

‘Grass in the cracks’: Gender, social reproduction and climate justice in the *Xolobeni* struggle

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Abstract

This chapter examines the opposition by members of the Xolobeni community to proposed mining on their communally-occupied land, including through litigation. While only one strategy amongst many, the use of law is notable and has thus far been effective in challenging the mining company and the government. The Xolobeni struggle points to important links between efforts to overcome gendered structures of production and reproduction and environmental destruction that offers insights for feminist struggles for climate justice. We draw on Silvia Federici’s gendered framing of the commons to tease out the key tensions in the long drawn-out opposition to mining in Xolobeni: the involvement of women as the main producers of food and custodians of the land, their movement to the centre of the struggle in the context of violence against activists, and their assertion of new forms of temporality that engage the responsibilities of the present generation to the future.

Key words: social reproduction, gender, climate justice, communal land, mining, litigation

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The very sense that we are living at the edge of a volcano makes it even more crucial to realise that, in the midst of so much destruction, another world is growing, like the grass in the cracks of the urban pavement, challenging the hegemony of capital and the state and affirming our interdependence and capacity for co-operation.

Silvia Federici¹

I Introduction

Duduzile Baleni, a Pondo headwoman from the Xolobeni area of South Africa’s Wild Coast, is the first applicant in a case brought by her community against the South African government and an Australian mining company hoping to secure the right to mine titanium and other minerals in an open cast mine over 900 hectares of coastal land on which the community resides. In late 2018 the High Court held that the mining rights could not be granted without the agreement of the community living there.² The decision has been appealed. The mining plan has caused conflict within the community, and between the

¹ Silvia Federici, *Re-Enchanting the World: Feminism and the Politics of the Commons* (PM Press 2019) 1.

community and the provincial and central governments, tragically involving the deaths of activists.

This chapter examines the Xolobeni opposition to the proposed mining to highlight the links between environmental justice struggles and feminist efforts to overcome the gendered structures of production and reproduction underpinning capitalism. What can the arguments against extractive mining in Xolobeni offer for constituting feminist responses to climate change? How can rights be engaged to challenge destructive extractivism that threatens the environment, the climate and continued life on earth? And how can such rights-based strategies centre gender equality in fighting for climate justice? At issue is not only protecting common resources, but also ensuring that they are governed sustainably and with the full attention to gender inequalities. The Xolobeni struggle over nearly two decades, and notably its pursuit through the courts, is a productive case to consider these questions. First, the system of communal land management has resonances with global struggles for a rural commons; second, the anti-mining claims of the community (by no means singular) have been articulated through and by women, and framed in terms of law and rights; third, the success, thus far, of the legal and political struggles has engaged the local, national and transnational levels.

The chapter draws on the ideas of Silvia Federici³ about gender, social reproduction, and resistance to enclosure of the commons to argue that the Xolobeni struggle is in important ways *simultaneously* gendered and anti-capitalist. These sites of contestation tend to be treated separately in practice, even though their interrelationships have by now been well noted, and we show how they might be brought into conversation with each other. We argue that struggles against mining constitute a particular and urgently needed intervention to halt, if not reverse, the pernicious effects of neoliberalism: the privatisation and marketisation of all aspects of human and non-human life leading to environmental and climate disaster. Since gender is a central structuring force within capitalism, resistance to mining can also be framed to entail resistance to the exploitation of women's reproductive labour. We use Federici's gendered framing of the commons to tease out the key tensions in the long drawn-out opposition to mining in Xolobeni: the involvement of women as the main producers of food and custodians of the conditions for the reproduction of food, their movement to the centre of the struggle in the context of violence against activists, and their assertion of new forms of temporality that engage the responsibilities of the present generation to the future. We recognise that ultimately it is the collective political organisation of people on the land that will advance and sustain justice. However, institutional mechanisms such as the law and Constitution *can* be allies as people mobilise. With Federici, we argue that the commons is

² *Baleni and Others v Minister of Mineral Resources and Others* 2019 (2) SA 453 (GP). Note that the case has already been the subject of considerable scholarly attention, including by: The WoMin Collective, 'Extractives vs Development Sovereignty: Building Living Consent Rights for African Women' (2017) 25 Gend Dev 421; Thuto Thipe, 'Land and Reparation Politics and Policy after Apartheid' in Daniel Magaziner (ed), *The Oxford Handbook of South African History* (Oxford Handbooks Online edn, OUP 2020); Jackie Dugard, 'Analysing Transformative Constitutionalism in South Africa: A View Through the Mineral Rights Adjudication Looking Glass' (forthcoming).

³ Federici (n 1).

not necessarily the space of egalitarianism, and the struggles for the commons must be attentive to the ways in which women are included as agents. In the context of a rather bleak moment, the Xolobeni struggle is a space of hope: it is the articulation of the possibility that destructive, extractivist patriarchal capitalism may be halted and that rights struggles may contribute to achieving climate justice. We understand climate justice as the recognition that climate change has differential social, economic and health impacts and therefore requires a movement for transformative action in all these interlinked areas. The Xolobeni struggle against mining on their land concerns environmental damage and destruction of the means to life. As Mary Mellor explains, (sufficiency) provisioning is at the heart of the relationship between productive and reproductive labour; ‘It is critical to the development of a radical political economy that is both socially just and ecologically sustainable’.⁴ In challenging extractivist capitalism, a central contributor to climate harm, the climate justice movement questions core ideas underpinning this system: that the earth’s resources can be squandered without thought for the future; that enclosure of land and the destruction of communal custodianship is required in the pursuit of profit; and that the capitalist state is a central facilitator of these goals. The Xolobeni example provides insights into strategies of resistance to this system and hope for wider efforts to undermine the structural conditions that have produced climate change.

Our argument is in two parts. First, we read the Baleni judgment in some detail to explore how a serious consideration of social reproduction could have changed both the ways in which the litigants framed their case and the way the court articulated its judgment, arguing that there is an opportunity in the appeal case for a closer and more valuable link to be made between environmental justice and gender equality. Second, we argue that specific legal gains are important in advancing the climate justice movement but that the sustainability of victories lies in the institutionalisation of democratic and inclusive mechanisms. In this respect, the specific histories of land tenure and governance in South Africa shape what is politically possible; we lay out some of these contours. In sum, we argue that a gender egalitarian approach to climate justice requires a focus on social reproduction as well as inclusive governing of common resources. The chapter begins with a history and account of the Xolobeni struggle within and outside of the courts (**Part II**). It then conducts a re-reading of the High Court judgment, Baleni’s affidavit and the Acts at the centre of the litigation to draw out the unexamined gender issues in the case (**Part III**). It goes on to outline the ideas of Federici and others on gender, climate and the commons to construct an analysis of the Xolobeni case and reflect on what the unfinished story of Xolobeni means for the uses of law and rights in the gendered struggle for climate justice (**Part IV**).

