REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION PRETORIA)

CASE NO: 39724/2019

(1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: NO
(3) REVISED

18 March 2022
DATE

SIGNATURE

In the matter between:

THE TRUSTEES FOR THE TIME BEING OF GROUNDWORK TRUST First Applicant

VUKANI ENVIRONMENTAL JUSTICE ALLIANCE MOVEMENT IN ACTION Second Applicant

and

THE MINISTER OF ENVIRONMENTAL AFFAIRS First Respondent

NATIONAL AIR QUALITY OFFICER Second Respondent

THE PRESIDENT OF THE REPUBLIC OF SOUTH AFRICA Third Respondent

MEMBER OF THE EXECUTIVE COUNCIL FOR AGRICULTURE, RURAL DEVELOPMENT, LAND AND ENVIRONMENTAL AFFAIRS GAUTENG PROVINCE Fourth Respondent

MEMBER OF THE EXECUTIVE COUNCIL FOR AGRICULTURE, RURAL DEVELOPMENT, LAND AND ENVIRONMENTAL AFFAIRS MPUMALANGA PROVINCE Fifth Respondent

and

THE UNITED NATIONS SPECIAL RAPPORTEUR ON HUMAN RIGHTS AND THE ENVIRONMENT *Amicus Curiae*

This judgment is issued by the Judge whose name is reflected herein and is submitted electronically to the parties/their legal representatives by email. The judgment is further uploaded to the electronic file of this matter on Caselines by the Judge or his/her secretary. The date of this judgment is deemed to be 18 March 2022.

JUDGMENT

COLLIS J

INTRODUCTION

> **"***Air pollution knows no boundary and has potential to affect everyone, but it can affect us differently…children [the] elderly and those with respiratory diseases such as asthma, are the most vulnerable to air pollution…. The most vulnerable groups…[tend] to lose if air pollution levels are not properly managed."*[1]

[1] Applicant's Supplementary Affidavit annexure SP64. The initial impact assessment of the Priority Area Air Quality Management Plan Regulations Vol 6 p 1725.

[1] This is an opposed application launched on 7 June 2019. In this application, the applicant seeks declaratory and mandatory relief concerning the extent of government's obligations regarding air pollution in the Highveld Priority area.

[2] On 5 November 2020, and by consent of the parties the Special Rapporteur was admitted in these proceedings as *amicus curiae*.[2] Our courts have repeatedly recognised the important role of *amicus curiae* in court proceedings. This is due to an acknowledgment that constitutional issues usually have an impact beyond the litigants before the courts – as is evident in this case. In ***Koyabe***, the Constitutional Court stated that:

> "*Amici curiae have made and continue to make an invaluable contribution to this Court's jurisprudence. Most, if not all constitutional matters present issues, the resolution of which will invariably have an impact beyond the parties directly litigating before the Court. Constitutional litigation by its very nature requires the determination of issues squarely in the public interest, and in so far as amici introduce additional, new and relevant perspectives, leading to more nuanced judicial decisions, their participation in litigation is to be welcomed and encouraged*."[3]

[3] The role of an amicus is to "*draw the attention of the Court to relevant matters of law and fact to which attention would not otherwise be*

---

2 Amicus Replying Affidavit Vol 7 para 3 p 1751; Annexure DRB17 order

3 *Koyabe and Others v Minister for Home Affairs and Others (Lawyers for Human Rights as Amicus Curiae)* 2010 (4) SA 327 (CC) at para 80 (footnote omitted).

drawn."[4] An amicus is not simply limited to making legal submissions. In ***Children's Institute***, the Constitutional Court continued to say that:

> "*In public interest matters, like the present, allowing an amicus to adduce evidence best promotes the spirit, purport and objects of the Bill of Rights. Therefore, the correct interpretation of Rule 16A must be one that allows courts to consider evidence from amici where to do so would promote the interests of justice*."[5]

[4] It is in the interest of justice to consider the submissions made by the Special Rapporteur as these submissions are relevant to the main application. In addition, the possible ramifications of the relief sought by the applicants are of public importance and it is imperative that this Court considers all available evidence and all relevant arguments.

[5] In the present matter the Special Rapporteur's evidence further provides a base for its legal submissions. The evidence is not controversial and is not in dispute.

[6] The legal submissions made by the Special Rapporteur relate to aspects of international law which this Court is enjoined by section 39 of the Constitution to take into consideration. This Court may benefit from the comparative foreign jurisprudence, where courts in other

---

4 *In re Certain Amicus Curiae Applications: Minister of Health and Others v Treatment Action Campaign and Others* 2002 (5) SA 713 (CC) at para 5.

5 *Children's Institute v Presiding Officer, Children's Court, Krugersdorp and Others* 2013 (2) SA 620 (CC) at para 27.

jurisdictions have had to determine similar issues which this Court is required to decide.

[7] It is on this basis that this Court will consider the evidence and submissions of the Special Rapporteur.

[8] The present matter concerns the rights enshrined in section 24(a) of the Constitution,[6] specifically the right to an environment that is not harmful to health or well-being and the Air Quality Act.[7]

[9] Poor air quality falls disproportionately on the shoulders of marginalised and vulnerable communities who bear the burden of disease caused by air pollution.

[10] Now it is so that not all air pollution violates the right to a healthy environment. However, if air quality fails to meet the National Ambient Air Quality Standards ("National Standards"), it is a *prima facie* violation of the right. When the failure to meet air quality standards persists over a long period of time, there is a greater likelihood that the health, well-being, and human rights of the people subjected to that air is being threatened and infringed upon.

[6] The Constitution of the Republic of South Africa, Act 108 of 1996
[7] Air Quality Act 39 of 2004

ISSUES FOR DETERMINATION

[11] As per the Joint Practice Note, the parties tabulated the issues that this court was called upon to determine to be the following:[8]

11.1 The first issue to be decided upon as per the applicants, is whether there has been a breach of section 24(a) of our Constitution.

11.2 In this regard the respondents contend that this includes consideration of the following questions:

11.2.1 Whether the applicants can rely, for their cause of action, directly on section 24(a) of the Constitution in view of the Principle of Subsidiarity;

11.2.2 If so, whether in law a mere state of affairs, without relying on positive or negative conduct on the part of the First and Second Respondent, can constitute a breach of the right in section 24(a) of the Constitution, or whether in law some conduct is required which is in conflict with the correlative obligations of such right;

---

8 Joint Practice Note Index 14 p 4686-4694

11.2.3 If so, whether in law the right in section 24(a) of the Constitution is of such a nature that it is immediately realisable or progressively realisable;

11.2.4 If so, whether in law the right in section 24(a) of the Constitution is qualified, either by its context in section 24(a) thereof and/ or by the other fundamental rights in the Bill of Rights and/ or by the suite of Environmental Legislation enacted to give effect to section 24 thereof;

11.3 The second issue this court was called upon to determined, concerns the proper interpretation of section 20 of the Air Quality Act. It is whether section 20 provides for discretionary power to make regulations or whether it provides for an obligation or duty to do so as per paragraph 2 of the Notice of Motion.

COMMON CAUSE FACTS BETWEEN THE PARTIES

[12] The following are the common cause facts between the parties with reference to the affidavits filed before this court:

12.1 The Minister admits in her Answering affidavit that the high levels of ambient air pollution in the Highveld Priority Area

are, is in general, harmful to human health and wellbeing. In this regard the Minister states that:

> "*[T]he ongoing state of affairs regarding the unacceptable levels of air pollution in the Highveld Priority Area and the potentially adverse impact thereof, not only on the health or wellbeing of individuals but also on the environment falls within the domain of my political and legal responsibility as Minister.*"[9]

In the same affidavit she states further that: "*I am aware of the unacceptable high levels of ambient air pollution in the Highveld Priority Area and the potential for that polluted ambient air to adversely impact on the health and well-being of the people living and working in the area.*"[10]

The Minister also concedes that: "*[I]n general … poor quality at the hotspots in the Highveld Priority Area, has adverse consequences and impacts upon human health and well-being.*"[11]

12.2 Secondly, the Minister admits that this ambient air pollution continues to exceed the National Standards: In her Answering affidavit, she admits as follows: "*I do not dispute that in*

---

9 Answering Affidavit Vol. 5 para 3 p 1152
10 Answering Affidavit Vol. 5 para 104 p 1298
11 Answering Affidavit para 268 Vol. 5 p 1369

general there is ongoing air pollution and I do not dispute that the National Ambient Air Quality Standards are being exceeded at the hotspots in the Highveld Priority Area."[12]

In her Answering affidavit, she makes the further concession: "*[T]o date, the Government was not successful in bringing the ambient air quality everywhere in compliance with the National Ambient Air Quality Standards*."[13]

12.3 Thirdly, the Minister also admits that government has failed to achieve the Highveld Plan goals. In this regard, she makes the following concessions:

12.3.1 "*[T]o date, Government was not successful in bringing the ambient air quality everywhere in compliance with the National Ambient Air Quality Standards*"[14]

12.3.2 "I know that the seven (7) goals of the Highveld Plan have not yet been achieved fully and that some will not be achieved within the originally-planned timeframes …"[15]

---

12 Answering Affidavit Vol. 5 para 36 p 1210.
13 Answering Affidavit Vol. 5 para 299.1 p 1387.
14 Answering Affidavit Vol 5 para 299.1 p 1387.
15 Answering Affidavit Vol. 5 para 53.3.5 p 1264.

[13] Fourthly, it is admitted that while the Highveld Plan was intended to be a "living document" and was meant to be reviewed every five years, it has still not been updated, nine years on.[16]

[14] In the fifth instance, the Minister further admits that her predecessors made no effort to create section 20 regulations to implement the Highveld Plan.[17] The Minister has only now produced six pages of draft regulations, more than 18 months after taking office. The Minister has not yet initiated any formal public comment process, nor has she committed to any timelines for producing final regulations.

[15] In the sixth instance, the department's own internal socio-economic impact assessment confirms the necessity for implementation of regulations and the ongoing threats to health and well-being caused by air pollution in the Highveld Priority Area.

BACKGROUND

[16] During November 2007, the former Minister of Environmental Affairs (Minister) declared the "Highveld Priority Area", using his powers under the National Environmental Management: Air Quality Act of 2004 (*Air Quality Act*). This area consists of 31 000 km2 cutting across

---

16 Answering Affidavit Vol. 5 para 33.12 – 33.14 14p 1202.
17 Answering Affidavit Vol. 5 para 37 p 1211.

Gauteng and Mpumalanga. This is common cause between the parties.

[17] This area covers some of the most heavily polluted towns in the country, including eMalahleni, Middelburg, Secunda, Standerton, Edenvale, Boksburg and Benoni. It is home to 12 of Eskom's coal-fired power stations, and Sasol's coal-to-liquid fuels refinery, situated in Secunda, all supplied by numerous coal mining operations. Due to its concentration of industrial pollution sources, residents experience particularly poor and dangerous air quality.[18]

[18] At the time it was acknowledged that *"people living and working in these areas do not enjoy air quality that is not harmful to their health and well-being"*, and that targeted, urgent action was needed to address this problem.[19]

[19] On 2 March 2012 an Air Quality Management Plan (*The Highveld Plan*) for the Highveld Priority Are was published. Its sole objective was to reduce ambient air pollution to a level that complies with the National Standards. It set seven goals to achieve this overarching objective, with a 2020 deadline set for most of these goals.[20] This Highveld Plan envisaged that stakeholders, including heavy polluters, would submit

---

18 Founding Affidavit para 78 Vol. 1 p 44.
19 Founding Affidavit Annexure SP 10 p 209.
20 Highveld Plan: Rule 53 record Vol 8 p 406.

emission reduction plans, setting out how they intended to reduce emissions to achieve the goals set out in the plan.

[20] As this process so envisaged was entirely voluntary, rates of participation were low and by 2011, only 8% of heavy polluters in the Highveld Priority Area had submitted any implementation plans.[21]

[21] The applicants contend that nine years since the creation of the Highveld Plan and long after the 2020 deadlines expired, none of the Highveld Plan goals have been achieved. Levels of ambient air pollution remain well above the National Standards and pose an ongoing threat to the health and wellbeing of Highveld residents.

[22] This lack of progress so the applicants argue, is due, in part, to the absence of any implementation regulations to give legal effect to the Highveld Plan. The enabling legislation is in terms of section 20 of the Air Quality Act, which gives the Minister the power to create such regulations:

> *"The Minister … may prescribe regulations necessary for implementing and enforcing approved priority area air quality management plans, including-*
>
> *(a) funding arrangements;*
>
> *(b) measures to facilitate compliance with such plans;*

[21] See Appendix 6 to the Highveld Plan: Rule 53 Record Vol. 8 p 626ff. Replying Affidavit Vol 6 para 99.4 p 1605.

(c) penalties for any contravention of or any failure to comply with such plans; and

(d) regular review of such plans."

APPLICANTS CASE

[23] As such in brief it is the applicants' case that:

23.1 First, the unsafe levels of ambient air pollution in the Highveld Priority area are an ongoing breach of residents' section 24(a) constitutional right to an environment that is not harmful to health or well-being.

23.2 Second, the Minister is obliged to create regulations to implement and enforce the Highveld Plan, in terms of section 20 of the Air Quality Act and the Constitution.

[24] As a result of the failure by the former Minister, Ms Nomvula Mokonyane's, refusal to establish any implementation regulations,[22] the applicants proceeded to launch the present litigation.

[25] As at January 2021, the current Minister, Ms Barbara Creecy, has taken some steps. Her department is now in the process of preparing draft implementation regulations, a copy of which was circulated to

[22] Founding Affidavit Vol. 1 para 29-19.1 p 18; Founding Affidavit Ann SP27 p 464

stakeholders on January 2021, although they have not yet been published for public comment.[23] The applicants have no confidence that the Minister will see through her department's preliminary efforts to prepare or publish implementation regulations, timeously or at all.

THE MINISTER'S CASE

[26] In opposition, it is the Ministers' succinct case that there has not been any breach of the section 24(a) constitutional right and rejects any duty to establish implementation regulations. The Minister goes as far as to argue that implementation regulations would serve no purpose, are unnecessary, a waste of state resources, and would somehow be unlawful.[24]

[27] As per the amended notice of motion, the relief sought by the applicants consists of five parts:[25]

27.1 A declaration of rights:

> Declaring that the poor air quality in the Highveld Priority Area is in breach of residents' section 24(a) right to an environment that is not harmful to their health and well-being.

---

23 First and Second Applicants' Replying Affidavit Vol. 6 para 25 p 1574; Replying Affidavit Annex SP 54 p 1641ff.
24 Answering Affidavit Vol 5 para 12.3 p 14; para 53.5.8 p 125
25 Amended Notice of Motion Vol. 2 p 558ff.

27.2 A declaration of the Minister's obligations:

Declaring that the Minister is obliged to promulgate implementation regulations to give effect to the Highveld Plan.

27.3 A declaration of invalidity:

Declaring that the Minister's failure to promulgate regulations to give effect to the Highveld Plan is unconstitutional and invalid.

27.4 Review relief:

Reviewing and setting aside the Minister's refusal and / or unreasonable delays in creating implementation regulations in terms of the Promotion of Administrative Justice Act 3 of 2000 (PAJA), alternatively, the section 1(c) constitutional principle of legality.

27.5 A direction to produce regulations:

Directing the Minister, within six months of this order, to prepare and publish regulations in terms of section 20 of the Air Quality Act to implement and enforce the Highveld Plan, subject to appropriate directions.

[28] In turning then to the issues to be determined, the first question to be answered is whether there has been a breach of section 24(a) of the Constitution.

HAS THERE BEEN A BREACH OF SECTION 24(a) OF THE CONSTITUTION?

[29] Section 24 of the Constitution provides that:

> "*Everyone has the right:*
>
> *(a) to an environment that is not harmful to their health or well-being; and*
>
> *(b) to have the environment protected, for the benefit of present and future generations, through reasonable legislative and other measures that:*
>
> *(i) prevent pollution and ecological degradation;*
>
> *(ii) promote conservation; and*
>
> *(iii) secure ecologically sustainable development and use of natural resources while promoting justifiable economic and social development*."

[30] In HTF Developers (Pty) Ltd v The Minister of Environmental Affairs[26] Murphy J explained that section 24 consists of two parts:

---

[26] *HTF Developers (Pty) Ltd v The Minister of Environmental Affairs* 2006 (5) SA 512 (T) at para 17.

