

**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA**

CASE NO: 39724/19

**THE TRUSTEES FOR THE TIME BEING OF
GROUNDWORK TRUST**

First Applicant

**VUKANI ENVIRONMENTAL JUSTICE ALLIANCE
MOVEMENT IN ACTION**

Second Applicant

And

THE MINISTER OF ENVIRONMENTAL AFFAIRS

First Respondent

NATIONAL AIR QUALITY OFFICER

Second Respondent

**THE PRESIDENT OF THE REPUBLIC OF
SOUTH AFRICA**

Third Respondent

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

Fourth Respondent

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

Fifth Respondent

And

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

Amicus Curiae

***AMICUS CURIAE* HEADS OF ARGUMENT**

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INTRODUCTION

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

- 1 Evidence shows that the consequences of poor air quality falls disproportionately on the shoulders of marginalised and vulnerable communities who bear the burden of disease caused by air pollution.
- 2 Not all air pollution violates the right to a healthy environment. These submissions are not about the vindication of a demand for absolutely pristine air quality. However, if air quality fails to meet the National Ambient Air Quality Standards (“National Standards”), it is a *prima facie* violation of the right. When the failure to meet air quality standards persists over a long period of time, there is a greater likelihood that the health, well-being, and human rights of the people subjected to that air is being threatened and infringed upon.
- 3 The Department of Environment, Forestry and Fisheries’ acknowledges that women, children, people with disabilities, and the elderly are most profoundly affected by air quality that does not meet the National Standards in the Highveld Priority Area. This is consistent with findings of international bodies, including the United Nations and the World Health Organisation (“WHO”) who have found that

¹ Applicant’s supplementary affidavit annexure **SP64** The initial impact assessment of the Priority Area Air Quality Management Plan Regulations vol 6 p 1725.

air pollution disproportionately harms vulnerable populations and this is exacerbated by poverty.

4 The essence of the amicus submissions are to:

4.1 Set out the proper interpretation of section 24(a) of the Constitution. We highlight that the right creates a meaningful nexus between the environment, “health” and “well-being”. Furthermore, due to the absence of any internal qualifiers, the right is immediately realisable. This interpretation is consistent with international and regional human rights instruments like the African Charter on Human and Peoples’ Rights.

4.2 Highlight the implications that poor air quality has for a wide range of rights - in particular the right to life, health and children’s rights - relying on the evidence accepted by international bodies like the WHO.

4.3 Submit that having regard to the domino-effect that a breach of section 24(a) has on other rights, it should be understood as a gateway right whose realisation is important for the enjoyment of other rights.

4.4 Emphasise that poor and marginalised communities disproportionately shoulder the burden of toxic air. This is clear from the government’s own information as well as from international bodies. We submit that if this Court is to harness the transformative powers of the Constitution – it must adopt a pro-poor interpretation that gives a full and generous interpretation to the right to a healthy environment that secures real relief and protection to marginalized people.

5 In what follows, we show that the amicus submissions are relevant to the issues in the main application. We then discuss the duty to consider international law as well as the interconnectedness of rights before we turn to the main submissions.

THE SPECIAL RAPPORTEUR'S SUBMISSIONS ARE RELEVANT TO THE ISSUES BEFORE THIS COURT

6 The Special Rapporteur was admitted as *amicus curiae* in these proceedings by consent of the parties on 5 November 2020.² After the Special Rapporteur had been admitted to the proceedings, an affidavit deposed to by Mr Abader (the acting Director-General in the National Department of Environment, Forestry and Fisheries) was filed opposing the amicus submissions and arguing that they should be dismissed.³ The basis upon which the acting Director-General of the Department deposes to the affidavit opposing the amicus submissions remains unclear.⁴ Neither the Department nor Mr Abader are parties to these proceedings and he does not state that he has authority to depose to the affidavit on behalf of the respondents.⁵ We leave this in the Court's hands. Nonetheless, we address the merits of the criticism directed to the Special Rapporteur to show why this Court should accept the amicus submissions.

7 In what follows, we briefly deal with the importance of the role of an *amicus curiae* in proceedings of this nature and why it is in the interests of justice for this Court to consider the submissions of the Special Rapporteur. Thereafter, we show that these submissions are pertinent to the issues before this Court.

² Amicus RA vol 7 para 3 p 1751 and annexure **DRB17** order admitting the Special Rapporteur as *amicus curiae* pp 1760 – 1.

³ Responding affidavit to the amicus curiae vol 5 para 105 pp 1524 – 5.

⁴ In the amicus RA it is pointed out that it is not clear the basis on which Mr Abader deposes to this affidavit – whether in his personal capacity or as the acting Director-General on behalf of the Department.

⁵ Amicus RA vol 7 paras 4 – 9 pp 1751 – 1753.

The important role of amicus curiae

- 8 Our courts have repeatedly recognised the important role of an *amicus curiae*. This is because constitutional issues usually have an impact beyond the litigants before the courts – as is evident in this case. In **Koyabe**, the Constitutional Court stated that:

*“Amici curiae have made and continue to make an invaluable contribution to this Court’s jurisprudence. Most, if not all constitutional matters present issues, the resolution of which will invariably have an impact beyond the parties directly litigating before the Court. Constitutional litigation by its very nature requires the determination of issues squarely in the public interest, and in so far as amici introduce additional, new and relevant perspectives, leading to more nuanced judicial decisions, their participation in litigation is to be welcomed and encouraged.”*⁶

- 9 The role of an amicus is to “draw the attention of the Court to relevant matters of law and fact to which attention would not otherwise be drawn.”⁷ An amicus is not simply limited to making legal submissions. In **Children’s Institute**, the Constitutional Court continued to say that:

*“In public interest matters, like the present, allowing an amicus to adduce evidence best promotes the spirit, purport and objects of the Bill of Rights. Therefore, the correct interpretation of Rule 16A must be one that allows courts to consider evidence from amici where to do so would promote the interests of justice.”*⁸ (Own emphasis)

⁶ **Koyabe and Others v Minister for Home Affairs and Others (Lawyers for Human Rights as Amicus Curiae)** 2010 (4) SA 327 (CC) at para 80 (footnote omitted).

