IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

Case No: 39724/2019

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

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APPLICANTS' HEADS OF ARGUMENT

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INTRODUCTION

1 This application concerns the dangerous levels of air pollution in the Gauteng and Mpumalanga Highveld, which are among the worst in the world. This is an ongoing environmental, human health, and constitutional crisis that calls for urgent action.

2 In a recent study, the Department of Environmental Affairs (Department) confirms that at least 10,000 lives could be saved each year if levels of air pollution in this region were brought into compliance with the national ambient air quality standards ("National Standards", also referred to as the "NAAQS").[1]

3 In 2007, the former Minister of Environmental Affairs (Minister) declared the "Highveld Priority Area", using his powers under the National Environmental Management: Air Quality Act (Air Quality Act). 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.[2]

4 The Highveld Plan was established in 2012, to give effect to this declaration. 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 for most of these goals.

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1 Applicants' Supplementary Affidavit (SA) Vol. 6 Annex SP64 p 1724. Significantly, this study only refers to fine particulate matter (PMs). This does not account for the further lives that could be saved by reducing levels of other harmful pollutants listed in the National Standards.

2 Applicants' Founding Affidavit (FA) Annex SP 10 p 209.

5 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.

6 This lack of progress is due, in part, to the absence of any implementation regulations to give legal effect to the Highveld Plan. In terms of section 20 of the Air Quality Act, the Minister has 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;*
>
> *(c) penalties for any contravention of or any failure to comply with such plans; and*
>
> *(d) regular review of such plans."*

7 However, for more than a decade, successive Ministers have failed to exercise these section 20 powers. The result is that the Highveld Plan has remained a non-binding guideline without any means to enforce compliance with its goals.

8 Against this backdrop, the applicants' case rests on two propositions:

8.1 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.

8.2 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.

9 Neither of these propositions ought to be controversial. However, the former Minister, Ms Nomvula Mokonyane, rejected these propositions outright and explicitly refused to establish any implementation regulations.[3] This left the applicants with no option but to launch this litigation.

10 Since this application was launched, 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 stakeholders on January 2021, although they have not yet been published for public comment.[4]

11 However, the Minister's answering affidavit in these proceedings directly contradicts the actions of her Department. The Minister goes to great lengths to defend the decisions of her predecessor. She further denies 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.[5]

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3 FA Vol. 1 p 18 para 19-19.1; FA Ann SP27 p 464

4 First and Second Respondents' Replying Affidavit (RA) Vol. 6 p 1574 para 25; RA Annex SP 54 p 1641ff.

5 See, for example, AA Vol 5 p 14 para 12.3; p 125 para 53.5.8.

12 As a result of the Minister's contradictory stance, the applicants can have no confidence that the Minister will see through her Department's preliminary efforts to prepare or publish implementation regulations, timeously or at all. There remains a live dispute between the parties on all relevant issues.

13 The applicants therefore persist in seeking the relief set out in the amended notice of motion, which has five parts:[6]

13.1 *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.

13.2 *A declaration of the Minister's obligations:* Declaring that the Minister is obliged to promulgate implementation regulations to give effect to the Highveld Plan.

13.3 *A declaration of invalidity*: Declaring that the Minister's failure to promulgate regulations to give effect to the Highveld Plan is unconstitutional and invalid.

13.4 *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.

13.5 *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

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6 Amended NoM Vol. 2 p 558ff.

Air Quality Act to implement and enforce the Highveld Plan, subject to appropriate directions.

14 In what follows, we demonstrate that the applicants are entitled to this relief by addressing the following issues in turn:

14.1 First, we outline the limited scope of the dispute between the parties;

14.2 Second, we address the relevant factual background;

14.3 Third, we outline the relevant legal framework;

14.4 Fourth, we demonstrate the ongoing breach of the section 24(a) constitutional right in the Highveld Priority Area;

14.5 Fifth, we explain why implementation regulations are necessary, with reference to the Department's own arguments in favour of these regulations;

14.6 Sixth, we show that the Minister is under a statutory and constitutional duty to establish these implementation regulations;

14.7 Seventh, we address the grounds of review.

14.8 Finally, we address the just and equitable remedy and costs.

THE COMMON CAUSE FACTS AND THE LIMITED SCOPE OF THE DISPUTE

15 Despite the lengthy 263-page answering affidavit filed by the Minister, the material facts in this case are all common cause

16 First, the Minister admits that high levels of ambient air pollution in the Highveld Priority Area are, in general, harmful to human health and wellbeing. For example, the Minister states that:

16.1 *"[T]he ongoing slate 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."*[7]

16.2 *"I am aware of the unacceptably 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"*[8]

16.3 *"[I]n general … poor air quality at the hotspots in the Highveld Priority Area, has adverse consequences and impacts upon human health and well-being"*[9]

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7 AA Vol. 5 p 1152 para 3

8 AA Vol. 5 p 1298 para 104

9 AA Vol. 5 p 1369 para 268

17 Second, the Minister admits that this ambient air pollution continues to exceed the National Standards:

17.1 "*I do not dispute that in 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*."[10]

17.2 "*[T]o date, Government was not successful in bringing the ambient air quality everywhere in compliance with the National Ambient Air Quality Standards*"[11]

18 Third, the Minister admits that government has failed to achieve the Highveld Plan goals:

18.1 "*[T]o date, Government was not successful in bringing the ambient air quality everywhere in compliance with the National Ambient Air Quality Standards*"[12]

18.2 *"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 …"*[13]

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10 AA Vol. 5 p 1210 para 36

11 AA Vol. 5 p 1387 para 299.1

12 AA Vol. 5 p 1387 para 299.1

13 AA Vol. 5 p 1264 para 53.3.5.

19 Fourth, 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.[14]

20 Fifth, the Minister further admits that her predecessors made no effort to create section 20 regulations to implement the Highveld Plan.[15] 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.

21 Sixth, the Department's own internal socio-economic impact assessment confirms the necessity for implementation regulations and the ongoing threats to health and well-being caused by air pollution in the Highveld Priority Area. While the Minister made fleeting reference to this assessment in her answering affidavit, she failed to disclose its contents to this Court.[16] The applicants have since obtained a copy through a Rule 35(12) request, which is addressed in detail in a supplementary affidavit.[17]

22 As we show below, the contents of this assessment are entirely destructive of the Minister's case. They present the most compelling argument for the necessity for implementation regulations. They further show that the Minister's reasons for opposing implementation regulations are entirely lacking in substance.

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14 AA Vol. 5 p 1202 para 33.12 – 33.14.

15 AA Vol. 5 p 1211 para 37.

16 AA Vol. 5 p 1155 para 6.1.

17 SA Vol. 6 Annex SP64 pp 1715 - 1733.

23 The Minister's initial failure to disclose her own Department's findings and recommendations is contrary to the special duties of candour and 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.[18]

24 Given that so much is common cause, the Minister's continued opposition to this application is therefore difficult to understand. This opposition boils down to a series of flawed technical legal arguments, which we address below.