II History of community resistance, including through litigation, to the mining licence

Xolobeni lies between the Mzamba and Mtentu rivers and is the traditional land of the Mpondo people. The area has five village settlements with Xolobeni being the largest.

⁴ Mary Mellor, ‘An Eco-Feminist Proposal: Sufficiency Provisioning and Democratic Money’ (2019) 116/117 NLR 189, 190.

Xolobeni village itself has around 320 residents; the wider area is no more than 3000 people tightly connected by family ties, with women constituting the majority of residents.⁵ All the villages fall under the Amadiba Traditional Authority. This is communal land,⁶ nominally owned by the state (already a form of enclosure) and in practice designated customary land. The occupants hold a coveted Permission to Occupy certificate that guarantees secure tenure. The area is the second-richest botanical reserve in South Africa and this biodiversity is central to food security. Crops grown for consumption in the area include yams, spinach, carrots, lemons and guavas; most are produced for subsistence but some of them make their way to markets in Durban and East London.

This is not an area without problems. Xolobeni is under the provincial jurisdiction of the Eastern Cape, which has suffered under poor governance and corruption for the past two decades. Formal unemployment is high, and its pattern is gendered. Zamchiya estimated that only 12.7% of residents in the Xolobeni area had formal paid jobs, and of those 70% are held by men between the ages of 21 and 40 years.⁷ The Xolobeni area has a youthful population, with over two thirds between the ages of 18 and 35.⁸ There are no jobs in the cities. Literacy levels are low - unsurprising as the nearest school is 15km away - and the community is reliant on erratic mobile clinics for health care. Virtually the whole population (89%) is dependent on natural water from springs, boreholes and small dams. Very few households have access to electricity.⁹

The extraordinary biodiversity resulted in the area being brought under the Pondoland Marine Protected Area, governed by the National Environmental Management: Protected Areas Act 57 of 2003. By the time this protected status was legally declared, an Australian mining company, Mineral Resources Commodities (MRC), was eyeing the coastline's rich deposits of ilmenite and other minerals containing titanium – described on the company's website as ‘world class mineral sands.’¹⁰ Under the Environmental Act, mining was prohibited.

MRC had entered the country just after the end of apartheid, securing the rights to mine on the Cape’s West Coast and establishing the Tormin Mineral Mine. Exploratory drilling for titanium by the Australian company Transworld Energy and Mineral Resources (TEMR) on the Wild Coast found that there were considerable reserves in the sands of Xolobeni and the

⁵ Adrian Frith, ‘Xolobeni A: Main Place 297385 from Census 2011’ (*Census 2011*, 2013) <<https://census2011.adrianfrith.com/place/297385>> accessed 20 May 2021.

⁶ Note that there are important distinctions between communal land, communal activity, ‘the commons’, communitarian forms of social organisation, etc. Colonialism and apartheid have complicated the use of these terms in the South African context, but we are nevertheless intending here to draw out the implications of complicated land tenure and ownership relations for democratic forms of decision-making of public resources as understood generally under the label of ‘the commons’.

⁷ Phillan Zamchiya, ‘Differentiation and Development: The Case of the Xolobeni Community in the Eastern Cape, South Africa’ (2019) PLAAS Working Paper 61 <<http://repository.uwc.ac.za/xmlui/handle/10566/5086>> accessed 4 June 2021.

⁸ Statistics South Africa, ‘Xolobeni B’ (*Statistics South Africa*, 2011) <http://www.statssa.gov.za/?page_id=4286&id=6537> accessed 4 June 2021.

⁹ Nomsa Virginie Sibane, ‘Environmental Politics: The Case of the Xolobeni Mining Project in Mbizana, Eastern Cape Province, South Africa’ (MPhil thesis, University of Fort Hare 2012).

¹⁰ Mineral Commodities Limited, ‘Mineral Sands’ (*Mineral Commodities*, 2020) <<https://www.mineralcommodities.com/operations-projects/south-africa/>> accessed 20 May 2021.

government gave the company prospecting rights. In 2001, Mineral Commodities Limited (MRC) acquired a large share of TEM, making it the holding company. MRC proceeded the following year to seek the rights to mine for the lucrative mineral titanium in a strip 22km long and 2km wide. It is estimated that there are 20 years' worth of mineral in the sands.¹¹ A process of designating the land as mine-able began when it was granted a prospecting license in 2002 (a year before the area was designated a Protected Marine Area) and a full mining license was granted in 2008. MRC had allies within government – most notably the Ministry of Mineral Resources, which saw mining as a desirable form of development, harking back to a century earlier when gold and diamonds were the basis of building the modern South African economy. The process of awarding the license was considered suspicious by activists in the area in terms of public consultation (who precisely had been consulted inside the affected communities?) as well as a skimpily-conducted environmental impact assessment.¹²

In 2003, in line with the black economic empowerment regulations introduced under the Mbeki era, MRC created a local ‘empowerment partner’ called the Xolobeni Empowerment Company (XolCo), which claimed to represent the communities affected. XolCo’s right to represent the interests of the Xolobeni was highly contested.¹³ XolCo was invited to a community meeting in March 2007; when they failed to turn up, an alternative mechanism for representation, the Amadiba Crisis Committee, was formed by some members of the community.¹⁴ Traditional councils are themselves divided on whether to allow the mining. While Lungi Baleni, the most senior traditional leader (male), joined XolCo, headwoman and relative Cynthia Baleni has been a leader of the anti-mining members of the community. These separate and competing claimants to community representation were only the start of the tensions that would follow.

The struggle against mining in the area has been marked by high levels of violence against leading activists. Between 2002 and 2018, at least twelve opponents of the mining are believed to have been murdered; all the cases are still unsolved.¹⁵ The backbone of the opposition to mining, predictably, is the women in the area, currently led by the feisty Nonhle Mbhuthuma.¹⁶ Mbhuthuma was one of the founders of the Amadiba Crisis Committee (ACC). Her colleague Sikhosiphe (Bazooka) Rhadebe, was assassinated in 2016, and she lives with permanent bodyguards as she has been threatened so many times. Given their roles

¹¹ Dale T McKinley, ‘Xolobeni, Eastern Cape’ in Julie Reid and Dale T McKinley (eds), *Tell Our Story: Multiplying Voices in the News Media* (Wits University Press 2020).

¹² For a thorough discussion, see Andrew Bennie, ‘The Relation between Environmental Protection and “Development”: A Case Study of the Social Dynamics involved in the Proposed Mining at Xolobeni, Wild Coast’ (MA research report, University of the Witwatersrand 2010).

