

# The socio-economic nature of section 24(b) of the Constitution – some thoughts on *HTF Developers (Pty) Ltd v Minister of Environmental Affairs and Tourism* (HTF)\*

## Introduction

Socio-economic rights are generally distinguished from civil and political rights by virtue of the positive obligations that socio-economic rights place on states. These rights generally require that states provide certain goods or services to members of society to the extent that it is practically possible.<sup>1</sup> However, the extent to which socio-economic rights can, and should, be enforced by courts has been open to considerable criticism.<sup>2</sup> Whilst a plethora of reasons are usually cited in objection to the inclusion of socio-economic rights in a Bill of Rights,<sup>3</sup> one of the principal reasons centres on the notion that these rights impose duties on the state that are far beyond its fiscal capacities.<sup>4</sup>

Given these criticisms it is no surprise then that socio-economic rights are generally phrased in a rather cautious manner. The International

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<sup>1</sup>See, eg, *Government of the Republic of South Africa v Grootboom* 2001 1 SA 46 (CC).

<sup>2</sup>See, eg, Scott and Macklem 'Constitutional ropes of sand or judiciable guarantees? Social rights in a new South African constitution' (1992) 141 *Univ of Pennsylvania LR* 1. See also Davis 'Case against the inclusion of socio-economic demands in a bill of rights except as directive principles, the focus on socio-economic rights' (1992) 8 *SAJHR* 475.

<sup>3</sup>For a summary of these objections see E Mureinik 'Beyond a charter of luxuries: Economic rights in the Constitution' (1992) 8 *SAJHR* 464.

<sup>4</sup>*Id* 465. This argument is taken one step further and is linked with the doctrine of separation powers. It is thus argued that, in line with this doctrine, courts should not dictate to the executive how it should spend its money.

Covenant on Economic, Social and Cultural Rights (ICESR),<sup>5</sup> for example, curtails the scope of positive obligations on the state through the use of phrases such as ‘to the maximum of its available resources’ and ‘with a view to achieving progressively the full realization of the right ...’.<sup>6</sup> Socio-economic rights in the South African Constitution<sup>7</sup> similarly qualify socio-economic rights. Sections 26 and 27 deal with access to health and housing respectively, and they significantly qualify these rights by requiring the state to ‘take reasonable legislative and other measures, *within its available resources*, to achieve the *progressive realisation* of the right’ (own emphasis).<sup>8</sup> The overall effect of these limitations is to enjoin the state to *endeavour* to the best of its abilities to achieve certain socio-economic goals. Does this mean, however, that these socio-economic rights amount to mere aspiration, ie, hope or ambition?<sup>9</sup>

This was the position taken by the Court in *HTF Developers (Pty) Ltd v Minister of Environmental Affairs and Tourism (HTF)*<sup>10</sup> with specific reference to section 24(b), the environmental right, in the Constitution.<sup>11</sup> It is a position, however, that did not consider the now accepted interpretation of socio-economic rights which makes these rights subject to realisation. It is a position that may furthermore

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<sup>5</sup>International Covenant on Economic, Social and Cultural Rights (1966) 999 UNTS 3 adopted by Resolution 2200A(XXI) 1966-12-16.

<sup>6</sup>See, eg, art 2(1) of the IESCR).

<sup>7</sup>Act 108 of 1996.

<sup>8</sup>Ss 26(2) and 27(2). According to the Court in *Grootboom* (n 1) this formulation of the socio-economic rights delimits the state’s positive obligations, qualifying them in three ways: ‘(a) the obligation to “take reasonable legislative and other measures”; (b) “to achieve the progressive realization” of the right; and (c) “within its available resources”’ para 38.

<sup>9</sup>The *Oxford dictionary* defines aspiration as ‘a hope or ambition’.

<sup>10</sup>2006 5 SA 512 (T). The Supreme Court of Appeal and the Constitutional Court also delivered judgments on this case. See *HTF Developers (Pty) Limited v Minister of Environmental Affairs and Tourism* 2007 5 SA 438 (SCA) and *MEC: Department of Agriculture, Conservation and Environment v HTF Developers (Pty) Limited CCT 32/07* [unreported]. The scope and nature of s 24 was, however, not addressed in either of these judgments.