25 The Minister's responses also misconstrue the nature and purpose of this application. As a result, it is again necessary to emphasise what this application is about and what it is not about:

25.1 First, the applicants' do not ask this court to review all the state's actions and omissions in the Highveld Priority Area. The focus remains on the threat to section 24(a) and the Minister's duty to establish implementation regulations.

25.2 Second, the applicants also do not insist that section 20 implementation regulations be confined to the Highveld Priority Area, to the exclusion of all other priority areas. The problem is the absence of any section 20 regulations to implement and to give effect to the Highveld Plan, whether specific or general. The applicants are, in principle, not opposed to a set

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[18] *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.

of general implementation regulations, on condition that they are effective in properly enforcing and implementing the Highveld Plan and ensuring accountability from both government and industry.

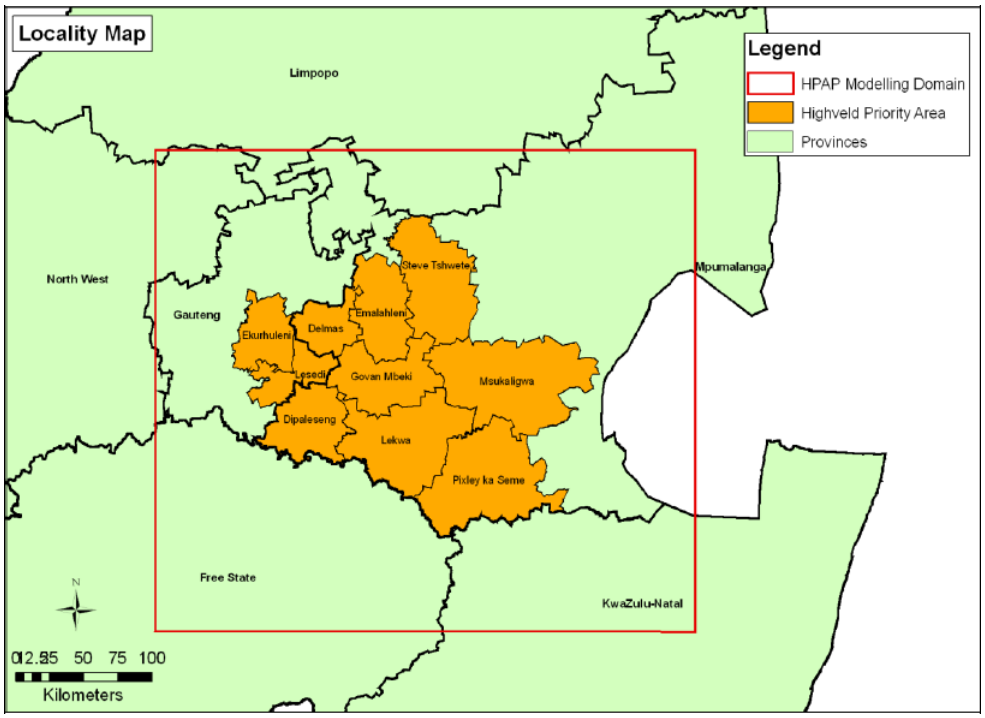
25.3 Third, the applicants have never suggested that section 20 implementation regulations would be a miracle cure for poor air quality in the Highveld Priority Area. However, effective implementation regulations are a necessary step in the process of achieving the now overdue Highveld Plan goals and in ensuring accountability.

25.4 Fourth, the applicants do not ask this Court to micromanage state resources, contrary to what the Minister claims. This application concerns the need for accountability and effective mechanisms to ensure that the Highveld Plan is properly implemented and enforced.

BACKGROUND

The Highveld Priority Area and the Highveld Plan

26 In November 2007, the former Minister declared the Highveld Priority Area, using his powers under Chapter 4, Part 1 of the Air Quality Act.[19] The location of this 31 000 km^2 area, which cuts across Gauteng and Mpumalanga, is shown in the following map:



27 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

19 FA Vol. 1 p 13, para 8; FA Ann SP10 p 209

mining operations. Due to its concentration of industrial pollution sources, residents experience particularly poor and dangerous air quality.[20]

28 It took more than four years before the Highveld Plan was published in March 2012.[21] The overall aim of the Highveld Plan is to ensure that ambient air quality in the priority area complies with the National Standards. It formulated seven goals designed to achieve this overall objective, with a deadline of 2020.

28.1 Goal 1: By 2015, organisational capacity in government is optimised to efficiently and effectively maintain, monitor and enforce compliance with ambient air quality standards.

28.2 Goal 2: By 2020, industrial emissions are equitably reduced to achieve compliance with ambient air quality standards and dust fallout limit values.

28.3 Goal 3: By 2020, air quality in all low-income settlements is in full compliance with ambient air quality standards.

28.4 Goal 4: By 2020, all vehicles comply with the requirements of the National Vehicle Emission Strategy.

28.5 Goal 5: By 2020, a measurable increase in awareness and knowledge of air quality exists.

28.6 Goal 6: By 2020, biomass burning and agricultural emissions are 30% less than the current state.

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20 FA Vol. 1, p 44, para 78.

21 FA Vol. 1 p 14, para 10; Ann SP10 Extract from the 'Highveld Priority Area Air Quality Management Plan', p 224. The full version of the Highveld Plan is found in the Rule 53 record: Vol. 8 pp 406 ff.

28.7 Goal 7: By 2020, emissions from waste management are 40% less than the current state.

29 The Highveld Plan envisaged that stakeholders, including heavy polluters, would submit emission reduction plans, setting out how they intended to reduce emissions to achieve the goals set out in the plan. Because this was entirely voluntary, rates of participation were low. By 2011, only 8% of heavy polluters in the Highveld Priority Area had submitted any implementation plans.[22]

The 2017 Draft Mid-Term Review

30 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.[23]

31 Only one initial review has been conducted, long out of time. The Department 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:

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22 Reflected in Appendix 6 to the Highveld Plan: Rule 53 Record Vol. 8 p 626ff. RA Vol. 6 p 1605 para 99.4.

23 See Ann SP10 'Highveld Priority Area Air Quality Management Plan', p 224

31.1 "*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*"[24];

31.2 "*Less than 50% of the interventions have been achieved in totality*" (emphasis added);[25]

31.3 "*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;[26]

31.4 "*Only 29% of industrial and low-income settlements interventions have been achieved*" (emphasis added);[27]

31.5 "*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, that ambient air quality is still a concern in the Highveld Priority Area*".[28]

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24 FA Ann SP21 p 421

25 FA Ann SP21 p 424

26 FA Annex SP21 p 426

27 FA Annex SP10 p 425

28 FA Annex SP10 p 426

Attempts to engage the Minister

32 On 2 October 2017, the applicants' attorneys, the Centre for Environmental Rights, in collaboration with groundWork, launched the *Broken Promises* Report.[29] This report was produced as a consequence of the inexplicably-delayed MTR process and highlighted multiple shortcoming in the implementation of the Highveld Plan.