¹³ McKinley (n 11).

¹⁴ Legal Resources Centre and Richard Spoor Inc, ‘Withdrawal of Australian Mining Company MRC Welcomed by Xolobeni Community; Questions on Way Forward Remain’ *Mining Weekly* (Johannesburg, 18 July 2016) Latest News <<https://www.miningweekly.com/article/withdrawal-of-australian-mining-company-mrc-welcomed-by-xolobeni-community-questions-on-way-forward-remain-2016-07-19>> accessed 20 May 2021.

This statement summarizes objections raised over many years.

¹⁵ Lindsay Maasdorp and Thabo Miyeni, ‘Threats and Murder won’t Stop South Africa’s Environmental Activists’ *Open Democracy* (London, 3 January 2021) <<https://www.opendemocracy.net/en/5050/threats-and-murder-wont-stop-south-africas-environmental-activists/>> accessed 20 May 2021.

¹⁶ Rosa Luxemburg Stiftung, ‘Xolobeni – The Right to Say No’ (5 Feb 2020) <<https://www.youtube.com/watch?v=Q8p1VXDgLkY>> accessed 4 June 2021.

in food production, and apartheid era laws that restricted their movement into the cities, women are the stalwarts of rural areas. While their economic and social roles are generally recognized, there has been a longstanding battle between rural women and the state in relation to the governance arrangements advanced by the post-1994 government. Legislation entrenching the power of traditional leaders has been consistently challenged by women on the grounds that it deprives them of meaningful equal participation in decision-making.¹⁷ The incorporation of women into the national government creates a further South African peculiarity in the roles of women in governance struggles, as gender targets place women in numerous places of authority, sometimes pitted against each other in ways that complicate questions of representation. In Xolobeni, for example, the Pondo queen, MaSobhuza Sigcau, intervened directly as broker between the community and the woman Minister of Co-operative Governance Buyelwa Sonjica.

The ACC was in for a long war of political attrition, using direct collective action and legal challenges.¹⁸ It also astutely drew on experienced lawyers with a track record on both the history of land and in fighting mining companies. After intense and highly mobilized opposition by the local communities, the mining licence was first suspended and then withdrawn in 2011 and then reissued in 2015. As the opposition escalated, the Ministers responsible in the Cabinet changed. President Ramaphosa appointed Gwede Mantashe as the Minister of Mineral Resources in early 2018. Mantashe is a ‘local boy’ from the Eastern Cape, a former gold mine worker and leader of the National Union of Mineworkers, who as government minister stepped in on the side of the mining company. His position reveals most explicitly the extent to which the government remains rooted – statically and unhelpfully – in the old extractivist models of economic development in South Africa. For Mantashe, the community ought to welcome titanium mining as it would build the economy in the same way that coal, gold and diamonds did a century ago. It is, he said, ‘being treated like a curse rather than a blessing. It is not treated as a wealth, it is treated as more of a negative. It is a polluter, it is a depravation and all that. That worries me because the mining we have, we are endowed with it naturally.’¹⁹ Mantashe reflects a deafness here to the environmental justice movement that has long pointed out the impacts of gold mining on the land.²⁰ His response

¹⁷ Sindiso Mnisi and Aninka Claassens, ‘Rural Women Redefining Land Rights in the Context of Living Customary Law’, *South African Journal on Human Rights*, 25(3) 2009: 491-516.

¹⁸ Thom Pierce, ‘South Africa’s Wild Coast Under Threat of Mining – Photo Essay’ *The Guardian* (Sydney, 20 Aug 2018) Environment <<https://www.theguardian.com/environment/2018/aug/20/the-australian-mining-threat-to-south-africas-wild-coast-photo-essay>> accessed 4 June 2021; Sonwabile Mnwana ‘Why South African Community’s Win Against Mining Company Matters’ *The Conversation* (Melbourne, 13 December 2018) Politics + Society <<https://theconversation.com/why-south-african-communitys-win-against-mining-company-matters-107746>> accessed 4 June 2021; Andrew Bennie ‘Mining will not Bring Jobs to Xolobeni’ *Daily Maverick* (Johannesburg, 15 January 2019) <<https://www.dailymaverick.co.za/article/2019-01-15-mining-will-not-bring-jobs-to-xolobeni/>> accessed 4 June 2021; Sabelo Ngubeni, ‘Xolobeni Mining Ruling Compromises the State’ *Mail & Guardian* (Johannesburg, 13 Sep 2019) <<https://mg.co.za/article/2019-09-13-00-xolobeni-mining-ruling-compromises-the-state/>> accessed 4 June 2021; Thom Pierce, ‘Postcards from Xolobeni’ (*Thom Pierce Studios*, 2020) <<https://thompierce.com/postcards-from-xolobeni>> accessed 4 June 2021.

¹⁹ S’thembile Cele, ‘Mantashe: Xolobeni Ruling Means We Could Have No Mining in SA’ *City Press* (Johannesburg, 22 November 2018) <<https://www.news24.com/citypress/business/mantashe-xolobeni-ruling-means-we-could-have-no-mining-in-sa-20181122>> accessed 4 June 2021.

²⁰ Jacklyn Cock, ‘Radical Agendas #5: An Eco-Socialist Order in South Africa’ (*ROAPE*, 18 January 2016) <<https://roape.net/2016/01/18/radical-agendas-5-an-eco-socialist-order-in-south-africa/>> accessed 4 June 2021.

also exposed the government's authoritarian side - its preparedness to use its power to impose decisions on communities. In Xolobeni, specifically, the government is refusing to see loss of lands and long term depletion of fertile soil as any kind of significant loss of rights, or to consider the implications of mining for the environment or, fundamentally, to understand that the state has a responsibility to protect public goods.

Clearly, these represent conflicting visions of development and the good life. On the one side, government wants to turn the people of Xolobeni into wage workers, rather than farmers and fisher people, with enclosure classically leading to proletarianization and precarity. Jacklyn Cock shows these links:²¹

the environmental imaginary of the post-apartheid state is focused on economic growth; nature is viewed instrumentally as a store of resources for growth, rather than for social needs or environmental sustainability. It is an imaginary which involves conflict and violence both to nature and people. But this hegemonic imagery is increasingly being challenged by disparate groups of the poor and marginalised who are promoting an alternative environmental imaginary centered on nature as a source of justice, meaning the acknowledgement of rights (which often implies the need for redistribution) and livelihoods.

