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SCHOLARLY ARTICLE

Procedural Justice and Due Process Principle in the Context of Just Energy Transition: Learning From South Africa

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Abstract

The transition to renewable energy models to tackle environmental degradation and climate change is one of the most important topics on the international agenda. The energy transition requires a system that is decentralised and democratic, depending more on local energy ownership and the genuine participation of the affected stakeholders. Although different states face various economic and cultural challenges, a common challenge is making the transition as inclusive and equitable as possible so that everyone can benefit equally. The article focuses on South Africa, acknowledging its special place among the Global South countries due to its history and the dependency of its economy on coal. Taking the South African experiences as an example, this article aims to show how the energy transition processes can be more inclusive and just, allowing the affected parties to participate at all levels of the just transition processes and making their voices heard.

Keywords: due process principle; energy justice; meaningful stakeholder consultation; procedural justice; South Africa

I. Introduction

In 2015, at the United Nations (UN) Climate Change Conference (COP21) in Paris, it was acknowledged by world leaders that climate change was an emergency transgressing the national borders that needed international cooperation.[1] Thus, it was agreed to reduce global greenhouse gas emissions substantially, limit the global temperature increase in this century to 2 degrees Celsius (with further efforts limiting it to 1.5 degrees Celsius), and overcome the adverse impacts of climate change.[2] As the most important anthropogenic driver of climate change is considered to be greenhouse gas emissions[3] of which a quarter is produced by the energy sector[4], the Paris Agreement (and the subsequent pledges at the

[1] Fiona Harvey, 'Paris Climate Change Agreement: The World's Greatest Diplomatic Success,' *The Guardian* (14 December 2015), https://www.theguardian.com/environment/2015/dec/13/paris-climate-deal-cop-diplomacy-developing-united-nations (accessed 27 August 2024).

[2] Paris Agreement (adopted on 12 December 2015, entered into force 4 November 2016), art 2.

[3] Róbert Csalódi et al, 'Sectoral Analysis of Energy Transition Paths and Greenhouse Emissions' (2022) 15 *Energies* 7920, 7920.

[4] United Nations Framework Convention on Climate Change, *Report of the Parties Serving as the Meeting of the Parties to the Paris Agreement on its Third Session, Held in Glasgow from 31 October to 13 November 2021* (Glasgow: United

following UN Climate Change Conferences) and the UN Sustainable Development Goals (SDGs) set targets regarding energy systems and use.[5]

The path to a low-carbon energy system goes through the large-scale use of renewable energy for electricity generation which will reduce greenhouse gas emissions and other pollutants.[6] While this process of application of energy technologies appropriated to reach net-zero emissions[7] is technically focused on fighting battles to bring down the numbers and overcome technological hurdles, it also implies a complex set of interconnected social, political and economic arrangements.[8] It aims not only to offer an overhaul of the current energy systems but also to offer employment opportunities and provide affordable and accessible energy to all.[9]

That is why this process is referred to as the 'just energy transition,' meaning that it is (or should be) aware of justice ideals such as the fair distribution of cost and benefits, stakeholder participation and non-discriminatory policy.[10] Consequently, an integral pillar of the energy transition is the role of the public and the democratic engagement of the stakeholders in the transition process, as the manifestation and implementation of the due process principle within the framework of energy justice.[11]

Against this backdrop, this article aims to address the following question: 'How does meaningful stakeholder engagement/consultation as an integral part of the concepts of procedural justice and due process manifest itself in the recent South African judgments, and to what extent are these judgments implemented in the just energy transition context?'. This article focuses on South Africa because (i) coal mining is of great significance to the country, (ii) the sector accounts for almost a hundred thousand jobs (in 2021) and, (iii) 72 per cent of the country's energy needs are directly sourced from coal.[12] Therefore, due to the country's heavy reliance on coal for electricity, it has become the prime candidate for a world-first funding agreement, backed by wealthy nations, aiming to increase investments in clean energy while also protecting those who rely on the fossil fuel sector (Just Energy Transition Investment Plan [JET IP]).[13] Furthermore, South Africa's just transition is further complicated by its legacies of apartheid, social unrest, poverty, unemployment and the structural crisis in its energy sector.[14]

Nations Framework Convention on Climate Change, 2021); Hannah Ritchie, Max Roser and Pablo Rosado, 'Energy' (2022), https://ourworldindata.org/energy (accessed 28 July 2023).

[5] Particularly SDG 7 which aims to ensure access to affordable, reliable, sustainable, and modern energy for all by setting targets such as increasing both the share of renewable energy in the global energy mix and the energy efficiency to tackle the impacts of climate change. See United Nations, 'Ensure Access to Affordable, Reliable, Sustainable and Modern Energy for All,' https://sdgs.un.org/goals/goal7 (accessed 20 December 2023).

[6] Andrew Chapman et al, 'Evaluating the Global Impact of Low-Carbon Energy Transitions on Social Equity, (2021) 40 *Environmental Innovation and Societal Transitions* 332, 333.

[7] United Nations Development Programme, 'Energy Transition,' https://www.undp.org/energy/our-work-areas/energy-transition (accessed 29 August 2024).

[8] Pablo García-García, Óscar Carpintero and Luis Buendía, 'Just Energy Transitions to Low Carbon Economies: A Review of the Concept and its Effects on Labour and Income' (2020) 70 *Energy Research & Social Science 101664.*

[9] Chapman et al, note 6, 333.

[10] Ibid.

[11] Madeleine Wahlund and Jenny Palm, 'The Role of Energy Democracy and Energy Citizenship for Participatory Energy Transitions: A Comprehensive Review' (2022) 87 *Energy Research & Social Science 102482.*

[12] Bernard Kengni, 'Transition from Coal to Renewables: Is South Africa Ready?,' *University of Cape Town Faculty of Law* (15 February 203), https://law.uct.ac.za/mineral-law/articles/2023-02-15-transition-coal-renewables-south-africa-ready#:~:text=Coal%20mining%20is%20of%20great,are%20directly%20sourced%20from%20coal (accessed 27 August 2024).

[13] Nick Hedley, 'New South African Government Fuels Optimism for Faster Energy Transition,' *Climate Home News* (4 July 2024), https://www.climatechangenews.com/2024/07/04/new-south-african-government-fuels-optimism-for-faster-energy-transition/ (accessed 27 August 2024).

[14] Pegah Mirzania et al, 'Barriers to Powering Past Coal: Implications for a Just Energy Transition in South Africa' (2023) 101 *Energy Research & Social Science* 103122.

Section II locates stakeholder engagement/consultation in the idea of justice in the energy transition and discusses the concepts of energy justice, procedural justice and due process principle. Section III explores the South African case law on stakeholder engagement/consultation in the energy sector. Section IV, then, looks at South Africa's JET IP, to examine whether the Plan has the necessary tools and safeguards in place to implement the findings of the South African courts. Ultimately, the paper aims to unpack the due process prong of energy justice and explore the South African interpretation and implementation of the concept which can have generalized implications for other just energy transition processes in other countries.

