IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

CASE NO: 50779/17

In the matter between:

MINING AND ENVIRONMENTAL JUSTICE COMMUNITY NETWORK OF SOUTH AFRICA	First Applicant
GROUNDWORK	Second Applicant
EARTHLIFE AFRICA, JOHANNESBURG	Third Applicant
BIRDLIFE SOUTH AFRICA	Fourth Applicant
ENDANGERED WILDLIFE TRUST	Fifth Applicant
FEDERATION FOR A SUSTAINABLE ENVIRONMENT	Sixth Applicant
ASSOCIATION FOR WATER AND RURAL DEVELOPMENT	Seventh Applicant
BENCH MARKS FOUNDATION	Eighth Applicant

and

MINISTER OF ENVIRONMENTAL AFFAIRS	First Respondent
MINISTER OF MINERAL RESOURCES	Second Respondent
ATHA-AFRICA VENTURES (PTY) LTD	Third Respondent
THE MABOLA PROTECTED ENVIRONMENT LANDOWNERS ASSOCIATION	Fourth Respondent
MEC FOR AGRICULTURE, RURAL DEVELOPMENT, LAND AND ENVIRONMENTAL AFFAIRS, MPUMALANGA	Fifth Respondent

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APPLICANTS' HEADS OF ARGUMENT

Table of Contents

Glossary of Abbreviations

Abbreviation	Description
AMD	Acid Mine Drainage
Atha	Atha-Africa Ventures (Pty) Ltd
Biodiversity Act	National Environmental Management: Biodiversity Act 10 of 2004
CER	Centre for Environmental Rights
CSIR	Council for Scientific and Industrial Research
DEA	Department of Environmental Affairs
District Municipality	Gert Sibande District Municipality
DG	Director-General
DMR	Department of Mineral Resources
DMR-approved EMPR	Atha's EMPR approved on 28 June 2016 by the Mpumalanga Regional Manager of the DMR in terms of section 39 of the MPRDA
DWA	Department of Water Affairs
DWS	Department of Water and Sanitation
EA	Atha's Environmental Authorisation
EA appeal	Applicants' internal appeal of the EA, lodged on 13 October 2016 with the MEC
EIAR	Atha's Environmental Impact Assessment Report
EMF	Environmental Management Framework for the Local Municipality
EMPR	Atha's Environmental Management Programme
EMPR appeal	Applicants' internal appeal of the EMPR, lodged on 19 August 2016 with the Director-General of the DMR
Environment Minister	Minister of Environmental Affairs
EWT	Endangered Wildlife Trust
FEPA	Freshwater Ecosystem Priority Area
FSE	Federation for a Sustainable Environment
IWWMP	Atha's Integrated Water and Waste Management Plan
Local Municipality	Dr Pixley Ka Isaka Seme Local Municipality
MBSP	Mpumalanga Biodiversity Sector Plan
MEC	MEC for Agriculture, Rural Development, Land and Environmental Affairs, Mpumalanga
Ministers	The Ministers of Environmental Affairs and Mineral Resources

Minerals Minister	Minister of Mineral Resources
MPE	Mabola Protected Environment
MPELA	Mabola Protected Environment Landowners Association
MPRDA	Mineral and Petroleum Resources Development Act 28 of 2002
MPRDAA	Mineral and Petroleum Resources Development Amendment Act 49 of 2008
NEMA	National Environmental Management Act 107 of 1998
NEMPAA	National Environmental Management: Protected Areas Act 57 of 2003
NEMPAA application	Atha's May 2016 application for written permission to conduct commercial mining in the MPE in terms of section 48(1)(b) of NEMPAA
NEMPAA decisions	Environment Minister's decision and Minerals Minister's decision to grant Atha written permission in terms of section 48(1)(b) of NEMPAA to conduct commercial mining in the MPE
NFEPA	National Freshwater Ecosystem Priority Area
NFEPA Atlas	Atlas of National Freshwater Ecosystem Priority Areas in South Africa
NWA	National Water Act 36 of 1998
PAIA	Promotion of Access to Information Act 2 of 2000
SANBI	South African National Biodiversity Institute
SAS	Scientific Aquatic Services CC
SDF	Spatial Development Framework
SLP	Atha's Social and Labour Plan
SPLUMA	Spatial Planning and Land Use Management Act 16 of 2013
Systems Act	Local Government: Municipal Systems Act 32 of 2000
Water Minister	Minister of Water and Sanitation
WWF-SA	World Wide Fund for Nature South Africa
WUL	Atha's Water Use Licence
WUL appeal	EWT, FSE and Mpumalanga Landbou/Agriculture's appeal of the WUL, lodged on 15 December 2016 with the Water Tribunal

INTRODUCTION

1 This is an application for the review and setting aside of decisions by the first and second respondents ("the Environment Minister" and "the Minerals Minister") on 20 August 2016 and 21 November 2016 respectively to grant the third respondent ("Atha") written permission in terms of section 48(1)(b) of the National Environmental Management: Protected Areas Act 57 of 2003 ("NEMPAA") to conduct commercial mining in the Mabola Protected Environment ("the MPE") in Mpumalanga[1].

2 Atha proposes to construct an underground coal mine near Wakkerstroom in the Dr Pixley Ka Isaka Seme Local Municipality ("the Local Municipality") and the Gert Sibande District Municipality ("the District Municipality") in Mpumalanga ("the Yzermyn mine" or "the mine")[2]. The entire area which would comprise the underground workings of the mine falls within the MPE, which was declared a protected environment on 22 January 2014 in terms of section 28 of NEMPAA[3]. The surface infrastructure of the mine would be constructed on a much smaller area of approximately 22.4 hectares which falls outside of the MPE[4]. We refer in these heads of argument to the underground mining area and the surface infrastructure area collectively as "the mine area".

3 The mine area corresponds with several channelled valley wetlands[5], and

[1] Amended notice of motion 3: 5-6. Reference is made in these heads of argument to the papers by describing the relevant document and paginated page number/s followed by a colon and the relevant paragraph number/s (where applicable)
[2] Founding affidavit 20: 20; Ministers answering affidavit 729: 134
[3] Annexure "TTN4" 168; founding affidavit 21: 21 and 21-22: 23; Ministers answering affidavit 729: 134
[4] Founding affidavit 22: 24; Ministers answering affidavit 729: 134
[5] Which is a valley-bottom wetland with a river channel running through it

seep wetlands[6]. It includes three farms which are used for the commercial grazing of livestock (sheep and cattle) and which support agricultural employment opportunities. Several subsistence farmers have made their homes on the proposed mining site, which has good to excellent grazing capacity. There are approximately eight homesteads situated on the proposed mining site, which are occupied by low-income families with between eight and thirty people living in each homestead. The households generally rely on limited income from a single family-member who works on the host farm, as well as on social grants[7].