On the other side, people contest the narrative that development is necessary because they are poor: ACC chairperson Sibusiso Mqadi (sadly deceased early in November) stated: "We don't need outsiders to tell us we are poor. We are not poor. Not a single person in Xolobeni goes to bed hungry....We get fish, crayfish, mussels from the sea... we plant vegetables in this beautiful and fertile soil of ours. We are happy with this way of life and feel it is an insult to suggest we are poor."²² And 85-year old Magusheni Madondo insisted: 'We never said we want mining and we never said we are poor, and no one must decide for us. That we are poor. We don't need their jobs if it comes through mining...This is the land of our forefathers and we are going to fight for it for the benefit of our own children and their offspring.'²³ On these issues, there are alliances between the residents of Xolobeni and environmental justice activists. The environmental justice movement was mischaracterized as being driven by white people.²⁴ It is obviously a convenient narrative in racialized South Africa to attribute opposition to mining as being pushed by an 'outsider' to the community and to cast ecotourism as a 'white' strategy.²⁵ But the ACC argues that the outcomes of mining –

²¹ Jacklyn Cock, 'Conflicting Environmental Imaginaries in Post-Apartheid South Africa' in Katharine Legun and others (eds), *The Cambridge Handbook of Environmental Sociology* (Vol 1, Cambridge University Press 2020) 285.

²² Lubabalo Ngcukana, 'Mining Project will Destroy Us, say Xolobeni Villagers' *City Press* (Johannesburg, 1 October 2018) <<https://www.news24.com/citypress/news/mining-project-will-destroy-us-say-xolobeni-villagers-20181001>> accessed 4 June 2021.

²³ ibid.

²⁴ For a wider perspective on race and the environmental movement, see also Neil Overy, 'St Lucia, Xolobeni and the Problem of Wilderness' *Daily Maverick* (Johannesburg, 1 March 2019) <<https://www.dailymaverick.co.za/article/2019-03-01-st-lucia-xolobeni-and-the-problem-of-wilderness/>> accessed 20 May 2021.

²⁵ Jacklyn Cock, 'The Radicalization of Environmental Justice in South Africa' in Dorothy L Hodgson and Judith A Byfield (eds), *Global Africa: Into the Twenty-First Century* (University of California Press 2017).

depletion of the land, pollution of the soil and likely the ocean – are of limited benefit to the community. What is needed, they argue, is to look to the future – to think of the land as being held in trust for this generation as well as future generations, that the mine was only projected to last for approximately 20 years, and after that the community would be worse-off for no longer being able to subsist on the land.²⁶

The community of Xolobeni eventually challenged the mining project through the courts. In the main case, the ACC took on the Minister of Mineral Resources to test the meaning of consultation.²⁷ A further court success followed on 14 September 2020 when the North Gauteng High Court held that the Xolobeni community were entitled to a copy of the company's application for a mining right, previously withheld from them.²⁸ The court found that this was necessary for 'meaningful consultations.' These decisions were significant blows to the state and companies involved in mining rights applications and have wider implications for communities elsewhere in South Africa.

We now examine the main decision on community consultation to consider how the missing gender dimension in the case might be productively introduced into conceptualizations of the impacts of extractivism. Our critical reading of the case aims to understand how gender impacts on the dynamics of this community, its resistance and its recourse to law, in order to learn broader lessons about gendered rights struggles for climate justice.

III The untold story: Excavating gender in the Xolobeni litigation

The *Baleni* judgment of Basson J, while very significant in its progressive interpretation of the law based on the Constitution of the Republic of South Africa, 1996,²⁹ is largely silent on issues of gender affecting the community.³⁰ The judgment provides a narrative that situates the Xolobeni community as proud occupiers of land which is central to their history, culture, subsistence and way of life. It uses rich and emotive language to illustrate this, describing the terrain as 'a coastline area of immense natural beauty'³¹ and beginning the judgment with a moving quote, illustrating the brutal dispossession of black South Africans,³² to explain the centrality of the struggle to regain their most valued resource – their land.³³ Racial justice and

²⁶ Rosa Luxemburg Stiftung (n 16).

²⁷ *Baleni* (n 2).

²⁸ *Baleni and Others v Regional Manager Eastern Cape Department of Mineral Resources and Others* 2021 (1) SA 110 (GP). See also Tracey-Lynn Field, 'South African Community Wins Right to Access Mining Application. But who will Win the War?' *The Conversation* (Sydney, 14 October 2020) Environment + Energy <<https://theconversation.com/south-african-community-wins-right-to-access-mining-application-but-who-will-win-the-war-147522>> accessed 5 June 2021.

²⁹ Dugard (n 2).

³⁰ The Court is of course guided by the arguments before it as shaped by the legal team who choose whether to highlight issues of gender in the case: Cathi Albertyn and Shamim Meer, 'Citizens or mothers? The marginalization of women's reproductive rights in the struggle for access to health care for HIV-positive pregnant women in South Africa' in M Mukhopadhyay and S Meer (eds) *Gender, Rights and Development: A Global Sourcebook*, (Royal Tropical Institute (KIT), 2008).

³¹ *Baleni* (n 2) [2].

³² *ibid* [1].

³³ The judgment mentions the history of violent conquest by the Zulu nation (the Mfecane) that led the community to settle in the early 1800s. *ibid* [9].

self-determination are central values informing the decision. The judgment refers to the centrality of ‘living customary law’, communal decision-making, and the importance of ancestral graves and community rituals. Again, it is expressive in referring to the community as comprising ‘the collection and intertwined relationships between the living and the dead’.³⁴

The court was required to determine the interaction between the consent requirements of the Interim Protection of Informal Rights to Land Act 31 of 1996 (IPILRA) and the consultation requirements of the Mineral and Petroleum Resources Development Act 28 of 2002 (MPRDA).³⁵ The MPRDA replaced the common law owner of land with the state, as ‘custodian of all mineral resources on behalf of the people of South Africa’,³⁶ while the IPILRA was introduced by the new democratic government to ‘protect those who held insecure tenure because of the failure to recognise customary title’ under apartheid.³⁷ The court concluded that, by reading both Acts together, the community must be allowed to reach a communal decision based on their custom regarding whether to consent to deprivation of their land. This is an important interpretation of the law that firmly privileges decision-making by the affected community based on the Constitution’s focus on advancing the rights of historically excluded people under apartheid.³⁸

The Founding Affidavit of Dudu Baleni, itself a story crafted by lawyers to make a compelling case, offers hints about the links between gender and struggles for the land.³⁹ The affidavit certainly attests to communitarian rights to land,⁴⁰ the social and economic interdependence of the community,⁴¹ and ‘networks of support and mutual dependency’ in the sharing of food, resources and labour.⁴² Subtle references to gender differences are mentioned. For example, the affidavit explains the process of land allocation to the ‘umzi’ (household).⁴³

Land is typically allocated to an umzi and not to individuals. The head of umzi in whose name the land gets allocated holds it in trust for all members of their umzi. After allocation, such land becomes a resource exclusively belonging to that particular umzi in perpetuity. This is so even if it is clear that only specific family members, such as the women in the umzi, will have the primary or even exclusive use thereof.