II. Energy Justice, Procedural Justice, Due Process, Stakeholder Engagement

The aim of achieving deep decarbonization in coal-dependent nations such as South Africa is the growing challenge of aligning the processes and outcomes of the clean energy transition to notions of fairness and equity or, in other words, implementing energy justice.[15] Energy justice is a fairly new concept whose early use in academia appeared in 2010 and began to receive more attention in early 2013.[16] The concept of energy justice seeks to establish a nexus between energy generation and delivery and justice.[17] It entails an energy system that fairly disseminates both the benefits and costs of energy services while having representative and impartial energy decision-making.[18]

Energy justice encompasses five central forms of justice: distributive, procedural, restorative, recognition and cosmopolitan justice.[19] Procedural justice is grounded on the fairness and inclusivity of decision-making processes concerning energy policy and infrastructure development, including the planning and execution phases of energy projects.[20] In this regard, the energy justice decision-making processes have eight core principles: (i) availability, (ii) affordability, (iii) due process, (iv) good governance, (v) sustainability, (vi) intergenerational equity, (vii) intragenerational equity and, (viii) responsibility.[21]

The due process aspect of energy justice seeks to ensure that the potential for stakeholder participation in the energy policymaking process, at least, roughly matches the importance (in aggregate and to each person affected) of the matter and the irrevocability of any decisions that may be reached.[22] The decision-making principle suggests that communities that are or will be affected by the projects must be involved in deciding about the

[15] Ibid.

[16] Raphael J Heffron and Darren McCauley, 'The Concept of Energy Justice Across the Disciplines' (2017) 105 *Energy Policy* 658, 659.

[17] Chukwuma G Monyei, Aderemi Adewumi and Kirsten E H Jenkins, 'Energy (In)Justice in Off-Grid Rural Electrification Policy: South Africa in Focus' (2018) 44 *Energy Research & Social Science* 152, 153.

[18] Benjamin K Sovacool and Michael H Dworkin, 'Energy justice: Conceptual Insights and Practical Applications' (2015) 142 *Applied Energy* 435, 436.

[19] Raphael J Heffron, 'Applying Energy Justice into the Energy Transition' (2022) 156 *Renewable Energy Reviews* 111936.

[20] Oyeniyi Abe and Victor Azubike, '(Re)examining the Intersection Between Energy Justice and Energy Transition' (2024) 42 *Journal* of Energy & Natural Resources Law 279, 283.

[21] Ibid, 439; Note that the concept has first emerged as having three central tenets: distributional, procedural and recognition justice, which employs energy life-cycle systems approach. See also Darren McCauley et al, 'Advancing Energy Justice: The Triumvirate of Tenets' (2013) 32 *International Energy Law Review* 107, 107–8. However, for the purposes of this research, the principle-based approach that strongly relates to the decision-making processes is employed because the article seeks to uncover the relationship of the due process principle as applied in the previous energy sector decisions to be used in the (possible) future renewable energy cases.

[22] Ibid.

projects and given space for fair and informed consent; environmental and social impact assessments must involve genuine community consultation and neutral arbitration to handle grievances.[23] This includes engaging with local communities and empowering marginalised groups; respecting their rights, cultures and traditional knowledge.[24]

Effectively engaging with the affected stakeholders improves democratic governance accountability, legitimizes resource decisions, enhances trust between stakeholders and promotes knowledge coproduction.[25] Furthermore, meaningful engagement and collaboration facilitate the inclusion of marginalised groups, such as women, children or indigenous peoples, who are usually the ones affected the most, into the transition processes. In addition, engagement with and participation of the affected communities is beneficial also for companies and governments, as it can reduce conflicts, protests and tensions usually associated with energy-related projects.[26]

III. What Can We Learn from the Energy Sector Cases for the Just Transition?

A. Context

Against this backdrop, this section examines the recent case law in the energy sector that can also guide the potential disputes in the mining of transition metals and minerals and the deployment of renewable energy. The previous guidance provided by the courts regarding stakeholder engagement/consultation applies to just transition through the common thread of energy justice because energy justice does not distinguish between different energy sources. Our energy systems are all interdependent and have worldwide impacts. Energy generation and distribution depend on raw materials mined with devastating impacts on local communities and the environment and are smelted, refined and manufactured globally for the technologies and fuels that power the energy grids.[27] This is the case whether energy is generated from oil, coal, wind, solar or other low-carbon technologies, although with differing degrees of impact.[28]

Renewable energy sources can produce negative externalities similar to the extractive sector. These negative externalities include noise disruptions, 'shadow flicker' from wind turbines, unpleasant smells or traffic and air pollution from landfill activities.[29] Building renewable energy technologies can be at odds with the land rights of communities living in the vicinity and may require free, prior and informed consent (FPIC) from indigenous peoples.[30] Thus, regardless of the source of energy, the due process principle will apply to ensure genuine stakeholder engagement/participation in the decisions relating to energy.

[23] Sovacool and Dworkin, note 18, 439.

[24] Abe and Azibuke, note 20, 295.

[25] Ziyan Han et al, 'Stakeholder Engagement in Natural Resources for Energy Transitions Governance' (2023) 102 *Environmental Impact Assessment Review* 107206.

[26] Oyeniyi Abe, 'Between Control and Confrontation: The Pitfalls and Potential of Corporate-Community Participatory Development in Africa's Energy and Extractive Industries' (2022) 11 *The Extractive Industries and Society* 101095.

[27] European Environmental Bureau, *Why Energy Justice? Towards a New Economic and Energy Framework in Europe*, (Brussels: European Environmental Bureau, 2002), 5.

[28] Ibid.

[29] Sanya Carley and David M Konisky, 'The Justice and Equity Implications of the Clean Energy Transition' (2020) 5 *Nature Energy* 569, 570.

[30] See, for instance, Mary Finley-Brook and Curtis Thomas, 'Renewable Energy and Human Rights Violations: Illustrative Cases from Indigenous Territories in Panama' (2011) 101 *Annals of the Association of American Geographers* 863.

Lastly, the Department of Minerals and Energy of South Africa considers the country's 130 years of mining as an asset in the rising demand for clean energy.[31] In this regard, energy transition also entails the sustainable mining of the 'energy transition' or 'critical' minerals and metals[32], which are needed to manufacture clean technologies to tackle climate change.[33] For instance, solar panels use large quantities of copper, silicon, silver and zinc, whereas wind turbines use iron ore, copper and aluminium.[34] The International Energy Agency predicts that the extraction of transition metals needs to increase six-fold by 2040 to reach net zero emissions.[35] Therefore, previous knowledge and experience from mining still present a valuable source for both the sustainable mining of transitional minerals and the deployment of renewable energy sources.