> *"Section 24(a) entrenches the fundamental right to an environment not harmful to health or well-being, whereas s 24(b) is more in the nature of a directive principle, having the character of a so-called second-generation right imposing a constitutional imperative on the State to secure the environmental rights by reasonable legislation and other measures."*

[31] On behalf of the applicants the argument advanced was to the effect that the distinction between the section 24(a) and 24(b) rights goes deeper than this passage suggests.

[32] Firstly, that section 24(a) is an "*unqualified*" right to an environment that is not harmful to human beings' health or well-being. It is a right to a safe environment here and now. Section 24(a) of the Constitution provides an immediate, unqualified right to an environment that is not harmful to health and well-being. The long-standing, ongoing, and unsafe levels of air pollution in the Highveld Priority Area continue to breach this right.

[33] It was further contended that in declaring the Highveld Priority Area, the Minister's predecessor acknowledged that levels of ambient air pollution in the Highveld Priority Area far exceed the National Standards and that "*there is little doubt that people living and working*

in these areas do not enjoy air quality that is not harmful to their health and well-being." [27]

[34] There is clear precedent so the applicants argued for this unqualified interpretation of section 24(a) in the Constitutional Court's jurisprudence on the section 29(1)(a) i.e. the right to a basic education. The textual structure of section 29(1) is materially similar to section 24, as it provides that:

> *"(1) Everyone has the right -*
>
> *(a) to a basic education, including adult basic education; and*
>
> *(b) to further education, which the state, through reasonable measures, must make progressively available and accessible."*

[35] The Constitutional Court has interpreted the section 29(1)(a) right as an "*unqualified*", "*immediately realisable*" right, that is not subject to the qualifications of reasonableness or progressive realisation found in section 29(1)(b). In ***Juma Musjid***,[28] the Constitutional Court held that:

> "*It is important, for the purpose of this judgment, to understand the nature of the right to 'a basic education' under section 29(1)(a). Unlike some of the other socio-*

---

[27] Founding Affidavit Ann SP10 p 209.

[28] *Governing Body of the Juma Musjid Primary School & Others v Essay N.O. and Others* [2011] ZACC 13; 2011 (8) BCLR 761 (CC) at para 37.

> *economic rights, this right is immediately realisable. There is no internal limitation requiring that the right be 'progressively realised' within 'available resources' subject to 'reasonable legislative measures'. The right to a basic education in section 29(1)(a) may be limited only in terms of a law of general application which is 'reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom'. This right is therefore distinct from the right to 'further education' provided for in section 29(1)(b). The state is, in terms of that right, obliged, through reasonable measures, to make further education 'progressively available and accessible.'"*

[36] As the Constitutional Court noted, the textual structure of these rights differs markedly from the "qualified" socio-economic rights found sections 26 and 27 of the Constitution. For example, section 26(1) states that "*[e]veryone has the right to have access to adequate housing*". This is immediately qualified in section 26(2), which provides that the "*the state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of this right*". The two components of this section 26 right cannot be separated and are textually interrelated.

[37] Section 24 of the Constitution, like section 29(1), is framed differently. It establishes distinct rights, with a basic set of unqualified, immediately realisable entitlements.

[38] This interpretation of section 24(a) is reinforced by the principle that the "negative" component of all socio-economic rights – the right to be free from interferences in the enjoyment of that right – is always unqualified and is not subject to any requirements of reasonableness.[29] The right of residents to live in conditions in which their health and wellbeing is not harmed by dangerous levels of air pollution is the clearest example of such a negative right.

[39] This means that residents of the Highveld Priority Area have a right to a safe and healthy environment, here and now and the state cannot claim that it is taking reasonable steps, over time, to gradually address these threats. Any denial of the section 24(a) right is a limitation which can only be permitted if it is authorised by a law of general application and passes the strict section 36 justification analysis.

[40] While section 24(a) and section 24(b) are distinct rights with distinct obligations, both are nevertheless underpinned by a set of common principles. One of the most important is the principle of "*sustainable development*". In ***Fuel Retailers***,[30] Ngcobo J, writing for a majority of the Constitutional Court, explained that sustainable development

---

29 *Jaftha v Schoeman; Van Rooyen v Stoltz* 2005 (2) SA 140 (CC) paras 31–34.

30 *Fuel Retailers Association of Southern Africa v Director-General: Environmental Management, Department of Agriculture, Conservation and Environment, Mpumalanga Province, and Others* 2007 (6) SA 4 (CC).

requires an appreciation that economic development cannot occur without environmental protection:

> "*[D]evelopment cannot subsist upon a deteriorating environmental base. Unlimited development is detrimental to the environment and the destruction of the environment is detrimental to development. Promotion of development requires the protection of the environment. Yet the environment cannot be protected if development does not pay attention to the costs of environmental destruction. The environment and development are thus inexorably linked*."[31]

[41] Sustainable development is integrally linked with the principle of "*intergenerational justice*". This is a rejection of short-termism as it requires the state to consider the long-term impact of pollution on future generations.

[42] The Supreme Court of Appeal in ***Vaal Environmental Justice Alliance***,[32]acknowledged that air pollution raises particularly urgent questions of intergenerational justice, requiring steps to be taken to protect both current and future generations:

> "*As we continue to reset our environmental-sensitivity barometer, we would do well to have regard to what was said about planet Earth by Al Gore, a former vice-president of the United States and an internationally recognised environmental activist engaged in educating the public about the dangers of*

---

31 *Ibid* at para 44

32 *Company Secretary, ArcelorMittal South Africa Ltd and Another v Vaal Environmental Justice Alliance* 2015 (1) SA 515 (SCA) at para 84.

global warming and those steps to be taken in response to reduce carbon emissions (for which he was a joint recipient of the 2007 Nobel Peace Prize):

> *'You see that pale, blue dot? That's us. Everything that has ever happened in all of human history, has happened on that pixel. All the triumphs and all the tragedies, all the wars, all the famines, all the major advances . . . . It's our only home. And that is what is at stake, our ability to live on planet Earth, to have a future as a civilization. I believe this is a moral issue, it is your time to seize this issue, it is our time to rise again to secure our future.'*

On the importance of developing a greater sensitivity in relation to the protection and preservation of the environment for future generations, Gore had the following to say:

> *'Future generations may well have occasion to ask themselves, What were our parents thinking? Why didn't they wake up when they had a chance? We have to hear that question from them, now.'*

We would, as a country, do well to heed that warning."[33]

Secondly, by contrast, section 24(b) is a "*qualified*" right requiring the state to protect the environment for present and future generations "*through reasonable legislative and other measures"*.

[43] Furthermore, it was argued that the distinction, reflects a clear conceptual difference between these rights in that section 24(a) sets

---

[33] *Ibid* at para 84.

the basic minimum for environmental protection: an environment that is not harmful, whereas section 24(b) goes further, requiring the state to take reasonable steps to protect the environment even where human health and well-being are not immediately threatened.

[44] It acknowledges so the argument went, that environmental protection is not solely about addressing immediate harms, but is also about exercising long-term custodianship and care for the environment.

[45] The distinction it was argued between the two sub-sections has its roots in the drafting history of section 24. Its predecessor as per our interim Constitution,[34] was section 29 which read: "*Every person shall have the right to an environment which is not detrimental to his or her health or well-being.*"

[46] Section 24(b) was added with the clear purpose of enhancing the scope and content of the environmental rights, beyond merely protecting human beings against harmful conditions.[35] As such section 24(b) was an addition to, not a subtraction from, the unqualified section 24(a) right.

---

[34] Constitution of the Republic of South Africa, Act 200 of 1993.

[35] Morne van der Linde and Ernst Basson "Environment" in Woolman and Bishop *et al* C*onstitutional Law of South Africa* (2nd edition, RS 2:10-10) p 50-9.

[47] As per the Founding Affidavit in support of the alleged breach of the provisions of section 24 of our Constitution, the applicant alleges as follows:

47.1 As the Highveld Plan envisaged that it would be reviewed and updated every five years, to assess the contents of the plan and determine the progress towards its implementation, this has not transpired.[36]

47.2 Only one initial review has been conducted and not within the envisaged five-year period, but indeed long thereafter. This is common cause between the parties. The department further conducted a Mid-Term Review (MTR) and a draft report was produced in December 2015, but was only made public in February 2017. The draft MTR acknowledged the state's overall failures to achieve the goals set out in the Highveld Plan as highlighted in the following concessions contained in the Mid-Term Review:

47.2.1 "*In terms of the [Air Quality Act], the Department of Environmental Affairs was supposed to develop regulations for the implementation and enforcement of the HPA AQMP*;"[37]

[36] Annexure SP10 'Highveld Priority Area Air Quality Management Plan', p 224.
[37] Founding Affidavit Annexure SP 21 p 421.

47.2.2 "*Less than 50% of the interventions have been achieved in totality*";[38]

47.2.3 "*In terms of governance, vast improvements have been made in government capacity and the development of [air quality management] resources and tools" and that there has been "an increase in ambient air quality monitoring stations across the Highveld Priority Area", while admitting that the majority of these monitoring stations are not functional*";[39]

47.2.4 "*Only 29% of industrial and low-income settlements interventions have been achieved*";[40]

47.2.5 "*measured ambient data does not indicate any significant improvement in air quality since the gazetting of the Highveld Priority Area. These data also indicate significant exceedances of the National Ambient Air Quality standards…It is clear that from these and measured results for other pollutants,*

[38] Founding Affidavit Annexure SP 21 p 424.
[39] Founding Affidavit Annexure SP 21 p 426.
[40] Founding Affidavit Annexure SP 10 p 425.

that ambient air quality is still a concern in the Highveld Priority Area".[41]

[48] On 2 October 2017, the *Broken Promises* Report was launched.[42] This report was produced as a consequence of the delayed MTR process and highlighted multiple shortcomings in the implementation of the Highveld Plan. This report also concludes that due to the failures identified, people of the Highveld Priority Area are experiencing ongoing violations of their Constitutional rights to an environment not harmful to health and well-being.[43]

[49] On the same day the *Broken Promises* memorandum of demands was submitted to the Department at the commencement of the annual National Air Quality Lekgotla.[44]

[50] [49] On receipt of this Memorandum of Demands and despite an undertaking to respond within 7 working days, no further response was received as to the findings and recommendations made in the Broken Promises report.[45] The applicants thereafter have attempted to engage with the Minister over the absence of regulations as a

---

41 Founding Affidavit Annexure SP 10 p 426.
42 Founding Affidavit Vol. 1 para 135 p 83.
43 Founding Affidavit Vol 1 para 134 p 84.
44 Founding Affidavit Vol.1 para 135 p 83. The 12th Air Quality Governance Lekgotla, Johannesburg, 2-3 October 2017.
45 Founding Affidavit Vol 1 para 135 p 83.

clearly necessary measure in the midst of the ongoing violation of section 24(a) of the Highveld Priority Area.[46]

[51] On 10 December 2018, Centre for Environmental Rights, on behalf of groundWork, addressed a letter to the then newly Minister, Ms Nomvula Mokonyane.[47] The letter:

51.1 provided an introduction to the Highveld Priority Area, the outstanding response to findings of the *Broken Promises* Report, and the ongoing state of chronic air pollution in the area;

51.2 called on the Minister to concede that there is a violation of section 24(a) of the Constitution and that the Minister is legally obliged to pass regulations, in terms of section 20 of the Air Quality Act, to give effect to the Highveld Plan;

51.3 emphasised that the Department's own draft MTR in 2015 found that, in terms of the Air Quality Act, implementation regulations were supposed to be developed to enforce the Highveld Plan;

---

46 Founding Affidavit Vol 1 para 141 p 85.
47 Founding Affidavit Vol. 1 para 144 p 86; Founding Affidavit Annexure SP 26 p 460.

51.4 requested that, if the Minister was of the view that implementation regulations are not necessary, that she provide reasons for this decision.

[52] On 9 May 2019, the Centre for Environmental Rights received a letter from the Minister, signed on 30 April 2019. In the said letter the Minister refused to confirm that the poor air quality in the Highveld Priority Area is in breach of the section 24(a) constitutional right and further refused to develop implementation regulations, in terms of section 20 of the Air Quality Act.[48]This response was received from the Minister some 19 months after the Broken Promises Memorandum of Demands had been submitted to the Department.

[53] The current Minister who is the First Respondent, Ms Creecy, took office on 30 May 2019.

[54] The Minister's answering affidavit sets out that work began on the draft implementation regulations soon after she took office and that a first draft was completed by 29 November 2019.[49]

[55] The Minister also refers to the socio-economic impact assessment process which began at the same time.[50] This socio-economic impact

---

48 Founding Affidavit Vol. 1 para 19-19.1 p 18; Founding Affidavit Annexure SP 27 p 464.
49 Answering Affidavit Vol. 5 para 5.1 p 1155; Replying Affidavit Vol. 6 para 26 p 1575.
50 Answering Affidavit Vol. 5 para 5.1 p 1155.

assessment is required in terms of the Socio Economic lmpact Assessment Guidelines (SElAS), as referred to in the Minister's answering affidavit.[51]

[56] On 19 January 2021, the Department circulated draft implementation regulations to stakeholders, including the applicants. These have not yet been published for public comment.[52]

[57] The Minister, as mentioned, has not indicated any timeline for the public comment process nor has she committed to any deadlines for the finalisation and publication of these regulations.

[58] It is on the basis of these refusals and/ or breaches that the applicants thereafter proceeded to launch this application in June 2019, wherein they ask of this court to conclude that:

58.1 that there had been a breach of section 24(a) of our Constitution and;

58.2 that as a result of such breach that there is a need for accountability and effective mechanisms to ensure that the Highveld Plan is properly implemented and enforced.

---

51 Answering Affidavit Vol. 5 para 5.1 p 1155; Supplementary Affidavit Annexure SP 65 p 1736.
52 Replying Affidavit Vol. 6 para 25 p 1574.

[59] In determining as to whether there had been a breach of section 24(a) of the Constitution, the response of the then Minister Mokonyane dated 30 April 2019 is instructive. Therein, and in response the then Minister sets out the following:

59.1 That she has had regard to the request for DEA to develop regulations for the implementation of the HPA Air Quality Management Plan (AQMP) and have considered the fact that that AQMP is not the only tool at the disposal of government to address air pollution in the priority area;

59.2 The Minister goes further and states that in fact there are a number of air quality management tools that complement the AQMP such as the Atmospheric Emission Licensing System and the Controlled Emitters Regulations to name but a few;

59.3 Furthermore, that whilst DEA in collaboration with other spheres of government takes the lead in the implementation of the AQM the challenge of tackling air pollution is however not the responsibility of government alone;

59.4 In addition, the Minister states that the AQMP's seek to coordinate the efforts of various stakeholders, with the view to leverage available resources, knowledge and skills;

59.5 Furthermore, in light of the various air quality management tools available to government and the existing structures for the implementation of the HPA AQMP, the DEA has no compelling reasons to develop regulations for its implementations;

59.6 With regards to the state of air in the HPA, ambient air quality data collected by the DEA's network in the Highveld Priority Area indicates that there had been notable improvements in $PM_{2.5}$ and PM_{10} levels in monitoring sites such as Ermelo, Hendrina and Middelburg but that despite the observed downward trend, that the ambient air quality has not reached the desired levels and that the desired improvements will not happen over a short period of time but rather progressively over time. Lastly, the then Minister reiterated the department's commitment to work with all stakeholders to achieve the goal of ensuring that the air quality in the Republic is not harmful to the wealth and wellbeing of its citizens.

[60] The alleged breach by the current Minister should therefore be assessed and seen as against the backdrop of the above response by the former Minister and more importantly, what has transpired subsequent thereto to address the air quality in the Highveld Priority Area.

[61] The argument further advanced by the applicants is also that not only had there been a breach of the provisions of section 24(a) of the Constitution, but that this is ongoing. This is confirmed in the 2017 National Framework, which emphasises that to "*give effect to the [section 24] right in the context of air quality, it is necessary to ensure that levels of air pollution are not harmful to human health or well-being, meaning that ambient air quality standards are achieved*."[53]

[62] As the Constitutional Court emphasised in ***Mazibuko***,[54] standards such as these are a vital tool to give content to constitutional rights and to ensure accountability. The Court held that:

> "*[O]rdinarily it is institutionally inappropriate for a court to determine precisely what the achievement of any particular social and economic right. . . This is a matter, in the first place, for the legislature and executive, the institutions of government best placed to investigate social conditions . . . and to determine what targets are achievable in relation to social and economic rights. Indeed, it is desirable as a matter of democratic accountability that they should do so for it is their programmes and promises that are subjected to democratic popular choice*."[55]

[63] In this light, it is therefore unsustainable for the Minister to claim that the National Standards have no legal significance for this case.[56] They

---

53 Founding Affidavit Annex SP4 para 1.3 p 147.
54 *Mazibuko and Others v City of Johannesburg and Others* 2010 (4) SA 1 (CC).
55 *Ibid* at para 61.
56 Answering Affidavit Vol. 5 para 30.2.2 pp 1193 – 1194.

reflect the government's own assessment of the content of section 24(a) of the Constitution and there must be accountability for failures to achieve these standards.

