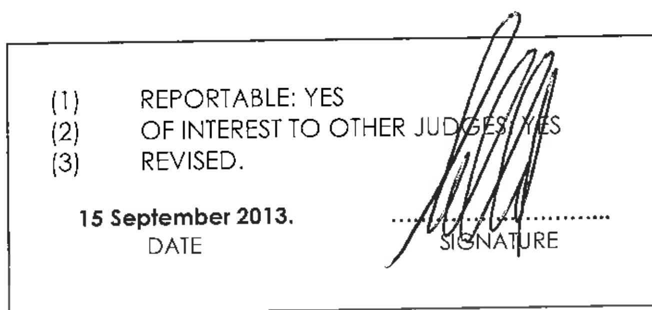
REPUBLIC OF SOUTH AFRICA

IN THE SOUTH GAUTENG HIGH COURT
JOHANNESBURG

CASE NO: 13852/2013
Date: 03/09/2013



(1) REPORTABLE: YES
(2) OF INTEREST TO OTHER JUDGES: YES
(3) REVISED.

15 September 2013. ....
DATE SIGNATURE

In the matter between

SPACE SECURITISATION (PTY) LIMITED	Applicant
and	
TRANS CALEDON TUNNEL AUTHORITY	First Respondent
THE MINISTER OF WATER AND ENVIRONMENTAL AFFAIRS	Second Respondent
DEAPRTMENT OF WATER AFAIRS	Third Respondent
GROUP FIVE	Fourth Respondent
DEPARTMENT OF ENVIRONMENTAL AFFAIRS	Fifth Respondent

JUDGMENT

VICTOR J:

[1] The issue for determination in this case is whether an interim interdict can be granted to stop short-term remedial measures put in place to treat acid mine drainage (AMD). The purpose of the treatment plant is to avert an imminent environmental crisis. The second issue for determination is whether an interim interdict can be granted preventing the first or second respondents from giving effect to a decision to expropriate a right of servitude across the applicant's property. This servitude is an integral part of the treatment plant processes.

[2] The two competing interests of the applicant and the respondents are not unlike the dilemmas facing ancient mariners passing between the mythical sea monsters of Charybdis and Scylla. On the one hand the applicant seeks to erect 2000 housing units which will assist the City of Johannesburg beset by a critical shortage of housing and on the other hand it faces a prospect of being overwhelmed by the environmental scourge of AMD, the result of gold mining which created its wealth.

[3] The applicant is a property owner of Portion 228, a portion of Portion 229 of the farm Rietfontein, (the property), and seeks an urgent interim interdict for the cessation of the building works of an AMD treatment plant on the adjacent property pending the final determination of a judicial review. The judicial review application raises the respondent's lack of statutory compliance for the construction of an acid mine drainage treatment plant for the Central basin of the Witwatersrand Gold Fields and the construction of pipelines which will run underground through the applicant's property.

[4] The applicants claim that the respondents in carrying out the remedial work have breached aspects critical to environmental good governance and justice. These breaches include several statutory provisions inconsistent with the principle of legality such as a flawed public participation process and the lack of powers by the first respondent to expropriate and register a servitude over the applicant's land,

Environmental litigation and conciliation

[5] Environmental litigation because of its critical and sometimes urgent nature, as in this case, dictates that it is prudent for a court to ask the parties whether there has been meaningful engagement prior to commencement of litigation. I also asked the parties whether there would be any value in engaging in meaningful debate and seeing whether some sort of compromise arrangement could be arrived at. Unfortunately the parties ultimately were too far apart. Environmental mediation as a tool to solve very difficult problems is still an emerging approach in South African environmental jurisprudence.

[6] This invitation led the applicants to request the court to exercise its discretion and direct in accordance with Section 17(3) of the National Environmental Act 107 of 1998 (NEMA) that the parties submit the dispute to a conciliator appointed by the Director General in terms of NEMA. The applicant insisted on the immediate suspension of the works. As can be seen from the balance of convenience determination the suspension of construction pending the outcome of the conciliation process would involve huge environmental risks and incur substantial penalties for standing time. The respondents were prepared to submit to conciliation provided that the works in question were not stopped. At an earlier stage and prior to my input the applicant prepared an agenda for discussion. The debate on the agenda proved fruitless as the adversarial atmosphere was intense and at that stage inconsistent with conciliation.