³⁴ ibid [7].

³⁵ The case built on the Constitutional Court decision in *Maledu and Others v Itereleng Bakgatla Mineral Resources (Pty) Limited and Another* 2019 (2) SA 1 (CC) that found that communal occupiers could not be evicted from land by mining companies in exercise of their mining rights.

³⁶ *Baleni* (n 2) [42] citing the Mineral and Petroleum Resources Development Act 28 of 2002, s 3. Note that the Act has led to the drafting of a Mining Charter which has been the subject of significant contest for many years. See Centre for Applied Legal Studies (CALS), ‘Mining Charter’ (*University of the Witwatersrand*, 2019) <https://www.wits.ac.za/cals/our-programmes/environmental-justice/mining-charter/> accessed 5 June 2021.

³⁷ *Baleni* (n 2) [51].

³⁸ See Thipe (n 2); Dugard (n 2).

³⁹ Duduzile Baleni, ‘Founding Affidavit, In the High Court of South Africa (Gauteng Division, Pretoria)’ (2016) Case No: 73768/2016.

⁴⁰ ibid [72].

⁴¹ ibid [115].

⁴² ibid [57].

⁴³ Ibid [96].

This implies that while a male household head may be named as the person to whom the land is allocated, women will still have use. It also implies that male members may leave the area for paid labour elsewhere but do not relinquish entitlements to the land worked by remaining women. Women who remain on the land provide the continuous care of land and property that supports the communities living there and those returning intermittently. This is a well-worn tale of gendered patterns of migrant labour in South Africa. What is unusual is the occupancy rights and decision-making powers of women in the Xolobeni community, less commonly seen elsewhere in South Africa.⁴⁴

Baleni's affidavit also references the different roles of men and women during the 'Pondo revolt' of the 1960s to resist attempts to relocate the community by an apartheid government 'betterment programme'.⁴⁵ She explains that 'In this war, all able-bodied men of the community took up arms, while women were supplying food, intelligence and protection'.⁴⁶ While this indicates the long-standing resistance to enclosure of the land, it is further evidence of the different but equally important allocation of gender roles in the communal life of, and in the defence of, the commons. The affidavit also documents the physical violence suffered by men and women in the community who have resisted the mine.⁴⁷ Similar events have been seen in contests over access to land by mining companies elsewhere in South Africa. In October 2020 Fikile Ntshangase, a woman leader of the Mfolozi Community Environmental Justice Organisation, (MCEJO) opposing coal mining in Northern KwaZulu-Natal was shot dead in her home.⁴⁸ Women have been fierce in their resistance and have been met with violence, as is often seen in struggles to enclose commons all over the world.⁴⁹ This echoes the earlier resistance of the Pondo revolt, although in this case women seem to be even more active on the frontline of conflict.⁵⁰

Baleni's affidavit captures the dangers that mining and destruction of the land and way of life poses to the community. She notes that:⁵¹

There will be strong opposition in the community to significant members (sic) of outsiders coming to live in our community. We are concerned that they will overwhelm our existing and limited social services, that they may introduce crime, alcohol, prostitution and other social ills, as is often the case ...

This suggests that the state services such as schools and clinics,⁵² though sparse, are essential to support the community alongside its own communal resources. The litigants' fear is that

⁴⁴ The WoMin Collective (n 2) 434.

⁴⁵ Baleni, 'Founding Affidavit' (n 39) [63].

⁴⁶ *ibid* [118].

⁴⁷ *ibid* [185-201].

⁴⁸ Fred Kockott and Matthew Hattingh, 'Fikile Ntshangase Opposed a Mine Extension. Last Night she was Murdered' *GroundUp* (Cape Town, 23 October 2020) <<https://www.groundup.org.za/article/mining-activist-murdered-kzn/>> accessed 5 June 2021.

⁴⁹ Itzá Castañeda Camey, Laura Sabater, Cate Owren and A. Emmett Boyer, *Gender-based violence and environment linkages: The violence of inequality* (IUCN, 2020), 162-177.

⁵⁰ The WoMin Collective (n 2).

⁵¹ Baleni, 'Founding Affidavit' (n 39) [145].

⁵² *ibid* [154.6.1].

outside workers will deplete these resources,⁵³ putting strain on the careful balance of communal subsistence. Their assumption is that the state will not step in to increase service provision in a province where government has been slow to improve the lives of its people. They also worry, based on the experience of other mining-affected communities, that an influx of workers will lead to damaging social impacts.

The concerns expressed in the affidavit are not unfounded. Mine workers, usually men living in hostels, tend to displace the labour of reproduction such as cooking and laundry onto women. Many of these women in the communities surrounding the mines are already burdened with sustaining their own families. Alcohol, crime and sex work also threaten the community in gendered ways with sexual violence and other forms of interpersonal violence evidently a (legitimate) fear. The gendered impacts on mining affected communities are well documented both within and outside South Africa and are clearly known to the Xolobeni community.⁵⁴ The judgment could have drawn on this evidence to show how the proposed mine might undermine the necessary social reproduction of the community.

A further way in which the case relates to, but does not tackle, gender issues concerns the two central pieces of legislation in the case: the MPRDA and the IPILRA. Both refer to the inclusion of women as central to the aims of each Act, while evading the question of underlying gender inequalities. The MPRDA lists expanding ‘opportunities for historically disadvantaged persons, including women and communities, to enter into and actively participate in the mineral and petroleum industries and to benefit from the exploitation of the nation’s mineral and petroleum resources’.⁵⁵ The Act also lists the objectives of advancing the social and economic welfare of all South Africans⁵⁶ and giving ‘effect to s 24 of the Constitution by ensuring that the nation’s mineral and petroleum resources are developed in an orderly and ecologically sustainable manner while promoting justifiable social and economic development’.⁵⁷ The relationship between ecological sustainability, mining, the needs of communities and the social and economic development of the wider society are undoubtedly complex. However, the Act does not provide any meaningful direction in

⁵³ Shirin M Rai, Catherine Hoskyns and Dania Thomas, ‘Depletion: The Cost of Social Reproduction’ (2014) 16 *Int Fem J Politics* 86; Beth Goldblatt and Shirin M Rai, ‘Recognizing the Full Costs of Care? Compensation for Families in South Africa’s Silicosis Class Action’ (2018) 27 *S & LS* 671.

