THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Reportable

Case no: 549/2023

In the matter between:

MINISTER OF ENVIRONMENTAL AFFAIRS	**Appellant**
and	
THE TRUSTEES FOR THE TIME BEING OF GROUNDWORK TRUST	**First Respondent**
VUKANI ENVIRONMENTAL JUSTICE ALLIANCE MOVEMENT IN ACTION	**Second Respondent**
NATIONAL AIR QUALITY OFFICER	**Third Respondent**
THE PRESIDENT OF THE REPUBLIC OF SOUTH AFRICA	**Fourth Respondent**
MEC FOR AGRICULTURAL AND RURAL DEVELOPMENT, LAND AND ENVIRONMENTAL AFFAIRS, GAUTENG	**Fifth Respondent**
MEC FOR AGRICULTURAL AND RURAL DEVELOPMENT, LAND AND ENVIRONMENTAL AFFAIRS, MPUMALANGA	**Sixth Respondent**

THE UN SPECIAL RAPPORTEUR ON HUMAN RIGHTS
AND THE ENVIRONMENT **First Amicus Curiae**

CENTRE FOR CHILD LAW **Second Amicus Curiae**

Neutral citation: *Minister of Environmental Affairs v The Trustees for the time being of Groundwork Trust and Others* (549/2023) [2025] ZASCA 43 (11 April 2025)

Coram: MOLEMELA P and ZONDI DP and DAMBUZA JA and HENDRICKS and DOLAMO AJJA

Heard: 28 August 2024

Delivered: This judgment was handed down electronically by circulation to the parties' representatives by email, publication on the Supreme Court of Appeal website and released to SAFLII. The time and date for hand-down is deemed to be 11h00 on 11 April 2025.

Summary: National Environmental Management: Air Quality Act 39 of 2004 (the Air Quality Act) – statutory interpretation – ministerial powers to enact regulations under the Air Quality Act – whether the regulation-making power of s 20 of the Air Quality Act vested the Minister with a discretion to prescribe regulations or imposed a duty to do so – enforcing the Highveld Priority Area Air Quality Management Plan (Highveld Plan) – whether there existed any grounds to interfere with the high court's discretion in granting a just and equitable remedy.

ORDER

On appeal from: Gauteng Division of the High Court, Pretoria (Collis J, sitting as court of first instance):

The following order is granted:

1. Save to the limited extent set out in paragraph 2 below, the appeal is dismissed with costs, including the costs occasioned by the employment of two counsel.
2. The order of the high court is varied to read as follows:

   2.1. It is declared that the poor air quality in the Highveld Priority Area is in breach of the constitutional right to an environment that is not harmful to health and well-being.

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

   2.3. It is declared that the Minister has unreasonably delayed to initiate, prepare and prescribe regulations to give effect to the published Highveld Priority Area Air Quality Management Plan.

   2.4. The Minister is directed, within 12 months of this order, to prepare, initiate, and prescribe regulations in terms of s 20 of the Air Quality Act to implement and enforce the published Highveld Priority Area Air Quality Management Plan'.

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

JUDGMENT

Molemela P (Zondi DP and Dambuza JA and Hendricks and Dolamo AJJA concurring):

Introduction

[1] This appeal concerns the unabated exposure of a community to high levels of air pollution[1] despite the protections set out in the Environmental Management: Air Quality Act 39 of 2004 (the Air Quality Act), a piece of legislation that is, in broad terms, aimed at regulating air quality and providing national norms and standards for the prevention of pollution and ecological degradation. At the core of the dispute is whether the Minister of Environmental Affairs (the Minister)[2] was, following her declaration of an area as a 'priority area' and the publication of a bespoke management plan developed to ensure compliance with ambient air quality standards as envisaged in s 20 of the Air Quality Act, obliged to make regulations aimed at implementing and enforcing the Highveld Priority Area Air Quality Management Plan (Highveld Plan).

Factual background

[2] The facts underlying the parties' dispute are largely common cause. Since such facts are set out in detail in a comprehensive judgment of the high court which was published sub nom *Trustees for the time being of Groundwork Trust and Another v Minister of Environmental Affairs and Others*,[3] it is not necessary to again provide detailed facts. Only the salient background facts are canvassed in this judgment.

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[1] Section 1 of the National Environment Management: Air Quality Act 39 of 2004 defines air pollution as 'any change in the composition of the air caused by smoke, soot, dust (including fly ash), cinders, solid particles of any kind, gases, fumes, aerosols and odorous substances'.

[2] The Ministry underwent several name changes since the declaration of the HPA. The Ministers who were the incumbents in that post during the relevant time were as follows: 2004-2009: The Honourable Mr M van Schalkwyk; 2009-2010: The Honourable Ms B. Sonjica; 2010-2018: The Honourable Ms E Molewa; 2018-2019: The Honourable N Mokonyane; 2019-2024: The Honourable Ms B Creecy; and 3 July 2024 to date: The Honourable D George.

[3] *Trustees for the time being of Groundwork Trust and Another v Minister of Environmental Affairs and Others* (39724/2019) [2022] ZAGPPHC 208 (18 March 2022).

[3] In 2007, following a public outcry about the high levels of pollution in an area where several coal mines were situated, the Minister of Environmental Affairs and Tourism declared a 31 106 square km area located in parts of Mpumalanga and Gauteng provinces as a High Priority Area (HPA) in accordance with Chapter 4, Part 1 of the Air Quality Act. This area is an industrial home to 12 of Eskom's coal-fired power stations, Sasol's refinery and numerous coal mines.

[4] In 2012, following the Minister's acknowledgment that ambient air pollution in the HPA exceeded the National Ambient Air Quality Standards (Air Quality Standards) and that the resultant air pollution had an adverse impact on the health and well-being of residents and the environment, the Minister published the Highveld Plan.[4] Its objective was to reduce air pollution in the HPA to acceptable air quality standards by the year 2020.[5] Among the goals set out in the Highveld Plan was to ensure that 'air quality in all low-income settlements is in full compliance with ambient air quality standards'. Notwithstanding the publishing of the Highveld Plan and the conclusion of the Department of Environmental Affairs (the Department)[6] that it was necessary to publish regulations for purposes of implementing the aforesaid plan, no regulations were published by the Minister.

