The Procedural Right of Access to Information as a Means of Implementing Environmental Constitutionalism in South Africa

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I INTRODUCTION

The 1996 Constitution of the Republic of South Africa, demands “a decisive break from, and a ringing rejection of, that part of the past which is disgracefully racist, authoritarian, insular, and repressive.”¹ Thus, Karl Klaré asserted in 1998 that South Africa must embark upon a project of transformative constitutionalism, requiring:

constitutional enactment, interpretation and enforcement committed... to transforming [our] country’s political and social institutions and power relationships in a democratic, participatory, and egalitarian direction... inducing large-scale social change... through processes grounded in law.²

Human rights scholars, lawyers and activists in South Africa continue to grapple with how to advance the project of transformative constitutionalism envisaged by Klaré.³ For instance, Sanele Sibanda argues that “the eradication of poverty [ought to form] an integral part of the raison d’être of the conception of South Africa’s postapartheid (or postindependence) constitutionalism,” but that “transformative constitutionalism’s ostensible weddedness to liberal democratic constitutionalism

¹ S v. Makwanyane, 1995 (3) SA 391, para. 262. See also Soobramoney v. Minister of Health (KwaZulu-Natal), 1998 1 SA 765 (CC), para. 8; and, more recently, Residents of Joe Slovo Community, Western Cape v. Thubelisha Homes, 2010 (3) SA 454 (CC), para. 142.
makes it ill-suited for achieving the social, economic and political vision it proclaims.”

In the ample literature concerning transformative constitutionalism in South Africa, very little has been said about the potential role of South African environmental law and governance to contribute toward this project. This is so even though South Africa is arguably a pioneer of the recent global phenomenon of environmental constitutionalism: “the recognition that the environment is a proper subject for protection in constitutional texts and for vindication by constitutional courts worldwide.”

South Africa has constitutionalized environmental protection in both a thin and a thick sense. The Constitution provides for thin environmental constitutionalism “as a means to determine, at the highest possible level, the ordering, composition and architecture of environmental governance” because it contains provisions that “constitute, establish, legitimise and guide the day-to-day governance of environmental matters in South Africa.” It provides for thick environmental constitutionalism not least by incorporating “a rights-based approach to environmental governance.” This approach has the capacity to achieve environmental justice by responding to environmental injustice, which includes “the unjust distribution of environmental benefits and burdens, ‘disproportionately visited upon the poor,’ that are ‘the end product or outcome of systemic race and class discrimination.” The Constitution includes not only a substantive environmental right, but also interrelated and mutually reinforcing substantive rights such as the rights to life, dignity, equality, water, food and housing – all of which “have a direct bearing on the environment.” In addition, the Constitution provides for procedural rights

4 Sibanda, “Not Purpose-Made!” (n 3) 482, 486.
5 Ibid, 487, and the literature referred to therein.
8 James R. May and Erin Daly, Global Environmental Constitutionalism (CUP 2015) 1.
10 Ibid, 193–94.
11 Ibid, 197.
13 S. 24 of the Constitution of the Republic of South Africa, 1996 provides that “everyone has a right to an environment not harmful to health or wellbeing” and “to have the environment protected for the benefit of present and future generations, through reasonable legislative and other measures,” including measures that “secure ecologically sustainable development and use of natural resources while promoting justifiable economic and social development.”
to access to information\(^{15}\) and to administrative justice,\(^{16}\) including in relation to environmental decision-making. In South Africa these procedural rights have the capacity to “facilitate participative, representative and transparent environmental governance,”\(^{17}\) another aspect of the evolving concept of environmental justice.\(^{18}\)

The project of transformative constitutionalism envisaged by Klare stands to be enhanced by effectively implementing environmental constitutionalism in the thin and thick sense such that those enacting, interpreting and enforcing it do so with a view to ensuring environmental governance and protection that reinforces and promotes social justice and the equality and dignity of all South Africans. After all, environmental degradation and the attainment of social justice, equality and dignity are intrinsically linked, since “the environment and nature...create the conditions for social justice.”\(^{19}\)

Although in South Africa there exists the potential to implement environmental constitutionalism in a transformative way so as to pursue social justice, dignity, and equality, a prevailing challenge in South Africa is the courts’ failure to develop the content of the substantive environmental right.\(^{20}\) Since this right gives constitutional status to environmental concerns – it is “the rationale behind, justification for, and foundation and impetus of environmental governance in South Africa”\(^{21}\) – it should arguably act as the point of departure in cases concerned with environmental protection and governance issues, with other rights and statutory provisions acting in support of it. Instead, often with little, if any, regard to the environmental right, the procedural rights to access to information and administrative justice, and the legislation giving effect thereto, are the principal tools in the pursuit of

\(^{15}\) Section 32 of the Constitution confers on everyone an unqualified right of access to information held by the state, and a qualified right of access to information held by “another person” in the sense that in the latter instance, everyone will have a right to such information only if it “is required for the exercise or protection of any rights.” S. 32 goes on to provide that legislation must be enacted to give effect to this right. That legislation was enacted in 2000 in the form of the Promotion of Access to Information Act 2 of 2000 (the Information Act or PAIA).