⁷ **In re Certain Amicus Curiae Applications: Minister of Health and Others v Treatment Action Campaign and Others** 2002 (5) SA 713 (CC) at para 5.

⁸ **Children’s Institute v Presiding Officer, Children’s Court, Krugersdorp and Others** 2013 (2) SA 620 (CC) at para 27.

10 It is our submission that it would promote the interests of justice if this Court considered the evidence and submissions of the Special Rapporteur for the following reasons:

10.1 First: The Special Rapporteur's submissions are relevant to the main application. The possible ramifications of the relief sought by the applicants are of public importance and it is imperative that this Court considers all available evidence and all relevant argument.

10.2 Second: The Special Rapporteur's evidence provides a base for the legal submissions set out in these heads. The evidence is not controversial and is not in dispute, as demonstrated below.

10.3 Third: The legal submissions speak to international law which this Court is enjoined by section 39 of the Constitution to consider. These submissions are of assistance to the Court in its interpretation of section 24 of the Constitution.

10.4 Fourth: This Court will also benefit from the comparative foreign jurisprudence, where courts in other jurisdictions have had to determine similar issues to that which this Court is required to decide.

11 Moreover, in respect of evidence, the Constitutional Court has explained why it is preferable for evidence to be introduced in the court of first instance:

"Courts of first instance must be permitted to admit evidence from an amicus curiae to avoid a situation where appellate courts are inundated with new evidence. In principle, courts of first instance should strive to accommodate the reception of evidence if this would be in the interests of justice. They should not knowingly leave

*relevant evidence that could have been received by them to be adduced at the appellate level. This is because appeals are generally limited to the record of the court below. Accordingly, the fact that the Constitutional Court, as a court of appeal, is permitted to admit evidence adduced by amici curiae further lends support to the notion that courts of first instance must be permitted to do the same.*⁹

- 12 Of course, this Court retains the discretion to determine whether to admit evidence on what it considers to be in the interests of justice in any case. As demonstrated below, it is evidently in interests of justice to consider the Special Rapporteur's submissions.

The duty to consider international law

- 13 This Court must consider all relevant international law, whether it is binding or not binding, when deciding whether 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.¹⁰ In ***Makwanyane*** Chaskalson P held that:

“ ... public international law would include non-binding as well as binding law. They may both be used under the section as tools of interpretation. International agreements and customary international law accordingly provide a framework within which [the Bill of Rights] can be evaluated and understood, and for that purpose, decisions of tribunals dealing with comparable instruments, such as the United Nations Committee on Human Rights, the Inter-American Commission on Human Rights, the Inter-American Court of Human Rights, the European Commission on Human Rights, and the European Court of Human Rights, and, in appropriate cases, reports of specialised agencies such as the International Labour Organisation, may provide guidance as to the

⁹ ***Children's Institute*** at para 29.

¹⁰ Section 39(1)(c) of the Constitution.

correct interpretation of particular provisions of [the Bill of Rights].”¹¹

14 These comments were endorsed in the context of the final Constitution in ***Glenister***, where Moseneke DCJ and Cameron J reiterated that the Constitutional Court “*made it plain that it is entitled to consider both binding and non-binding instruments of international law.*”¹²

15 The weight accorded to international law may vary, with more weight being given to international law that is binding on South Africa.¹³ But even non-binding sources, including reports by international bodies, are important sources of international law, and therefore important aids in interpreting the Constitution.

15.1 In ***Glenister*** the Constitutional Court held that the courts may have regard to reports prepared by international bodies when it relied on the report by the Organisation for Economic Co-Operation and Development (“OECD”) titled *Specialised Anti-corruption Institutions: Review of Models*. The Court justified its reliance on the OECD report on the basis that “[t]he OECD report is not itself binding in international law, but can be used to interpret and give content to the obligations in the conventions that we’ve described.”¹⁴

¹¹ ***S v Makwanyane and Another*** 1995 (3) SA 391 (CC) at para 35. The inserted text is from ***Government of the Republic of South Africa v Grootboom*** 2001 (1) SA 46 (CC) at para 26, which endorsed the comments in *Makwanyane* and tailored the paragraph to the final Constitution.

¹² ***Glenister v President of the Republic of South Africa*** 2011 (3) SA 348 (CC) at para 178, relying on *Makwanyane* at paras 34-35.

¹³ ***Government of the Republic of South Africa v Grootboom*** 2001 (1) SA 46 (CC) at para 26.

¹⁴ ***Glenister*** at para 187.

15.2 In a series of cases, the Constitutional Court and Supreme Court of Appeal (“SCA”) have held that the reports of United Nations Special Rapporteurs are also a source for the determination of international law.

15.2.1 In **Satawu**¹⁵ the Constitutional Court relied on a report by the Special Rapporteur on extrajudicial, summary or arbitrary executions for the purpose of giving content to the right of freedom of assembly.

15.2.2 In **Kaunda**¹⁶ the Constitutional Court made extensive use of the reports of the Special Rapporteur on diplomatic protection to determine South Africa’s obligation to protect its citizens outside of South Africa.

15.2.3 In **Rahim**¹⁷ the SCA relied on a report of the Special Rapporteur on the rights of migrants to determine international best practice for the treatment of foreign nationals who are detained in South Africa.

