

will allow those power stations to continue operating temporarily at their existing rates of emission. Again it is relevant to take note of the commitments by the Government of the Republic of South Africa in the National Development Plan, to ensuring environmental sustainability and an equitable transition to a low-carbon economy, as mentioned in paragraph 18.4 above.

**Ad paragraph 38-39 thereof:**

**340.** I have already dealt with the National Dust Control Regulations, 2013.

**341.** With reference to paragraph 39, there is no allegation of primary fact for the secondary opinion to the effect that a lack of enforcing the co-operation between the various National Departments in respect of mining is a "*fundamental issue*", allegedly exacerbating the high level of PM<sub>10</sub> in the Highveld Priority Area.

**341.1** I have already explained, and the National Air Quality Officer will confirm, the near impossibility of showing the contribution of any particular intervention to the ambient air quality.

**341.2** I also repeat what I stated in paragraph 5.4 above, concerning the Director-Generals Working Group that I have established.

**341.3** In any event, both the National Department as well as the National Department for Mineral Resources and Energy are indeed co-operating

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In this regard and there is no lack of enforcement co-operation. What these National Departments also keep in mind, is that there is a clear demarcation of the mandate, duties and responsibilities of each one of these National Departments as far as the Environmental Management of mining activities is concerned. This is why section 31BB read with section 31D of the NEMA empowers the Minister of the National Department for Mineral Resources and Energy to designate, as an Environmental Mineral Resource Inspector, any staff member of that department and to mandate such an inspector with the necessary powers - in respect of mining activities - for compliance monitoring and enforcement of the provisions of the NEMA, a Specific Environmental Management Act or any of the subordinate legislation promulgated in terms thereof.

**341.4** In a developing country such as the Republic of South Africa, the waste of resources by unnecessary duplication is to be avoided. The duplication of parallel regulatory systems is a waste. Such unnecessary duplication is also inconsistent with the constitutional imperatives for public administration in section 195 of the Constitution.

**342.** The Applicants seem to think that simply and only because the ambient air quality at certain hotspots in the Highveld Priority Area is not yet in compliance with or below the National Ambient Air Quality Standards, it must follow that each and every environmental management tool that was used in this regard has "*evidently*" been proven to be ineffective. This is a fallacy. As I have already

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stated, there has been an overall improvement in the air quality of the Highveld Priority Area since 2012, albeit that we have not yet achieved the overall objective of the Highveld Plan everywhere in the Highveld Priority Area. Evidently all these environmental management tools that were available and implemented or enforced within the Highveld Priority Area were and are indeed effective.

**Ad paragraph 40-44 thereof:**

343. I have already dealt fully with the allegations contained in these paragraphs. Again the main concern of the Applicants seem to be the manner in which resources are allocated and with which they do not agree.

**Ad paragraph 45-47 thereof:**

344. The regulations that I refer to, are the generic regulations I have already referred to in paragraph 36 and 86 above. These are not the specific regulations as contended for by the Applicants.

345. With reference to paragraph 47, I have already explained why non-compliance with the National Ambient Air Quality Standards does not automatically constitute, whether as an alleged direct consequence or otherwise, a breach of the environmental right under section 24(a) of the Constitution.

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346. I take note of the remaining allegations contained in this paragraph.

Ad paragraph 48-52 thereof:

347. I take note of the allegations contained in these paragraphs. The affidavit of Mr Boyd is dealt with in paragraph 363-369 below as well as in the attached affidavit of the Acting Director-General of the National Department, Mr Moegamat Ishaam Abader (annexure 'BC 10' hereto).

348. From the outset I must make one thing very clear. It is not for Mr Boyd, as a Special Rapporteur from the United Nations, or for the Applicants to express an expert opinion or make a finding as to whether or not a fundamental right in the Constitution has been violated or breached by myself, in my capacity as Minister, or any of the officials of the National Department. That is a final issue upon which the Court, and only the Court, decides.

349. By the same token the scope of the permissible assistance that can be given by Mr Boyd is demarcated by section 39(1)(b) and section 233 of the Constitution. When interpreting the Bill of Rights, the Court must consider International Law. When interpreting any legislation, the 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. Mr Boyd should therefore make his specialised knowledge of International Law available to the Court in order so that the Court can better interpret section 24 of the

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Constitution and section 20 of the Air Quality Act.

Ad paragraph 53-54 thereof:

350. I have already dealt fully with these alleged grounds of review.

Ad paragraph 55-66 thereof:

351. I take note of the factual allegations contained in these paragraphs but I dispute any of the inferences that the Applicants seek to draw from them. In general, however, a recurring theme from the Applicants is the need for a re-allocation of resources.

Ad paragraph 67-69 thereof:

352. I have dealt with the primary ground of review.

Ad paragraph 70-80 thereof:

353. I have already dealt with the alternative ground of review and its four pillars.

354. With reference to paragraph 70, the former Minister referred to environmental management tools in general and then gave a summary of the key tools. She did not specifically refer to only the five instruments which the Applicants now

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subject to intensive criticism.