\(^{16}\) S. 33 of the Constitution confers on everyone a “right to administrative action that is lawful, reasonable and procedurally fair” and to request written reasons when administrative action adversely affects his or her rights. Like S. 32, the right to administrative justice envisages that it will be given effect through national legislation, which was enacted in 2000 in the form of the Promotion of Administrative Justice Act 3 of 2000 (the Administrative Justice Act or AJA).


\(^{18}\) David Schlosberg, “Theorising Environmental Justice: The Expanding Sphere of a Discourse” (2013) 22(j) Environmental Politics 37, 40.

\(^{19}\) Ibid, 58.

\(^{20}\) As Louis J. Kotzé and Ané du Plessis (“Some Brief Observations on Fifteen Years of Environmental Rights Jurisprudence in South Africa” (2010) 3 Journal of Court Innovation 157, 165), explain, “domestic judicial guidance in this respect has been limited inasmuch as only in a few cases have the courts directly engaged with the substantive meaning of section 24(a) and (b).” Although their work was published some years ago, the position essentially remains the same today.

\(^{21}\) Ibid, 166.
environmental constitutionalism. South Africa’s substantive environmental right thus remains “underutilized” in the context of litigation aimed at environmental protection. An overreliance on procedural rights in environmental litigation, often detached from the environmental values at stake, seems to have stultified the development of substantive environmental rights jurisprudence. Case law arising from environment-related litigation in South Africa thus “reflects a remarkably narrow range of issues focussing on PAIA and PAJA-related applications or other forms of administrative law challenges” that often treats the crucial environmental context as “peripheral.” This is so even though these cases are typically brought to court by progressive environmental justice movements such as the South Durban Community Environmental Alliance, Earthlife Africa, the Biowatch Trust and the Vaal Environmental Justice Alliance. In these cases, the potential of the substantive environmental right (and indeed other relevant rights such as the right to dignity) as tools for the implementation of transformative environmental constitutionalism in South Africa is often overlooked. Even when the litigants are successful in their procedural rights claims, very little is said in the case law about the substantive reasons why the litigants came to court in the first place – the environmental and social justice struggles they face. In this way environmental constitutionalism is weakened – a body of case law emerges focused on procedural rights disconnected from the environmental issues at stake. In countries where there exists no “fully-fledged right to an environment” it is understandable that environmental movements might depend upon the procedural guarantees of existing political rights to guard against conduct likely to cause significant deterioration to the environment. It is remarkable in South Africa where there exists a “fully-fledged environmental right” that this right is nonetheless rarely referred to as one of the mechanisms

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26 See, e.g., Earthlife Africa (Cape Town) v. Director-General Department of Environmental Affairs and Tourism, 2005 (3) SA 156 (CC); Trustees for the time being of the Biowatch Trust v. Registrar; Genetic Resources, 2009 (6) SA 232 (CC); Kruger and Another v. Minister of Water and Environmental Affairs and Others [2016] 1 All SA 565. For exceptions to this approach, see the cases discussed in Kotzé and du Plessis, “Brief Observations” (n 20) 170–174.

related to and reinforcing the procedural rights invoked. Although the principle of subsidiarity dictates that “adjudication of substantive issues be determined with reference to more particular constitutional norms, rather than more general constitutional norms,” relevant legislation must, given the supremacy of the Constitution, be used by the judiciary so as to give effect to applicable constitutional rights. The environmental right cannot be given effect when more specific legislation is applied if the judiciary does not grapple with its content and import, however.