15.3 It is thus not unprecedented for our courts to have regard to the reports of Special Rapporteurs to determine international best practice or South Africa’s obligations in respect of relevant rights. The acting Director-General’s criticism of the reliance placed on the report of the Special Rapporteur as “*merely recommending what is regarded as best practice*”

¹⁵ **Satawu and Another v Garvas and Others** 2013 (1) SA 83 (CC) at para 64.

¹⁶ **Kaunda and Others v president of the Republic of South Africa and Others** 2005 (4) SA 235 (CC) at para 27.

¹⁷ **Rahim and Others v Minister of Home Affairs** 2015 (4) SA 433 (CC) at para 18.

ignores that furnishing this Court with international best practice allows this Court to have all relevant information before it when giving content to fundamental constitutional rights.

The interconnectedness and indivisibility of rights

16 The acting Director-General implores this Court to consider section 24 of the Constitution (and other socio-economic rights) as third- or fourth-generation human rights. The significance of this, so it is argued, is that *“these categories of human rights are by definition and by nature to be progressively realised.”*¹⁸

17 The argument that the right to an environment that is not harmful to health and well-being is “by nature” progressively realised is deeply flawed. This is because:

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

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

“there is in this case no impediment of any kind to the vindication of learners’ rights in terms of s 29 of the Constitution. That right is, as determined by the

¹⁸ Responding affidavit to the amicus curiae vol 5 para 81 p 1517.

*Constitutional Court in Juma Masjid, immediately realisable.*¹⁹

17.3 Third, the language used in section 24(a) of the Constitution and the content of the right clearly indicates that there is no internal limitation requiring that the right be “progressively realised” within “available resources” subject to “reasonable legislative measures”.²⁰ There is no basis to read such qualifications into the clear language of the Constitution.

17.4 Fourth, it fails to take into account that the Constitution entrenches both civil and political rights and social and economic rights. “*All the rights in our Bill of Rights are inter-related and mutually supporting.*”²¹ Moreover, as observed by Yacoob J, the proposition that rights are inter-related and are all equally important, has immense human and practical significance in a society founded on human dignity, equality and freedom.²²

18 It is all the more important within the context of the right to an environment that is not harmful to health and well-being to acknowledge and reinforce the close relationship between socio-economic rights in the setting of the Constitution as a whole.²³

¹⁹ ***Minister of Basic Education and Others v Basic Education for All and Others*** 2016 (4) SA 63 (SCA) at para 44.

²⁰ ***Governing Body of the Juma Masjid Primary School & Others v Essay N.O. and Others*** (CCT 29/10) [2011] ZACC 13 (11 April 2011) at para 37.

²¹ ***Grootboom*** at para 23.

²² ***Grootboom*** at para 83.

²³ ***Grootboom*** at para 24.

19 Section 24(a) protects the environment and the people living in that environment. Infringement of this right has a domino-effect on other rights in the Constitution, even those that would have historically been referred to as first or second generation rights. The proper approach to constitutional rights is to give rights a purposive interpretation taking into account the interconnectedness of rights to determine whether the state has met its obligations. We submit that this is the approach that is appropriate in giving content to section 24 of the Constitution.

THE PROPER INTERPRETATION OF SECTION 24 OF THE CONSTITUTION

20 In what follows, we submit that in determining the scope and content of section 24(a) of the Constitution and whether the Minister is in breach of it, this Court must:

20.1 Acknowledge the nexus created in the text of the right between the environment, “human health” and “well-being”.

20.2 Highlight that the right to an environment that is not harmful to health and well-being is a gateway right for the realisation of other rights.

20.3 Emphasise that poor and marginalised communities disproportionately shoulder the burden of toxic air. If this Court is to harness the transformative powers of the Constitution – to be pro-poor, this Court must adopt an unqualified interpretation of the right.

The nexus between the ‘environment’, ‘human health’ and ‘human well-being’.

21 Poor air quality implicates the right to an environment that is not harmful to health and well-being. Section 24 of the Constitution is the starting point to understanding this right. It provides:

“Everyone has the right—

(a) to an environment that is not harmful to their health or wellbeing; 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.”

23 The right in section 24 thus reflects characteristics of both fundamental rights and socio-economic rights, mirroring the pattern of the Bill of Rights as a whole (and the importance of the inter-connectedness of rights), which includes traditional fundamental rights as well as socio-economic rights.²⁴

Section 24(a) of the Constitution

22 Section 24(a) of the Constitution is the fundamental human right to an environment that is not harmful to health or well-being. The following is evident from the language of the right.

²⁴ Glazewski “Environmental Law in South Africa” (2000) p 5-10(3).

- 22.1 First, it creates a meaningful nexus between the environment, “human health” and “well-being”.²⁵ According to Du Plessis, the linkage lies in that human health and well-being depend on the quality of the environment. They are “*influenced by the environmental conditions both positively and negatively, with significant economic and social consequences.*”²⁶
- 22.2 Second, in respect of the environment and “health”, the section extends health rights beyond section 27(1) of the Constitution. The right recognises that there is an inextricable relationship between one’s health and the environment within which one lives. A particular environment may be damaging to a person’s health, yet avoid falling foul of the right to health in section 27, as it does not infringe on that person’s right of access to health care services. Health is unarguably a component of environmental concern and falls within the ambit of section 24.²⁷
- 22.3 Third, in adding two separate descriptive modifiers namely “health” or “well-being” the right goes beyond health and shows that the drafters of the Constitution were not only concerned with disease outcomes by seeking to protect a person’s “well-being”. Du Plessis argues that it “*...relates to those instances where environmental interests – which do not necessarily have evident health implications are affected.*”²⁸ The definition of “pollution” in the National Environmental Management Act 107

²⁵ Du Plessis “The promise of ‘well-being’ in section 24 of the Constitution of South Africa” (2018) SAJHR vol 34 pp 191 – 208 p 193.

²⁶ Du Plessis “The promise of ‘well-being’” p 193.