B. Consent vs. Consultation

Previous research shows that around 54 per cent of the projects relating to the energy transition minerals are located on or near indigenous lands, with 29 per cent of the projects on or near lands over which indigenous peoples are recognised as managing or exercising some form of control or influence over land for conservation.[36] Thus, energy transition processes can bring up the issue of land rights of indigenous peoples and require the participation of or engagement with indigenous peoples. Especially in the South African context, the issues of informal and customary land rights and land reform, have been contentious, considering the efforts to remedy the injustices of the past regarding land ownership by indigenous communities.[37]

The question in the *Baleni* case concerned the level of consent required for obtaining a mining right over land held by a community with informal or customary land rights.[38] The community at stake (Umgungundlovu) is made up of the collection and intertwined relationships between the living members and the dead which have been buried in the family graves in the affected area.[39] The decisions in the community require a higher degree of consensus than the majority and circumspection is required to pass a decision with respect to issues that have the potential of conflict and division.[40] The community opposes the proposed mining because they fear the disastrous social, economic and ecological consequences of mining.[41]

[31] Department of Mineral Resources and Energy, *South African Energy Sector Report 2022* (Pretoria: Department of Mineral Resources and Energy, 2022), 8, 11.

[32] World Bank Group, 'The Growing Role of Minerals and Metals for a Low Carbon Future,' (June 2017), https://documents.worldbank.org/pt/publication/documents-reports/documentdetail/207371500386458722/the-growing-role-of-minerals-and-metals-for-a-low-carbon-future (accessed 20 December 2023).

[33] Saleem H Ali et al, 'Mineral Supply for Sustainable Development Requires Resource Governance' (2017) 543 *Nature* 367, 367.

[34] Nico Valcks et al, 'Metals Demand From Energy Transition May Top Current Global Supply,' *International Monetary Fund Blog* (8 December 2021), https://www.imf.org/en/Blogs/Articles/2021/12/08/metals-demand-from-energy-transition-may-top-current-global-supply (accessed 25 August 2023).

[35] International Energy Agency, 'The Role of Critical Minerals in Clean Energy Transition: Executive Summary' (2017), https://www.iea.org/reports/the-role-of-critical-minerals-in-clean-energy-transitions/executive-summary

[36] John R Owen et al, 'Energy Transition Minerals and Their Intersection with Land-Connected Peoples' (2022) 6 *Nature Sustainability* 203, 204.

[37] Yolandi Meyer, 'Baleni v Minister of Mineral Resources 2019 2 SA 453 (GP): Paving the Way for Formal Protection of Informal Land Rights' (2020) 23 *Potchefstroom Electronic Law Journal*, available at https://www.saflii.org/cgi-bin/disp.pl?file=za/journals/PER/2020/22.html&query=baleni.

[38] *Baleni and Others v Minister of Minerals Resources and Others* [2019] 2SA 453 (GP) *(Baleni* case). In the same vein, see *Maledu and Others v Itereleng Bakgatla Mineral Resources (Pty) Limited and Another* [2019] SA 1 (CC).

[39] Ibid, para 7.

[40] Ibid, para 10.

[41] Ibid, para 14.

In this case, two separate legislations namely, the Interim Protection of Formal Land Rights Act (IPILRA)[42] and Mineral and Petroleum Resources Development Act (MPRDA)[43] that mandate different stakeholder engagement processes were at tension. The two acts regulate different matters. IPILRA provides temporary protection of certain rights to and interests in land which are not otherwise adequately protected by law[44] whereas MPRDA makes provision for equitable access to and sustainable development of the nation's minerals and petroleum resources.[45] The stakeholder engagement levels required by these two acts are different.

IPILRA requires the consent of the person who will be deprived of his/her informal rights as a result of the activity.[46] On the other hand, MPRDA only requires consultation with the interested and affected parties upon the receipt of an application for a prospecting right, mining right or mining permit.[47] Consent denotes an agreement while consultation denotes a process of consensus-seeking that may not necessarily result in an agreement.[48]

In the case, the Court decided that the MPRDA and IPILRA must be read together, in light of the country's history and past injustices, and the applicants should benefit from the higher level of protection offered by the IPILRA.[49] When deciding so, the Court also referred to international norms that require the grant or refusal of the FPIC of communities to any mining development that will significantly affect them.[50] The Court specifically mentioned the General Recommendation No.23: Indigenous Peoples issued in terms of the Convention on the Elimination of All Forms of Racial Discrimination, the International Covenant on Economic, Social and Cultural Rights, the International Covenant on Civil and Political Rights and the African Charter.[51]

Thus, in cases where communities do not hold formal land rights, they can be entitled to special protection under IPILRA which requires more than mere consultation. Furthermore, when the community in question can be considered as indigenous peoples, FPIC can also come into play. According to the Court, when the land is held on a communal basis, the community must be placed in a position to consider the proposed deprivation and be allowed to take a communal decision in terms of their custom and community on whether they consent or not, to a proposal to dispose them of their rights to their land.[52]

However, Mensi argues that the approach taken by the Court gives the communities a right to veto but points out that the international instruments referred to by the Court do not give a complete veto right to the projects.[53] He contends that the right to consent affirmed by the Court and the IPILRA, does not correspond neither to the current content of FPIC under international law nor to the approach of the African Court and Commission on Human Rights or South African domestic law.[54] Thus, although he states that there is almost

[42] Interim Protection of Informal Land Rights Act 31 of 1996 (SA) (IPILRA).
[43] Mineral and Petroleum Resources Development Act 28 of 2002 (SA) (MPRDA).
[44] IPILRA, art 2.
[45] MPRDA, preamble.
[46] IPILRA, art 2(1).
[47] MPRDA, art 10.
[48] *Baleni* case, note 38, para 71. See also *Bengwenyama Minerals (Pty) Ltd and Others Genorah Resources (Pty) Ltd and Others* [2011] SA 113 (CC).
[49] Ibid, para 79.
[50] Ibid, para 78.
[51] Ibid, para 78–82.
[52] Ibid, para 79.
[53] Andrea Mensi, 'The South Africa High Court Baleni Judgment: Towards an Indigenous Right to Consent?' (2022) 6 *African Human Rights Yearbook* 375, 392–3.
[54] Ibid, 392.

no evidence to reconcile the right to consent with a veto power, he concludes that the findings of the High Court can contribute to strengthening the indigenous right to FPIC.[55]

C. Meaningful Engagement and Consultation

Similar to the need to obtain a social license to operate from the communities in the extractive industries[56], renewable energy systems may also require a certain type of social license. In certain countries, wind and solar projects already face resistance from communities who perceive the projects as threats to their livelihoods or socio-cultural identities or feel excluded from project benefits and decision-making.[57] Thus, it is important to engage with the stakeholders, especially with the local and/or affected communities in a meaningful way that allows them to become a part of the process. It may very well be that the local and/or affected communities are also indigenous peoples.

In this regard, two recent cases particularly stand out from the South African case law namely, *Sustaining The Wild Coast NPC and Others v Minister of Mineral Resources and Energy and Others (3491/2021)* [2022][58] (hereinafter referred to as the '*Shell* case') and *South Durban Community Environmental Alliance and Another v Minister of Forestry, Fisheries and the Environment and Others (17554/2021)* [2022] (hereinafter referred to as the '*South Durban Community* case').[59]

The *Shell* case concerns a proposed grant of an exploration right for the exploration of oil and gas, which also includes conducting a seismic survey on a part of the coastline in the Eastern Cape, the Wild Coast. The seismic survey allows Shell to detect the location of possible energy reserves below sea level.[60] The survey includes discharging pressurized air from its air gun arrays to generate sound waves.[61] In this light, one of the main issues is the right of the communities, who had strong spiritual connections to the ocean and depended on the ocean for sustenance, impacted by seismic survey and exploration activities to be meaningfully consulted.[62] Rankin characterizes the *Shell* case rightfully as 'a case that runs contrary to the neoliberal narratives that often permeate the interactions between large multinational companies and the local communities in the countries these companies come for resources extraction, countries that most often are to be found in the Global South.'[63]

On the other hand, the *South Durban Community* case concerns the grant of an environmental authorization required by the National Environmental Management Act (NEMA) to construct a mid-merit combined gas cycle power plant.[64] The applicants argued

[55] Ibid, 394.

