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THE LACK OF ACCESS TO CLEAN AND RELIABLE ELECTRICITY: THE SECTION 24 CONSTITUTIONAL RIGHT TO AN ENVIRONMENT THAT IS NOT HARMFUL TO HEALTH AND WELL-BEING IS UP IN SMOKE

by

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Submitted in partial fulfilment of the requirements for the degree of Master of Laws by Coursework and Research Report at the University of Witwatersrand, Johannesburg

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DECLARATION

I, 2869692, declare that this Research Report is my own unaided work. It is submitted in partial fulfilment of the requirements for the degree of Master of Laws (by Coursework and Research Report) at the University of the Witwatersrand, Johannesburg. It has not been submitted before for any degree or examination in this or any other university. I have submitted my final Research Report through Turnitin and have attached the report to my submission.

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Abstract

Eskom, currently South Africa's sole electricity supplier, has been faced with severe electricity shortages exacerbated by its ageing coal-fired power stations ('the current fleet'). Load shedding has been implemented for several years to prevent grid collapse, which would cause socio-economic disaster and immense human suffering. The electricity shortage was found to be a problem of the State's own making for failure to ensure that sufficient (and cleaner and cheaper) electricity generation was established when there were alternatives, such as renewable energy, readily available. In turn, the current fleet is also causing illness and death of certain residents in South Africa and the continued operation of the current fleet (as is) will exacerbate climate change, which inherently poses a threat to humanity. The objective of the study is to prove that the unjustifiable infringements of the right to life and to an environment not harmful to health and well-being could have been avoided if the State utilised the abundance of renewable energy sources available at its disposal instead of 'weaponising' national electricity grid failure. The conclusion of this discussion is that South Africa can no longer justify sacrificing lives for electricity security; a rights-aligned future lies in replacing the current fleet with renewable energy.

List of keywords

Climate change, load shedding, health and well-being, right to life, unjustified limitation.

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CHAPTER 1: INTRODUCTION AND BACKGROUND

1. Introduction

1.1. Background

Eskom Holdings SOC Ltd ('Eskom'), the sole electricity provider of South Africa (for the time being at least),[1] generates the bulk of the country's electricity from coal-fired power plants.[2] South Africa's reliance on coal-based electricity generation is ascribed to its abundant coal reserves.[3] However, the average age of Eskom's coal-fired power plants is 36 years ('the current fleet'), whereas the estimated utility of most coal-fired power plants is approximately 46 years.[4] Furthermore, coal-fired power plants are known to exhibit a decreasing energy generation efficiency as they age.[5] Therefore, the current fleet is reaching its 'end-of-life' and already operates at a decreased efficiency. Due to the current fleet's age, frequent maintenance of the power plants is required, which often requires power plants to be taken 'off-grid' for repairs.[6]

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1 https://arxiv.org/abs/2403.15037 ('Clark').
The Electricity Regulation Amendment Act, 38 of 2024 ('ERAA') recently amended the Electricity Regulation Act, 4 of 2006 ('ERA'). In terms of the preamble and s 34A of ERAA, it aims to facilitate an open-market platform allowing for competitive electricity trading. Unfortunately, a discussion of the effects of ERAA falls outside of the scope of this study.

2 Clark.

3 V Nalule & T Acheampong 'Energy Transition Indicators in African Countries: Managing the Possible Decline of Fossil Fuels and Tackling Energy Access Challenges' (2021) 12 *The Journal of Sustainable Development Law and Policy* 1, 40.

4 Clark.

5 Clark.

6 AA Adebiyi & K Moloi 'Renewable Energy Source Utilization Progress in South Africa: A Review' (2024) 17 Energies 1, 4.

As a result of the ageing current fleet, severe shortages of electricity supply have occurred in South Africa.[7]

Eskom previously conceded that the shortage of electricity supply often encountered 'causes human suffering and has a detrimental impact on a variety of constitutionally protected rights'.[8] Consequently, the strained electricity supply has been conveniently 'weaponised' to grant Eskom several exemptions from installing costly pollution reduction equipment in the current fleet in favour of meeting the electricity demand, notwithstanding the harmful pollutants released during the coal-combustion process for electricity generation.[9]

A report published in 2021 named Eskom as the world's largest emitter of health-harming sulphur dioxide.[10] Eskom alone emits more sulphur dioxide than the entire power sector of the European Union and the United States.[11] These emissions, in turn, contribute to pollution-related deaths in South Africa.[12]

Save for the 'more direct' pollution-related deaths ascribed to the current fleet, it has been widely accepted that fossil fuel-derived[13] electricity generation contributes to the increased accumulation of carbon dioxide, leading to the 'greenhouse effect' and, in turn,

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7 https://climateactiontracker.org/countries/south-africa/policies-action/.

8 *United Democratic Movement v Eskom Holdings SOC Ltd* (unreported case number 005779/2023) [2023] ZAGPPHC 1949, 14.

9 Clark.

10 https://energyandcleanair.org/wp/wp-content/uploads/2021/10/Eskom-is-now-the-worlds-most-polluting-power-company.pdf ('Myllyvirta').

11 Myllyvirta.

12 Myllyvirta.

13 Fossil fuels include gas, oil, and coal. These fuels pose a high risk of urban industrial air pollution and the acidification of the environment, exacerbating climate change.
Report of the World Commission on Environment and Development: Our Common Future UN Doc A42/427 (4 August 1987) (the 'Brundtland Commission Report) Chapter 7, para 19.

exacerbates climate change.[14] An estimated additional 250,000 to 300,000 deaths may occur between the years 2030 and 2050 as a result of the effects of climate change.[15] African countries specifically stand to suffer the most harm from climate impacts.[16] The South African legislature recognises, in the preamble of the Climate Change Act, 22 of 2024, that climate change poses an urgent threat to human society and will, amongst others, impact human health.[17]

From what is stated, it is already obvious that the current fleet has detrimental impacts on human health and well-being, and ultimately human life, both directly and indirectly. It is at this juncture that it must be pointed out that constitutionally enshrined fundamental rights are being threatened by the operation (and insufficient electricity supply) of the current fleet. It is beyond the scope of this paper to traverse all of the constitutional infringements caused as a result of the current fleet. Instead, the focus of this paper will surround the intersection between sections 11 and 24 of the Constitution of the Republic of South Africa, 1996, as quoted hereunder.

> 'Everyone has the right to life.'[18]
> and
> '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

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14 Brundtland Commission Report Chapter 7, para 19.

15 I Aucamp, F Retief & N King 'The Social Dimension of Environmental Management' in N King, H Strydom & F Retief (eds) *Fuggle and Rabie Environmental Management in South Africa* (online edition) 1177, 1181.

16 Nalule & Acheampong (note 3 above) 9.

17 The preamble of the Climate Change Act, 22 of 2024.

18 Section 11 of the Constitution.

(iii) secure ecologically sustainable development and use of natural resources while promoting justifiable economic and social development.'[19]

The Constitution defines the fundamental rights of every person that the State must respect.[20] In *S v Makwanyane* ('*Makwanyane*'), wherein the constitutionality of the death penalty was assessed, leading to its ruling of unconstitutionality and abolishment, the Constitutional Court held that all the rights in the Constitution, specifically the rights contained in the Bill of Rights, must be construed in such a manner that secures the full measure of its protection.[21] Further, 'the Bill of Rights applies to all law, and binds the legislature, the executive, the judiciary and all Organs of State',[22] and the State must respect, protect, promote and fulfil the rights in the Bill of Rights.[23] It must not be forgotten that the Constitution is no ordinary piece of legislation but the source of legislative and executive authority that determines how the country is to be governed.[24] Consequently, this study seeks to assess whether the lack of access to clean and reliable electricity constitutes a violation of the concomitant constitutional rights to life and an environment not harmful to health and well-being.