33 The *Broken Promises* memorandum of demands was submitted to the Department at the commencement of the annual National Air Quality Lekgotla in 2017.[30] Despite repeated attempts to engage the then Minister and the Department on the contents of this report, no substantive response was received at the time.[31]

34 On 10 December 2018, CER, on behalf of groundWork, addressed a letter to the then newly appointed Minister, Ms Nomvula Mokonyane.[32] The letter:

34.1 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;

34.2 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

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29 FA Vol. 1 p 83, para 135

30 FA Vol. 1 p 83, para 135. The 12th Air Quality Governance Lekgotla, Johannesburg, 2-3 October 2017.

31 FA Vol. 1 p 83, para 136

32 FA Vol. 1 p 86, para 144; FA Ann SP26 p 460

regulations, in terms of section 20 of the Air Quality Act, to give effect to the Highveld Plan;

34.3 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;

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

35 On 9 May 2019, CER received a letter from the Minister, signed on 30 April 2019. In sum, 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.[33]

36 On the basis of these refusals, the applicants proceeded to launch this application in June 2019.

37 What followed were a series of unexplained and lengthy delays, as the Minister failed to deliver a complete Rule 53 record on time, despite repeated demands, and then failed to file an answering affidavit until directed to do so by the Acting Deputy Judge President. The Minister has never sought condonation for these delays. The complete timeline of these delays is set out in detail in the applicants' chronology, filed with these heads of argument.

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33 FA Vol. 1 p 18, para 19-19.1; FA Ann SP27 p 464

The events after this application was launched

38 The current Minister, Ms Creecy, took office on 30 May 2019, shortly before the papers in this application were filed.

39 The Minister's answering affidavit suggests that work began on the draft implementation regulations soon after she took office and that a first draft was completed by 29 November 2019.[34]

40 The Minister also refers to the socio-economic impact assessment process which began at the same time.[35] This socio-economic impact assessment is required in terms of the Socio Economic Impact Assessment Guidelines (SEIAS), as referred to in the Minister's answering affidavit.[36]

41 On 19 January 2021, the Department circulated draft implementation regulations to stakeholders, including the applicants. These have not yet been published for public comment.[37]

42 As already noted above, the Minister 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. On the contrary, her answering affidavit suggests that she remains actively hostile to implementation regulations.

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34 AA Vol. 5 p 1155, para 6.1; RA Vol. 6 p 1575, para 26

35 AA Vol. 5 p 1155, para 6.1

36 AA Vol. 5 p 1155, para 6.1; SA Ann SP65 p 1736

37 RA Vol. 6 p 1574, para 25.

THE RELEVANT LEGAL FRAMEWORK

The section 24 constitutional right

43 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*."

44 In ***HTF Developers (Pty) Ltd v The Minister of Environmental Affairs***[38] Murphy J explained that section 24 has two parts:

> *"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."*

45 This distinction between the section 24(a) and 24(b) rights goes deeper than this passage suggests:

45.1 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.

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

45.2 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"*.

46 This reflects a clear conceptual difference between these rights. Section 24(a) sets the basic minimum for environmental protection: an environment that is not harmful. Section 24(b) then goes further, requiring the state to take reasonable steps to protect the environment even where human health and well-being are not immediately threatened. It acknowledges that environmental protection is not solely about addressing immediate harms, but is also about exercising long-term custodianship and care for the environment.

47 This distinction has its roots in the drafting history of section 24. Its predecessor, section 29 of the interim Constitution,[39] contained a single line: "*Every person shall have the right to an environment which is not detrimental to his or her health or well-being.*" 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.[40] Section 24(b) was an addition to, not a subtraction from, the unqualified section 24(a) right.

48 There is clear precedent for this unqualified interpretation of section 24(a) in the Constitutional Court's jurisprudence on the section 29(1)(a) right to a basic

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39 Constitution of the Republic of South Africa, Act 200 of 1993.

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

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."*

49 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***,[41] 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-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.""*

50 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*

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41 *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.

realisation of <u>this right</u>". The two components of this section 26 right cannot be separated and are textually interrelated.

51 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.

52 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.[42] 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.

53 This means that residents of the Highveld Priority Area have a right to a safe and healthy environment, here and now. When residents are choking on noxious air pollution that threatens their lives and well-being, it is no answer for the state to 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.

54 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

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

most important is the principle of "*sustainable development*". In ***Fuel Retailers***,[43] Ngcobo J, writing for a majority of the Constitutional Court, explained that sustainable development 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."*[44]

55 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. In ***Vaal Environmental Justice Alliance***,[45] the SCA 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 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. <u>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</u>*

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43 *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).

44 Ibid at para 44

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

> *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."*[46] (Emphasis added)

NEMA and the Air Quality Act

56 The National Environmental Management Act 107 of 1998 (NEMA), is the overarching environmental legislation which seeks to give effect to section 24 of the Constitution and the principles that underpin it.[47] Section 2 of NEMA sets out a series of binding principles that must inform the interpretation and application of all environmental legislation.[48]

57 The Air Quality Act is subsidiary environmental legislation under NEMA. Parliament enacted this legislation with the express aim of addressing air pollution and protecting the section 24 constitutional rights. In its preamble, the Air Quality Act recognises; amongst other things, that:

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[46] Ibid at para 84.

[47] *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) at para 56.

[48] Section 2(1)(c) provides that these principles "*serve as guidelines by reference to which any organ of state must exercise any function when taking any decision in terms of this Act or any statutory provision concerning the protection of the environmen*t".

Section 2(1)(e) further provides that these principles must "*guide the interpretation, administration and implementation of this Act, and any other law concerned with the protection or management of the environment.*"

57.1 "*the quality of ambient air in many areas 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*";

57.2 "*the burden of health impacts associated with polluted ambient air falls most heavily on the poor*";

57.3 "*air pollution carries a high social, economic and environmental cost that is seldom borne by the polluter*"; and

57.4 "*minimisation of pollution through vigorous control, cleaner technologies and cleaner production practices is key to ensuring that air quality is improved*".

58 Section 2 of the Air Quality Act makes its purpose plain, stating that the object the 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.*

59 Section 3 further imposes a "*general duty on the state*", providing, *inter alia*, that "*[i]n fulfilling the rights contained in section 24 of the Constitution, the State …*

through the organs of state applying this Act, must seek to protect and enhance the quality of air in the Republic".

60 The Air Quality Act establishes a number of mechanisms through which these aims are to be achieved, including the National Framework, the National Standards, atmospheric emission licences , and the declaration of priority areas.

The National Framework

61 Section 7 of the Air Quality Act provides for the creation of a National Framework, setting out binding norms and standards for achieving the objectives of the Act. The current National Framework – the 2017 National Framework – was published on 26 October 2018.[49]

The National Standards

62 In terms of section 9 of the Air Quality Act, the Minister must identify substances or mixtures of substances in ambient air which, through ambient concentrations, bioaccumulation, deposition or in any other way, present a threat to health, well-being or the environment. Furthermore, the Minister must, in respect of each of those substances or mixtures of substances, establish national standards for ambient air quality, including the permissible amount or concentration of each such substance or mixture of substances in ambient air.