[56] Lucy Diana Mercer-Mapstone et al, 'What Makes Stakeholder Engagement in Social Licence Meaningful? Practitioners' Conceptualisations of Dialogue' (2018) 27 *Rural Society* 1.

[57] Mikkel Funder et al, 'Corporate Community Engagement Professionals in the Renewable Energy Industry: Dilemmas and Agency at the Frontline of South Africa's Energy Transition' (2021) 81 *Energy Research & Social Science* 102249.

[58] *Sustaining the Wild Coast NPC v Minister of Mineral Resources and Energy* (3491/2021) [2022] ZAECMKHC 55 ('*Shell*' case).

[59] *South Durban Community Environmental Alliance and Another v Minister of Forestry, Fisheries and the* Environment *and Others* (17554/2021) [2022] ZAGPPHC 741 ('*South Durban Community* case').

[60] *Shell* case, note 58, para 22.

[61] Ibid, para 23.

[62] Ibid, para 24–7.

[63] Claire Rankin, 'Defending the Rights Local Communities Against Box-Ticking Exercises: An Analysis of *Sustaining the Wild Coast NPC v Minister if Mineral Resources and Energy*' (2023) *Business and Human Rights Journal* 1, 6.

[64] The One Environmental System was launched in 2014 to streamline the different authorization processes set out in different laws and to prevent duplication of authorization applications. For a more detailed

seven grounds that the environmental authorization granted was impugned, where one of the grounds concerned was inadequate public participation.[65] Below, the constitutive elements of meaningful stakeholder engagement are explored in turn through these two decisions.

D. Identification of the Stakeholders

The MPRDA and its relevant regulations enshrine the right to be consulted or to participate for the affected communities in granting mining, exploration or production rights. Sub-regulation 3 of the MPRDA stipulates that the public must be notified through (at least) either a publication in the applicable Provincial Gazette, a notice in the Magistrate's Court in the magisterial district applicable to the land in question, or an advertisement in a local or national newspaper circulating where the land or offshore area to which the application relates.[66] Furthermore, this publication must include an invitation to submit comments in writing with all the required information about the person to whom the comments must be delivered.[67]

In this regard, in the *Shell* case, Shell's consultation process included the identification of the potential interested and affected parties through an analysis of the potential stakeholders based on previous similar studies and the creation of a list of such stakeholders, the distribution of an information document regarding the exploration activities, notification of the public about the project in some newspapers together with the ways of how to provide input for the local communities, a compilation of the issues/concerns raised and public disclosure of it on the project website, notification of the interested and affected parties in group meetings including certain monarch representatives and a final report of all the data gathered.[68]

However, the High Court identified several deficits with the consultation process. Firstly, the Court highlighted that the company's consultants had identified the interested and affected parties, not through a public process, but through an analysis of potential stakeholders engaged in previous similar studies in the area.[69] The Court also pointed out that although Impact Africa was aware of numerous communities in the area concerned, there was no evidence from the reading of the newspapers that Shell or Impact Africa had conducted investigations to uncover the identities of these communities.[70] As a result of this, these communities were not a part of the stakeholder database and were not consulted.[71]

In this regard, the Public Participation Guidelines of 2017, which provide information on the characteristics of a vigorous and inclusive public participation process in line with the requirements of the public participation processes under NEMA, can be inspirational in guiding all processes of engagement with communities.[72] The Guidelines provide concrete

explanation of the streamlining process, see Shamila Mpinga, 'The One Environmental System for the Mining Industry: Has it Given Rise to Intra-Governmental Conflict of Interest?,' *University of Cape Town Faculty of Law* (5 December 2017), http://www.mlia.uct.ac.za/news/one-environmental-system-mining-industry-has-it-given-rise-intra-governmental-conflict-interest (accessed on 11 August 2023).

[65] *South Durban Community* case, note 59, para 12.

[66] Mineral and Petroleum Resources Development Regulations 2004 (RSA), Sub-regulation 3, sec 3(3).

[67] Ibid, sec 3(4).

[68] *Shell* case, note 58, para 19.

[69] Ibid, para 90.

[70] Ibid.

[71] Ibid.

[72] Department of Environmental Affairs (2017), Public Participation Guideline in Terms of NEMA EIA Regulations, Department of Environmental Affairs, Pretoria, South Africa.

ways to identify the affected stakeholders, ranging from the social profiles, making a summary of the key characteristics of the people living in that area, using the established lists and databases or using network/chain referral systems according to which key stakeholders are asked to assist in identifying other stakeholders.[73] As is evident from the Guidelines, there are several ways (and, of course, it is always possible to go beyond the Guidelines) to identify the affected stakeholders. Although it may be easy and convenient to utilise the previous similar studies, it is not enough in most cases.

E. Methods and Language

In the *Shell* case, the public was notified through some newspapers but the Court stated that the newspapers used were not within reach for the relevant communities (Dwesa-Cwebe, Xolobeni and the Pondoland area communities) and (although they were not in reach anyway) they were written in English and Afrikaans whereas the affected communities were speaking Xhosa.[74] More information was made available online through a website for the affected and interested stakeholders after the initial project information was compiled.[75] However, the Court pointed out that some interested and affected communities live in rural areas and do not have access to computers or the internet (the applicant communities are among those who are still disadvantaged), making it impossible for them to access such information.[76]

A similar approach was taken by the company in the *South Durban Community* case. To notify and consult the public about the project, two public meetings were advertised in certain newspapers, and registered interested and affected persons were notified in writing.[77] The consultations and public meetings allowed for the interested and affected parties to comment on this application.[78] Key stakeholder workshops were held.[79] The process was conducted in English; isiZulu was not used, although it was the most commonly spoken language in the affected areas.[80] A document containing background information about the project was distributed to identified stakeholders and interested and affected parties, placed in public places such as libraries and made available online.[81]

In the *South Durban Community* case, the Court referred to the recent Public Participation Guidelines, which provide extended guidance on engaging with the affected stakeholders.[82] According to the Guidelines, the purpose of any public participation process must be to provide the space for the role-players to voice their support, concerns and questions regarding the projects, applications or decisions; to provide them with the opportunity to suggest ways for reducing or mitigating any negative impacts of the projects and enhancing their positive impacts and to conduct a transparent and open process.[83] In this regard, all potential interested and affected stakeholders have the right to be informed early and in an informative and proactive manner about the potential effects the proposals might have on their lives/livelihoods.[84] Thus, it must be in such a way that it considers the extent of the

