

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

**CASE NO: 39724/2019**

In the matter between:

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

First Applicant

**VUKANI ENVIRONMENTAL JUSTICE  
ALLIANCE MOVEMENT IN ACTION**

Second Applicant

and

**THE MINISTER OF ENVIRONMENTAL AFFAIRS**

First Respondent

**NATIONAL AIR QUALITY OFFICER**

Second Respondent

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

Third Respondent

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

Fourth Respondent

**MEMBER OF THE EXECUTIVE COUNCIL FOR  
AGRICULTURAL, RURAL DEVELOPMENT, LAND  
AND ENVIRONMENTAL AFFAIRS,  
MPUMALANGA RESPONDENT**

Fifth Respondent

**THE UN SPECIAL RAPPORTEUR ON HUMAN  
RIGHTS AND THE ENVIRONMENT**

*Amicus Curiae*

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**MINISTER OF ENVIRONMENTAL AFFAIRS**

**APPLICATION FOR LEAVE TO APPEAL**

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**TAKE NOTICE THAT** the Minister of Environmental Affairs (“the Minister”) hereby applies for leave to appeal on a date to be arranged by the Registrar against paragraphs 241.2 to 241.5, inclusive, of the Order made by Collis J on 18 March 2022 in Case No. 39724/2019 (“the Order”).

Leave to appeal to the Supreme Court of Appeal, alternatively the Full Court is sought.

The Minister relies on both grounds of appeal mentioned in section 17(1)(a) of the Superior Courts Act 10 of 2013, namely, that the appeal would have reasonable prospects of success and that there are compelling reasons justifying the appeal.

**TAKE NOTICE THAT** the affidavit of the Minister will be used in support of the application for leave to appeal.

The grounds of appeal are set out below.

## **1 First ground of appeal : no duty to prescribe regulations**

1.1 Paragraph 241.2 of the Order provides:

*“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’).”*

1.2 The Court erred in interpreting section 20 of the National Environmental Management : Air Quality Act 39 of 2004 (“the AQA”) as not merely vesting the Minister with a discretion to prescribe regulations, but imposing a duty on her to do so.

- 1.3 Properly interpreted, section 20 of the AQA:
  - 1.3.1 confers a discretion on the Minister;
  - 1.3.2 leaves it to the Minister to decide whether or not to exercise such discretion;
  - 1.3.3 should the Minister decide to exercise a discretion to prescribe regulations, it permits the Minister, in her discretion, to decide on the content of any regulations she prescribes;
  - 1.3.4 entitles the Minister, in her discretion, to decide on the timing of any regulations she may choose to prescribe.
- 1.4 To interpret section 20 of the AQA as imposing not simply a power but also a duty to prescribe regulations:
  - 1.4.1 unlawfully fetters the Minister's legislative competence;
  - 1.4.2 defeats the legislative scheme which explicitly vests the Minister with the discretion to decide whether or not to prescribe regulations;
  - 1.4.3 impermissibly interferes with the separation of powers.
- 1.5 The interpretation of section 20 of the AQA adopted by the Court:
  - 1.5.1 impermissibly limits the Minister's regulation-making discretion by imposing an obligation on her to prescribe regulations under that section, without due regard to the

broad regulation-making powers conferred by section 53 of AQA;

1.5.2 impermissibly obliges the Minister to prescribe regulations relating to a particular priority area rather than permitting regulations which apply to all such areas, thus limiting the Minister's legislative discretion and autonomy.

## **2 Second ground of appeal : no unlawful delay**

2.1 Paragraph 241.3 of the Order provides:

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

2.2 The contents of paragraphs 1.2 to 1.5 above are repeated and incorporated herein.

2.3 If properly interpreted, section 20 of the AQA confers a discretion on the Minister to prescribe regulations, but not a duty to do so, it follows that the Minister cannot be held to have delayed the preparation and initiation of regulations.

## **3 Third ground of appeal : no duty to prepare, initiate or prescribe regulations within a particular time**

3.1 Paragraph 241.4 of the Order provides:

*"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."*

3.2 The contents of paragraphs 1.2 to 1.5 above are repeated and incorporated herein.

3.3 If properly interpreted, section 20 of the AQA confers a discretion on the Minister to prescribe regulations but not a duty to do so, it follows that the Minister cannot be compelled to prepare, initiate and prescribe regulations within a specified time.