<sup>11</sup>S 24 of the South African Constitution provides:

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.

limit the interpretation of section 24(b) in future. This note analyses the position taken by the Court and discusses the facts of the case and provides some thoughts on the judgement. In doing so, it explores the concept of directive principles of state, and considers whether section 24(b) is a socio-economic right and addresses the notion of 'aspiration' as suggested by the Court.

## The facts

The applicant had secured local authority approval for the subdivision and development into residential units of land zoned as 'special residential' and had begun clearing and conducting earthworks on the site, in preparation for the proposed development. The Gauteng Department of Agriculture, Conservation and Environment (Department) issued a directive in terms of section 31A of the Environmental Conservation Act 73 of 1989 (ECA)<sup>12</sup> to the applicant, that directed the applicant immediately to cease clearing the site and to cease its construction activities on the site, and to design and implement a plan for the land's rehabilitation. The Department argued that the applicant's activities on the site were illegal, as it had failed to secure the necessary departmental authorisation prior to commencing those activities as required by the section 22(1) of the ECA.<sup>13</sup> In addition, the Department

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<sup>12</sup>S 31A of ECA states that:

- (1) If, in the opinion of the Minister or the competent authority, local authority or government institution concerned, any person performs any activity or fails to perform any activity as a result of which the environment is or may be seriously damaged, endangered or detrimentally affected, the Minister, competent authority, local authority or government institution, as the case may be, may in writing direct such person-
- (a) to cease such activity; or
  - (b) to take such steps as the Minister, competent authority, local authority or government institution, as the case may be, may deem fit, within a period specified in the direction, with a view to eliminating, reducing or preventing the damage, danger or detrimental effect.

S 31A essentially provides for liability for environmental damage and gives the competent authority the ability to mandate, *inter alia*, remediation of such environmental damage.

<sup>13</sup>S 22(1) of the ECA deals with environmental impact assessment and states that 'no person shall undertake an activity identified in terms of section 21(1) or cause such an activity to be undertaken except by virtue of a written authorization issued by the Minister or by a competent authority or a local authority or an officer, which competent authority, local authority or officer shall be designated by the Minister by notice in the *Gazette*'. S 21(1), in turn, affords the Minister the ability to identify those activities which in his opinion may have a substantial detrimental effect on the environment, whether in general or in respect of certain areas by notice in the GG. The Department argued that

contended that the proposed development was inconsistent with the departmental ridges policy which dictated that no subdivision of the particular land can be allowed and that only low-impact development will be considered and then only after an extensive environmental impact assessment (EIA) and public participation process with specialist reports, including ecological, hydrological, geotechnical, pollution and social studies had been completed.

The applicant challenged the legality of a directive, *inter alia*, on the basis that its activity was not covered by existing regulations. It contended that the land on which the activity took place was not 'virgin ground' as contemplated in item 10 of Schedule 1 of regulation 1182<sup>14</sup> and hence no authorisation was required for its development the property. It therefore requested an order that the section 31A notice was unlawful because it was issued in respect of an activity not falling within the regulations to the ECA.

Murphy J disagreed and adopted an interpretation of the regulation and specifically of the term 'virgin ground' that is in line with the constitutional imperative contained in section 39(2) which mandates the interpretation of legislation in a manner promoting the spirit and purport of the rights in the Bill of Rights. In doing so the Court went out on a limb in upholding an administrative decision that essentially curtails the private rights of landowners in favour of the environmental right.

Thus, in line with section 24 and its effort to promote conservation and ecologically sustainable development, the Court defined 'virgin ground' to mean 'land that has not been used or developed in the last ten years, such land being of obvious concern to the environmental authorities in the present age of accelerated environmental degradation'.<sup>15</sup> The Court also noted that the power conferred by section 31A on the Minister or competent authority is not only a necessary measure, but one which is contemplated in section 24(b) of the Constitution, to

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the activity undertaken by the applicant is covered by ss 22(1) and 21(1).

<sup>14</sup>'Virgin ground' is defined in Reg 1182 to mean 'land which has at no time during the preceding 10 years been cultivated,' in GG No 23401 2002-05-10. Reg 16, promulgated under NEMA, now regulates 'undeveloped land' more specifically as: 'The transformation of undeveloped, vacant or derelict land to (a) establish infill development covering an area of 5 hectares or more, but less than 20 hectares; or (b) residential, mixed, retail, commercial, industrial or institutional use where such development does not constitute infill and where the total area to be transformed is bigger than 1 hectare,' GN R613 GG no 28938 2006-06-23.

