arrangements would have allowed it to convert its old order rights – it was merely its own financial position that prevented this.[[42]](#footnote-42) Further, the court considered the purpose of the Act, which is to facilitate equitable access to the mining industry, promote sustainable development, and eradicate discriminatory practices in the mining sector.[[43]](#footnote-43)

1. *Merafong Municipality*

The case of *Merafong Municipality[[44]](#footnote-44)* came to court following a decision by Merafong City Local Municipality (Merafong) to add a surcharge to the industrial and domestic water use of AngloGold Ashanti Limited.[[45]](#footnote-45) This they had done in accordance with their exclusive constitutional competence in terms of s 156(1) of the Constitution, read with s 1 of the Water Services Act (the Act).[[46]](#footnote-46) However, AngloGold appealed to the Minister of Water Affairs and Forestry (Minister), who was empowered to decide such an appeal in terms of s 8(4) of the Act.[[47]](#footnote-47) The Minister overturned the surcharge levied for industrial use, and ruled that the domestic water use tariff should be negotiated by the relevant actors.[[48]](#footnote-48) Merafong subsequently received legal advice, however, to suggest that they did not have to comply with the Minister’s ruling.[[49]](#footnote-49) They therefore threatened to turn off AngloGold’s water unless they paid the surcharge, and the company had no choice but to comply.[[50]](#footnote-50) They did, however, launch a court application to compel Merafong to comply with the Minister’s ruling.[[51]](#footnote-51)

The application was upheld in both the High Court and the Supreme Court of Appeal,[[52]](#footnote-52) but Merafong gained leave to appeal to the Constitutional Court. Here, Merafong contended that where a public official makes a decision that is outside the scope of their powers, this decision may be ignored until there is an attempt to enforce it, and at this point the nullity of the decision may be raised.[[53]](#footnote-53) Cameron J, writing for the majority, disputed the Supreme Court of Appeal’s finding that a collateral challenge may only be raised by an individual, not an organ of state, finding that reactive challenges have always been treated flexibly in our law, depending on context.[[54]](#footnote-54) Following the lower courts in considering the cases of *Oudekraal[[55]](#footnote-55)* and *Kirland*,[[56]](#footnote-56) Cameron J then goes on to confirm that Merafong should have either followed the Minister’s decision or challenged it in court, rather than resorting to self-help – this is a question of good constitutional citizenship.[[57]](#footnote-57) However, Cameron J also considered that Merafong’s belated ‘conditional counter-application’ did raise a substantive challenge to the Minister’s decision.[[58]](#footnote-58) He held that Merafong should have the chance to justify its delay in seeking judicial recourse – also to avoid further delaying an already protracted process – and so remitted the matter to be considered again by the High Court.[[59]](#footnote-59)

**Hello? Hello? Section 24?**

Now, it may not appear so at first blush, but each of the three cases described above would have benefitted from the application of section 24. Or perhaps it would be more correct to say that section 24 would have benefited from being applied. But it is not necessary to pick apart the mutually reinforcing relationship between rights and their application here. For the moment, all I want to do is to set up that relationship. We can quibble through its details later.

When you come down to it, each of the cases above is decided in terms of the powers of the state. In *Lagoonbay*, a decision is made about the exclusive competence of municipalities. *AgriSA* compares the concept of expropriation to the functions of the MPRDA – but what is that if not an exercise of state power? Finally, *Merafong Municipality* again goes into municipalities’ competences. Each decision is procedural more than substantive. Only *AgriSA* uses rights-based language, when it considers section 25 in the context of transformation. And none of them considers section 24 at all – not once.

This may not seem strange if you consider the issues put before the court in each case. Environmental issues were not raised as part of the applications as they finally came to the Constitutional Court, and it is well established that the court should not sit as court of first and last instance. That was again acknowledged in *Lagoonbay*, but in the same breath Mhlantla AJ speaks of the wide jurisdiction of the Constitutional Court, and its duty to raise issues if this is in the interests of justice.[[60]](#footnote-60) I would submit that environmental rights are quite essentially in the interests of justice. They may be too easily forgotten, for reasons that will be suggested below, but that does not take away from their importance. Rather, it suggests that in the case of environmental rights, much as with children’s rights, the court should act as upper guardian.

