CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT 102/15

In the matter between:

MINISTER FOR ENVIRONMENTAL AFFAIRS	First Appellant
DEPARTMENT OF ENVIRONMENTAL AFFAIRS	Second Appellant
and	
AQUARIUS PLATINUM (SA) (PTY) LIMITED	First Respondent
MINISTER OF WATER AND SANITATION	Second Respondent
DIRECTOR-GENERAL: DEPARTMENT OF WATER AND SANITATION	Third Respondent
MINISTER OF MINERAL RESOURCES	Fourth Respondent
PRESIDENT OF THE REPUBLIC OF SOUTH AFRICA	Fifth Respondent
and	
LEON BEKKER	Amicus Curiae

Neutral citation:	*Minister for Environmental Affairs and Another v Aquarius Platinum (SA) (Pty) Ltd and Others* [2016] ZACC 4
Coram:	Moseneke DCJ, Cameron J, Jafta J, Khampepe J, Madlanga J, Nkabinde J, Nugent AJ, Van der Westhuizen J and Zondo J
Judgments:	Jafta J
Heard on:	17 November 2015

Decided on: 23 February 2016

Summary: National Environmental Management Laws Amendment Act 25 of 2014 — Constitutional validity of publication of Act in absence of regulations — Act validly promulgated

Rationality of President's decision to publish Act in absence of regulations — Publication of Act may precede regulations — section 32 prescribed for publication of Act before regulations — Decision not irrational

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ORDER

On appeal from the High Court of South Africa, Gauteng Division, Pretoria:

1. The appeal is upheld.
2. The order of the High Court of South Africa, Gauteng Division, Pretoria is set aside and replaced with the following order:

   "The application is dismissed."

JUDGMENT

JAFTA J (Moseneke DCJ, Cameron J, Khampepe J, Madlanga J, Nkabinde J, Nugent AJ, Van der Westhuizen J and Zondo J):

[1] This case concerns the validity of the decision of the President of the Republic of South Africa to publish an Act of Parliament which he had assented to and signed. The High Court of South Africa, Gauteng Division, Pretoria (High Court) declared

that the President's decision was irrational and set it aside.[1] Its order was submitted to this Court for confirmation as required by the Constitution.[2] Section 172(2)(d) confers the right of appeal against this kind of order on any person or organ of state with sufficient interest. Hence the appeal pursued by the Minister for Environmental Affairs and her Department.

[2] The first appellant is the Minister of Environmental Affairs (Minister) and the second appellant is the Department of Environmental Affairs. They were cited together with the President and the Minister of Mineral Resources as well as the Minister of Water and Sanitation as respondents in the High Court. The proceedings in the High Court were instituted by Aquarius Platinum (SA) (Pty) Ltd (Aquarius) which sought an order declaring invalid the President's decision to publish an Act.

[3] Aquarius also sought the review of the refusal to grant a water license to it. However, the claim against the Minister of Water and Sanitation does not form part of these proceedings. The High Court postponed the determination of that claim and decided the claim against the President only. Consequently, the Minister of Water and Sanitation and her Director-General did not participate in the present proceedings, even though they were cited. The President and Minister of Mineral Resources too had no participation both here and in the High Court.

[4] Although Aquarius initiated the application for confirmation of the High Court's order, it later withdrew as an applicant for confirmation and respondent in the appeal. This left as active parties the appellants. At the request of the Court, Mr Leon Bekker, who was counsel for Aquarius until it withdrew from the proceedings, assisted it with submissions, for which the Court is indebted to him.

[1] *Aquarius Platinum (SA) Pty Ltd v Minister of Water and Sanitation and Others* [2015] ZAGPPHC 584 (High Court judgment).

[2] Section 172(2) proclaims that an order of constitutional invalidity of the conduct of the President has no force unless confirmed by this Court.