<sup>15</sup>Para 28 at 521.

empower competent authorities to take steps to prevent ecological degradation and to secure ecologically sustainable development. It also enables the competent authority to deal expeditiously with harmful activities either not foreseen by the Minister when making regulations, or not necessarily intended to be subjected to the principle of environmental assessment.<sup>16 17</sup>

In the interpretation of the reach and ambit of the applicable legislation and policies, the Court investigated section 24 of the Constitution. It observed that section 24(a) of the Constitution, on the one hand, guarantees the fundamental right of everyone to an environment that is not harmful to their health or well-being. Section 24(b), on the other hand, imposes 'programmatic and positive' obligations on the state to protect the environment through reasonable legislative and other measures that prevent pollution and ecological degradation; promote conservation; and secure ecologically sustainable development, while promoting justifiable economic and social development.<sup>18</sup> According to the Court, and in line with the view espoused by most commentators, section 24 therefore contains two components.<sup>19</sup> Murphy J states as follows: 'Section 24(a) entrenches the fundamental right to an environment not harmful to health or well-being, whereas section 24(b) is more in the nature of a directive principle, having the character of a so-called *second generation* [or socio-economic] right imposing a constitutional imperative on the State to secure the environmental rights by reasonable legislation and other measures. Despite its *aspirational* form, or perhaps because of it, section 24(b) gives content to the entrenched right envisaged [section 24(a)] by specifically identifying the *objects of regulation*, namely, the prevention of pollution and environmental degradation; the promotion of conservation; and the securing of ecologically sustainable development and use of natural resources while promoting justifiable economic and social development'.<sup>20</sup>

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<sup>16</sup>Para 32 at 523.

<sup>17</sup>As mentioned above (n 10), this decision has subsequently gone on appeal to the Supreme Court of Appeal and to the Constitutional Court.

<sup>18</sup>Para 16 at 518.

<sup>19</sup>See, eg, Glazewski *Environmental law in South Africa* (2005) 78 and Feris and Tladi 'Environmental rights' in Brand and Heyns (eds) *Socio-economic rights in South Africa* (2005) 249 257.

<sup>20</sup>Para 17 at 518 (own emphasis.)

The Court concluded, rightly so, that the scope of section 24 is rather extensive in that it goes beyond simply securing an environment which is not harmful to health. It also protects against conduct which is harmful to well-being.<sup>21</sup> It held that whereas the term 'well-being' may well be regarded as open-ended and manifestly incapable of precise definition, it nevertheless holds critical value in that it 'defines for the environmental authorities the constitutional objectives of their task'.<sup>22</sup> From this interpretation, it follows that the imperatives of section 24 imposes on authorities a stewardship '... whereby the present generation is constituted as the custodian or trustee of the environment for future generations'.<sup>23</sup> Thus, the provisions of section 24 impose limitations on current owners of land in that '... owners of land no longer enjoy the absolute real rights known to earlier generations. An owner may not use his or her land in a way which may prejudice the community in which he or she lives because, to a degree, he or she holds the land in trust for future generations'.<sup>24</sup>

It is against the background of this analysis that the Court endorsed the validity of the Departments' ridges policy as compatible with the objectives and values not only of the regulatory framework pertaining to environmental assessments, but also with the constitutional environmental right and the principles of sustainable development. The application was dismissed with costs.

## Some thoughts on the judgment

The judgment establishes the importance of assessing environmental laws, regulations, policy and, in fact, administrative conduct in the context of the constitutional imperatives as defined in section 24. Moreover, it confirms that section 24 places a duty on environmental authorities to not only exercise their duties within the parameters of section 24, but to also assume stewardship over the environment. This

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<sup>21</sup>Para 18 at 518.

<sup>22</sup>*Ibid.* The Court refers to the views of a commentator who views the potential ambit of a right to 'well-being' as exciting, but potentially limitless and who states that it 'encompasses the essence of environmental concern, namely a sense of environmental integrity; a sense that we ought to utilise the environment in a morally responsible and ethical manner. If we abuse the environment, we feel a sense of revulsion akin to the position where a beautiful and unique landscape is destroyed or an animal is cruelly treated'.