4 The applicants seek the following ancillary substantive relief ("the ancillary relief"):

4.1 that Atha's application for written permission to conduct commercial mining in the MPE in terms of section 48(1)(b) of NEMPAA ("the NEMPAA application") be remitted to the Environment and Minerals Ministers for reconsideration[8]; and

4.2 that the Environment and Minerals Ministers ("the Ministers") be directed in reconsidering the NEMPAA application to consider all relevant considerations and –

4.2.1 to comply with sections 3 and 4 of the Promotion of

[6] These are wetland areas sloping land dominated by unidirectional movement of water. Founding affidavit 22-23: 25; Ministers answering affidavit 729: 134
[7] Founding affidavit 100: 176-177. This is not denied by the Ministers (Ministers answering affidavit 746-748: 179) or by Atha (other than by a broad denial at the outset of its answering affidavit 525: 7), and in any event appears from the socio-economic study which Atha's environmental assessment practitioner commissioned for purposes of the environmental impact assessment report
[8] Amended notice of motion 3: 7

Administrative Justice Act 3 of 2000[9];

4.2.2 to take into account the interests of local communities and the environmental principles referred to in section 2 of the National Environmental Management Act 107 of 1998 ("NEMA")[10];

4.2.3 to defer any decision regarding the NEMPAA application until after the outcome of various administrative appeals pertaining to other authorisations required by Atha before it may commence with construction of the mine[11]; and

4.2.4 without detracting from their obligation to consider all relevant circumstances, not to grant permission to conduct commercial mining in the MPE in terms of section 48(1)(b) of NEMPAA unless (alternatively, without considering whether) –

3.2.4.1. a management plan for the MPE has been approved by the fifth respondent ("the MEC") in terms of section 39(2) of NEMPAA[12];

3.2.4.2. the management plan's zoning of the area in which the intended mining is to take place permits such mining[13];

[9] Amended notice of motion 4: 8.1
[10] Amended notice of motion 4: 8.2
[11] Amended notice of motion 4: 8.3
[12] Amended notice of motion 5: 8.4.1
[13] Amended notice of motion 5: 8.4.2

3.2.4.3. exceptional circumstances have been shown by Atha to exist which justify the mining of coal within the MPE[14]; and

3.2.4.4. Atha has made full and secure financial provision for the complete rehabilitation of the MPE in consequence of the coal mining, upon termination of the mining, including the treatment of any polluted water that may be decanting from the mine at the time of termination or that may decant from the mine at any time in the future[15].

5 The review relief and ancillary relief are set out in Part B of the notice of motion. The relief sought in Part A of the notice of motion is for an interim interdict pending the final determination of the review in Part B, should such relief prove necessary[16]. The relief in terms of Part A will only be sought in the event that Atha gives notice of its intention to commence mining before this review has been finally disposed of by this court or on appeal.[17]

6 Atha does not oppose the relief aimed at the review and setting aside of the NEMPAA decisions[18]. Atha also does not oppose the relief aimed at:

6.1 having the NEMPAA application remitted to the Ministers for

[14] Amended notice of motion 5: 8.4.3
[15] Amended notice of motion 5: 8.4.4
[16] Amended notice of motion 2-3: 1-4
[17] Founding affidavit 19-20: 18; Ministers answering affidavit 729: 134
[18] Atha answering affidavit 524: 6

reconsideration[19]; and

6.2 directing the Ministers in reconsidering the NEMPAA application to consider all relevant considerations; to comply with sections 3 and 4 of PAJA; and to take into account the interests of local communities and the environmental principles referred to in section 2 of NEMA[20].

7 Atha does oppose the relief described in paragraphs 4.2.3 and 4.2.4 above.[21] Atha also opposes the prayer for costs in the notice of motion.[22]

8 As appears from an affidavit filed on behalf of the Ministers and the MEC,[23] the Ministers and the MEC oppose all of the relief sought by the applicants.

9 The remainder of these heads of argument are organised as follows:

9.1 In Part A, we describe the statutory requirements which must be met before a mine such as the one proposed by Atha may be constructed and how they relate to each other;

9.2 In Part B, we summarise the strategic importance of the MPE;

9.3 In Part C, we summarise the manner in which the NEMPAA decisions were taken;

9.4 In Part D, we set out the various grounds of review; and

[19] Atha answering affidavit 525: 8
[20] Atha answering affidavit 525: 8-9
[21] Atha answering affidavit 525: 9. Since the administrative appeal described in paragraph 8.3.1 of the notice of motion has been determined, this part of the relief sought falls away.
[22] Atha answering affidavit 525: 9
[23] Ministers answering affidavit 669-757

9.5 In Part E, we explain the basis for the ancillary relief sought.

PART A: STATUTORY FRAMEWORK

A.1 The Constitution

10 Section 24 of the Constitution provides that:

"Everyone has the right –

(a) to an environment that is not harmful to their health or well-being; 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".

11 The state has a duty in terms of section 7(2) of the Constitution to respect, protect, promote and fulfil the right in section 24 of the Constitution.

12 The state has adopted several legislative measures pursuant to its duty in terms of sections 24 and 7(2) of the Constitution, including the Mineral and Petroleum Resources Development Act 28 of 2002 ("the MPRDA"), NEMA, the National Water Act 36 of 1998 ("the NWA") and NEMPAA.

13 As we explain below, Atha requires authorisations in terms of each of these Acts before it may construct the coal mine. While this application concerns only the permission granted in terms of NEMPAA, the legislative scheme as a whole is relevant to several of the grounds of review, as is the status of Atha's attempts to secure authorisation under each of these separate statutes.

A.2 The environmental provisions of the MPRDA

14 Mining may only be conducted in terms of a mining right granted in terms of section 23 of the MPRDA.

15 Section 23(1)(d) of the MPRDA, in the form in which it applied to Atha's mining right application (namely, prior to its amendment by section 19 of the Mineral and Petroleum Resources Development Amendment Act No. 49 of 2008 ("MPRDAA")) provided that the Minerals Minister must grant a mining right if, among other things, "*the mining will not result in unacceptable pollution, ecological degradation or damage to the environment*". This must be read with section 23(3) of the MPRDA, which at all relevant times provided that the Minerals Minister must refuse to grant a mining right if that requirement is not met. It was also a condition of the grant of a mining right that the applicant had provided financially and otherwise for the prescribed social and labour plan (section 23(1)(e), prior to its amendment by section 19 of the MPRDAA).

16 Section 39 of the MPRDA used to govern the approval of an environmental management programme ("EMPR") by the Minerals Minister and still applies to Atha's mining right, notwithstanding the repeal of that section by section 33 of the MPRDAA. Section 39 of the MPRDA provided, in relevant part, as follows:

> *"(1) Every person who has applied for a mining right in terms of section 22 must conduct an environmental impact assessment and <u>submit an environmental management programme</u> within 180 days of the date on which he or she is notified by the Regional Manager to do so.*
>
> *(2) ….*
>
> *(3) An applicant who prepares an <u>environmental management programme</u> … must –*

(a) *establish baseline information concerning the affected environment to determine protection, remedial measures and environmental management objectives;*

(b) *investigate, assess and evaluate the impact of his or her proposed … mining operations on –*

(i) *the environment;*

(ii) *the socio-economic conditions of any person who might be directly affected by the … mining operation;…and*

(d) *describe the manner in which he or she intends to –*

(i) *modify, remedy, control or stop any action, activity or process which causes pollution or environmental degradation;*

(ii) *contain or remedy the cause of pollution or degradation and migration of pollutants…;*

(4) …the Minister must, within 120 days from the lodgement of the environmental management programme …, approve the same, if –

(i) *it complies with the requirements of subsection (3);*

(ii) *the applicant has complied with section 41(1); and*

(iii) *the applicant has the capacity, or has provided for the capacity, to rehabilitate and manage negative impacts on the environment.*"

17 Section 41(1) of the MPRDA, which was also repealed by section 33 of the MPRDAA although it still applies to Atha's mining right and EMPR, required the applicant to make the prescribed financial provision for the rehabilitation or management of negative environmental impacts.

A.3 NEMA

18 NEMA establishes a framework regulating the decisions taken by organs of state in respect of activities by any person or entity that may affect the environment.