Take the three cases described above. In *Lagoonbay*, the issue was one of a large land development. Land use is fairly essentially an environmental issue. Inappropriate land use may lead to land degredation, an issue of such importance that one of the UN’s three large environmental conventions is dedicated to it.[[61]](#footnote-61) That is not to say that the land development in question would necessarily have led to land degredation, only that environmental rights were relevant in this case. But silently. It is true that a local environmental organisation was admitted as respondent, but as it made no meaningful contribution at this point, we can overlook that. It is also true that one of the arguments put forward in favour of the Provincial Minister was that the size of the development meant it needed to be considered in terms of strategic provincial planning. This argument is at least semi-environmental. It is certainly in line with the approach favoured by the Department of Environmental Affairs, which has in the past called for land-focused Strategic Environmental Assessments when planning across a larger area, as opposed to project-focused Environmental Impact Assessments.[[62]](#footnote-62) However, this argument is not taken up by the court, or even briefly placed into its section 24 context. More generally, the court fails to recognise that this case is another clear example of the tensions of sustainable development which are so exhaustively discussed in *Fuel Retailers*.

Then, *AgriSA* concerned mining rights. Despite being the mainstay of our economy in the past, it is fairly uncontroversial to state that the potential environmental impacts of mining are large – both in terms of ecological and human systems.[[63]](#footnote-63) But again, not one mention of section 24, despite several possible openings for it. For one thing, the aim of the MPRDA is to reform the mining industry to ensure that all South Africans benefit from it.[[64]](#footnote-64) The question of who has access to mining rights is certainly relevant here, but so is the question of how this mining happens. If the exercise of mining rights causes nearby communities to constantly breathe in their dust and get asthma,[[65]](#footnote-65) or if migrant labour creates hollow, unsustainable settlements of grandmothers and babies,[[66]](#footnote-66) then we are dealing with a clear infringement of environmental rights. Again, I am not saying that mining rights must necessarily cause these problems, only that section 24 should be considered so that they do not. The aim of the MPRDA, or at least its application through the courts, should be expanded. This might be possible, for example, by inserting more meaningful environmental rights requirements into authorisation processes for mining rights. This authorisation process was mentioned explicitly in the *AgriSA* case, but appears to have been largely a formality subject to payment.[[67]](#footnote-67) In the case, had the state been asked to take on a stronger environmental rights role, this would have added to the strength of the justification of tis powers under the MPRDA.

Finally, the case of *Merafong Municipality* involved a surcharge on water. Perhaps there was a time when it would have been necessary to remind the reader that South Africa receives just over half of the world’s average rainfall, 860 mm to our 497 mm.[[68]](#footnote-68) But surely, since Cape Town’s recent misadventures,[[69]](#footnote-69) that is no longer necessary. It should be clear that the management of water in South Africa is both important and closely connected to environmental rights. But although *Merafong Municipality* deals with this very issue, there is not one mention of section 24. The case is decided purely in terms of procedure. The substance of the Minister’s decision is not considered, despite its strangeness in terms of environmental rights. The industrial surcharge had been summarily dismissed, while the levy for domestic water use was left open for negotiation.[[70]](#footnote-70) This is strange, because of the link between industrial water use and pollution, and therefore environmental rights.[[71]](#footnote-71) A tax or surcharge on industrial water use might be used for better environmental management, or just used as a sin tax designed to improve the efficiency and sustainability of industrial water use.[[72]](#footnote-72) However, there is no substantive consideration by the court of the Minister’s decision, or of the management of water more generally. Once again, the opportunity to engage with section 24 is lost.

Now, it is possible that a consideration of section 24 would not in fact have changed the outcome of *Lagoonbay*, *AgriSA*, or *Merafong Municipality*. The court in *Lagoonbay* might have found both subdivision and rezoning of land to be provincial competences, or would at least have considered the strategic competences necessary to make broader decisions about land use. In *AgriSA*, environmental rights would most likely only have strengthened the finding that the MPRDA is not expropriation, adding to the need for government oversight of mineral rights. A conscientious court might have questioned the requirements needed for the granting of a mining authorisation, and ordered that these be reconsidered in terms of section 24. Finally, in *Merafong Municipality*, the court would likely still have remitted the case to the High Court, but perhaps with the proviso that water management – and particularly industrial water use – should be considered in terms of section 24.

However, even if environmental rights would not have changed the formal outcome of these cases much, the inclusion of section 24 would have added to the environmental rights jurisprudence in the Constitutional Court. And that is no small thing. We currently have none. We have *Fuel Retailers*, certainly, but the biggest contribution of that case was to point to a tension that is very difficult to resolve, between the different needs of society, the economy, and the environment. It did not really offer guidance on how to resolve that tension. Of course, there is no one answer to that question, sustainability being as it is, essentially context-specific.[[73]](#footnote-73) But the best way to explore the parameters of section 24 is to test its application in different contexts. How else are we to understand what sustainable development means in a post-Apartheid country with one of the highest Gini coefficients in the world?[[74]](#footnote-74) How else are we to resolve the ongoing tension in *Fuel Retailers*?