<sup>23</sup>*Ibid.*

<sup>24</sup>Para 19 at 519.

duty is confirmed by the National Environmental Management Act<sup>25</sup> (NEMA) which states that '[T]he environment is held in public trust for the people, the beneficial use of environmental resources must serve the public interest and the environment must be protected as the people's common heritage'.<sup>26</sup> This imperative is contained in section 2 of NEMA which sets out principles that apply to the actions of all organs of state 'that may significantly affect the environment'.<sup>27</sup>

The notion that section 24 imposes limitations on current owners of land furthermore confirms the 'horizontal nature' of the obligations conferred by section 24.<sup>28</sup> It thus takes into consideration that human beings are probably unique in being the only species that has succeeded in changing the natural environment to a point at which serious efforts need to be made to ensure its continued existence. It is through adaptation - cultural, social, political and economic - that the natural environment has become threatened. As a result, the Court takes into account that considerable effort is needed to conserve the natural environment for present and future generations. It states that the real rights of landowners are specifically limited by the operation of section 24 and the demands of inter-generational equity which require taking into consideration the needs and interests of future generations.

Despite these commendable points, the judgment also raises various concerns, especially as regards the interpretation of section 24(b). First, the Court equates section 24(b) with a directive principle. Second, it makes the statement that the nature of section 24(b) is akin to a socio-economic right in that it imposes a constitutional imperative on the State to secure the environmental rights by reasonable legislative and other measures. In doing so, the Court equates socio-economic rights with directive principles. Third, it depicts all socio-economic rights, and by implication the environmental right, as *aspirational* in nature. Each of these points will be critically considered below.

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<sup>25</sup>Act 107 of 1998.

<sup>26</sup>S 2(4)(o).

<sup>27</sup>S 2(1).

<sup>28</sup>S 8(1) makes the Constitution applicable to the legislature, the executive, the judiciary and all organs of state. In addition, s 24(b) places a specific duty on the state to regulate in favour of environmental protection. In this regard, the Bill of Rights adheres to the traditional view that a constitution should protect citizens against unwarranted interference by the state and should, as a result, operate on the vertical plane. S 8(2), however, deviates from this traditional view and provides that a provision of the Bill of Rights also binds natural and juristic persons if, and to the extent that, it is applicable, taking into account the nature of the right and of any duty imposed by the right

## Directive principles of state policy

A number of countries have incorporated directive principles in their respective Constitutions, including India, Austria, Spain, Brazil, France, Italy and Germany.<sup>29</sup> These directives lay down certain principles for the guidance of governments and often include human rights principles. They are affirmative instructions to the state to act in a positive manner. However, directive principles are not legally binding.

The Indian Constitution, for example, distinguishes between fundamental rights, which are mainly civil and political rights, and socio-economic rights. This is achieved by including the first mentioned as fundamental rights in the Constitution, whilst provision for socio-economic rights is supplied by way of directive principles of state policy. Unlike fundamental rights, directive principles of state policy were not made justiciable. Article 37 states that the provisions contained in Part IV of the Constitution dealing with Directive Principles of State Policy shall not be enforceable by any court, but that they are nevertheless fundamental in the governance of the country and that it shall be the duty of the State to apply these principles in making law. The result is that personal and political rights can be enforced against the state, while social and economic rights cannot be enforced.<sup>30</sup> This treatment of rights in the Indian Constitution demonstrates the main distinction between including fundamental rights in a bill of rights and as directive principles of state policy. First, while fundamental rights may either prohibit the state from doing something, or may place a positive obligation on the state, directive principles are simply affirmative instructions to the state. Second, while fundamental principles are legally binding, directive principles are not.

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<sup>29</sup>See Constitution of India (1950), *Österreichische Bundesverfassung* (1945), *Constitucion Espanola* (1978), *Constituição da República Federativa do Brasil* (1988), *Constitution du 4 Octobbre 1958* (1958), *Constituzione della Repubblica Italiana* (1948) and German *Grundgesetz* (1949).