²⁷ Glazewski “Environmental Law in South Africa” (2000) p 5-16. See also ***Verstappen v Port Edward Town Board and Others*** 1994 (3) SA 569 (D).

²⁸ Du Plessis “The promise of ‘well-being’” p 198.

of 1998 (“NEMA”) includes reference to a change in the environment which “has an adverse effect on human health or well-being”. The definition recognises that experiencing pollution could have an adverse effect on well-being. Pollution that does not have a direct effect on health could nevertheless be seen as harmful to an individual’s well-being and therefore in violation of the environmental right.²⁹

22.4 Fourth, unlike other rights, the right may be invoked purely for the benefit of future generations. Meaning only potential violation will suffice. Section 24 guarantees everyone an environment not harmful to their health or well-being and mandates the state to ensure compliance with that right through reasonable legislative and other measures. It also requires that the environment be protected for the benefit of present and future generations in the ways identified in section 24(b)(i) to (iii).³⁰ Section 24(b) gives effect to the right in section 24(a), and requires the state to take the measures necessary to protect the environment so that everyone (present and future generations) may have an environment that is not harmful to their health or well-being. The guarantee is contained in 24(a) and the mechanism to exercise that guarantee is contained in 24(b). Construed this way, section 24(a) can be invoked for the benefit of future generations (a broad concept which can mean posterity, or those whose birth is imminent), to protect their health and well-being.

²⁹ Donald “Advancing the constitutional goal of social justice through a teleological interpretation of key concepts in the environmental rights in section 24” (2014) p 81. See also ***Hichange Investments (Pty) Ltd v Cape Produce Co (Pty) Ltd t/a Pelts Products*** 2004 (2) SA 393 (E) and ***HTF Developers (Pty) Ltd v The Minister of Environmental Affairs*** 2006 (5) SA 512 (T).

³⁰ ***Fuel Retailers Association of Southern Africa v Director-General: Environmental Management, Department of Agriculture, Conservations and Environment, Mpumalanga Province and Others*** 2007 (6) SA 4 (CC) at para 102.

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

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

Regional international human rights law supports this interpretation

23 Regional international human rights law³¹ recognises the inextricable link between the environment and the health and well-being of the person.

24 The right to a healthy environment was first recognised in a regional human rights treaty with the African Charter on Human and Peoples’ Rights in 1981. The African regional human rights system was also the first to pronounce on the meaning and content of the right. Though differently worded to section 24(a) of the Constitution, the link between the environment, health and well-being is also evident in article 24 of the African Charter, which provides that “*all peoples shall have the right to a general satisfactory environment favourable to their development*.”

³¹ In addition to the regional human rights law treaties discussed below, it includes article 38 of the Arab Charter on Human Rights’ and articles 28 and 35 of the ASEAN Human Rights Declaration.

24.1 The African Commission on Human and Peoples' Rights has recognised that the right to a healthy environment is closely linked to economic and social rights in so far as the environment affects the quality of life and safety of the individual.³² It relied on the observation made by Alexander Kiss that:

*“an environment degraded by pollution and defaced by the destruction of all beauty and variety is as contrary to satisfactory living conditions and the development as the breakdown of the fundamental ecological equilibria is harmful to physical and moral health.”*³³

24.2 The African Commission interprets article 24 (together with article 16 concerning the right to enjoy the best attainable state of physical and mental health) to give effect to a set of procedural and substantive elements that give content to the environmental right. The right to a general satisfactory environment, as guaranteed under article 24 of the African Charter therefore imposes clear obligations upon a government. It requires the state to take reasonable and other measures to prevent pollution and ecological degradation, to promote conservation, and to secure an ecologically sustainable development and use of natural resources. **SERAC** confirms the important link between the environment, economic and social rights, and well-being.

³² ***The Social and Economic Rights Action Center and the Center for Economic and Social Rights v Nigeria (“SERAC”)*** ACHPR (155/96) 27 May 2002 at para 51. The complaint concerned abuse of the rights, including the right to health under Article 16 of the Charter and the degradation of the Niger Delta environment by oil operations undertaken by Nigerian-based multi-national oil companies (especially Shell Oil Company.)

³³ **SERAC** at para 51.

25 The Inter-American regional human rights system has similarly interpreted article 11(1) of the Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights broadly.³⁴ Article 11(1) provides that *"everyone shall have the right to live in a healthy environment"*.

25.1 The Inter-American Commission developed, amongst others, the following environmental doctrine in its Report on the Situation of the Indigenous Peoples in Ecuador³⁵:

25.1.1 The respect of the dignity inherent in the person is the principle on which fundamental protections to the right to life and the preservation of physical well-being are based. The conditions of grave environmental contamination, which can cause serious physical illness, disabilities and suffering to the local population, are incompatible with the right to be respected as a human being.

25.1.2 The rules of the Inter-American system of human rights do not discourage or impede development, but require that it be carried out under conditions which respect and guarantee the human rights of affected individuals. As set forth in the Declaration of Principles of the Summit of the Americas, social progress and economic prosperity are only sustainable if people live in a

³⁴ The San Salvador Protocol November 17, 1988.

³⁵ Summary taken from Víctor Rodríguez Rescia "The right to a healthy environment in the Inter-American system for the protection of human rights: In Search of the implementation of a regional litigation strategy" (2003) at 14, available at <https://elaw.org/system/files/interamerican.victor.article.2003.eng.doc>, accessed on 19 March 2021.

healthy environment and the ecosystems and natural resources are managed with care and responsibility.