1.2. Area of Focus

1.2.1. Central Research Question

The central research question of this study is whether the lack of access to clean and reliable electricity constitutes a violation of the concomitant constitutional rights to life and an

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19 Section 24 of the Constitution.

20 *S v Makwanyane* 1995 (2) SACR 1 (CC) 15;

21 Ibid 10.

22 Section 8(2) of the Constitution.

23 Section 7(2) of the Constitution.

24 Note 20 above 15.

environment not harmful to health and well-being. The central research question is subdivided into the following secondary research questions:

- What are the implications of the rights to life and to an environment not harmful to health and well-being?
- What are the implications of the lack of access to clean and reliable electricity on the concomitant rights to life and to an environment not harmful to health and well-being?
- To what extent are the State's energy policy decisions justiciable under South African constitutional law?

1.2.2. Objectives of the Study

The objective of the study is to prove that the unjustifiable infringements of the right to life and to an environment not harmful to health and well-being could have been avoided if the State utilised the abundance of renewable energy sources available at its disposal instead of 'weaponising' national electricity grid failure.

To achieve the above objective, the following secondary objectives are set:

- To consider the implications of the concomitant rights to life and to an environment not harmful to health and well-being;
- To investigate the implications of the lack of access to clean and reliable electricity on the concomitant rights to life and to an environment not harmful to health and well-being by reference to case law examples,
- To investigate the justiciability of the State's energy policies under South African Constitutional Law, and
- To distil from the analysis whether the fundamental right to life can be justifiably limited for the sake of electricity grid stability.

1.2.3. Assumptions and Hypotheses

The following assumptions form the basis of this study:

- The constitutionally enshrined fundamental rights are mutually enforceable;
- The State may not interfere with the enjoyment of fundamental human rights in the absence of a justifiable limitation;
- The constitutional environmental right is a fundamental human right; and
- The concept of 'the environment' extends beyond the 'natural environment'.

The main hypothesis is that the State unjustifiably infringes on the right to life and the right to an environment not harmful to health and well-being, despite its pleas of socio-economic suffering to be caused by the impending national electricity grid collapse, as viable and cheaper electricity generation through renewable energy has been available, which addresses socio-economic and human rights concerns.

1.3. Research Methodology

This is a desktop study that assesses relevant literature such as legislation, case law, policies, current international commitments, relevant industry reports and journal articles.

1.4. Study Outline

Chapter 2 considers the implications of the rights to life and an environment not harmful to health and well-being. It reflects that these rights are unqualified, mutually reinforcing, and require the State to protect the environment as an essential condition to safeguard life. Chapter 3 reviews the implications of the lack of access to clean and reliable electricity on these concomitant rights. It shows that both electricity shortages and the harmful operation of the current fleet infringe on these rights, highlighting the State's duty to secure clean and reliable electricity. Chapter 4 considers the extent to which the State's Energy Policy decisions are justiciable under the Constitution. These decisions can be challenged procedurally through

review, but substantive rights may also be invoked. Importantly, it is established that the preventable deaths caused by the operation of the current fleet cannot be justified on socio-economic grounds. Chapter 5 contains the conclusion.

CHAPTER 2: THE IMPLICATIONS OF THE RIGHTS TO LIFE AND TO AN ENVIRONMENT NOT HARMFUL TO HEALTH AND WELL-BEING

2.1. Introduction

The judiciary, in *The Trustees for the Time Being of Groundwork Trust v Minister of Environmental Affairs* ('*Deadly-Air*'), has affirmed that all rights contained in the Bill of Rights are interrelated and mutually reinforcing.[25] It has been argued that the environmental law right is mutually enforceable with, amongst others, the right to life.[26] Section 2.1. discusses the nature of the right to life, highlighting that it is unqualified and that the State has a duty to protect it. Section 2.2 explores the nature of the right to an environment not harmful to health and well-being, and highlights the applicability thereof in both urban and natural environments. It is affirmed that the protection of the environment is vital for the enjoyment of the right to life.[27]

2.2. The Right to Life

The right to life has been categorised as the most fundamental human right.[28] Other rights can be limited and granted again, but when life ceases, all other rights also cease.[29] Sach J in *Makwanyane* goes even further and states that the right to life is not limited by death; it is extinguished in its entirety.[30]

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25 *The Trustees for the Time Being of Groundwork Trust v Minister of Environmental Affairs* (unreported case number 39724/2019) [2022] ZAGPPHC (18 March 2022) ('*Deadly Air'*) 37.

26 M Murcott 'Introducing Transformative Environmental Constitutionalism in South Africa' (2017) in Daly, E. et al (eds) New Frontiers in Environmental Constitutionalism 280, 283.

27 M Murcott 'Minding the Gap: Constitutional Court's Jurisprudence Concerning the Environmental Right' 2023, 13 *Constitutional Court Review* 148, 150.

28 P Carstens & D Pearmain Foundational Principles of South African Medical Law (2007) 27.

29 Note 20 above.

30 Ibid 350.

The right to life is unqualified.[31] The State is obliged to protect the right to life.[32] The duty of the protection of life is a negative duty and, therefore, constitutes the obligation to ensure that no one can take it away.[33] In *Carmichele v Minister of Safety and Security*, the court reiterated that the right to life, amongst others, is entrenched in the Bill of Rights and that a duty is imposed on the State not to perform any act that infringes on that right and that some circumstances may require that the State take positive steps to provide appropriate protection to everyone.[34] In fact, the State is 'obliged to take action to protect human life against violation by others'.[35] 'The State must set the example by demonstrating the priceless value it places on the lives of all its subjects, even the worst'.[36] Further, the State may not put forth a message that the value of human life is variable.[37] The Constitution aims to establish a society where the individual value of each member of the community is recognised and cherished, and the right to life is central thereto.[38]

Naturally, for an in-depth discussion on the right to life, one must merely turn to the seminal *Makwanyane* case*,* wherein the apex court discussed the constitutionality of the death penalty in South Africa.[39] The court described death as the 'most extreme form of punishment [...] execution is final and irrevocable. It puts an end not only to the right to life itself, but to all other personal rights which had vested in the deceased'.[40]

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31 Note 20 above 39.

32 Carstens & Pearmain (note 28 above) 27.

33 Ibid 27.

34 *Carmichele v Minister of Safety and Security* 2001 (4) SA 938 (CC) 44.

35 Note 20 above 117.

36 Ibid 190.

37 Ibid 232.

38 Ibid 326.

39 Ibid.

40 Ibid 26.

Judge Madala in the matter of *Soobramoney v Minister of Health, Kwazulu-Natal,* also reiterated that the State must 'do all in its power to protect and preserve life.[41] In the same case, Judge Sach states that a 'healthy life depends on social interdependence: the *quality of air*, water and sanitation which the State maintains for the public good',[42] which ties in with the broad concept of 'health and well-being' referred to below.

Whilst section 2.2. highlighted the unqualified nature of the right to life and the State's duty to protect it, it is evident that the enjoyment of this right also depends on environmental conditions. Accordingly, section 2.3 examines the constitutional right to an environment not harmful to health and well-being.

