HARMONY GOLD MINING COMPANY LIMITED v FREE STATE, DEPARTMENT OF WATER AFFAIRS AND FORESTRY 2005 JDR 0465 (SCA)

Importance	This is a very important case (and one of the very few) dealing with the interpretation of s 19 of the National Water Act 36 of 1998 (NWA). The precedent established by the case is that the obligation to take 'reasonable measures' to prevent pollution in terms of s 19(1) is not confined to reasonable measures that can be effected on one's own land, but extends to land owned, controlled or used by another. However, the court also introduces an interesting distinction between measures that are *preventative* (which he holds is the focus of s 19(1) and (2) of the NWA) and measures which are *necessary* (which he links with s 28(6) of NEMA). The implications of this distinction have not been fully explored in the literature.
Parties	**Appellant:** Harmony Gold Mining Company Ltd **First Respondent:** Regional Director: Free State Department of Water Affairs and Forestry **Second Respondent:** Minister of Water Affairs and Forestry
Facts	Harmony Gold Mining Company Limited was one a few remaining companies operating mines in the KOSH (Klerksdorp – Orkney – Stilfontein – Hartebeespoort) basin (one of the other remaining players being Anglogold). Operations at the northernmost mines in the KOSH basin (Stilfontein, Hartebeesfontein and Buffelsfontein) had ceased. Because groundwater moved from the northernmost to the southernmost mines, dewatering at these mines had to continue to ensure the economic value and safety of Harmony and Anglogold's operations and to prevent the formation of acid mine drainage (AMD – though the court refrains from using this term, see para 2). The northern mines were equipped with infrastructure able to extract a greater amount of water than the pumps maintained at the Harmony and Anglogold mines. The litigation was precipitated by the provisional liquidation of the company controlling the Buffelsfontein mine (which company was, in turn, controlled by DRD Gold). The provisional liquidators let it be known that the Buffelsfontein mine had no funds to pay for continued pumping and that Eskom had threatened to cease supplying electricity to the Buffelsfontein and Hartebeesfontein mines after 12 April 2005. Pumping after that date could only continue if DRD Gold (which also controlled the company operating the Hartebeesfontein mine) joined forces with Stilfontein, Harmony and Anglogold to continue dewatering at the defunct mines. On 11 April 2005 Anglogold applied for an interdict at the Witwatersrand Local Division (WLD) compelling the Minister of Water Affairs and Forestry to direct DRD Gold, the Stilfontein company and the liquidators of the Buffelsfontein company to continue the

	dewatering of the three northern mines. While this application was still pending, the Regional Director of Water Affairs: Free State (acting in terms of powers delegated by the Minister) issued a directive on 13 and 15 April respectively. The directives, issued in terms of s 19(3) of the NWA, were addressed to Harmony, DRD Gold, Anglogold and the company operating the Stilfontein mine and essentially compelled them to share the cost of pumping and treating water in the KOSH basin at the most appropriate locations. To this end, they were to provide the Regional Director with a determination of their financial capacity to contribute to the cost of dewatering at the three northern mines, given the respective surface and underground areas exposed by their operations. The later directive contained more detailed provisions of the shafts at which particular volumes of water needed to be treated, and the obligations of Harmony and the other mines in this regard. Harmony subsequently applied to the Johannesburg High Court (former WLD) for the review and setting aside of the directive in terms of the Promotion of Administrative Justice Act 3 of 2000. The application was dismissed but leave to appeal to the Supreme Court of Appeal (SCA) was granted. Even though the second directive had expired by the time the matter was heard in the SCA, the court decided the issue on the basis that subsequent directives between the same parties would be based on the proper interpretation to be accorded to s 19(3) of the NWA (see para 13).
Relief sought	Appeal against decision of the Johannesburg High Court affirming Harmony Gold's obligation to treat water on land other than its own.
Legal Issues & Judgment	***Issue 1:*** The appellant made a number of submissions but the one deemed most crucial to the outcome of the enquiry was whether s 19(1) of the NWA envisaged that measures to control, remediate or remedy pollution also be taken on land owned or controlled by another (paras 24 & 27). ***Judgment:*** Section 19(1) of the NWA provides that an obligation to take measures to prevent pollution rests upon an *owner of land* of which any activity or process was undertaken or any situation exists. The appellant thus argued that a directive issued in terms of s 19(3) to a person who fails to take such measures is confined to the taking of reasonable measures on the land owned, used or occupied by the person concerned – thus s 19(3) cannot be used to compel a person to take anti-pollution measures on the land of another. The nub of the appellant's argument was therefore that there was a territorial limit to the measures referred to in s 19(1) (para 30). In support of its argument the appellant maintained that if the legislature intended that the obligation to take reasonable measures in terms of s 19(1) extended extra-territorially, then they would have included in s 19 a provision comparable to s 28(6) of the National

	Environmental Management Act 107 of 1998 (which allows for expropriation when a person required to undertake remedial or rehabilitation work reasonably requires access to land of another in order to undertake such work, but cannot acquire such access on reasonable terms). The court rejected this interpretive argument, holding that the focus of both s 19(1) and (2) of the NWA and s 28(1) and (2) of NEMA was on *preventative* measures. By contrast s 28(6) of NEMA was concerned with rehabilitation and remedial work; i.e. where some damage had occurred and restoration needed to be effected. Such measures were *necessary* and not merely reasonable (para 31). On the other hand 'where reasonable measures were required and the person obliged to take them is thwarted by another landowner's refusal of access' the former would probably have done what can 'reasonably' be attempted (ibid). If was therefore not necessary for the legislature to say anything further about the purpose, scope and nature of 'reasonable measures' (ibid). In the court's view there was nothing in the language of s 19 of the NWA to suggest that the 'reasonable measures' required were intended to be confined to the land of the person obliged to take such measures (para 32). The court held that the legislature intended by the term 'reasonable measures' to lay down 'a flexible test dependent on the circumstances of each case' (para 33). On the facts of the case it was a reasonable anti-pollution measure to take steps to prevent groundwater from the defunct mines reaching the active ones. This interpretation was in line with the constitutional (s 24) and statutory anti-pollution objectives which, in terms of s 1(3) of the NWA, had to be preferred to an interpretation that did not give effect to such objectives. The requirement to undertake reasonable measures on the land of another would, furthermore, be for the account of the person undertaking the measures. In the case at hand the mines were being asked to share the costs of the preventative measures. In the court's view this kind of collaboration was not outside the scope of 'reasonable measures' (para 35).
Outcome	The appeal was dismissed.
Obiter	The court noted a relationship between the directives issued in this case and s 21(j) (the water use of removing, discharging or disposing of water found underground). The directives did not at the same time purport to authorize such a water use. The court simply noted that 'it does not matter if the issue of the directives was motivated more by the need to combat flooding than pollution (the focus of s 21(j)). As long as s 19 was legally resorted to there was no impediment to killing two birds with one stone' (para 16). It would thus appear that where an action is the subject of a directive it is not necessary to obtain a

	water use licence for that activity, even though one would ordinarily be required.