In this chapter I argue that procedural rights stand to be more effective and transformative tools for the implementation of environmental constitutionalism in South Africa when used in conjunction with relevant substantive rights. As Shelton points out in the context of international environmental law, where procedural rights are relied upon in environmental litigation it is necessary to link them to substantive environmental norms in order to achieve effective protection of the environment: to reason substantively in enforcing a procedural right. This can occur through the explicit recognition of the environmental context in which the litigation takes place, the legitimate roles of stakeholders seeking to secure environmental protection and the significance of related rights, such as rights to the environment, dignity and equality, and of aspirational values. When environmental constitutionalism is implemented in this way it can offer more to South Africa’s project of transformative constitutionalism, as issues of environmental degradation and social injustice can come to the fore.

Company Secretary of Arcelormittal South Africa Ltd v. Vaal Environmental Justice Alliance (VEJA)\(^{31}\) represents a shift toward such an approach in the implementation of environmental constitutionalism in South Africa. VEJA arose from litigation grounded in the right to access to information instituted against a major industrial corporation, Arcelormittal South Africa Ltd, by a nongovernmental community organization pursuing environmental advocacy, the Vaal Environmental Justice Alliance (the Alliance). VEJA illustrates how the implementation of environmental constitutionalism can be strengthened when judges bring substantive environmental rights issues to the fore in cases where procedural rights are invoked by environmental movements. The outcome of VEJA reveals that campaigns for access to information can serve as valuable as tools for the implementation of environmental


\(^{29}\) Shelton, “Environmental Rights” (n 27) 120–121.

\(^{30}\) On this point, see Kotzé and du Plessis, “Brief Observations” (n 20) 168, where they argue that jurisprudence developing the substantive environmental right in South Africa could “deepen the domestic environmental law discourse and indirectly contribute to the design of environmental law so that it is consistent with the values espoused in the Constitution, as well as the environmental right itself.”

I argue that the engagement with the constitutional design ought to entail an engagement with overcoming social injustice and the conditions of poverty.

\(^{31}\) Company Secretary of Arcelormittal South Africa and Another v. Vaal Environmental Justice Alliance, 2015 (1) SA 515 (SCA) (hereafter VEJA).
constitutionalism. Before commenting on VEJA and the value of the right to access to information in the implementation of environmental constitutionalism, to set the scene, I turn now to the factual context in which the VEJA litigation occurred.

II FACTUAL CONTEXT: THE VAAL TRIANGLE

About sixty kilometers south of Johannesburg, Gauteng, South Africa’s most populous and economically active province, is an industrial area known as the Vaal Triangle in which Vereeniging and Vanderbijlpark are located. The Vaal River flows through the area into the nearby Vaal Dam, an important source of drinking water for much of Gauteng. However, worryingly, the area is one of the most polluted in South Africa: in 2006, it was the first part of the country to be declared a priority area under the National Environmental Management Act: Air Quality Act 39 of 2004 (NEMAQA) due to the ambient air quality standards in the area being particularly poor and detrimental to human health and the environment. ArcelorMittal, with its steel works in Vereeniging and Vanderbijlpark, is one of the most significant contributors to pollution in the area. It has been found by the Department of Environmental Affairs to have repeatedly violated environmental laws. In the typical pattern of environmental injustice, many impoverished communities live in the area. As at 2006, 46.1 percent of households in the

33 Sasol Limited’s Secunda plant in the area is described by the Centre for Environmental Rights (CER) as “the world’s biggest single point emission source.” Centre for Environmental Rights, “Environmental Rights Blog: Sasol Shareholders Must End Its Assault on Air Quality Rules” <www.cer.org.za/news/environmental-rights-blog-sasol-shareholders-must-end-its-assault-on-air-quality-rules>. According to the Statistics South Africa 2015 South African National Census, Gauteng is home to 13.2 million people, almost 25 percent of the total South African population. SouthAfrica.info reports that “Gauteng contributes around 34% to the national economy and some 7% to the GDP of the entire African continent.” “Gauteng Province, South Africa” <www.southafrica.info/about/geography/gauteng.htm>.

33 The declaration of the Vaal Triangle Airshed as a priority area was published in the Government Gazette in terms of S. 18(i) of NEMAQA under Notice no 365 of April 21, 2006, as amended by Notice no 771 of August 17, 2007. In terms of S. 18(i) of NEMAQA, the Minister or an MEC may declare an area as a priority area if he or she reasonably believes that ambient air quality standards are being, or may be, exceeded in the area, or any other situation exists that is causing or may cause, a significant negative impact on air quality in the area, and the area requires specific air quality management action to rectify the situation.