[5] In 2017, the Centre for Environmental Rights, in partnership with an organisation known as GroundWork (which is the first respondent in this appeal), and another called Highveld Environmental Justice Network, released a report titled 'Broken Promises

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[4] Published in GG 35072 in Government Notice 144, 2 March 2012.
[5] The following seven goals were included in the published Highveld Priority Area Air Quality Management Plan (Highveld Plan):
'Goal 1: By 2015, organisational capacity in government is optimised to efficiently and effectively maintain, monitor and enforce compliance with ambient air quality standards;
Goal 2: By 2020, industrial emissions are equitably reduced to achieve compliance with ambient air quality standards and dust fallout limit values;
Goal 3: By 2020, air quality in all low-income settlements is in full compliance with ambient air quality standards;
Goal 4: By 2020, all vehicles comply with the requirements of the National Vehicle Emission Strategy;
Goal 5: By 2020, a measurable increase in awareness and knowledge of air quality exists;
Goal 6: By 2020, biomass burning and agricultural emissions will be 30% less than current; and
Goal 7: By 2020, emissions from waste management are 40% less than current.'
[6] 'Department' means the Department responsible for environmental affairs.

Report'. Its findings showed that the Highveld Priority Area had not attained its goal of improving air quality.

[6] On 7 June 2019, discontent with the lack of progress in reducing pollution in the HPA over the twelve-year period following the publication of the Highveld Plan, led to the launching of an application in the Gauteng Division of the High Court, Pretoria (the high court). The first applicant in the application filed in the high court (first respondent in the appeal) was GroundWork, a registered non-profit environmental organisation. The second applicant (second respondent in the appeal) was Vukani Environmental Movement, a registered non-profit company. The object of the two non-profit companies, (together referred to as 'the respondents') is to promote awareness of and advocate for environmental justice in South Africa.

[7] The Minister was cited as the first respondent (and is the only appellant in the appeal). The National Air Quality Officer was cited *nomine officii* as the second respondent in the application. The President of the Republic of South Africa was cited as the third respondent and no relief was sought against him, save the costs in the event of opposition. The Member of the Executive Council for Agriculture and Rural Development, Gauteng, was cited as the fourth respondent, while the Member of the Executive Council for Agriculture and Rural Development, Mpumalanga, was cited as the fifth respondent. The two members of the executive council were cited in their official capacity because of the direct and substantial interest they have in the matter on account of their constitutional responsibility for the effective implementation of the provisions of the Air Quality Act within their respective provinces.

[8] The application rested on two propositions: first, that the unsafe levels of ambient air pollution in the HPA constituted an ongoing breach of the right to an environment that is not detrimental to the health and well-being of inhabitants, as enshrined in s 24*(a)* of the Constitution of the Republic of South Africa, 1996 (the Constitution); second, that the Minister was, in terms of the Air Quality Act, obliged to create regulations to implement

and enforce the Highveld Plan. In an Amended Notice of Motion the salient relief sought was couched as follows:

'1. It is declared that the poor air quality in the [HPA] is in breach of residents' section 24(a) right to an environment that is not harmful to their health and well-being.

2. It is declared that the [Minister] has a legal duty to prescribe regulations under section 20 of the [Air Quality Act] to implement and enforce the [Highveld Plan].

3. It is declared that the Minister's failure and / or refusal to prescribe regulations to give effect to the Highveld Plan is unconstitutional, unlawful and invalid.

4. The Minister's refusal to prescribe regulations is reviewed and set aside.

4A. In the alternative to paragraph 4, it is declared that the Minister has unreasonably delayed in preparing and initiating regulations to give effect to the Highveld Plan.

5. The Minister is directed, within six months of this order, to prepare and initiate regulations in terms of section 20 of the Air Quality Act to implement and enforce the Highveld Plan.'

[9] Before the high court, the two applicants (respondents in this Court) claimed that the Minister had violated her constitutional and statutory duties by failing to prescribe regulations to address the poor quality of the air in the HPA. As a result of that failure, so it was submitted, those who lived and worked in that area inhaled air containing high levels of pollution, which was detrimental to their health and inter alia resulted in chronic respiratory and other illnesses and premature death. They averred that exposing the inhabitants of the HPA to dangerous levels of polluted air violated their constitutionally protected right to an environment that is not harmful to their health or well-being. In support of that application, three residents of the HPA deposed to affidavits, alleging that the polluted air adversely affected their health. The respondents therefore sought an order mandating the Minister to promulgate regulations to give effect to the Highveld Plan, and ancillary relief.

[10] The Minister opposed the application, her stance being that there was no causal link between air pollution and the health issues experienced by residents of the HPA. She rejected the argument that there was a legal duty on her to create implementation regulations and maintained that there was no breach of the fundamental environmental rights enshrined in s 24*(a)* of the Constitution. She argued that the regulations would

serve no purpose, would be a waste of state resources and were therefore unnecessary. On 5 November 2020, the high court admitted the UN Special Rapporteur on Human Rights and the Environment in the proceedings as an *amicus curiae (‘amicus’)*.

[11] It warrants mentioning that following the launching of the application and pursuant to the filing of a Rule 35(12) application,[7] the Department filed the findings of a health study embodied in a document titled ‘Initial Impact Assessment of the Priority Area Air Management Plan Regulations’ (Impact Assessment Report). The study’s conclusion was that low-income groups, women, youth, children, and persons with disabilities were disproportionately affected by air pollution, and that this has a negative influence on their health and well-being. According to that health study, which focused on particulate matter ($PM_{2.5}$ and PM_{10}),[8] if these pollutants' levels were reduced to those allowed by the Air Quality Standards, an average of 10 000 lives could be saved. Additionally, it provided the following:

‘The [HPA] health study finding reveals through Human Health Risk Impact Assessment for air pollution levels on the cases of mortally estimated a 4 881 decrease in $PM_{2.5}$ 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 PM_{10} 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 furthermore recommended that it is essential to improve air quality to meet NAAQS and to save lives.

The overall findings of the health study reports shows that air quality has negative impact on the health of people, and DEFF must prioritise the management of air quality, including the implementation of the [Highveld Plan] . . .. *Most vulnerable groups that are easily affected by air pollution are women, youth, children, and people with disabilities*, because most of the time they are found within the same area for a long time, most of them are staying in informal settlement, and their houses have poor insulation….’ (Own emphasis.)

[12] The health study's final conclusion was that the best course of action would be to prescribe implementation regulations as that could potentially save lives. Armed with the

[7] Uniform Rules of Court.