19 Section 2 of NEMA contains a list of principles that apply to the actions of all organs of state that may significantly affect the environment. In terms of

section 2(1) they also *"(c) serve as guidelines by reference to which any organ of state must exercise any function when taking any decision in terms of … any statutory provision concerning the protection of the environment"* and *"(e) guide the interpretation, administration and implementation of [NEMA] and any other law concerned with the protection or management of the environment".*

20 These principles are quoted and discussed with reference to the specific review grounds in Part D below.

21 NEMA provides *inter alia* for the identification of "*listed activities*", as published by notice in the Government Gazette, which activities may not commence without environmental authorisation from "*the competent authority*" (section 24(2)(a)), who, at the time of Atha's application for environmental authorisation, was either the Environment Minister or the relevant MEC, depending on the nature of the proposed activity.

22 Section 24(4) of NEMA contains detailed requirements for the investigation, assessment and reporting of the potential consequences or impacts of listed activities on the environment. Once these impacts have been adequately assessed and reported in an environmental impact assessment report ("EIAR") by an appropriately qualified practitioner, the impacts must be considered by the competent authority in the process of deciding whether or not to grant an environmental authorisation (or "EA").

A.4 The NWA

23 The NWA is intended, among other things, to achieve the sustainable use of

water for the benefit of all users and requires that certain water uses must be authorised by the responsible authority in terms of the Act. The responsible authority is the Minister of Water and Sanitation, who may delegate his or her powers to various Department of Water and Sanitation ("DWS") office-holders and institutions as specified in the NWA.

24 Section 21 of the NWA lists several water uses that require authorisation in terms of the NWA. Because the mine would trigger more than one of these water uses, Atha had also to obtain a water use licence.

A.5 NEMPAA

25 In the present instance, apart from a mining right, the approval of an EMPR, an environmental authorisation, and a water use licence[24], Atha also required permission in terms of section 48(1)(b) of NEMPAA to conduct commercial mining in a protected environment.

26 The MPE was declared as a protected environment on 22 January 2014 in terms of section 28(1)(a)(i) and (b) of NEMPAA[25]. Section 48(1)(b) prohibits mining in a protected environment, even if other statutory authorisations are in place. But the section creates an exception, namely, if the Ministers responsible for the environment and mining respectively, grant written permission for commercial mining to take place in the protected environment.

27 The objectives of NEMPAA include:

[24] Atha also requires a change of land use to be approved in terms of section 26(4) of the Spatial Planning and Land Use Management Act 16 of 2013 ("SPLUMA"). Atha has not yet obtained this
[25] Founding affidavit 21: 21

27.1 to provide for co-operative governance in the declaration and management of protected areas (section 2(b));

27.2 to effect a national system of protected areas in South Africa as part of a strategy to manage and conserve its biodiversity (section 2(c));

27.3 to provide for a diverse and representative network of protected areas on state land, private land, communal land and marine waters (section 2(d));

27.4 to promote sustainable utilisation of protected areas for the benefit of people, in a manner that would preserve the ecological character of such areas (section 2(e)); and

27.5 to promote participation of local communities in the management of protected areas, where appropriate (section 2(f)).

28 Section 28(1)(i) of NEMPAA provides that the Environment Minister or the relevant MEC may by notice in the Gazette declare any area specified in the notice as a protected environment.

29 The purposes of declaring protected areas (including protected environments) in terms of NEMPAA include, among others, the following (section 17):

"(a) to protect ecologically viable areas representative of South Africa's biological diversity and its natural landscapes and seascapes in a system of protected areas;

(b) to preserve the ecological integrity of those areas;

(c) to conserve biodiversity in those areas;

(d) to protect areas representative of all ecosystems, habitats and species naturally occurring in South Africa;

(e) to protect South Africa's threatened or rare species;

(f) to protect an area which is vulnerable or ecologically sensitive;

(g) to assist in ensuring the sustained supply of environmental goods and services;

(h) to provide for the sustainable use of natural and biological resources;

(i) to create or augment destinations for nature-based tourism;

(j) to manage the interrelationship between natural environmental biodiversity, human settlement and economic development;

(k) generally, to contribute to human, social, cultural, spiritual and economic development; or

(l) to rehabilitate and restore degraded ecosystems and promote the recovery of endangered and vulnerable species."

30 Section 48 of NEMPAA provides in relevant part as follows:

"(1) Despite other legislation, no person may conduct commercial prospecting, mining, exploration or related activities -

…

(b) in a protected environment without the written permission of the [the Cabinet member responsible for national environmental management] and the Cabinet member responsible for minerals and energy affairs;

…

(4) When applying this section, the Minister must take into account the interests of local communities and the environmental principles referred to in section 2 of the National Environmental Management Act, 1998." (our emphasis)

31 It is clear from these provisions that the purpose of NEMPAA is to ensure that areas which are worthy of protection in South Africa are identified, and are then afforded formal protection. The declaration of a protected environment adds a further layer of protection to strategically important and sensitive areas over and above that which is afforded in the ordinary course by applicable environmental laws.

32 In making a decision in terms of section 48(1)(b) of NEMPAA, the Ministers are required to consider all of the relevant information, and to determine whether or not the granting of written permission in terms of NEMPAA would serve the objectives of the Act as listed in section 2(a) to (g) of NEMPAA (alternatively, would be consistent with those objectives). In addition, section 48(4) of NEMPAA requires the Environment Minister before granting written permission specifically to take into account the interests of local communities and the environmental principles referred to in section 2 of NEMA.

A.6 The NEMPAA decisions in the context of the overall legislative scheme

33 Whereas there are clearly areas of overlap between the various statutes in terms of which authorisation for mining and its associated activities is required (for instance, the section 2 NEMA principles must be considered as part of each process), each statute has a unique focus. The authorities charged with granting authorisations in terms of the individual pieces of legislation must in each case exercise an independent discretion having regard to the factors and objectives contained in the legislation governing that decision. That particular activities may require more than one authorisation by different administrative authorities, and that each such authority must exercise an independent discretion in terms of the relevant legislation, is something which has been recognised by the Constitutional Court.[26]

[26] See *Fuel Retailers Association of Southern Africa v Director-General: Environmental Management, Department of Agriculture, Conservation and Environment, Mpumalanga Province and Others* 2007 (6) SA (4) CC at paras 84-92; 96

34 When it comes to the permission required in terms of section 48(1)(b) of NEMPAA, the Ministers are required to consider all of the relevant information in light of the particular objectives of NEMPAA and the special status accorded to protected environments.

35 The need for responsible authorities to bring a fresh discretion to bear in each decision-making process is apparent from *inter alia* the fact that the authorities who must grant the various authorisations are not in all instances the same. In this case, for instance:

35.1 Atha was granted a mining right on 14 April 2015 by the Minerals Minister in terms of section 103(4)(b) of the MPRDA[27] - The mining right is the subject of an application for judicial review which was launched by the applicants on 10 September 2015 in the Gauteng Division, Pretoria of the High Court under case number 73278/15 ("the mining right review"), which litigation is still pending[28];

35.2 Atha's EMPR was approved on 28 June 2016 by the Mpumalanga Regional Manager of the DMR ("the DMR-approved EMPR") in terms of section 39 of the MPRDA[29] - The DMR-approved EMPR is the subject of an internal appeal[30] which was lodged by the applicants on 19 August 2016 and which is to be determined by the Director-General

[27] Who purported to withdraw and replace an earlier mining right which had been granted on 19 September 2014 by the Director-General of the Department of Mineral Resources in terms of section 23(1) of the MPRDA
[28] Founding affidavit 25: 28.1; Ministers answering affidavit 729: 135
[29] Founding affidavit 23: 26.2; Ministers answering affidavit 729:134
[30] In terms of section 96(1)(a) of the MPRDA and regulation 74 of the Mineral and Petroleum Resources Development Regulations, 2004

of the DMR ("the EMPR appeal"), which appeal is still pending;[31]

35.3 Atha was granted an environmental authorisation on 7 June 2016 by the Chief Director: Environmental Affairs, Mpumalanga for listed activities in terms of section 24 of NEMA ("the EA")[32] – The EA was taken on appeal by the applicants on 13 October 2016 to the MEC ("the EA appeal")[33], which appeal was dismissed by the MEC on 23 November 2017[34]. The EA appeal is also the subject of an application for judicial review[35], which is still pending.