[64] Twelve years have passed since the declaration of the Highveld Priority Area and the levels of ambient air pollution have not significantly diminished and remain far in excess of the National Standards.[57] Monthly reports from publicly available information on the South African Air Quality Information Systems (*SAAQIS*), administered by the South African Weather Service, for the period from 2015 to 2018 show that most days at all air quality monitoring stations exceeded the WHO guideline for 24 hr average $PM_{2.5}$ (25 ug/m3), while half or more of the days of each year exceeded WHO guideline for daily average PM_{10} (50 ug/m3).There is no clear improvement over time. Similarly, exceedances of the National Standards occurred for all pollutants in all of the four years.[58]

[65] The 2018 State of the Air report, produced by the Department, also shows a deterioration of ambient air quality at several monitoring stations.[59]

---

57 Founding Affidavit Vol. 1 para 175 p 101.
58 Founding Affidavit Vol. 1 p 49, para 92
59 Founding Affidavit Vol. 1 p 115-116, para 217; Founding Affidavit Ann SP14 p 249

[66] This was further confirmed in the minutes of the Highveld Priority Area authorities' meetings from 2016 to 2018, which again acknowledged the poor state of air quality.[60]

[67] In the face of this evidence, counsel had argued that it is entirely baseless for the Minister to claim that there have been "*substantial improvements*" in air quality in the Highveld Priority Area:

[68] Furthermore, any claims of improvements are also entirely unreliable given the Minister's concession that the air quality monitoring system is defective and that most monitoring sites are capturing data at far below the required levels.[61] As just one example, the air quality monitoring station at Middelburg has a data capture rate as low as 37%.[62]

[69] In any event, the alleged improvements in air quality are irrelevant given the Minister's repeated concessions that levels of ambient air pollution in the "hotspots" throughout the Highveld Priority Area remain far in excess of the National Standards.[63]

[70] Various studies conducted on the health effects of air pollution in South Africa have confirmed the dire impact of the Highveld Priority

---

60 Supplementary Founding Affidavit Vol. 3 p 32, para 65.
61 Answering Affidavit Vol. 5 p 1286, para 93
62 Founding Affidavit Vol. 1 p 43 para 93.4, not denied AA Vol. 5 p 1360, para 251.
63 Answering Affidavit Vol. 5 p 1209 para 36; p 1387 para 299.1.

Area's toxic air.[64] It is commonly accepted that the air pollution in the Highveld Priority Area is responsible for premature deaths, decreased lung function, deterioration of the lungs and heart, and the development of diseases such as asthma, emphysema, bronchitis, tuberculosis and cancer. It is also acknowledged that children and the elderly, especially with existing conditions such as asthma, are particularly vulnerable to the high concentrations of air pollution in the Highveld Priority Area.

[71] The Highveld Plan itself draws this link between ambient air pollution and severe harms to human health. For example, it cites a 2007 study which concluded that:

> "*[O]utdoor air pollution caused 3.7% of total mortality from cardiopulmonary disease in adults aged 30 years and older, 5.1 % of mortality attributable to cancers of the trachea, bronchus, and lung in adults, and 1.1 % of mortality from acute respiratory infections in children under 5 years of age*."[65]

[72] The Department's own *Initial Impact Assessment of the Priority Area Air Management Plan Regulations*, 2019 provides further evidence of the health risks in the Highveld Priority Area.[66] As previously noted,

---

64 See Findings of Dr Andy Gray and Dr Peter Orris summarised in the applicants' founding affidavit at Founding Affidavit Vol. 1 para 101-1026 pp 55 – 58; Founding Affidavit Vol. 1 pp 58 – 61, para 104 – 105.4 and Annexure SP61 p 1667 – 1669 respectively.

65 Rule 53 record Vol. 8, File 3 p 2173.

66 Applicants' Supplementary Affidavit Vol. 6 Ann SP64 p 1715.

this report only came to light after the applicants submitted a Rule 35(12) request to compel the Minister to provide it, after she failed to disclose its contents to this Court.[67]

[73] Section 1.5 of the assessment concludes that women, youth, children, people with disabilities and low income groups are all affected by the dangerous levels air pollution because "*[t]heir health and well-being [is] negatively affected*" and that "*women, youth, children, and people with disabilities are not benefit[t]ing*".[68]

[74] Most significantly, the report provides an overview of an Air Quality Health Study that the Department conducted for the Vaal Priority Area and the Highveld Priority Area.[69] That study has not been made publicly available, but its findings are summarised in the report, which confirms that:

74.1 Communities in these priority areas are at "*high risk of acute and chronic health effects due to exposure to PM, NO_x and SO_2*";[70]

74.2 In respect of $PM_{2.5}$ and PM_{10} levels alone, some 10,000 deaths could be avoided if levels of these pollutants were brought

---

67 Rule 35 (12) Notice Vol. 10 pp 4332-4333
68 Applicants' Supplementary Affidavit Vol. 6 Ann SP64 p 1724
69 Applicants' Supplementary Affidavit Vol. 6 Ann SP64 p 1725
70 Applicants' Supplementary Affidavit Vol. 6 Ann SP64 p 1725

within the limits prescribed in the National Standards. The assessments state that:

> "*The Highveld Priority Areas health study finding reveals through Human Health Risk Impact Assessment for air pollution levels (i.e. specially for PM10 and PM2.5 levels) on the cases of mortality estimated a 4 881 decrease In PM25 attributable mortality if annual $PM_{2.5}$ NAAQS were met, whereas the estimated lives that could have been saved by meeting the annual NAAQS for PM10 is 5 125 people. Findings of the report concluded that there Is a chance to save thousands of lives if annual PM NAAQS were met, and further more recommended that it is essential to meet Improve air quality to meet NAAQS and to save lives.*"[71]

74.3 Notably, this study only considered exposure to harmful PM levels. This does not account for the further lives that could be saved by reducing levels of other harmful pollutants, including SO_2, NO_x and O_3.

74.4 On this basis, the impact assessment report concludes "*there is a chance to save thousands of lives if annual PM [National Standards] were met*".[72]

---

71 Applicants' Supplementary Affidavit Vol. 6 Ann SP64 p 1725
72 Applicants' Supplementary Affidavit Vol. 6 Annexure SP64 p 1725

[75] The human health impacts of this air pollution are starkly demonstrated by the experiences of three residents of the Highveld Priority Area, who have deposed to affidavits explaining how poor air quality has affected their lives.[73] They all reside in and around eMalahleni (formerly Witbank), a pollution hotspot as identified in the Highveld Plan. The residents of this area are exposed to frequent exceedances of the National Standards, especially PM_{10} and $PM_{2.5,}$ and describe the daily reality of this exposure.

[76] This is a further demonstration that the enduring and unsafe levels of air pollution in the Highveld Priority Area are an ongoing violation of the section 24(a) constitutional rights of residents. This violation necessarily violates other constitutional rights, including the rights to dignity, life, bodily integrity and the right to have children's interests considered paramount in every matter concerning the child.

[77] Despite this overwhelming evidence, much of which comes from the Department itself, the Minister continues to deny any causal link between air pollution and harm. The Minister argues that there is no "*forensic evidence*" of harm and suggests that the applicants had to prove harm on a strict "*but for*" test.[74] These arguments are entirely at odds with the established science, the Department's own studies,

---

[73] Founding Affidavit Ann SP34-SP36 pp 511-522
[74] Answering Affidavit Vol. 5 para 264.1 p 1366.

the Air Quality Act, and the Highveld Plan, which all acknowledge the direct link between air pollution and adverse health impacts.

[78] The Minister is equally mistaken in attempting to apply a delictual standard of "*but for*" causation here. This case is concerned with public law remedies for threats to constitutional rights. In terms of section 38 of the Constitution, litigants are entitled to approach a court for relief where rights "*are infringed or threatened*". There can be no doubt that unsafe levels of ambient air pollution directly threaten constitutional rights.

[79] Given the Minister's denials counsel contended that it would also be just and equitable that this Court correct her misapprehensions by issuing a declaratory order confirming that the conditions in the Highveld Priority Area are in breach of section 24(a) of the Constitution. This declaratory relief is necessary both to vindicate the right and to provide guidance to the Minister.

[80] On behalf of the Special Rapporteur the following arguments were advanced on whether the respondents have breach section 24(a) of the Constitution. In this regard, the argument that the right to an environment that is not harmful to health and well-being is "by nature" progressively realised is deeply flawed. This is because:

80.1 First, this argument assumes that all socio-economic rights have to be treated with the same broad brush stroke of "progressive realisation", irrespective of the actual wording of the relevant constitutional provision. It renders the actual wording of the right irrelevant.

80.2 Second, it ignores that rights, like the right to basic education, which has no internal qualifier of "progressive realisation" have been interpreted by the Constitutional Court to be unqualified. In ***Basic Education for All*** the SCA held that:

> *"there is in this case no impediment of any kind to the vindication of learners' rights in terms of s 29 of the Constitution. That right is, as determined by the Constitutional Court in Juma Musjid, immediately realisable."*[75]

80.3 Third, the language used in section 24(a) of the Constitution and the content of the right clearly indicates that there is no internal limitation requiring that the right be "progressively realised" within "available resources" subject to "reasonable legislative measures".[76] There is no basis to read such qualifications into the clear language of the Constitution.

---

[75] *Minister of Basic Education and Others v Basic Education for All and Others* 2016 (4) SA 63 (SCA) at para 44.

[76] *Governing Body of the Juma Musjid Primary School & Others v Essay N.O. and Others* (CCT 29/10) [2011] ZACC 13 (11 April 2011) at para 37.

80.4 Fourth, it fails to take into account that the Constitution entrenches both civil and political rights and social and economic rights. *"All the rights in our Bill of Rights are inter-related and mutually supporting."*[77] Moreover, as observed by Yacoob J, the proposition that rights are inter-related and are all equally important, has immense human and practical significance in a society founded on human dignity, equality and freedom.[78]

[81] In addition it was argued that it is all the more important within the context of the right to an environment that is not harmful to health and well-being to acknowledge and reinforce the close relationship between socio-economic rights in the setting of the Constitution as a whole.[79]

[82] In this regard counsel had argued that section 24(a) of the Constitution is the fundamental human right to an environment that is not harmful to health or well-being. The following is evident from the language of the right.

82.1 First, it creates a meaningful nexus between the environment, "human health" and "well-being".[80] According to Du Plessis,

---

77 *Grootboom* at para 23.
78 *Grootboom* at para 83.
79 *Grootboom* at para 24.
80 Du Plessis "The promise of 'well-being' in section 24 of the Constitution of South Africa" (2018) SAJHR vol 34 pp 191 – 208 p 193.

the linkage lies in that human health and well-being depend on the quality of the environment. They are "*influenced by the environmental conditions both positively and negatively, with significant economic and social consequences*."[81]

82.2 Second, in respect of the environment and "health", the section extends health rights beyond section 27(1) of the Constitution. The right recognises that there is an inextricable relationship between one's health and the environment within which one lives. A particular environment may be damaging to a person's health, yet avoid falling foul of the right to health in section 27, as it does not infringe on that person's right of access to health care services. Health is unarguably a component of environmental concern and falls within the ambit of section 24.[82]

82.3 Third, in adding two separate descriptive modifiers namely "health" or "well-being" the right goes beyond health and shows that the drafters of the Constitution were not only concerned with disease outcomes by seeking to protect a person's "well-being". Du Plessis argues that it "*…relates to those instances where environmental interests – which do not*

---

81 Du Plessis "The promise of 'well-being'" p 193.

82 Glazewski "Environmental Law in South Africa" (2000) p 5-16. See also *Verstappen v Port Edward Town Board and Others* 1994 (3) SA 569 (D).

necessarily have evident health implications are affected."[83] The definition of "pollution" in the National Environmental Management Act 107 of 1998 ("NEMA") includes reference to a change in the environment which "has an adverse effect on human health or well-being". The definition recognises that experiencing pollution could have an adverse effect on well-being. Pollution that does not have a direct effect on health could nevertheless be seen as harmful to an individual's well-being and therefore in violation of the environmental right.[84]

82.4 Fourth, unlike other rights, the right may be invoked purely for the benefit of future generations. Meaning only potential violation will suffice. Section 24 guarantees everyone an environment not harmful to their health or well-being and mandates the state to ensure compliance with that right through reasonable legislative and other measures. It also requires that the environment be protected for the benefit of present and future generations in the ways identified in section 24(b)(i) to (iii).[85] Section 24(b) gives effect to the right in section 24(a), and requires the state to take the

---

83 Du Plessis "The promise of 'well-being'" p 198.

84 Donald "Advancing the constitutional goal of social justice through a teleological interpretation of key concepts in the environmental rights in section 24" (2014) p 81. See also *Hichange Investments (Pty) Ltd v Cape Produce Co (Pty) Ltd t/a Pelts Products* 2004 (2) SA 393 (E) and *HTF Developers (Pty) Ltd v The Minister of Environmental Affairs* 2006 (5) SA 512 (T).

85 *Fuel Retailers Association of Southern Africa v Director-General: Environmental Management, Department of Agriculture, Conservations and Environment, Mpumalanga Province and Others* 2007 (6) SA 4 (CC) at para 102.

measures necessary to protect the environment so that everyone (present and future generations) may have an environment that is not harmful to their health or well-being. The guarantee is contained in 24(a) and the mechanism to exercise that guarantee is contained in 24(b). Construed this way, section 24(a) can be invoked for the benefit of future generations (a broad concept which can mean posterity, or those whose birth is imminent), to protect their health and well-being.

82.5 Fifth: When section 24(a) is read with section 24(b) it means the state has both negative and positive obligations in respect of the environment. Negative obligations to desist from harming the environment and positive obligations to take measures to ensure a healthy environment. There is also the general positive obligation in section 7(2) of the Constitution which provides that the state must *"respect, protect, promote and fulfil the rights in the Bill of Rights".*

82.6 Sixth: as highlighted above, the right is unqualified and must therefore be understood to be immediately realisable.

[83] In opposition to the relief sought by the applicants, specifically in answer as to whether there had been a breach of section 24(a) of the

Constitution, the following arguments were advanced on behalf of the respondents: Firstly, that this case concerns the complex problem of whether a Court, within the Judicial Branch of Government, should instruct an Organ of State in the Executive Branch of Government to address the pressing and decades-old continuing issue of air pollution at certain hot-spots in the Highveld Priority Area, which is the heartland of electricity generation for the whole of South Africa.

83.1 By virtue of the Doctrine of Constitutional Supremacy,[86] the issues in dispute must be considered and resolved within the parameters of all the relevant principles, doctrines and provisions of the Constitution, and not only by means of a few selected provisions thereof.

83.2 Furthermore, by virtue of the Rule of Law,[87] this problem must also be considered and resolved within the parameters of all the relevant principles, doctrines and provisions of the suite of Environmental Legislation that was enacted by the Legislative Branch of Government to give effect to, and to limit, the fundamental environmental rights in section 24 of the Constitution.

---

[86] Section 2 of the Constitution, which commands that the Constitution is the supreme law of the Republic of South Africa, that any law or conduct inconsistent with it is invalid, and that the obligations imposed by it must be fulfilled.

[87] Section 1(c) of the Constitution, which establishes the Republic of South Africa as one sovereign, democratic state founded *inter alia* on the foundational values of the Rule of Law.

83.3 By virtue of the Doctrine of Separation of Powers,[88] this problem must also be considered and resolved within the context of the steps, actions, plans and programmes already initiated by the Executive Branch of Government:

> "*Where the Constitution or valid legislation has entrusted specific powers and functions to a particular branch of government, courts may not usurp that power or function by making a decision of their preference. That would frustrate the balance of power implied in the principle of separation of powers. The primary responsibility of a court is not to make decisions reserved for or within the domain of other branches of government, but rather to ensure that the concerned branches of government exercise their authority within the bounds of the Constitution. This would especially be so where the decision in issue is policy-laden as well as polycentric*."[89]

83.4 It is on this basis that the respondents contended that the Applicants and the Special Rapporteur has had no regard for the relevant provisions of the Constitution, for the suite of Environmental Legislation enacted to give effect to and limit the environmental rights under section 24 the Constitution, or

---

88 See *National Treasury v Opposition to Urban Tolling Alliance* 2012 (11) BCLR 1148 (CC) par [44],[63]; *De Lange v Smuts NO* 1998 (7) BCLR 779 (CC) par [60]; *In re: Certification of the Constitution of the Republic of South Africa, 1996 1996* (10) BCLR 1253 (CC) par [106]-[108].