34 On ArcelorMittal’s polluting activities, see CER Full Disclosure, 9–23.


36 See Murcott, “Environmental Justice” (n 12) 885–889.

area lived in poverty and 47.9 percent of the population was unemployed.\textsuperscript{38} The area is thus one where environmentalism must respond to “three of our greatest challenges: the struggle against racism, the struggle against poverty and inequality and the struggle to protect the environment, as the natural resource base on which all economic activity depends.”\textsuperscript{39} In 2004, the Vaal Environmental Justice Alliance (the Alliance) was established as an advocate for environmental justice with the object of responding to environmental health, water quality, air quality and waste management issues in the Vaal Triangle.\textsuperscript{40}

### III LESSONS FROM THE VEJA LITIGATION

In 2011, the Alliance began a campaign to gain access to records from Arcelormittal which would reveal whether or not the company had complied with its internal environmental requirements and strategy as well as obligations imposed on it in terms of licenses issued by various government departments under various environmental legislation (including to prevent pollution and to implement remediation measures).\textsuperscript{41} To seek access to Arcelormittal’s records, the Alliance asserted its right to access to information – a right that is horizontally enforceable in South Africa in terms of the Information Act where information is required for the protection of a right. In its request for records issued in terms of the Information Act, the Alliance claimed that the information it requested was required in the public interest for the protection of the environmental right, also a horizontally applicable right.\textsuperscript{42} Environmental constitutionalism in the thick sense was thus invoked directly through the procedural right of access to information, and indirectly through the right to an environment not harmful to health or well-being.

Instead of making the records requested available, Arcelormittal disputed that the Alliance required the records requested for the protection of the environmental right and adopted an obstructive stance.\textsuperscript{43} Among other things, Arcelormittal

\textsuperscript{38} Ibid, 796.


\textsuperscript{40} Vaal Environmental Justice Alliance, “Vaal Environmental Community News” <www.vaalenviroinmetalnews.blogspot.co.za>.

\textsuperscript{41} VEJA, paras. 8–9.

\textsuperscript{42} In terms of S. 8(2) of the Constitution, the Bill of Rights binds natural or juristic persons “if, and to the extent that, it is applicable, taking into account the nature of the right and the nature of the duty imposed by the right.” Furthermore, S. 39(2) provides that courts “must promote the spirit, purport and objects of the Bill of Rights” when interpreting legislation and developing the common law. As Iain Currie and Johan De Waal (The Bill of Rights Handbook (sixth edn, Juta 2013) 41), point out, the Bill of Rights “recognizes that private abuse of human rights may be as pernicious as violations perpetrated by the state” through the direct and indirect horizontal application of rights. See also Michael Kidd, Environmental Law (2nd edn Juta 2011) 30.

\textsuperscript{43} See VEJA, paras. 11–15 and 83.
asserted that the Alliance was attempting to “usurp” government’s monitoring, compliance and enforcement role by seeking access to the requested records. It also contended that one of the records requested, Arcelormittal’s so-called Master Plan of 2003, which the Alliance contended was a driver for Arcelormittal’s internal environmental strategy, contained scientifically unfounded and flawed information, was outdated and could no longer be relied upon.

Arcelormittal’s arguments were rejected in the Supreme Court of Appeal’s judgment in VEJA, through the implementation of environmental constitutionalism in the thick sense, through a rights-based approach. On November 26, 2014, the Supreme Court of Appeal, acting from “within a judicial comfort zone” in which it had to determine whether the Alliance’s procedural right of access to information had been violated, upheld the High Court’s order in which Arcelormittal was required to deliver the records requested within fourteen days. Although the Supreme Court of Appeal’s order entailed simply granting access to information, the reasoning in VEJA is to be applauded for a number of reasons. Throughout the judgment, the environmental right, the right to access to information and the value of participation were treated as mutually reinforcing and interrelated. This approach resulted, first, in the point of departure in VEJA being the relevant environmental context – pollution and its impact on communities – that gave rise to the litigation. This context was treated as central rather than peripheral. In addition, principles and objects of relevant environmental legislation providing for environmental protection, participation, transparency and accountability as interconnected concerns were strenuously promoted and explained as giving effect to the environmental right. Moreover, by linking access to information, participation and environmental protection VEJA extended the application of environmental principles to private actors responsible for environmental harm. In these ways, VEJA effectively implemented environmental constitutionalism in a manner that contributes toward South Africa’s project of transformative constitutionalism. VEJA thus pursued transformative environmental constitutionalism.