[8] According to Encyclopaedia Britannica, ‘particulate matter is a type of air pollution that consists of airborne suspensions of extremely small solid or liquid particles, such as soot, dust, smokes, fumes, and mists’.

report's findings, the respondents wrote to the Minister on 10 December 2018, proposing immediate remedial action, including the making of regulations to help guarantee that the objectives outlined in the Highveld Plan were met, either before the deadlines indicated in the plan or thereafter. The letter also requested the Minister to concede that the poor air quality in the Highveld Priority Area was in breach of s 24*(a)*. Furthermore, the Minister was requested to provide clarity on whether the Departments' 2019-2020 Legislative Programme would include the development of the implementation regulations for the Highveld Plan, and in the event that it would not do so, to provide reasons for such refusal.

[13] In a letter dated 30 April 2018, the Minister stated that the Department had endeavoured to ensure that the quality of the air in the Republic did not pose a threat to the health and well-being of its citizens. The letter further asserted that the country's air quality management had been brought in line with international ambient air quality standards, and that various mechanisms had been put in place to ensure that the rights guaranteed in s 24*(a)* were protected and realised.

The order of the high court

[14] It is evident from the judgment of the high court that the fact that the Highveld Plan had been approved many years before the initiation of the litigation weighed heavily with that court, as was the fact that the Department's own internal assessment and studies had revealed a link between air pollution and the health impacts identified by the deponents to the founding affidavits.

[15] The high court also observed that, at the time of writing its judgment, the Minister had not published the regulations despite the Department having prepared draft regulations whose copy had already been circulated to stakeholders. The high court found that the regulations were indeed necessary for implementing and enforcing the Highveld Plan. It accordingly declared that the Minister had a legal duty to prescribe regulations under s 20 of the Air Quality Act to implement and enforce the Highveld Plan.

[16] The high court held that the poor air quality in the HPA breached the residents' constitutional rights to an environment that is not harmful to their health and well-being as set out in s 24*(a)* of the Constitution. Having found that the Minister had unreasonably delayed preparing regulations to give effect to the Highveld Plan, the high court accordingly ordered the Minister to prepare, initiate, and prescribe regulations in terms of s 20 of the Air Quality Act within 12 months of its order.[9]

[17] The Minister was further directed to give consideration, in preparing such regulations, the need to give legal effect to the Highveld Plan. In addition to the foregoing orders, the high court issued detailed directions geared at ensuring that the Highveld Plan is implemented and enforced expeditiously in the HPA. These included the laying down of penalties for non-compliance, requiring the monitoring and reporting of atmospheric emissions in the HPA, ensuring the participation of all relevant governmental stakeholders in the implementation of the Highveld Plan, creating a co-ordinated response to address pollution in low income, densely populated areas; appointing and training support personnel; and allocating adequate financial support for the overall implementation of the Highveld Plan.[10]

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[9] The salient parts of the order granted by the high court read as follows:
'241.1 It is declared that the poor air quality in the Highveld Priority Area is in breach of residents' section 24(a) constitutional right to an environment that is not harmful to their health and well-being.
241.2 It is declared that the Minister of Environmental Affairs ("Minister") has a legal duty to prescribe regulations under section 20 of the National Environmental Management: Air Quality Act 39 of 2004 to implement and enforce the Highveld Priority Area Air Quality Management Plan ("Highveld Plan").
241.3 It is declared that the Minister has unreasonably delayed in preparing and initiating regulations to give effect to the Highveld Plan.
241.4 The Minister is directed, within 12 months of this order, to prepare, initiate, and prescribe regulations in terms of section 20 of the Air Quality Act to implement and enforce the Highveld Plan.'

[10] The directions emphasised (a) the need to give legal effect to the Highveld Plan goals, coupled with appropriate penalties for noncompliance; (b) the need for enhanced monitoring of atmospheric emissions in the priority area through the urgent improvement, management, and maintenance of the air quality monitoring station network to ensure that verified, reliable data is produced, and that real-time emissions data is publicly available online and on request; (c) the need for enhanced reporting of emissions by industry in the area, including the requirement that atmospheric emission licences, monthly, and annual emission reports, real-time emission data, and real-time ambient monitoring data from all licence-holders be made publicly available online and on request; (d) the need for a comprehensive air quality compliance monitoring and enforcement strategy, including the provision of a programme and regular progress reports on the steps taken against non-compliant facilities in the HPA; (e) the need to appoint and train an adequate number of appropriately-qualified officials with the right tools and equipment for the implementation and enforcement of the Air Quality Act; (f) the need for all relevant national departments, municipalities, provincial departments and MECs to participate in the HPA process and co-operate in the implementation and enforcement of the Highveld Plan; (g) the need for the regular review of the Highveld Plan and provision of

[18] Aggrieved by the orders granted, the Minister approached the high court seeking leave to appeal to this Court. The appeal is with leave of the high court. At the commencement of the proceedings in this Court, counsel advised the bench that the regulations which formed the subject of the appeal had been published a few days before the date of the hearing of the appeal. A copy of the regulations was handed up.[11]

Mootness

[19] In the light of the fact that the regulations had been published in the intervening period, the appeal panel of Judges enquired whether the publishing of the regulations did not render the dispute moot. Counsel for the respondents submitted that the published regulations suffice in respect of the order of the high court declaring that the Minister has a legal duty to prescribe regulations under s 20 of the Air Quality Act to implement and enforce the Highveld Plan. However, both indicated that notwithstanding that the publishing of the regulations resolved the dispute between parties, they considered it necessary for this Court to pronounce itself on the matter due to its public importance. They considered the fact that one of the orders granted by the high court directed that the matter could be re-enrolled by the parties if further orders were considered necessary as another reason why the matter was not moot.

[20] The principles applicable to mootness are trite. A matter is moot if it no longer presents an existing or live controversy. Courts should not decide matters that are abstract or academic and which do not have any practical effect, either on the parties before the court or the public at large. The crisp question is whether a judgment or order of the court will have a practical effect, and not whether it will be of importance for a

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reports to all stakeholders regarding the progress achieved in its implementation and enforcement; (h) the need to address the postponement and/or suspension of compliance with MES in the priority area, including to ensure the withdrawal, decommissioning and rehabilitation of all facilities that have not obtained once-off suspension of compliance and those that cannot meet new plant MES by April 2025; (i) the need for further or more stringent dust-control measures in the area, including to ensure adequate monitoring, measurement, and reduction of dust emissions, and penalties for non-compliance; (j) the need for a coordinated response to address air pollution in low-income, densely populated areas; and (k) the need for adequate financial support and resources, and adequate human resource capacity to ensure that all of these issues can be addressed.