2.3. The Right to an Environment Not Harmful to Health and Well-Being

South Africa's Constitution adopts an encompassing right to protect the environment in which people live and work and the natural resources that support them.[43] Section 24 first confers the right to an environment that is not harmful to health and well-being, and secondly, it mandates the State to realise that right through reasonable legislative and other measures.[44] It is argued that s 24(a) contains the 'basic minimum for environmental protection being an environment

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41 *Soobramoney v Minister of Health, Kwazulu-Natal* 1998 (1) SA 765 (CC) 39.

42 Ibid 54.

43 M Diedericks, D Dube & A du Plessis 'Involving South Africa's Human Rights Commission in Environmental Protection: *South African Human Rights Commission v Msunduzi Local Municipality'* (2023) 39 *South African Journal on Human Rights* 236, 237.

44 *Minister of Environmental Affairs v the Trustees for the time being of Groundwork Trust* 2025 (4) SA 98 (SCA) 26.

that is not harmful'.[45] Coggin states that s 24(a) thus requires the consideration of which kinds of environments are harmful.[46]

In the *Deadly-Air* case, it was stated that s 24 of the Constitution is 'unqualified' and the rights thereunder 'immediately realisable'.[47] The Judiciary has also drawn a distinction between socio-economic rights and the s 24 environmental law right in that, unlike the former, the realisation of the latter is not subject to progressive realisation in accordance with reasonable measures which are to be taken within the State's available resources.[48] The court remarked that 'a proposition that urges for the progressive realisation of the right to an environment that is unharmful to health rights seems out of touch with reality'.[49] Section 24 of the Constitution also consists of a negative duty to, for example, not interfere with the citizens' right to live in conditions which are not detrimental to their health and well-being, such as dangerous levels of air pollution.[50] The court also noted that the United Nations General Assembly and the Human Rights Council recognise the right to a clean, healthy, and sustainable environment as a fundamental human right.[51]

The concept of 'health and well-being' is broad.[52] It is stated that 'health is a state of complete physical and mental health as well as social well-being, and not merely the absence

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45 Note 25 above 44.

46 T Coggin 'Recalibrating Everyday Space: Using Section 24 of the South African Constitution to Resolve Contestation in the Urban and Spatial Environment' (2021) 24 *Potchefstroom Electronic Law Journal* 2, 15.

47 Nalule & Acheampong (note 3 above) 37.

48 Note 44 above 45.

49 Ibid 48.

50 Note 25 above 38.

51 Note 44 above 32.

52 Carstens & Pearmain (note 28 above) 34.

of disease or infirmity'.[53] Whereas 'well-being' is more subjective as it often refers to living a 'quality life', which differs amongst cultures, geographical areas, and more.[54]

Human health cannot be obtained without ecosystem health, [55] and many environmental threats are equally threatening to human health and life.[56] This is specifically true when one considers that (in terms of the environmental justice lens at least) the definition of the 'environment' goes far beyond the traditional concept of the 'wilderness' to include the areas where individuals conduct their daily activities.[57] Despite environmental law having been predominantly concerned with the natural environment, increased scholarship is approaching it as humans' place in the environment, thus drawing attention to living conditions.[58] Pieterse argues that the phrasing of s 24(a) 'clearly', lends itself to apply beyond the natural environment to other places where people may find themselves, including cities.[59] Coggin also argues that the constitutional environmental law right can 'transcend siloed interpretations of individual rights in the urban and spatial environment'.[60] Coggin posits that considering the human and the non-human natural environment as being separate creates a false binary between the two systems that are so 'distinctively intertwined'.[61]

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53 Aucamp et al (note 15 above) 1179.

54 Ibid 1181.

55 Murcott (note 26 above), 283.

56 Ibid 289.

57 D Schlosberg & LB Collins 'From environmental to climate justice: climate change and the discourse of environmental justice' (2014) 5 *Wiley Interdisciplinary Reviews: Climate Change* 359, 360.

58 M Pieterse 'The Right to the City and the Urban Environment': Re-imaging Section 24 of the 1996 Constitution' (2014) 29 *Southern African Public Law* 175, 180.

59 Ibid 181.

60 Coggin (note 46 above) 2.

61 Ibid 15.

In the context of the urban environment, Pieterse highlights that the concept of 'health', and the infringements thereof, can easily be ascertained and lists examples, including 'poor health outcomes as a result of pollution to negative health and safety effects of crumbling infrastructure and a lack of access to essential services such as water, sanitation and electricity'.[62] Highly relevant to this discussion, urban air pollution causes respiratory diseases and shortened life expectancy.[63] Pieterse further states that s 24(b) of the Constitution seemingly requires measures such as promoting energy efficiency and reducing pollution.[64]

2.4. Conclusion

This chapter laid the constitutional foundation for the remainder of the study. The fundamental human rights to life and the constitutional environmental right are mutually enforceable and unqualified. The State may not interfere with the enjoyment of these rights. The constitutional environmental right extends beyond the natural environment to urban spaces where people live and work. Moreover, the State may not engage in conduct which results in the perception that the value of human life is variable. Crucially, the extinguishment of life entails the loss of all other fundamental rights. Chapter 3 will examine how the operation of the current fleet has adversely impacted these concomitant fundamental rights.

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62 Pieterse (note 58 above) 182.

63 Murcott (note 26 above) 289.

64 Pieterse (note 58 above) 183.

Chapter 3: The Implications of the Lack of Access to Clean and Reliable Electricity on the Concomitant Constitutional Rights to Life and to an Environment Not Harmful to Health and Well-Being

3.1. Introduction

Chapter 2 established the importance of the rights to life and to an environment not harmful to health and well-being, and emphasised their interrelated and unqualified nature. Building on this foundation, Chapter 3 examines the implications of access to clean and reliable electricity on these rights. Particularly, it will be considered how electricity shortages and the operation of the current fleet have adversely affected these rights by reviewing key aspects of three contemporary case law examples. This discussion will demonstrate that both inadequate access to clean and reliable electricity, as well as the operation of the current fleet, have dire consequences on constitutionally protected rights, thereby emphasising the State's obligations in this domain.

3.2. The Impact of Electricity Shortages on the Environment

Electricity supply is integral to the enjoyment of fundamental human rights such as the right to life and the constitutional environmental right. From 1990 to 2000, the electrification of households in South Africa was the highest globally.[65] Thus, new generation capacity would be needed, and this need was set out to the cabinet together with the recommendation to unbundle Eskom's generation, transmission and distribution divisions as early as 1998.[66] Therefore, failure to ensure the provision of sufficient electricity supply is a decades-long failure, wherefore the warning calls have not been heeded. For the purposes of this section, two contemporary case law sources will be cited to highlight how the judiciary has approached

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65 In 1990, only 35% of South African households had access to electricity.
Note 8 above 26.

66 Ibid 27.

electricity shortages against the backdrop of fundamental rights infringements and consequently leading to an environment that is harmful to one's health and well-being. The first case referred to is the Constitutional Court judgment of *Eskom Holdings SOC LTD v Vaal River Development Association (Pty) Ltd* ('*Vaal'*).[67] *Vaal* surrounded the appeal of interim interdictory relief, which had been granted against Eskom to cease reducing the electricity supply to certain municipalities for their failure to pay amounts due to Eskom.[68] The decision of *Vaal* was made due to the 'atrocious' infringements on fundamental human rights caused by the reduced electricity supply.[69] The second case is the High Court judgment of *United Democratic Movement v Eskom Holdings SOC Ltd* ('*UDM'*).[70] *UDM,* in part A, entailed granting interim relief against the prejudicial impact of load shedding on public health facilities, police stations and schools ('the institutions') which do not have access to alternative energy sources.[71] Part A led to an interim order that was handed down ordering the State to ensure that a sufficient supply of electricity is supplied to these institutions,[72] as the practice of load shedding 'prejudicially' impacts multiple fundamental constitutional rights.[73] Part B of *UDM* surrounded the declaration that the State's conduct surrounding load shedding (the implementation thereof and the State's response to the energy crisis) is unconstitutional and leads to the unjustifiable infringement of multiple fundamental rights.[74]

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67 *Eskom Holdings SOC LTD v Vaal River Development Association (Pty) Ltd* 2023 (4) SA 325 (CC).