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49 FA Vol. 1 Annex SP 4 p 144ff.

63 National Standards have been set for eight pollutants: nitrogen dioxide (NO_2), ozone (O_3), sulphur dioxide (SO_2), CO (carbon monoxide), benzene (C_6H_6), lead (Pb), PM_{10} (particles with aerodynamic diameter less than ten micron metres),[50] and $PM_{2.5}$ (particles with aerodynamic diameter less than two-and-a-half micron metres).[51]

64 For most pollutants, including PM_{10},$PM_{2.5}$, and SO_2, standards are set for both shorter term averaging periods (24 hours or less) and annual periods, because these pollutants can significantly harm human health with short-term exposures. In other words, even if ambient air is compliant with the annual averaging period standard for a pollutant, it can be non-compliant with the short-term standard.

65 It is important to note that our National Standards are significantly weaker than the World Health Organisation's Guidelines.[52]

Atmospheric Emissions Licences

66 In terms of section 21(1)(a) of the Air Quality Act, the Minister is required to publish, by notice in the *Gazette*, a list of activities which "*result in atmospheric emissions and which the Minister or MEC reasonably believes have or may have a significant detrimental effect on the environment, including health, social conditions, economic conditions, ecological conditions or cultural heritage*" (the List of Activities).

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50 GN 1210 in *GG* 32816 of 24 December 2009.

51 GN 486 in *GG* 35463 of 29 June 2012.

52 See Replying Affidavit Vol. 6 p 1581, para 40-40.3

67 In turn, anyone engaging in these listed activities is required to obtain an atmospheric emission licence (AEL), issued under Chapter 5 of the Air Quality Act. It is an offence to conduct any of the listed activities without a licence.[53]

68 Chapter 5 prescribes the licensing regime for listed activities. In terms of section 36(1), the licensing authority is ordinarily a metropolitan or district municipality, although the Minister or a provincial organ may assume this function in certain circumstances.

Priority Areas and Air Quality Management Plans

69 The individual licensing regime is inherently ill-equipped to deal with the cumulative problem of ambient air pollution, which knows no municipal or provincial boundaries. As a result, the Air Quality Act provides for the designation of priority areas to ensure focused interventions across municipal and provincial boundaries.

70 Section 18 provides the Minister or relevant provincial MECs with the power to declare priority areas. It provides, in relevant part, that:

> *"18. Declaration of priority areas*
>
> *(1) The Minister or MEC may, by notice in the Gazette, declare an area as a priority area if the Minister or MEC reasonably believes that -*
>
> *(a) ambient air quality standards are being, or may be, exceeded in the area, or any other situation exists which is causing, or may cause, a significant negative impact on air quality in the area; and*

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53 Air Quality Act, section 22.

(b) the area requires specific air quality management action to rectify the situation."

(2) The Minister may act under subsection (1), if -

(a) the negative impact on air quality in the area -

(i) affects the national interest; or

(ii) is contributing, or is likely to contribute, to air pollution in another country;

(b) the area extends beyond provincial boundaries; or

(c) the area falls within a province and the province requests the Minister to declare the area as a priority area.

…

(5) The Minister or MEC may, by notice in the Gazette, withdraw the declaration of an area as a priority area if the area is in compliance with ambient air quality standards for a period of at least two years."

71 Consequently, the aim of declaring a priority area is to take steps to address the ambient air pollution so that there is compliance with National Standards. The declaration may be withdrawn if the area is in compliance with the National Standards for at least two years.[54]

72 At present, South Africa has three priority areas which were all declared by the Minister: the Vaal Triangle Airshed Priority Area (Vaal Priority Area) was declared in April 2006,[55] a year prior to the Highveld Priority Area, and the Waterberg-Bojanala National Priority Area (Waterberg Priority Area),[56] declared most recently in 2012.

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54 Section 18(5) of the Air Quality Act.

55 GN 365 in *GG* 28732 dated 21 April 2006.

56 GN 495 in *GG* 35435 dated 15 June 2012.

73 The declaration of a priority area is merely the starting-point, as the Air Quality Act requires the development of a priority area air quality management plan (AQMP), aimed at co-ordinating air quality management and addressing air quality issues.[57] Section 19 of the Air Quality Act provides that:

> *"(1) If the Minister has in terms of section 18 declared an area as a priority area, the national air quality officer must-*
>
> *(a) after consulting the air quality officers of any affected province and municipality, prepare a priority area air quality management plan for the area; and*
>
> *(b) within six months of the declaration of the area, or such longer period as the Minister may specify, submit the plan to the Minister for approval.*
>
> *…*
>
> *(4) Before approving a priority area air quality management plan, the Minister or the relevant MEC or MECs-*
>
> *(a) must follow a consultative process in accordance with section 56 and 57;*
>
> *(b) may require the relevant air quality officer to amend the plan within a period determined by the Minister or the relevant MEC or MECs.*
>
> *(5)*
>
> *(a) The Minister or the relevant MEC or MECs must publish an approved plan in the Gazette within 90 days of approval.*
>
> *(b) The approved plan takes effect from the date of its publication.*
>
> *(6) A priority area air quality management plan must-*
>
> *(a) be aimed at co-ordinating air quality management in the area;*
>
> *(b) address issues related to air quality in the area; and*
>
> *(c) provide for the implementation of the plan by a committee representing relevant role-players.*

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57 Section 19 of the Air Quality Act.

(7) a priority air quality management plan lapses when the declaration of the area as a priority area is withdrawn in terms of section 18(5).”

74 Section 20 further makes provision for “*regulations to implement and enforce priority area air quality management plans*”, in the terms set out above.[58] Since the declarations of the three priority areas, implementation regulations have only been published for the Vaal Priority Area in May 2009.[59] There are no implementation regulations to give effect to the Highveld Plan.

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58 See paragraph 6 above.

59 GN R614 in *GG* 32254 dated 29 May 2009.

THE ONGOING BREACH OF THE SECTION 24(A) RIGHT IN THE HIGHVELD PRIORITY AREA

75 As explained above, 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.

76 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.*" [60]

77 By definition, any exceedance of the National Standards poses a direct threat to health and well-being. Section 9(1) of the Air Quality Act provides that, in identifying National Standards, the Minister must identify those substances that "*present a threat to health, well- being or the environment or which the Minister reasonably believes present such a threat*."

78 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*."[61]

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60 FA Ann SP10 p 209

61 FA Annex SP4 p 147 para 1.2.

79 As the Constitutional Court emphasised in ***Mazibuko***,[62] 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."[63] (Emphasis added.)*

80 In this light, it is unsustainable for the Minister to claim that the National Standards have no legal significance for this case.[64] They 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.

81 Almost 12 years since the declaration of the Highveld Priority Area, the levels of ambient air pollution have not significantly diminished and remain far in excess of the National Standards.[65]

81.1 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

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62 *Mazibuko and Others v City of Johannesburg and Others* 2010 (4) SA 1 (CC).