Constitutional and legislative scheme

[5] For a proper understanding of the constitutional challenge and the order granted by the High Court, it is necessary to set out the legal framework before narrating the facts. The Constitution confers the legislative power at the national sphere upon Parliament.[3] In the exercise of this power, Parliament passes legislation which is introduced to it in the form of Bills. In the National Assembly, Bills may be introduced by a Cabinet member, a Deputy Minister or a member of the Assembly only.[4] The Bill does not assume the status of a law until it has been assented to and signed by the President.[5]

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[3] See section 42 and 43 of the Constitution. Section 42 provides that—

> "(1) Parliament consists of—
>
> (a) the National Assembly; and
>
> (b) the National Council of Provinces.
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> (2) The National Assembly and the National Council of Provinces participate in the legislative process in the manner set out in the Constitution.
>
> (3) The National Assembly is elected to represent the people and to ensure government by the people under the Constitution. It does this by choosing the President, by providing a national forum for public consideration of issues, by passing legislation and by scrutinizing and overseeing executive action.
>
> (4) The National Council of Provinces represents the provinces to ensure that provincial interests are taken into account in the national sphere of government. It does this mainly by participating in the national legislative process and by providing a national forum for public consideration of issues affecting the provinces.
>
> (5) The President may summon Parliament to an extraordinary sitting at any time to conduct special business.
>
> (6) The seat of Parliament is Cape Town, but an Act of Parliament enacted in accordance with section 76(1) and (5) may determine that the seat of Parliament is elsewhere."

Section 43 provides:

> "In the Republic, the legislative authority—
>
> (a) of the national sphere of government is vested in Parliament, as set out in section 44;
>
> (b) of the provincial sphere of government is vested in the provincial legislatures, as set out in section 104; and
>
> (c) of the local sphere of government is vested in the Municipal Councils, as set out in section 156."

[4] See section 73 of the Constitution which provides:

> "(1) Any Bill may be introduced in the National Assembly.

[6] Section 79 introduces the President as a role player in the process of making legislation. But the President's role is activated only after Parliament has completed its functions and has presented the Bill to the President. Upon receipt of a Bill, there are two options open to him. He may assent to and sign the Bill, in which case a further step would follow. This is the prompt publication of a Bill which has been converted into an Act of Parliament following the assent to and signing by the President.

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(2) Only a Cabinet member or a Deputy Minister, or a member or committee of the National Assembly, may introduce a Bill in the Assembly, but only the Cabinet member responsible for national financial matters may introduce the following Bills in the Assembly:

(a) a money Bill; or

(b) a Bill which provides for legislation envisaged in section 214.

(3) A Bill referred to in section 76(3), except a Bill referred to in subsection (2)(a) or (b) of this section, may be introduced in the National Council of Provinces.

(4) Only a member or committee of the National Council of Provinces may introduce a Bill in the Council.

(5) A Bill passed by the National Assembly must be referred to the National Council of Provinces if it must be considered by the Council. A Bill passed by the Council must be referred to the Assembly."

[5] Section 79 of the Constitution provides:

"(1) The President must either assent to and sign a Bill passed in terms of this Chapter or, if the President has reservations about the constitutionality of the Bill, refer it back to the National Assembly for reconsideration.

(2) The joint rules and orders must provide for the procedure for the reconsideration of a Bill by the National Assembly and the participation of the National Council of Provinces in the process.

(3) The National Council of Provinces must participate in the reconsideration of a Bill that the President has referred back to the National Assembly if—

(a) the President's reservations about the constitutionality of the Bill relate to a procedural matter that involves the Council; or

(b) section 74(1), (2) or (3)(b) or 76 was applicable in the passing of the Bill.

(4) If, after reconsideration, a Bill fully accommodates the President's reservations, the President must assent to and sign the Bill; if not, the President must either—

(a) assent to and sign the Bill; or

(b) refer it to the Constitutional Court for a decision on its constitutionality.

(5) If the Constitutional Court decides that the Bill is constitutional, the President must assent to and sign it."

[7] On the other hand, if the President has reservations about the constitutionality of the Bill, he may decline to assent to and sign it. In that event, the President must refer the Bill back to the Assembly for reconsideration. To facilitate a proper reconsideration of the Bill, the President must specify the grounds on which his reservations are based. If, following reconsideration, the Bill addresses the President's reservations he must assent to and sign it. If not he may refer the matter to the Constitutional Court for a decision on its constitutionality. However, the President is not precluded from signing a Bill even if his reservations were not all accommodated.[6]

[8] The publication of a Bill that has become an Act of Parliament is governed by section 81 of the Constitution. It provides:

> "A Bill assented to and signed by the President becomes an Act of Parliament, must be published promptly, and takes effect when published or on a date determined in terms of the Act."

[9] A closer examination of section 81 reveals that it deals with three issues. First, it tells us that a Bill that has been assented to and signed by the President becomes an Act of Parliament. Second, it requires that the new Act be published without delay. Third, it states that as a general rule, the Act comes into force upon publication unless stated otherwise. It is not unusual for Parliament to include a provision in an Act that states that it will come into operation on a date determined by the President or the relevant Minister.[7]

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[6] Section 79(4) of the Constitution.

