

REX v MARSHALL & ANOTHER [1951] 2 All SA 440 (A)

Importance	An important case for historical purposes as it clearly demonstrates that authorities were holding mines criminally liable for the release of acid mine drainage as early as the 1950s. The case provides some interpretive guidance to reg. 7(2) of the Miners and Works Regulations, 1937. Significantly, the court found that reg. 7(2) was neither void for vagueness, nor unreasonableness nor <i>ultra vires</i> the empowering provision. The court did not shy away from dealing with the difficulties arising in relation to the causal effect of the mining activities on the water but offered a pragmatic response to each technical point raised by the defence.
Parties	First appellant: Manager of Natal Cambrian Collieries Ltd Second appellant: Resident engineer of Natal Cambrian Collieries Ltd
Facts	Natal Cambrian Collieries owned the farms Frede and Try Again at Dannhauser in the district of Newcastle, Natal. The company carried on coal mining operations. The water from the mouth of the mine, situated on Frede, passed over these two farms and eventually found its way into a small stream that crossed a number of lower-lying farms. It was alleged that between April and August 1948 the mine had allowed water containing injurious matter to escape from the mine without first being treated. Samples of water taken at various points along this stream were found to contain unwholesome matter and to be highly acid. The Crown maintained that the deleterious ingredients had been introduced into the stream by the mine in contravention of Reg. 7(2) of the Mines and Works Regulations, 1937 (published in GG 1124 of 1937 and promulgated by virtue of Act 12 of 1911). Regulation 7(2) provided that: 'In no case may water containing any injurious matter in suspension or solution be permitted to escape without having been previously rendered innocuous'. Taking into account the designation of responsible persons in regs 157(1) and 177(2) of the regulations respectively, the manager and resident engineer were charged in the magistrates' court where they were found guilty and sentenced to a fine of £5 each. An appeal against their convictions to the Natal Provincial Division was dismissed.
Relief sought	Appeal against conviction for contravention of reg. 7(2) of the Mines and Works Regulations, 1937.
Legal Issues & Judgment	The case dealt with issues of fact and law. Although the court's decision on the facts do not create precedent, they are covered in this fact sheet to demonstrate the manner in which the court dealt with the facts. Issue 1 (Factual): The appellants argued that the Crown had not proved that the objectionable ingredients in the water came from the mine, suggesting instead that the stream passed through a contaminated bed.

	<p>Judgment: The Crown had not placed before the court analyses of the water taken from the point at which it issued from the mine. However, it had gained the impression that ‘it was assumed on both sides to be common knowledge that the mine produces acid water’ (at 440). The court also referred to the evidence submitted by one Robert Charles Ferguson, the manager of Natal Cambrian Collieries from April 1924 to January 1947, who clearly affirmed that acid mine water issued from the mine and described the various methods the mine had employed (during his tenure) to treat it. After analyzing the water samples which had been submitted by the Crown, the court found that it had been established beyond reasonable doubt that the source of the acidity and the excess of solids and sulphuric oxide found in the stream during July and August 1948 was the mine water (at 445). The court said: ‘The indications are too strong to be upset by the mere suggestion of a theoretical possibility of contamination by acid beds in the stream with no evidence whatever of the presence of such beds or of any likely cause of them’ (ibid). There was also evidence that the farmers downstream had been complaining about the water for years.</p>
	<p>Issue 2 (Factual): It was argued that the prosecution had failed to prove that the water was injurious. There was both evidence that cattle which had drunk from the stream below the mine had sickened and died, and evidence that cattle belonging to various people which grazed on the mine property regularly drank from the stream without any apparent ill effects.</p> <p>Judgment: The court held that the evidence on the effect of the water on cattle was not conclusive one way or another (at 446). The court preferred to rely on the testimony of the Government Analyst who had maintained that the water should not be used for domestic use, for animals or for irrigation, and the expert for the prosecution, Dr D.G. Steyn who testified that at least half of the water samples were toxic to animals (ibid). The advocate for the defence then suggested that there could be other substances in the water that would have a neutralizing effect on the substances that were harmful to animals and humans, but the court found that these suggestions were not strong enough to nullify Dr Steyn’s testimony (ibid).</p>
	<p>Issue 3 (Legal): The defence contended that reg. 7(2) was void for vagueness, since no definite meaning could be assigned to the words ‘injurious’, ‘innocuous’ and ‘escape’.</p> <p>Judgment: The court held that in ordinary parlance to describe water was ‘injurious’ was to find that it was ‘unfit for human or animal consumption, dangerous to animal life, and unsuitable for irrigation’, and ‘innocuous’ carried the opposite meaning. For water to ‘escape’ was for it to escape from a place where it was not causing damage to a place where it does or is likely to do so. Thus the water could have ‘escaped’ even whilst still on the Company property. (at 447).</p>
	<p>Issue 4 (Legal): The defence further contended that even if the</p>

	<p>meaning of the words ‘injurious’ and ‘escape’ were not so vague as to invalidate the regulation, they were wide enough to make the regulation <i>ultra vires</i> the empowering legislation. The empowering legislation was s 4(1) of Act 12 of 1911 which entitled the Governor-General to make regulations ‘in respect of or in connection with ... the safety and health of people employed in or about mines and works, and generally of persons, property and public traffic’ (s 4(1)(l)). This was in addition to an ‘omnibus’ provision allowing for regulations ‘ensuring the property working and management of all mines ...’.</p> <p>Judgment: The court rejected this argument as well, holding that ‘injurious’ in its ordinary connotation means detrimental to the safety or health of persons or property, thus falling within the ambit of s 4(1)(l) (at 448).</p> <p>Issue 5 (Legal): The defence further contended that re. 7(2) was void for unreasonableness, since water had to be discharged somewhere and the regulation required an absolute standard of purity which it could be possible to attain.</p> <p>Judgment: The court rejected this argument, holding that a satisfactory degree of innocuousness could, and indeed had in the past, been maintained (at 449).</p> <p>Issue 6 (Legal): The defence argued that the use of the word ‘permit’ required a wrongful state of mind – neglect or wrongful act with knowledge of the results it would entail.</p> <p>Judgment: The court held that it was unnecessary to decide whether the regulation required <i>mens rea</i> on the part of the manager and resident engineer because the evidence before the court established that some neglect was attributable to both parties (at 450).</p>
Outcome	The appeal was dismissed and the convictions of the manager and resident engineer were confirmed.
Obiter	None.