Urgency

[7] On 19 April 2013 the applicant launched an urgent application. No blame can be apportioned to the applicant that the matter was only heard on 25 July 2013. The court roll did not facilitate an earlier hearing. On the further question on whether the application should have launched as one of urgency at all I found that because of the importance and far reaching consequences to the applicant and its rights of ownership and also because of the environmental and public interest issues raised, the argument on lack

urgency could not be upheld. Environmental litigation cannot be viewed and scrutinised by the strict and clinical application of rules pertaining urgency. A broader approach to context and scientific consequence is necessary.

[8] In this case the slow start by the respondents to address AMD was manifest and only gained momentum from 2011 onwards and is not dissimilar to the initial lack of urgency with which the applicant approached the matter. It only gained an incremental urgent note when a portion of their property was expropriated and the construction of the treatment plant became more visible.

What is AMD?

[9] The Witwatersrand Gold Fields is split into three main basins, namely the western, central and eastern basin. The Western Basin lies between Randfontein and Krugersdorp. The Central Basin which is the issue for determination in this application is 45 kilometres long and lies between Roodepoort and Germiston. The other basin is the Eastern Basin which lies between Springs and Nigel.

[10] These basins were formed as a result of mining activity during the excavation of mine tunnels and shafts across the gold fields. These basins were formed when rock was removed from mine tunnels and shafts leaving open areas known as voids.

[11] While the mines were operational the water entering the mine void was removed by pumping to the surface, but this ceased when the mines were no longer operational. In 2008 pumping in the Central Basin ceased after a mine related incident occurred when two people died from the gaseous discharge during the pumping process. The relevant authority ordered the pumping to cease. If the water is not pumped out it rises and fills the mine voids and the sulphide minerals in the rocks exposed to water and oxygen form acidic water. This acidic water starts reaching an environmentally critical level and if left further it decants onto the surface.

[12] Of importance in determining whether to grant the interim relief in this matter is the determination of the date on which the environmental critical level, (ECL) would be reached. The projected date on which the ECL would be reached was determined during the investigation and due diligence stage and the anticipated date was approximately August 2013.. The ECL is defined as the water level in a mine void where interaction between ground water and surface water sources is negligible or the level below which the contaminated acid mine water will not mix and impact with the surface water bodies or near-surface aquifer ground water and hence impact on ground water users.

[13] For the Central Basin the ECL was set taking into account the protection of weathered and fractured aquifers which extend 80 to 100 metres below the surface. In order to ensure that the acid mine water would never enter the aquifer an additional 50 metres buffer was included.

[14] Mr. Seeth an expert in a further affidavit requested by the court to confirm the date on which ECL would be reached relied upon a conservative and risk averse approach. He opined that the ECL was defined as being 150 metres below the potential decant point, which in this instance in the central basin is the Cinderella East shaft. This meant that the ECL was placed in the Central Basin at 1467 metres above mean sea level (mamsl). The date for ECL was confirmed to be August 2013.

[15] The scoping report also referred to the devastating sequelae that could result if the AMD reaches the ECL level and reaches the point of decant. A lot of research has already been done in relation to the Western Basin where decant level was reached because of lack of intervention to treat the water. The AMD breached the ECL and decant occurred into the surface water and streams. The result was devastating to surrounding communities, farmers, flora and fauna.

[16] In the scoping report reference is made to the fact that should the ECL level be reached tourist attractions and historical sights such as

Gold Reef City would be severely affected. The rise in the ECL into the ground water systems could affect the dolomitic aquifer to the south and rise to the surface decanting in low lying areas in the vicinity of the ERPM Mine in Boksburg. Decant could also take place in other areas across the Witwatersrand. Whilst extensive peer review reports on these scientific conclusions and on decant were not lodged, the applicant's own scientist Mr Louis Botha reached similar conclusions on the date on which ECL levels would be reached.