35.4 Atha was granted its water use licence on 7 July 2016 by the DG (Acting) of the DWS in terms of section 22(1)(b) of the NWA – the water use licence is the subject of an internal appeal which was lodged by the fifth and sixth applicants (EWT and FSE) and Mpumalanga Landbou/Agriculture on 15 December 2016, which appeal will be heard by the Water Tribunal on 24 to 26 July 2018 ("the WUL appeal").[36]

36 It is clear that the Environment Minister, when faced with a decision in terms of section 48(1)(b) of NEMPAA, might not be responsible for granting any of the other authorisations required by an applicant, as for instance in this case,

[31] Founding affidavit 25: 28.2; The Ministers appear to deny that this appeal is still pending (Ministers answering affidavit 729: 136), but this is not correct.
[32] Founding affidavit 23: 26.3; Ministers answering affidavit 729: 134
[33] Founding affidavit 25: 28.3; Ministers answering affidavit 729: 137. The appeal was in terms of section 43(2) of NEMA and regulation 61 of the Environmental Impact Assessment Regulations, 2010
[34] Supplementary founding affidavit 380: 7
[35] The EA review was launched by the applicants on 22 May 2018 in the Mpumalanga Division of the High Court under case number 1390/18.
[36] Founding affidavit 25-26: 28.4; Ministers answering affidavit 729: 138. The appeal was lodged in terms of section 148(1) of the NWA. The date of the hearing of the appeal is not in the papers because it was set down subsequently.

where it was the MEC who granted the EA. The granting of permission to conduct commercial mining in terms of NEMPAA will often be the first and only contact which the Environment Minster will have with a particular development proposal.

37 Although the Minerals Minister may, when faced with a decision in terms of section 48(1)(b) of NEMPAA, have previously considered, for example, the EMPR and the Social and Labour Plan[37] of an applicant as part of a previous process in terms of the MPRDA, the Environment Minister, who is specifically and individually directed to have regard to the interests of local communities and the section 2 NEMA principles, cannot be taken to have done so. She would therefore need to consider documents such as the EMPR and the Social and Labour Plan as relevant considerations, together with all of the other relevant considerations, before granting permission in terms of section 48(1)(b) of NEMPAA.

38 In this instance it was in any event a delegee of the Minerals Minister who approved the EMPR, and furthermore the Minerals Minister who granted the mining right was the Hon. Ngoako Ramatlhodi while the Minerals Minister who granted Atha permission in terms of section 48(1)(b) of NEMPAA was the Hon. Mosebenzi Zwane.

39 As we explain in the relevant sections below, in order for the Ministers to have exercised an independent discretion in terms of section 48(1)(b) of NEMPAA,

[37] Which is required in terms of the MPRDA and which contains a developer's socio-economic commitments in respect of a project

they must necessarily have had before them all of the relevant information, including:

39.1 The terms of the final and approved EMPR, which is the instrument which contains the mitigation and remediation measures to which a developer may be held;

39.2 The EIAR with all of its attendant specialist studies;

39.3 The terms of the final and approved EA, including any conditions attaching to it; and

39.4 The terms of any final and approved WUL, including any conditions attaching to it.

40 Without the information contained in these documents, the Ministers could not satisfy themselves that a proposed development will be consistent with the objectives of NEMPAA. They could also not give proper consideration to the interests of local communities and the environmental principles referred to in section 2 of NEMA without this essential information.

41 Since the terms and conditions of an EMPR, EA and WUL may be changed on appeal (in each case the appeals are wide appeals), it is only after the outcome of any such appeals that a decision should be taken in terms of section 48(1)(b) of NEMPAA. The precise form which the mining is intended to take, the impacts of the mine, and the conditions that will attach to mining can only be known after the appeals have been finalised.

42 That a decision in terms of section 48(1)(b) of NEMPAA should be taken after the other administrative processes have been completed, is a view shared by the Department of Environmental Affairs ("DEA"). Mr Shonisani Munzhedzi, the DEA Deputy Director-General: Biodiversity and Conservation, confirmed that this was the position of the Department at a meeting of the Parliamentary Portfolio Committee on Environmental Affairs on 9 May 2017.

43 We return to these submissions at the relevant places below.

PART B: RECOGNITION OF THE STRATEGIC IMPORTANCE OF THE MPE AND THE MINE AREA

B.1 Introduction

44 Numerous organs of State and other stakeholders have recognised the fundamental ecological and environmental importance of the larger area in which the mine would be located and have acted in myriad ways to keep it in as pristine a state as possible. These developments constitute information and factors which should have been considered by the Ministers in making their decisions under NEMPAA but which, as appears below, were not. We refer only to the most important and the most recent of these developments in these heads of argument.

B.2 Recognition in the Mpumalanga Biodiversity Sector Plan

45 In 2013, the mine area was depicted in the Mpumalanga Biodiversity Sector Plan ("MBSP"), as falling within areas largely classified as "*Irreplaceable Critical Biodiversity Areas"* and "*Optimal Critical Biodiversity Areas"*[38]. An

[38] Founding affidavit 36: 61; annexure "TTN8" 172

"*Irreplaceable Critical Biodiversity Area"* is an area which is "*considered critical for meeting biodiversity targets and thresholds …which are required to ensure the persistence of species and the functioning of ecosystems*"[39]. An "*Optimal Critical Biodiversity Area"* has an irreplaceability of less than 80% but collectively with other such areas it incorporates the most biodiversity in the smallest area and therefore provides the most cost-effective options for biodiversity[40]

46 After the MPE had been declared on 22 January 2014, the areas comprising the MPE were classified in the MBSP as protected environment areas, while the remaining mine area not falling within the MPE[41] was largely classified as "*Irreplaceable Critical Biodiversity*" and "*Optimal Critical Biodiversity*" and was depicted as falling within a "*Protected Area Buffer*"[42]. Thus even the small parts of the mine area which fall outside of the MPE are deemed to be either critical for meeting biodiversity targets (in the case of those portions which are *Irreplaceable Critical*) or strategically important for that purpose (in the case of those portions which are *Optimal Critical*).

47 The Ministers admit the contents of the MBSP but deny that it "*bind[s] decision-making at national government level*". Instead they say it "*was aimed at provincial environmental and biodiversity agencies*"[43]. Significantly the Ministers do not deny that they failed to take the MBSP into account,

[39] Compiled Record (NSS ecological assessment) 2408
[40] Compiled Record (NSS ecological assessment) 2408
[41] Zoetfontein 94 HT and Portion 1 of Yzermyn 96 HT, which was omitted from the MPE in the final declaration of the area
[42] Founding affidavit 54: 83; annexure SP13(2) 488
[43] Ministers answering affidavit 731:145.2

contending instead that it was duly considered in the EIA and WUL processes[44]. This clearly demonstrates a failure on the part of the Ministers to take into account a relevant consideration. We return to this aspect at the relevant point below.