[73] Ibid, sec 4.1.
[74] *Shell* case, note 58, para 90.
[75] Ibid, para 101.
[76] Ibid.
[77] *South Durban Community* case, note 59, para 89.1.
[78] Ibid, para 89.2.
[79] Ibid, para 89.3.
[80] Ibid, para 86.
[81] Ibid, para 91.
[82] Environmental Impact Assessment Regulation 2014 (RSA); See also Public Participation Guidelines, note 72.
[83] Public Participation Guidelines 2017, note 72.
[84] Ibid, sec 4.

impacts of the project, the sensitivity of the affected environment, the degree of controversy of the projects, and the characteristics of the potentially affected parties.[85]

The communication method must be appropriate and effective, considering the unique needs of the affected communities, such as lack of skills to read, language barriers or disability.[86] In this regard, in the *Shell* case, where Shell had used English and Afrikaans-language newspapers although the affected communities were not using those languages and also used a website to publish certain information to reach the stakeholders, genuine engagement would require Shell to tailor the method of engagement to the particular situation of the stakeholders. As such, it may sometimes mean an announcement on a local radio station in a local language, using participatory rural appraisal and participatory learning and action approaches and techniques to build capacity to increase participation or hold separate meetings with vulnerable and marginalized groups.[87] Similarly, in the *South Durban Community* case, the Court, quoting the *Federation of South African Fly Fishers* case, stated that public participation was not limited to the educated members of the society who can read English or the privileged ones who can access the internet.[88]

Consequently, in both cases, the Courts decided that since the languages affected communities spoke were not used in the processes, it was clear that anyone who did not speak English or Afrikaans was excluded from the public participation process.[89] In addition, making the relevant information available online and at libraries poses a prerequisite of a certain level of education and an ability to access the internet, which again makes the public participation process conditional.[90] As a result of the above, the Court ultimately decided that the public participation process was inadequate.[91]

F. Top-Down Approach

In the *Shell* case, the consultation meetings had a top-down approach where only certain monarchs were approached rather than the individuals in communities.[92] As the Court rightly pointed out, such an approach has no place in constitutional democracy.[93] In this regard, the Court pointed out that the community (a group of historically disadvantaged persons with interests or rights in the particular area of land on which the members have or exercise communal rights in terms of an agreement, custom or law) was separate from the 'Chief' and that the 'Chief' of the community did not denote the whole community.[94]

Referring to the *Maledu* case, the Court stated that when the land is held on a communal basis, affected parties must be given sufficient notice and be afforded a reasonable opportunity to participate at any meeting where a decision to dispose them of their rights to that land is to be taken. Furthermore, this decision can only be taken with the support of the majority of the affected persons having an interest in or rights to the land concerned, and who are present at such a meeting.[95] Thus, to fulfil the right to participate,

[85] Ibid.
[86] Ibid.
[87] Ibid, sec 4.2.
[88] *South Durban Community* case, note 59, para 93. For the case quoted by the Court, see *The Federation of South African Fly Fishers v Minister of Environmental Affairs* 2021 JDR 2304 (GP), para 66.
[89] *South Durban Community* case, note 59, para 95; *Shell* case, note 58, para 102.
[90] *South Durban* case, note 59, para 96; *Shell* case, note 58, para 101.
[91] *South Durban* case, note 59, para 97; *Shell* case, note 58, para 102.
[92] *Shell* case, note 58, para 92.
[93] Ibid.
[94] Ibid, para 93.
[95] Ibid. See also *Maledu* case, note 38, para 97.

local communities and individual members must be able to freely and fairly express their views without coercion, manipulation or use of force.[96]

G. Interim Conclusion

Overall, meaningfully engaging with the affected stakeholders is not a tick-box exercise, and it requires a genuine and bona fide, substantive, two-way process that aims to achieve (as far as possible) consensus relating to what the process entails.[97] Compiling what the Courts have said in the above-mentioned cases, the critical points of meaningfully engaging with the stakeholders require not to be pedantic but instead have a genuine, open, transparent and two-way dialogue with communities who will bear the consequences of the projects.[98] It requires that such persons are fully informed in a way suitable to their characteristics on a case-by-case basis, allowing them to comprehend all the possible consequences of such projects. This can entail using traditional languages specific to a particular area or using less technological communication methods such as the radio and paying special attention to marginalised or vulnerable groups that might have different needs.

In addition, while it is essential to acknowledge the previous work done, it is even more important to build on it. As shown in the *Shell* case above, it is not enough to depend solely on previous studies but the entity that wishes to conduct exploration must realise that the previous work can only be the basis of a more project-specific approach. Complementarily, it is also important to consider the role of history and context.[99] History shapes relations and power dynamics between different actors and thus determines who gets to participate, who gets to speak and which knowledge is used.[100] As seen from both case examples above, interested and affected parties were notified in English (and/or Afrikaans) and expected to know and speak it. Of course, the fact that English was chosen as the primary and default language relates to the country's history. In the second case, the defendants even argued that the applicants did not object to the absence of publications in the most commonly spoken language in the area (which was isiZulu) during the events.[101] However, as the Court makes clear, a person who does not know or understand the process cannot be expected to register or participate.[102]

Lastly, it must be borne in mind that every project will concern a different set of rights for the affected communities. For instance, some cases more closely concern the indigenous rights of the communities (i.e., the *Baleni* case or *Shell* case), whereas others have more general rights, such as the right to health or a healthy, sustainable environment. Thus, the approaches should differ depending on the rights that are more severely affected by the projects. For example, when indigenous rights are more severely affected, traditional knowledge and/or solutions may be more significant in the project's progression. On the other hand, in a case where the project is foreseen to severely affect the health of communities living in the vicinity, the solutions can be more technical. Some remedies can be relevant for one type of harm and/or right or only one type of community, whereas others can be relevant in other situations.

[96] Abe, note 26.

[97] *Shell* case, note 58, para 95.

[98] See also, Thabang Maphanga, Karabo Shale and Babalwa Gqomfa, 'The State of Public Participation in the EIA' 105 *South African Geographical Journal* 277.

[99] Nicola Favretto et al, 'Editorial for Special Issue: Collaboration and Multi-stakeholder Engagement in Landscape Governance and Management in Africa: Lessons From Practice' (2021) 10 *Land* 285, 286.

[100] Ibid.

[101] *South Durban Community* case, note 59, para 92.

[102] Ibid, para 95.

The decisions above convey how principles relating to achieving more equality and democratisation, as outlined in the analysis of the country's evolving framework policies and laws, were to be put into practice in specific situations. The cases provide clear guidance on how to facilitate meaningful stakeholder engagement, which is an essential pillar of achieving energy justice. With these findings in mind, the next section looks at the JET IP to see how much of these findings can be implemented in the process and what more can be done to contribute to achieving energy justice.