25.2 The Inter-American Court of Human Rights has elaborated that the right to a healthy environment requires not only an obligation of respect, but also the obligation of guarantee, which duty is projected to the private sphere, to prevent third parties from violating the protected legal assets. States must establish adequate mechanisms to supervise and control certain activities to guarantee human rights, protecting them from actions by public entities, as well as private individuals.³⁶

25.3 In its Advisory Opinion on the Environment and Human Rights, the Inter-American Court said:

“The human right to a healthy environment has been understood as a right with both individual and collective connotations. In its collective dimension, the right to a healthy environment constitutes a universal interest, owed to both present and future generations. However, the right to a healthy environment also has an individual dimension, insofar as its violation may have direct or indirect repercussions on individuals due to its connection with other rights, such as the right to health, personal integrity or life, among others. Environmental degradation can cause irreparable damage to human beings, which is why a healthy environment is a fundamental right for the existence of humanity.”³⁷

26 Despite the fact that the European Convention on Human Rights does not contain an explicit right to a healthy environment, the European Court on Human Rights has developed and established through its case law that where an individual is directly and seriously affected by noise or other pollution, an issue

³⁶ **Caso Comunidades Indígenas Miembros de la Asociación Lhaka Honhat (Nuestra Tierra) v Argentina** IACtHR (Feb 6, 2020) at para 203 onwards.

³⁷ Advisory Opinion 23/17 para 59.

may arise under the Convention. The Court has underlined that serious damage to the environment can affect the well-being of individuals.

26.1 In **López Ostra** the Court said:

“[S]evere environmental pollution may affect individuals’ well-being and prevent them from enjoying their homes in such a way as to affect their private and family life adversely, without, however seriously endangering their health.”³⁸

26.2 In **Fadeyeva**³⁹ the Court held that there had been a violation of article 8 of the Convention on account of the state’s failure to protect the applicant’s private life and home from severe environmental nuisance arising from the industrial activities of a steel plant. Significant air pollution was caused by the operation of the steel plant, close to the applicant’s home. The Court said:

“ ... the very strong combination of indirect evidence and presumptions makes it possible to conclude that the applicant’s health deteriorated as a result of her prolonged exposure to the industrial emissions from the Severstal steel plant. Even assuming that the pollution did not cause any quantifiable harm to her health, it inevitably made the applicant more vulnerable to various illnesses. Moreover, there can be no doubt that it adversely affected her quality of life at home. Therefore, the Court accepts that the actual detriment to the applicant’s health and well-being reached a level sufficient to bring it within the scope of Article 8 of the Convention.”⁴⁰

27 In addition the European Social Committee of Social Rights, which adjudicates cases alleging violations of the European Social Charter that sets out social and

³⁸ **López Ostra v Spain** Application No 16798/90 (1994) ECHR.

³⁹ **Fadeyeva v Russian Federation** Application No 55723/00 (1995) ECHR.

⁴⁰ **Fadeyeva** at para 88.

economic rights, ruled that by failing to address air pollution caused by coal mining, the government of Greece violated the right to a healthy environment.⁴¹

28 We submit that it is because of this inextricable link between the environment, human health and well-being that this Court must give section 24(a) of the Constitution a generous interpretation that allows for the fullest protection.

Section 24(b) of the Constitution

29 Section 24(b) of the Constitution is the directive to the state to take legislative and other measures towards the attainment of this right.⁴² It is in section 24(b) that the internal qualifier of “reasonable legislative and other measures” is introduced.

29.1 It emphasises the positive obligations that the environmental right imposes on the state by providing that “*everybody [also] has the right to have their environment protected*” to the degree that ensures that existing and future generations of people would be able to live a healthy life in that right and to experience well-being.⁴³

29.2 The obligation to ‘protect’ the environment must be understood in the context that to live in an environment that is not harmful to health or well-

⁴¹ ***Marangopoulos Foundation for Human Rights v Greece*** Complaint No 30/2005 (6 December 2006)

⁴² Currie and De Waal “The Bill of Rights Handbook” 6th ed p 519.

⁴³ Du Plessis “South Africa’s constitutional environmental right (generously interpreted) – what is in it for poverty” (2011) SAJHR 27 pp 279 – 307 p 299.

being (section 24(a)). This will necessitate that steps be taken to ‘protect’ the environment.⁴⁴

30 The acting Director-General objects to the Special Rapporteur’s submissions on the basis that they are “*preoccupied with the protection of the environment for the sake of human health and well-being*”, and so the Special Rapporteur is alleged to lose “*sight of the broader context on which the protection of the environment is regulated by law ... namely the legal requirements for sustainable development*”.⁴⁵ He (incorrectly) alleges that the Special Rapporteur’s prioritises the environment over all other considerations arguing that it is inconsistent with the balanced considerations required by the concept of sustainable development.⁴⁶ Instead it is the acting Director-General that fails to acknowledge, as the Constitutional Court has, that the environment and development are inexorably linked. In **BP** this Court held that:

“The concept of ‘sustainable development’ is the fundamental building block around which environmental legal norms have been fashioned, both internationally and in South Africa, and is reflected in section 24(b)(iii) of the Constitution.

Pure economic principles will no longer determine, in an unbridled fashion, whether a development is acceptable. Development, which may be regarded as economically and financially sound, will in future be balanced by its environmental impact, taking coherent cognisance of the principle of intergenerational equity and sustainable use of resources in order to arrive at an integrated management of the environment, sustainable development and socio-economic concerns. By elevating the environment to a fundamental justiciable human right, South Africa has irreversibly embarked on a road, which will lead to the goal of attaining a

⁴⁴ Du Plessis “South Africa’s constitutional environmental right” p 299.

⁴⁵ Responding affidavit to the amicus curiae vol 5 para 30 p 1498.