[7] See for example section 53 of the National Environmental Management Act 107 of 1998 which provides that—

"[t]his Act comes into operation on a date fixed by the President in the Gazette."

And section 84 of the National Environmental Management: Waste Act 59 of 2008 in relevant part states that—

"[t]his Act is called the National Environmental Management: Waste Act, 2008, and takes effect on a date determined by the Minister by proclamation in the Gazette."

[10] Sometimes Parliament prescribes a method in terms of which the date of coming into force is determined. For example, an Act may have a provision that says that it will come into force six months from the date on which it is published. In that case the Act does not come into operation immediately upon publication. Nor is the determination of the date left to the President. Nor is the date specified. Instead the Act prescribes the method in terms of which the date must be determined. In that case the date of the publication would be a point of reference from which the period of six months would be calculated.

[11] However, it is apparent from the text of section 81 that publication is a peremptory requirement that must be performed promptly after a Bill has been assented to and signed by the President. Publication must occur irrespective of whether the relevant Act is to come into force immediately or on some future date. This suggests that in some cases there may be no connection between the publication and the date of coming into operation. Therefore, it does not follow as a matter of course that the person who publishes an Act must satisfy herself that it is conducive for the Act to be implemented.

[12] But, if the Act in question empowers the President to determine the date of coming into effect, then the President must be satisfied that the Act is ready to commence operating before choosing the date. This is so because the power to determine the date was conferred for a specific purpose. That purpose is to put the Act into force. If the President were to determine the date and purport to put the Act into force on a date when it is practically impossible to do so, he would have exercised the power but not to achieve the purpose for which it was conferred. Were he to do so deliberately, he would have exercised the power for a wrong purpose. But if the same conduct were to amount to an error, there would be no rational connection between the exercise of the power and the purpose. Put differently, the President's decision would have failed to meet the rationality standard.

[13] In *Pharmaceutical Manufacturers Association*,[8] the President mistakenly believed that it was appropriate to put an Act into force. He then by proclamation determined the date on which the Act was supposed to have commenced operating. When it was brought to his attention that the regulatory framework necessary for implementing the Act was still to be made and that, without the framework, the Act could not be applied, the President approached the High Court for an order setting aside his decision. In that case this Court held that the power vested in the President to determine the date on which the Act would come into operation imposed on him the duty to satisfy himself that it was appropriate to bring the Act into force. In coming to this opinion the President would, this Court observed, take into account all relevant factors including the time needed for making the necessary regulations.[9]

[14] Since in that case the President could not bring the Act into force in the absence of the regulations, his subjective but mistaken belief that it was appropriate to do so, was regarded as failing to meet the standard of objective rationality. The Court reasoned that decisions must be rationally connected to the purpose for which the power was granted. On the relevant facts, the exercise of power by the President could not achieve the prescribed purpose of bringing the Act into operation.[10] Accordingly, the President's decision was set aside. A similar approach was followed in *Kruger*.[11]

[15] The duty to ascertain whether the circumstances are ripe for bringing an Act into operation arises also where the publication alone would cause it to come into force. This means that the President or the Minister who publishes an Act must first determine whether it is appropriate to put it into operation. It is now convenient to set out what happened in this case.

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[8] *Pharmaceutical Manufacturers Association of South Africa and Another: In re Ex Parte President of the Republic of South Africa and Others* [2000] ZACC 1; 2000 (2) SA 674 (CC); 2000 (3) BCLR 241 (CC).

[9] Id at para 80.

[10] Id at paras 85-9.

[11] *Kruger v President of the Republic of South Africa and Others* [2008] ZACC 17; 2009 (1) SA 417 (CC); 2009 (3) BCLR 268 (CC).

Factual and litigation background

[16] Aquarius carries on a mining business at Kroondal in the North West Province. This mining operation produced tailings which, as required by the relevant legislation, had to be deposited and stored in prescribed dams so as to protect the environment. When Aquarius realised that its storage dams were progressively filling up it decided to create a new one described as the West-West Pit. To establish the new storage facility, Aquarius was required to obtain statutory authorisations including a water licence, an environmental authorisation and a ministerial approval to operate the West-West Pit storage. These permits were obtainable from different departments: Department of Environmental Affairs, Department of Mineral Resources and the Department of Water and Sanitation.