B.3 Recognition in Spatial Development Frameworks

48 On 30 November 2010 the Local Municipality published its Spatial Development Framework ("the SDF") in terms of the Local Government: Municipal Systems Act 32 of 2000 ("the Systems Act"). The area comprising the proposed mine area is identified in the SDF as a "s*ensitive natural area*" meaning that it "s*hould be considered as protected and development proposed in the area should be directed by the different environmentally sensitive aspects as described in the environmental section of the SDF*"[45]. The environmental section of the SDF states that[46]:

48.1 Operational mines pose a significant threat to underground water quality;

48.2 "*The spreading of coal mining activities in the Wakkerstroom area is of concern as this area is of high conservation value to the extensive wetlands found there. Mining would seriously threaten the integrity of the wetlands and other habitats"*[47];

[44] Ministers answering affidavit 749-750: 182
[45] Founding affidavit 40-43: 65. The SDF goes on to say that the abundance of conservation and protected areas should also be utilised as part of the natural environment to promote the economy and tourism in the municipal area by developing the areas to attract tourists and promote the attractiveness of the municipality
[46] Ibid
[47] That the mine area falls within the Wakkerstroom area appears from the founding affidavit (48: 75), and is not denied by the Ministers (Ministers answering affidavit 733: 150)

48.3 "*The high value of properly functioning ecosystems particularly in terms of water services provides an economic justification for their protection and restoration*";

48.4 "*One of the key regulating ecosystem services provided by [the] grasslands area [is] associated with the water environment given the areas importance at the headwater of three major [Water Management areas]… Numerous wetlands [that] … are centres of biodiversity, act as carbon sinks and are paramount to the hydrological functioning of drainage systems. The services provide water security for the area and also play a critical role as a "water factory" area with national importance for water security*…"; and

48.5 "*The available evidence and observation of the situation in other mining areas indicates a high risk of significant unmitigated cumulative impacts from intensive mining*".

49 In November 2014, the District Municipality published its 2014 SDF ("the 2014 SDF") in which it reiterated statements in an earlier SDF about the importance of conserving the wetlands and grasslands in the Wakkerstroom area[48], and stated that[49]: "*[O]wing to their crucial role in maintaining the ecological integrity in the area*" and in "*hydrological management, flood attenuation and water quality maintenance*", the grasslands and wetlands in the Wakkerstroom region "*have a high conservation value and should be protected at all cost*".

[48] That the mine area falls within the Wakkerstroom area appears from the founding affidavit (48: 75), and is not denied by the Ministers (Ministers answering affidavit 733: 150)
[49] Founding affidavit 44: 66

50 The Ministers admit the contents of these plans. On a proper analysis of their affidavits, they also admit that they failed to take them into account, contending instead that they were duly considered in the EIA and WUL processes[50]. Because the Ministers were required themselves to take into account all of the relevant circumstances in exercising an independent discretion, this admission confirms the existence of a further reviewable irregularity, to which we return below.

B.4 Recognition by the Minerals Minister and the Environment Minister

51 Both the Environment Minister and the Minerals Minister have in different contexts recognised the environmental sensitivity and importance of the area.

52 It is common cause that on 9 December 2011 the then Minister of Water and Environmental Affairs (who was at this time the Hon. Edna Molewa, presently the Environment Minister) published in terms of section 52(1)(a) of the National Environmental Management: Biodiversity Act 10 of 2004 ("the Biodiversity Act"), a national list of ecosystems that are threatened and in need of protection[51]. The Wakkerstroom/Luneburg Grasslands (MP11) was listed as an endangered ecosystem. The area now comprising the MPE and the mine area, as well as Portion 1 of Yzermyn 96 HT and Zoetfontein 94 HT, is located in the Wakkerstroom/Luneburg Grasslands endangered ecosystem.[52]

[50] Ministers answering affidavit 732:147 and 749-750: 182
[51] GN 1002 in GG 34809 dated 9 December 2011
[52] Founding affidavit 47: 72; annexure "TTN11(2)" 486; Ministers answering affidavit 733:149

53 The Ministers admit this but deny that the NEMPAA decisions were in conflict with this declaration. As we explain in greater detail below however, the mine would have lasting impacts on the wetlands and ecology of the mine area if allowed to proceed.

54 It is also common cause that[53]:

54.1 On 31 August 2010, the Minerals Minister (at this time the Hon. Susan Shabangu) imposed a moratorium on the granting of all prospecting rights in South Africa;[54]

54.2 The moratorium was extended on 28 February 2011 for one month until 31 March 2011, except for Mpumalanga in respect of which the moratorium was extended to 30 September 2011;[55]

54.3 At the time of the extension of the moratorium in February 2011, the Minerals Minister was quoted as telling a media briefing on 8 February 2011 that the reason for not lifting the moratorium in Mpumalanga was that the DMR had "*challenges bigger than what we expected, so we will lift eight provinces, and Mpumalanga will continue... for two to three months before we lift the moratorium*";

54.4 According to the Minister, the biggest challenge in Mpumalanga was environmental matters, "*issues of ecology*" - "*You find sensitive areas where rights have been granted*," she was quoted as saying. "*We*

[53] Founding affidavit 46-47: 70-71; Ministers answering affidavit 733: 148.3
[54] GN R768 in GG 33511 of 31 August 2010
[55] GN R160 in GG34057 of 28 February 2011 as amended by GN R287 in GG 34171 of 31 March 2011

intend to address that matter, hence we are not going to lift the moratorium, so as to make sure that we respond to the challenges of nature. Unfortunately rights were granted, but we'll have to address those issues."

54.5 On 31 May 2012 the Minerals Minister (who was then still the Hon. Susan Shabangu) stated in the DMR's Annual Report for 2011/12 that "*[t]he previous extension of the moratorium in Mpumalanga was due to the complex nature of environmental challenges in that province. It culminated in over 41 rights that are located in Wakkerstroom and Chrissiesmeer being identified as those belonging to the category of environmentally sensitive areas and consequently action has been taken to prohibit mining within those areas*."[56]

55 While the Ministers deny that there is any indication that the Minerals Minister in the last quoted statement was referring to Atha's prospecting right, they do not place on record what the true position is.[57] This would have been a relatively easy thing to establish from departmental records. But in any event, it is clear that in 2012, it was envisaged and represented by the Minerals Minister that, notwithstanding the existence of prospecting rights, mining would be prohibited in the Wakkerstroom area by virtue of its environmental sensitivity. While we accept that the Minerals Minister did not in the end take steps to prohibit such mining, the 2011/12 Annual Report does reflect a concern on her part about the environmental sensitivity of the Wakkerstroom

[56] Founding affidavit 48: 74 and answering affidavit 733: 149
[57] Ministers answering affidavit 733: 150.1

area and the threat posed to it by mining. Neglecting to follow through on her assessment that mining should not proceed in the areas concerned by taking steps to prohibit mining, does not mean that the environmental sensitivity has gone away.