Writing for the Supreme Court of Appeal, Navsa ADP held that the Alliance had met the threshold in order to obtain the requested records: the records requested

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44 Ibid, para. 12.
46 See May and Daly, Global Environmental Constitutionalism (n 8) 249, where they explain that “procedural rights are... easier to enforce than substantive rights.” Indeed, a strategic advantage of pursuing procedural environmental rights directly rather than substantive environmental rights is that they pose simpler legal questions, with simpler legal answers, than substantive rights. The direct application of substantive environmental rights is more challenging because they “demand that courts try to answer hard questions about what the environment is and should be to be safe, healthy, or clean.” However, answering these hard questions is precisely what the implementation of environmental constitutionalism ought to entail if courts take seriously their role in protecting the environment and the pursuit of social justice.
were required for the protection of the environmental right.\textsuperscript{47} In reaching this conclusion, Navsa ADP implemented environmental constitutionalism in a thick sense, from a rights-based perspective, by treating the procedural right to access to information, the value of participation, and the substantive environmental right as interrelated and mutually reinforcing in a number of ways.

\textbf{A The Environmental Context as Central, Rather than Peripheral}

Navsa ADP implemented environmental constitutionalism by placing the litigation in its proper (environmental) context. Navsa ADP did so by highlighting the significance of Arcelormittal’s “acknowledged history of operational impact on the environment”:\textsuperscript{48}

[Arcelormittal]'s industrial activities, impacting as they do on the environment, including on air quality and water resources, has an effect on persons and communities in the immediate vicinity and is ultimately of importance to the country as a whole. Translated, this means that the public is affected and that [Arcelormittal]'s activities and the effects thereof are matters of public importance and interest. Put differently, the nature and effect of [Arcelormittal]'s activities are crucially important. [Arcelormittal] is a major, if not the major, polluter in the areas in which it conducts operations.

Navsa ADP also wrote his judgment from the perspective of a need “to reset our environmental sensitivity barometer” given the perils of global warming.\textsuperscript{49} Thus, \textit{VEJA} is a welcome departure from other more narrowly cast cases where access to information is disconnected from the environmental harms in respect of which information is sought, and the day-to-day struggles of the people impacted by those harms. The implementation of environmental constitutionalism was strengthened because environmental harms caused by polluting industry and their impacts were placed at the center of \textit{VEJA} rather than as peripheral issues.

\textbf{1 Promoting Environmental Legislation}

Although he did not directly develop the content of the environmental right, Navsa ADP implemented environmental constitutionalism by traversing a number of provisions in South African environmental legislation that pursue social justice and explicitly connect questions of participation and transparency to environmental protection.\textsuperscript{50} In finding that the information requested by the Alliance was required for the protection of the environmental right, Navsa ADP engaged with aspects of

\textsuperscript{47} \textit{VEJA}, para. 74.
\textsuperscript{48} Ibid, para. 52.
\textsuperscript{49} Ibid, para. 84.
\textsuperscript{50} Ibid, paras. 62–70.
environmental legislation that explicitly give effect to the right. In other words, he relied upon and promoted, as a basis for disclosure of Arcelormittal’s information, provisions of constitutionally ordained environmental legislation, in the sense that each statute is intended to be a reasonable legislative measure aimed at fulfilling section 24 of the Constitution.\textsuperscript{51}

For instance, Navsa ADP indicated that the information the Alliance requested was required for the protection of the environmental right as captured by the principal legislation regulating waste management in South Africa, the National Environmental Management: Waste Act 59 of 2008 (NEMWA).\textsuperscript{52} He recognized as important that NEMWA’s preamble asserts, among other things, that “the impact of improper waste management practices are often borne disproportionately by the poor.” He thus highlighted that legislation enacted to give effect to the environmental right pursues social justice. He accepted that the information the Alliance sought was required for the protection of the environmental right as encompassing that goal.

Next, Navsa ADP highlighted that the National Water Act 36 of 1998, which gives effect to the environmental right and the right to water, requires that the nation’s water resources must be protected so as to meet the basic needs of present and future generations.\textsuperscript{53} In doing so, Navsa ADP recognized that the environmental right provides for access to clean water, a basic human need to be met in an equitable fashion, and that access to information can help secure that right.