89 *International Trade Administration Commission v SCAW South Africa (Pty) Limited* 2010 (5)BCLR (CC) par (95].

for all of the other actions, plans and programmes already initiated by the Executive Branch of Government,[90] since 1993 with the dawn of the new constitutional dispensation, in order to address this complex problem with the limited resources available to the State.[91]

83.5 Despite this so the argument went that the applicants and the Special Rapporteur take the current Minister for Forestry, Fisheries and the Environment[92] to task in this regard, alleging that the fundamental right in section 24(a) of the Constitution is being breached and demanding that she immediately and urgently make regulations for the Highveld Priority Area under the discretionary empowering provision in section 20 of the National Environmental Management: Air Quality Act 39 of 2004[93] so as to address this problem, as if those regulations will immediately improve the poor air quality in the Highveld Priority Area.

83.6 Furthermore, the argument advanced was that at the core of this matter is the difficult policy-laden and poly-centric decisions that those in Government must make, within the

---

90 See Record p. 1152, 1211-1237 and 1282-1284 (para 4, 38-44 and 86 of the Answering Affidavit).
91 See Record p. 1161-1162, 1167-1168, 1171-1172, 1178 and 1181-1182 (para 13, 18.5, 21.2, 23.1 and 23.5-24 of the Answering Affidavit).
92 "the Minister".
93 "*the Air Quality Act*".

framework of the supreme Constitution, when faced with the multi-faceted problem of serious air pollution, originating in different degrees and in different ways from various point and non-point sources, both from within and from outside the particular area, and not attributable to a single source.[94]

[84] It is on this basis that the Minister argues that the principle of subsidiarity precludes the applicants from relying directly on the section 24(a) of the Constitution.

[85] The Principle of Subsidiarity it was argued is an established doctrine in Constitutional Law and its essence has been captured as follows: where legislation has been enacted to give effect to a fundamental right, a litigant should rely on that legislation in order to give effect to the fundamental right or alternatively challenge the legislation as being inconsistent with the Constitution.[95] The Minister further contends that the existing suite of environmental legislation, including NEMA and the Air Quality Act, was enacted to give effect to this right and thus bars any direct reference to section 24(a).[96] The applicants

---

94 See for instance Record p. 1427-1428 (Table 1 in the Highveld Plan).

95 See *My Vote Counts NPC v Speaker of the National Assembly* 2016 (1) SA 132 (CC) para [161]; Mazibuko v City of Johannesburg 2010 (4) SA 1 (1) par [73] (and also par [173])

> "[73] …This court has repeatedly held that where legislation has been enacted to give effect to a right, a litigant should rely on that legislation in order to give effect to that right or alternatively challenge the legislation as being inconsistent with the Constitution."

96 Answering Affidavit Vol. 5 para 48 p 1250.

as a result cannot circumvent the existing suite of Environmental Legislation.

[86] The rationales for the Principle of Subsidiarity counsel had argued was set to be the following:[97]

86.1 Firstly, allowing a litigant to rely directly on a fundamental right containedin the Constitution, rather than on legislation enacted in terms of the Constitution to give effect to that right, would defeat the purpose of the Constitution in requiring the right to be given effect through legislation and it would be inconsistent with the principle of subsidiarity;

86.2 secondly, comity between the Branches of Government enjoins Courts to respect the efforts of other Branches of Government in fulfilling constitutional rights; and

86.3 thirdly, allowing reliance directly on constitutional rights, in defiance of their statutory embodiment, would encourage the development of two parallel systems of law.

[87] These *rationales* for the Principle of Subsidiarity go much further than the single consideration of the purpose of the Constitution but also

---

[97] See *My Vote Counts NPC v Speaker of the National Assembly* 2016 (1) SA 132 (CC) par [160]; Answering Affidavit para 48 p 1252.

include the consideration of comity between the three Branches of Government as well as the consideration of having one integrated and coherent system of law.

[88] In respect of the first rationale (defeating the purpose of the Constitution), the court's attention was drawn to the following:

88.1 Firstly, all legislation is enacted in terms of the Constitution but not all legislation is enacted, to give effect to a particular fundamental right. This is the context in which the Constitutional Court captured the essence of the Principle of Subsidiarity as being applicable where legislation has been enacted to give effect to a constitutional right, without qualifying this to a further subclass of such legislation. In this regard it is trite law that the suite of Environmental Legislation has been specifically enacted to give effect to the two fundamental rights with regard to the environment as provided for in section 24 of the Constitution.[98]

---

[98] Mining and Environmental Justice Community Network of South Africa v Minister of Environmental Affairs [2019] 1 All SA 491 (GP) par [4]:

"The legislation in question to give effect to the abovementioned environmental provision [section 24] contained in the Constitution are the National Environmental Management Act 107 of 1998 ('NEMA', the National Environmental Management: Biodiversity Act 10 of 2004 ('NEMBA', the National Environmental Management: Protected Areas Act 57 of 2003 ('NEMPAA'J and the National Water Act 36 of 1998 ("the National Water Act');"

See also Earthlife Africa Johannesburg v Minister of Environmental Affairs [2017] 2 All SA 519 (GP) par [58]; Minister of Water and Environmental Affairs v Kloof Conservancy [2016] 1 All SA 676 (SCA) par [1]; Company Secretary of Arce/ormittal South Africa v Vaa/ Environmental Justice Alliance [2015] 1 All SA 261 (SCA) par [68]; Maccsand (Pty) Ltd v City of Cape Town 2012 (4) SA 181 (CC) par [8]; Fuel Retailers Association of South Africa v Director-Genera /: Environmental Management , Dept of Agriculture, Conservation & Environment, Mpumalanga Province 2007 (6) SA 4 (CC) par [40]; Currie and De Waal The Bill of Rights Handbook (2016) 528-529.

88.2 Secondly, there are provisions in the Constitution which expressly require legislative measures to give effect to a fundamental right (for example section 24(b),[99] section 25(5),[100] sections 26(2),[101] sections 27(2)[102] and section 29(1)(b)[103] of the Constitution) and other provisions which expressly contemplate legislation in the context of a fundamental right (for example, sections 9(4),[104] sections 15(3),[105] section 23(5)(-6),[106] section 25(6) and (9),[107] section 32(2)[108] and section 33(3)[109] thereof). It however, does not follow that only the legislation so expressly

---

99 Section 24(b) of the Constitution provides for a fundamental right to have the environment protected, for the benefit of present and future generations, through reasonable legislation and other measures.

100 Section 25(1) of the Constitution provides for a fundamental right to protection of property but then, in section 25(5) thereof, commands the State to take reasonable legislative and other measures, within its available resources, to foster conditions which enable citizens to gain access to land on an equitable basis.

101 Section 26(1) of the Constitution provides for a fundamental right to have access to adequate housing and then, in section 26(2) thereof, commands the State to take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of this right.

102 Section 27(1) of the Constitution provides for fundamental rights of access to (a) health care services including reproductive health care; (b) sufficient food and water; and (c) social security, including, if they are unable to support themselves and their dependants, appropriate social assistance. Section 27(2) thereof then continues to command the State to take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of each of these rights.

103 Section 29(1)(b) of the Constitution provides for a fundamental right to further education, which the State, through reasonable measures, must make progressively available and accessible.

104 Section 9(4) of the Constitution contemplates national legislation to be enacted to prevent or prohibit unfair discrimination.

105 Section 15(3) of the Constitution contemplates the possibility of legislation to recognise marriages concluded under any tradition, or a system of religious, personal or family law; and/or to recognise systems of personal and family law under any tradition, or adhered to by persons professing a particular religion.

106 Section 23(5)-(6) of the Constitution contemplates that national legislation may be enacted to regulate collective bargaining and that national legislation may recognise union security arrangements contained in collective agreements.

107 Section 25(6) of the Constitution contemplates an Act of Parliament to address the legally insecure tenure of land for a person or community, resulting from past racially discriminatory laws or practices and section 25(9) thereof commands Parliament to enact that legislation.

108 Section 32(2) the Constitution contemplates national legislation that must be enacted to give effect to the right of access to information.

109 Section 33(3) of the Constitution contemplates national legislation that must be enacted to give effect to the right to just administrative action.

contemplated by the Constitution in those provisions are subject to the Principle of Subsidiarity and there is, with respect, no authority for such a proposition. Accordingly, the Principle of Subsidiarity is not restricted to the subclass of expressly-contemplated legislation, giving effect to a fundamental right.

88.3 Thirdly, in those instances where in the context of a particular fundamental right, some legislation is expressly contemplated, such legislation is also expressly contemplated in the more general context of section 9 of the Constitution.

88.3.1 Although section 9(1) of the Constitution provides for the fundamental right of equality before the law and to equal protection and benefit of the law, section 9(2) thereof recognises that this reflects a formal right to equality whilst distributive justice demands a more substantive right of equality so that the fundamental right to equality may include *"the full and equal enjoyment of <u>all rights</u> and freedoms."*

88.3.2 This same provision then contemplates that, with a view to promote the achievement of

(substantive) equality, legislative and other measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination may be taken.

88.3.3 The preamble of the Air Quality Act provides the reasons or motivation for the enactment thereof, which include that the quality of ambient air in many areas of the Republic of South Africa is not conducive to a healthy environment for the people living in those areas let alone promoting their social and economic advancement; that the burden of health impacts associated with polluted ambient air falls most heavily on the poor; that air pollution carries a high social, economic and environmental cost that is seldom borne by the polluter; that everyone has the constitutional right to an environment that is not harmful to their health or well-being; that everyone has the constitutional right to have the environment protected, for the benefit of present and future generations, through reasonable legislative and other measures; that the minimisation of pollution through vigorous control, cleaner technologies and cleaner production

practices is key to ensuring that air quality is improved; and that additional legislation is necessary to strengthen the Government's strategies for the protection of the environment and, more specifically, the enhancement of the quality of ambient air, in order to secure an environment that is not harmful to the health or well-being of people. It is for this basis that counsel contended that Air Quality Act is also legislation expressly contemplated in section 9(2) of the Constitution.

88.4 Fourthly, section 36 of the Constitution provides that the Bill of Rights may be limited in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors. Therefore, such a law of general application which gives effect to a fundamental right. Accordingly, counsel had argued, that the Air Quality Act is such a law of general application giving a circumscribed effect to the environmental right in section 24(a) of the Constitution.

88.5 In is therefore on this basis that counsel had argued, that allowing direct reliance on the environmental right in section 24(a) of the Constitution would defeat the purpose of the Constitution.

[89] As to the roles of the various Branches of Government, counsel had argued that the courts are enjoined to respect the efforts of the other Branches of Government in fulfilling constitutional rights. This also flows from the constitutional Doctrine of Separation of Powers,[110]which includes judicial respect for the effort to enact the Air Quality Act, which the Applicants cannot simply bypass by relying on section 24(a) of the Constitution directly for its cause of action.

[90] In addition, counsel further submitted that in this regard the main stakeholder, i.e. the Local Sphere of Government,[111] be engaged instead of bypassed as Metropolitan Municipalities and District Municipalities are generally charged in terms of section 36(1) of the Air Quality Act with implementing the atmospheric emission licensing system, referred to in section 22 thereof, and must for this purpose perform the functions of licensing authority as set out in the Air Quality Act.

---

110 See *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs* 2004 (4) SA 490 (CC) par [46].

111 See section 155 (6)(a) and (7) of the Constitution, read with schedule 48 thereof. This is the result of an Institutional Principle of Subsidiarity.

[91] The numerous atmospheric emission licenses that were issued by municipalities within the Local Sphere of Government for listed activities, the lawful emission of harmful substances into the ambient air of the Highveld Priority Area by each holder of such a licence is allowed and legal. It is therefore also on this basis also the Principle of Subsidiarity should find application.

[92] On the Rule of Law consideration,[112] going to the trite requirement that certainty and clarity is an essential aspect of the Rule of Law: those who are required to comply with the law, and those charged with enforcing it, should have reasonable certainty about what it is.[113] In *casu*, where the applicants rely directly on the right in section 24(a) of the Constitution, they seek to develop a system of law which would not brook the introduction, or indeed the presence, of any source of harm in the environment. As a result of the Air Quality Act providing for the listing of activities which result in atmospheric emissions and in respect of which there is a reasonable believe that those emissions have or may have a significant detrimental effect on the environment, including health, social conditions, economic conditions, ecological conditions or cultural heritage,[114] the result of such listing, is that a

---

[112] Section 1(c) of the Constitution, which establishes the Republic of South Africa as one, sovereign, democratic state founded inter alia on the foundational values of the Rule of Law.

[113] *NUMobo Majebe v Civil and General Contractors* [2021] 4 BLLR 374 (LAC) par [30]; *National Commissioner of Police v Gun Owners of South Africa* [2020] 4 All SA 1 (SCA) par [43]; *Beadica 231 CC v Trustees for the Time Being of the Oregon Trust* 2020 (9) BCLR 1098 (CC) par [81].

[114] Section 21 of the Air Quality Act.

person may only conduct such an activity with an atmospheric emission licence.[115] It as such follows that the introduction or presence of a source of harm in the environment is lawful under these circumstances.[116]

[93] It is on this basis further that counsel had argued, that the Air Quality Act thus limits the fundamental right in section 24(a) of the Constitution, as contemplated in section 36 thereof and by allowing reliance directly on this constitutional right, in defiance of its statutory embodiment and limitation under the Air Quality Act, the Court would encourage the development of two parallel systems of law. This contradicts the Principle of Subsidiarity and the Rule of Law.

[94] In the present instance, counsel had further argued that the applicants elected not to attack the constitutional reasonableness of all the "other measures" that were taken by the Minister to address the poor air quality in the Highveld Priority Area but instead elected to advance a cause of action directly founded upon section 24(a) of the Constitution whilst ignoring the *"legislative measure"* that was enacted by Parliament to give effect to that same fundamental right.

---

115 See section 22 of the Air Quality Act.

116 Various other provisions in the suite of Environmental Legislation follow a similar Command and control approach. Certain activities are listed but are then allowed under the authority of an authorisation or a licence, allowing a source of harm to be lawfully introduced into the environment but under controlled circumstances.

[95] In addition, counsel highlighted the preamble of the Air Quality Act and certain relevant provisions of the Act. The preamble of the Air Quality Act is quoted hereunder for ease of reference:

> ***"Preamble.***
>
> *WHEREAS the quality of ambient air in many areas of the Republic is not conducive to a healthy environment for the people living in those areas let alone promoting their social and economic advancement;*
>
> *AND WHEREAS the burden of health impacts associated with polluted ambient air falls most heavily on the poor;*
>
> *AND WHEREAS air pollution carries a high social, economic and environmental cost that is seldom borne by the polluter;*
>
> *AND WHEREAS atmospheric emissions of ozone-depleting substances, greenhouse gases and other substances have deleterious effects on the environment both locally and globally; AND WHEREAS everyone has the constitutional right to an environment that is not harmful to their health or well-being; AND WHEREAS everyone has the constitutional right to have the environment protected, for the benefit of present and future generations, through reasonable legislative and other measures that-*
>
> *(a) prevent pollution and ecological degradation;*
>
> *(b) promote conservation; and*
>
> *(c) secure ecologically sustainable development and use of natural resources while promoting justifiable economic and social development;*

AND WHEREAS minimisation of pollution through vigorous control, cleaner technologies and cleaner production practices is key to ensuring that air quality is improved;

AND WHEREAS additional legislation is necessary to strengthen the Government's strategies for the protection of the environment and, more specifically, the enhancement of the quality of ambient air, in order to secure an environment that is not harmful to the health or well-being of people, ..."

[96] In section 2 of the Air Quality Act, the object thereof is stated to be as follows:

"The object of this Act is-

(a) to protect the environment by providing reasonable measures for –

(i) the protection and enhancement of the quality of air in the Republic;

(ii) the prevention of air pollution and, ecological degradation; and

(iii) securing ecologically sustainable development while promoting justifiable economic and social development; and

(b) generally to give effect to section 24(b) of the Constitution in order to enhance the quality of ambient air for the sake of securing an environment that is not harmful to the health and well-being of people."

