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## Environmental Right in Terms of the Constitution

What is an environmental right? An environmental right relates to the right we have to the environment. The environment has been an important factor since the beginning of time. Even the Interim Constitution (before the Final 1996 Constitution of the Republic of South Africa came into operation), included an environmental right in terms of Section 29 thereof.

The environmental right is contained in the Constitution of the Republic of South Africa, Act 108 of 1996 (hereafter referred to as "The Constitution"). Section 24 now enshrines environmental rights in South Africa. This right is interpreted to have a two-fold purpose. The first part guarantees a healthy environment to every person. The second part mandates the State to ensure compliance with the first part mentioned above. The State is prohibited from infringing on the right to environmental protection and is further required to provide protection against any harmful conduct towards the environment.

## The environmental right explained

Section 24 states as follows:

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.

This Section also incorporates International Environmental Law which includes the duty of care and that the "Polluter" will pay for polluting the environment, which creates liability for environmental damage caused.

The concept of health and well-being – Section 24(a)

Critics agree that “health” relates to human health which includes both mental and physical integrity. However, “well-being” is more difficult to define and often questioned. Usually “well-being” is regarded in the wider sense which includes spiritual or psychological characteristics and an individual’s need to be able to connect with nature. Environmental issues, such as conservation and the maintenance of biodiversity, are brought within the ambit of the above right.

The concept of health was first dealt with in terms of the Interim Constitution in the case of Minister of Health and Welfare v Woodcarb (Pty) Ltd (hereafter referred to as the Woodcarb case). In the Woodcarb case, the Minister of Health and Welfare applied for an interdict under the Atmospheric Pollution Prevention Act (hereafter referred to as the “APPA”) based on complaints received about smoke emissions from the Woodcarb sawmill plant. Woodcarb operated without the necessary registration certificate as required by the APPA. The interdict was granted in terms of Section 29 of the Interim Constitution. The court, however, came to this decision without any interpretation of the concept of either health or well-being.

Another practical example of how Section 24(a) is applied, is the case of Hichange Investments (Pty) Ltd v Cape Produce Company (Pty) Ltd t/a Pelts Products and Others (hereafter referred to as the Hichange case). The Cape Produce Company produced a number of chemical waste products of which some were controlled under the APPA. In the Hichange case, the Applicant (Hichange Investments) alleged that the noxious gases which was produced, caused a foul offensive odour and rapid, uncontrollable corrosion of metal structures and that these gases were prejudicial to the health and well-being of workers and the residents of the city. The court herein linked well-being to the notion of physical discomfort.

The courts have been hesitant to interpret well-being in the wider sense which goes beyond the physical and includes aesthetic or spiritual dimensions.

### **Sustainable development – Section 24(b)**

Before the State fulfils its mandate in terms of Section 24(b), it will have to ensure that there is a balance, not only in environmental considerations, but also social and economic considerations - namely sustainable development. To achieve sustainability in most cases, the economic inequalities need to be reduced and social welfare concerns need to be addressed.

In a well-known case Minister of Public Works and Others v Kyalami Ridge Environmental Association and Another (hereafter referred to as Kyalami Ridge case), heavy rains led to extensive flooding and the subsequent destruction of homes of approximately 300 people. The Government decided to establish a site for temporary accommodation. The residents then brought an interdict restraining the Respondents from proceeding with the establishment of an informal settlement for the temporary accommodation.

The residents’ argument was based thereon that Government’s action was in contravention of the relevant town planning scheme as well as applicable environmental legislation. Their argument was further based on damage that would have been done to the environment if the temporary camps were to be established. The court granted an interim interdict and ordered the Government to comply with the necessary environmental legislation.

The Government then successfully appealed the case to the Constitution Court. The appeal raised important constitutional considerations, including Government’s constitutional obligation to provide assistance to flood victims. The court concluded that, if regard was given to Government’s constitutional obligations to owners of the land, and to its executive power to implement policy decisions, its decision to establish a temporary transit camp for the victims of the flooding was lawful. However, critics argue that the court in Kyalami Ridge missed an opportunity to assess sustainable development against the background of the challenging interest characteristic in the principle of sustainability itself.

Sustainable development received the most detailed attention in the case of Fuel Retailers Association of SA (Pty) Ltd v Director-General Environmental Management Mpumalanga and Others (hereafter referred to as Fuel

Retailers). This case was concerned with the nature and scope of the obligations of environmental authorities when they make decisions that may have a substantial detrimental impact on the environment. In particular, the interaction between social and economic development and the protection of the environment. In Fuel Retailers, a family trust wanted to construct a filling station. However, the Environmental Conservation Act prohibits any person from undertaking an activity that may have a substantial detrimental impact on the environment without written authorisation from the correct Governing body directed by the Minister. In the above case authorisation was obtained from MEC Agriculture, Conservation and Environment, Mpumalanga.

Sustainable development is not only one concept -different factors play a role in determining sustainable development.

### **In conclusion**

Environmental Law in South Africa has been strengthened by the inclusion of an environmental right in terms of Section 24 of the Constitution. The Section provides a mandate on the State to ensure environmental protection and ecologically sustainable development. The aforesaid is achieved by way of laws and regulations. Private individuals, corporate entities and public authorities need to comply with such laws and regulations by way of putting the appropriate measures in place and, where compliance is lacking, enforcement mechanisms. Courts and the judiciary further play a key role in ensuring the enforcement of environmental rights.

South Africa also has numerous goals to achieve sustainability in different fields, namely; ensure availability and sustainable management of water and sanitation for all; ensure access to affordable, reliable, sustainable and modern energy for all; take urgent action to combat climate change and its impacts (this will be done in line with the United Nations Framework Convention on Climate Change); conserve and sustainably use the oceans, seas and marine resources for sustainable development as well as protect, restore and promote sustainable use of terrestrial ecosystems, sustainably manage forest, combat desertification, and halt and reverse land degradation and halt biodiversity loss.