**Interference**

The question remains, what are the barriers that are currently stopping us from engaging with environmental rights? I have already mentioned one: *Fuel Retailers*, by failing to develop a replicable test for section 24, appears to have left the court transfixed, too afraid to engage with environmental rights. In a decade of its jurisprudence, the Constitutional Court has not once applied section 24 in a meaningful fashion since then – and its cursory mentions can be counted on the fingers of one hand.

Another possibility, which is perhaps more easily understood, is that the science of sustainability is very new and perpetually evolving,[[75]](#footnote-75) and this makes the court hesitant to apply engage with it. Further, the legal framework surrounding sustainability – environmental rights – is novel not only in South Africa but in the world.[[76]](#footnote-76) It is new not only in jurisprudence, but in society’s thinking, and that may be part of the reason that the parties to the three cases outlined above do not argue primarily, or at all, along the lines of environmental rights.

Another part of the reason is that the environment cannot itself go to court, and the vulnerable people whose environmental rights are infringed by big mining interests, say, may not be able to go to court either. So, left to themselves, environmental rights may never make it to court. The one environmental intervention in the three cases, although it did not in fact make it to the Constitutional Court, was made by an environmental interest group in *Lagoonbay*. Which leaves me with the question: Do we really need to rely on civil society to raise environmental rights issues? Is the realisation of environmental rights not a constitutional government duty?

The answer, of course, is yes. It is a constitutional government duty. But there are barriers to its realisation, as we have already seen. Does this mean we give up? No. It means that the court must be stronger in applying section 24, even where the parties to an action do not immediately see its relevance. The Constitutional Court, as the highest court in our beautiful land, must take on the role of upper guardian of environmental rights. It must work consciously to create a jurisprudence of environmental rights, so that eventually the application of these rights is not strange or difficult, but rather humdrum.

**A better connection**

As it is, I realise that I have not done much better than the *Fuel Retailers* case that I have so enjoyed lambasting. I have made a case for environmental rights to be considered by the Constitutional Court, but I have not made any suggestions for how this should be done. One suggestion, as alluded to above, has been made by Tladi[[77]](#footnote-77) and Feris.[[78]](#footnote-78) Tladi in particular suggested that a focus on one of the three pillars of sustainability should be consciously chosen, and explicitly argued.[[79]](#footnote-79) This approach certainly has merit, particularly from a strategic government planning point of view. However, it insufficiently acknowledges the dynamism and context-specificity of sustainability needs.[[80]](#footnote-80) The appropriately focused approach may be different in each case, and we are back with the uncertainty and value-based decisions that we started with.

Another approach is to draw from sustainability science, in the form of literature or expert testimony. This might be combined with Tladi’s method to assist in the choice of sustainability pillar – although then, we are likely to come up against the second level of difficulty with his approach. There is unlikely to be only one understanding of environmental challenges, even if the fields of the social, the economic and the environmental are separated. What of renewable energy production using biofuels, which may necessitates extensive land conversion?[[81]](#footnote-81) Or the competing desires of a community that has won a land claim on a protected area, all of them ‘social’?[[82]](#footnote-82) In fact, as these examples show, it is difficult or impossible to truly separate the realms of the social, economic and environmental. Contra to Tladi,[[83]](#footnote-83) I would suggest that trying to think about these issues separately is neither possible, nor particularly useful. Sustainability, by its very nature, functions at the interface of these issues, and its science focuses more on their linkages than their separation.[[84]](#footnote-84)

One theory that may be employed to give meaning to these interlinkages is that of environmental justice, which is commonly conceptualised as being made up of distributional justice, justice as recognition and procedural justice.[[85]](#footnote-85) Distributional justice speaks to how the goods and ills of a project are distributed – say an energy production project, whose environmental impacts affect the poor local people who cannot themselves afford energy.[[86]](#footnote-86) Justice as recognition asks the question of who should be recognised in the project’s planning and implementation processes – who gets invited to a stakeholder’s meeting, and which ways of life are considered.[[87]](#footnote-87) Then, procedural justice considers whether stakeholder engagement processes are fair and meaningful – are communities merely informed about a project, or are they asked what they think.[[88]](#footnote-88) The theory of environmental justice has found use mainly in academia and advocacy thus far, but I do not see why it should not find legal application. A consideration of its three areas may allow the components of a system to be better understood, together with their interlinkages. It may give some structure to an environmental rights enquiry, while giving voice to vulnerable local groups who may not themselves be able to make a court application for their environmental rights to be vindicated.