Navsa ADP also implemented environmental constitutionalism by traversing a number of the “justice-oriented” principles in section 2 of NEMA,\textsuperscript{54} which are intended to give content to the constitutionally entrenched notion of sustainable development through procedural and substantive protections.\textsuperscript{55} The NEMA principles are binding on the actions of organs of state that may significantly affect the environment.\textsuperscript{56} They have been found to amount to an “injunction [on the state] that the interpretation of any law concerned with the protection and management of the environment must be guided by [them].”\textsuperscript{57}

In particular, two of the NEMA principles which Navsa ADP found to be significant encapsulate an expansive understanding of environmental justice as described by David Schlosberg and David Carruthers, that goes beyond the unjust distribution of environmental goods and bads, and:

\textsuperscript{51} Ibid, para. 61.
\textsuperscript{52} Ibid, paras. 67–68.
\textsuperscript{53} Ibid, para. 69.
\textsuperscript{55} MEC for Agriculture, Conservation, Environment and Land Affairs, Gauteng v. Sasol Oil and Another [2006] 2 All SA 17 (SCA) (hereafter Sasol Oil), para. 15. See also BP Southern Africa v. MEC for Agriculture, Conservation, Environment and Land Affairs, 2004 (5) SA 124 (T).
\textsuperscript{56} NEMA, S. 2(1).
\textsuperscript{57} Sasol Oil, para. 15.
[A]lso address[es] recognition of the various cultures and races that have been at the receiving end of that inequity, authentic inclusion and political participation of a broad array of peoples and interests, and various capabilities necessary for individuals and communities to be free, equal, and functioning.  

Navsa ADP referred first to section 2(4)(b) of NEMA, which provides that environmental management must acknowledge that “all elements of the environment are linked and interrelated” and “must take into account the effects of decisions on all aspects of the environment and all people in the environment.” Next, he remarked upon the significance of section 2(4)(f) of NEMA, which states that “participation of all interested and affected parties in environmental governance must be promoted, and all people must have the opportunity to develop the understanding, skills and capacity necessary for achieving equitable and effective participation, and participation by vulnerable and disadvantaged persons must be ensured.” Both provisions are reflective of the pursuit of environmental justice as recognition and participation, which also plays a role in enhancing “civic dignity.”

Furthermore, Navsa ADP acknowledged the legitimate role of the Alliance as “genuine advocates for environmental justice” entitled to monitor the operations of Arcelormittal and its effects on the environment, and as an environmental stakeholder with whom Arcelormittal had committed to engaging as part of its “collaborative corporate governance” efforts. Thus Navsa ADP promoted environmental justice not just in his favorable characterization of the Alliance, but also the important role of South Africa’s environmental legislation in this regard, noting that:

[O]ur legislature has recognised, in the field of environmental protection, inter alia the importance of consultation and interaction with the public. After all, environmental degradation affects us all.

Navsa ADP went on to point out that the value of participation by organizations such as the Alliance has been acknowledged in other public interest environmental litigation. By casting the Alliance in this role, and giving it a “seat at the table,” Navsa ADP affirmed the value of participation by members of the public and nongovernmental organizations in environmental management and accountability.

Given the environmental context of the litigation – the extensive pollution in the Vaal Triangle affecting predominantly disadvantaged communities – Navsa ADP

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59 VEJA, para. 64.
60 Ibid, para. 65.
61 Daly and May, “Bridging Constitutional Dignity and Environmental Rights Jurisprudence” (n 14) 19.
62 VEJA, paras. 53 and 80.
63 Ibid, para. 71.
65 Schlosberg, “Theorising Environmental Justice” (n 18) 40.
could have gone further in his engagement of the NEMA principles by engaging with other provisions dealing with the distributive aspects of environmental justice. For instance, section 2(4)(c) of NEMA entails an injunction to pursue environmental justice “so that adverse environmental impacts are not distributed in such a manner as to unfairly discriminate against any person, particularly vulnerable and disadvantaged persons.” Furthermore, section 2(4)(d) demands that “[e]quitable access to environmental resources, benefits and services to meet basic human needs and ensure human well-being must be pursued,” including through taking “special measures” for “persons disadvantaged by unfair discrimination.”

B Enhancing Corporate Responsibility

Another way in which Navsa ADP implemented environmental constitutionalism in VEJA was by extending the potential application of the NEMA principles to corporations. In particular, he highlighted the principle in section 2(4)(k) of NEMA which demands that environmental decisions “must be taken in an open and transparent manner, and access to information must be provided in accordance with the law.” He then held that although the provision “relates principally to the state,” it “must, in principle, apply to corporate decisions and activities that impact on the environment and thus implicate the public interest, particularly when their activities require regulatory approval.” While it is uncontroversial that the provisions of the Information Act and the Administrative Justice Act may apply to corporations, the extension of the application of the NEMA principles to the private sphere is a significant development, consistent with a growing acceptance of the need for transnational corporations to respect and protect human rights, including in relation to the environment. This development indicates that in South Africa the implementation of environmental constitutionalism implicates not only government, but also private actors. This is important because, as Nolan points out:

Corporate social responsibility, accountability or citizenship is not a new concept. What is new is an emerging international consensus on the human right standards that are applicable to companies and some innovative proposals for ensuring companies implement such standards.

