

## LIMPOPO COAL COMPANY – MAPUNGUBWE

<b>Importance:</b>	<p>The importance of this case rests, firstly, on the collaboration and co-operation between non-governmental environmental and other organizations which it evinces. This reflects a paradigm shift in the manner in which civil society organizations concerned with the protection of the environment engage in adversarial processes of adjudication. Secondly, the interdict proceedings will potentially provide clarity on the relationship between and sequencing applicable to the granting of a mining right/approval of the EMP in terms of the Mineral and Petroleum Resources Development Act 28 of 2002 (MPRDA) and the issuing of a water use licence in terms of the National Water Act 36 of 1998 (NWA), as well as the status of prohibitions against mining in provincially-declared private nature reserves. It is somewhat disappointing that the current interdict proceedings will probably not result in a precedent related to the many substantive grounds of appeal outlined in the MPRDA s 96 appeal process – these include the adequacy of the provisions on public participation and consultation, the sufficiency of the EMP regarding the identification and evaluation of impacts, the effect of the project on South Africa’s obligations in terms of international environmental law, and the failure to consider adequately land claims submitted in respect of land falling within the mining area. Precedents regarding these issues would require judicial review proceedings of the granting of the mining right/approval of the EMP after the finalization of the appeal. The current proceedings before the Water Tribunal, however, allow for consideration of the adequacy of the substantive grounds upon which the water use licence was granted, provided that the Water Tribunal does not find grounds to dismiss the case on technical or procedural grounds as has been the case in a number of other cases related to water use and mining.</p>
<b>Alleged Facts:</b>	<p>This is a complex case involving multiple authorizations and interventions. The case centres on the establishment of the Vele colliery in Musina, Limpopo Province, by Limpopo Coal (Pty) Ltd, a subsidiary of Australian mining company Coal of Africa (CoAL). The mining area is some 8500 ha in extent and, taking into account the full life of the mine, will at one stage lie 7km from the borders of the Mapungubwe National Park. The area is of significance historically and archeologically, in addition to its abundant biodiversity. The case is unique in that it is being challenged by a coalition of environmental non-governmental and civil society organizations, including the Mapungubwe Action Group (MAG), Endangered Wildlife Trust (EWT), Association of Southern African Professional Archeologists (ASAPA), Peace Parks Foundation (PPF), World Wide Fund for Nature (South Africa) (WWF), Birdlife South Africa (BSA), the Wilderness Foundation, South Africa (WFSA), and the University of Pretoria. Most of these organizations were registered as Interested and Affected Parties (I&amp;APs) during the public participation and consultation process undertaken by Jacana Environmentals CC, Naledi Development Restructured (Pty) Ltd and WSM Leshika on behalf of Limpopo Coal. The public participation and consultation processes took place between May and November 2009.</p> <p>It appears that the Department of Mineral Resources (DMR) granted Limpopo Coal a mining right in respect of the afore-mentioned area on 10</p>

March 2009. The Environmental Management Programme (EMP) was subsequently approved on 29 March 2010.

The documentation available covers the following processes:

- **Process 1: Appeal against granting of a mining right.** Appeals against the granting of the mining right were lodged by a number of the afore-mentioned organizations between 15 and 26 March 2010, whilst a consolidated separate appeal against the approval of the EMP was lodged on 28 April 2010. The period leading up to this was marked by a lack of responsiveness by both the DMR and the legal representatives of Limpopo Coal to make key documentation available to the appellants, including the mining and works programme and a copy of the mining right itself. The outcome of this appeal is still awaited.
- **Process 2: Interdict proceedings.** An application interdicting Limpopo Coal from carrying on any mining or related operations on the Vele mining area was launched by MAG, EWT, PPF, ASAPA, WWF, BSA and WFSA on 3 August 2010. The respondents were Limpopo Coal and the Minister of Mineral Resources and the case is to be heard in the South Gauteng High Court. The first respondent filed an answering affidavit on 24 November 2010. The applicants filed a replying affidavit but the respondents then requested permission to file a replicating affidavit and this is currently awaited. The Centre for Child Law at the University of Pretoria is also attempting to intervene as an *amicus curiae* in the matter, but their application in this regard is being opposed by Limpopo Coal. The Centre for Child Law is arguing from the point of the protection of inter-generational environmental rights.
- **Process 3: Appeal against authorization for rectification in terms of s 24G, NEMA.** Two days after the interdict proceedings were launched, the Environmental Management Inspectorate (Green Scorpions) issued a Compliance Notice to Limpopo Coal, directing it to cease with activities that had commenced without the requisite authorization in terms of the National Environmental Management Act 107 of 1998 (NEMA). These included the construction of roads, the above-ground storage of dangerous goods, activities within the 1:10 year floodline of the Limpopo River, the construction of a sludge dam and the installation of a water pipeline network. Limpopo Coal objected to the Compliance Notice and requested a suspension from the Minister of Water and Environmental Affairs in relation to some of the instructions set out in the notice. While the suspensions were partially granted the Minister refused Limpopo Coal's objection on 9 May 2011.