But this takes us back to the need to draw from sustainability science to give meaning to section 24. The approach may not lead the courts to one answer, but it likely to enable a more nuanced understanding of environmental rights. And that is desirable, particularly where a branch of law is new to the courts and its thematic focus lies primarily outside of the formal legal field thus far. Customary law, for example, is in much the same position, and the Constitutional Court has found that expert testimony is invaluable in understanding its nuances.[[89]](#footnote-89)

A more traditional legal perspective may still be required, however, and so the court might consider drawing from the jurisprudence of other constitutional rights. After all, section 24 gives us the right to an environment that is not harmful to our health or well-being. Logically, therefore, it is intimately connected to the section 27 right to health care, food, water and social security – to say nothing of equality, dignity and life. If we think of section 24 in terms of its connection to these other rights, it may begin to seem more possible to give it substantive meaning. After all, the Constitutional Court has certainly engaged with the substance of these other rights in the past. For example, very clear lines were established in the case of *Soobramoney*, regarding the meaning of health rights.[[90]](#footnote-90)

In conclusion, the primary call of this essay is for section 24 to be applied. How else are we to develop a jurisprudence of environmental rights? We must move on from *Fuel Retailers’* recognition of the tensions of sustainable development. We must certainly move on from the vow of silence the Constitutional Court seems to have imposed on section 24 currently. There are a number of tools – legal and otherwise – that the court may draw on for assistance with this admittedly very difficult task. Ultimately, the Constitutional Court must embrace its role as upper guardian of environmental rights.

1. Many thanks and much acknowledgement are due to Professor Stuart Woolman, who not only for provided this piece with the perfect title, but also helped me extensively with the planning of all the words below it. [↑](#footnote-ref-1)
2. ## *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).

   [↑](#footnote-ref-2)
3. ## *Minister of Local Government, Environmental Affairs and Development Planning of the Western Cape v Lagoonbay Lifestyle Estate (Pty) Ltd and Others* 2014 (1) SA 521 (CC).

   [↑](#footnote-ref-3)
4. ## *Agri South Africa v Minister for Minerals and Energy* 2013 (4) SA 1 (CC).

   [↑](#footnote-ref-4)
5. ## *Merafong City Local Municipality v AngloGold Ashanti Limited* 2017 (2) SA 211 (CC).

   [↑](#footnote-ref-5)
6. Loretta Feris ‘Sustainable development in practice: *Fuel Retailers Association of Southern Africa v Director-General Environmental Management, Department of Agriculture, Conservation and Environment, Mpumalanga* Province’ (2008) 1 *Constitutional Court Review* 235. [↑](#footnote-ref-6)
7. Dire Tladi ‘*Fuel Retailers*, sustainable development and integration: a response to Feris’ (2018) 1 *Constitutional Court Review* 255. [↑](#footnote-ref-7)
8. Feris op cit note 5 at 237-239. [↑](#footnote-ref-8)
9. Feris op cit note 5 at 240-4. [↑](#footnote-ref-9)
10. Feris op cit note 5 at 250. [↑](#footnote-ref-10)
11. Robert W. Kates ‘What kind of a science is sustainability science?’ (2011) 108(49) *PNAS* 19449 at 19450. [↑](#footnote-ref-11)
12. D Tladi *Sustainable development in international law: An analysis of key enviroeconomic instruments* (2007) 58 at 80. [↑](#footnote-ref-12)
13. Tladi op cit note 6 at 258. [↑](#footnote-ref-13)
14. B.L. Turner II and Paul Robbins ‘Land-Change Science and Political Ecology: Similarities, Differences and Implications for Sustainability Science’ (2008) 33 *Annual Review of Environmental Resources* 295 at 307-9. [↑](#footnote-ref-14)
15. *Fuel Retailers* supra note 1 para 113. [↑](#footnote-ref-15)
16. *Fuel Retailers* supra note 1 at 114. [↑](#footnote-ref-16)
17. Robert W. Kates, William C. Clark,\* Robert Corell, J. Michael Hall, Carlo C. Jaeger, Ian Lowe, James J. McCarthy, Hans Joachim Schellnhuber, Bert Bolin, Nancy M. Dickson, Sylvie Faucheux, Gilberto C. Calloprn, Arnulf Grübler, Brian Huntley, Jill Jäger, Narpat S. Jodha, Roger E. Kasperson, Akin Mabogunje, Pamela Matson, Harold Mooney, Berrien Moore III, Timothy O'Riordan, Uno Svedin ‘What kind of a science is sustainability science?’ (2001) 292 *Science* 241 at 242. [↑](#footnote-ref-17)
18. Johan Rockstrom ‘A safe operating space for humanity’ (2009) 461 *Nature* 472. [↑](#footnote-ref-18)
19. Thabo Madihlaba ‘The fox in the henhouse: the environmental impact of mining on communities’ in David A. McDonald (ed) *Environmental justice in South Africa*. [↑](#footnote-ref-19)
20. *Fuel Retailers* supra note 1 para 109. [↑](#footnote-ref-20)
21. Tladi op cit note 6. [↑](#footnote-ref-21)
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