[17] Data from two sampling sites in the Elsburg Spruit and the Kliprivier upstream of Henley on Klip show that there is already a downstream effect of AMD discharge. This particular scientific investigation has not reached its final conclusion, but it was not disputed that there was evidence of AMD in surface streams. The question of polluted surface water ingress into the mine voids from disused mine dumps was also raised.

Environmental governance and adherence to the statutory framework

[18] It is the applicant's case that what has happened is inconsistent with legality and that the respondents are abusing their statutory powers. The applicant claims that access to information and the public participation process was a fundamentally flawed process and thus affects the principle of legality.

[19] The applicant complains that the respondents were initially inert about the AMD problem and then suddenly decided to do something about it. The applicant notes that the mines stopped pumping out water from the mines a long time ago and despite the warnings by various scientists did nothing about it. The respondents have certainly known since 2011 what the import of the potential catastrophe was and then declared it to be an emergency. There was somewhat of a rush through the statutory compliance procedures and the applicant claims prejudice because of this. The applicant claims that proper access to information and public participation would have led to a

more balanced environmental decision. For example the treatment plant could have been placed elsewhere.

[20] The review court will ultimately have to consider the following issues, whether the Minister's decision of 5 April 2011 to direct the Trans Caledon Tunnel Authority, that is first respondent under Section 103 (2) of the National Water Act 36 of 1998, (the National Water Act) to undertake emergency works to treat the AMD in the Witwatersrand Gold Fields; secondly the Minister's decision of 28 September 2012 in terms of Section 110 (2) (a) of the National Water Act to declare all measures that the Department of Water Affairs, the second respondent, might implement to mitigate the impact of AMD in the Witwatersrand Gold Fields to be of an emergency nature and not subject to the approval of an environmental impact assessment before construction of the plant commenced and to declare that the works required to discharge the neutralised AMD into receiving rivers is of a temporary nature of less than 5 years and not subject to the EIA process. In addition the fifth respondent's decision of 7 January 2013 to grant the Department of Water Affairs an authorisation, an IEA, to abstract, store and treat AMD and to discharge the treated AMD and waste and to grant the Department of Water Affairs exemption from compliance with Regulation 31, Regulation 32, Regulation 33(B) and Regulation 34 of the NEMA Regulations; also the decision of the Trans Caledon Tunnel Authority, the Minister and or Department of Water Affairs to construct an AMD treatment plant for the central basin of the Witwatersrand Gold Fields and to undertake ancillary work on a property adjacent to the applicant's property in Germiston; the decision of 8 April 2013 of the Trans Caledon Tunnel Authority or the Minister to expropriate a right of servitude over the applicant's property and to construct three underground pipelines in the area of the servitude to discharge treated AMD and waste elsewhere.

Interim Relief

[21] The requirements for interim relief are trite and were well traversed in argument. Each of the respondents dealt in detail with each of the essentials

of interim relief. The primary focus of the applicant on the question of interim relief was that it had a prima facie right and that its case was one of the clearest to justify the halt of the construction of the treatment plant.

[22] It is important to note that this interim application will not traverse areas relevant to the final review relief sought, however the scientific detail of AMD is a core consideration to the determination of interim relief.

[23] The purpose of the applicant's interim interdict is to protect its property rights. It has already spent tens of millions of Rands, in excess of R35 million in purchasing the property and has already received the relevant local authority's approval to erect the housing estate which will be known as Shaft City. The photographs of the treatment plant in progress submitted by Mr. Young on behalf of the first respondent depict fairly heavy industrial activity in the surrounding area. Despite this the applicants complaint is that the impact of this treatment plant would be noisy and smelly because of the open ponds. The photographs show the ponds are within a couple of metres of the applicant's fence.

[24] It is the applicant's case that the environmental impact assessments were truncated and that despite the perilous context described by the respondents the court should not hesitate to grant interim relief as the extent and ambit of the applicant's rights had to be weighed equally against those of the respondents.

Balance of Convenience and the separation of powers doctrine

[25] The first respondent raised the question of the balance of convenience very fully. In the case of *National Treasury and Others vs. Opposition to Urban Tolling Alliance and others,* 2012 (6), CC 223, at para 47.