⁵⁴ WoMin, ‘Women, Gender and Extractivism in Africa: A Collection of Papers’ (International Alliance on Natural Resources in Africa) <<https://womin.africa/archive/available-literature/>> accessed 2 June 2021; Christina Hill and Kelly Newell, ‘Women, Communities and Mining: The Gender Impacts of Mining and the Role of Gender Impact Assessment’ (Oxfam Australia, December 2009) <<https://policy-practice.oxfam.org/resources/women-communities-and-mining-the-gender-impacts-of-mining-and-the-role-of-gende-293093/>> accessed 5 June 2021; Kuntala Lahiri-Dutt (ed), *Gendering the Field: Towards Sustainable Livelihoods for Mining Communities* (ANU Press 2011); South African Human Rights Commission, ‘National Hearing on the Underlying Socio-Economic Challenges of Mining-Affected Communities in South Africa’ (South African Human Rights Commission, September and November 2016) <<http://www.sahrc.org.za/home/21/files/SAHRC%20Mining%20communities%20report%20FINAL.pdf>> accessed 5 June 2021; Salimah Valiani and Nester Ndebele, ‘A Feminist Perspective on Women and Mining in South Africa’ in Salimah Valiani (ed), *The Future of Mining in South Africa: Sunset or Sunrise?* (MISTRA 2018).

⁵⁵ Mineral and Petroleum Resources Development Act 2002, s 2(d).

⁵⁶ ibid s 2(f).

⁵⁷ ibid s 2(h).

resolving this. The reference to ‘women and communities’ as historically disadvantaged groups assumes that they should benefit from mining along with other more advantaged stakeholders. It does not consider the possibility that ‘women and communities’, or the environment for that matter, may be better served without mining proceeding at all.⁵⁸

To give effect to the IPILRA, the Department of Rural Development and Land Reform prepared a policy and procedure for the Minister of Land to make development decisions about land where the Minister is nominally owner of the land.⁵⁹ This policy refers to the ‘White Paper on South African Land Policy’ which states that decisions about land must ‘establish whether the changes protect the rights of women’ and the Minister must ensure that the rights of women are protected in the decision-making process.⁶⁰ While the Baleni application does not list women’s rights as one of the rights implicated in this case⁶¹ the references to these rights in the MPRDA and the policy documents flowing from the IPILRA point to the need to investigate how these rights are impacted by the proposed mine.

As noted, the case was framed around land rights and community consent. The judgment responds well to this framing by asserting the centrality of the land to the reproduction of the community now and for future generations. While this was an important victory, from a feminist climate justice perspective the framing was limited. Neither the affidavit nor the judgment foreground gender and environmental rights sufficiently. In the next section, we read the possibilities for a more nuanced interpretation of the complex interplay of issues in this case. Using the concepts of provisioning and social reproduction, both of which are framed as part of the commons by Mellor and Federici, we explore how mining impacts climate change and how unchecked extraction impacts the production-reproduction nexus. Such arguments might fortify responses to the government and the mining company’s appeal case and provide precedent for future interpretation of the legislation.

IV Xolobeni as prefigurative for climate struggles: Defence and governance of the commons

The discussion above lays out what could be read as a straightforward account of successful social movement mobilization combined with strategic uses of the law, albeit with insufficient attention to gender and the environment. However, we want to extend this to highlight the prefigurative aspects of this struggle for the range of issues that may arise in litigating cases connected to environmental destruction and climate change, and to tease out the gender questions at stake. Margaret Davies explains prefigurative theory, or

⁵⁸ Communities are aware that where mining rights have been granted with requirements to remediate land after the project ends there is evidence that this is neither undertaken nor enforced by the state leading to further doubts about allowing such projects: South African Human Rights Commission, *National Hearing on the Underlying Socio-Economic Challenges of Mining-Affected Communities in South Africa*, 2016, <https://www.sahrc.org.za/home/21/files/SAHRC%20Mining%20communities%20report%20FINAL.pdf>

⁵⁹ Documented in Baleni, ‘Founding Affidavit’ (n 39) [236].

⁶⁰ South African Government Department of Land Affairs, *White Paper on South African Land Policy* (DLA, April 1997) 90-1 <<https://www.gov.za/documents/south-african-land-policy-white-paper>> accessed 5 June 2021.

⁶¹ See Baleni, ‘Founding Affidavit’ (n 39) [276].

‘methodologies that are hopeful in the sense that they imagine and create at the same time as engage with and describe the world’.⁶² In ‘choosing a present in order to imagine a future’⁶³ we consider how the Xolobeni struggle and the way of life it defends anticipates an ecologically sustainable and just social system built around social reproduction and production within the commons, and a legal framework that can recognize this as legitimate, desirable and even exemplary. The legal struggle is thus prefigurative in terms of the politics of resistance but also in terms of substantive conceptions of social and ecological ordering and new ways of understanding and using law. Just as law is often complicit in the harm of climate destruction it might, in some instances, be mobilized both to remedy harm that has already occurred and also work to anticipate and prevent it.⁶⁴ It may even, in the right conditions, support radical transformative conceptions of new social formations that require environmental remediation and a sustainable world.⁶⁵

Eco-feminism and climate justice

Skosana and Cock argue that the struggles of women in mining-affected communities are eco-feminist in practice, even if not explicitly articulated as such, and even when not part of how the women themselves might identify. They point to three relevant ways in which eco-feminist concerns underlie their struggles: 1) their roles in social reproduction (especially in the garnering of food, energy and water), 2) the solidaristic and communal nature in which struggles are fought, and 3) the respect for nature itself.⁶⁶ Eco-feminists have noted the uneven impact of environmental degradation and climate destruction on women who perform much of the world’s social reproductive work, itself dependent on natural resources.⁶⁷ Mellor explains that reproductive work, which is gendered, ‘stands between ‘the economy’ and the natural world, grappling with the consequences of ecological destruction’.⁶⁸ Federici argues that ‘as the primary subjects of reproductive work, historically and in our time, women have depended on access to communal natural resources more than men and have been most penalized by their privatization and most committed to their defence’.⁶⁹ Based on the idea that

⁶² Margaret Davies, *Law Unlimited: Materialism, Pluralism, and Legal Theory* (Routledge 2017).

⁶³ Margaret Davies, ‘Beyond Unity: Feminism, Sexuality, and the Idea of Law’ in Vanessa E Munro and Carl F Stychin (eds), *Sexuality and the Law: Feminist Engagements* (Cavendish Press 2007); Davina Cooper, *Everyday Utopias: The Conceptual Life of Promising Spaces* (Duke University Press 2014).

⁶⁴ Beth Goldblatt and Shirin Rai, ‘Remedying Depletion through Social Reproduction: A Critical Engagement with the United Nations’ Business and Human Rights Framework’ (2020) 3 EJPG 185.

⁶⁵ Bronwen Morgan and Declan Kuch, ‘The Socio-Legal Implications of the New Politics of Climate Change’ (2016) 39 UNSWLJ 1715.