Subsequent to being issued with the compliance notice, Limpopo Coal submitted two applications for rectification under s 24G of NEMA to the Department of Environmental Affairs (DEA). On or about 11 May 2011, Coal of Africa paid an administrative fine of R9,24 million to DEA, and then on 5 July 2011, the DEA granted an environmental authorization to Limpopo Coal for certain of the

	<p>illegal activities. Seven NGOs subsequently lodged an appeal against the decision to award an environmental authorization in the first s 24G application. The outcome of this appeal is still awaited.</p> <ul style="list-style-type: none"> <li> <b>Process 4: Appeal against granting of a water use licence.</b> The properties constituting the mining area fall within the quaternary catchment of the Limpopo River, which is a shared watercourse with Botswana, Zimbabwe and Mozambique. Limpopo Coal had submitted a water use licence application to the Department of Water Affairs (DWA) in November 2009. Notwithstanding that objections were lodged by a number of NGOs and other affected parties, the DWA granted a WUL for the proposed colliery on 29 March 2011. On 28 July, five NGOs (represented by the Centre for Environmental Rights) launched an appeal in the Water Tribunal against the granting of the licence. The lodging of an appeal automatically suspends the WUL. Despite representations to the contrary, the Minister of Water and Environmental Affairs lifted the suspension on 17 October 2011. Further, a month after it was granted the WUL, Coal of Africa wrote to the DWA requesting an amendment of the licence. Certain amendments were proposed by the DWA on 15 July 2011 which were accepted by Coal of Africa on 18 July 2011. </li> </ul>
<p><b>Forum:</b></p>	<p>Administrative appeal to the D-G/Minister of the Department of Minerals in terms of s 96 of the MPRDA; interdict proceedings in the South Gauteng High Court; administrative appeal to the MEC/Minister of the Department of Environmental Affairs; appeal in the Water Tribunal.</p>
<p><b>Issues for decision:</b></p>	<p>The processes outlined above raise the following key issues:</p> <p>Regarding <b>process 1:</b></p> <ul style="list-style-type: none"> <li> <b>Insufficient and inappropriate consultation.</b> Apart from the fact that not all direct neighbours of the proposed mine appeared to have been consulted, the only difference between the first version (May 2009, pre-consultation) and the final version of the EMP (November 2009, post-consultation) is a change to the distance between the proposed mine and Mapungubwe on p. 45 of the 180 page document – this notwithstanding the numerous comments and contributions made by I&amp;APs in the consultation process. As such it points to formulaic and superficial compliance with the provisions relating to public participation and consultation. </li> <li> <b>Failure to consider objections at RMDEC or to take RMDEC recommendations into account.</b> A number of objections to the project were submitted in terms of s 10 of the MPRDA. By law the Regional Mining Development and Environmental Committee (RMDEC) was obliged to consider these and submit recommendations to the Minister of Mineral Resources. Although the EWT was granted an opportunity to address the RMDEC of its concerns, the RMDEC meeting at which this was to occur was postponed. No further notice of a RMDEC meeting at which objections to the Vele colliery were considered was received by the </li> </ul>

appellants and to the best of their knowledge none took place prior to the approval of the EMP. This points to either a procedural flaw in the functioning of the RMDEC and/or in the exercise of the Minister's discretion to approve the EMP (as, in terms of s 39(4)(b)(i) of the MPRDA, she *may not* approve the EMP until she has considered any recommendation of the RMDEC).