[11] The regulations were published in Regulation Gazette No 11727 dated 26 August 2024.

hypothetical future case.[12] I disagree that the order of re-enrolment granted by the high court renders the dispute live. The fact that the regulations have now been published cannot be wished away. The effect thereof is that the directions issued by the high court have now been overtaken by events. To my mind, the fact that the regulations have now been issued means that any perceived shortcomings of the published regulations are issues that can only be raised in a fresh review application targeting the regulations. That having been said, it is also trite that where the interests of justice so require, a court still has a discretion to determine a matter despite its mootness.[13] Due to the discrete legal point of public importance which will affect matters in the future and on which the adjudication of this Court is required, it is in the interests of justice that the appeal be heard despite the fact that it no longer presents a live controversy between the parties.

The applicable law

[21] Section 7(2) of the Constitution provides:

'The state must respect, protect and fulfil the rights in the Bill of Rights.'

Section 24 of the Constitution provides:

'24 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.'

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[12] *Member of the Executive Council for Cooperative Governance and Traditional Affairs, KwaZulu-Natal v Nkandla Local Municipality and Others* [2021] ZACC 46; (2022) 43 ILJ 505 (CC); 2022 (8) BCLR 959 (CC) para 16.

[13] *Botha v Smuts and Another* [2024] ZACC 22; 2024 (12) BCLR 1477 (CC); 2025 (1) SA 581 (CC) paras 43-46, applying the dicta in *Police and Prisons Civil Rights Union v South African Correctional Services Workers' Union and Others* [2018] ZACC 24; [2018] 11 BLLR 1035 (CC); 2018 (11) BCLR 1411 (CC); (2018) 39 ILJ 2646 (CC); 2019 (1) SA 73 (CC) para 46.

Section 39(2) of the Constitution provides:

‘When interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights.’

Section 233 of the Constitution provides:

‘When interpreting any legislation, every court must prefer any reasonable interpretation of the legislation that is consistent with international law over any alternative interpretation that is inconsistent with international law.’

[22] As regards the objects of the Air Quality Act, s 2 reads as follows:

‘The object of this Act is-

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

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

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

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

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

Section 3 provides for the general duty of the state and reads as follows:

‘In fulfilling the rights contained in section 24 of the Constitution, the State –

(a) through the organs of state applying this Act, must seek to protect and enhance the quality of air in the Republic; and

(b) must apply this Act in a manner that will achieve the progressive realisation of those rights.’

Section 12 provides as follows:

‘For the purpose of this Chapter, the Minister must prescribe the manner in which-

(a) ambient air quality measurements must be carried out;

(b) measurements of emissions from point, non-point or mobile sources must be carried out; and

(c) the form in which such measurements must be reported and the organs of state to whom such measurements must be reported.’

Section 18 provides:

‘(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

(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.

(3) The MECs of two or more adjoining provinces may by joint action in terms of subsection (1) declare an area falling within those provinces as a priority area.

(4) Before publishing a notice in terms of subsection (1), the Minister or the relevant MEC or MECs must follow a consultative process in accordance with sections 56 and 57.

(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.’

[23] In relevant parts, s 19 of the Air Quality Act provides that the Minister must publish the declaration of a high priority area within 90 days. Once the specific area has been declared a high priority area, an air quality officer must develop an air quality national management plan for purposes of addressing the issues pertaining to air quality and bringing the high priority area in compliance with ambient air quality standards. Before approving such plan, the Minister or the relevant MEC or MECs must follow a consultative process envisaged in ss 56 and 57.

[24] Section 20 of the Air Quality Act provides:

‘The Minister or MEC 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.' (Own emphasis.)

Section 53 of the Air Quality Act provides that the Minister may make regulations necessary to give effect to the country's international obligations, emissions and environmental cooperation agreements. Section 54 provides that the MEC may make regulations for a specific province 'in respect of any matter for which the MEC may or must make regulations' in terms of the Air Quality Act.

Analysis

[25] As a point of departure, it bears mentioning that although the Minister disputed the obligation to make regulations, the order of the high court declaring the poor air quality in the HPA to be in violation of the residents' constitutional right to an environment that is not harmful to their health and well-being as enshrined in s 24*(a)* of the Constitution has not been attacked on appeal.[14] This means that the scope of the issues that arise for determination is confined to the crisp point of whether s 20 of the Air Quality Act imposes

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[14] The high court was required to determine two primary issues: (i) whether the unsafe levels of ambient air pollution in the HPA are an ongoing breach of the residents' constitutionally protected rights to an environment that is not harmful to health and well-being; and (ii) whether s 20 of the Air Quality Act obliges the Minister to prescribe regulations to implement and enforce the Highveld Plan. The high court found for the respondents on both questions. The order of the high court, sans the directions, read as follows:
'In the result the following order is made:

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

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

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

241.4 The Minister is directed, within 12 months of this order, to prepare, initiate, and prescribe regulations
in terms of section 20 of the Air Quality Act to implement and enforce the Highveld Plan.'

When granting leave to appeal, the high court stated that leave was 'confined to paragraphs 241.2 to 241.5 of its order. Since the order granted in clause 241.1 is not subject to this appeal, the sole issue on appeal is whether s 20 of the Air Quality Act, read in context, imposes a legal duty on the Minister to create the regulations.

an obligation on the Minister to make regulations that are deemed necessary for the implementation and enforcement of approved priority area quality management plans. Even though it is not necessary to delve into a deeper analysis on the issue of the breach of s 24*(a)* of the Constitution, it suffices to mention that the common-cause facts that will be highlighted in the ensuing discussion will reveal that the high court's conclusion that s 24*(a)* of the Constitution was breached, was indeed correct. It is against this backdrop that the undisputed facts are examined vis-a-vis the legal position as set out in the Constitution, national legislation, and international law.