IV. Searching for Meaningful Stakeholder Engagement/Consultation in the JET IP

A. *JET IP and Its Possible Limitations*

South Africa's JET IP constitutes a partnership between the governments of South Africa, France, Germany, the United Kingdom, the United States and the European Union to transition South Africa's fossil fuel-dependent economy in a just manner and support South Africa's path to low-carbon emissions, decarbonisation of the electricity system and development of greener technologies (around 8.5 billion US dollars).[103] It has been developed to support energy security goals, just transition and economic growth while clarifying South Africa's priority investment requirements in electricity, new energy vehicles (NEVs) and green hydrogen (GH2).[104]

The South African conceptualisation of just transition needs a broader economic and social framing, prioritising the need to address societal issues of poverty and inequality.[105] Social framing of issues and the need to take into account the country's history is also repeatedly emphasised by the South African courts, as per above. If the transition is subject to indiscriminate disinvestment by the financing community, resulting in the transmission of scarce and expensive electricity, it may have negative implications for the country's economic growth prospects.[106] Thus, the success of the JET IP depends on the scale and availability of concessional finance.[107]

However, this is not an easy task, and trade unions and civil society groups have already raised concerns regarding financing conditions, employment losses, skills deficiencies and the need to decrease large corporations' power in the energy value chain.[108] In this regard, the project has received additional funding pledges from Denmark, the Netherlands and Spain, focusing on investment by the domestic private sector, mostly in new energy generation (around 3.5 billion US dollars).[109] However, the Plan estimates that

[103] The Presidency of Republic of South Africa, *South Africa's Just Energy Transition Investment Plan (JET IP)* (Pretoria: The Presidency of Republic of South Africa, 2022), 1.

[104] Ibid, 6.

[105] Harald Winkler et al, 'Just Transition in South Africa: An Innovative Way to Finance Accelerated Phase out of Coal and Fund Social Justice' (2023) 3 *Journal of Sustainable Finance & Investment* 1228, 1233.

[106] Ibid.

[107] Amanda Hattingh and Pawan Maharaj, South Africa's Cabinets Has Approved the Just Energy Transition Implementation Plan, *Herbert Smith Freehills Notes Blog* (29 November 2023), https://hsfnotes.com/esg/2023/11/29/south-africas-cabinet-has-approved-the-just-energy-transition-implementation-plan/ (accessed 13 December 2023).

[108] Khwezi Mabas, 'Time for South Africa's Government to Deliver on Promises,' (16 December 2023), https://www.ips-journal.eu/topics/democracy-and-society/time-for-south-africas-government-to-deliver-on-promises-6394/ (accessed 13 December 2023); See also Alex Lenferna, 'South Africa's Unjust Climate Reparations: A Critique of the Just Energy Transition Partnership' (2023) 50 *Review of African Political Economy* 1.

[109] Antony Sguazzin, 'Netherlands, Denmark to Help Pay for South Africa's Energy Transition,' *Bloomberg* (19 October 2023), https://www.bloomberg.com/news/articles/2023-10-19/s-africa-says-netherlands-denmark-join-climate-finance-pact?leadSource=uverify%20wall (accessed 13 December 2023).

South Africa needs more than 98 billion US dollars over the next five years to implement the Plan, and the money should come in the form of grants or highly concessional loans.[110]

Furthermore, South Africa also signed an agreement with the World Bank concerning a Development Policy Loan (1 billion US dollars).[111] It has also signed bilateral loan agreements with Kreditanstalt für Wiederaufbau, a German investment bank (500 million US dollars), and African Development Bank (300 million US dollars).[112] However, financing the Plan through loan agreements needs more attention. More debt places the financial risk of investing in the just energy transition on ordinary South Africans.[113]

The transition to a low-carbon economy means the coal-powered energy provision will decline. However, the rapid closure of coal-powered power plants and mines at the pace foreseen by the JET IP presents challenges due to the huge reduction in production and employment in the coal industry.[114] For instance, South Africa has taken 497 million USD to decommission and repurpose the coal-fired power plant Komati.[115]

It is usually the case that the workforce of a mine is provided by communities living in the vicinity. Therefore, the impact of mine closures on the 2.5 million residents of 69 host communities will be significant unless they are compensated through intervention measures, particularly as income, employment and education levels are already low, and many municipalities are in financial distress.[116] As such, workers and unions are even actively campaigning against the program.[117] Thus, community participation and ownership in renewable energy projects must be a cornerstone of the JET IP, to ensure that the benefits of the transition are shared equitably.[118]

B. Stakeholder Engagement/Participation in JET IP

Leading up to the JET IP, between 2017 and 2019, the National Planning Commission conducted social dialogues on the just transition involving stakeholders from all

[110] Overseas Development Institute, *Taking Stock of Just Energy Transition Partnerships* (London: Overseas Development Institute, 2023), 5.

[111] The World Bank, South Africa: 'World Bank Backs Reforms to Advance Energy Security and Low Carbon Transition,' (25 October 2023), https://www.worldbank.org/en/news/press-release/2023/10/25/south-africa-afe-world-bank-backs-reforms-to-advance-energy-security-and-low-carbon-transition (accessed 13 December 2023).

[112] Terence Creamer, 'New $1.8bn-Plus Concessional Loan Package Signed to Support JET-IP,' (21 November 2023), https://www.engineeringnews.co.za/print-version/new-18bn-plus-concessional-loan-package-signed-to-support-jet-ip-2023-11-21 (accessed 13 December 2023).

[113] Neil Overy and Ulrich Steenkamp, 'SA is Failing its Climate Commitments- Is the Jet Investment Plan Too Little, Too Late?,' (24 April 2023), https://earthlife.org.za/sa-is-failing-its-climate-commitments-is-the-jet-investment-plan-too-little-too-late/ (accessed 13 December 2023).

[114] Overseas Development Institute, note 110, 9.

[115] European Commission, 'Joint Statement: South Africa Just Energy Transition Investment Plan' (2022, *European Commission*) https://ec.europa.eu/commission/presscorner/detail/en/statement_22_6664 (accessed 26 August 2024). See also Bongani J Mwale and Nandipha D Siwahla-Madiba, 'South African Transition Pathway-Lessons Learnt from the Komati Power Station Decommissioning and Repurposing Project' (2024) 16 *European Journal of Business and Management* 55.

[116] Ibid, 10.

[117] Lochner Marais et al, 'Mine Closure in the Coal Industry: Global and National Perspectives in Lochner Marais et al (eds), *Coal and Energy in South Africa: Considering a Just Transition* (Edinburgh: Edinburgh University Press, 2022), 34.