63 Ibid at para 61.

64 AA Vol. 5 pp 1193 – 1194 para 30.2.2.

65 See FA Vol. 1 p 101, para 175

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.[66]

81.2 The 2018 State of the Air report, produced by the Department, also shows a deterioration of ambient air quality at several monitoring stations.[67]

81.3 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.[68]

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

82.1 The largely illegible graphs that the Minister presents in support of this claim are riddled with errors, they are missing entire years of air pollution data, and cover only four of the eight pollutants listed in the National Standards.[69] The deficiencies in these graphs are addressed in detail in the applicants' replying affidavit.[70]

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66 See FA Vol. 1 p 49, para 92

67 See FA Vol. 1 p 115-116, para 217; Founding Affidavit Ann SP14 p 249

68 See SFA Vol. 3 p 32, para 65

69 See AA Annex BC4 – BC7 pp 1457 – 1460

70 See RA pp 1579 – 1581, paras 37 – 39.5

82.2 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.[71] As just one example, the air quality monitoring station at Middelburg has a data capture rate as low as 37%.[72]

83 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.[73]

84 The various studies on the health effects of air pollution in South Africa have confirmed the dire impact of the Highveld Priority Area's toxic air.[74] 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.

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71 See AA Vol. 5 p 1286, para 93

72 FA Vol. 1 p 43 para 93.4, not denied AA Vol. 5 p 1360, para 251.

73 AA Vol. 5 p 1209 para 36; p 1387 para 299.1.

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

85 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."*[75]

86 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.[76] As previously noted, 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.[77]

86.1 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*".[78]

86.2 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.[79] That study has not been made publicly available, but its findings are summarised in the report, which confirms that:

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

76 See Applicants' Supplementary Affidavit Vol. 6 Ann SP64 p 1715

77 Rule 35 (12) Notice Vol. 10 pp 4332-4333

78 Applicants' Supplementary Affidavit Vol. 6 Ann SP64 p 1724

79 Applicants' Supplementary Affidavit Vol. 6 Ann SP64 p 1725

86.2.1 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*";[80]

86.2.2 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 within the limits prescribed in the National Standards. The assessments states 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.*"[81]

86.2.3 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.

86.2.4 On this basis, the impact assessment report concludes "*there is a chance to save thousands of lives if annual PM [National Standards] were met*".[82]

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80 Applicants' Supplementary Affidavit Vol. 6 Ann SP64 p 1725

81 Applicants' Supplementary Affidavit Vol. 6 Ann SP64 p 1725

82 Applicants' Supplementary Affidavit Vol. 6 Ann SP64 p 1725

87 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.[83] 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.

88 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.

89 Despite this overwhelming evidence, much of which comes from the Department itself, the Minister continues to deny any casual 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.[84] These arguments are entirely at odds with the established science, the Department's own studies, the Air Quality Act, and the Highveld Plan, which all acknowledge the direct link between air pollution and adverse health impacts.

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83 See FA Ann SP34-SP36 pp 511-522

84 AA Vol. 5 p 1366, para 264.1

90 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.

91 Given the Minister's denials, it is 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. We return to the relevant principles on just and equitable relief in dealing with remedies below.

92 In response, the Minister argues that the principle of subsidiarity precludes the applicants from relying directly on the section 24(a) of the Constitution. She 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).[85]

93 The Minister goes so far as to suggest that the only remedy available to residents of the Highveld is to challenge each of the countless atmospheric emission

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[85] AA Vol. 5 p 1250, para 48

licences that have been granted in the Highveld Priority Area by different municipal authorities under the Air Quality Act.[86]

94 This reflects a mistaken understanding of subsidiarity. The Constitutional Court has repeatedly held that subsidiarity is not a fixed rule. In ***My Vote Counts***,[87] the majority stressed that:

> *"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. It is not necessary to do that in this case."*[88]

95 What emerges from the Constitutional Court's case law is that subsidiarity generally applies in two circumstances:

95.1 First, where the Constitution itself obliges Parliament to pass specific legislation to effectively codify rights, such as the section 9(4) right to equality,[89] the section 23(1) right to information,[90] or the section 33 right to just administrative action.[91]

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86 AA Vol. 5 p 1250, para 48

87 *My Vote Counts NPC v Speaker of the National Assembly and Others* 2016 (1) SA 132 (CC) at para 52, affirmed in *Pretorius and Another v Transport Pension Fund and Others* 2019 (2) SA 37 (CC) at paras 51 – 52.

88 Ibid at para 52.

89 See *MEC for Education: KwaZulu-Nata; and Others v Pillay* 2008 (1) SA 474 (CC) at paras 39 – 40.

90 See *My Vote Counts NPC v Speaker of the National Assembly and Others* 2016 (1) SA 132 (CC) at para 160

91 See *Minister of Health and Another v New Clicks South Africa (Pty) Ltd and Others* 2006 2 (SA) 311 (CC) at paras 95 - 97

95.2 Second, where legislation "*covers the field*" by providing clear procedures, dedicated forums, and specific statutory remedies for constitutional rights violations, such as labour legislation[92] or the Equality Act.[93]

96 Outside of these circumstances, the Constitutional Court has little difficulty in relying directly on constitutional rights, even where there is a substantial body of legislation giving effect to those rights. For instance, the Court consistently relies directly on the section 28(2) children's rights, even though the Children's Act seeks to give content and effect to that right.[94] Equally, the Court relies directly on the section 29 education rights, despite the existence of the Schools Act and a raft of other national and provincial legislation governing education in South Africa.[95]

97 This case falls neatly into this latter category, where subsidiarity does not apply. Section 24 of the Constitution did not place a specific obligation on Parliament to pass specific legislation to codify these environmental rights. Moreover, NEMA, the Air Quality Act and other environmental legislation do not provide residents with any clear procedures, remedies or specialised tribunals to obtain remedies

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92 See *South African National Defence Union v Minister of Defence* 2007 5 SA 400 (CC) at para 51 – 52. Compare *Pretorius and Another v Transport Pension Fund and Others* 2019 (2) SA 37 (CC) at paras 51 – 52, which indicated that subsidiarity may not always apply to labour legislation.

93 See *MEC for Education: KwaZulu-Nata; and Others v Pillay* 2008 (1) SA 474 (CC) at paras 39 – 40.

94 See, for example, *AB and Another v Pridwin Preparatory School and Others* 2020 (9) BCLR 1029 (CC) at para 209 – 210 (placing direct reliance on section 28(2) in setting aside the decision by the principal of an independent school to expel two learners without a hearing).

95 See, for example, *Moko v Acting Principal of Malusi Secondary School and Others* [2020] ZACC 30 (setting aside a principal's refusal to allow a learner to write matric exams, with direct reference to section 29(1)(a)); *Pridwin* ibid; *Governing Body of the Juma Musjid Primary School & Others v Essay N.O. and Others* 2011 (8) BCLR 761 (CC) (relying directly on section 29(1) in the context of eviction proceedings involving a private school).

for ambient air pollution that exceeds the National Standards and threatens their health and well-being.