<sup>30</sup>The justiciability of the Directive Principles of State Policy was a contentious issue during the drafting of the Indian Constitution. One of the delegates, Krisnamarachi, referred to it as 'a veritable dustbin of sentiment ... sufficiently resilient as to permit any individual of this house to ride his hobby horse into it' quoted in Dube *The role of the Supreme Court in the Indian Constitution* (1987) 154. Others labelled the directive principles as 'pious hopes', 'pious expressions' and 'pious superfluities,' and said that they could be equated to 'resolutions made on New Year's Day which are broken at the end of January', that they are 'vague' and 'adrift' and that they are a 'cheque on the bank payable when able'. Dube 153.

It is therefore clear that fundamental rights cannot be equated to directive principles and the statement by the Court that section 24(b) is 'in the nature of a directive principle' is not correct. If section 24(b) was in fact a 'directive principle' it would have amounted to a mere direction to the state to endeavour to achieve certain environmental and sustainable development goals and it would not have imposed any concrete legal duties on the state.

In contrast with the Indian Constitution, all the rights contained in Chapter 2 of the South African Constitution are justiciable. Unlike the Indian Constitution, the South African Constitution does not distinguish between civil and political rights and socio-economic rights, and the latter have been translated into concrete legal duties.<sup>31</sup> Thus socio-economic rights in the South African Constitution are not directive principles. Similarly, section 24(b) is a fully justiciable right and cannot operate like a directive principle.

### Is section 24(b) a socio-economic right?

It has been stated that 'socio-economic rights create entitlements to material conditions for human welfare, such as food, water, health care services and shelter'.<sup>32</sup> In other words, socio-economic rights place a positive obligation on the state to give effect to the rights by way of active implementation. In this regard section 7(2) of the Constitution requires the state to *respect, protect, promote and fulfil* the rights contained in the Bill of Rights. With regard to the function of socio-economic rights it is argued that they fulfil two primary duties. They are 'blueprints for the state's manifold activities that proactively guide and shape legislative action, policy formulation and executive and administrative decision-making'.<sup>33</sup> Yet, they are also 'tools of political struggle, rhetorical devices to be used in "forms of political action, such as lobbying bureaucrats and legislators, campaigning for public support, or protest"'.<sup>34</sup>

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<sup>31</sup>See, eg, *Grootboom* (n 1) where the court affirmed the state's duty to provide access to adequate housing by providing for the shelter needs of those in housing crisis. See also *Minister of Health v Treatment Action Campaign* 2002 5 SA 721 (CC) where the court required that the Department of Health must adopt and implement a constitutionally sound HIV/AIDS policy in order to give effect to the right to have access to health care services.

<sup>32</sup>Brand 'Introduction to socio-economic rights in South Africa' in Brand and Heyns (eds) *Socio-economic rights in South Africa* (2005) 3.

<sup>33</sup>*Id* 2.

<sup>34</sup>*Ibid* citing Wilson 'Taming the Constitution: Rights and reform in the South African education system' (2004) 20 *South African Journal on Human Rights* 418 421.

Section 24 fits into the above definition. As a whole, the right relates to 'material conditions for human welfare.' It encompasses an acknowledgment that environmental degradation has a profound effect on humans and their continued existence. Ultimately, continued environmental degradation threatens the health, livelihoods and lives of humans. In recognition of this, section 24(b) places a positive obligation on the state to ensure the protection of the environment by way of legislative and other means. Consequently, it can be said that the state may not take any unreasonable measures, legislative or other, that may be harmful to the environment and thus also to the health or well-being of any person. The duty to 'respect' fundamental rights therefore implies that any measure on the part of the state that causes environmental harm should be terminated.

The obligation to 'protect' the rights in the Bill of Rights requires that the state must ensure that the rights of an individual are not unduly infringed or interfered with by other individuals or groups.<sup>35</sup> In relation to the environment this means, for example, that the state must protect individuals and groups living in the vicinity of industries against pollution detrimental to their health and well-being caused by such industries.<sup>36</sup> The effective protection of rights also requires an adequate legislative and institutional framework, the proper implementation of legislation, as well as provision for appropriate judicial and other remedies for violations.<sup>37</sup>

In addition, it requires the state to strike a balance between environmental protection and justifiable socio-economic development. Section 24(b)(iii) places a duty on the state to 'secure ecologically sustainable development and use of natural resources while promoting justifiable economic and social development. In this regard the Court noted in *BP Southern Africa (Pty) Ltd v MEC for Agriculture, Conservation, Environment and Land Affairs*<sup>38</sup> that 'pure economic principles will no longer determine, in an unbridled fashion, whether a development is acceptable. Development, which may be regarded as economically and financially sound, will, in future, be balanced by its environmental impact, taking coherent cognisance of the principle of intergenerational equity and sustainable use

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<sup>35</sup>Liebenberg 'The interpretation of socio-economic rights' in Woolman *et al* (eds) *Constitutional law of South Africa* (2005) 33-36.