B.5 Recognition in the Atlas of National Freshwater Ecosystem Priority Areas

56 In August 2011 the Water Research Commission, the Council for Scientific and Industrial Research ("CSIR"), the South African National Biodiversity Institute ("SANBI"), the Department of Water Affairs ("the DWA") (now the DWS) and the DEA published the Atlas of National Freshwater Ecosystem Priority Areas in South Africa ("the NFEPA Atlas"). The then Minister of Water and Environmental Affairs (still the Hon. Edna Molewa) said in the foreword to the NFEPA Atlas, that it was essential that water is dealt with in an integrated and cooperative manner across key government departments and that the NFEPA Atlas would inform decisions about land use. The following things appear from the NFEPA Atlas[58]:

56.1 The entire mine area (and surrounds) falls within a River Freshwater Ecosystem Priority Area ("FEPA") and associated sub-quaternary catchment, meaning that it contributes to national biodiversity goals and the sustainable use of water resources[59];

56.2 River Freshwater Ecosystem Priority Areas are rivers that should remain in relatively good condition to contribute to national

[58] Founding affidavit 48-50: 76 read with supplementary founding affidavit 397: 63; Annexure "TTN12(2)" 487
[59] Supplementary founding affidavit 397: 63; Annexure "TTN12(2)" 487

biodiversity goals and support sustainable use of water resources. The surrounding land and stream networks need to be managed in a way that maintains the good condition of the river reach (p. 14); and

56.3 The area now comprising the MPE is located in a high water yield area, which areas are important "*because they contribute significantly to the overall water supply of the country. They can be regarded as our water factories, supporting growth and development needs that are often a far distance away. Deterioration of water quantity and quality in these high water yield areas can have a disproportionately large adverse effect on the functioning of downstream ecosystems and the overall sustainability of growth and development in the regions they support. High water yield areas should therefore be maintained in a good condition (A or B ecological category). This requires minimising land use activities that reduce stream flow in these areas (e.g. plantation forestry), as well as any activity that would affect water quality (e.g. timber mills, mining, over-grazing). Wetlands also play an important role in these areas, regulating stream flow and preventing erosion…*" (own emphasis)

57 The Ministers admit the publication of the NFEPA Atlas and its contents and must be taken not to have disputed that the mine area (and surrounds) is a

FEPA.[60] But they say that the NFEPA Atlas was considered in the course of the EIA and WUL processes and that it was not for them to "*second guess the decision to grant the WUL by the DG: DWS*". The Ministers' answer confirms that they did not themselves give independent consideration to the status of the mine area as a strategic water resource, despite the obligation imposed on them by section 48(4) of NEMPAA to do so.

B.6 Recognition by the MEC responsible for environment

58 It is common cause that on 21 February 2012, the MEC published by notice in the Mpumalanga Gazette an Environmental Management Framework ("EMF") for the Local Municipality in terms of sections 24(5) and 44 of NEMA and the Environmental Management Framework Regulations, 2010.[61] It is clear from the Environmental Management Zones figure that the proposed mine area falls within a "*Zone 1: Conservation*" Environmental Management Zone. In terms of the EMF, "*Mining, dumping, dredging and prospecting*" is an "*undesirable type of activity*" and should "*not [be] allowed at all*" in a Zone 1: Conservation area[62].

59 The Ministers admit the contents of the EMF, but appear to deny that it was necessary for them to consider it because it was considered in the course of the EIA and WUL processes[63]. That approach is however fundamentally

[60] Minsters answering affidavit 734: 151; 749-750:182; 755-765:194. The Ministers' denial of these paragraphs is a bald denial and one that does not give rise to a real dispute of fact. The Ministers do not put up any evidence to dispute what is stated by Ms Stone in her affidavit as regards the FEPA map which is annexure "TTN12(2) and depicts both the below and above surface components of the mine as falling squarely within a FEPA" (Stone 505-509)
[61] Founding affidavit 50: 79; Ministers answering affidavit 734: 152
[62] Founding affidavit 50: 79
[63] Answering affidavit 749-750: 182

flawed. The Ministers were duty-bound themselves to consider independently all relevant considerations, including a statutorily prescribed planning document of the provincial sphere of government.

B.7 Recognition as a Strategic Water Source Area

60 In March 2013, the CSIR completed the Strategic Water Source Areas Report for WWF-SA. On the basis of this report, in August 2013 WWF-SA published for the public an "*Introduction to South Africa's Strategic Water Source Areas*". The following things appear from the latter report:

60.1 Part of the mine area was identified as a Strategic Water Source Area, called the Enkangala Drakensberg Strategic Water Source Area[64];

60.2 The Strategic Water Source Areas were described as being the 8% of South Africa's land area that provides 50% of our surface water run-off. They "*provide a disproportionate amount of run-off to the rest of the catchment ... Downstream users and ecosystems are dependent on the healthy functioning of these areas to sustain good quality water supplies … Disrupting water supply from these 16 strategic WSAs [water source areas] would effectively turn off the taps to our economy and seriously impact our food and water security*"; and

60.3 The Enkangala Drakensberg Strategic Water Source Area "s*upplies water to South Africa's economic hub, Gauteng …"*.

[64] The founding affidavit is incorrect insofar as it suggests that the whole of the mine area was identified as comprising part of the Enkangala Drakensberg Strategic Water Source Area

61 There are numerous headwater and mountain streams in the mine area which flow into larger streams that drain into the Assegaai River. The Assegaai River, in turn, flows into the Heyshope Dam, from which water is diverted into the Vaal River System via inter-basin transfer. Accordingly, the area constituting the mine area is a water source of the Vaal River System which, as stated, "s*upplies water to South Africa's economic hub, Gauteng …"*. Downstream of the Heyshope Dam, the Assegaai River flows into the Usutu River which flows through Swaziland and, after joining the Pongola River, flows into Mozambique, where it is known as the Maputo River. The health of the Usutu River System is also relevant to South Africa's international obligations to Swaziland and Mozambique.

62 The Ministers admit all of these allegations.[65] It is therefore common cause that part of the mine area falls within a larger area which provides a disproportionate amount of run-off to the rest of the catchment, and that downstream users and ecosystems in South Africa's economic hub in Gauteng and in two of its neighbouring countries, are dependent on the healthy functioning of this area to sustain good quality water supplies.

B.8 Recognition by the Mining Sector

63 On 22 May 2013 the "*Mining and Biodiversity Guideline: Mainstreaming Biodiversity into the Mining Sector*" was published by the DEA, the DMR, the Chamber of Mines, the South African Mining and Biodiversity Forum and SANBI (particularly, its Grasslands Programme). The mine area falls within an

[65] Ministers answering affidavit 734: 153

area which has been identified in the Mining and Biodiversity Guideline as a Category B area, having the "*Highest biodiversity importance*" and being at the "*Highest Risk for mining*". The significance of the biodiversity features in a Category B area is that:[66]

63.1 If the existence of the biodiversity features is confirmed in an EIA, "*the likelihood of a fatal flaw for new mining projects is very high because of the significance of the … ecosystem services"*;

63.2 Category B areas "*are viewed as necessary to ensure the protection of biodiversity, environmental sustainability, and human well-being*"; and

63.3 "*An EIA …should fully take into account the environmental sensitivity of the area, the overall environmental and socio-economic costs and benefits of mining, as well as the potential strategic importance of the minerals to the country. Authorisations may well not be granted. If granted, the authorisation may set limits on allowed activities and impacts, and may specify biodiversity offsets…*"

64 The Ministers deny that the mine area falls within a Category B area.[67]

65 This bald denial stands to be rejected by reason of the facts that:

65.1 Atha's Final Environmental Impact Assessment Report ("Final EIAR") itself confirms that the mine area falls within a Category B area, having

[66] Founding affidavit 53: 81
[67] Answering affidavit 734: 154.2.1

the "*Highest biodiversity importance*" and being at the "*Highest Risk for mining*"[68]; and

65.2 It appears from the Mining and Biodiversity Guideline itself, including the high resolution maps and underlying data which are available on the SANBI spatial biodiversity information B-GIS website, that the mine area falls within a Category B area.[69]

66 The Ministers' failure to appreciate that the mine area falls within a Category B area in the Mining and Biodiversity Guideline gives rise to a reviewable irregularity on its own. The Ministers did not appreciate the significance of the area where the mine will be constructed. They did not realise that they would be granting permission for mining in an area which they themselves had identified as being at the highest risk from mining.