[118] Narend Singh, the Deputy Minister of Forestry, Fisheries and the Environment, in the National Consultative Workshop on Early Warnings for All, 'Benefits of Just Energy Transition Must be Shared Equally' (26.08.2024, *South African Government News Agency*) https://www.sanews.gov.za/south-africa/benefits-just-energy-transition-must-be-shared-equally (accessed 27 August 2024).

provinces, including youth and energy-intensive users.[119] In 2018, the Presidential Jobs Summit agreed to establish an independent statutory body, the Presidential Climate Commission (PCC), to lead the just transition work across all sectors.[120] The PCC strived to create a just transition framework and guidelines for the government by conducting wide consultations and research and preparing many reports and recommendations on various aspects concerning the just transition.[121] It highlighted the importance of procedural justice and the inclusion of worker and community organisations in just transition policy and decision-making processes.[122]

The stakeholder consultation outcomes were compiled into a report.[123] According to this report, consultations were done with business, civil society (including faith and youth) and government (including local government and labour).[124] Community consultations were held at the local level.[125] The engagement is ongoing as PCC states that a long-term exchange of views between social partners and PCC is critical to reach a consensus and enable implementation.[126]

C. Consultation with Labor Organizations

The PCC has held consultations with the labour organisations, as they represent one of the communities that will be severely impacted by the transition, especially by the decommissioning of the coal plants. The following are the key outcomes of the consultation:[127]

- Labor organisations expressed that the consultative process was poor (in the sense that the participants felt like it was a tick-box exercise and a fait accompli) and unreasonably emphasised the rapid decarbonisation instead of critically engaging with the issues arising from transitioning away from coal.
- They stressed that South Africa was, to a certain extent, being pressured by their foreign funding partners to decarbonise its economy rapidly.
- It was proposed that older power stations whose lifecycles could be extended to solve issues of adaptation and resilience, as coal was still seen as a fundamental driver of economic growth in South Africa.
- They also stressed the need for a much larger funding allocation for skills development (training and reskilling workers).
- The size of the grant component of the Plan compared to the loan component within JET IP was also criticised, as it was argued that the burden of the loan repayments would be placed on the South African taxpayer.

[119] Energy Transition Partnership, *JETP Experience in South Africa and Indonesia, and Lessons Learnt for Vietnam*, (Thailand: Energy Transition Partnership, 2023), 25.

[120] Ibid.

[121] For a complete overview, see Presidential Climate Commission, 'South Africa's Just Energy Transition Investment Plan,' https://www.climatecommission.org.za/south-africas-jet-ip (accessed 18 December 2023).

[122] Presidential Climate Commission, *A Critical Appraisal of South Africa's Just Energy Transition Investment Plan* (Pretoria: Presidential Climate Commission, 2023), 7.

[123] Presidential Climate Commission, *Stakeholder Perspectives on South Africa's Just Energy Transition Investment Plan*, (Pretoria: Presidential Climate Commission, 2023).

[124] Ibid, 2.

[125] Ibid, 3.

[126] Ibid, 4.

[127] Ibid, 37–8.

D. Consultations with the Communities and the Reported Issues

Consultations were held with eight communities experiencing the direct economic impacts of the transition, those who are dependent on and/or directly impacted by fossil fuel and energy value chains (Lephalale/Limpopo, Emalahleni/Mpumalanga, Carolina/Mpumalanga, Secunda/Mpumalanga, South Durban Basin/ KwaZulu-Natal, Xolobeni/Eastern Cape, Gqerberha, Eastern Cape, Hotazel and Northern Cape).[128] According to the report, target locations where stakeholder engagement would be carried out were identified first.[129] In this regard, stakeholder mapping was carried out to identify the key stakeholders representing the affected communities, including local community members, community representatives (e.g., forums, associations councillors and youth and women groups and leaders), non-governmental organisations and other community-based organisations, as well as, relevant district, regional or national government representatives.[130]

Site visits were done to consult and engage with key (previously identified) local stakeholders to publicise and communicate about the upcoming engagement, get buy-in and consult with stakeholders on the identification of other/additional stakeholders who were not identified before and get consensus on the agenda for the engagement including possible workshop hosting venues.[131] Participatory engagements in the form of site visits were followed by workshops, and *imbizos* were held with vulnerable and affected communities and social partners.[132]

However, the number of communities, the specific stakeholders engaged during the site visits and the agendas of the workshops held during these site visits seem to indicate that PCC's stakeholder engagement falls short of what is expected to fulfil the procedural justice element and the guidance of the courts as per Section II.[133] It is not clear from PCC's report how the groups and organisations to be present at the workshops are selected. For instance, in the Annex, for the Secunda site, only the National Youth Development Agency has been listed as the engaged stakeholder.[134] On the other hand, for some communities (i.e., the Durban South Basin site) more organisations, groups, movements, businesses and community members have been listed.[135] The report in general also does not provide any quantitative or qualitative data on the engaged stakeholders. Therefore, it is not clear to what extent the individual community members have been engaged.

In addition, the workshop agendas show that the workshops for each community spanned over one day including an overview of just transition, the role of the PCC, and discussions on what the transition would entail for the community and what the community would need.[136] It is questionable to what extent a one-day workshop can give necessary information about the transition process and provide enough space for the stakeholders to comprehensively share their views. Of course, as the PCC engagement is supposed to be an ongoing process, the initial engagement is expected to be continued and improved.

[128] Presidential Climate Commission, *Community and Stakeholder Engagement on a Just Transition in South Africa*, (Pretoria: Presidential Climate Commission, 2022), 4.
[129] Ibid, 5.
[130] Ibid, 5.
[131] Ibid.
[132] Ibid, 13.
[133] Ibid, 43–56.
[134] Ibid, 43.
[135] Ibid 43–4.
[136] Ibid, 45–52.

E. General Issues: South Durban Community as an Example

South Durban Basin region is a melting pot of heavy industries located near one another.[137] Consequently, the region is also known to have extreme amounts of air pollution (unacceptable levels of toxins, chemical waste and a large context of sulphur dioxide), which has harmed the health and well-being of the surrounding residents.[138] The region consists especially of poor, black South Africans as a result of the apartheid era.[139]

In 2022, the Pretoria High Court found that the poor air quality in the Gauteng and Mpumalanga's Highveld Priority Area (the neighbouring region Kwazulu-Natal where South Durban Basin is located), was in breach of residents' Section 24(a) constitutional right to an environment that is not harmful to their health and well-being.[140] The judgment is also important for the South Durban Basin region because it recognises the poor air quality in the Highveld region as a breach of the residents' constitutional rights to have a healthy environment and well-being. Thus, it is a landmark decision for all communities affected by air pollution.[141]

The community has expressed that (i) the prominent oil and gas company in the region, Engen, does not engage or invest in the community or provide job security; (ii) the community already has the skilled labour force to drive just transition and there had to be (management) plans to create more jobs with the transition; (iii) the need for a health fund for the community to address the health risks of the community; (iv) there are voices in social dialogue that dominate and they should be sensitively managed when consulting the community; (vii) engagements must be undertaken in the dominant local language with support for other languages in the room; (viii) there must be a clear understanding of the function of the PCC and just transition and (ix) the community does not believe in government, the mayor and local government are seen to be absent in engaging with this community, while there are no responses to problems that are reported to the municipality.[142]

The voiced concerns by the South Durban community have already been explicitly addressed by the South African courts both in the *Shell* and *South Durban Community* cases. In this regard, the appropriate methods and language of engagement are fundamental blocks of making the engagement meaningful and facilitating procedural justice. The report's conclusion on the South Durban Basin community is that the community thinks that just transition must happen but that they cannot be left behind as they have been in the past. Furthermore, the community believes that a just transition is happening, but there is no justice.[143]

[137] Department of Environment Affairs and Tourism, *South Durban Basin Multi-Point Plan Case Study Report*, (Pretoria: Department of Environment Affairs and Tourism, 2007), 6.