'The test is that the balance of convenience inquiry must

carefully probe whether and to which extent the restraining order will probably intrude in the exclusive terrain in another branch of government. The inquiry must along other relevant harm have proper regard to what may be called the separation of powers harm and the court must bear in mind that the temporary restraint against the exercise of statutory power well ahead of the final adjudication of a claimant's case may be granted in only the clearest of cases and after a careful consideration of the separation of powers harm. It is neither prudent, nor necessary, to define clearest of cases, however one important consideration would be whether the harm appreciated by the claimant amounts to a breach of one or more of the fundamental rights warranted by the bill of rights.'

[26] Moseneke DCJ supra also referred to the separation of powers doctrine as an important consideration when the balance of convenience is assessed in relation to interim relief. In *Doctors for Life International vs. the Speaker of the National Assembly & Others*, 2006 (6), SA 41 (CC) the question of where the Constitution or valid legislation entrusts specific powers and functions to a particular branch of government, courts may not usurp that power or function by making a decision of their preference. It is necessary for a court to consider the question of judicial deference to the decision made as in this case by the inter-governmental teams tasked with dealing with the AMD problem. The problem of AMD is manifestly polycentric in nature but this does not prevent a court from scrutinizing whether there has been non compliance with the processes defined by the statutes. The government response to an environmental crisis is not fraught with policy laden considerations and in this case every step taken was in essence based on current scientific data and input from experts. In this case the respondents are not 'immunized from judicial review'. See supra National Treasury supra at paras 63 and 64. If regard be had to the complexity of the scientific context and the statutory process this is not one of the clearest cases justifying judicial intervention in what would be a critical stage in the remediation process.

[27] It is the applicant's case that its case presents an example of one of the clearest cases for interim intervention as its rights qua owner have been infringed as well as non adherence by the respondents to the processes set out in the relevant legislation. As a neighbouring property owner, it was not properly incorporated into the public participation process and the respondents did not fully interact with the applicant in taking the decisions that they have taken.

[28] As part of good environmental governance the applicant sought to demonstrate that public participation must be meaningful, and not mechanical and tokenistic. During the course of argument the applicant sought to extend its locus standi to speak for other groups who would be affected in the neighbourhood and downstream. The extension of this standing argument was commendable but this was not the case the respondents were called to court to meet.

[29] The further attack by the applicant is that the Minister of Water Affairs is not statutorily entitled to delegate the AMD project to the first respondent. It was also not empowered to expropriate property for the purposes of the AMD project and was not entitled to act under the integrated environmental authorisations (EA) (akin to a licence to collect and discharge water), because the EA was issued to the Department of Water Affairs and not to the first respondent. In *Aquatur (Pty) Ltd v Sacks and others* 1989 (1) SA 56 (A) it was held that a licence was a purely personal statutory privilege granted to a particular person under the liquor laws to sell liquor at particular premises. Its grant involves the exercise by the licensing authorities of a delectus personae so that the licensee cannot transfer or otherwise deal with the licence unless authorised by the statute. The statutory context of the grant of an EA cannot be compared to a grant of licence in a different statute.

[30] It was on that basis therefore that the applicant asked the court to intervene to stop the works and to at least allow the applicant an opportunity to interact with the respondents in a measured and moderate way so that the

review court ultimately would not to be faced with a fait accompli

[31] Reference was also made to the article of an academic R. Summers – "Where certainty and legality collide: the efficacy of interdictory relief for the cessation of building works pending review proceedings". He emphasised that the court should not hesitate to intervene where there has been collision of competing interests.

[32 It was submitted on behalf of the first respondent in a very detailed argument incorporating facts, figures and in particular the devastating effects to the environment should an interdict be granted.

[33] The first respondent referred to the sections in the record and contended that its appointment was lawful. In particular, the response to the fact that the Minister was not entitled to delegate the AMD project to it was to be answered in the very legislation referred to. Although the first respondent was established to implement international agreements it can take on other work where it was able to do so and in this case it is the first respondent's argument that it was able to do so and it was in fact such a body.