<sup>36</sup>See, eg, *Hichange Investments (Pty) Ltd v Cape Produce Co (Pty) Ltd t/a Pelts Products* 2004 2 SA 393 (ECD).

<sup>37</sup>*Id* 33-41.

<sup>38</sup>2004 5 SA 124 (W).

of resources in order to arrive at an integrated management of the environment, sustainable development and socio-economic concerns. By elevating the environment to a fundamental justiciable human right, South Africa has irreversibly embarked on a road, which will lead to the goal of attaining a protected environment by an integrated approach, which takes into consideration, *inter alia*, socio-economic concerns and principles.<sup>39</sup>

The duties to 'promote and fulfil' the rights in the Bill of Rights carry the state's obligation into the realm of positive fulfilment.<sup>40</sup> The state needs to take positive measures, legislative and other, to ensure a safe and healthy environment for everyone in an equitable manner and to ensure that the environment is protected. The state is also obliged to find ways and means to effectively implement legislation dealing with environmental protection and to ensure compliance with such legislation and other protective measures. In this way section 24(b) 'guides and shapes legislative action, policy formulation and executive and administrative decision-making'.

It is important to note, however, that section 24 can be distinguished from socio-economic rights such as the rights to access to housing and access to health in that it is not limited by the requirement for the state to take measures, *within its available resources*, to achieve the *progressive realisation* of the right. In this respect the obligations imposed on the state by socio-economic rights are dependent upon the resources available for such purposes, and the corresponding rights themselves are limited by reason of the lack of resources.<sup>41</sup> In theory the omission of the paragraph *within its available resources*, to achieve the *progressive realisation* of the right would imply that the state cannot rely on budgetary constraints as a justification for not fulfilling its constitutional duties regarding the environment. In practice, however, the state may well be faced with a lack of resources to prevent pollution or ecological degradation. In this respect, section 24(b) is further qualified by the requirement of 'reasonableness' in that it requires 'reasonable' legislative and other measures to give effect to its constitutional mandate. It may not be reasonable to demand state action if resources are not available.

Section 24(b) has certainly been used as a 'tool for political action'. As environmental awareness has grown over the last decade, so has the

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<sup>39</sup>*Id* 144B-D.

<sup>40</sup>*Id* 33-58.

<sup>41</sup>*Soobramoney v Minister of Health (Kwazulu-Natal)* 1998 1 SA 765 (CC) para 11.

number of organisations engaged in ‘environmental lobbying’.<sup>42</sup> These groups and communities have in a number of instances relied on section 24(b) to enjoin to take action in instances where environmental health or well-being were under threat or being endangered.

### Is section 24(b) aspirational in nature?

In its judgment the Court refers to section 24 as a so-called second generation or socio-economic right that imposes a constitutional imperative on the State, and it does so ‘despite its *aspirational* form’.<sup>43</sup> This statement seems to suggest that not only section 24(b), but all socio-economic rights are merely aspirational in form. This may simply have been an unfortunate choice of words; however it is important to set the record straight.

The word ‘aspirational’ suggests a mere hope, dream or desire, that is, that which we want but might never attain. This is clearly not in line with the general interpretation of socio-economic rights as set out above. The mandate stemming from section 24(b) and other socio-economic rights arguably reaches far beyond hopes and dreams and falls within the realm of real expectations. The Constitutional Court has taken the view that, at a minimum, these rights can at least be ‘negatively protected from improper invasion’.<sup>44</sup> Case law suggests that the level of protection goes further than negative protection and that the state can be obliged to ensure that it fulfils its positive duty to give effect to the right.<sup>45</sup>