[17] In March 2013 Aquarius received an environmental authorisation that was granted in terms of the National Environmental Management Act (Environmental Act).[12] In June 2013, the Minister of Mineral Resources granted Aquarius permission to construct and operate the West-West Pit storage. This permission was issued in terms of the Mineral and Petroleum Resources Development Act.[13] The Department of Water and Sanitation took no decision on the application for a water licence and as a result in October 2014 Aquarius approached the High Court for the review of that failure to determine its application.

[18] Meanwhile Parliament had amended the Environmental Act to streamline the requirements for authorisations. This objective was achieved through two amendment Acts. These were the National Environmental Laws Amendment Act[14] and the National Environmental Management: Waste Amendment Act.[15] These Acts introduced new and different requirements in the storage and management of mining

[12] Above n 7.

[13] 28 of 2002.

[14] 25 of 2014 (Environmental Amendment Act).

[15] 26 of 2014 (Waste Amendment Act).

tailings. The amendments required that "residue stockpiles and residue deposits" be managed in the prescribed manner on a site demarcated for that purpose in the environmental management plan or programme. The manner of managing tailings was to be prescribed by regulations. This meant that for the amended legislation to be implemented there should be relevant regulations in place. These regulations were to be made by the Minister charged with the responsibility to administer the National Environmental Management: Waste Act.[16]

[19] Both the Environmental Amendment Act and the Waste Amendment Act, having been passed by Parliament, were submitted to the President to assent to and sign them into law. Having done so the President, acting in terms of the Constitution, published both Acts so as to notify the public.

[20] As the content of these publications has a bearing on whether the President acted rationally, it is necessary to quote them verbatim. Both publications were made on 2 June 2014. In respect of the Environmental Amendment Act, Government Gazette No. 37713 reads:

> "It is hereby notified that the President has assented to the following Act, which is hereby published for general information—
>
> Act no 25 of 2014: National Environmental Management Laws Amendment Act, 2014."

[21] In identical terms Government Gazette No. 37714 which refers to the Waste Amendment Act reads:

> "It is hereby notified that the President has assented to the following Act, which is hereby published for general information:
>
> Act no 26 of 2014: National Environmental Management: Waste Amendment Act, 2014."

[16] 59 of 2008.

[22] What immediately strikes one's attention is the expressed purpose of the publications. Both Gazettes commenced by notifying the public that the President has assented to the relevant Act and proceeded to announce that each Act is published for general information. There is no mention of the dates on which those Acts would come into force. This is not surprising because each Act contains a provision that prescribes how that date should be determined. For example, the Environmental Amendment Act, on which Aquarius based its challenge against the President's decision, stipulates that it will come into effect three months from the date of publication.

[23] On the expiry of three months from 2 June 2014, the Environmental Amendment Act came into operation in September 2014. However, the regulations that were necessary for the implementation of some of its provisions were not in existence. A vacuum was created because the new Act had repealed some of the old legislation when it came into force whereas provisions that were supposed to replace that old legislation could not be put into effect without the supporting regulations. This generated uncertainty that led to the constitutional challenge by Aquarius.

[24] Aquarius held the view that the President prematurely published the Environmental Amendment Act at the time when the regulations were not set in place. It contended before the High Court that the President's decision did not meet the rationality requirement. The High Court captured the argument in these terms:

> "The upshot of the argument on behalf of Aquarius is that the decision of the President to publish NEMLAA [Environmental Amendment Act] at a stage where nothing had been done to formulate the regulations required under NEM: WA to regulate mine residues, was not objectively rational having regard to the powers given to the President in sections 79 and 81 of the Constitution to cause legislation to become effective. The President should have exercised the power in a responsible and considered manner, having assessed the progress that had been made to

> promulgate the related regulations required to implement the amendments to various legislation as a result of NEMLAA [Environmental Amendment Act]."[17]

[25] Although the Minister of Environmental Affairs was cited as a respondent together with the President and the other Ministers, she did not file opposing papers explaining the failure to make regulations before the Act came into force on 2 September 2014. She was content to oppose the relief sought by filing a notice raising a legal argument and advancing it at the hearing. The President did not participate in the hearing. It appears that he left opposing the application to the Ministers.

[26] Relying on the decision of this Court in *Pharmaceutical Manufacturers Association*, the High Court held that publication of an Act which brings it into force must be rational. The Court concluded that the present publication was premature because it was done before the regulations were made, which still were not in existence even at the time the High Court heard the matter and delivered its judgment on 27 May 2015.