[34] The Trans Caledon Tunnel Authority was established in terms of Section 138(A) of the Repealed Water Act 54 of 1956 to execute the Lesotho Highlands Project. When that Act was repealed the National Water Act was enacted and the Trans Caledon Tunnel Authority's existence and status was maintained under Section 108 of the National Water Act. In other words it is clear that the Minister can delegate her powers and duties to the first respondent.

[35] For example, Section 103(2) of the National Water Act provides that the first respondent can perform additional functions also of a non-treaty nature. In terms of Section 103(2) it can undertake management services, financial services and training and other support services but is not limited to those functions. It is not the applicant's case that the first respondent does not have the capacity to do this work. The applicant's submission on the lack

of the first respondent's authority and statutory ability to operate in this genre of work must fail.

[36] In addition it is the applicant's case that the first respondent did not have the right to expropriate the area to lay its pipes. The answer to that is also to be found in the legislation. Section 25(2) of the Constitution allows expropriation in the public interest so does s 64 of the National Water Act allow expropriation in the circumstances required to promote the purpose of the act. On 6 April 2011 the Minister authorised the first respondent in writing to expropriate an area of applicant's land.

[37] In *Bengwenyama Minerals (Pty) Ltd and others v Genorah Resources (Pty) Ltd and others* 2011 (4) SA 113 (CC) Froneman J stated at para [45]

> 'In modern government it is a practical necessity that functions assigned by the Constitution and legislation often need to be performed by administrative officials. These functions may be performed under assignment or delegation. What usually distinguishes delegation in its many forms from assignment is that the delegator retains final control over the decision taken by the delegatee in her name. As Kriegler J put it in Executive Council, Western Cape Legislature, and Others v President of the Republic of South Africa and Others, delegation 'postulates revocable transmission of subsidiary authority'. What kind of control is retained by the delegator depends on the purpose of the delegation and the specific terms regulating the delegation in the applicable legislation.'

[38] In this case the delegation was expressly limited and well defined. It is a practical necessity that the performance of projects such as this one be delegated to an appropriate statutory entity and where necessary to expropriate land for the needs of that particular project. The first respondent's submission must therefore be accepted that it was entitled to take on this additional emergency water project with the right to expropriate land with proper delegated authority as was demonstrated in the

documentation attached to the application.

[39] The applicant attacked the environmental authorisation (EA) and submitted that it could only be issued in the name of the third respondent. This was not raised in the affidavits but be that as it may, the first respondent was successfully able to demonstrate that it had been expressly authorised to implement the project and in implementing that project it was therefore entitled to act under the environmental authorisation and the exemptions granted to the Department of Water Affairs.

[40] A further important aspect in relation to the balance of convenience was the affidavit admitted by agreement between the parties as to the current state of the project. According to the affidavit of Mr. Allan Young who is the principle technical manager of the project, he states that the main civil works are approximately 50 percent complete. All the major items of mechanical equipment have been ordered and are in the process of being manufactured. Orders have been placed for the electrical power supply and switch gear and the manufacturing of those items have commenced. These are not stock items, they are items which have to be manufactured and customised.

[41] In addition, the main dewatering pumps ordered have been manufactured and were at that stage in the process of being shipped from Germany. The manufacturing of stainless steel pipes has commenced.

[42] The amount spent on the project to date is R316 149 413. In addition to those costs, if the project were to be suspended the following costs would be incurred: the standing time would be approximately R10 million per month made up as follows, R3 364 985 per month in respect of time related preliminary and general costs, 2 331 590 per month in respect of Group Five's plant standing time as well as R3 812 500 for Group Five's labour standing time and an estimated cost of R500 000.00 per month for the cost of closing, securing and reopening the AMD project site and restarting the project works. Should the project be halted, there would be damages claims

in the region of R200 mill.

[43] Photographs of the progress of the plant were attached to his affidavit. It is clear that the treatment plant from a building perspective has progressed quite substantially and there are already four ponds which would accommodate the treatment of the sludge which would come from neutralising the acid water. It is this aspect which the applicant claims will cause the odour. If regard be had to the area depicted on the photograph there are many industries and the applicant fears that the end treatment process on that particular site will give rise to smells and other environmental hazards. No expert report was available on exactly what the adverse effects would be. In any event, the applicants contend that it would be detrimental to the intended housing estate.