The duty in section 24(b) addresses, as suggested above, matters affecting the very nature of human existence, clean air, safe water, the availability of food, and healthy sanitation. Environmental problems such as climate change and desertification threaten humans in an indiscriminate way and present a threat to the very existence of humankind. Constitutional entrenchment of environmental rights in the form of a human right therefore serves as a basic condition for

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<sup>42</sup>Organisations like Biowatch South Africa, Earthlife Africa, Cape Town Ecology group, Wildlife and Environmental Society of South Africa (WESSA), Friends of the Pilanesberg, Koeberg Alert and Nelson Mandela Bay Local Environmentalists (NIMBLE) actively engage in ongoing environmental lobbying. See also *Petro Props(Pty) Ltd v Barlow* 2006 5 SA 160 (W) where an environmental organisation publicly opposed the development of a fuel service station in a wetlands area.

<sup>43</sup>Para 18.

<sup>44</sup>*Ex Parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of the Republic of South Africa, 1996* 1996 10 BCLR 1253 (CC) para 78.

<sup>45</sup>The *Grootboom* (n 1) decision is the most notable decision in this regard.

human existence. It is a duty to which the state must pay serious consideration and make every attempt to realise. As such, section 24(b) goes beyond mere inspiration. The legislature has paid serious attention to the positive duty created in section 24(b) and it has, since the adoption of the Constitution, enacted and implemented a number of statutes that attempt to protect environmental resources and regulate harmful impacts on the environment.<sup>46</sup>

## Conclusion

It was recently noted that the 'role of the courts is especially important in the context of the protection of the environment and giving effect to the principle of sustainable development'.<sup>47</sup> I have also argued that the insertion of an environmental right into a constitution elevates the importance of the environment and of environmental protection and conservation, but that there is a need for the development of sound jurisprudence on environmental rights, specifically jurisprudence that defines section 24 in the context of the specific economic and social conditions prevalent in South Africa.<sup>48</sup>

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<sup>46</sup>National Environmental Management Act 107 of 1998 (NEMA) gave birth to the environmental framework legislation, and established a new form of environmental regulation and environmental governance in South Africa. NEMA aims to:

- define overarching and generic principles in which sectoral-specific legislation is embedded;
- enhance co-operative environmental governance amongst fragmented line ministries; and
- provide for a broad flexible framework to address environmental issues and to respond to changes in socio-economic and ecological parameters

Legislation addressing specific sectoral environmental concerns was enacted in areas such as biodiversity, the National Environmental Management: Protected Areas Act 57 of 2004 (NEM:PAA), the National Environmental Management: Biodiversity Act 10 of 2003 (NEM:BA) and the National Forest Act 84 of 1998 ('NFA'); air quality, the National Environmental Management: Air Quality Act 39 of 2004 (AQA); protection of marine resources, the Marine Living Resources Act 18 of 1998 (MLRA); protection of water resources, the National Water Act 36 of 1998 (NWA) and the regulation of mining and energy on the environment, the Minerals and Petroleum Resource Development Act 28 of 2002 (MPRDA). Legislation dealing with waste management is currently in the process of being drafted, the National Environmental Management: Waste Management Bill 2006.

<sup>47</sup>*Fuel Retailers Association of Southern Africa v Director General Environmental Management, Department of Agriculture, Conservation and Environment Mpumalanga Province* Case CCT 67/06 (unreported) para 102.

<sup>48</sup>Feris 'Constitutional environmental rights: An under-utilised resource' Paper presented at the 5<sup>th</sup> Annual IUCN Academy of Environmental Law Colloquium, Parati,

The judiciary, therefore, has a responsibility to assess and interpret the environmental right and to give guidance on how we should apply and adhere to the right.

In this respect, the importance of section 24 cannot be gainsaid. It is a right that goes to the heart of the continued existence of humankind. It therefore guarantees an environment that will not be detrimental to the continued existence of this and future generations. It does so by way of a justiciable right and not merely by directing the state to endeavour to fulfil this obligation. Moreover, by way of section 24(b) it places a specific legal obligation on the state to give effect to this right by way of specific means. It should not merely 'aspire' to do so. Care should be taken, therefore, that section 24 and especially section 24(b), is not interpreted in a manner that is detrimental to the very essence of the right itself, namely, one that places a *positive* obligation on the state to ensure an environment that is not detrimental to health and well-being.

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