66 S. 2(4)(d) of NEMA.
67 VEJA, para. 66.
68 Ibid.
71 Ibid, 582.
In the South African context, the idea of corporate accountability is linked to the pursuit of social justice and is given constitutional recognition through the horizontal application of rights. While there is little jurisprudence on the topic, it is widely accepted that:

The power wielded by private actors is often comparable to, if not greater than, that of the state itself. For the most part, the current distribution of wealth and the resulting power dynamics within the private market is a product of the socio-political as well as the legal structures of the apartheid regime... The law cannot tolerate a perpetuation of the apartheid legacy by virtue of continuing pre-constitutional socioeconomic power relations in the private arena.

By implementing environmental constitutionalism so as to reinforce the notion of corporate accountability VEJA arguably responds to "capital's logic of accumulation that is destroying the ecological conditions that sustain life: through the pollution and consumption of natural resources, destruction of habitats and biodiversity, and global warming."

Although Navsa ADP did not expressly engage with the horizontal application of the environmental right linked to the right to access to information in VEJA, he implicitly supported such application through his forceful remark that:

Corporations operating within our borders, whether local or international, must be left in no doubt that in relation to the environment in circumstances such as those under discussion, there is no room for secrecy and that constitutional values will be enforced.

By reinforcing ArcelorMittal's corporate accountability in the environmental sphere, Navsa ADP strengthened the implementation of environmental constitutionalism. This stance led Navsa ADP to reject ArcelorMittal's refusal to disclose its Master Plan on the basis that it was outdated and contained scientifically flawed information. Navsa ADP took the view that disclosure would either verify ArcelorMittal's stance or be cause for greater concern about environmental degradation.

Thus VEJA acknowledged that environmental constitutionalism is not only implemented through the disclosure of information by government, but also by private actors who hold immense power, are capable of wreaking significant environmental harm in their pursuit of profits, and therefore arguably owe stronger duties to disclose information in those circumstances. Invoking environmental principles

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75 VEJA, para. 82.

76 Ibid, para. 81.
so as to compel private actors to disclose information related to environmental degradation serves to empower vulnerable communities to take action against industry, and thus fosters social justice.

**IV POST-VEJA**

As a result of the ways in which Navsa ADP implemented environmental constitutionalism by reasoning substantively in the enforcement of the right to access to information, linking that right to the right to an environment not harmful to health or well-being, VEJA is a good illustration of how a procedural right can operate so as “to keep [a] substantive [environmental right] vital.” 77 It took the Alliance roughly four years of litigating to achieve this feat. The end result was, however, one that arguably strengthened the implementation of environmental constitutionalism in South Africa and contributed toward its project of transformative constitutionalism.78

Following the litigation, during 2015, the records that formed the subject of the litigation were made public.79 As a result, the Alliance and the public more generally could better determine whether or not to take further legal action against Arcelormittal to hold it accountable for environmental noncompliance. By 2017 no further litigation had been instituted. The potential to pursue further legal action is not the only value of a judgment like VEJA, however. As explained by a survey of the PAIA Civil Society Network on, among other things, South Africa’s access to information culture:

> [T]he right to access to information seems to be more at risk in South Africa today than ever before. Within this context, the need for information activism and promoting awareness and use of PAIA in order to strengthen the right to know, seems increasingly pressing.80

These words point to the intrinsic value of VEJA in facilitating the pursuit of a culture of transparency and openness in South Africa by raising awareness, and promoting the use of the Information Act, including in the implementation of environmental constitutionalism. This value contributes toward social justice, equality and dignity by empowering those affected by environmental harm to take action to protect the environments in which they exist and pursue a more just and equitable society that promotes, rather than impairs their dignity.81

77 May and Daly, *Global Environmental Constitutionalism* (n 8) 236.
78 As May and Daly, ibid, point out, “without effective information, vigorous participation, and opportunities to seek judicial intervention, substantive environmental constitutionalism can suffocate.”
80 Catherine Kennedy, Director of the South African History Archive, for and on behalf of the PAIA Civil Society Network “PAIA Civil Society Network Shadow Report” (released February 2, 2015)
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81 Daly and May, “Bridging Constitutional Dignity and Environmental Rights Jurisprudence” (n 14) 3.
Following from the litigation Arcelormittal published a summary report outlining its past and current environmental issues and the steps it has taken to comply with environmental laws.\textsuperscript{82} Although the summary report takes the form of a public relations exercise for Arcelormittal, its existence suggests a greater level of corporate accountability and responsiveness to environmental harms and the people that they impact.