⁶⁶ Dineo Skosana and Jacklyn Cock, “Our Existence is Resistance”: Women and the Challenge of the Climate Crisis and Covid-19 Pandemic Lockdown in Mining-Affected Communities in South Africa’ (2020) Society, Work & Politics Institute (SWOP), University of the Witwatersrand <<https://www.swop.org.za/post/our-existence-is-resistance-women-and-the-challenge-of-the-climate-crisis-and-covid-19-pandemic>> accessed 5 June 2021.

⁶⁷ Julie A Nelson and Marilyn Power, ‘Ecology, Sustainability, and Care: Developments in the Field’ (2018) 24(3) Fem Econ 80; Stephanie Buechler and Anne-Marie Hanson (eds), *A Political Ecology of Women, Water, and Global Environmental Change* (Routledge 2015); Patricia Perkins ‘Climate Justice, Gender and Intersectionality’ in Tahseen Jafry (ed), *Routledge Handbook of Climate Justice* (Routledge 2019); Bernadette P Resurrección, ‘Persistent Women and Environment Linkages in Climate Change and Sustainable Development Agendas’ (2013) 40 Women’s Stud Int Forum 33.

⁶⁸ Mellor (n 4) 191.

⁶⁹ Federici (n 1) 107.

social reproduction is the work involved in creating and maintaining life, threats to the communal land and environment of Xolobeni are intricately enmeshed in threats to the way of life of people in that community, particularly the women, and their capacity to reproduce themselves over time.

Perkins notes that ‘In the face of climate change, movements in the Global South and North, largely led by women, are resisting ongoing enclosures for extraction and fossil fuel industries and, in the process, reclaiming commons’.⁷⁰ Federici points out that not all struggles for the commons are successful, but the very fact that they are fought is important. They contain, she argues, both the reinstatement of democratic politics – the renewal of voices at the grassroots, and the mobilisations of ordinary people otherwise disabled by neoliberalism – as well as the seeds for a different future. ‘It is impossible, in fact, to defend existing communal rights without creating a new reality, in the sense of new strategies, new alliances and new forms of social organization.’⁷¹ Legal strategies are part of these struggles with a growing focus by ecofeminist lawyers to link environmental and climate justice to broader intersectional feminist and social justice movements.⁷²

Governance of the commons

An important link between the climate justice concerns and gender egalitarianism is the precise design of governance and the role of traditional authorities, which impacts on the control over and uses of the commons. Federici considers the process of formalising and extending *traditional* control a form of gender enclosure, as it restricts women’s access to and control over land by placing control in the hands of a few. We can see the use of these instruments in the Xolobeni conflict. In November 2019, President Ramaphosa signed the Traditional and Khoi-San Leadership Act 3 of 2019 into law. The Act will allow traditional councils to sign partnerships with companies without necessarily gaining the consent of the communities they govern. The Act is seen to resurrect colonial and apartheid forms of chiefly authority, reinscribing a compulsory dual legal system. Undue power will be given to chiefly authorities while the rights of ordinary rural people are undercut. It comes on top of the Traditional Courts Bill 15 of 2008 which directly affects women and children who are main rural dwellers. It allows traditional authorities enormous say in land allocation and allows them to charge a ‘tax’ or fees for use of resources. It deprives rural citizens of the right they previously had to choose whether they would prefer civil law or customary law – something especially important to women. This Bill was previously defeated by gender rights groups and rural women’s groups and has come back into parliament. If passed, it will undermine the ideals of consensual decision-making procedures that are central to traditional consultations

⁷⁰ Patricia E (Ellie) Perkins, ‘Climate Justice, Commons, and Degrowth’ (2019) 160 *Ecol Econ* 183.

⁷¹ Federici (n 1) 3.

⁷² Angela P Harris, ‘Vulnerability and Power in the Age of the Anthropocene’ (2015) 6 *Wash & Lee J Energy Climate & Envt* 98 <<https://scholarlycommons.law.wlu.edu/jece/vol6/iss1/5>> accessed 5 June 2021; Rowena Maguire ‘Gender, Climate Change and the United Nations Framework Convention on Climate Change’ in Susan Harris Rimmer and Kate Ogg (eds), *Research Handbook on Feminist Engagement with International Law* (Edward Elgar 2019); Cinnamon P Carlarne, ‘Environmental Law and Feminism’ in Deborah L Brake, Martha Chamallas and Verna L Williams (eds), *The Oxford Handbook of Feminism and Law in the United States* (forthcoming).

as well as give traditional leaders undue power over women's personal lives.⁷³ This is a return to colonialism and its vestige institutions, not a valorization of indigenous customs as it is being portrayed by traditional leaders. It is a reminder of the key role that chiefs played in the past in servicing the mining industry with male labour.⁷⁴ Now, it creates an incentive structure for chiefs to derive personal benefits – what Comaroff and Comaroff call 'Ethnicity Inc'.⁷⁵ One example from the Eastern Cape underscores this: 'In November 2018, King Ndamase Ndamase of Western Pondoland signed a lease with a Chinese investment company in which he undertook to clear all the inhabitants from a 30km stretch of coastline around Port St Johns, in exchange for the low rent of R1-million per year.'⁷⁶ Allowing women to also be traditional leaders, which is one demand made in the women and land debates, will not resolve the problems of commodifying land use and mismanaging resources.

The struggle in Xolobeni opens the question of what a democratic and egalitarian (feminist) system of governing the commons might look like in ways that extend the existing frame of land debates. While we agree with and draw on Federici on the importance of linking social reproduction with struggles to defend the commons, we differ somewhat with her reading of law, which for her is only and inextricably tied with the defense of private property. She comments that what women need is not more law, but more land.⁷⁷ To be sure, Federici is concerned to point out how the commons are neither automatically nor necessarily egalitarian. As she notes, who represents and who is being represented in the community have been central in contestations over land. She is less clear, however, on what is to be done about that. In gesturing to the ultimate goal of shifting power directly into the hands of people ('challenging the hegemony of capital and the state and affirming our interdependence and capacity for co-operation'),⁷⁸ she leaves open a number of important questions about how to safeguard women's rights to participate. As the bitter fights over the bills leading to the Traditional and Khoi-San Leadership Act and the Communal Land Rights Act 11 of 2004 in South Africa have demonstrated, representing rural women is a contentious matter. We want to distinguish the Xolobeni struggles from those which: a) assume that democratizing the institution of traditional leadership will give women equal access to positions of authority; b) foreground a return of land to communities without any specification of what the internal

⁷³ Aninka Claassens, 'Traditional Courts Bill: How to Entrench Inequality and a Parallel Reality for 18 Million Marginalised South Africans' *Daily Maverick* (Johannesburg, 4 February 2021)

<<https://www.dailymaverick.co.za/article/2021-02-04-traditional-courts-bill-how-to-entrench-inequality-and-a-parallel-reality-for-18-million-marginalised-south-africans/>> accessed 8 June 2021; Aninka Claassens, 'Bantustan Bills' Trample on the Rights of Rural People 2019, *Daily Maverick* (Johannesburg, 4 November 2019) <<https://www.dailymaverick.co.za/article/2019-11-04-bantustan-bills-trample-on-the-rights-of-rural-people/>> accessed 8 June 2021; Aninka Claassens, 'Who Told them we Want this Bill? The Traditional Courts Bill and Rural Women' (2009) 23(82) Agenda 9; Aninka Claassens and Sizani Ngubane, 'Women, Land and Power: The Impact of the Communal Land Rights Act' in Aninka Claassens and Ben Cousins (eds), *Land, Power & Custom: Controversies Generated by South Africa's Communal Land Rights Act* (UCT Press 2008).