98 In these circumstances, the Air Quality Act and other environmental legislation were never intended to obstruct affected individuals from accessing appropriate constitutional remedies in response to harmful levels of ambient air pollution.

99 Next, the Minister argues that any limitation of section 24(a) is broadly justified under section 36 of the Constitution by socio-economic considerations and the need to promote sustainable development. This is mistaken on several levels:

99.1 First, there is no law of general application that permits levels of ambient air pollution in the Highveld Priority Area that far exceed the National Standards in a manner that poses a direct threat to the health and wellbeing of residents. The Minister has failed to point to any such legislation.

99.2 Second, the Air Quality Act and the range of other instruments all have the stated aim of putting in place measures to improve air quality and to prevent conditions of this nature, not to sustain or increase levels of ambient air pollution at levels above the National Standards.

99.3 Third, the principle of sustainable development requires that measures to promote economic development should not sacrifice the environment and human health and wellbeing. The suggestion by the Minister that economic considerations trump concerns for the environment and human health is plainly at odds with this principle.

99.4 Finally, this argument reflects a callous disregard for human life, particularly in light of the Department's finding that more than 10,000 premature deaths each year are directly attributable to air pollution in the Highveld.

100 In these circumstances, residents of the Highveld Priority Area are suffering an ongoing breach of their section 24(a) constitutional rights that requires urgent attention.

IMPLEMENTATION REGULATIONS ARE NECESSARY

101 More than 9 years after the Highveld Plan was established, it is clear that the 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. It is also clear that existing laws and regulations have not been enough to achieve the Highveld Plan goals.

102 This is the conclusion reached by the Minister's own Department.

103 The draft Highveld Plan MTR, discussed above, specifically acknowledged that:

> *"[The] Department of Environmental Affairs was supposed to develop regulations for the implementation and enforcement of the HPA AQMP."* [96]

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96 FA 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

104 The need for these implementation regulations is best explained in the Department's own socio-economic impact assessment, prepared as part of the regulation-drafting process

104.1 The report acknowledges that "*air quality in the area does not meet the National Air Quality Standards (NAAQS) due to the ineffective implementation of the AQMPs*"[97]

104.2 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]*" (emphasis added).[98]

104.3 It goes on to hold that "*There is no legal instrument to enforce the AQMP commitments*".[99]

104.4 The report finds further that "*[m]ajor polluters don't consider AQMP as a legal document that can be enforced*".[100] It adds that "*[n]o punitive measures could be applied. The Regulation will provide guidance on the punitive measures*".[101]

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97 SA Vol.6 Annex SP 64 p 1719.

98 Ibid at p 1720.

99 Ibid.

100 Ibid (table, third column).

101 Ibid 1721 (table, third column).

105 This assessment concludes that the creation of implementation regulations is the most desirable option and that the potential benefits in lives saved and improved health outweigh the costs.[102]

106 The draft implementation regulations produced by the Department further illustrate their necessity and the gaps in the existing regulatory scheme.[103] Once again, the Minister did not disclose their contents in her answering affidavit. While these draft regulations are not a model of perfection, they are a useful start. The draft contains the following key features:

106.1 Draft regulation 2 explicitly acknowledges that these draft regulations are considered to be "*necessary for implementing and enforcing Priority Area Air Quality Management Plans.*"[104]

106.2 Regulation 3 identifies the relevant stakeholders, which include national departments, provinces, and municipalities; industry; mines; and civil society organisations.[105]

106.3 In terms of regulation 4, the "*emission reduction interventions*"[106] that are identified in the relevant AQMP will now be turned into legally binding

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102 Ibid at p 1727 para 2.1; p 1732 para 3.1

103 RA Annex 54 Vol.6 p 1641.

104 Ibid p 1643.

105 Ibid.

106 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".

obligations, which must be implemented by stakeholders within the target date.[107]

106.4 Significantly, regulation 4.2 will require that these emission reduction interventions be incorporated into atmospheric emission licences (AELs).[108] This will mean that AELs will finally be aligned with the aims of the Highveld Plan. The applicants have repeatedly called for this intervention.

106.5 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*".[109]

106.6 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.*
>
> *6.2 The Minister shall provide complimentary support to provinces and municipalities responsible for the implementation of the air quality management plan."*[110]

106.7 Under regulation 7, there will be binding reporting requirements.[111]

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107 Ibid pp 1643 – 1644.

108 Ibid p 1643.

109 Ibid p 1644.

110 Ibid p 1644.

111 Ibid p 1645.

106.8 Regulation 9 will create a clear obligation to conduct a review of the relevant AQMPs every 5 years.[112]

106.9 Regulations 10 and 11 prescribe offences and penalties for non-compliance with these regulations.[113]

107 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 proved incorrect when one compares these draft section 20 regulations against what currently exists.[114] In summary, these implementation add at least four necessary features which are currently missing from the regulatory scheme:

107.1 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*".

107.2 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.

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112 Ibid.

113 Ibid.

114 RA Vol. 6 p 1578, para 33

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

107.4 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.

108 In these circumstances, the Minister's repeated denial of the necessity for implementation regulations rings hollow.

THE MINISTER'S OBLIGATION TO ESTABLISH IMPLEMENTATION REGULATIONS

109 The Minister has a power 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 plans. This duty has two sources:

109.1 Section 20 of the Air Quality Act itself imposes a duty to produce implementation regulations;

109.2 Alternatively, even if it is held that section 20 does not impose this duty, the Minister is under a self-standing duty under section 7(2) of the Constitution to establish regulations to protect and promote constitutional rights.

The relevant principles of interpretation

110 The proper approach to the interpretation of statutory provisions is now well settled. This requires due regard to the text, purpose and context of the provision and applicable constitutional rights and values.[115]

111 Section 39(2) of the Constitution further 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:

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115 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.

111.1 First, if a provision is reasonably capable of more than one meaning, the meaning that does not violate constitutional rights should be preferred.[116]

111.2 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.[117]

"May" means "must" in appropriate cases

112 Our courts have long held that statutory provisions framed in discretionary language may impose a power coupled with a duty.[118] The courts have frequently cited the House of Lords decision in ***Julius v The Lord Bishop of Oxford***[119] 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."*

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116 *Makate v Vodacom Ltd* 2016 (4) SA 121 (CC) at paras 87 - 89.

117 *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.

118 *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.

119 *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.

113 The offshoot of this principle is that the word "*may*" in a statute can mean "*must*", in appropriate circumstances, especially where this interpretation is required to promote and protect constitutional rights and values.

114 In ***Van Rooyen***[120] the Constitutional Court interpreted the word "*may*" in section 13(3)(aA) of the Magistrates Act as imposing a duty rather than a mere discretion.

114.1 The Court addressed whether the Minister had a discretion to confirm a recommendation by the Magistrates' Commission that a magistrate be suspended.