- 355.** I repeat what I stated in paragraph 341 above.
- 356.** With reference to paragraph 72, the issues raised therein can again be tracked back to the re-allocation of resources. To increase organisational capacity, increase enforcement and compliance action, revise existing regulations and develop new strategies, require manpower with the requisite skills, finances and time. One cannot legislate these resources into existence, also not by way of regulations under section 20 of the Air Quality Act.
- 357.** With reference to paragraph 73-76, the perceived, but unfounded, lack of co-operation between the National Department and the National Department of Mineral Resources and Energy is also not a problem that can be resolved by regulations under section 20 of the Air Quality Act. There is already a comprehensive legislative framework in place to address this problem, namely the Intergovernmental Relations Framework Act 13 of 2005 read with the Implementation Protocol Guidelines and Guidelines on Managing Joint Programmes (GN 696 of 2007 published in Government Gazette No 30140 of 3 August 2007). I also repeat what I have stated in paragraph 5.4 above.
- 358.** With reference to paragraph 77-79, I refer the Court to what I have already stated in paragraph 15-24 above, concerning the constitutional context relevant for the purposes of this application. Therein I have touched upon the

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constitutional imperatives for co-operative governance. Precisely because of those constitutional imperatives, I cannot make regulations under section 20 of the Air Quality Act to compel another Minister or officials from his or her National Department to co-operate in the Environmental Management of the Highveld Priority Area or the implementation of the Highveld Plan. To do so would be in breach of those constitutional imperatives. Those same constitutional imperatives also prevent me, in my capacity as Minister, from intruding on the constitutional status, powers and functions of the autonomous Municipalities in the Local Sphere of Government, which Municipalities are given the constitutional right to administer air pollution.

350. Elsewhere in this answering affidavit I have dealt fully with the remaining allegations contained in this paragraph.

Ad paragraph 91-97 thereof:

360. I repeat what I have stated in paragraph 86-87 above.

Ad paragraph 98-99 thereof:

361. I have already dealt with the submission that this relief be granted and I have provided the grounds and circumstances why such relief should not be granted.

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**Ad paragraph 100 thereof:**

**362. The application should be dismissed.**

**RESPONSE TO AFFIDAVIT BY DAVID RICHARD BOYD**

**363. As I have stated in paragraph 9.6 above, I respond only in general to the contents of the affidavit deposed to by Mr Boyd. The more detailed response is given by the Acting Director-General of the National Department, Mr Moegamat Ishaam Abader of whom an affidavit is attached as annexure 'BC 10' hereto.**

**364. I repeat what I stated in paragraph 348-349 above.**

**365. As Minister of the National Department, I am of the view that the South African legal position is clear as far as the interpretation or meaning of the environmental rights, provided for in section 24 of the Constitution, is concerned. There is consequently no need for any assistance from Mr Boyd in this regard.**

**366. In any event the affidavit by Mr Boyd is, as demonstrated in the affidavit of Mr Abader (annexure 'BC 10'), of very questionable assistance (if any). What concerns me the most, however, is the exclusive focus of Mr Boyd on the right to the environment and the impact thereof on health or well-being. Whilst I am the Minister for the National Department and overall responsible for all environmental affairs, my mandate and responsibility go much further and are**

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much more complex.

**367.** I fervently believe in the anthropocentric core of the Environmental Law and the institution of Integrated Environmental Management as provided for in the NEMA. I, in my capacity as a Member of Cabinet together with all of my other colleagues in the National Executive, place people and their needs at the forefront of our concern, and we discharge the responsibilities of our office to serve the physical, psychological, developmental, cultural and social interests of the people of South Africa equitably.

**368.** In this context it is also relevant to take notice, again, of the commitments in the National Development Plan 2030, committing to ensuring environmental sustainability and an equitable transition to a low-carbon economy. This is part of the domestic setting in which the assistance, proffered by Mr Boyd, has to be considered.

**369.** In the result I find it regrettable that the Applicants, together with Mr Boyd, paints a picture which is totally at odds with the reality.

#### **CONCLUDING REMARKS**

**370.** In view of the foregoing, I respectfully submit that the application against me, in my capacity as the Minister of the National Department, and the National Air Quality Officer should be dismissed. In line with constitutional jurisprudence, I

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will not be seeking a cost order against the Applicants.

WHEREFORE I pray that the application be dismissed.

  
Deponent: B D Crecy

Signed and sworn before me at Harare this 29 day of January 2021 after the Deponent declared that she is familiar with the contents of this statement and regards the prescribed oath as binding on her conscience and has no objection against taking said prescribed oath. There has been compliance with the requirements of the Regulations contained in Government Gazette R1258, dated 21 July 1972 (as amended).

COMMISSIONER OF OATHS:  
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