[97] Counsel further argued that the wording of section 2(a) of the Air Quality Act mirrors that of section 24(b) of the Constitution whilst the wording of section 2(b) of the Air Quality Act mirrors that of section 24(a) of the Constitution.[117]

[98] Having regard to the provisions of section 2(b) of the Air Quality Act, counsel also submitted that this section is clearly not premised upon an environmental right under section 24(a) of the Constitution which is immediately and without any qualification enforceable.

[99] In addition, the argument advanced was that section 3 of the Air Quality Act also makes clear that this legislation was enacted to give effect to the environmental rights in section 24 of the Constitution, by imposing the following general duty on the State:

> "*In fulfilling the rights contained in section 24 of the Constitution, the State –*
>
> *(a) through the organs of state applying this Act, must seek to protect and enhance the quality of air in the Republic; and*
>
> *(b) must apply this Act in a manner that will achieve the progressive realisation of those rights (sic: plural).*"

[100] It is for this reason that counsel contended that there is a limitation in section 3(b) of the Air Quality Act despite the wording used in

---

[117] The reference to section 24(b) of the Constitution in section 2(b) of the Air Quality Act is clearly and patently a typing error.

section 24(a) of the Constitution. This section clearly calls for a progressive realisation of both the environmental rights as provided for in section 24(a) and (b) of the Constitution.

[101] Support for this argument counsel submitted is to be found in the decision **My Vote Counts NPC v Speaker of the National Assembly** 2016 (1) SA 132 (CC) para [166].[118]

> *"In view of the Constitutional Court's justification of the first two subsidiarity principles, the question is not whether legislation in fact gives effect to* a *right in the Bill of Rights, but whether it was enacted to do so. In other words, the focus is on the intention of the post-1994 democratic legislature to honour its constitutional obligations and promote the spirit, purport and object[s] of the Bill of Rights through exercise of its legislative powers."*[119]

[102] It is on this basis therefore that counsel did not agree with the proposition by the applicants, namely that what emerges from the constitutional jurisprudence is that the Principle of Subsidiarity generally applies only in two circumstances.[120]

[103] The reliance placed by the applicants on constitutional jurisprudence which dealt with children's rights under section 28 of the Constitution

---

118 *My Vote Counts NPC v Speaker of the National Assembly* 2016 (1) SA 132 (CC) par [166].
119 The underlined text is the text that was emphasised by the Constitutional Court.
120 See para 95 of the Applicants' Heads of Argument.

or education rights under section 29 thereof,[121] is opportunistic and misleading as none of the parties raised the issue of subsidiarity in any of the judgments referred to by the Applicants and there is no mention of any aspect of subsidiarity therein.

[104] The below-mentioned examples under the Air Quality Act should suffice setting out the procedure and remedies available: [122]

104.1 Section 32(1) of the NEMA empowers any person or group of persons to seek appropriate relief in respect of any breach or threatened breach of any provision the NEMA or any provision of a Specific Environmental Management Act such as the Air Quality Act.

104.2 Section 33(1) of the NEMA empowers any person, in the public interest or in the interest of the protection of the environment, to institute and conduct a prosecution in respect of any breach or threatened breach of any duty, other than a public duty resting on an Organ of State, in any national or provincial legislation or municipal by-law, or any regulation, licence, permission or authorisation issued in terms of such legislation, where that duty is concerned with the protection of the environment and the breach of that duty is an offence.

---

121 See para 96 of the Applicants' Heads of Argument.
122 See para 97 of the Applicants' Heads of Argument.

[105] Accordingly, counsel submitted that the Principle of Subsidiarity is a complete answer to the case as advanced by the Applicants in this matter on the alleged breach of section 24(a) of the Constitution, and the declaratory relief should as a result not be granted.

[106] In addition, counsel further submitted that a mere state of affairs, which is not attributed to the conduct of the Executive or an Organ of State, cannot in logic or law constitute the breach of a fundamental right, as it requires either positive or negative conduct from the duty-bound person in conflict with the correlative duty. If a mere state of affairs can constitute a breach of the environmental right in section 24(a) of the Constitution, then a sand-storm by way of an example making the air unbreathable in a community or a volcano spewing toxic gasses over a town would be a breach of this environmental right.

[107] Support for this contention is found in section 2 of the Constitution, which provides for the supremacy of Constitution. It is also found in section 7(2) of the Constitution which provides that the state must respect, protect, promote and fulfil the rights in the Bill of Rights. Section 8(1) of the Constitution provides that the Bill of Rights binds the legislature, executive, the judiciary and all organs of state.

[108] In addition, section 172(1)(a) of the Constitution provides that a court when deciding a constitutional matter within its power must declare any law or conduct that is inconsistent with the Constitution invalid to the extent of its inconsistency. Lastly section 237 of the Constitution provides that: all constitutional *obligations* must be performed diligently and without delay.

[109] It is on this basis that counsel contended that common sense dictates that a breach must either be positive conduct (by action in conflict with the correlative duty or obligation calling) or negative conduct (by inaction in conflict with the correlative duty or obligation), but some form of human conduct there must be as a most basic requirement. The idea that one can legislate a state of affairs in physical reality away, is absolute unrealistic or nonsensical, hence the maxim *lex non cogit ad impossibilia.*

[110] It is on this basis that counsel submitted that there is no basis in law or in fact for the granting of this declaratory relief in respect of a state of affairs.

[111] In addition, in view of the nature and limitations on the fundamental right as contained in section 24(a) of the Constitution, the poor air quality at the various hotspots in the Highveld Priority Area does not constitute a breach of this fundamental right.

[112] In as far as the applicants contend that the fundamental right as contained in section 24(a) of the Constitution is of a particular nature and that is immediately enforceable here and now,[123] the argument went that the applicants failed to distinguish between the different correlative duties or obligations for the right in question, which may be either (1) the duty to avoid deprivation (corresponding with the notion of the negative duty to protect rights), (2) the duty to protect from deprivation (corresponding with the intermediate duty to prevent others from interfering with rights), and (3) the duty to aid the deprived (corresponding with the positive duty to fulfil rights). In this regard, it was argued that the case for the applicants is not aimed at the first two types of duties, concerned with the negative duty not to do something (that is, to refrain from introducing a source of harm for health and well-being into the environment). The case for the applicant is rather aimed at the third type of duty, concerned with the positive duty to do something (namely to fulfil and promote the enjoyment of that fundamental right).

[113] This primary premise, counsel contended, is wrong because the environmental right in section 24(a) of the Constitution, to the extent that it imposes a correlative positive duty or obligation to ensure (that is, *"to respect, protect, promote and fulfil")*[124] an environment that is

[123] See para 45 of the Applicants' Heads of Argument.
[124] See section 7(2) of the Constitution.

not harmful to a person's health or well-being, is clearly a fundamental right that is progressively realisable.

[114] Relying on section 9 of the Constitution the argument advanced was to the effect that the section recognises the reality that in South African society, as a result of our history, everyone is not in a position to fully and equally enjoy all rights and freedoms. It is on this basis counsel had argued that the section is a clear recognition, by the Constitution, that the residents in the Highveld Priority Area are also not in a position to fully and equally enjoy the environmental right in section 24(a) of the Constitution.

[115] As section 9(2) of the Constitution empowers the state, in order to promote the achievement of equality of its citizenry, to take legislative and other measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination that this is a further clear recognition of the progressively realisable nature of the correlative duty to the environmental right in section 24(a) of the Constitution.

[116] The progressively realisable nature of the environmental right in section 24(a) of the Constitution is, as mentioned previously also confirmed in section 2 and section 3 of the Air Quality Act.

[117] The progressively realisable nature of the environmental right in section 24(a) of the Constitution is further confirmed in section 4 of the Local Government: Municipal Systems Act 32 of 2000 where the primary responsibility for the functional area of air pollution is with the Local Sphere of Government, and section 36 of the Air Quality Act which recognizes municipalities as the licensing authorities for atmospheric emission licenses).[125] In this regard, section 4 provides as follows:

> **"4. Rights and duties of municipal councils.**
>
> (1) The council of a municipality has the right to –
>
> (a) govern on its own initiative the local government affairs of the local community;
>
> (b) exercise the municipality's executive and legislative authority, and to do so without improper interference; and
>
> (c) …….
>
> (2) The council of a municipality, within the municipality's financial and administrative capacity and having regard to practical considerations, has the duty to ...
>
> (i) promote a safe and healthy environment in the municipality; and

[125] Municipal Systems Act.

(j) contribute, together with other organs of state, to the progressive realisation of the fundamental rights contained in sections 24, 25, 26, 27 and 29 of the Constitution.

(3) A municipality must in the exercise of its executive and legislative authority respect the rights of citizens and those of other persons protected by the Bill of Rights."

[118] Support for the above argument is further found in the remarks made by the Constitutional Court on progressive realisation of a fundamental right in the Grootboom decision:

> *"[45] The extent and content of the obligation consist in what must be achieved, that is, 'the progressive realisation of this right'. It links ss (1) and (2) by making it quite clear that the right referred to is the right of access to adequate housing. The term 'progressive realisation' shows that it was contemplated that the right could not be realised immediately. But the goal of the Constitution is that the basic needs of all in our society be effectively met and the requirement of progressive realisation means that the State must take steps to achieve this goal. It means that accessibility should be progressively facilitated: legal, administrative, operational and financial hurdles should be examined and, where possible, lowered overtime. Housing must be made more accessible not only to a larger number of people but to a wider range of people as time progresses*" [126]

---

[126] *Government of the Republic of South Africa v Grootboom* 2001 (1) SA 46 (CC) par [45].

[119] In as far as the applicants' case is premised thereon that the fundamental right as contained in section 24(a) of the Constitution is of a particular scope, namely an unqualified right that is unlimited[127] or has a *"basic minimum for environmental protection,"*[128] at the outset the respondents point out that the notion of a fundamental right having a minimum core contents[129] has previously been rejected by our Constitutional Court.[130]

[120] It is for this reason, that counsel contended that the impugned state of affairs, with regard to the poor air quality in the Highveld Priority Area, has been brought about by activities falling within the qualifications to and limitations of the right as contained in section 24(a) of the Constitution.

[121] Counsel further submitted that the right in section 24(a) of the Constitution is not an absolute but relative right, which is qualified and limited. In this regard counsel pointed out that in the first place, the right in section 24(a) of the Constitution is limited by the conjoined environmental right as provided for in section 24(b) thereof, embodying a constitutional imperative for sustainable development.[131]

---

127 See para 45-53 of the Applicants' Heads of Argument.
128 See para 46 of the Applicants' Heads of Argument.
129 See para 46 of the Applicants' Heads of Argument.
130 *Government of the Republic of South Africa v Grootboom* 2001 (1) SA 46 (CC) para [32].
131 *Fuel Retailers Association of South Africa v Director-Genera/: Environmental Management Department of Agriculture, Conservation & Environment, Mpumalanga Province* 2007 (6) SA 4 (CC) par [44]-[62].

[122] In this regard section 24(b) of the Constitution provides that everyone has the right to have the environment protected, for the benefit of present and future generations, through reasonable legislative and other measures. In this regard the Air Quality Act was enacted and a number of legislative instruments which allow for the release of harmful substances into the ambient air: the instrument of atmospheric emission licences in respect of listed activities,[132]the declaration of controlled emitters[133] and the declaration of controlled fuels.[134]

[123] NEMA was enacted and it provides for at least one legislative instrument which allows for the release of harmful substances into the ambient air: the instrument of prior environmental authorisation for the commencement of listed activities.[135] These include, for example, listed activities for the generation of electricity; listed activities for prospecting and mining; listed activities for the development of railway lines, stations and shunting yards; and listed activities for the development of road networks and other transport infrastructure.[136]

[124] The Waste Act 59 of 2008[137] was enacted and it also provides for at least one legislative instrument which allows for the release of harmful

---

132 See section 21-22A of the Air Quality Act.
133 Section 23-25 of the Air Quality Act.
134 Section 26-28 of the Air Quality Act.
135 Section 24 and section 24A-24S of the NEMA.
136 See Listing Notice 1 of 2014 and Listing Notice 2 of 2014, published in GN R. 983 and GN R. 984 of Government Gazette No 38282 of 4 December 2014, as amended.
137 Referred to as the Waste Act.

substances into the ambient air. Section 19 thereof requires a waste management licence for listed waste management activities, which waste management licences may in terms of section 45 thereof also authorise the treatment of waste by way of incineration.

[125] Counsel further advanced the argument that by giving effect to section 24(b) of the Constitution in this legislation, the environmental right in section 24(a) was qualified or limited in terms of laws of general application.

[126] By way of example the right in section 24(a) of the Constitution is limited by section 10 of the Constitution provides for the right to dignity by promoting various industries such as clay brick manufacturing, power generation, transport networks and residential areas are all efforts to make a dignified existence available for every person in the Republic of South Africa. Section 11 of the Constitution which provides for the right to life, which should include a right to a quality of life. Section 21 i.e the right to freedom of movement which cannot be exercised without transport infrastructure.

[127] Section 25 of the Constitution, which is the basis upon which the Mineral and Petroleum Resources Development Act 28 of 2002 was enacted so as to provide equitable access to the natural resources of this country, is also relevant: the prospecting and mining operations

in the Highveld Priority Area have been legally authorised in terms thereof.

[128] Lastly the socio-economic rights in section 26-29 of the Constitution, counsel submitted that these rights are not achievable without sustainable development and a vibrant economy which provides the resources for fulfilling those socio-economic rights. The fulfilment of all these other fundamental rights will therefore, inevitably, have an impact on the safety of the environment.

[129] As such it was argued that this court should refuse to grant a declarator resulting from constitutional and lawful activities as these activities are all lawfully authorised and it will be irrational to regard their consequences as unlawful.

[130] In as far as the respondents' dereliction of an alleged duty in terms of section 20 of the Air Quality Act, the following arguments were advanced.

[131] Section 20 of the Air Quality Act provides as follows (underlining for emphasis):

> ***"20. Regulations for implementing and enforcing priority area air quality management plans.***
>
> *The Minister or MEG may prescribe regulations necessary for implementing and enforcing approved*

priority area air quality management plans, <u>including</u> –

(a) funding arrangements;

(b) measures to facilitate compliance with such plans;

(c) penalties for any contravention of or any failure to comply with such plans; and

(d) regular review of such plans."

[132] In as far as the interpretation of the phrase: "may prescribed regulations," it is the case for the applicants that, as a matter of proper interpretation, the phrase *"may prescribe regulations"* as used in this provision means *"must prescribe regulations."*[138] Accordingly the only issue is an issue on the level of law, pertaining to the proper interpretation of section 20 of the Air Quality Act.

[133] In this regard counsel had argued, that when interpreting a statute, the factual circumstances of a case have no bearing on the analysis.[139] The reason for this, is that the same words in a legislative instrument cannot be interpreted differently under different circumstances;[140] in other words, for the sake of the certainty required by the Rule of Law, the interpretation of a legislative instrument does not take place within the factual matrix peculiar to a specific case. For purposes of

---

138 See para 109-134 of the Applicants' Heads of Argument.
139 See *Desert Palace Hotel Resort (Pty) Ltd v Northern Cape Gambling Board* 2007 (3) SA 187 (SCA) par [7].
140 See *Mamogalie v Minister van Naturellesake* 1961 (1) SA 467 (A) 473B.

interpretation, the poor air quality in the Highveld Priority Area must therefore be left out of account.

[134] The usage of the word "may" in section 20 the argument went therefore bestows a discretionary power on the Minister with a correlative liability for individuals once that power is exercised. If Parliament wanted to impose an obligatory duty, it would have been quite easy to state so.

[135] Having regard to the context of section 20, it is apparent that a discretionary power was bestowed upon the Minister that is only in circumstances where it is *"necessary"*, may regulations be prescribed. As such there is no general power to prescribe regulations in respect of the approved air quality management plan of each declared priority area.

[136] Whether or not such regulations are *"necessary"*, is in the first place for the Minister to satisfy herself but this does not mean that the making of regulations is left to her whim.[141] In any event and on the level of fact, the Minister has provided the factual basis showing that, objectively, no such specific regulations are *necessary".*[142]

---

[141] See para 119 of the Applicants' Heads of Argument.
[142] See Record p. 1261-1271 (para 53 of the answering affidavit).