114.2 The Court held that such a discretion would not be consistent with the constitutional principle of judicial independence.[121]

114.3 Accordingly, the Court held that "may", in the context of that section, must therefore be read to authorise an action coupled with a duty to take that action:

> *"As far as the Act is concerned, if "may" in section 13(3)(aA) is read as conferring a power on the Minister coupled with a duty to use it, this would require the Minister to refer the Commission's recommendation to Parliament, and deny him any discretion not to do so. In that event the reference in section 13(3)(c) to a report on the reasons for the suspension would be construed as referring to the Commission's reasons for its decision.*
>
> *In my view this is the constitutional construction to be given to section 13(3)(aA). On this construction, the procedure prescribed by section 13(3) of the Act for the removal of a magistrate from office is not inconsistent with judicial independence."*[122]

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120 *S and Others v Van Rooyen and Others* (General Council of the Bar of South Africa Intervening) 2002 (5) SA 246.

121 Ibid at para 178.

122 Ibid at paras 181 – 182.

115 In ***Saidi***,[123] the Constitutional Court applied these principles in interpreting section 22(3) of the Refugees Act, which provided 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.

115.1 The question in that case was whether the word "*may*" in this provision conferred a discretion to refuse to issue or renew asylum seeker permits while asylum seekers were awaiting the outcome of judicial review proceedings.

115.2 Madlanga J, writing for the majority, 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."*[124]

115.3 Madlanga J further emphasised that this interpretation was mandated by section 39(2) of the Constitution.[125]

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[123] *Saidi and Others v Minister of Home Affairs and Others* 2018 (4) SA 333 (CC).

[124] Ibid at para 18.

[125] Ibid at para 38.

The proper interpretation of section 20

116 This reasoning applies with equal force in interpreting the Minister's powers under section 20 of the Air Quality Act. The word "may" must be interpreted as a mandatory "must". This follows for several reasons.

117 First, this interpretation is textually possible, therefore it must be preferred as the interpretation that better promotes and protect constitutional rights, as is required by section 39(2) of the Constitution.

118 The Department itself recognises the constitutional imperative in establishing effective implementation regulations, as it confirms that "*there is a chance to save thousands of lives"* through enhanced efforts to address air pollution in the Highveld Priority Area.[126]

119 Second, section 20 is subject to an objective jurisdictional requirement, providing that the Minister's power is triggered where regulations are "*necessary for implementing and enforcing*" priority area plans. Where regulations are necessary under section 20, it would be absurd to leave this to the whim of the Minister.

119.1 This is precisely the circumstance contemplated in ***Julius v Oxford***, where the House of Lords held that:

> *"[W]here a power is deposited with a public officer for the purpose of being used for the benefit of persons who are specifically pointed out, and with regard to whom a definition is supplied by the Legislature of the conditions upon which they are*

[126] SA Vol. 6 Annex SP 64 p 1725.

> *entitled to call for its exercise, that power ought to be exercised, and the Court will require it to be exercised."* (Emphasis added)

119.2 The Appellate Division cited this passage with approval in ***Diepsloot Residents' and Landowners' Association***.[127] There legislation provided that an administrator "*may*" designate a "*less formal township*" where the administrator was "*satisfied*" that there was an urgent need for land. The Court held that where this jurisdictional requirement was triggered, the discretionary power was transformed into an enforceable duty:

> *"It is common cause that the respondent was satisfied (and was entitled to be so satisfied) that the Zevenfontein squatters were in urgent need of land on which to settle informally. It was therefore incumbent upon him to designate the Diepsloot site (being the land made available by him under s 2(1) of the Act) for informal settlement. Despite the use of permissive language ('may'), s 3(1) imposes upon the respondent a power coupled with a duty."*

120 Third, this interpretation best gives effect to the purposes and objectives of the Air Quality Act under section 2 and 3, by promoting "*the protection and enhancement of the quality of air in the Republic", "the prevention of air pollution and ecological degradation"*, and "*the quality of ambient air for the sake of securing an environment that is not harmful to the health and well-being of people.*"

121 Fourth, this interpretation further promotes the principles of accountability and public participation that underpin the Constitution and the section 2 principles in NEMA.

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127 *Diepsloot Residents' and Landowners' Association and Another v Administrator, Transvaal* 1994 (3) SA 336 (A) at 348D-F.

122 Implementation regulations would give communities and civil society the tools to hold polluters and government to account for failures to implement the Highveld Plan, rather than merely being reliant on non-binding promises.

123 As just one example, a binding obligation to review and update the Highveld Plan every five years would allow civil society to enforce this obligation, through litigation if necessary. In the absence of such an obligation, civil society's demands for action have generally fallen on deaf ears, as demonstrated by the years of fruitless engagement following the release of the *Broken Promises* report in 2017.

124 As the Constitutional Court has held, "*[a]ccountability of those exercising public power is one of the founding values of our Constitution and its importance is repeatedly asserted in the Constitution.*"[128] This is an essential part of the democratic process: ours is a participative democracy, and the purpose of conferring enforceable rights is to enable citizens to hold their government accountable for its conduct.

125 The Department notes that one of the consequences of implementation regulations is that "*[civil society] is likely to use the proposed regulations to litigate against industries and government.*"[129] This is an outcome that should be welcomed. As the Constitutional Court has held, litigation to enforce constitutional obligations plays a vital role in promoting participative democracy:

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[128] *Rail Commuters Action Group v Transnet Ltd t/a Metrorail* 2005 (2) SA 359 (CC) at paras 73 – 76.

[129] SA Vol. 6 Annex SP 64 p 1733

> *"The purpose of litigation concerning the positive obligations imposed by social and economic rights should be to hold the democratic arms of government to account through litigation. In so doing, litigation of this sort fosters a form of participative democracy that holds government accountable and requires it to account between elections for specific aspects of government policy."*[130]

The Minister's denials

126 The Minister continues to deny that she has any legal obligation to prepare and publish regulations. She does so on three primary grounds.

127 First, the Minister advances a narrow textual argument, as she claims that the Air Quality Act uses the words "may" and "must" deliberately, in different provisions.[131] This is beside the point: the word "may" must be interpreted in the context of each provision, with regard to the principles set out above. The Courts have long held that the same word or phrase may have different meanings in different statutory provisions within the same statute, depending on the context.[132] Moreover, as the Constitutional Court held in ***Saidi***, "*text is not everything*" where constitutional rights are at stake.[133]

128 Second, the Minister argues that because section 20 vests regulation-making powers in both the Minister and relevant provincial MECs, this somehow

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130 See *Mazibuko and others v City of Johannesburg and others* 2010 (4) SA 1 (CC) at para 160.

131 AA p 1254 para 52.2.

132 *S v Dlamini, S v Dladla and Others; S v Joubert; S v Schietekat* 1999 (4) SA 623 (CC) at paras 47 – 49.