[27] Having outlined the hiatus that arose from the absence of regulations when the Environmental Amendment Act came into operation, the High Court held:

> "The above simply demonstrate the irrationality of the President's decision to put into effect the amendments without proper regulations for implementation. To that extent the proclamation is invalid and should be set aside."[18]

[28] Consequently, it declared that the publication of the Act by the President was irrational and set it aside.[19] The order was submitted to this Court for confirmation.

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[17] High Court judgment above n 1 at para 19.

[18] Id at para 29.

[19] The High Court issued the following order:

> "1. The publication by the fourth respondent (the President) of the National Environmental Laws Amendment Act 25 of 2014 in the Government Gazette 37713

Issue in this Court

[29] The single issue that arises with regard to both the confirmation and appeal is whether the decision by the President to publish the Environmental Amendment Act was irrational because the publication was done without the regulations necessary for implementing the Act being in existence. If indeed the President has acted irrationally, the High Court order must be confirmed. In contrast, if it was rational then the appeal must be upheld and the order should not be confirmed.

[30] The determination of this issue requires the proper interpretation of section 32 of the Environmental Amendment Act, read with section 81 of the Constitution. This is so because section 32 prescribes the method of determining the date on which the Act was to come into operation.

[31] But before addressing the issue, a preliminary observation needs to be made. While the matter was pending in this Court, the Minister of Environmental Affairs published the relevant regulations on 24 July 2015. This was done almost a year after the Act had come into force. The publication influenced Aquarius to abandon its request for confirmation. However its withdrawal does not affect the determination whether the High Court's order should be confirmed. The duty to consider confirmation of that order arises directly from the Constitution and is activated independently of what the parties to particular litigation wish. This Court would have been obliged to consider that order even if none of the parties participated in the proceedings before it. This is because the High Court's order would remain in suspension until confirmed by this Court.

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2 June 2014, without promulgating the regulations for the implementation of the amendments envisaged in the above-mentioned Act, is reviewed and set aside;

2. The relief sought by the applicant in prayer 4 of the amended notice of motion is dismissed;

3. The fifth and sixth respondent are jointly and severally ordered to pay 60% of the applicant's costs."

Meaning of section 32

[32] Section 32 of the Environmental Amendment Act provides:

> "This Act is called the National Environmental Management Laws Amendment Act, 2014, and comes into effect three months from the date of publication of this Act by the President in the Gazette in terms of section 81 of the Constitution."

[33] Apart from stating the short title of the Act, section 32 empowers the President to publish the Act in the Gazette, acting in terms of section 81 of the Constitution. Notably, in this provision, Parliament did not authorise the President to determine the date on which the Act would come into force. Nor could the default position apply. The default position would apply where the Act itself did not determine the date. In that event the Act would come into effect upon publication in terms of section 81 of the Constitution.

[34] But in section 32, Parliament itself has determined the date on which the Environmental Amendment Act would come into force. It stipulates that the Act will commence operating three months from the date of publication. Thus in the context of section 32, publication serves a dual purpose. It informs the general public about the Act and it is also a reference point from which the date of its commencement is ascertained.

[35] The question that arises is whether the President was duty bound to check that the relevant regulations were or would be in place before publishing the Act. For it would have been irrational for the President to publish in the absence of the regulations if the legislation required him to ascertain that the regulations existed before he published the Act. Section 32 cannot be construed as imposing a duty of that sort. It is not necessary for us to consider whether, where the Act determines its own coming into force at a future date, the President is ever under a duty to consider

whether regulations would then be in place. This is because there was no suggestion that the President had any reason not to assume that the regulations would be in place.

[36] In the absence of express terms, the duty to assess whether it would be appropriate to bring an Act into operation arises in three instances only. The first is where the Act authorises the President to determine the date of coming into effect. The second is where the Act says it will come into force on the date of publication. The third is where the Act is silent on the issue and the default position in section 81 of the Constitution is triggered. In both the second and third instances, the act of publication alone would bring the Act into effect. In other words, the purpose of the power to publish there is to bring legislation into force in both instances.