[137] Support for the discretionary power of the Minister is also found having regard to the provisions of section 18 and 19 of the Air Quality Act as the situation in one declared priority area may differ vastly from another declared priority area and because the air quality management plan of one area will differ from the plan for the next area, it makes sense that section 20 provides for a discretionary power for prescribing regulations instead of an obligatory duty.

[138] Given the purpose and objective of the Air Quality Act of a progressive realisation of the right to an environment not harmful for the health or well-being of a person, there is therefore no reason why section 20 thereof must be interpreted as providing for an obligatory duty,[143] but rather it supports the notion of a discretionary power being conferred on the Minister.

[139] In addition, the argument on interpretation that was advanced, is for an interpretation that is consistent with and in accordance with, the imperatives of the Constitution:

139.1 The constitutional scheme allocates the primary responsibility for the functional area of air pollution to the Local Sphere of Government.[144]

---

[143] Para 120 of the Applicant's Heads of Argument.
[144] See section 155 (6)(a) and (7) of the Constitution, read with schedule 4B thereof.

139.2 Section 156(1)(a) of the Constitution states that a municipality has executive authority in respect of, and has the right to administer the local government matters listed in Part B of Schedule 4 of the Constitution.

139.3 Section 156(2) of the Constitution states that a municipality may make and administer by-laws for the effective administration of the matters which it has the right to administer. This municipal power to make by-laws is the equivalent of the Ministerial power to prescribe regulations.

139.4 Section 156(5) of the Constitution states that a municipality has the right to exercise any power concerning a matter reasonably necessary for, or incidental to, the effective performance of its functions.

139.5 Section 151(3) of the Constitution states that a municipality has the right to govern, on its own initiative, the local government affairs of its community, subject to national and provincial legislation, as provided for in the Constitution. Section 20 of the Air Quality Act is not legislation as provided for expressly in the Constitution.

139.6 Section 151(4) of the Constitution commands the National Government (which includes the Minister), in peremptory

terms, not to compromise or impede a municipality's ability or right to exercise its powers or perform its functions.

[140] As regards the applicants' reliance on section 7(2) of the Constitution as an alternative source for the ministerial obligation to prescribe regulations,[145] in other words that over and above section 20 of the Air Quality Act the Minister is independently obliged under section 7(2) of the Constitution to make these regulations, the following submissions in this regard were made:

140.1 On this argument for the Applicants, the absurdity is that each and every regulation-making power in any Environmental Legislation imposes an obligatory duty to make regulations. In fact, there is hardly any legislation which does not somehow have a bearing on a fundamental right and on this argument all regulation-making powers will be obligatory.

140.2 Section 7(2) of the Constitution does not transform "*may*" into "*must*', especially in the absence of any factual basis to show that these regulations will be either reasonable or effective when regard is had to all of the other measures already taken by the State.

---

[145] See para 131-134 of the Applicants' Heads of Argument.

140.3 At a more fundamental level, however, the essence of Constitutionalism is that the power of the State should be defined and limited by law to protect the interests of society, as a way of ensuring limited government as opposed to the arbitrary rule of an autocracy or a dictatorship.[146]

140.4 As a result, imposing a duty or obligation in terms of section 7(2) of the Constitution does not mean the Minister now has unlimited powers or carte blanche to discharge that duty or obligation. On the one hand she must also be given a competence to act and on the other hand she must follow the prescribed procedure.[147]

140.5 On the Doctrine of Legality, the Minister cannot exercise any power nor perform any function unless that power or function is authorised in law. These powers and functions, entrusted to the Minister, provide her with a scope of limited competence within which she must discharge her constitutional duties and obligations.

[141] It is for this reason that counsel submitted that section 7(2) of the Constitution can therefore not be read in isolation so as to create a power for the prescription of regulations.

---

[146] See Currie and De Waal *The Bill of Rights Handbook* (2016) 21.
[147] See Currie and De Waal *The Bill of Rights Handbook* (2016)

[142] From the papers and arguments for the Applicants, counsel argued that it is not clear if their case is only about a proper interpretation of section 20 of the Air Quality Act on the level of law (where the factual matrix is not relevant) or if they also advance a case on the level of fact, especially in view of their persistence that there was a delay in prescribing these regulations (premised upon a legal duty existing from the outset, and not on duty arising afterwards from the facts). On the level of fact, the question is whether the occasion was such that it called for the exercise of the discretionary power to prescribe regulations under this provision.[148]

[143] Originally, so the argument went, it was the case advanced by the applicants that regulations should be passed specifically to implement and enforce the Highveld Plan.[149] The prescription of generic regulations for all air quality management plans was not part of their case.

[144] After having received the answering affidavit for the Minister, wherein she made it clear that there is a distinction between generic regulation under section 20 of the Air Quality Act, which will be applicable to all priority areas as and when declared (currently and on the level of fact

---

[148] See section 10(1) of the Interpretation Act 33 of 1957, which provides as follows:
"(1) When a law confers a power or imposes a duty then, unless the contrary intention appears, the power may be exercised and the duty shall be performed from time to time as occasion requires."

[149] See Record p. 2-4 (prayer 2-3 and 5-6 of the Notice of Motion); p. 559-561 (prayer 2-3 and 4A-6 of the Amended Notice of Motion).

in the process of drafting), and specific regulations dedicated for application within a particular priority area (which for various reasons are not necessary in the case of specifically the Highveld Priority Area),[150] the Applicants now seize upon the making of these generic regulations as if that in itself demonstrates, on the level of fact, the basis for the relief that they seek.[151]

[145] Whether it was *"necessary"* for specific regulations under section 20 of the Air Quality Act, is a question of fact to be determined on the totality of the evidence (in accordance with the applicable rule where final relief is sought in motion proceedings) and not by way of semantic argument or textual criticisms.

[146] For the reasons as set out above the respondents seek the dismissal of the application as the necessity for the making of specific regulations in terms of section 20 of the Air Quality Act it argued, has not been demonstrated by the Applicants. In addition to the above, the allegation that there was no improvement in the poor air quality in the Highveld Priority Area and that the other air quality management tools did not work, is an unsubstantiated opinion: on the one hand the actual air quality was not compared with what the hypothetical air quality would have been in the absence of these air

---

150 See Record p. 1152, 1155-1156, 1179-1181, 1182, 1184, 1189, 1210-1211, 1255 and 1282-1284 (para 4, 6.2- 6.3, 23.3-23.4, 24, 27.1, 28.1, 37, 52.4 and especially 86 of the Answering affidavit).

151 See para 25.2 and 106 of the Applicants' Heads of Argument.

quality management tools and on the other hand the evidence shows that, in general, there has been an improvement over the years.

[147] On the common cause fact that regulations for the Vaal Triangle Plan were not effective, the rhetorical question is how would such regulations then be effective specifically for the Highveld Plan?

[148] The nature of the Highveld Plan, counsel had argued rather calls for the flexible constitutional imperatives of co-operative governance instead of a crude command- and-control dispensation imposed upon all the other Organs of State or stakeholders through regulations and there are already a number of other air quality management tools in place to address the air pollution also in the Highveld Priority Area.

ANALYSIS

First issue to be determined: whether the applicants can rely directly on the provisions of section 24(a) of the Constitution for their cause of action.

[149] To my mind, the answer to this question lies in the wording of the section itself read together with the evidence which has been placed before this court in support of their cause of action.

[150] Before this court, as mentioned, it is common cause between the parties that the Highveld Priority Area was declared more than 12

years ago and that the Highveld Plan was promulgated more than 8 years ago.

[151] At the time that the Highveld Priority Area was declared, the media statement released indicated that "*there is little doubt that people living and working in these areas do not enjoy air quality that is not harmful to their health and well-being*," and the then Minister at the time allowed the department two years to develop a plan to his satisfaction.[152]

[152] That despite this lapse of time period, Goal 1 set out in the Highveld Plan, the deadline being set for 2015, has still not been achieved and that little progress has been made in ever achieving Goals 2-7 all of which are due for completion in 2020. The notice of motion in these proceedings was issued on 6 June 2019, a period of 4 years past the deadline set for achieving Goal 1 of the Highveld Plan by 2015.

[153] Supporting affidavits filed in these proceedings by some residents in the town of Emalahleni falling within the Highveld Priority Area, set out how the state of air pollution in the area has affected them over a period of time. The contents of these affidavits are undisputed evidence that have been placed before this court,[153] confirming the contention that persons living in the Highveld Priority Area are

---

[152] Founding Affidavit, annexure "SP 10" p 211-212
[153] Founding Affidavit, annexures "SP34-36" p 513-524.

exposed to air pollution that is harmful to their health and wellbeing. This much the Minister has conceded when she stated amongst others that "poor air quality at the hotspots in the Highveld Priority Area has adverse consequences and impacts upon human health and well-being", and that she is aware of "the unacceptably high levels of ambient air pollution in the Highveld Priority Area and the potential for the that polluted ambient air to adversely impact on the health and well-being of the people living and working in the area."[154]

[154] The Minister further conceded, as mentioned, that the National Ambient Air Quality Standards are being exceeded at the hotspots in the Highveld Priority Area and as such these levels of air pollution observed over a period of time, have not been compliant with the National Standards which have been set in this regard. It has also been conceded by the Minister that the Government has not been successful in bringing the ambient air quality everywhere in compliance with the National Ambient Air Quality Standards set, albeit that these standards are significantly lower than that set by the WHO Guidelines.[155] In addition counsel for the Minister also conceded that the air quality in the Highveld Priority Area is poor and indeed very poor at certain hotspots and that it has been poor for decades now.[156]

---

154 Answering Affidavit para 268 and 104 respectively.
155 Answering Affidavit Vol 5 para 36 and 299.1; Replying Affidavit Vol 6 para 40-40.3 p 1581.
156 Respondents Heads of Argument para 14.2 p 8135.

[155] As a consequence of this failure of the levels of air pollution not being achieved to date, and the Department's own finding[157] that more than 10 000 premature deaths occur each year which are directly attributable to air pollution in the Highveld Priority Area, the inescapable conclusion that must be reached on the evidence presented, is that the levels of air pollution in this area is not consistent with the section 24(a) right to an environment that is not harmful to health or wellbeing.

[156] In turning then to the wording of the section itself, counsel for the applicants had argued that it was the Minister's contention that section 24(a) is a "*qualified*", "*progressively realisable*" right which does not protect residents of the Highveld against dangerous levels of air pollution immediately. This contention by the Minister is firstly not supported in the plain wording of the section, i.e. that this right afforded to citizens will only be realised with the passage of time and that it is a right not afforded to citizens here and now. Having regard to the wording of the section itself, the right as phrased is entirely unqualified and this is supported by the omission of any reference being made to "*progressive realisation*" in the text of the section itself.

[157] On behalf of the applicants the argument advanced was that the right set out in section 24(a) of the Constitution is in complete contrast as

---

[157] Applicants Supplementary Affidavit Vol 6 Annexure "SP64" P 1715.

compared with the qualified socio-economic rights in section 26(2) (housing) and section 27(2) (healthcare, food, water and social security).

[158] The above rights both state that *"The state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of this right."*

[159] Support that the section 24(a) right is unqualified, is also found in the similar wording used in the framing of section 29(1)(a), the right to basic education, which is framed in identical unqualified terms as section 24(a) and which are not subject to any requirement of progressive realisation.

[160] In this regard the applicants had placed reliance on, amongst others, the Constitutional Court decision of ***Juma Musjid*** where it was stated in para [37] as follows*:*

> *"It is important, for the purpose of this judgment, to understand the nature of the right to "a basic education" under section 29(1)(a). Unlike some of the other socio-economic rights, this right is immediately realisable. There is no internal limitation requiring that the right be "progressively realised" within "available resources" subject to "reasonable legislative measures". The right to a basic education in section 29(1)(a) may be limited only in terms of a law of general application which is "reasonable and justifiable in an open and democratic society*

based on human dignity, equality and freedom". This right is therefore distinct from the right to "further education" provided for in section 29(1)(b). The state is, in terms of that right, obliged, through reasonable measures, to make further education "progressively available and accessible." See in this regard *Governing Body of the Juma Musjid Primary School & Others v Essay N.O. and Others* 2011 (8) BCLR 761 (CC).

[161] In paragraph [52] the court further explained as follows:

"The inadequacy of schooling facilities, particularly for many blacks was entrenched by the formal institution of apartheid, after 1948, when segregation even in education and schools in South Africa was codified. Today, the lasting effects of the educational segregation of apartheid are discernible in the systemic problems of inadequate facilities and the discrepancy in the level of basic education for the majority of learners."

[162] It is on this basis that the argument advanced by the applicants was that the right having regard to the basis of the wording of the section is unqualified.

[163] The reasoning employed by the Constitutional Court in the *Juma Masjid* matter, in as far as concluding that the right to an education, having regard to the wording of section 29(1)(a), is immediately realisable, I am in agreement with in as far as the present matter is concerned. In the present matter, this wording of section 24(a) is similar to the wording employed in section 29(1)(a). It is for this

reason that I am inclined to agree with the reasoning of the Constitutional Court in the *Juma Masjid*-decision that concluded that the right in section 24(a) is immediately realisable.

[164] On the point on subsidiarity, in respect of the applicant's cause of action, the respondent contends that the section 24(a) is progressively realisable and that the principle of subsidiarity precludes any relief based on section 24(a).

[165] Differently put, that it is not legally permissible for the applicants to rely directly on section 24(a) of the Constitution for its cause of action. The myriad of reasons advanced by the respondents in support of this argument have been fully canvassed above.

[166] In opposing these reasons, the argument advanced by the respondents on progressive realisation of the section 24(a) right the argument by the applicants was that the Minister presented the argument on subsidiarity as if it were a rigid and inflexible rule. This is as submitted by counsel in conflict the **My Vote Counts**-decision where is paragraph [82] the Constitution obiter stated the following:

> *"[82] We should not be understood to suggest that the principle of constitutional subsidiarity applies as a hard and fast rule. There are decisions in which this court has said that the principle may not apply. This Court is yet to develop*

the principle to a point where the inner and outer contours of its reach are clearly delineated."[158]

[167] This position was also reiterated in the **Pretorius-decision**, where the Constitutional Court stressed that the Principle of Subsidiary is not a "*hard and fast rule*". See in this regard *Pretorius and Another v Transport Pension Fund and Others* 2019 (2) SA 37 (CC) at paras 51-52.

[168] From the established case law on point counsel argued, it is apparent that the subsidiarity principle generally applies in two circumstances:

168.1 Firstly, in instances where the Constitution itself obliges Parliament to pass specific legislation to effectively codify rights such as section 33 right to just administration.

168.2 Secondly it applies where legislation "covers the field" by providing clear procedures, dedicated forums and specific statutory remedies for constitutional rights violations such as labour legislation, or the Equality Act.

[169] On a mere reading of section 24(a) of the Constitution it fails to place a specific obligation on Parliament to pass specific legislation to codify environmental rights. Moreover, the existing legislation, such as the

---

158 2016 (1) SA 132 (CC) para [182].

Air Quality Act, NEMA and other legislation does not provide residence with clear procedures and remedies for ambient air pollutions that exceeds the National Standards and where in instances their lives are threatened by poor air quality. In this regard the Minister has also failed to set out in her affidavit, how the entire enacted suite of Environmental Legislation has given the residents of the Highveld Priority Area effect to achieving this particular right as envisaged in section 24(a).

[170] In addition, from the environmental legislation already enacted it cannot be said was ever intended to prevent and obstruct affected individuals from accessing the courts and where appropriate to seek remedies in response to the harmful levels of ambient air pollutions within their particular area. It is on this basis that it was argued that its cause of action can be premised on section 24(a) of the Constitution.

[171] With reference to the provisions of section 24(a) the Minister further argued, that section 24(a) may be justified or limited under section 36 of the Constitution in terms of the law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom taking into account all relevant factors.

[172] It is on this basis that counsel submitted that the Air Quality Act is such law of general application giving a circumscribed effect to the environmental right in section 24(a) of the Constitution and that limits of this fundamental right by introducing a presence of source of harm in the environment under controlled circumstances may be permitted. It is on this basis, so the argument went that as there is room for limitation of this right, one cannot peer in isolation at the right in determining whether there has been a breach thereof or not. Accordingly, applying the principle of subsidiarity it is a complete answer to the case advanced by the applicants.

[173] To the above argument the applicants contended that any limitation to the section 24(a) right the Minister has failed to point to any law of general application which will prevent the ambient air pollution levels to exceed the National Standards in a manner that poses a direct threat to the health and well-being of residence. In this regard the Minister has also failed to point to any such legislation.