⁴⁶ Responding affidavit to the amicus curiae vol 5 para 48 pp 1504-1505.

protected environment by an integrated approach, which takes into consideration, inter alia, socio-economic concerns and principles.”⁴⁷

31 Furthermore in ***Earthlife Africa*** this Court held that:

“Section 24 recognises the interrelationship between the environment and development. Environmental considerations are balanced with socio-economic considerations through the ideal of sustainable development. This is apparent from section 24(b)(iii) which provides that the environment will be protected by securing ecologically sustainable development and use of natural resources while promoting justifiable economic and social development.”⁴⁸

32 The nub of the issue is this:

32.1 There is no stark choice between giving people “bread” (or in the words of the acting Director-General – “*the ravages of poverty*”⁴⁹) and clean air that is not harmful to your health and well-being. In providing for the development that must occur, the Constitution, again, uses two descriptive modifiers in section 24(b)(iii) namely “ecologically” and “sustainable” development.

32.2 Socio-economic factors are relevant in considering the relationship between people and the environment. These factors are not in tension with this right, they must be considered consistently and harmoniously with the right.

⁴⁷ ***BP Southern Africa (Pty) Ltd v MEC for Agriculture, Conservation, Environment and Land Affairs*** 2004 (5) SA 124 (W) at 144A-E.

⁴⁸ ***Earthlife Africa Johannesburg v Minister of Environmental Affairs and Others*** [2017] 2 All SA 519 (GP) para 80 – 81.

⁴⁹ Responding affidavit to the amicus curiae vol 5 para 34 p 1499.

32.3 The whole right must be interpreted with this context of inter-generational environmental protection and within the context of sustainable development. Owosuyi states that one of the most quoted definitions of sustainable development defines it as “*development that meets the needs of the present without compromising the ability of future generations to meet their own needs.*”⁵⁰

33 The Constitution recognises the need for the protection of the environment while at the same time recognising the need for social and economic development. It contemplates the integration of environmental protection and socio-economic development, apparent from section 24(b)(iii) of the Constitution.⁵¹

SECTION 24(a) HAS A DOMINO-EFFECT ON OTHER CONSTITUTIONAL RIGHTS

34 Poor air quality has implications for a wide range of human rights, including the right to life, health, water, food, housing and the rights of children.⁵² This is not denied by the acting Director-General of the Department. Instead, he acknowledges that the “*Highveld Priority Area and its implications or consequences as alluded to..., is a matter of serious concern to the Minister.*”⁵³ That there is no dispute that this right has a myriad of implications for other

⁵⁰ Owosuyi “The pursuit of sustainable development through cultural law and governance frameworks: A South African perspective” 2015 vol 18 PER 73.

⁵¹ ***Fuel Retailers Association of Southern Africa v Director-General: Environmental Management, Department of Agriculture, Conservations and Environment, Mpumalanga Province and Others*** 2007 (6) SA 4 (CC) at para 45.

⁵² Amicus FA para 17 p 801.

⁵³ Responding affidavit to the amicus curiae vol 5 para 58 p 1508.

constitutional rights. These implications are important in both understanding and interpreting the right.

- 35 We submit that having regard to the interconnectedness of rights and the domino-effect that section 24(a) of the Constitution has on other rights it should be regarded as a gateway right, with its breach or realisation implicating other constitutional rights. In what follows, we highlight the impact that this right has on the right to life, health and children's rights.

Toxic air implicates the right to life

- 36 There is no dispute between the Special Rapporteur and acting Director-General that there is an interrelationship between the enjoyment of the right to life and the environment.⁵⁴ Neither can there be.

36.1 The government's own data shows that thousands of lives would be saved if annual fine particulate air pollution (PM₁₀ and PM_{2.5}) National Standards were met.

36.2 This is consistent with the Special Rapporteur's report that demonstrates compelling evidence when strong air quality regulations are enacted and enforced, lives are saved and illnesses prevented. For example, air quality in China is improving as a result of strong laws, policies and actions. Levels of particulate matter in 74 cities decreased by 33 percent in five

⁵⁴ Responding affidavit to the amicus curiae vol 5 para 59 p 1508.

years. China also achieved substantial reductions in nitrogen oxides and sulphur dioxide.⁵⁵

36.3 It is also consistent with the international research referred to in and attached to the amicus application. The research shows that the impacts of air pollution on children begin in the womb with maternal exposure being associated with increases in preterm birth, low birth weight and increased use of health care in hospital after birth. Air pollution is also associated with increased risk of infant mortality.⁵⁶

36.4 Long-term exposure to ambient air pollution sets the stage for a number of adverse respiratory and cardiovascular health effects observed in adulthood, including stroke, cardiovascular disease, chronic lung disease and cancer.⁵⁷

37 In at least 12 countries – including India, Pakistan and Nigeria – courts have ruled that the right to a healthy environment is an essential element to the right to life and therefore enforceable as a constitutionally protected right.⁵⁸ In Bangladesh, a petition was brought against government authorities for not fulfilling their constitutional and statutory duties to mitigate air pollution. The

⁵⁵ Amicus FA annexure **DRB 4** Report of the Special Rapporteur “Issues of human rights obligations relating to the enjoyment of a safe clean, healthy and sustainable environment” vol 3 paras 92-93 p 850.

⁵⁶ Amicus FA vol 3 para 22 p 803; annexure **DRB 7** WHO (2017) “Inheriting a Sustainable World: Atlas on children’s health and the environment” vol 3 p 891.

⁵⁷ Amicus FA vol 3 para 22 p 803; annexure **DRB 7** WHO (2017) “Inheriting a Sustainable World: Atlas on children’s health and the environment” vol 3 p 891.

⁵⁸ Amicus FA annexure **DRB 4** Report of the Special Rapporteur “Issues of human rights obligations relating to the enjoyment of a safe clean, healthy and sustainable environment” vol 3 para 14 p 837.