[26] Section 2 of the Air Quality Act expressly states that its object is generally to give effect to s 24*(b)* of the Constitution; it, in substance, echoes the constitutional imperatives set out in s 24*(b)* of the Constitution. Section 3 of the Air Quality Act acknowledges that the state has the duty to fulfil the rights entrenched in s 24 of the Constitution. Section 24 must be considered in its entirety. What is discernible from a reading of that provision is that it has two effects which must be considered together: first, it confers the right to an environment that is not harmful to health and well-being; second, it mandates the state to realise that right through *reasonable legislative and other measures*. The creation of regulations is in the realm of such measures, as they are for the specific purpose of implementing and enforcing an air quality management plan that has already been *approved* by the Minister for a focal area that was declared as a priority area by the same Minister.[15]

[27] It is common cause that s 20 empowers the Minister to prescribe regulations necessary for the implementation and enforcement of, in this case, the HPA. The question is whether the Minister was obliged to prescribe regulations. The Minister contends that while there is a constitutional obligation on the state to take legislative measures to protect and realise rights in specific instances under provisions of the Bill of Rights, properly interpreted, the word 'may' in s 20 of the Air Quality Act is permissive, providing the Minister with an option but not obliging her to pass regulations. Finally, she contends that s 7(2) of the Constitution imposes only a general duty on the state to promote and uphold

[15] See sections 18, 19 and 20 of the Air Quality Act.

rights enshrined in the Bill of Rights and does not extend to imposing specific legislative obligations in terms of s 20. The respondents, on the other hand, contend that a proper interpretation confers on the Minister both the power and the duty to prescribe regulations to implement and enforce the Highveld Plan. They submit further that s 20 imposes a self-standing duty on the Minister to take reasonable and effective measures to protect the rights of residents of the HPA.

[28] Several judgments have held that, when used in a statute, the word 'may' does not imply 'must' by default, but cautioned that the language actually employed serves as the foundation for any legislative interpretation.[16] The principles of statutory interpretation are trite. In *Cool Ideas 1186 CC v Hubbard and Another*,[17] the Constitutional Court found that the basic principle of statutory interpretation is that, absent an absurdity, terms in statutes should be interpreted according to their ordinary grammatical meaning. It stated as follows:

'There are three important interrelated riders to this general principle, namely:

(a) that statutory provisions should always be interpreted purposively;

(b) the relevant statutory provision must be properly contextualised; and

(c) all statutes must be construed consistently with the Constitution, that is, where reasonably possible, legislative provisions ought to be interpreted to preserve their constitutional validity. This proviso to the general principle is closely related to the purposive approach referred to in (a).'[18]

[29] It is now well settled that statutory provisions framed in discretionary language may impose a power coupled with a duty. The Constitutional Court has confirmed that there may be instances where the government is required to act on its own initiative.[19] In interpreting the word 'may' in legislation, Corbett JA in *Schwartz v Schwartz* (*Schwartz*),[20] held that while the term may be couched in permissive terms, it does not necessarily

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[16] *Diener NO v Minister of Justice and Correctional Services* [2018] ZACC 48; 2019 (2) BCLR 214 (CC); 2019 (4) SA 374 (CC) para 37. See also *South African Police Service v Public Servants Association* [2006] ZACC 18; 2007 (3) SA 521 (CC); [2007] 5 BLLR 383 (CC); (2006) 27 ILJ 2241 (CC) para 35.

[17] *Cool Ideas 1186 CC v Hubbard and Another* [2014] ZACC 16; 2014 (4) SA 474 (CC); 2014 (8) BCLR 869 (CC) para 28.

[18] Ibid para 28.

[19] *Kaunda and Others v President of the Republic of South Africa* [2004] ZACC 5; 2005 (4) SA 235 (CC); 2004 (10) BCLR 1009 (CC); 2005 (1) SACR 111 (CC) para 67.

[20] *Schwartz v Schwartz* [1984] ZASCA 79; [1984] 4 All SA 645 (AD); 1984 (4) SA 467 (A).

follow that the legislature intended to confer a discretion on the decision maker, and explained as follows:

'A statutory enactment conferring a power in permissive language may nevertheless have to be construed as making it the duty of the person or authority in whom the power is reposed to exercise that power when the conditions prescribed as justifying its exercise have been satisfied. Whether an enactment should be so construed depends on, inter alia, the language in which it is couched, the context in which it appears, the general scope and object of the legislation, the nature of the thing empowered to be done and the person or persons for whose benefit the power is to be exercised.'[21]

[30] In *Saidi and Others v Minister of Home Affairs and Others* (*Saidi*),[22] which I consider to be instructive, the Constitutional Court was faced with determining whether a section of the Refugees Act confers a discretion on a refugee reception officer to refuse to issue or renew asylum seeker permits while asylum seekers were awaiting the outcome of judicial review proceedings. The Constitutional Court held that in interpreting the word 'may' in that section, proper account had to be taken of the purpose of the statute and other provisions of the Constitution.[23] It held that the word 'may' should be interpreted as a mandatory duty, in particular because such an interpretation affords better constitutional protection to refugees awaiting the outcome of judicial review proceedings.[24]

[31] Apart from s 24 of the Constitution, which is the foundation of this case, three other constitutional provisions should serve as constitutional context in the exercise of interpreting the provisions of the Air Quality Act. These are s 7(2) of the Constitution, which enjoins courts to respect, protect, promote and fulfil the rights in the Bill of Rights, s 39, which exhorts courts to promote the spirit, purport and objects of the Bill of Rights, as well as s 233 of the Constitution, which urges courts to prefer a reasonable interpretation that is consistent with international law when interpreting legislation. All these provisions serve as a backdrop in the assessment of whether the state has taken

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[21] Ibid at 473I-474B.
[22] *Saidi and Others v Minister of Home Affairs and Others* [2018] ZACC 9; 2018 (7) BCLR 856 (CC); 2018 (4) SA 333 (CC) (*Saidi*)
[23] Ibid para 34.
[24] Ibid para 18.

adequate steps for the realisation of the constitutionally protected right. Compliance with the applicable prescripts is key.

[32] In considering the international law landscape, it is crucial to bear in mind that the Human Rights Council and United Nations General Assembly recognise the right to a clean, healthy, and sustainable environment as a fundamental human right. It bears noting that in 2021, the United Nations Environment Programme (UNEP) published a study titled *'Regulating Air Quality: The First Global Assessment of Air Pollution Legislation'*. This study inter alia concluded that effective governance demands regular monitoring and reviewing of applicable air quality standards. Bearing in mind that s 3 of the Air Quality Act sets out the duties that the state must carry out for purposes of fulfilling the rights contained in s 24 of the Constitution, it follows that a human rights-based approach which is cognisant of international law prescripts, which has been followed in many judgments of the Constitutional Court, should form part and parcel of the interpretation of s 20 of the Air Quality Act.