68 Ibid.

69 Ibid 305.

70 Note 8 above.

71 *United Democratic Movement v Eskom Holdings SOC Ltd* (unreported case number 005779/2023) [2023] ZAGPPHC 280, 2.

72 Ibid 1.

73 Ibid case summary.

74 Note 8 above 21.

3.2.1. The Vaal Judgment regarding the Impact of the Rotational Electricity Disruptions on Fundamental Rights

Prior to the Constitutional Court judgment, the High Court reiterated that there is no explicit right to electricity provided for in the Bill of Rights; however, electricity supply is inextricably intertwined with the rights to dignity, life, housing, health, food, water and social security.[75] The right to an environment not harmful to health and well-being was also explicitly mentioned by the Constitutional Court.[76] The Supreme Court of Appeal held that Eskom, an Organ of State, supplies electricity to the local spheres of government to secure the economic and social well-being of the people.[77] The Supreme Court of Appeal further considered the fact that Eskom, as an Organ of State, is constitutionally required, in terms of ss 8(1) read with 7(2) of the Constitution, to enable the municipalities to discharge their duties.[78] Thus, the provision of electricity is an essential resource.[79] The Constitutional Court reiterated that Organs of State, in terms of s 7(2) of the Constitution, must respect the rights in the Bill of Rights.[80] Notwithstanding the fact that Eskom has no direct, positive duty to supply electricity to the residents, to respect the rights contained in the Bill of Rights, Organs of State must refrain from unreasonable conduct that results in infringements of rights contained in the Bill of Rights.[81] In other words, Organs of State may not act in a manner that interferes with or diminishes the

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75 Note 67 above 22.

76 Ibid 260.

77 Ibid 33.

78 Ibid 108.

79 Ibid 74.

80 Ibid 199.

81 Ibid 199.

enjoyment of the rights in the Bill of Rights.[82] These rights infringements can occur directly or indirectly.[83]

Eskom is a near monopoly that provides the majority of the country's electricity.[84] Due to its near monopoly status, municipalities are largely dependent on Eskom for electricity supply, which, in turn, enables the municipalities to discharge their constitutional duties.[85] It was pleaded in *Vaal* that the residents in these municipalities were not legally permitted to purchase electricity elsewhere but from the municipalities, which electricity, in turn, could only be sourced from Eskom.[86] Thus, residents were left without any alternative source of electricity supply.[87]

The practical implications of what was said above, as mentioned in *Vaal*, will now become clear. Eskom supplied bulk electricity to the two municipalities in question. As a result of the municipalities' failure to pay Eskom for the electricity provided, Eskom started applying 'rotational load reduction' (restricting the supply of electricity to the municipalities in question).[88] The municipalities then had to reduce the electricity supply to the residents of the municipalities.[89] Due to the reduced electricity supply, the treatment of sewage was adversely affected, resulting in raw sewage running into the Vaal River, which posed a dire risk to the environment and the health of the residents.[90] The health hazard was exacerbated by the fact that the water extraction plant for potable water was located in the same area where the raw

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82 Ibid 267.

83 Ibid 267.

84 Ibid 21.

85 Ibid 108.

86 Ibid 165.

87 Ibid 165.

88 Ibid 8.

89 Ibid 9.

90 Ibid 257.

sewage spillage was occurring.[91] To make matters worse, the water purification system also malfunctioned due to the inadequate supply of electricity.[92] The Court further highlighted the threat of loss of life if the provision of healthcare services at hospitals and old-age nursing homes were adversely affected.[93] The Court described it as a 'human catastrophe' characterised by gross violations of the residents' fundamental rights.[94] The Constitutional Court stated that all of these rights infringements arose due to Eskom's conduct.[95]

Finally, the Court stated Eskom must not be permitted to 'ride roughshod over the rights of individuals' out of the fear of Eskom's collapse.[96] The appeal against the interim relief interdicting Eskom from persisting with the rotational load reduction was dismissed.[97]

3.2.2. The UDM Judgements and the Impact of Load Shedding on Fundamental Human Rights

Part A of *UDM* was not to end load shedding, but to ensure that the impact thereof on the institutions is reduced.[98] As stated above, part B of *UDM* sought an order declaring the State's conduct surrounding load shedding and the infringements caused as a result, as unconstitutional.[99]

The concept of 'load shedding' is defined in the *UDM* case of as 'the process whereby Eskom Holdings SOC Ltd effectively cuts off the supply of electricity to areas of the country

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91 Ibid 257.

92 Ibid 257.

93 Ibid 258.

94 Ibid 284.

95 Ibid 260.

96 Ibid 298.

97 Ibid 310.

98 Note 71 above 2.

99 Note 8 above 21.

on a rotational and scheduled basis […] and is done to protect the integrity of the national energy grid when the demand for electricity exceeds the capacity generated by Eskom from time to time'.[100] If load shedding had not been implemented, it could have resulted in complete grid collapse, which would cause 'immense human suffering and economic harm'.[101] The electricity generation and supply shortage, however, was not a novel concern. 'The Government had been warned (and had accepted) that it would run out of generating capacity by 2008 (which had happened) and in the 15 years since then, has failed to remedy the situation'.[102]

Eskom ascribed the lack of adequate electricity supply to insufficient investment in new energy generation capacity, a responsibility which was then vested in the Minister of Mineral Resources and Energy ('DMRE').[103] The court held further that it is 'clear' that 'the consequences of policy decisions resulted in the current need [...] to implement [...] load shedding'.[104]

The court further elaborated briefly on how fundamental rights are impacted by load shedding. Firstly, load shedding interferes with the right to access health care services.[105] It referenced the possibility of electricity supply to life-supporting equipment being interrupted, and thus may infringe the right to life enshrined in s 11 of the Constitution.[106] It was further stated that load shedding impacts the right to education as schools with no access to electricity, often in rural areas, must close for the day.[107] This practice thus leads to the deprivation of the

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100 Note 71 above 1.

101 Ibid 23.

102 Ibid 30.

103 Ibid 26.

104 Ibid 37.

105 Ibid 13.

106 Ibid.

107 Ibid 14.

right to education, but in some instances, also to the only guaranteed meal of the pupils' day.[108] Finally, it was stated that the right to freedom and security of the person is impacted as the South African Police Service cannot perform its functions due to the lack of electricity brought about by load shedding.[109]

The court highlighted that the rights infringed on by load shedding are part of a 'continuing wrong'.[110] The main argument is that these fundamental rights can only be exercised or manifested by way of an uninterrupted supply of electricity.[111] The argument also followed that the state has a positive duty to take reasonable steps to ensure that these fundamental rights are realised.[112] The parties in *UDM* did, however, concede that the violations do pass the moment electricity is supplied, by whatever means.[113]

The court declared that the electricity crisis of the Respondent Organs of State was a breach of their constitutional duties to protect and promote the rights contained in the Bill of Rights.[114] As part of the declaration, the court ascribed the electricity crisis to the failure to open the electricity sector to competition with private sector actors, and the decisions to operate the current fleet beyond its capabilities without proper maintenance, among others.[115] The court declared that this resulted in the unjustifiable infringements of the right to dignity,[116] life, freedom and security of the person,[117] the right to an environment not harmful to health and

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108 Ibid.