Supreme Court ordered the government to adopt adequate and sufficient measures to control pollution. It said that:

“Articles 31 and 32 of our constitution protect [the] right to life as a fundamental right. It encompasses within its ambit, the protection and preservation of environment, ecological balance free from pollution of air and water, and sanitation without which life can hardly be enjoyed. Any act or omission contrary to thereto will be violative of the said right to life.”⁵⁹

38 The Supreme Court of Chile held that the constitutional right to a healthy environment was violated by the government’s longstanding failure to address industrial air pollution in the Quintero-Puchuncaví region. It ordered the government to implement a suite of remedial actions to protect public health and the environment. The Supreme Court said:

“economic development, such as that represented by the creation of Ventanas Industrial Complex, even when it legitimately aims to improve the quality of life of people, ... , cannot be implemented by ignoring or abandoning the conservation and protection of the environment, while it also cannot compromise the expectations of future generations.”⁶⁰

39 In 2018, the United Nations Human Rights Committee stated in the context of the right to life that:

“environmental degradation, climate change and unsustainable development constitute some of the most pressing and serious threats to the ability of present and future generations to enjoy the right to life.”⁶¹

⁵⁹ ***Farooque v Bangladesh*** 17 B.L.D (AD) 1997.

⁶⁰ ***Franciso Chahuan Chahuan v Empresa Nacional de Petróleos ENAP S.A*** Case No. 5888-2019 (May 28, 2019) para 34.

⁶¹ General comment No. 36 (2018) on article 6 of the International Covenant on Civil and Political Rights, on the right to life para 62.

Toxic air implicates the right to health

- 40 Government's own socio-economic impact assessment frankly acknowledges that ambient air quality in the priority area does not meet the National Standards. It continues to say that:

*“exposure to [particulate matter] has been associated with hospitalisation for respiratory or cardiovascular diseases and exacerbation of respiratory diseases, such as asthma. The health effects depend on particle size and chemical composition. The health impact of PM_{2.5} are more pronounce[d] because smaller particles [are] readily absorbed through the respiratory system.”*⁶²

- 41 Despite the fact that the government's own impact assessment acknowledges the causal link between air pollution and health, in these proceedings the acting Director-General has referred to this causal link as a “fallacy”. He argues that:

*“the fallacy, that if air quality fails to meet established air-quality standards, it constitutes some or other violation of the alleged right to a healthy environment has been dealt with ... [by] the Minister.”*⁶³

- 42 There is simply no basis to question the causal link between air pollution and the right to health. As we have discussed above, section 24(a) of the Constitution creates a meaningful nexus between the environment, health and well-being.
- 43 International bodies have accepted the causal relationship between air pollution and adverse health. The Special Rapporteur's report notes that *“exposure to air pollution causes a wide range of health effects including respiratory illness and*

⁶² Applicants' supplementary affidavit annexure **SP64** The initial impact assessment of the Priority Area Air Quality Management Plan Regulations vol 6 p 1719.

⁶³ Responding affidavit to the amicus curiae vol 5 para 81 p 1517.

*infections, heart disease, stroke, lung cancer and negative birth outcomes (e.g. pre-term birth and low-birth weight).*⁶⁴ In line with the government's own assessment that "*the health impact of PM_{2.5} are more pronounce[d] because smaller particles [are] readily absorbed through the respiratory system*", the Special Rapporteur's report acknowledges the grave impact of PM_{2.5} noting that it is "*the single largest environmental risk to health worldwide.*"⁶⁵

- 44 The International Covenant on Economic, Social and Cultural Rights ("ICESCR") protects the right to health and provides that the steps to be taken by states to achieve the full realisation of the right shall include those necessary for the improvement of all aspects of environmental and industrial hygiene.⁶⁶ The Committee on Economic, Social and Cultural Rights determined that the right to health extends to the underlying determinants of health including safe drinking water, adequate sanitation, safe food, adequate housing and healthy working and environmental conditions. The Committee has also encouraged individual states to increase their efforts to reduce air pollution in order to protect human rights.⁶⁷

Toxic air implicates the rights of children

⁶⁴ Amicus FA annexure **DRB 4** Report of the Special Rapporteur "Issues of human rights obligations relating to the enjoyment of a safe clean, healthy and sustainable environment" vol 3 para 23 p 839.

⁶⁵ Amicus FA annexure **DRB 4** Report of the Special Rapporteur "Issues of human rights obligations relating to the enjoyment of a safe clean, healthy and sustainable environment" vol 3 para 24 p 839.

⁶⁶ Article 12 of the ICESCR.

⁶⁷ Amicus FA annexure **DRB 4** Report of the Special Rapporteur "Issues of human rights obligations relating to the enjoyment of a safe clean, healthy and sustainable environment" vol 3 para 53 pp 843-844.

“Children breathe twice as quickly as adults, take in more air relative to their body weight. Their respiratory tracks are more permeable and thus more vulnerable. Their immune systems are weaker. Their brains are still developing.”⁶⁸

45 Children are considered especially vulnerable to environmental threats due to their developing organs and immune systems, smaller bodies and airways.⁶⁹ The WHO notes that because children spend a lot of time outdoors during peak times of air pollution in the day, their exposure level are often higher than adults.⁷⁰

46 The Convention on the Rights of the Child mandates states to take appropriate action to combat disease and malnutrition, and to take into consideration the dangers and risks of environmental pollution (article 24(2)(c)). States are required to take the best interests of children into consideration (article 3(1)). As a result, the WHO has pronounced that children have a basic human right to breathe clean air in their homes, schools and communities.⁷¹

47 The acting Director-General seems to take the position that section 28 of the Constitution does not recognise a right to breath clean air for children. He states that:

“contrary to the position adopted by the World Health Organisation, that children have a basic human right to breathe clean air in their homes, schools and communities, section 28 of the Constitution does not recognise such a right for children.”

⁶⁸ Amicus FA annexure **DRB 8** UNICEF (2018) Clean the air for the children: the impact of air pollution on children p 918.