B.9 Conclusion

67 It is clear that the area in which the coal mine would be situated is unlike other areas in which coal mines might be situated. It falls within an area which has been recognised by all three spheres of government and various statutory and other conservation bodies as requiring protection.

68 The Ministers on the whole do not dispute this. They also do not dispute that they themselves did not take these instruments into account, alleging instead that they were/would have been considered in the EIA and WUL processes.

[68] Replying affidavit (to Ministers) 890: 91.1 and annexure "SP12" 904-905
[69] Replying affidavit (to Ministers) 890: 91.1; annexure "SP13" and Stone 929-932

Neither of the Ministers granted the administrative authorisations which followed the EIA and WUL processes and so they would not have considered the instruments in that capacity either. Even if they had, they would have been required to consider these instruments in light of the specific objectives of NEMPAA.

PART C: ABSENCE OF TRANSPARENT DECISION-MAKING

C.1 The CER's attempts to find out about any application or decision-making through correspondence

69 It is common cause that:

69.1 On 23 February 2015, the CER addressed a letter to the Acting Deputy DG: Biodiversity and Conservation of DEA requesting urgent confirmation as regards whether or not the Minister or the DEA had received a request for written permission in terms of section 48(1)(b) of NEMPAA in respect of the proposed mine. CER asked that if any such request was being considered, that the DEA advise what public participation process had been initiated or was being contemplated to ensure compliance with the requirements of NEMPAA, NEMA and the Promotion of Administrative Justice Act, 2000[70];

69.2 In response, on 26 February 2015 the CER received an email from the DEA, in which it advised that such queries should be directed to the Department: Protected Areas for a response"[71];

69.3 In March 2015 the CER attempted to contact the DEA's Protected

[70] Founding affidavit 57-59: 90-91, annexure "TTN16" 274-275
[71] Founding affidavit 59: 92, annexure "TTN17" 276

Areas directorate telephonically to obtain answers, but this was not successful and it set about preparing a request for this information under the Promotion of Access to Information Act 2 of 2000 ("PAIA"), which was submitted to the DEA on 17 April 2015[72];

69.4 On 2 April 2015, the CER addressed letters to the Ministers on behalf of the applicants requesting them not to take any steps to consider or determine any application in terms of section 48(1)(b) of NEMPAA pending the final determination of the applicants' challenge of the mining right. Save for an acknowledgment of receipt from the DEA on behalf of the Environment Minister, the applicants did not receive any responses to these letters[73];

69.5 On 20 August 2015, because it appeared from an early version of the EIAR that Atha had requested the MEC to withdraw the declaration of the MPE, the CER addressed a letter to the MEC on behalf of the applicants requesting him to confirm whether he had received any request from Atha to withdraw the declaration of the MPE.[74] Acknowledgement of receipt of the letter was received on 21 August 2015, but no substantial reply was ever received;

69.6 On 27 August 2015 the CER addressed a letter to the Environment Minister and the DG of the DEA on behalf of the applicants[75] informing them that the applicants intended to launch the mining right review and

[72] Founding affidavit 59: 93
[73] Founding affidavit 60: 95-96, annexures "TTN18" and "TTN19" 277-281
[74] Founding affidavit 61: 98-99, annexure "TTN21" 286-288
[75] Copied to Atha

requesting that the Environment Minister suspend any decision-making process in terms of section 48(1)(b) of NEMPAA pending the outcome of the judicial review[76]. There was no substantive reply to these letters.

69.7 On 2 September 2016 the CER addressed a letter to the Environment Minister and the DG of the DEA informing them that the applicants had (on 19 August 2016) lodged an appeal against the EA decision, and requesting that the Environment Minister take the appeal into account when considering any application by Atha for permission in terms of section 48(1)(b) of NEMPAA[77]. The CER reiterated its request that the decision-making process in terms of section 48(1)(b) of NEMPAA be suspended pending the outcome of the mining right review. Acknowledgement of receipt of the letter on behalf of the DG of the DEA was received on 5 September 2016, but no substantial reply was ever received;

69.8 On 28 November 2016 the CER addressed a letter to Atha's attorneys enquiring whether Atha had made application for NEMPAA permission, whether NEMPAA permission had been granted by either of the Ministers, and whether an opportunity had been given to interested and affected persons to make representations in respect of any application by Atha. No response to this letter has ever been received.[78]

[76] Founding affidavit 61-62: 100, annexure "TTN22" 289-291
[77] Founding affidavit 62-63: 102-103, annexure "TTN23" 292-294
[78] Founding affidavit 63-64: 104, annexure 295-297

C.2 The CER's attempts to find out about any application or decision-making through PAIA requests

70 Having failed to elicit any information from the DEA in response to CER's letter on 23 February 2015 or from the subsequent telephone calls to the Protected Areas directorate, on 17 April 2015 the CER, on behalf of the FSE (the sixth applicant), submitted a request in terms of PAIA to the DEA for access, *inter alia*, to "*any correspondence between Atha and the DEA and/or Minister of Environmental Affairs contemplated by section 48(1)(b) of [NEMPAA]*" ("the first PAIA request")[79]. This PAIA request and the subsequent ones described in this part are admitted by the Ministers[80].

71 On 10 June 2015, the DEA refused the first PAIA request on the basis that it "*has no records herein*"[81].

72 Again, having failed to elicit any information from the DEA in response to the CER's letters, on 20 October 2016 the CER, on behalf of the FSE, submitted a request in terms of PAIA to the DEA for access to any application or motivation by Atha to the DEA and/or the Environment Minister for permission in terms of section 48(1)(b) of NEMPAA, as well as any correspondence between Atha and the DEA and/or Minister in this regard ("the second PAIA request")[82].

[79] Founding affidavit 64:105, annexure 298-302
[80] Ministers answering affidavit 739: 168.1
[81] Founding affidavit 64: 106, annexure "TTN26"303-305
[82] Founding affidavit 64-65: 107, annexure "TTN27" 306-310

73 On 29 November 2016, pursuant to the second PAIA request, the DEA provided the CER with a letter from Atha to the Environment Minister dated 3 May 2016 in which it requested permission to mine within the MPE in terms of section 48(1)(b) of NEMPAA ("Atha's May 2016 NEMPAA application")[83].

74 Neither the Environment Minister nor the DEA had notified the applicants or the CER of Atha's request. Nor had they provided the applicants or CER any opportunity whatsoever of being heard in relation to Atha's NEMPAA application[84].

75 On 2 December 2016 the CER addressed a letter to the Ministers and the DG of the DEA requesting that the applicants be given a reasonable opportunity to make representations to the Ministers in respect of the NEMPAA application and any similar such request that may have been made to the Minerals Minister[85]. The CER also formally requested that the applicants be provided with a copy of any application which Atha may have made to the Minerals Minister for such permission. To date, the CER has received no response to these letters.

76 On 7 December 2016 the CER, on behalf of the FSE, submitted another PAIA request to the DEA for access to, *inter alia*, any correspondence between Atha and the DEA and/or the Environment Minister regarding the Environment Minister's permission in terms of section 48(1)(b) of NEMPAA to mine

[83] Founding affidavit 65: 108, annexure "TTN28" 311-337
[84] Founding affidavit 65: 109
[85] Founding affidavit 65-66: 110, annexure 338-343

commercially in the MPE and any decision in respect of any request by Atha for such permission ("the third PAIA request")[86].