109 Ibid 15.

110 Ibid 6.

111 Ibid 16.

112 Ibid.

113 Ibid 11.

114 Note 8 above 120.

115 Ibid 120.

116 Section 10 of the Constitution.

117 Section 12 of the Constitution.

well-being, the right to access to healthcare services, the right to access to sufficient food and water, [118] and the right to basic education.[119]

All of these infringements caused by the electricity generation and supply shortages can lead to the incorrect assumption that no fundamental human rights infringements will occur as a direct result of the current fleet when the current fleet is operational. Alternatively, due to the plethora of rights impacted by the electricity generation and supply shortages, the operation of the current fleet should be safeguarded at any cost. These assumptions are dispelled by the following case law example and further on in the study.

3.3. The Impact of the Operation of the Current Fleet on an Environment Not Harmful to One's Health and Well-Being – The Deadly Air Judgments

The *Deadly Air* case relates to the Highveld Priority Area ('HPA').[120] The HPA consists of a host of South Africa's most polluted towns and hosts 12 coal-fired power plants of Eskom's current fleet.[121] Air quality in the HPA is described as 'particularly poor and dangerous'.[122] It was further acknowledged that the air quality in the HPA is harmful to the health and well-being of its residents.[123] Several studies have indicated that air pollution in the HPA causes approximately 10,000 premature deaths annually,[124] decreased lung function, deterioration of

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118 Section 27 of the Constitution.

119 Section 29 of the Constitution.

Note 8 above 120.

120 Note 25 above.

121 Ibid.

122 Ibid.

123 Ibid 18.

124 Ibid 155.

the lungs and heart, and leads to the development of diseases such as asthma, emphysema, bronchitis, tuberculosis and cancer.[125] The government was aware of this link.[126]

To address these concerns, the Air Quality Management Plan was published in 2012,[127] some seven years before the *Deadly Air* matter was instituted. The court recited the preamble of the National Environmental Management: Air Quality Act, 39 of 2004 ('NEMAQA')[128], wherein it is stated that the air quality in various areas of South Africa is *not* conducive to a healthy environment and is *not* conducive to promoting the socio-economic advancement of its inhabitants.[129] Moreover, the court highlighted that 'Air pollution knows no boundary and has the potential to affect everyone'.[130]

The court went on to state that the unsafe level of air pollution goes beyond violating s 24 of the Constitution but further violates the right to dignity, life, bodily integrity, and the 'best interest of the child',[131] which are all constitutionally enshrined.[132] The High Court proceeded to declare that the poor air quality in the HPA is a constitutional breach of the s 24 right to an environment not harmful to health and well-being.[133]

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125 Ibid 70.

126 Ibid 71.

The government's own studies have shown that there is a direct link between air pollution and adverse health impacts

Ibid 76.

127 Ibid 19.

128 National Environmental Management: Air Quality Act, 39 of 2004 ('NEMAQA').

129 Note 25 above 88.3.3; Preamble of NEMAQA.

130 Note 25 above 1.

131 Section 28(2) of the Constitution.

132 Note 25 above 76.

133 Ibid 241.1.

Deadly Air was further heard on appeal.[134] Even though the Supreme Court of Appeal regarded the cause of action (the failure to publish regulations to improve the ambient air quality of the HPA) moot (as the necessary draft regulations were published), it proceeded to hear the appeal as it was deemed to be a matter of public importance.[135] The Supreme Court of Appeal further referred to the international law landscape, wherein it is recognised that the right to a clean, healthy, and sustainable environment is a fundamental human right.[136] The Supreme Court of Appeal went on to affirm the High Court's conclusion that s 24(a) was breached.[137]

3.4. Conclusion

At this juncture, it is clear that the operation of the current fleet, as well as electricity supply shortages caused by the current fleet, both affect fundamental human rights. It also appears that these rights infringements cannot be extinguished by cherry picking which of the two scenarios is the least offensive. Further considerations must be given due regard to find a mutually beneficial solution to prevent all of the rights infringements caused by the current fleet. The following chapter will consider to what extent the State's energy policy decisions are justiciable under the Constitution.

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134 Note 44 above.

135 Note 25 above 20.

136 Ibid 32.

137 Ibid 26

Chapter 4: The Justiciability of the State's Energy Policy Decisions Under South African Constitutional Law

4.1. Introduction

Chapter 3 established that the operation of the current fleet, as well as electricity supply shortages caused by the current fleet, both affect fundamental human rights. Chapter 4 examines whether the State's energy policy decisions are justiciable under the Constitution and how the courts can enforce constitutional rights when scrutinising these energy policy decisions.

4.2. Constitutional Basis for Judicial Oversight

Clearly, the operation of the current fleet has caused wide-scale suffering and impacted a plethora of rights contained in the Bill of Rights. In *Esau v Minister of Co-Operative Governance and Traditional Affairs*, the court stated that '[…] even in times of national crisis […], the executive has no free hand to act as it pleases, and all of the measures it adopts to meet the exigencies that the nation faces must be rooted in law and comply with the Constitution. The rule of law, a founding value of the Constitution, applies in times of crisis as much as it does in more stable times'.[138]

Murcott and Vinti highlight the duty of the court, couched in peremptory terms in s 172(1)(a) of the Constitution, to declare conduct that is inconsistent with the Constitution invalid.[139] South Africa does not have a strict separation of powers, and the judiciary is ultimately the 'guardian and custodian of the Constitution'.[140] The duty of the court includes

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138 *Esau v Minister of Co-Operative Governance and Traditional Affairs* 2021 (3) SA 593 (SCA) 5.

139 JM Murcott & C Vinti 'The Judge-Made "Duty" to Consider Climate Change in South Africa' (2024) 16 *Journal of Human Rights Practice* 125, 128.

140 Ibid.

the prevention of abuse by other branches of the government and ensuring that the values and the rights of the Constitution are upheld.[141]

4.3. Administrative Law and Policy Decisions in Energy Governance

Recently, in *African Climate Alliance v The Minister of Resources and Energy* (the '*ACA case*'), it was contended by the Respondents that the Minister's power to publish an *Integrated Resource Plan* ('IRP') does not derive from the Electricity Regulation Act, 4 of 2006 ('ERA'), but was a policy-making power.[142] The court confirmed that the appropriate Minister is obliged to determine the policy for the electricity supply and thus to publish the IRP, but that those decisions are not a result of an administrative decision.[143]

The court further stated that an 'administrative decision' does not include a decision by a Cabinet Minister and that PAJA does thus not apply.[144] This is somewhat controversial as the nature of the power exercised will dictate – 'not the identity of the actor'.[145] The executive, including Cabinet Ministers, at times, will exercise functions that are administrative in nature and other times not.[146]

Hoexter highlights that the executive is vested with certain constitutional responsibilities (and pertinently highlights policy-making), which cannot be seen as administrative action.[147] This statement also appears to be qualified as policy formulated

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142 *African Climate Alliance v The Minister of Resources and Energy* (unreported case numbers 56901/2021) [2024] ZAGPPHC 1172 (4 December 2024) 10.

143 Ibid 17.

144 Ibid.

145 *Permanent Secretary, Department of Education and Welfare, Eastern Cape v Ed-U-College (PE) (Section 21 Inc)* 2001 (2) SA 1 (CC) 18.