[33] In addition to the broad constitutional context mentioned in the preceding paragraph, the purpose of the Air Quality Act must be considered. What is discernible in the scheme of that Act is that Chapter 4 thereof sets out an array of regulatory tools or measures available to government for purposes of implementing and enforcing that Act. These regulatory tools are designed in such a way as to ensure a variety of regulatory approaches aimed at managing air pollution in the most efficient manner.

[34] Section 20 is located in Part 1 of Chapter 4. Part 1 is directed at setting out measures aimed at managing air quality. It empowers the Minister and Member of Executive Council to identify air pollution high density areas for focused attention, which are then declared national or provincial priority areas. Following the declaration of a priority area, the national air quality officer must, after consulting the air quality officers of the affected province and municipality, develop a priority area air quality management plan for purposes of bringing the area in compliance with ambient air quality standards. The plan in question is thereafter submitted to the Minister or MEC for approval. Section

19 therefore focuses on the management of priority areas.[25] It is axiomatic that ss 18, 19 and 20 are collectively aimed at rectifying an established threat to the implementation of the air quality management plan. This is the crucial purposive context in which the word 'may' in s 20 must be seen. A purposive interpretation of s 20 also requires that the steps taken by the Minister to address high levels of air pollution in the HPA be scrutinised to determine whether the arsenal of ameliorative measures set out in the Air Quality Act were utilised in pursuit of the stated objects of the Air Control Act.

[35] On the authority of *Saidi*, I am of the view that an interpretation that will afford better protection to communities who live in places declared as high priority areas is one that will ensure effective compliance with the interventions set out in a published plan and sanction any non-compliance therewith. In the language of *Motala v Master of the North Gauteng High Court, Pretoria (Motala),*[26] this Court, relying on *Schwartz*, found that the word 'may' in a legislative provision may confer a discretion that is coupled with a duty to exercise it when the conditions prescribed as justifying its exercise have been met. In this matter, that jurisdictional fact is 'necessity'. Once the jurisdictional fact of necessity has been objectively established, the duty to create regulations arises

[36] Based on all the authorities mentioned above and the circumstances of the case, my view is that the correct interpretation of s 20 of the Air Quality Act is that it grants the Minister (or MEC) a discretion but also creates a legal duty. Expressed differently, it does not impose an absolute obligation on the Minister or MEC to make regulations; rather, it confers the power to create regulations once a certain situation arises, namely necessity. In other words, once the jurisdictional fact of necessity has been established, the duty to create regulations arises. Given this finding, the crisp question in this matter is whether the making of the regulations by the Minister was necessary in the circumstances of this case, an aspect to which I now turn.

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[25] Section 19 of the Air Quality Act.
[26] *Motala v Master of the North Gauteng High Court, Pretoria* [2019] ZASCA 60; [2019] 3 All SA 17 (SCA); 2019 (6) SA 68 (SCA) para 64.

Was it necessary for the Minister to make the regulations for the implementation and enforcement of the Highveld Plan?

[37] In *Schwartz*,[27] this Court held that the exercise of the powers conferred by an empowering provision was triggered when the condition described therein came into existence (in the context of the present matter, that trigger is the phrase 'necessary for implementing and enforcing' in s 20 of the Air Quality Act). In *Minister of Finance v Afribusiness*,[28] Madlanga J, defined the word 'necessary' as being something 'needing to be done, achieved, or present' and that must be done or was 'unavoidable'.[29] In *Minister of Cooperative Governance and Traditional Affairs and Another v British American Tobacco South Africa (Pty) Ltd and Others*,[30] this Court confirmed that the enquiry into necessity was an objective one and did not depend on the subjective beliefs of the Minister.[31] This approach was later confirmed by the Constitutional Court in *Nu Africa Duty Free Shops (Pty) Ltd v Minister of Finance and Others*.[32]

[38] As far as the uncontroverted facts of this matter are concerned, it must be borne in mind that the Medium Term Review of the HPA, authored by officials in a department overseen by the Minister, acknowledged that the Department itself, was supposed to develop regulations for the implementation and enforcement of the Highveld Plan.[33] Furthermore, there were uncontroverted affidavits deposed to by the residents of the HPA, detailing the effects that the air quality in the area has had on their health over a period of time. Moreover, the 2019 socioeconomic impact assessment report authored by the officials of the Department indicated that although some interventions had been recommended, air quality in the HPA remained poor and ambient air quality remained in excess of national standards due to poor implementation. Plainly, this finding revealed that the assertion made by the Minister in her letter dated 30 April 2018, in which it was

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[27] Op cit fn 20 at 474.
[28] *Minister of Finance v Afribusiness NPC* [2022] ZACC 4; 2022 (4) SA 362 (CC); 2022 (9) BCLR 1108 (CC)
[29] Ibid para 114.
[30] *Minister of Cooperative Governance and Traditional Affairs and Another v British American Tobacco South Africa (Pty) Ltd and Others* [2022] ZASCA 89; [2022] 3 All SA 332 (SCA).
[31] Ibid para 91.
[32] *Nu Africa Duty Free Shops (Pty Ltd v Minister of Finance and Others* [2023] ZACC 31; 2023 (12) BCLR 1419 (CC); 2024 (1) SA 567 (CC).
[33] The Department of Environmental Affairs' draft medium-term Review of the 2011 Highveld Priority Area Quality Management Plan – Review Report: 'A Publication of December 2017' at 421.

claimed that the air quality management was aligned with international standards, no longer held true.

[39] The Impact Assessment Report also indicated that the main cause of the challenges related to the implementation of the Highveld Plan was the negative attitudes from major polluters who did not consider the air quality management plans as binding legal documents, and that stakeholders could not be held accountable as no punitive measures could be applied. Its final conclusion was that the best course of action would be to create implementation regulations because that could potentially save lives and yield better health outcomes. The Department, in its Impact Assessment Report, concluded that existing regulatory measures were insufficient to give effect to the Highveld Plan, and that implementation regulations would be a more efficient means of achieving the goals set out in the plan. These are compelling factors that ineluctably point to the need to create the regulations. The very fact that high levels of pollution continue unabated in the HPA despite the dangers they pose to the community, including children, is a clear attestation that the non-binding set of goals contained in the Highveld Plan are insufficient to achieve the substantial reductions in atmospheric emissions that are required in the HPA.