[138] Kayleigh Bhangdia, 'Fighting for the Right to Breathe: Exploring Perspectives of Environmental Threats in the South Durban Basin' (2015), *Independent Study Project Collection* 2034, 6.

[139] Jyoti Jaggernath, Environmental Conflicts in the South Durban Basin: Integrating Residents' Perceptions and Concerns Resulting From Air Pollution, (2010) 10 *African Journal on Conflict Resolution* 137, 138.

[140] *The Trustees for the Time Being of Groundwork Trust and Other v The Minister of Environmental Affairs and Others* [2022] 39724/2019 ZAGPPHC 208. However, this case was granted a leave for appeal on 13 March 2023. See for the analysis of the air quality of the South Durban Basin, Tristan Meek, 'South Durban Community Environmental Alliance, Pollution, Air Quality & Health 2022-2023,' (15 November 2023), https://sdcea.co.za/2023/11/15/pollution-air-quality-health-2022-2023/ (accessed 19 December 2023).

[141] Centre for Environmental Rights, 'Analysis: Why the #DeadlyAir High Court Judgment Matters,' (13 April 2022), https://cer.org.za/news/analysis-why-the-deadlyair-high-court-judgment-matters (accessed 19 December 2023).

[142] Presidential Climate Commission, note 128, 25.

[143] Ibid.

F. Other Pertinent Issues

Clear and Comprehensive Explanations as to What the Transition Entails

It carries great importance that the communities understand what the just transition projects entail for them (in terms of the costs, resources and contribution of renewable energy to just transition).[144] For instance, the consultation with the Hotazel community revealed that just transition is too technical for the community. It needs to be simplified and communicated to communities in a relatable format, such as through community organisations and trusted leadership structures.[145]

Mpumalanga region is another example. Mpumalanga is a heavily coal-industrialised region. Although some communities in the region have been consulted, the report fails to demonstrate the severity of their needs. For instance, the people of Ermelo, the commercial hub of Gert Sibande district in the Mpumalanga province, state that they have been trying to convince the PCC to do a proper consultation with Ermelo because they wish to be informed about the shutting down of power stations and coal mines, as a coal-dependent community.[146]

The lack of awareness as to the consequences of the transition process is also evidenced by the recent research conducted by Seriti, a non-governmental and non-profit organization in South Africa.[147] Seriti targeted communities in the Mpumalanga, Limpopo and KwaZulu-Natal (which were also participants of the PCC consultations), focusing on coal miners, their families and other community members dependent on the coal value chain.[148] Seriti's research found that only 36 per cent of the respondents were aware of the JET initiative and 53 per cent of the respondents stated that it was the first time they heard about JET.[149]

Furthermore, Seriti's engagement with the Komati community has revealed that, although the community had formal information-sharing sessions already, due to the decommissioning of the Komati power plant, only 28 per cent confirmed that they received information on JET.[150] Unfortunately, this shows the inadequateness of the engagement with the affected communities, together with a need for more comprehensive and thorough explanations and engagement to facilitate procedural justice.

Lack of Engagement by the Government

Another important aspect is that the government is widely seen as unresponsive and negligent in its community engagement.[151] This is not a new issue for South Africa; on a national level, the country has been experiencing bad governance issues for years, spanning through a wide range of sectors.[152] For instance, in the stakeholder consultation about the decommissioning of the coal-fired power plant in Komati, stakeholders stated that the consultation should have started much earlier, with more frequent engagement opportunities and follow-up after engagements to respond to questions raised in sessions.[153]

[144] Ibid, 8.
[145] Ibid, 32.
[146] Thabo Molelekwa, 'Coal Communities Fear South Africa's Clean Energy Transition,' (2 February 2023), https://www.climatechangenews.com/2023/02/02/coal-communities-left-behind-fear-south-africa-green-energy-transition/ (accessed 20 December).
[147] Seriti, Community Response: Just Energy Transition (JET), (Johannesburg: Seriti, 2024).
[148] Ibid, 5.
[149] Ibid, 30.
[150] Ibid.
[151] Presidential Climate Commission, note 128, 7.
[152] See, e.g., Solomon Mandla Zembe and Neil Barnes, 'Exploring Community Engagement Challenges in the Mining Sector of South Africa' (2023) 9 *Indonesian Journal of Community Engagement* 53.
[153] Presidential Climate Commission, note 151, 11.

The lack of engagement by the government in relation to the transition process is evidenced also by Seriti's research, which shows that only 3 per cent of the respondents heard about the JET from the councillors or other government officials and only 4 per cent heard from the mining companies.[154] Furthermore, the engagement with the Komati community conveyed that the community did not believe in the JET process because the promises forthcoming from the community consultations were yet to be realised.[155]

The outcomes of the engagements with the communities can significantly contribute to the implementation of large-scale energy transition projects.[156] However, unfortunately, many communities have already voiced that they would only be consulted once and not updated or consulted about further developments related to the energy transition.[157]

Overall, the current feedback from the engaged stakeholders shows severe deficits in fulfilling the due process prong of energy justice. The consultation process is short of what is expected of such an existential overhaul of the current economy. However, it is (and it should be) an ongoing process.[158] The consultative process that has started must be taken further to cocreate partnerships for delivering on aspects of the plan and deepened by taking the conversation to the shop floor and community level.[159] Otherwise, the potential that just transition carries will only exacerbate the pre-existing inequalities entrenched in South African society.

V. Conclusion

The article focused on the due process aspect of procedural justice in the energy transition by first looking at South African case law and then the initial implementation of the South African JET IP. The just energy transition is a multifaceted issue that needs to be contextualised more broadly to accommodate social concerns, especially in the South African context. In this regard, South African jurisprudence provides important guidance on meaningful stakeholder engagement/participation that can be imported into the upcoming just energy transition processes.

At the heart of meaningful stakeholder engagement and participation lies genuineness. As such, affected communities must have a seat at the table from the beginning until the end of the project (and also in the aftermath of it) to voice their interests, needs and concerns. In other words, it must be an ongoing process. Such an approach legitimises the processes, makes the process more inclusive and fair, and grants equal access to the project's benefits to the communities who are the stakeholders affected by the project the most.

The deployment of renewable energies and the decommissioning of the old power plants surely bring additional stakeholder concerns into the equation. Such projects need a more critical understanding of the effects on workers in the affected communities and take their needs and concerns aboard. In this regard, just transition presents an opportunity to contribute to the climate challenges and address the pre-existing

[154] Seriti, note 147, 30.
[155] Ibid, 32.
[156] Ibid.
[157] Life After Coal Campaign & Fair Finance Coalition, *Just Energy Transition Investment Plan (JET IP) and Draft Electricity Recommendations: Comments on Behalf of the Life After Coal Campaign and the Fair Finance Coalition Southern Africa* (South Africa: Life After Coal Campaign & Fair Finance Coalition, 2023), 19.
[158] Presidential Climate Commission, note 123, 4.
[159] Presidential Climate Commission, note 122, 7.

concerns of the affected communities, such as health risks and inequalities in access to energy. Overall, the South African experience is not isolated, and the insights discussed above should also help and guide other countries in their stakeholder engagement/consultation processes.

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