146 Note 142 above.

147 C Hoexter *Administrative Law in South Africa* 2 ed (2012) 177.

outside of the legislative framework often constitutes a political decision, whereas policy formulated in terms of the executive implementing legislation often constitutes administrative action.[148]

The court in *Breede Valley Onafhanklik v Speaker of Breede Valley Municipality,* in a self-proclaimed oversimplification of the requisite assessment, states that one must consider if it is action surrounding the creation of policy or the implementation thereof and, by extension, which involves 'practical routine decisions that directly affect people's rights and obligations'.[149]

Evidently, distinguishing what ought to be characterised as the implementation of legislation as opposed to the formulation of policy can pose difficulties.[150] However, due to the *UDM* and the *ACA* cases, precedent now leans in favour of the view that the determination of new electricity generation capacity is indeed a policy decision not reviewable under PAJA.

Regardless, all public power is susceptible to scrutiny.[151] If PAJA does not apply, and if the action involves a 'species of public power', the principle of legality will be utilised for the basis of review [152] in terms of s 1(c) read with s 172 of the Constitution.[153]

Importantly, preliminary decisions can have serious consequences. In *Director: Mineral Development, Gauteng Region v Save the Vaal Environment*, the Supreme Court of Appeal reiterated that a preliminary decision may lay the foundation for a possible decision resulting

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148 Note 142 above.

149 *Breede Valley Onafhanklik v Speaker of Breede Valley Municipality* (unreported case number 2613/2023) [2024] ZAWCHC 341 (1 November 2024) 24.

150 *Earthlife Africa Johannesburg v The Minister of Environmental Affairs* High Court Gauteng Division, Pretoria (unreported case number 65662/2016) [2017] ZAGPPHC 58 (8 March 2017) 18.

151 Murcott & Vinti (note 139 above) 129.

152 Note 149 above 22.

153 Ibid 18.

in adverse impacts.[154] Similarly, in the matter of *Sustaining the Wild Coast NPC v Minister of Mineral Resources and Energy*, the court stated that 'the processes are discrete stages in a single process that culminates in the production and combustion of oil and gas, and the emission of greenhouse gases that will exacerbate the climate crisis'.[155] Because matters are justiciable where there is an existing controversy, prejudice, or *threat of prejudice*,[156] early-stage policy decisions (such as including fossil-fuel capacity in the IRP) are justiciable since they form part of the sequence of decisions that ultimately result in rights infringements.

Nevertheless, it is reiterated that the constitutional environmental right is a fundamental, justiciable human right, which requires that environmental considerations be accorded appropriate recognition and respect in the administrative processes.[157] The judiciary recognised that, alongside climate change, the legal and administrative approach to environmental concerns must also evolve.[158]

4.4. Climate Change Considerations in Judicial Precedent

Rising temperatures, water scarcity, and natural disasters linked to climate change pose a substantial risk to sustainable development.[159] Sustainable development requires reasonable

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154 *Director: Mineral Development, Gauteng Region v Save the Vaal Environment* Supreme Court of Appeal (unreported case number 133/1998) [1999] ZASCA 9 (12 March 1998) 17.

155 *Sustaining the Wild Coast NPC v Minister of Mineral Resources and Energy* 2022 (6) SA 589 (ECMk) 124.

156 S Heleba 'Mootness and the Approach to Costs Awards in Constitutional Litigation: A Review of *Christian Roberts v Minister of Social Development* Case No 32838/05 (2010) (TPD)' (2012) 15 *Potchefstroom Electronic Law Journal* 567, 570.

157 DIRECT 20.

158 DIRECT.

159 Murcott & Vinti (note 139 above); Note 150 above.

measures to protect the environment for present and future generations, thus necessitating adequate consideration of climate change.[160]

Earthlife Africa Johannesburg v The Minister of Environmental Affairs[161] ('*Earthlife'*) is widely considered the first South African climate change matter.[162] *Earthlife* surrounded the granting of the appropriate environmental authorisations of a new coal-fired power station and the State's failure to consider the climate change impacts, leading to the finding that the authorisations were inconsistent with the right to administrative justice and with the rule of law.[163]

It was held that s 24O of the National Environmental Management Act, 107 of 1998 ('NEMA') (governing the environmental impact assessments) must give effect to s 24 of the Constitution, specifically that the environment must be protected by securing ecologically sustainable development.[164]

The court also held that a climate change impact assessment is a necessary consideration, specifically when considering the country's international climate change commitments.[165] Section 233 of the Constitution obligates the courts to prefer reasonable interpretations of legislation that are consistent with international law, [166] while s 39(1)(b) of the Constitution obliges courts to consider international law when interpreting the Bill of Rights.[167]

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160 Ibid; Ibid.

161 Note 150 above.

162 Murcott & Vinti (note 139 above) 132.

163 Ibid; Note 150 above 87.

164 Ibid; Ibid 82.

165 Ibid; Ibid 90.

166 Ibid 83; s 233 of the Constitution.

167 Section 39(1)(b) of the Constitution.

Some of the international climate change instruments highlighted in *Earthlife,*[168] in terms of which South Africa is a signatory, include the United Nations Framework Convention on Climate Change,[169] the Kyoto Protocol,[170] and the Paris Agreement.[171]

Even where such instruments have not been domesticated, as set out in Section 231 of the Constitution, [172] they remain highly relevant as an interpretative tool, particularly to 'evaluate and understand our Bill of Rights'. [173]

Section 39(1)(c) of the Constitution further permits the courts to consider foreign law when interpreting the Bill of Rights.[174] Relevant to this discussion, and also against the backdrop of the constitutional duty to protect and improve the natural environment, the

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168 Note 150 above 35.

169 United Nations Framework Convention on Climate Change (adopted 9 May 1992, entered into force 21 March 1994) 1771 UNTS 107 ('UNFCCC').
The object of the UNFCCC is the stabilisation of greenhouse gas concentrations in the atmosphere at a level that would prevent dangerous anthropogenic interference with the climate system whilst acknowledging the common concern of climate change impacts and its adverse impacts on the environment and humankind.
The preamble read with Article 2 of the UNFCCC.

170 Kyoto Protocol to the United Nations Framework Convention on Climate Change (adopted 11 December 1997, entered into force 16 February 2005) 2302 UNTS 162 ('Kyoto Protocol').
The Kyoto Protocol, in pursuit of Article 2 of the UNFCCC, placed emission limitation and reduction commitments on certain signatory states (so-called developed nations) as listed therein.
Article 1 of the Kyoto Protocol.

171 Paris Agreement (adopted 12 December 2015, entered into force 4 November 2016) 3156 UNTS 79 ('Paris Agreement').
The Paris Agreement, also in pursuit of Article 2 of the UNFCCC, aims to strengthen the global response to climate change threats (by all signatory states, including developing countries) in the context of sustainable development and poverty eradication.
Article 2 read with Articles 3 and 4 of the Paris Agreement.

172 Section 231 of the Constitution.

173 *Glenister v President of the Republic of South Africa* 2011 (3) SA 347 (CC) 96.