[44] It would also appear that the local authority, having granted the applicant the right to erect the housing estate, was clearly not co-ordinating any strategy for the area with what the respondents as government authorities were doing on the adjoining site. However it is now *fait accompli* that the work has commenced and has progressed quite significantly.

Precautionary principle

[45] The court in assessing what the appropriate approach is to granting interim relief in these circumstances has to consider whether it takes a more cautious approach in refusing or granting the relief and in this regard the well-known scientific principle, the precautionary principle is relevant. The scientific picture which has emerged, and in particular the evidence of the catastrophic effects to the Central Basin, if the water is not pumped out, has been described in great detail in the scoping reports. Principle 15 of the Rio Declaration suggests the onus should be discharged by the party not wanting the application of the precautionary principle to apply.

[46] The precautionary principle has been raised in our law in the case of *HTF Developments Pty (Ltd) and the Minister of Environmental Affairs and Tourism and Others,* 2006(5), SA 512(T), Murphy J referred to the

precautionary principle based on the schemata set out by Professor Jan Glazewski in his work and in addition the precautionary principle has to be balanced with the entrenched rights in the Constitution.

[47] In the further case of *Fuel Retailers Association of Southern Africa vs. the Director General, Environmental Management, Department of Agriculture Conservation and Environment, Mpumalanga and others*, 2007(6), SA 4 (CC) the precautionary principle was also referred to by the Constitutional Court where Chief Justice Ncgobo stated:

> 'The precautionary principle required these authorities to insist on adequate precautionary measures to safeguard against the contamination of underground water, this principle is applicable where due to unavailable scientific knowledge there is uncertainty as to the future impact of the proposed development. Water is a precious commodity; it is a natural resource that must be protected for the benefit of the present and future generations.'

[48] The precautionary principle has been well traversed in many writings and in many countries throughout the world, in particular the work done by Andrew Jurdin and Timothy Ordeodon in their working paper - The Precautionary Principle in the UK Environmental Law and Policy. The application of the precautionary principle is of importance particularly in situations where the scientific data might not have been finally crystallised, but where there is some context where the environments and or society might be endangered. The precautionary principle also has its critics. By and large however this principle has been absorbed into the EU treaties as well as by various countries throughout the world. The four elements of the precautionary principle are basically that there must be a willingness to take action in advance of formal justification of proof; there must be a proportional response; a preparedness to provide ecological space and margins for error.

[49] In this case the applicant contends that there has been some uncertainty about the date when the ECL level will be reached and mindful of the alleged statutory breaches by the respondents I should grant an interdict

at this interim stage. I directed that further accurate and current evidence be produced to determine whether the critical ECL level had been reached so as to balance the interests of the parties on the question of timing. The cost of halting the project might well have had to yield to conciliation or the finality of the review proceedings if there was sufficient time left before the ECL level was reached. The applicants and respondents filed further affidavits, which were of great assistance to the court in making the assessment as to whether interim relief should be granted. All the experts who deposed to affidavits were clearly experts in their fields if regard be had to their substantial curriculum vita in this and there knowledge and experience in the assessment of what is taking place with the AMD in the Central Basin. The experience gained from the crisis in the Western Basin and the research done by way of mathematical modelling was of some assistance in the crisis facing the central Basin.

[50] Mr. Seeth on behalf of the first respondent submitted an affidavit requested by the court. He has an impressive CV in the field relevant to the question of AMD. He opined that August 2013 was a realistic date for the ECL to be reached. It is common cause between the scientists that it is impossible to place an absolutely accurate figure and date as to when exactly the ECL level would be breached. Factors such as climate, rainfall, surface water, and spills are variables that impede calculation with mathematical precision on the exact date of ECL. He attached a recent diagram illustrating the calculation and that it might well be that the ECL level would not be reached until 1 October 2013.