[40] Based on the objective evidence canvassed in the preceding paragraph, which not only reveal the obstacles the Department faced over a long period of time but also a likely failure to achieve the goals of the Highveld Plan, as well as the violation of the rights enshrined in s 24*(a)* of the Constitution, the necessity for prescribing the regulations to ensure the implementation and enforcement of the Highveld Plan is indisputable. The purpose of the Highveld Plan was to coordinate air quality in the HPA, address all issues related to air quality in the area, and provide for implementation of the plan by stakeholders.[34] It follows axiomatically that once that goal had proven unachievable due to the stakeholders' failure to co-operate, more serious interventions became necessary. Given that one of the tools provided by the Act is the creation of the regulations, and considering that the Department's opinion was that the making of the regulations was the

[34] Section 19 of the Air Quality Act.

only avenue left to preserve the health and well-being of those residing in the HPA, the Minister was constrained to create and publish the regulations.

[41] Against the background of the continued violation of the constitutionally protected human rights as evidenced by the contents of the socioeconomic impact assessment report, a human rights-based approach was necessary. The UN Sustainable Development Group describes a human rights-based approach as 'a conceptual framework for the process of human development and is normatively based on international human rights standards and operationally directed to promoting and protecting human rights'.[35] This is the kind of approach that was likely to benefit the marginalised[36] low-income group occupying the HPA.

[42] A human rights-based approach is not only about the accountability of individuals but also about institutions 'ensuring that both the standards and the principles of human rights are integrated into policy-making as well as the day to day running of organisations'.[37] As mentioned in several judgments, the mere making of a policy to address the infringement of a constitutionally protected right is not sufficient; the policy must be reviewed to determine its effectiveness. If a policy review reveals inadequacies, these must be addressed. This is the human rights-based approach that has been consistently urged by the Constitutional Court in its enforcement of socioeconomic rights. In *Government of the Republic of South Africa v Grootboom (Grootboom*),[38] the Constitutional Court cautioned that:

'Mere legislation is not enough. The State is obliged to act to achieve the intended result, and the legislative measures will invariably have to be supported by appropriate, well-directed policies

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[35] UN Sustainable Development Group 'Human-Rights-Based Approach'. Available at <http://unsdg.un.org/2030-agenda/universal-values/human-rights-based-approach>. Accessed 27 March 2025.

[36] Compare Office of the United Nations High Commissioner for Human Rights (OHCHR) 'A Human Rights-based Approach to health'. Available at <https://www.ohchr.org/sites/default/files/Documents/Issues/ESCR/Health/HRBA-HealthInformationSheet.pdf>. Accessed 27 March 2025.

[37] The South African Human Rights Commission (SHRC) 'What is a Human Rights-based Approach? Available at <http://careaboutrights.scottishhumanrights.com/whatisahumanrightsbasedapproach.html>. Accessed 27 March 2025.

[38] *Government of the Republic of South Africa v Grootboom* 2001 (1) SA 46 (CC); 2000 (11) BCLR 1169.

and programs implemented by the Executive. . . . the formulation of a program is only the first stage in meeting the State's obligations. The program must also be reasonably implemented. An otherwise reasonable program that is not implemented reasonably will not constitute compliance with the State's obligations.'[39]

[43] The sentiments expressed in *Grootboom* were echoed by the Constitutional Court in *Mazibuko and Others v City of Johannesburg and Others*.[40] It held that the concept of progressive realisation of protected rights recognises that policies formulated by the state will need to be reviewed and revised to ensure that the realisation of social and economic rights is progressively achieved.

[44] Further and in any event, s 237 of the Constitution provides that all constitutional obligations must be performed diligently and without delay. The Air Quality Act is one of the legislative measures envisaged in s 24*(b)* of the Constitution. Thus, even if it were to be accepted that the usage of the word 'may' meant that the Minister had a discretion whether or not to publish the Regulations, it is clear that Chapter 4 of the Air Quality Act calls for prompt, efficient and coordinated action to address dangerously high levels of air pollution. Any dragging of feet in addressing the problems would therefore undermine the achievement of this purpose.[41] Under these circumstances, it would be absurd to conclude that the Minister's delay in publishing the regulations amounted to a proper exercise of her discretion. There can be no doubt that in the context of this matter, the Minister's failure to make the regulations would have amounted to an improper exercise of that discretion. This is more so the case where the Minister had, in any event, elected to publish draft regulations of her own accord, thus acknowledging the need for the regulations to be created. Of significance is that the failure to exercise a discretion constitutes a ground of review. It follows that the outcome of the application would have been the same.

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[39] *Ibid* fn 38 above para 42; *BP Southern Africa (Pty) Ltd v MEC for Agriculture, Conservation, Environment and Land Affairs* 2004 (5) SA 124 (W).
[40] *Mazibuko and Others v City of Johannesburg and Others* [2009] ZACC 28; 2010 (3) BCLR 239 (CC); 2010 (4) SA 1 (CC) para 40.
[41] Compare *MEC for Health, Eastern Cape v Kirland Investments (Pty) Ltd* [2014] ZACC 6; 2014 (5) BCLR 547 (CC); 2014 (3) SA 481 (CC).

[45] Another string to the Minister's bow was her reliance on the provisions of s 3*(b)* of the Air Quality Act as her authority for the contention that the Air Quality Act had to be applied in a manner that would achieve the progressive realisation of the protected rights within the available means of the state. It is settled that the interpretation of a statute is a unitary exercise which requires a holistic approach in terms of which the text, context and purpose are considered simultaneously.[42] It bears emphasis that the Constitutional Court in *Eskom Holdings SOC Ltd v Vaal River Development Association (Pty) Ltd and Others*,[43] distinguished socioeconomic rights from the rights to dignity, basic education and to an environment that is not harmful to health or well-being and concluded that environmental rights are not subject to progressive realisation in accordance with reasonable measures which are to be taken within the state's available resources. This is the succinct answer to the contention mentioned in this paragraph.

[46] In any event, in the circumstances of this case, the Minister's submission is flawed on two counts. First, the regulations envisaged in s 20 are for the specific purpose of implementing and enforcing an air quality management plan *approved* by the Minister for a focal area that was declared as a priority area by the same Minister. In this matter, the published Highveld Plan was prefaced by the Minister's acknowledgment that its publication was 'for information and implementation'. Under such circumstances, where implementation proves to be a challenge, the Minister is dutybound to employ the full armoury of legislative interventions aimed at ameliorating the situation.