⁶⁹ Amicus FA annexure **DRB 9** WHO (2017) “Don’t pollute my future! The impact of the environment on children’s health” vol 3 p 961.

⁷⁰ Amicus FA annexure **DRB 7** Inheriting a sustainable world? Atlas on children’s health and the environment p 891.

⁷¹ Amicus FA vol 3 para 27 pp 804-805.

- 48 While the express language of section 28 does not include a right to clean air, section 24(a) of the Constitution which applies to ‘everyone’ read with section 28 of the Constitution affords children the right to breathe air that is not harmful to their health and well-being.
- 49 According to the United Nations Committee on the Rights of the Child, states should take special measures to address the dangers and risks that local environmental pollution poses to children’s health in all settings.⁷² The Committee has urged many states to scale up and expedite actions to protect children from polluted air.⁷³
- 50 Furthermore, the former Special Rapporteur emphasised the need to reduce the calamitous health impacts of air pollution on children and youth. Similarly, the Special Rapporteur on Hazardous Substances and Wastes decried the “silent pandemic” of disease associated with childhood exposure to toxic substances, including air pollution.⁷⁴
- 51 Adverse environmental exposures during childhood lead to disease, disability or early death at adult age. Preventing these exposures during childhood could contribute importantly to reducing the growing worldwide numbers of diabetes, cardiovascular disease and cancer. A strong focus on primary prevention through reducing environmental risks will not only improve children’s health, but

⁷² Amicus FA vol 3 para 28 p 805.

⁷³ Amicus FA vol 3 para 28 p 805.

⁷⁴ Amicus FA vol 3 para 28 p 805.

will also lead to health care savings. The environment is a key element of protecting children’s health and reducing health inequalities.⁷⁵

52 Children have their whole lives ahead of them, so anything that has irreversible impacts on their development is especially burdensome.

A BREACH OF SECTION 24(a) DISPROPORTIONALITY AFFECTS THE POOR

53 Air pollution that exceeds acceptable air quality standards affects everyone, causing widespread violations of the right to live in an environment that is not harmful to health or well-being. While air pollution is indiscriminate in who it affects, the burden of disease caused by air pollution is inequitably distributed, disproportionately harming certain vulnerable populations – children, women, and people living with disabilities. Poverty is strongly correlated with exposure to air pollution, with impoverished children disproportionately suffering the effects of air pollution and less access to healthcare.⁷⁶

54 Major sources of ambient air pollution, including power plants, factories, incinerators and busy roads are often located in poor communities. Air pollution plagues low quality housing, informal and temporary settlements. Poverty also exacerbates the impacts of air pollution through lack of access to information,

⁷⁵ Amicus FA annexure **DRB 9** WHO (2017) “Don’t pollute my future! The impact of the environment on children’s health” vol 3 p 975.

⁷⁶ Amicus FA annexure **DRB 10** WHO (2018) “Air pollution and child health” prescribing clean air” vol 3 p 991.

limited access to affordable health care, and a lack of political power to demand remedial action.⁷⁷

- 55 Government's socio-economic impact assessment acknowledges that the poor are of the most vulnerable group affected by air pollution. It provides:

“Air pollution knows no boundary and has the potential to affect everyone, but it can affect us differently depending on the distance from the pollution sources, and also the vulnerability of our body systems. ... Most of the people in the priority areas, are working and staying close to the source pollution such as industries, main road and unpaved road, and mine etc. Most vulnerable group that are easily affected by air pollution are women, youth, children, and people with disabilities, because most of them are staying in informal settlement, and their houses have poor insulation, they also use dirty fuels for cooking and space heating, and as a result these group turn to lose if air pollution levels are not managed properly.(sic)”⁷⁸

- 56 Poor families have limited options to improve the air quality in their homes. Outside of the household, they have even less control over what is emitted into the air that surrounds them. Reducing ambient air pollution requires wider action, as individual protective measures are not only insufficient, but neither sustainable nor equitable.⁷⁹ To reduce and prevent exposure to ambient air pollution, public

⁷⁷ Amicus FA vol 3 para 34 p 807.

⁷⁸ Applicants' supplementary affidavit annexure **SP64** The initial impact assessment of the Priority Area Air Quality Management Plan Regulations vol 6 p 1725.

⁷⁹ Amicus FA annexure **DRB 10** WHO (2018) “Air pollution and child health” prescribing clean air” vol 3 p 994.

policy and effective regulations is essential.⁸⁰ Air quality standards should protect the most vulnerable members of society.⁸¹

57 We submit that the only way to harness the full transformative power of the Constitution is by paying close attention to those constitutional violations that disproportionately affect the poorest and weakest among us. Where the burden of the violation is borne mainly by children, the poor and marginalised then this Court must have a greater obligation to vindicate the rights of those affected.⁸²

CONCLUSION

58 In the circumstances, the amicus supports the relief sought to declare the unsafe levels of ambient air pollution in the Highveld Priority Area an ongoing breach of residents' section 24(a) constitutional right to an environment that is not harmful to health or well-being.⁸³

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26 March 2021

⁸⁰ Amicus FA annexure **DRB 10** WHO (2018) "Air pollution and child health" prescribing clean air" vol 3 p 994.

⁸¹ Amicus FA annexure **DRB 4** Report of the Special Rapporteur "Issues of human rights obligations relating to the enjoyment of a safe clean, healthy and sustainable environment" vol 3 para 71 p 846.

⁸² See **Caso Comunidades Indígenas Miembros de la Asociación Lhaka Honhat (Nuestra Tierra) v Argentina** IACtHR (Feb 6, 2020) at para 209 where the Court held that violations can occur with greater intensity in certain groups in vulnerable situations and that states are legally obliged to address these vulnerabilities, in accordance with the principles of equality and non-discrimination.

⁸³ Special thanks to pupil advocate Phumzile Sokhela for all her research assistance.

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