- **EMPR was insufficient.** The appellants argued that the EMP submitted by Limpopo Coal and approved by the DMR insufficiently described the nature of the impacts, alternately the significance thereof on: Archeological and heritage resources; biodiversity; water; ambient air quality; and existing socio-economic dynamics in the area.
- **Mining in sensitive areas.** The proximity of the proposed mine to sensitive landscapes and, more importantly, the effect of the colliery as a precedent for future development of mining in the area is a concern. Moreover, the colliery is situated on land proclaimed as private nature reserves in 1965, being the Skutwater and Sighetti Nature Reserves respectively. Each of these private nature reserves was proclaimed both as a 'game reserve' and as a 'native flora reserve' in terms of the Transvaal Game Ordinance 23 of 1949 and the Transvaal Native Flora Protection Ordinance 9 of 1940 respectively. These ordinances were repealed by the Transvaal Nature Conservation Ordinance 17 of 1967, which was in turn repealed by the Transvaal Nature Conservation Ordinance 12 of 1983, in turn repealed by the Limpopo Environmental Management Act 7 of 2003 (LEMA). All of the repealing laws preserved things done under the repealed legislation (i.e. including the declaration of private nature reserves) and provided for the establishment of private nature reserves. In terms of s 28(1)(a) of the LEMA no mining whatsoever may be authorized on private nature reserves. Such reserves also receive protection under s 48(1) read with s 12 of the National Environmental Management: Protected Areas Act 57 of 2003.
- **Non-compliance with international obligations.** The impact of the proposed project on South Africa's obligations in terms of a number of multilateral environmental agreements (MEAs) was not properly considered in the EMP and thus in the approval of the project. The relevant MEAs include the World Heritage Convention, the Ramsar Convention, the Convention on Biological Diversity, the SADC Protocol on Wildlife and Law Enforcement, the SADC Revised Protocol on the Use of Shared Watercourse Systems and the SADC Protocol on Mining.
- **Failure to obtain a water use licence.** The mining right was granted and the EMP approved almost a year before a valid water use licence was granted by the DWA. This means that considerations particular to the impact of the proposed colliery on water resources in the area were not properly taken into account in the DMR's authorization process.

- **Failure to consider land claims in the mining area.** The EMP for the proposed project failed to make any reference to the restitution claim of the Ga-Machete community to farms falling within the project area, viz. the farms Bergen op Zoom 124, Overvlakte 125 and Semple. The matter was referred to the Land Claims Court by the Land Claims Commission on 1 October 2009. This also raises the issue of preferent mining rights for such community if the land claim is successful.

Regarding **process 2**: The issues are substantively similar, although reorganized in terms of three key causes of action, as follows;

- **Failure to obtain a valid water use licence (the 'water interdict').** The applicants seek an order from the court in terms of which Limpopo Coal is interdicted from carrying on any mining or related operations on the Vele mining area without a licence to do so in terms of the NWA.
- **Mining in private nature reserves (the 'nature reserve interdict').** The applicants seek an order of court interdicting Limpopo Coal from mining on the areas of land which have been declared private nature reserves in terms of provincial legislation.
- **Finalization of the MPRDA appeal (the 'interim interdict').** In light of the Minister's failure to exercise a discretion to suspend the mining right pending finalization of the appeal, the applicants seek an order interdicting Limpopo Coal from carrying on any mining or related operations on the Vele mining area pending the finalization of the appeal, alternately the judicial review of the appeal. In this regard the applicants point to the strength of their arguments against the granting of the mining right and approval of the EMP.

No further documentation is available in respect of **process 3**.

Regarding **process 4**:

- **Grounds of appeal.** The appeal currently before the Water Tribunal is based on 17 grounds of appeal specific to the impact of the Vele colliery on water resources in the area. These are as follows: (1) the Reserve determination for the WUL is based on incorrect estimates of the basic human needs component of the Reserve approved without authority; (2) water management strategies and similar instruments applicable to the relevant water resource were not taken into account; (3) the probable duration of the proposed mining operation was not properly considered; (4) the impacts on other water users were not taken into account; (5) the socio-economic impacts of the water use were not adequately taken into account; (6) the issuing of the WUL perpetuates instead of redresses the results of past racial and gender discrimination; (7) the strategic importance of the proposed water use was not taken into account; (8) the quality of the water required for meeting South Africa's international obligations was not considered; (9) the approval of the WUL does not qualify as an 'efficient and beneficial use of water in the public interest'; (10) comments from other

	<p>affected authorities were not considered; (11) the impacts of climate change and water security were not adequately considered, if at all; (12) the impacts on food security were not adequately considered, if at all; (13) the environmental management principles of NEMA were not adequately considered; (14) investments already made or to be made by the water user were inappropriately considered; (15) the decision was based on inaccurate information about the distance of mining from the Limpopo River; (16) the decision is unjustifiable on the basis of Limpopo Coal’s previous non-compliance with water legislation; and (17) inadequate public participation and consultation.</p> <ul style="list-style-type: none"><li>• <b>Lack of public participation in subsequent WUL amendments.</b> The bilateral process which unfolded between the mining company and the regulator regarding the amendment of the WUL a month after it was granted raises the issue of the lack of public participation in the amendment process and the extent to which this may be used to strategically avoid submitting key issues to scrutiny by I&amp;APs.</li></ul>
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**Paper Trail:** Documentation pertaining to this case is already available and organized on the website of the Centre for Environmental Rights (see <http://cer.org.za/hot-topics/mapungubwe/>).