[37] As Chaskalson P observed in *Pharmaceutical Manufacturers Association*, the power to bring legislation into force imposes a duty to exercise that power only when the functionary on whom it is conferred has determined that it was appropriate to bring the legislation into operation.[20] What emerges from this statement is that the power to put legislation into effect has the corresponding duty of first determining whether relevant circumstances permit that the legislation should commence operating. Where no criteria have been set for the exercise of the power, the functionary would have to decide which factors must be taken into account. In *Pharmaceutical Manufacturers Association*, it was stated:

> "The factors relevant to this decision do not in themselves become jurisdictional facts on which the exercise of the President's decision depends. It is for the President to decide which factors are relevant, and in the light of those factors to make the political judgment as to whether it is appropriate to bring the Act into force."[21]

[38] However, where the legislation in question may not be brought into operation without regulations being in place, the existence of those regulations becomes an

[20] *Pharmaceutical Manufacturers Association* above n 8 at para 80.

[21] Id at para 81.

essential requirement for the exercise of the power. But there is an exception to this rule. Here, the publication by the President did not instantly bring the Act into force. There was no suggestion that the President had any reason to think that the regulations would not exist before the Act came into operation. The necessary regulations could still be made within the period of three months before the Act came into effect. Had these regulations been in place on or before 2 September 2014, the Act would have been properly brought into force.

The purpose of three months

[39] Parliament considered that it would be inappropriate to bring the Environmental Amendment Act into force immediately upon publication. Hence it delayed the coming into operation of that Act by a period of three months. This was to afford the Minister of Environmental Affairs time to make regulations necessary for the implementation of the Act. It is inconceivable that the period of three months set in section 32 was determined without the Minister's input. Parliament, in its wisdom, had decided that the period was sufficient for the Minister to make the necessary regulations.

[40] In these circumstances, the President had no reason to believe that the Minister would fail to make the regulations within the stipulated time for the Act to be implemented. It was not irrational for the President to publish the Act in the absence of the relevant regulations. The scheme of section 32 is that the publication of the Act may precede the making of the regulations. It follows that the High Court erred in holding that the President's decision to publish the Act was irrational.

Minister's conduct

[41] The fault for putting the Environmental Amendment Act into force without the necessary regulations lies squarely on the Minister's shoulders. She and she alone is to blame and not the President. The Minister was the functionary mandated to make the regulations within three months from the date of publication. This she failed to do and there is no explanation for the failure, despite the fact that she was cited as a party

to the proceedings. It may well be that she has a plausible explanation for her failure but we simply do not know because she chose not to furnish it. For now it is fair to infer from her failure to give an explanation that she has none. Otherwise she would have provided one if she had it. More so because the matter raises a serious dereliction of duty on her part.

[42] The Minister's failure to make regulations here has serious implications to upholding the Constitution and the rule of law. Her omission undermined not only the legislative process authorised by the Constitution but also thwarted the operation of legislation in the making of which she had participated. In fact, it appears from the parliamentary records that it was the same Minister who introduced the Bill in Parliament and that section 32 was already part of it when it was introduced.[22] So, she was privy to deciding what was adequate time for making the necessary regulations, presumably after some research or investigation.

[43] Every Minister carries an obligation to uphold the Constitution as well as to respect and promote the rights in the Bill of Rights. One of them is everyone's right to an environment that is not harmful to their health or wellbeing and also the right to have the environment protected, for the benefit of present and future generations, through reasonable legislative and other measures.[23] The Environmental Amendment

[22] She introduced the Bill to the National Assembly on 14 August 2013. This is reflected in the Announcements, Tablings and Committee Reports, no 100 of 2013 published on Parliament's official website under Parliamentary Papers that can be accessed here:

http://www.parliament.gov.za/live/commonrepository/Processed/20140411/531358_1.pdf

[23] Section 24 of the Constitution 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."

Act is a legislative measure the Minister was duty-bound to enforce. Here the omission had quite the opposite effect. From September 2014 when the Act came into force to July 2015 when she published the regulations, a lacuna was created which may have had catastrophic consequences. Yet the Minister did not consider it necessary to explain the lapse in these proceedings.

[44] When it became clear to the Minister that the making of the regulations would not be completed before the Act came into effect, it was expected of her to take necessary steps to avoid the hiatus that ensued. This is exactly what President Mandela did in *Pharmaceutical Manufacturers Association*. An application to a competent court to have the publication set aside could have prevented that lacuna. This was not done and we are not told why.

Order

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

1. The appeal is upheld.
2. The order of the High Court of South Africa, Gauteng Division, Pretoria is set aside and replaced with the following order:

   "The application is dismissed."

For the Appellants:	M M Oosthuizen SC and R M Molea instructed by the State Attorney
At the request of the Court:	L Bekker