174 Section 39(1)(c) of the Constitution.

Supreme Court of India, Civil Appellate Jurisdiction, enforced regulations requiring the purchase of a certain amount of electricity generated from renewable energy sources.[175] Some foreign jurisdictions have even found that the respective governments are not taking sufficient action to combat the urgent threats posed by climate change and ordered these governments to increase their climate change mitigation efforts.[176]

Nevertheless, at the time of *Earthlife,* the then legislative suite did not explicitly impose a duty to consider climate change impacts;[177] however, the legislative and policy frameworks (already) 'overwhelmingly' supported the consideration of climate change impacts and mitigation measures when deliberating on whether environmental authorisation must be granted.[178] Officials could account for climate considerations on their own accord.[179]

Nevertheless, Murcott and Vinti highlight that Judges may, through the interpretation of legislation against the backdrop of the Constitution, make law.[180] The judiciary has delivered various 'climate judgments' where the administrative decisions of the executive were held unlawful for the failure to consider climate change.[181] This 'judge's-made-law' must be complied with, or administrative decisions made by the executive branch may be set aside if the judicial interpretation is not adhered to.[182]

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175 *Hindustan Zinc Ltd v Rajasthan Electricity Regulatory Commission* 2015 SCI (Supreme Court of India).

176 *The State of the Netherlands v Stichting Urgenda* 2015 HAZA (Supreme Court of the Netherlands); *Verein Klimaseniorinnen Schweitz v Switzerland* 2024 ECHR (European Court of Human Rights).

177 Murcott & Vinti (note 139 above) 141.

178 Ibid; Note 138 above 91.

179 Murcott & Vinti (note 139 above).

180 Ibid; Section 165 of the Constitution.

181 Ibid 129.

182 Ibid.

4.5. Renewable Energy – The Middle-Ground of Clean and Reliable Electricity and Promoting Socio-Economic Circumstances

Grid failure would undeniably cause a national crisis and human suffering, but the State failed to utilise the avenues available to its disposal to ameliorate the detrimental impacts of the current fleet. Renewable energy projects are the least cost-intensive, yet fossil fuel-based energy investment in South Africa persisted.[183] Further, the implementation of renewable energy resources is 'one of the most efficient and effective solutions' in the pursuit of poverty alleviation, energy security and climate change mitigation.[184] Moreover, South Africa has significant potential for renewable energy generation.[185] Therefore, the impending 'national crisis' (being the electricity grid collapse) cannot be used by the State to escape accountability for its inaction.

4.6. Invoking the Most Substantive Human Right to Cease the Operation of the Current Fleet - the Death Penalty Analogy

Procedural rights, such as the constitutional right to administrative justice, are frequently invoked in challenges in the environmental sphere.[186] Substantive fundamental rights can also be invoked to challenge energy production where it impairs these human rights.[187] In *ACA*, it was stated that the decision to onboard 1500 megawatts of new coal-fired power stations will

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183 Nalule & Acheampong (note 3 above) 41.

184 P Calzadilla & R Mauger 'The UN's New Sustainable Development Agenda and Renewable Energy: the Challenge to reach SDG7 while achieving Energy Justice' (2018) 36 *Journal of Energy & Natural Resources Law* 233, 234.

185 See Adebiyi & Moloi (note 6 above) for statistics on the South African renewable energy source utilization and potential.

186 Murcott (note 26 above) 282.

187 C Redgwell 'Sustainable Development of National Energy Resources: What has International Law got to do with it?' (2017) 8 *Journal of Sustainable Development Law and Policy* 377**,** 389.

impact the rights of present and future generations.[188] The Judge stated that even though the application was 'pointedly in respect of the health rights of children, the general effect of the intended procurement equally impacted on the health rights of a nation as a whole'.[189]

It cannot be denied that the *Deadly Air* and *ACA* cases plainly acknowledge that both the current fleet and planned additional coal-fired power stations are a threat to human health and well-being, which may further impact the right to life as already established. One would wish to argue that judicial precedent has made the onboarding of new coal-fired power plants improbable; however, it is reiterated that the successful attacks predominantly hinged on undue process and the complete lack of consideration of climate change. Nevertheless, the State's own findings indicate that the air pollution caused by the current fleet is causing deaths. This constitutes a multi-faceted breach of fundamental rights.

As soon as an HPA resident passes due to air pollution, the State essentially infringes upon all other rights that vested in the deceased. As the residents of the HPA are dying at the hands of an Organ of State, the continuous operation of the current fleet in the HPA will be equated to the imposition of the death penalty. Therefore, this paper will now return to the seminal *Makwanyane* case.

By its very nature, the death penalty is specifically degrading as it turns the convicted into an 'object to be eliminated by the State'.[190] In *Makwanyane,* the court quotes American Justice Brennan J, who stated that the death penalty treats members of the human race as 'nonhumans, objects to be toyed with and discarded; it is therefore inconsistent with the fundamental premise that even the 'vilest criminal remains a human being possessed of

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188 Note 142 above 1.

189 Ibid.

190 Note 20 above.

common human dignity'.[191] The court then quoted the German Federal Constitutional Court, which stated that the State cannot turn an offender into an object of crime prevention to the detriment of his constitutionally protected rights.[192] Thus, the South African Government cannot be allowed to continue causing the deaths of innocent residents of the HPA when it is not allowed to sentence the 'vilest criminal' to death.

Capital punishment is prohibited as 'allowing the State to kill will cheapen the value of human life'.[193] As a society founded on human rights, the right to life and dignity are to be valued above all else.[194] Sach J stated that the 'Constitution commits the State to affirming and protecting life'.[195] Kentridge AJ, noted that 'wanton killing must stop before it makes a mockery of the civilised, humane and compassionate society which the nation aspires (to be)'.[196]

Kidd points out that the respective ministers involved in the *Deadly Air* matter had the laborious task of balancing health and well-being concerns with the possible interference with an already-tenuous national energy supply.[197] It is so that grid collapse will cause large-scale suffering; however, it is a problem of the government's own making, and it does not stand to reason why the residents of the HPA should be 'sentenced to death' and stripped of all further fundamental rights as a 'punishment' for the government's inaction.

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191 Ibid 57.

192 Ibid 59.

193 Ibid 124.

194 Ibid 144.

195 Ibid 354.

196 Ibid 190.

197 M Kidd 'Deadly Air and the Misinterpretation of the Section 24 Environmental Right: The Groundwork Trust case' (2023) 26 Potchefstroom Electronic Law Journal 1, 7.

In assessing the constitutionality of the death penalty, the Constitutional Court states that the limitation clause (now s 36 of the Constitution)[198] allows for the limitation of constitutional rights where it is reasonable and necessary in a democratic society.[199] In assessing whether an infringement is an unlawful limitation of rights, it must be established whether a guaranteed right is contravened and whether that contravention is justified.[200] This assessment (a proportionality assessment) entails weighing up competing values.[201] The assessment also considers whether the purported limitation can be realistically achieved by an alternative, less destructive of entrenched rights.[202]

The first stage of the assessment is easily dispensed with against the backdrop of the right to life 'which could not possibly be plainer'.[203] Residents of the HPA are dying as a result of the air pollution caused by the current fleet. It is out of dispute and admitted by the State. Naturally, the right to life, the precursor to all other rights, 'weighs heavily in the scale of proportionality'.[204]

Any limitation of rights must be authorised by law.[205] If not, the limitation is unconstitutional.[206] It is unfathomable to consider that any law will allow for the State to cause the death of the HPA residents to ensure a stable and sufficient electricity supply. Even if the argument can be made that there are specific laws which permit the causing of death in favour

198 S36 of the Constitution.

199 Note 20 above 104.

200 Ibid 208.

201 Ibid 104.

202 Ibid 339.

203 Ibid 208.

204 Ibid 342.

205 IM Rautenbach & R Venter *Rautenbach -Malherbe Constitutional Law* 7th ed (2018) 311.

206 Ibid.

of grid stability, it must be a law of general application.[207] A law of general application prohibits that only the rights of specific individuals are to be limited.[208] Accordingly, should a law permit the State to do all things necessary (not merely what is *reasonably* necessary as the law currently stands) to ensure a stable and sufficient electricity supply, even when it results in human fatalities, it cannot operate in such a manner that only a specific group of individuals' rights are limited. It would mean that the right to life of only the HPA residents could be limited to ensure a stable and sufficient supply of electricity. On these grounds alone, the continued operation of the coal-fired power plants in the HPA, which is causing deaths of the HPA residents, is not authorised by law and, even if it were, would not meet the criteria to qualify as a law of general application. As a result, it would not be necessary to investigate whether the limitation is a reasonable and justifiable limitation. The continued operation of the coal-fired power plants of the HPA amounts to an unconstitutional limitation of the right to life.