[51] The last measurement at the shaft where the treatment plant is being constructed was done on 13 May 2013 and no measurement was possible after that because of the construction. He did however look at the readings at the same level at Gold Reef City and the SWV shaft. The latest reading, which he took at the Gold Reef City on 2 August 2013, indicated a water rise of 20 metres, which is substantial between the period 17 May 2013 to 2 August 2013. That would be equivalent to a daily rise of 0.26 metres. It might well be that this is a little less than the figure which was referred to

during argument, that figure was 0.23 metres per day. His finding is that the current water level is 24 metres below the ECL level and using the current average rise figure the ECL level would be breached on 16 October 2013 or 2 November 2013.

[52] It is clear therefore that the ECL level cannot be determined with mathematical precision. The argument put up by all the experts in the application as well as the new affidavits that I have requested indicate that there are many variables that could influence the rise of the water. But it is quite clear that the breach of the ECL could take place, if it has not already taken place in the period August 2013 to 2 November 2013. The time parameter is an accurate and objective yardstick.

[53] A second affidavit in the category requested by the court was that of Mr. Hobbs, also on behalf of the first respondent. He is a senior research hydrologist also with a lot of experience. He commenced his research in the Western Basin in 2007 and he has been a member of all the teams, in particular the hydrological monitoring teams since then. He describes that insofar as the Central Basin is concerned the ECL level could be reached by October 2013. He also refers to the arguments raised in court why it is not possible to place a very accurate date on ECL. He also justifies why some of the original dates are now invalid and why the ECL level was not met for example by August 2012. He describes how the geo-hydrological modelling takes place and because of the variables that are fed into the model and the empirical data such as rainfall etc, it would not be possible for any scientist to pinpoint the exact date. The mathematical model, however, as used in this scientific field demonstrates that the breach of the ECL level could certainly be within 2013.

[54] Of importance is the affidavit of Mr Louis Botha filed and very properly placed before the court by the applicant despite it being prejudicial to its case. He is an expert in this very field of geo-hydrology and also has an impressive curriculum vita.

[55] He prepared a report which deals with the various estimates as to when the ECL level would be reached. He deals with the rate of rise of the underground water and also refers to the variables such as seasonal rainfall and the like. He however has not been able to undermine in any way the estimates given by the respondent's experts. In his conclusion he states that assuming an average rate of rise between 0.26 and 0.29 metres per day the Central Basin ECL level will be reached earliest on 23 October 2013, but likely nearer to 2 November 2013. He states that it is unlikely that the rainfall or the voids spaced at the elevation of ECL will significantly quicken the rate of rise to achieve ECL more than 1 week earlier that is not before 16 October 2013.

[56] The undisputed or a dispute involving a mere few days as to when the ECL level will be reached is a central factor in determining the balance of convenience. There is nothing before me that would suggest that the court cannot apply the precautionary principle. In the face of the applicant's own expert it cannot discharge the onus in relation to the non application of the precautionary principle.

Failure to utilize internal remedies

[57] The second and third respondents criticise the applicant for not exhausting the internal remedies. In terms of Section 24(M) of NEMA the Minister may grant exemptions from any provision of the Act. In terms of Section 43 of NEMA any affected person may appeal the decision of the Minister to delegate the powers to the entity that it did. The applicant has not made application for exemption from the obligation to exhaust internal remedies. By virtue of the applicant not exhausting its internal remedies the second and third contend that then applicant is barred in terms of the provisions of Section 7(1)(b) of PAJA from having the decision reviewed. The second and third respondents set out factual and statutory detail to the background of the project and how various ministers were obliged to take action. The second and third respondents also referred to the environmental impact assessment. They did involve the interested and affected parties (the

IAP) in the process. There were time constraints but pubic meetings were and details were published in the newspapers. The current owner did receive emails inviting the property owner to the meetings, but he apparently deleted the emails for whatever reason, and claims he had no knowledge of the public participation process. There may some difficulty with the applicant's knowledge of the public participation process at this interim stage it is clear that there has not been a flagrant non compliance with statutory provisions so as to halt the project.