The events following VEJA illustrate some of the advantages of implementing environmental constitutionalism by invoking the right to access to information in litigation aimed ultimately at environmental protection. Particularly given the horizontal application of rights in South Africa, where the litigation is successful it can have the effect of instilling greater levels of corporate accountability and responsiveness to environmental harm and communities affected thereby. As May and Daly highlight, “given the difficulty of securing judicial victories of substantive rights in most courts around the world” a victory in litigation in the nature of VEJA could potentially be more effective at ensuring environmental protection than litigation utilizing the environmental right directly.\textsuperscript{83} This kind of victory encourages self-regulation and promotes a culture of corporate environmental compliance. It empowers the public by informing them about the environmental risks to which they may be exposed, giving them avenues to compel the state to order the taking of remedial and other measures. VEJA is therefore an example of the effective and transformative implementation of environmental constitutionalism by “pursuing and exercising participatory rights that will inure to the benefit not only of the environment but of civil society as a whole.”\textsuperscript{84} Importantly, in VEJA these rights were pursued as interrelated with and reinforcing of the environmental right and legislation enacted to give effect to it. By promoting self-regulation and a culture of corporate environmental compliance VEJA achieves more than just good environmental governance. By implementing environmental constitutionalism so as to hold private actors to account in respect of an underlying environmental evil, a culture of environmental noncompliance that secrecy facilitates – not just a failure to provide access to information – is mitigated.\textsuperscript{85} In these circumstances one of the key criticisms of the overreliance on procedural rights to enforce substantive rights – that it fails to address the target evil by focusing on questions of good governance – falls away.\textsuperscript{86}


\textsuperscript{83} May and Daly, Global Environmental Constitutionalism (n 8) 253.

\textsuperscript{84} Ibid.

\textsuperscript{85} This culture of environmental noncompliance cannot be done away with altogether within a capitalist framework that necessitates choosing profits over environmental protection but is also mitigated by more effective enforcement of environmental legislation.

\textsuperscript{86} On this critique, see Danie Brand, “The Proceduralisation of South African Socio-Economic Rights Jurisprudence, or ‘What Are Socio-Economic Rights For?’,” in H. Botha, A. J. van der Walt, and
V CONCLUSION

This chapter explains that environmental constitutionalism in South Africa is often implemented through the use of procedural rights in a narrow sense, rather than seeing the substantive environmental right and procedural rights as mutually reinforcing and interrelated. I have argued that the implementation of environmental constitutionalism stands to be strengthened and better contribute toward South Africa’s project of transformative constitutionalism (as it should), when used in conjunction with relevant substantive rights and values. This is so because when procedural rights are invoked in conjunction with substantive rights, the environmental harms at stake, and the social injustices they cause, come into focus. I illustrated that VEJA could represent a shift toward the implementation of environmental constitutionalism of this kind: transformative environmental constitutionalism. Although primarily about a procedural right to access to information, it focused on environmental protection and the questions of human dignity and equality associated therewith. This is because in VEJA the environmental right, the right to access to information, and the value of participation were treated as mutually reinforcing and interrelated. As a result, the point of departure in VEJA was the relevant environmental context – pollution and its impact on communities – that gave rise to the litigation. Furthermore, the principles and objects of relevant environmental legislation providing for environmental protection, participation, transparency and accountability as interconnected concerns were strenuously promoted and explained as giving effect to the environmental right. Finally, by linking access to information, participation and environmental protection VEJA extended the application of environmental principles to private actors responsible for environmental harm. In these ways, VEJA effectively implemented environmental constitutionalism in a manner that contributes toward South Africa’s project of transformative constitutionalism. This kind of reasoning – that is not merely focused on procedural questions, but also on the environmental and social harms giving rise to environmental litigation, and the legislation responding to those harms – can better serve environmental protection and social justice. The aftermath of VEJA illustrates that a powerful message had been sent to and received by Arcleormittal in relation to its environmental noncompliance and refusal to act in a transparent and accountable manner. Going forward, environmental movements and courts in South Africa would do well to pursue the progressive, transformative kind of environmental constitutionalism implemented in VEJA.