[174] The suite of environmental legislation has all in mind to improve harm caused to the environment or to limit harm. It does not have in mind, to increase as in the present instance levels of air pollutions at levels above what has been set by the National Standards posing a threat to human life and wellbeing.

[175] The principle of sustainable development further requires that measures put in place to achieve economic development should not sacrifice the environment and human life and wellbeing and it must be that a balance should be struck. Where one trumps the other, it cannot be said the right of section 24(a) has been achieved. This argument was supported by the Special Rapporteur.

[176] On the evidence that has been presented before this court, I cannot but conclude that the respondents have failed to justify any limitation to the section 24(a) right by placing reliance on section 36 of the Constitution.

[177] In further argument, the respondents contended that the applicants have failed to prove either an omission or act in support of their contention of a breach of section 24(a) and that a mere state of affairs cannot be said to be in breach of section 24(a). The Minister's counsel had argued that a mere state of affairs cannot threaten or breach fundamental rights and that the applicants had to show either an omission or a commission by the State.

[178] Before this court, the undisputed evidence is that the present ambient air pollution levels by far exceed the National Standards and that the levels recorded poses a threat to a safe environment and human life and their wellbeing. The question that then begs the answer, is what

mechanisms should or could have been put in place to date to have the air pollution levels in the Highveld Priority Area reduced? In this regard the erstwhile Minister held the view that to promulgate regulations is not the only tool available to monitor air pollution in the Highveld Priority Area and opted not to promulgate any regulations in this regard. In a complete contrast, the current Minister indeed took steps in this direction, albeit belatedly and in a draft form in respect of which public comment is yet to be obtained.

[179] It is for this reason that this court cannot agree with the argument that the applicant merely relies on a state of affairs in support of a breach of section 24(a) but rather that the Minister by her own concession has to date failed to promulgate regulations proposed by her own Department and which her own Department has concluded will save lives. Consequently, the applicants have established an omission on the part of the Minister to promulgate regulations timeously. The argument that the applicants relied on a mere "state of affairs" is therefore rejected.

[180] Furthermore, before this Court, the undisputed evidence presented shows that the levels of air pollution in the Highveld Priority Area remain far in excess of the National Standards and show no meaningful improvement. This, 13 years since the Highveld Priority

Area was declared and 9 years after the Highveld Plan was established.

[181] This in addition to the Minister's failure to give an indication as to by when the Regulations as proposed to by her own Department will be implemented as expeditiously and effectively as possible towards the full realisation of this right as alluded to in **Mazibuko and Others v City of Johannesburg and Others**,[159] depicts a further clear indication that a breach of section 24(a) has occurred. In fact, nothing about the levels of air pollution in the Highveld Priority Area could be classified as "*expeditious and effective*" realisation of the right to an environment that is not harmful to health and wellbeing.

[182] In addition to the above, the Minister's initial failure to disclose her own Department's findings and recommendations is contrary to the special duties of transparency that are imposed on organs of state in constitutional litigation. Organs of state are duty-bound to assist the courts by providing a full and frank account of the material facts where constitutional rights are at risk.[160] This was not done initially by the Minister, and only disclosed during reply to a rule 35(12) Notice being served on the Minister.

---

159 2010 (4) SA 1 (CC) para 40

160 *Public Protector v South African Reserve Bank* [2019] ZACC 29; 2019 (9) BCLR 1113 (CC) at para 152 (and the cases cited therein); *Matatiele Municipality and Others v President of the Republic of South Africa and Others* (1) 2006 (5) SA 47 (CC) at para 107.

[183] On the conspectus of the evidence presented and having regard to the available authorities, I am as a result satisfied that the applicants have established a breach of section 24(a) of the Constitution, as a result of the Ministers' failure to promulgate the regulations for the Highveld Priority Area.

The second issue to be determined by the court: The proper interpretation of section 20 of the Air Quality Act.

[184] Section 20 of the Air Quality Act provides that the Minister may produce implementation regulations to implement and enforce priority air quality management plans.

[185] In addition to this Minister has a power under section 7(2) of the Constitution to establish regulations to protect and promote constitutional rights. coupled with a duty to establish implementation regulations where, as in this case, these regulations are necessary to implement and enforce an air quality management plan.

[186] In this regard it is the applicants' contention that the phrase "may prescribed regulations" contained in the section, should in the presence matter be interpreted as "must prescribed regulations."

[187] Furthermore, that when the court interprets the section that the court must have regard to the text, purpose and context of the provision and applicable constitutional rights.[161]

[188] Our courts have long held that statutory provisions framed in discretionary language may impose a power coupled with a duty.[162] The courts have frequently cited the House of Lords decision in ***Julius v The Lord Bishop of Oxford***,[163] where Earl Cairns LC explained that:

> "*There may be something in the nature of the thing empowered to be done, something in the object for which it is to be done, something in the conditions under which it is to be done, something in the title of the person or persons for whose benefit the power is to be exercised, which may couple the power with a duty, and make it the duty of the person in whom power is reposed to exercise that power when called upon to do so*."

The offshoot of this principle is that the word "*may*" in a statute can mean "*must*", in appropriate circumstances, especially where this

---

[161] See *Road Traffic Management Corporation v Waymark (Pty) Limited* 2019 (5) SA 29 (CC) at paras 29–30; *Cool Ideas 1186 CC v Hubbard and Another* 2014 (4) SA 474 (CC) at para 28 and *Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012 4 SA 593 (SCA) at para 18.

[162] *Veriava and Others v President, SA Medical and Dental Council and Others* 1985 (2) SA 293 (T) at pp 310 -311; *Diepsloot Residents' and Landowners' Association and Another v Administrator, Transvaal* 1994 (3) SA 336 (A) at 348D-F; *Kaunda and Others v President of the Republic of South Africa and Others* 2005 (4) SA 235 (CC) at paras 67 – 70.

[163] *Julius v The Lord Bishop of Oxford* (1879-80) 5 AC 214 (HL) at p 222 – 223. Cited in *Veriava ibid* at 310; *Diepsloot Residents' and Landowners' Association ibid* at p 348.

interpretation is required to promote and protect constitutional rights and values.

[189] Relying on the provisions of section 39(2) of the Constitution counsel submitted that the section provides that "*[w]hen interpreting any legislation … every court ... must promote the spirit, purport and objects of the Bill of Rights*." This imposes a two-fold obligation on courts: First, if a provision is reasonably capable of more than one meaning, the meaning that does not violate constitutional rights should be preferred.[164] Second, if the provision is capable of more than one constitutionally compatible meaning, courts are obliged to prefer the meaning that best promotes constitutional rights.[165]

[190] In the ***Saidi-decision***,[166] the Constitutional Court interpreted the word "may" contained in section 22(3) of the Refugees Act, which provides that a refugee reception officer "*may from time to time extend the period*" of an asylum seekers' permit to live and work in the country as "must."

[191] In the said matter the question that the court was faced with was whether the word "*may*" in this provision conferred a discretion to

---

164 *Makate v Vodacom Ltd* 2016 (4) SA 121 (CC) at paras 87 - 89.
165 *Makate ibid* at para 89, quoting *Fraser v Absa Bank Ltd (National Director of Public Prosecutions as Amicus Curiae)* 2007 (3) SA 484 (CC) at para 43.
166 *Saidi and Others v Minister of Home Affairs and Others* 2018 (4) SA 333 (CC).

refuse to issue or renew asylum seeker permits while asylum seekers were awaiting the outcome of judicial review proceedings.

[192] In the majority judgment Madlanga J, held that the word "*may*" did not confer a discretion, but had to be interpreted as a mandatory duty. Doing so, he held, would best protect and promote the constitutional rights of asylum seekers:

> "*This interpretation better affords an asylum seeker constitutional protection whilst awaiting the outcome of her or his application. She or he is not exposed to the possibility of undue disruption of a life of human dignity. That is, a life of: enjoyment of employment opportunities; having access to health, educational and other facilities; being protected from deportation and thus from a possible violation of her or his right to freedom and security of the person; and communing in ordinary human intercourse without undue state interference*." [167]

[193] In the **Sadi**-decision, the court emphasised that this interpretation was mandated by section 39(2) of the Constitution,[168] and on the argument advanced by the applicants it is the same reasoning which should apply when this Court is to interpret section 20 of the Air Quality Act.

---

[167] *Ibid* at para 18.
[168] *Ibid* at para 38.

[194] On the interpretation of the phrase "may prescribed" contained in section 20 of the Air Quality Act, the arguments on behalf of the respondents were the following:

194.1 That if the legislature had intended to use the word "may" prescribed instead of "must" prescribed, it would have used the word must instead of may;

194.2 Secondly, that the section confers a discretionary power to the Minister and only where necessary and not a general power to prescribed regulations exists. In this regard, the erstwhile Minister has showed that at the time, the regulations were not necessary;

194.3 In addition, that sections 18 and 19 of the Air Quality Act, is confirmation, that the Minister was given discretionary power in addition taking into account the purpose and objective of the Air Quality Act of it being a progressive realisation of the right to an environment not harmful to the health or well-being of a person;

194.4 Further, the Minister, argues that because section 20 vests regulation-making powers in both the Minister and relevant

provincial MECs, this somehow indicates that this power is purely discretionary;[169]

194.5 In addition, the Minister argues that implementation regulations would be unlawful, as they would usurp the powers of municipalities over air pollution.

[195] In the present case, the Department itself has concluded that existing regulatory measures are insufficient to give effect to the Highveld Plan, and that implementation regulations are the reasonable and effective means to protect rights. In this regard further, section 7(2) of the Constitution imposes an obligation on the Minister to produce these regulations.

[196] It is for this reason that the present Minister has, in a complete reversal of the stance taken by her predecessor who refused to prescribed implementation regulations, embarked on the process of producing draft regulations which are yet to be published for public participation.

[197] This step taken by the Minister in the present matter, to my mind, is destructive of the Minister's case on whether implementation regulations for the Highveld Priority Area is necessary. If the Minister

---

[169] AA Vol. 5 1255 para 52.5

had not initiated this process around implementation of regulations for the Highveld Priority Area, it would have been necessary for this court to make such a determination on whether section 20 in relation to the Highveld Priority Area affords the Minister discretionary powers to so or not. In the present instance the Minister, however, has had the presence of mind and the need no longer exists to order the Minister to start drafting regulations for the Highveld Priority Area. She has in fact started taking these steps and in my view correctly so.

[198] The matter however does end there. The draft regulations came about some 9 years after the Highveld Plan was established. Having regard to the Highveld Plan goals set, it is clear that these non-binding set of goals contained in the Plan are insufficient to achieve the substantial reductions in atmospheric emissions that are required in the Highveld Priority Area.

[199] A further confirmation of the argument advanced that existing laws and regulations have not been enough to achieve the Highveld Plan goals is found in the draft Highveld Plan MTR itself, wherein it is specifically acknowledged that:

> "*[The] Department of Environmental Affairs was supposed to develop regulations for the implementation and enforcement of the HPA AQMP*." [170]

[170] Founding Affidavit Annex SP21 'The Medium-Term Review of The 2012 Highveld Priority Area Air Quality Management Plan – Review Report: A Publication of December 2017' p 421.

[200] Further support for the need for the implementation of these regulations is best explained in the Department's own socio-economic impact assessment prepared, as part of the regulation-drafting process. In this report it is acknowledged that "*air quality in the area does not meet the National Air Quality Standards (NAAQS) due to the ineffective implementation of the AQMPs*"[171] It further states that "*[t]he main cause of the problem is [the] lack [of] enforcement measures to ensure accountability in the enforcement of the [Highveld Plan]*".[172]

[201] The report goes on to state that "*There is no legal instrument to enforce the AQMP commitments*".[173]

[202] Therein a finding is also made that "*[m]ajor polluters don't consider AQMP as a legal document that can be enforced*".[174] It adds that "*[n]o punitive measures could be applied. The Regulation will provide guidance on the punitive measures*".[175]

[203] This assessment, as such, concludes that the creation of implementation regulations is the most desirable option and that the

---

171 Supplementary Affidavit Vol.6 Annex SP 64 p 1719.
172 *Ibid* at p 1720.
173 *Ibid*.
174 *Ibid* (table, third column).
175 *Ibid* 1721 (table, third column).

potential benefits in lives saved and improved health outweigh the costs.[176]

[204] The draft implementation regulations produced by the Department further illustrate their necessity and the gaps in the existing regulatory scheme.[177] This the Minister also did not disclose in her answering affidavit. The draft regulations contain the following additional key features, namely:

204.1 Draft regulation 2 explicitly acknowledges that these draft regulations are considered to be "*necessary for implementing and enforcing Priority Area Air Quality Management Plans.*"[178]

204.2 Regulation 3 identifies the relevant stakeholders, which include national departments, provinces, and municipalities; industry; mines; and civil society organisations.[179]

204.3 In terms of regulation 4, the "*emission reduction interventions*"[180] that are identified in the relevant AQMP will

---

176 *Ibid* at p 1727 para 2.1; p 1732 para 3.1
177 Replying Affidavit Annex 54 Vol.6 p 1641.
178 *Ibid* p 1643.
179 *Ibid*.
180 Defined as: "*interventions or activities to minimise or prevent emissions; including measures to facilitate compliance, to which the identified stakeholders have undertaken to implement within the target date*".

now be turned into legally binding obligations, which must be implemented by stakeholders within the target date.[181]

204.4 Significantly, regulation 4.2 will require that these emission reduction interventions be incorporated into atmospheric emission licences (AELs).[182] This will mean that AELs will finally be aligned with the aims of the Highveld Plan. The applicants have repeatedly called for this intervention.

204.5 In terms of regulation 5, there will be a binding obligation on identified stakeholders to develop "emission reduction plans", defined as "*the emission reduction plan prepared and submitted by the identified stakeholders that aims to minimise or prevent emissions*".[183]

204.6 Under regulation 6, provision will be made for the mobilisation of the necessary resources to implement the relevant AQMP, including "*complimentary support*" from national government:

> *"6.1 The identified stakeholder shall be responsible to provide necessary resources for the implementation of the air quality management plan.*

---

181 *Ibid* pp 1643 – 1644.
182 *Ibid* p 1643.
183 *Ibid* p 1644.

> *6.2 The Minister shall provide complimentary support to provinces and municipalities responsible for the implementation of the air quality management plan."*[184]

204.7 Under regulation 7, there will be binding reporting requirements.[185]

204.8 Regulation 9 will create a clear obligation to conduct a review of the relevant AQMPs every 5 years.[186]

204.9 Regulations 10 and 11 prescribe offences and penalties for non-compliance with these regulations.[187]

[205] These draft regulations provide necessary regulatory tools that are not currently available under any existing legislation. The Minister's repeated claims that existing regulations are sufficient to implement and enforce the Highveld Plan, are refuted and proved incorrect when one compares these draft section 20 regulations against the current state of affairs.[188]

[206] In addition, the proposed implementation regulations assist in:

---

184 *Ibid* p 1644.
185 *Ibid* p 1645.
186 *Ibid*.
187 *Ibid*.
188 Replying Affidavit Vol. 6 p 1578, para 33

206.1 Accountability: Major polluters and other stakeholders will now be obligated to submit emission reduction plans aligned with the Highveld Plan goals, on pain of sanctions. This is in stark contrast with the status quo where, as the Department puts it, "*[m]ajor polluters don't consider AQMP as a legal document that can be enforced*".

206.2 Alignment: The requirement that AELs be aligned with the Highveld Plan is also a significant development, which would go some way towards harmonising the disparate licensing decisions taken by different municipalities across the Highveld Priority Area.

206.3 Support: The regulations specifically provide for national government support to municipalities, to address the existing incapacity and dysfunction in the enforcement of air pollution controls.

206.4 Enforceable timelines: The clear legal obligation to review and update the Highveld Plan is also a significant development, particularly given the significant delays in conducting a full-term review of this plan.

[207] The need for drafting implementation regulations in respect of the Highveld Priority Area, was also properly motivated and supported by the Special Rapporteur.

[208] On the argument that in terms of section 18 that both the Minister and relevant MECs have the power to declare priority areas, in different circumstances, counsel for the applicants had argued, that it is so that in circumstances where the Minister declares a priority area, the responsibility for approving and publishing the air quality management plan falls exclusively on the Minister in terms of section 19(1).