What is now left to consider is the potential counterargument that the country's socio-economic factors must be considered before decommissioning the current fleet.

4.7. Limits of Socio-Economic Justifications (the Just Transition)

The energy transition will have to consider a country's socio-economic factors.[209] Whilst some argue that poverty alleviation is a difficult feat amidst stringent carbon emission targets,[210] the South African legislature and judiciary recognised that the air quality of South Africa is not conducive to socio-economic development.

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207 RAU 313.

208 RAU.

209 Nalule & Acheampong (note 3 above) 3.

210 M Tao & C Xi 'BRICS Energy Cooperation and Global Energy Governance' (2022) 1 *Contemporary China and World* 118, 125.

The energy transition is not concerned with an outright ban on fossil fuels.[211] Yet, globally, fossil fuel investment is declining, [212] and developing countries, such as South Africa, must look towards structural reform to remain competitive.[213]

Despite fossil fuels being the recognised main contributor to climate change, [214] environmental law does not, generally, require the total elimination of polluting substances (except highly toxic substances).[215] Instead, it requires the balancing of polluting emissions from economic activity with the societal demands for a tolerably healthy environment.[216] However, the balance between environmental and socio-economic concerns is not being struck locally, and could have been reasonably avoided.[217] Activities 'required' for South Africa's economic stability are killing people.[218] As a result, the s 24 environmental right is being violated on an ongoing basis [219] - and with it, the right to life.

4.8. Conclusion

Chapter 4 established that South Africa's energy policy decisions are constitutionally justiciable wherever they threaten fundamental rights (for purposes of this study, the right to life and the right to an environment not harmful to health and well-being). Judicial precedent

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211 VR Nalule & X Mu 'Should Countries Fire Sell their Oil & Gas Assets? Addressing Misconceptions Surrounding the Continued Role of Fossil Fuels in the Energy Transition Era' (2020) 11 *The Journal of Sustainable Development Law and Policy* 432, 434.

212 Nalule & Acheampong (note 3 above) 8.

213 Tao & Xi (note 210 above) 122.

214 Nalule & Mu (note 211 above) 438.

215 Kidd (note 197 above).

216 Ibid.

217 Ibid 19.

218 Ibid 21.

219 Ibid.

confirms that procedural failings, such as ignoring climate and health impacts, render decisions unlawful. It was further established that substantive rights violations (the preventable deaths caused by coal-fired power plants) cannot be justified under socio-economic or policy arguments. The principle of legality and the nature of courts' role have and will compel the State to ensure energy policy reconciles developmental needs with the protection of human rights. In effect, energy decisions that foreseeably harm human health or the environment must be subject to scrutiny, accountability, and remedial action.

CHAPTER 5: CONCLUSION

From the late 1990s, it was warned that South Africa's sole electricity provider, Eskom, would not be able to keep up with the increased electricity demand due to the increased electrification of households. By 2008, this warning became a reality, and Eskom had to resort to the implementation of load shedding to prevent complete grid collapse, which would cause immense human suffering. The electricity supply shortage was further exacerbated by the current fleet, which is currently operating inefficiently due to it reaching its 'end of life' cycle. The judiciary finally held that load shedding infringed multiple fundamental rights, as an electricity supply is needed to realise these rights. It was argued that by the very nature of these rights infringements, load shedding itself caused an environment which is harmful to health and well-being. This is specifically so when one keeps in mind that the concept of the 'environment' includes the environment wherein people live and work, and is not merely confined to the 'wilderness' any longer. It should also be kept in mind that the concepts of 'health' and 'well-being' also do not merely denote the lack of illness but the living of a quality life. That being said, however, the listed human rights infringements brought on by load shedding cease once the electricity supply has been restored.

Conversely, due regard was also given to air pollution-related illnesses and consequent deaths within the HPA, the hub where Eskom's ageing and inefficient current fleet is predominantly located. Climate considerations were naturally also linked to the threat to human lives exacerbated by coal-fired power plants. It was firmly established that the current fleet and potential future coal-fired power plants pose a threat to human health and well-being, as recently reiterated by the judiciary. It was further established that South African legislation (and before that, the judiciary) has made it obligatory to include climate change considerations when decisions are being made. Due recognition is given to the fact that climate change itself contributes to an environment that is harmful to health and well-being and will cause additional deaths. Due to the severity of climate impacts, the executive will have to pay due regard to

climate change concerns or face judicial review through PAJA or the principle of legality where appropriate. It was, however, argued that attacking executive and administrative decisions relating to the current fleet and proposed electricity generation may decrease.

What remains certain, however, is that the current fleet is causing premature deaths of tens of thousands of HPA residents annually. Thus, it infringes upon the right to an environment that is not harmful to health and well-being and, by extension, the right to life. In this regard, the seminal case of *S v Makwanyane* was revisited wherein the Constitutional Court extensively interpreted the right to life. The State ought not to 'cheapen' the value of human life by treating people like objects to be eliminated. The State ought to set an example in this regard but fails to do so as it knowingly causes the deaths (or fails to prevent the deaths) of the HPA residents to avoid socio-economic disaster due to grid collapse (which could have been prevented by reasonably onboarding renewable energy electricity generation). From what is reiterated above, fundamental rights can only be limited by a law of general application, which limitation is reasonably necessary and justifiable in a democratic society. No law permits the causing of human fatalities to ensure a sufficient supply of electricity to the Republic. In fact, the suite of environmental laws provides for the very opposite. Nevertheless, if a law did permit the causing of human fatalities in favour of grid stability, the limitation would still not pass muster as it would not be a law of general application. This is so as it would be deemed that the lives of the HPA residents are worth less than other South Africans and thus can be sacrificed to avoid socio-economic disaster caused by grid collapse. Notwithstanding, in assessing whether the limitation could have been prevented by implementing an alternative solution, it would have been very clear that the limitation would not have been necessary at all if renewable energy had been adopted more readily and the current fleet decommissioned or, at the very least, retrofitted with pollution control mechanisms. The State is, in any event, obligated to promote the air quality of the country.

This discussion was rounded off by briefly considering the probable counter of the 'just transition', which would be that socio-economic growth and poverty alleviation are not easily achieved amidst stringent carbon emission targets; thus, fossil fuels should continue to play a role in society. It is to be noted that the environmental law suite does not aim to eradicate the use of fossil fuels in its entirety. Environmental law aims to strike a balance between socio-economic development and an environment not harmful to health and well-being. Again, this balance is not being struck in South Africa as people are dying in favour of 'socio-economic development', which in itself is a contrary sentiment, as it was previously stated that air pollution is inherently not conducive to socio-economic development.

Protecting fundamental rights and promoting socio-economic development are not mutually exclusive. Renewable energy electricity generation offers a path to achieve both, and invoking substantive rights alongside procedural rights can drive this transition.

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