Lecture 2
THE CONSTITUTION AND THE ENVIRONMENT

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The Constitution of the RSA 1996 (s 24)

- SA’s legal system was brought into a new era in 1994 with the enactment of a Constitution, which included a bill of fundamental human rights.
- The Constitution is the highest law of the land – First point of reference. Contains all ‘Basic’ / ‘fundamental’ law of the land
- Bill of Rights
- Establishes spheres of government: National, provincial, local
- Division of legislative competences
- Division / allocation of administrative responsibilities
‘Environmental right’

• Kind of right
  – Human right (Basic) – The rights of humans to a safe and healthy environment
  – Right of environment itself (only partly addressed) – The rights of the environment itself not to be degraded.
  – Categories of rights
    – Blue (1st Generation: Civil & Political rights of individuals) equality, life, freedoms
    – Red (2nd Generation: Social, Economic, Cultural) right to work, food, housing etc.
    – Green / brown (3rd: Solidarity, Environmental) peace, environmental and to development.

• Environmental Right? – Categorized differently: Some confer an environmental human right and some require the government to protect natural resources and the environment. Some require the citizens of a country to protect the environment.
The ‘environmental right’ (section 24) (1)

- Section 24: 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
    (iii) secure ecologically sustainable development and use of natural resources while promoting justifiable economic and social development.
The ‘environmental right’ (section 24)

(2)

• There are TWO parts to this right:
• Subsection (a) is a fundamental human right while,
• subsection (b) is more in the nature of directing the State to take positive steps towards the attainment of the right.
The ‘environmental right’ (section 24) (3)

• Paragraph (a): Fundamental (human) right
  – ‘Health’ (well established personal right under common law)
  – Each person has a right to an environment that is not detrimental to his/her health.
  – Environment must be conducive and promote the well-being of the human being.

Environment - defined in NEMA
Health - preventing human injury and illness and promoting well-being

Well-being: state of being comfortable, healthy, or happy.
The ‘environmental right’ (section 24) (4)

– ‘Well-being’: meaning of?

• *HTF Developers v The Minister of Environmental Affairs and Tourism* Case 2006 (T): open-ended & incapable of precise meaning…

• The words nevertheless encompass the essence of environmental concern, provides a sense of environmental integrity and that we need to utilise the environment in a morally responsible and ethical manner.

• *Hichange Investments v Cape Produce Co* Case 2004 (E): exposure to a ‘stench’ was regarded as being adverse to one’s health and well-being.

• Also, well-being is not something that directly affects an individual per se. Thus, a person’s well-being can be affected if the environment is being affected in a place that is different to where he/she finds him/herself.
The ‘environmental right’ (section 24) (5)

- Paragraph (b): Directive principle – imposing a constitutional imperative on the state
  – Reasonable measures aimed at objectives in paragraph (b)
  - *Grootboom* Case 2001 (CC) (Based on use of the word Environment Protected, for Present and Future Generations) – The State is required to take reasonable legislative and other measures in order to ensure the directive.
  - Creating laws is not enough, must implement policies as well.

Government vs Grootboom: State is required take reasonable legislative and other measures.
The ‘environmental right’ (section 24) (6)

(i) **prevent pollution and ecological degradation** - Policies must be put into place to sustain the environment we have today so that there can be one for generations to come – obligation placed on the State.

(ii) **promote conservation** - Prevention of decay or loss, ensuring preservation (again, for future generations)

(iii) **secure ecologically sustainable development and use of natural resources while promoting justifiable economic and social development** – First mention of the concept of Sustainable Development

Fuel Retailers v Director General: Environmental Management Case – The Constitution integrates environmental protection and socio-economic development. It envisages that environmental protection will be balanced with socio-economic considerations through the ideal of SD.
Other rights relevant to environmental management

- *Locus standi* clause (section 38) – Anyone who fits the requirements of s38 can approach a court if his/her environmental right is infringed.
- Just administrative action clause (section 33)
- Access to information clause (section 32) – Can use this Constitutional provision to require factory owners to disclose information about air pollution levels etc.
- Property clause (section 25)
- Limitations clause (section 36)
- Interpretation clause (section 39)