⁷⁴ Belinda Bozzoli, 'Marxism, Feminism and South African Studies', *Journal of Southern African Studies* (1983) Vol 9, No.2

⁷⁵ Jean Comaroff and John Comaroff, *Ethnicity Inc* (University of Chicago Press 2009).

⁷⁶ Kevin Bloom, 'China, the Pondo King and Namaqualand: In Pursuit of the "Disney Playground" Deal' *Daily Maverick* (Johannesburg, 26 March 2019) <<https://www.dailymaverick.co.za/article/2019-03-26-china-the-pondo-king-and-namaqualand-in-pursuit-of-the-disney-playground-deal/>> accessed 26 May 2021.

⁷⁷ Federici (n 1) 124.

⁷⁸ Federici (n 1).

relations of those communities will be; or, c) those that proceed from the assumption that the traditional arrangements are fixed and egalitarian and that there can be a recuperation of precapitalist relations. The Xolobeni struggles are about control of land by communities, of course, but they reveal the very complicated and messy (and gendered) power relations within communities. The contestation in Xolobeni is a story of spaces that are held in community trust, but whose inner logics of decision-making and livelihood-making are intensely political and contested.

There is a long history of women's struggles in relation to land that intersect with these developments in Xolobeni, but the issue of mining exceeds the ways in which land and gender issues have previously been thought about. Up to now, the questions have related to the disjunction between women's labour on the land, and their lack of control over decision-making (what and when to plant, how to distribute the benefits of production, and so on). In the post-1994 debates, these have played out in various contestations between groups of rural women, communities, and traditional leaders –fights over the legislative framework that would regulate the governance of land and unresolved tensions over titling, amongst other issues. Xolobeni shifts the stakes to a more fundamental set of issues about the implications of control of land for the survival of communities. It is about whether the developmental path offered by mining will lead to such profound changes to the land that it will in time lose its viability as habitation.⁷⁹ This is, in Federici's terms, what is at stake in the contemporary forms of enclosure: a) that primitive forms of accumulation are not eclipsed in capitalist development but are endemic and ongoing, and are disciplined by violence; and, b) that appropriating women's labour is key to the dispossession that accompanies primitive accumulation. Mining in Xolobeni is an exemplary form of enclosure, in that it appropriates land (with corporations and the state colluding) and reduces independent producers (mainly though not exclusively women) to wage workers, and may increases women's dependence on male wage workers, while degrading the environment so that it will reduce inhabitants to abjection over the longer term (the mineral resources will have been extracted within a single generation). It intersects with previous struggles of women in several interesting ways: traditional leaders' expropriation of decision-making from women; women's ongoing responsibilities to bear and manage the impact of violence; women coming to the fore as representatives of a community in crisis.

As before, women have articulated a different conception of time to that of development-time, linking past and future differently to the linear narrative of capitalist expansion. The demand is not for an exit from the modern state, but rather for a more holistic understanding of what is at stake and a recalibration of how public funds are distributed nationally. The

⁷⁹ This raises some unresolved questions about land: the twin pillars of land policy have been restitution and redistribution, that is addressing the dispossession of land under apartheid (though not colonialism) and offering either land or financial recompense. The Land Commission has been weak, with much left to resolve. There are still large tracts of land that were not taken away by apartheid, of which Xolobeni is an example. In this case, new kinds of questions arise. Communal land does not necessarily mean community-controlled land; resolving control by giving individual title to women is also not a clear solution. If there had been individual title to this land, it is likely that the corporation and/or government could have secured control more easily by a divide and rule strategy. Of what use would secure tenure be if resources are commodified to the extent that they are depleted and the land ultimately depreciated as a source of survival?

underlying argument of the anti-mining activists is that the preservation of these lands is a common good and that the residents should not have to give up one set of resources (land) in order to access other public goods (schools, clinics and roads). This is a struggle that is about holding out for a different future, for what seems unimaginable. The Xolobeni struggle is thus prefigurative and instructive in exposing the complex challenges of contests over land and resources and in positing new types of resistance that protect and maintain the commons, while resisting extraction that threatens the environment, the climate and the earth we inhabit.

VI Conclusion

This chapter is a preliminary reading of the complex relationships between struggles over environmental destruction through extraction and its links to climate change, gender, law and rights. It provides a discussion of the Xolobeni battles in and outside of the courts as a positive case study of resistance to mining and loss of access to communal land. While the case is central to the contest over land rights in post-apartheid South Africa, we see it as prefigurative of a more fundamental gendered challenge to capitalist enclosure, at the root of climate destruction. Xolobeni is a tiny, under-serviced community in a far-flung corner of the country which has dug in its heels and taken on the state and international investors using the law, amongst other weapons. Women have been central figures of resistance who are deeply concerned with the threats to the means to reproduce themselves and those who come after them. The somewhat surprising success of these struggles provides hope that legal mechanisms may at times prove effective, in combination with other means, in halting the relentless march of damaging extraction. Federici's image of grass pushing through the cracks in the concrete affirms the idea that the Xolobeni struggles prefigure a different way of being – one that is sustainable, communal and attentive to the voices of women. We do not wish to romanticise a pre-industrial way of life, an ideal commons where patriarchy is absent, or a struggle where women are the stereotyped victims or heroes; indeed, as we show, despite women's frontline role in the struggle, gender concerns have been insufficiently articulated. Nor do we wish to over-claim the place of law, on its own, in defending marginalised people. Our suggestion is that the case provides evidence of some optimism that this (thus far) successful struggle using legal rights can inform similar struggles elsewhere. Further, it demonstrates that even where neither gender nor the climate are centred within rights claims, such litigation can nevertheless advance an ecofeminist justice agenda, but that inclusion of strong gender and environmental rights may further bolster the development of exemplary jurisprudence.