133 *Saidi and Others v Minister of Home Affairs and Others* 2018 (4) SA 333 (CC) at para 36.

indicates that this power is purely discretionary.[134] This is a misreading of the relevant provisions:

128.1 In terms of section 18, both the Minister and relevant MECs have the power to declare priority areas, in different circumstances

128.2 However, when 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)

128.3 It follows, 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.

128.4 The Minister acknowledges this 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*".[135]

128.5 The Minister further acknowledges that the National Department, under the Minister, is the "*lead agent*" for air quality management in the Highveld Priority Area.[136]

129 Third, the Minister repeatedly argues that implementation regulations would be unlawful, as they would somehow usurp the powers of municipalities over air

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134 AA Vol. 5 1255 para 52.5

135 AA Vol 5 p 1152 para 3.

136 AA Vol 5 p 1358 para 244.

pollution. This point is raised as an afterthought. No such concerns are evident in the assessments produced by the Minister's own Department, which have repeatedly advocated for the creation of implementation regulations. In addition, no such concerns were ever raised when implementation regulations were established for the Vaal Priority Area.

130 In any event, this argument reflects a basic misunderstanding of the division of powers between the national government and municipalities.

130.1 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.

130.2 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.

130.3 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.

130.4 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.

130.5 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.

The self-standing section 7(2) constitutional obligation

131 Even if it were held that section 20 does not impose an obligation on the Minister to create regulations, this duty flows from section 7(2) read with section 24 of the Constitution.

132 In ***Glenister II***, the Constitutional Court held that *"[i]mplicit in section 7(2) is the requirement that the steps the state takes to respect, protect, promote and fulfil constitutional rights must be reasonable and effective."*[137]

133 The full court of this division recently endorsed this principle in ***Helen Suzman Foundation v Speaker of the National Assembly***.[138] There the applicants argued that Parliament was under an obligation to pass specific legislation to address the Covid-19 pandemic. This Court agreed that section 7(2) imposed an obligation on the state to take positive legislative and other steps to address the pandemic, although it held that this duty had already been satisfied through the Disaster Management Act and the Disaster Regulations:

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137 *Glenister v President of the Republic of South Africa and Others* 2011 (3) SA 347 (CC) at para 189. Quoted with approval by Zondo J in *Malan v City of Cape Town* 2014 (6) SA 315 (CC) at para 130.

138 *Helen Suzman Foundation* v Speaker of the National Assembly and Others (32858/2020) [2020] ZAGPPHC 574 (5 October 2020).

> *"Therefore on the Section 7(2) argument our view is that the threat caused by the pandemic to the well - being and life of the people of South Africa would have required a state response that is grounded in Section 7(2) and that what was required were measures that were reasonable and effective. Those measures are to be found in the provisions of the DMA as well as the regulations issued to date and the Applicants do not direct any criticism against either the reasonableness of those measures or their efficacy to date."*[139]

134 In this 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 these circumstances, section 7(2) of the Constitution imposes an obligation on the Minister to produce these regulations.

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139 Ibid at para 71.

GROUNDS OF REVIEW

135 In its recent judgment in ***Esau***,[140] 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*".[141]

136 Regulations (and their absence) are also exercises of public power which are subject to the section 1(c) constitutional principle of legality. In any event, all of the grounds of review addressed in this application are encompassed under both PAJA and legality alike.

137 The applicants rely on three grounds of review in this matter:[142]

137.1 First, Minister Mokonyane's refusal to prescribe implementation regulations was in breach of the statutory and constitutional obligations to enact regulations, addressed above.[143]

137.2 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

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140 *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.

141 PAJA, section 1.

142 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

143 RA Vol. 6 p 1591, para 65.1

is based on the detailed grounds of review set out in the applicants' founding papers.[144]

137.3 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 these regulations.[145] The more than nine year 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.[146] These delays are hardly consistent with the Minister's constitutional duty to perform all obligations "diligently and without delay".[147]

138 The Minister argues that the decision taken by her predecessor to refuse to develop section 20 implementation regulations is now moot.[148] This is incorrect:[149]

138.1 The lawfulness of Minister Mokonyane's refusal to create regulations remains a live dispute, because the current Minister repeatedly and

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144 RA Vol. 6 p 1591, para 65.1 RA Vol. 6 p 1591, para 65.1

145 RA Vol. 6 p 1592, para 65.2

146 AA Vol. 5 p 1154, para 6 ; Reply p 1591 para 64.3

147 Constitution, section 237.

148 Answering Affidavit Vol. 5 p 1152, para 4.

149 Replying Affidavit Vol. 6 p 1568, para 11; p 1590, para 64.1.

wholeheartedly defends her predecessor's decision and claims that it was correct.[150]

138.2 If the previous Minister's decision is not reviewed and set aside, there will always be the risk that the current Minister will decide that regulations are not necessary and will refuse to finalise or implement section 20 regulations.

139 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.

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150 See AA Vol. 5 p 1273 - 1284 paras 63 – 88. Replying Affidavit Vol. 6 p 1568, para 11

REMEDIES

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

141 Whenever this Court finds that the state's conduct is inconsistent with the Constitution, it is bound declare the conduct invalid under section 172(1)(a) of the Constitution. That is a mandatory duty that cannot be avoided.[151]

142 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 <u>any order</u> that is just and equitable…*". This broad remedial discretion exists even in the absence of a declaration of invalidity.[152]

143 The phrase "*any order*" is "*as wide as it sounds*",[153] serving as an injunction to do "*practical justice, as best and as humbly as the circumstances demand*".[154]

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

152 *Head of Department: Mpumalanga Department of Education v Hoërskool Ermelo* 2010 (2) SA 415 (CC) at para 97.

153 *Corruption Watch NPC and Others v President of the Republic of South Africa* 2018 (10) BCLR 1179 (CC) at para 68;

154 *Mwelase and Others v Director-General, Department Of Rural Development And Land Reform And Another* 2019 (6) SA 597 (CC) at para 65.

At the bare minimum, justice and equity demand effective remedies to protect constitutional rights. As Ackermann J observed in ***Fose***:[155]

> *"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."*[156]

The declaratory orders

144 The applicants seek two declaratory orders:

144.1 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

144.2 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.

145 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*".

146 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*

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155 *Fose v Minister of Safety and Security* 1997 (3) SA 786 (CC).

156 Ibid at para 69.

administrative action relates" and "*declaring the rights of the parties in relation to the taking of the decision*", respectively.

147 In ***Rail Commuters***,[157] 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 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."*[158]

148 In that 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."*

149 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

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

158 Ibid at paras 107-8.

provide the Minister and her successors with necessary guidance on their legal obligations going forward.

The declaration of invalidity

150 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.

Review relief

151 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.

The duty to prepare and publish regulations

152 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*".

153 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.

154 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.

155 The applicants seek further orders directing the Minister to pay "*due regard*" to matters which ought to be addressed in the implementation regulations.[159] 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.

156 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.[160]

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159 Amended NoM Vol 2 pp 559 – 561 prayer 6.

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

CONCLUSION AND COSTS

157 For the reasons set out above, this application ought to succeed, with costs. The respondents quite correctly do not seek costs if application is dismissed,[161] in accordance with the ***Biowatch*** principle.[162]

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23 March 2021

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161 AA Vol. 5 pp 1408 - 1409 para 370.

162 *Biowatch Trust v Registrar Genetic Resources and Others* 2009 (6) SA 232 (CC).