[47] Second, the Minister was being asked to utilise a mechanism already catered for by legislation and was not being asked to put any additional programmes in place. It can hardly be argued that mechanism was not unrealisable. Against the advice of the officials of his own Department (who, by virtue of their positions would have been privy to any

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[42] *University of Johannesburg v Auckland Park Theological Seminary* [2021] ZACC 13; 2021 (8) BCLR 807 (CC); 2021 (6) SA 1 (CC) para 65.
[43] *Eskom Holdings SOC Ltd v Vaal River Development Association (Pty) Ltd and Others* [2022] ZACC 44; 2023 (5) BCLR 527 (CC); 2023 (4) SA 325 (CC) para 295.

budgetary considerations that could be perceived as obstacles), the Minister failed to publish the Regulations notwithstanding that draft regulations had already been prepared.

[48] Significantly, s 18(5) permits the Minister to 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. It is worth noting that at no stage was the declaration of the HPA withdrawn. This casts doubt on any assertion of ambient air being compliant with set standards. Considering that by the time the application was launched, there had been a state of inertia for more than a decade after the declaration of the HPA, a proposition that urges for progressive realisation of the right to an environment that is unharmful to health rights seems out of touch with reality. Besides, during the seven year period following the publishing of the plan, it was always open to the Minister to stipulate any interventions he or she considered to be within the means of the state.

[49] In the face of ongoing high levels of air pollution, the Minister was dutybound to act, and with the passage of time, the creation of the regulations became imperative. By the time the application was heard in the high court, the urgency of the creation and publication of these Regulations was unquestionable. The fact that the Regulations were published more than ten years after the publication of the Highveld Plan is a lost opportunity in the quest for an environment that is not harmful to the inhabitants of this country. The following observation made by the Constitutional Court in *MEC for Health, Eastern Cape v Kirland Investments (Pty) Ltd*[44] in a slightly different context remains apposite:

'There is a higher duty on the state to respect the law, to fulfil procedural requirements and to tread respectfully when dealing with rights. Government is not an indigent or bewildered litigant, adrift on a sea of litigious uncertainty, to whom the courts must extend a procedure-circumventing lifeline. It is the Constitution's primary agent. It must do right, and it must do it properly.'[45]

[44] *MEC for Health, Eastern Cape and Another v Kirland Investments (Pty) Ltd* [2014] ZACC 6; 2014 (5) BCLR 547 (CC); 2014 (3) SA 481 (CC).
[45] Ibid para 82.

Conclusion

[50] Having considered the provisions of the Air Quality Act holistically and the conspectus of the evidence, I conclude that the word 'may' ought to be interpreted as 'must' in the circumstances of this case. As mentioned before, uncontroverted evidence showed that it was necessary for the regulations to be created for purposes of implementing and enforcing the Highveld Plan. In the language of *Schwartz*, the conditions justifying the exercise of the discretion in s 20 of the Air Quality Act were satisfied. Thus, the Minister had the legal duty to create and publish the Regulations as envisaged in that provision. It follows that the order of the high court mandating the Minister to publish the Regulations was justified.

[51] However, as regards the exhortations contained in the various directions issued by the high court, I am of the view that these directions implicated the principle of separation of powers and ought not to have been made notwithstanding the Minister's delay in publishing the Regulations. Although the appeal falls to be dismissed, the order of the high court must be varied by excising all the directions that were issued. This variation has no bearing on the costs.

[52] What remains before granting the final order is for this Court to express its displeasure in how the appeal record was prepared. Although core bundles were prepared in an attempt to comply with Rule 8(7) of the Rules Regulating the Conduct of the Proceedings of the Supreme Court of Appeal of South Africa,[46] a perusal of the filed records reveals that the official who prepared them was not familiar with the purpose of the filing of core bundles. It was difficult to navigate through the filed appeal records because the main-appeal record as well as the core-bundle record contained incomplete documents. Thus, some pages of the Notice of Motion and founding affidavit were contained in the main-appeal record, while the remaining pages of the same Notice of Motion were filed in the core-bundle record. The upshot is that both the core and the main

[46] Rules Board for Courts of Law Act 107 of 1985: Amendment of Rules regulating the conduct of the proceedings of the Supreme Court of Appeal of South Africa, Government Notice R3398, G. 48571 (12 May 2023).

appeal had to be read side by side. A procedure intended to save preparation-time for the bench led to an unnecessary trolling of the entire case-record. This state of affairs cannot be countenanced.

[53] In terms of Rule 8(1), the preparation and filing of the appeal records lies with the appellant. In this case, the appellant (the Minister) was represented by the State Attorney. Had the record not been prepared by the State Attorney, the appropriate measure under the circumstances would be to make an order disentitling the appellant's attorney from claiming their fees for the preparation of the record.[47] For the reasons already alluded to, such an order would be futile in this matter, which is rather regrettable. Equally regrettable is the delay in finalising this judgment, which is not attributable to any of the litigants. The scribe conveys an unconditional apology to the parties for this delay. The only solace is that by the date of the hearing of the appeal, the Regulations which were a bone of contention in the high court, had already been published.

[54] In the result, the following order is made:

1. Save to the limited extent set out in paragraph 2 below, the appeal is dismissed with costs, including the costs occasioned by the employment of two counsel.
2. The order of the high court is varied to read as follows:

   2.1. It is declared that the poor air quality in the Highveld Priority Area is in breach of the constitutional right to an environment that is not harmful to health and well-being.

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

[47] In terms of Rule 11A of the Rules of Conduct of the Supreme Court of Appeal of South Africa, the Court may make an order for costs to be borne personally by any party or attorney or counsel if the hearing of the appeal is adversely affected by the failure of that party or his or legal representative to comply with these Rules.

2.3. It is declared that the Minister has unreasonably delayed to initiate, prepare and prescribe regulations to give effect to the published Highveld Priority Area Air Quality Management Plan.

2.4. The Minister is directed, within 12 months of this order, to prepare, initiate, and prescribe regulations in terms of section 20 of the Air Quality Act to implement and enforce the published Highveld Priority Area Air Quality Management Plan'.

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

M B MOLEMELA
PRESIDENT
SUPREME COURT OF APPEAL

Appearances:

For the appellant:	G Marcus SC (with J Rust SC and M Salukazana
Instructed by:	State Attorney, Pretoria
	State Attorney, Bloemfontein
For first and second respondents:	N Maenetjie SC (with C McConnachie and A Cachalia)
Instructed by:	Centre for Environmental Rights, Cape Town
	Phatshoane Henney Inc., Bloemfontein
For second amicus curiae:	R M Courtenay
Instructed by:	Centre for Child Law, Pretoria
	Phatshoane Henney Inc., Bloemfontein