Prescription in Review Proceedings

[58] The respondents contend that the applicant's right to review the decision regarding the construction of the treatment plant has become prescribed. The decision to build the plant was taken on 6 April 2011 in terms of s103(2) of the National Water Act. In terms of PAJA the applicant should have sought a review of the decision within 6 months. In addition in the absence of a condonation application the review has no prospect of success. This point is not dispositive at this interim stage as the applicant might well have a defence to the prescription point.

Prima facie right

[59] The fifth respondent emphasised that the applicant does not have a *prima facie* right to the relief. There are other remedies that it may have pursued such as the appeal remedies. It is the fifth respondent's case that the alleged breach of the statutory provisions as affecting legality was without merit. In particular the fifth respondent claims that the grant of exemptions was perfectly permissible in the face of emergency circumstances and the detailed transparent steps it took to grant the authorisation which it did.

[60] The fifth respondent also attacked the alleged lack of public participation process and asked the court to adopt a common sense approach to the matter and to disbelieve or find that it is not probable that the applicant would not have known about the public participation process. It was submitted that the deletion of the emails concerning the public participation

process by Mr Buck of the applicant is improbable when he must have been aware of activity on the site long before the launch of the application.

Conclusion

[61] The consequences of interdicting the current works based on the principles and detail which I have already referred to could have a catastrophic effect on the City of Johannesburg.

[62] It is a pity that the current short-term solution allows partially treated water into the water ways and streams. It is concern that the very high TDS levels will create a salinity problem further downstream and which would eventually find its way into the Vaal River. That aspect is however not a matter before me, but it does illustrate what the applicant is saying that there have been knee jerk reactions to the problem.

[63] In assessing interim relief however the continuation of a short term project such as the present does avert the greater danger and consequences of untreated AMD. In the long term however it would be a great shame for our waterways to be characterised with high salinity levels because of the lack of the desalination plant.

Costs in environmental litigation

[64] On the question of costs at this interim stage the attack by the applicant is in the area of proper environmental governance. The applicant does have a commercial interest but the application has also highlighted potential dangers downstream as a result of the discharge of highly saline water. The short term project does not envisage a de-salination plant.

[65] Many environmental jurisprudential writers have referred to fact that environmental litigation must be viewed differently from other forms of litigation. It is a jurisprudence that must still evolve as the environment does

not have a voice of its own. Litigants such as the applicant often highlight the problems even in the face of highly priced remediation developments. The applicant's attack on legality is yet to be traversed and determined at the review stage. The applicant certainly has at this stage been *bona fide* in bringing this application. Its attempt to widen the question of standing to neighbours and interested stakeholders downstream was a logical sequence of its argument. This is an appropriate case for the reservation of costs to the court finally determining the review application. The matter was one of complexity and justified two counsel in respect of each set of respondents.

[66] Had that case been made out in the founding papers the question of costs might have been a lot easier to determine at this stage. It is clear to me that there are still many legal issues to be adjudicated at review stage. The application for interim relief must fail.

The order that I would make is the following.

The application for two interim interdicts as set out in the applicant's notice of motion is refused and the costs are reserved.

Victor J
Judge of the South Gauteng High Court

Counsel for Applicant: Adv Wasserman SC and Adv I Curry
Attorney for Applicant: Cliffe Dekker Hofmeyr Inc

Counsel for First Respondent: J Blou SC and I Goodman
Attorney for First Respondent: Fluxnmans Attorneys

Counsel for Second and Third Respondents: Adv P M Mtshaulana SC and Adv MK Mathipa

Attorney for Second and Third Respondents: The State Attorney Pretoria

Counsel for Fifth Respondent: Adv T J Bruinders SC and Adv L Kutumela

Attorney for Fifth Respondent: The State Attorney Pretoria Ref F. Patel

SUMMARY IN SPACE SECURITISATION (PTY) LIMITED

Environmental Governance – The application of the precautionary principle and the onus in the face of two competing interests between rights flowing property ownership and the construction of a treatment plant aimed at treating acid mine drainage in order to avert an imminent environmental crisis. Issues of separation of powers, judicial deference and the balance of convenience are key features in weighing up the grant of interim relief in matters of complexity involving inter governmental cooperation to deal with an environmental crisis.