[209] Furthermore, that in terms of section 20, only the Minister has the power and corresponding duty to establish implementation regulations to give effect to plans which the Minister has approved. This the Minister acknowledges in her answering affidavit, when she states that because her predecessor declared the Highveld Priority Area, she has assumed "*political and legal responsibility*" for the "*unacceptable levels of air pollution in the Highveld*".[189]

[210] In addition the Minister further acknowledges that the National Department, under the Minister, is the "*lead agent*" for air quality management in the Highveld Priority Area.[190]

---

189 Answering Affidavit Vol 5 p 1152 para 3.
190 Answering Affidavit Vol 5 p 1358 para 244.

[211] The creation of implementation regulations has repeatedly been advocated by the Minister's own Department.

[212] In addition, the Highveld Priority Area was established after the Vaal Priority Area, in respect of which implementation regulations were promulgated by the office of the Minister.

[213] The argument presented by the respondents in this regard that in the event of the Minister establishing implementation regulations, that the Minister would in such instance usurp the function of the Municipalities, rather reflects a basic misunderstanding of the division of powers between the national government and municipalities.

[214] As to the divisions of power, the following is to be noted:

214.1 In terms of Schedule 4 Part B of the Constitution, air pollution, while a municipal function, is a matter of shared national and provincial legislative competence.

214.2 Under section 156(7) of the constitution, the national government also has the legislative and executive authority to see to the effective performance by municipalities of their functions, which includes publishing appropriate regulations.

214.3 Section 6(2)(c) of the Air Quality Act further provides that to the extent that there is any conflict between regulations issued in terms of the Act and municipal by-laws, the regulations prevail.

214.4 Accordingly, there is nothing that prohibits the Minister from passing effective regulations under section 20 of the Air Quality Act to coordinate and support the activities of the many municipalities falling within the Highveld Priority Area.

214.5 Moreover, there is nothing in the draft regulations that usurps municipal powers. Far from it, the draft regulations reflect a clear intention to support municipalities in conducting their functions particularly by making "complimentary support" available to provinces and municipalities.

214.6 Section 6(2)(c) of the Air Quality Act further provides that to the extent that there is any conflict between regulations issued in terms of the Act and municipal by-laws, the regulations prevail.

[215] As such, there is nothing that prohibits the Minister from passing effective regulations under section 20 of the Air Quality Act to coordinate and support the activities of the many municipalities falling within the Highveld Priority Area. Moreover, there is nothing in the

draft regulations that usurps municipal powers. The draft regulations rather point to a clear intention to support municipalities in conducting their functions particularly by making "complimentary support" available to provinces and municipalities.

[216] For the reasons alluded to above and taking into account the evidence presented in the present case by either side, I could only but conclude that the provisions of section 7(2) of the Constitution, read with section 20 of the Air Quality Act, imposes a duty on the Minister to promulgate these regulations.

[217] As to the applicants' grounds for review the following arguments were advanced by the applicants.

[218] In ***Esau***,[191] the SCA confirmed that regulation-making constitutes administrative action in terms of section 1 of PAJA. The failure to establish regulations is also administrative action, as this concept encompasses "*any decision taken, or any failure to take a decision*".[192]

[219] Regulations (and their absence) are also exercises of public power which are subject to the section 1(c) constitutional principle of

---

[191] *Esau and Others v Minister of Co-Operative Governance and Traditional Affairs and Others* [2021] ZASCA 9 (28 January 2021) at paras 76 to 84.

[192] PAJA, section 1.

legality. In any event, all of the grounds of review addressed in this application are encompassed under both PAJA and legality alike.

[220] In this application, the applicants rely on three grounds of review in this matter:[193]

220.1 First, Minister Mokonyane's refusal to prescribe implementation regulations was in breach of the statutory and constitutional obligations to enact regulations, addressed above.[194]

220.2 In the alternative, even if it is held that the Minister has no obligation, but merely a discretion to decide whether to prescribe regulations, the refusal by the former Minister to prepare implementation regulations falls to be reviewed and set aside due to the improper exercise of her discretion. This is based on the detailed grounds of review set out in the applicants' founding papers.[195]

220.3 In the further alternative, to the extent that the current Minister has revoked her predecessor's outright refusal, there has been an unreasonable delay in preparing and initiating

---

[193] Supplementary Founding Affidavit Vol. 2 p 605, para 53-53.3. The grounds of review were duly supplemented in light of the Rule 53 record.
[194] Replying Affidavit Vol. 6 p 1591, para 65.1.
[195] Replying Affidavit Vol. 6 p 1591, para 65.1 RA Vol. 6 p 1591, para 65.1.

these regulations.[196] The more than nine years delay in establishing implementation regulations is manifestly unreasonable. The fact that it has taken the current Minister nearly two years to produce a six-page draft set of regulations, which have not yet been formally put out for public comment, is further evidence of unreasonable delay.[197] These delays are hardly consistent with the Minister's constitutional duty to perform all obligations "*diligently and without delay*".[198]

[221] The Minister argues that the decision taken by her predecessor to refuse to develop section 20 implementation regulations is now moot.[199] This is incorrect:[200]

221.1 The lawfulness of Minister Mokonyane's refusal to create regulations remains a live dispute, because the current Minister repeatedly and wholeheartedly defends her predecessor's decision and claims that it was correct.[201]

221.2 If the previous Minister's decision is not reviewed and set aside, there will always be the risk that the current Minister

196 Replying Affidavit Vol. 6 p 1592, para 65.2
197 Answering Affidavit Vol. 5 p 1154, para 6; Reply p 1591 para 64.3
198 Constitution, section 237.
199 Answering Affidavit Vol. 5 p 1152, para 4.
200 Replying Affidavit Vol. 6 p 1568, para 11; p 1590, para 64.1.
201 Answering Affidavit Vol. 5 p 1273 - 1284 paras 63 – 88. Replying Affidavit Vol. 6 p 1568, para 11

will decide that regulations are not necessary and will refuse to finalise or implement section 20 regulations.

[222] In any event, the issue of unreasonable delay remains live: by the time that this review is heard in May 2021, it will have been almost two years since this application was launched and the Department is still only at the stage of draft regulations. The Minister has provided no indication of a timeline for finalising these regulations, if she intends to do so. This undue delay without an explanation on the side of the Minister cannot be condoned by this Court and as such it calls for this Court's intervention.

REMEDIES

[223] This Court has wide remedial powers under section 172(1) of the Constitution and section 8 of PAJA.

[224] Whenever this Court finds that the state's conduct is inconsistent with the Constitution, it is bound to declare the conduct invalid under section 172(1)(a) of the Constitution. That is a mandatory duty that cannot be avoided.[202]

---

[202] Rail Commuters Action Group v Transnet Ltd t/a Metrorail 2005 (2) SA 359 (CC) at paras 107 – 108.

[225] Under section 172(1)(b) of the Constitution and sections 8(1) and 8(2) of PAJA, this Court has a further remedial discretion to grant any just and equitable remedy. Section 172(1)(b) provides that "*When deciding a constitutional matter within its power, a court … may make any order that is just and equitable…*". This broad remedial discretion exists even in the absence of a declaration of invalidity.[203]

[226] The phrase "*any order*" is "*as wide as it sounds*",[204] serving as an injunction to do "*practical justice, as best and as humbly as the circumstances demand*".[205] At the bare minimum, justice and equity demand effective remedies to protect constitutional rights. As Ackermann J observed in ***Fose***:[206]

> *"Particularly in a country where so few have the means to enforce their rights through the courts, it is essential that on those occasions when the legal process does establish that an infringement of an entrenched right has occurred, it be effectively vindicated. The courts have a particular responsibility in this regard and are obliged to 'forge new tools' and shape innovative remedies, if needs be, to achieve this goal."*[207]

[227] The applicants seek two declaratory orders:

---

[203] Head of Department: Mpumalanga Department of Education v Hoërskool Ermelo 2010 (2) SA 415 (CC) at para 97.
[204] *Corruption Watch NPC and Others v President of the Republic of South Africa* 2018 (10) BCLR 1179 (CC) at para 68;
[205] *Mwelase and Others v Director-General, Department Of Rural Development And Land Reform And Another* 2019 (6) SA 597 (CC) at para 65.
[206] *Fose v Minister of Safety and Security* 1997 (3) SA 786 (CC).
[207] *Ibid* at para 69.

227.1 First, a declaration that the unsafe levels of ambient air pollution in the Highveld Priority Area are in breach of residents' section 24(a) right to an environment that is not harmful to their health and well-being; and

227.2 Second, a declaration that the Minister has a legal duty to prescribe implementation regulations under section 20 of the Air Quality Act and the Constitution.

[228] Section 38 of the Constitution expressly provides that where a right in the Bill of rights is threatened or infringed, a court may grant appropriate relief, "*including a declaration of rights*".

[229] Sections 8(1)(d) and 8(2)(b) of PAJA also empower courts to grant orders "*declaring the rights of the parties in respect of any matter to which the administrative action relates*" and "*declaring the rights of the parties in relation to the taking of the decision*", respectively.

[230] In ***Rail Commuters***,[208] the Constitutional Court emphasised the importance of declaratory orders of this kind, particularly where organs of state repeatedly deny their legal obligations:

> *"A declaratory order is a flexible remedy which can assist in clarifying legal and constitutional obligations in a manner which promotes the protection and enforcement of our Constitution and*

[208] Rail Commuters Action Group v Transnet Ltd t/a Metrorail 2005 (2) SA 359 (CC) at para 106.

> *its values. … [D]eclaratory relief is of particular value in a constitutional democracy which enables courts to declare the law, on the one hand, but leave to the other arms of government, the executive and the legislature, the decision as to how best the law, once stated, should be observed."*[209]

[231] In the above case, both Transnet and the Commuter Corporation denied that they owed rail passengers any legal obligation to protect their safety. The Constitutional Court held otherwise and determined that a declarator was necessary to correct this error and to provide appropriate guidance going forward. Accordingly, the Court granted a declarator, framed as follows:

> *"It is declared that the first and second respondents have an obligation to ensure that reasonable measures are taken to provide for the security of rail commuters whilst they are making use of rail transport services provided and ensured by, respectively, the first and second respondents."*

[232] This case, too, calls out for an appropriate declaration of rights and obligations. The Minister's repeated and emphatic denials of any breach of section 24(a) of the Constitution and any corresponding duty to establish implementation regulations calls out for appropriate correction. The declaratory orders would provide the Minister and her successors with necessary guidance on their legal obligations going forward.

---

[209] *Ibid* at paras 107-8.

[233] The applicants seek a further declaration that the Minister's failure or refusal to prescribe implementation regulations is unconstitutional, unlawful and invalid. This declaration of invalidity is a mandatory order, as required under section 172(1)(a) of the Constitution.

[234] Flowing from this declaration of invalidity, it follows that Minister Mokonyane's outright refusal to prescribe implementation regulations ought to be reviewed and set aside. Furthermore, it would be just and equitable to declare that the delay in establishing regulations is unreasonable and unlawful, for all the reasons addressed above.

[235] It is further just and equitable to direct the Minister to publish regulations within 6 months of this Court's order. Sections 8(2)(a) and 8(2)(c) of PAJA provide for such mandatory orders in cases of unreasonable delay, empowering courts to direct the taking of a decision and any other action that is "*necessary to do justice between the parties*".

[236] The inordinate delay of almost a decade in preparing implementation regulations means that the Minister must now be put on terms to complete this task as soon as possible. The fact that it has taken the Department almost two years to prepare six-page draft regulations is further evidence of the need for expedition and clear timeframes.

[237] Given the preparatory work that has already been undertaken by the Department, and the existence of draft regulations, a six-month deadline is more than reasonable in the circumstances.

[238] The applicants seek further orders directing the Minister to pay "*due regard*" to matters which ought to be addressed in the implementation regulations.[210] This order does not seek to fetter the Minister's discretion or bind her to a particular outcome, but instead offers appropriate guidance. Such guidance falls well within the bounds of this Court's just and equitable remedial discretion.

[239] The Minister's bald appeals to the separation of powers, without more, carry little weight in the assessment of a just and equitable remedy. The Constitutional Court reminds us that "*the bogeyman of separation of powers concerns should not cause courts to shirk from [their] constitutional responsibility*", particularly in cases of executive foot-dragging and inordinate delay.[211]

[240] As to the remedies, which the Applicants are seeking and the law and evidence presented before this court in this regard, I am satisfied that the Applicants have made out a case for the relief which they are

---

[210] Amended Notice of Motion Vol 2 pp 559 – 561 prayer 6.

[211] *Mwelase and Others v Director-General, Department of Rural Development and Land Reform And Another* 2019 (6) SA 597 (CC) at para 51.

seeking. As the Applicants are the successful party, the costs will follow the result.

ORDER

[241] In the result the following order is made:

241.1 It is declared that the poor air quality in the Highveld Priority Area is in breach of residents' section 24(a) constitutional right to an environment that is not harmful to their health and well-being.

241.2 It is declared that the Minister of Environmental Affairs ("Minister") has a legal duty to prescribe regulations under section 20 of the National Environmental Management: Air Quality Act 39 of 2004 to implement and enforce the Highveld Priority Area Air Quality Management Plan ("Highveld Plan").

241.3 It is declared that the Minister has unreasonably delayed in preparing and initiating regulations to give effect to the Highveld Plan.

241.4 The Minister is directed, within 12 months of this order, to prepare, initiate, and prescribe regulations in terms of section

20 of the Air Quality Act to implement and enforce the Highveld Plan.

241.5 In preparing regulations, the Minister is directed to pay due regard to the following considerations:

241.5.1 the need to give legal effect to the Highveld Plan goals, coupled with appropriate penalties for non-compliance;

241.5.2 the need for enhanced monitoring of atmospheric emissions in the priority area; including through the urgent improvement, management, and maintenance of the air quality monitoring station network to ensure that verified, reliable data are produced, and that real-time emissions data are publicly available online and on request;

241.5.3 the need for enhanced reporting of emissions by industry in the area, including the requirement that: atmospheric emission licences, monthly, and annual emission reports, real-time emission data, and real-time ambient monitoring data from all licence-holders should be publicly available online and on request;

241.5.4 the need for a comprehensive air quality compliance monitoring and enforcement strategy; including a programme and regular progress reports on the steps taken against non-compliant facilities in the Highveld Priority Area;

241.5.5 the need to appoint and train an adequate number of appropriately-qualified officials, with the right tools and equipment in order to implement and enforce the Highveld Plan and the Air Quality Act;

241.5.6 the need for all relevant national departments, municipalities, provincial departments and MECs to participate in the Highveld Priority Area process and co-operate in the implementation and enforcement of the Highveld Plan; demonstrated by published, written commitments signed by the relevant Ministers;

241.5.7 the need for regular review of the Highveld plan; including reporting on implementation and enforcement progress to all stakeholders as required by the Highveld Plan;

241.5.8 the need to address the postponement and/or suspension of compliance with MES in the priority area; including to ensure that the atmospheric emission licences of all facilities that have not obtained once-off suspension of compliance and that cannot meet new plant MES by April 2025 are withdrawn, and decommissioning and rehabilitation of those facilities is enforced;

241.5.9 the need for further or more stringent dust-control measures in the area; including to ensure adequate monitoring, measurement, and reduction of dust emissions, and penalties for non-compliance;

241.5.10 the need for a coordinated response to address air pollution in low-income, densely populated areas; and

241.5.11 the need for adequate financial support and resources, and adequate human resource capacity to ensure that all of these issues can be addressed.

241.6 It is further ordered that any of the parties may re-enrol this matter for hearing at any stage, if necessary, on duly

supplemented papers, to address the need for further orders arising from the orders set out above.

241.7 The costs of this application, including the costs of three counsel, are to be paid, jointly and severally, by the first and second respondents.

COLLIS J
JUDGE OF THE HIGH COURT

Appearances

Counsel for the 1st & 2nd Applicants	:	Adv. S. Budlender SC & Adv. C. McConnachie; Adv. C. Tabata
Attorney for the 1st & 2nd Applicants	:	Centre for Environmental Rights: Cape Town
Counsel for the 1st & 2nd Respondents	:	Adv. M.M. Oosthuizen SC & Adv. J. Rust SC; Adv. I. Mwanawina; Adv. T.C. Chiloane
Attorney for the 1st & 2nd Respondents	:	Office of the State Attorneys: Pretoria
Counsel for the *Amicus Curiae*	:	Adv. L. Zikalala & Adv. K. Hardy
Attorney for the *Amicus Curiae*	:	Lawyers for Human Rights: Johannesburg
Date of Hearing	:	17 and 18 May 2021
Date of Judgment	:	18 March 2022

Judgment transmitted electronically.