**4 Fourth ground of appeal : no duty to prescribe regulations with a particular content**

4.1 Paragraph 241.5 of the Order provides:

*“241.5 In preparing regulations, the Minister is directed to pay due regard to the following considerations:*

*241.5.1 The need to give legal effect to the Highveld Plan goals, coupled with appropriate penalties for non-compliance;*

*241.5.2 The need for enhanced monitoring of atmospheric emissions in the priority area; including through the urgent improvement, management, and maintenance of the air quality monitoring station network to ensure that verified, reliable data are produced, and that real-time emissions data are publicly available on line and on request;*

*241.5.3 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 should be publicly available on line and on request;*

*241.5.4 The need for a comprehensive air quality compliance monitoring and enforcement strategy; including a programme and regular progress reports on the steps taken against non-compliant facilities in the Highveld Priority Area;*

- 241.5.5 *The need to appoint and train an adequate number of appropriately qualified officials, with the right tools and equipment in order to implement and enforce the Highveld Plan and the Air Quality Act;*
- 241.5.6 *The need for all relevant national departments, municipalities, provincial departments and MEC's to participate in the Highveld Priority Area process and cooperate in the implementation and enforcement of the Highveld Plan; demonstrated by published, written commitments signed by the relevant Ministers;*
- 241.5.7 *The need for regular review of the Highveld Plan; including reporting on implementation and enforcement progress to all stakeholders as required by the Highveld Plan;*
- 241.5.8 *The need to address the postponement and/or suspension of compliance with MES in the Priority Area; including to ensure that the atmospheric emission licences of all facilities that have not obtained once-off suspension of compliance and that cannot meet new plant MES by April 2025 are withdrawn, and decommissioning and rehabilitation of those facilities is enforced;*
- 241.5.9 *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;*
- 241.5.10 *The need for a coordinated response to address air pollution in low income, densely populated areas; and*
- 241.5.11 *The need for adequate financial support and resources, and adequate human resource capacity to ensure that all of these issues can be addressed."*

4.2 The contents of paragraphs 1.2 to 1.5 above are repeated and incorporated herein.

- 4.3 If, properly interpreted, section 20 of the AQA confers a discretion on the Minister to prescribe regulations but not a duty to do so, it follows that it is unlawful to prescribe the contents of any such regulations or the factors to which the Minister must have due regard.
- 4.4 Alternatively to paragraph 4.3, and if it is held that section 20 of the AQA imposes a duty on the Minister to prescribe regulations:
- 4.4.1 it is unlawful to fetter the Minister's discretion by prescribing the factors to which she is required to have due regard;
  - 4.4.2 the Order improperly limits the Minister's legislative autonomy;
  - 4.4.3 the Order breaches the separation of powers;
  - 4.4.4 the factors to which the Minister is required to have due regard are couched in such impermissibly vague terms as to make compliance not feasible;
  - 4.4.5 every factor to which the Minister is required to have due regard itemised in paragraphs 241.5.1 to 241.5.11 is prefaced by the phrase "*the need*" to do so, thus making it obligatory and a breach of the Minister's legislative autonomy and the separation of powers.
- 4.5 In addition to the foregoing, the directives contained in paragraphs 241.5.1 to 241.5.11 of the Order:

- 4.5.1 impermissibly constrain the Minister's discretion to determine legislative policy and the appropriate model for regulation;
- 4.5.2 impermissibly oblige the Minister to impose obligations on other Organs of State, including –
  - 4.5.2.1 MECs and other Departments, both provincial and local, as envisaged by paragraph 241.5.6 of the Order;
  - 4.5.2.2 officials responsible for minimum emission standards (MES) as envisaged in paragraph 241.5.8 of the Order;
- 4.5.3 impermissibly overlooks the Minister's obligations flowing from section 3(b) of the AQA to apply the Act (which includes the power to make regulations), "*in a manner that will achieve the progressive realisation*" of the rights contained in section 24 of the Constitution.

## **5 Reasonable prospects of success and other compelling reasons**

- 5.1 There are reasonable prospects of success in advancing each and every ground of appeal referred to above.
- 5.2 There are several statutes within the environmental sphere which contain regulation-making powers similar to those contained in section 20 of the AQA and many other statutes to similar effect. It is therefore of considerable wider importance that clarity be obtained as

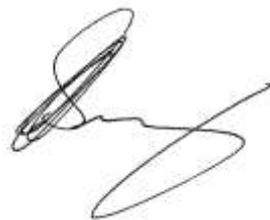
to whether or not the conferral of such powers is discretionary or whether it also imposes a duty.

## 6 Order

The Minister seeks an Order in the following terms:

- 6.1 Leave to appeal is granted to the Supreme Court of Appeal alternatively the Full Court;
- 6.2 Costs of this application for leave to appeal will be costs in the appeal;
- 6.3 Further or alternative relief.

DATED at PRETORIA on this 8th day of APRIL 2022



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TO :

The Registrar of the above  
Honourable Court  
PRETORIA

AND TO:

**CENTRE FOR ENVIRONMENTAL RIGHTS**

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