C.3 The applicants and CER learn of the NEMPAA decisions

77 On 29 August 2016 the applicants learned that the DG (Acting) of the DWS had issued the WUL to Atha[87] and on 15 December 2016 certain of the applicants lodged the WUL appeal which had the effect of automatically suspending the WUL. Atha however requested the Minister of Water and Sanitation to exercise her discretion to uplift the suspension in terms of section 148(2)(b) of the NWA to uplift the suspension.

78 On 31 January 2017, DWS provided the CER with a copy of Atha's request to uplift the suspension in order to enable the applicants to make representations to the Water Minister in response. Attached to the copy of Atha's request was a copy of a document recording that on 20 August 2016 and 21 November 2016 the Environment Minister and the Minerals Minister, respectively, had given Atha permission in terms of section 48(1)(b) of NEMPAA to conduct commercial mining inside the MPE[88].

79 This was the first time that either the applicants or CER learned of the NEMPAA decisions. It thus emerged that the applicants and the public had deliberately been kept in the dark for several months by both Atha and the two Ministers and their departments, with the result that they were not heard before

[86] Founding affidavit 66: 111, annexure "TTN30" 344-348
[87] Founding affidavit 66: 112; Ministers answering affidavit 739: 169
[88] Founding affidavit 67: 114, annexure "TTN31" 349-360; Ministers answering affidavit 739: 169

the NEMPAA decisions were taken. This is denied by the Ministers, but the denial is a completely bare one. Nothing is said to refute the detailed explanation provided by the applicants for their assertion in the founding affidavit.[89]

PART D: THE GROUNDS OF REVIEW

D.1 The Ministers did not take the NEMPAA decisions in an open and transparent manner or in a manner that promoted public participation

80 Section 2(4) of NEMA includes the following national environmental management principles:

80.1 the participation of all interested and affected parties in environmental governance must be promoted (section 2(4)(f) of NEMA); and

80.2 decisions must be taken in an open and transparent manner, and access to information must be provided in accordance with the law (section 2(4)(k) of NEMA).

81 Section 41(1)(c) of the Constitution obliges all spheres of government and all organs of state within each sphere to "*provide effective, transparent, accountable and coherent government for the Republic as a whole*", and section 195 of the Constitution requires that –

> *"(f) Public administration must be accountable.*
>
> *(g) Transparency must be fostered by providing the public with timely, accessible and accurate information*."

[89] Founding affidavit 67: 115. This is denied by the Ministers (739-740: 170)

82 In *President of the Republic of South Africa and Others v M & G Media Ltd* [90] the Court described *"open and transparent government and a free flow of information concerning the affairs of the state"* as *"the lifeblood of democracy."*[91]

83 In *Doctors for Life International v Speaker of the National Assembly and Others*,[92] Sachs J observed that:

> *"…Accountability, responsiveness and openness… are by their very nature ubiquitous and timeless. They are constants of our democracy, to be ceaselessly asserted in relation to ongoing legislative and other activities of government."* [93]

84 It cannot in any respect be said that the NEMPAA decisions were taken in an open and transparent manner, or that the participation of all interested and affected parties in environmental governance was promoted.

85 To the contrary, as appears from Part C above, the applicants and the CER were met with sustained stonewalling by the Environment Minister, the DEA and the Minerals Minister. This despite the fact that each of these parties was well aware from the public participation processes in respect of the other statutory authorisations that the applicants were interested and affected parties who were entitled to be heard in the NEMPAA decision-making process.

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[90] 2011 (2) SA 1 (SCA)
[91] Para 1
[92] 2006 (6) SA 416 (CC)
[93] Para 230

86 Moreover, there was absolutely no notification given to the public that the NEMPAA decisions were about to be made, or, once they had been made, that that was the case. Atha's application for permission in terms of section 48(1)(b) of NEMPAA ("the NEMPAA application") was not placed before the public for comment. Only Atha was informed once the NEMPAA decisions had been taken.

87 The Ministers also failed to inform the statutorily appointed management authority of the MPE (the Mabola Protected Environment Landowners Association ("MPELA")), that the NEMPAA application had been received and that the Ministers would be taking decisions in terms of section 48(1)(b) of NEMPAA whether or not to permit commercial mining in the area for which they are responsible, namely the MPE.

88 In answer to this, the Ministers say that all interested and affected parties were invited to make submissions in the mining right process, the EIA process, the WUL process and the process leading up to the declaration of the MPE. They say that "*[i]n a bid to avoid duplication of processes, the Ministers incorporated these submissions in the section 48 decision-making process*"[94]. The Ministers say that this approach was justified by section 24K of NEMA.

89 Section 24K of NEMA does not provide any lawful foundation for the Ministers' secretive approach. It provides –

> "*(1) The Minister or an MEC may consult with any organ of state responsible for administering the legislation relating to any aspect of an activity that also requires environmental authorisation under this*

[94] Ministers answering affidavit 740-741: 174.2; 680: 13.1.1; 699: 61.6; and pp 716-717 para 90

Act in order to coordinate the respective requirements of such legislation and to avoid duplication.

(2) The Minister or an MEC, in giving effect to Chapter 3 of the Constitution and section 24(4)(a)(i) of this Act, may after consultation with the organ of state contemplated in subsection (1) enter into a written agreement with the organ of state in order to avoid duplication in the submission of information or the carrying out of a process relating to any aspect of an activity that also requires environmental authorisation under this Act.

(3) The Minister or an MEC may—

(a) after having concluded an agreement contemplated in subsection (2), consider the relevance and application of such agreement on applications for environmental authorisations; and

(b) when he or she considers an application for environmental authorisation that also requires authorisation in terms of other legislation take account of, either in part or in full and as far as specific areas of expertise are concerned, any process authorised under that legislation as adequate for meeting the requirements of Chapter 5 of this Act, whether such processes are concluded or not and provided that section 24(4)(a) and, where applicable, section 24(4)(b) are given effect to in such process."

90 Section 24K of NEMA does not avail the Ministers because *inter alia* –

90.1 The co-ordination envisaged in section 24K pertains to the granting of environmental authorisations under NEMA in respect of activities that also require authorisation under other legislation. In this particular case we are concerned with a permission granted under section 48(1)(b) of NEMPAA, not an environmental authorisation under NEMA;

90.2 For the provision to operate, there must be in place a written agreement between the Minister of Environmental Affairs and the other organ of state involved – no such written agreement was proven by the Minister;

90.3 Nothing in section 24K suggests that the process provides a basis for avoiding the constitutional obligation for decision-making to be transparent and accountable – affected members of the public would have to be fully alerted to the fact that a consolidated procedure under more than one statute was under way – something clearly not done in this case;

90.4 Nothing in section 24K suggests that the process provides a basis for avoiding the constitutional and statutory duty to proceed fairly in relation to the particular decision in question. The requirement of procedurally fair administrative action that there be *"adequate notice of the nature and purpose of the proposed administrative action"*[95] cannot have been complied with through procedures under other legislation that made no mention of intended action under section 48(1)(b) of NEMPAA; and

90.5 The provision does not avail the Minister of Minerals and Energy, who is also a relevant decision-maker under section 48(1)(b) of NEMPAA.

91 Accordingly, the NEMPAA decisions are reviewable on the ground that mandatory and material procedures or conditions prescribed by empowering provisions (sections 2(4)(f) and (k) of NEMA read with sections 2(1)(c) of NEMA and section 48(4) of NEMPAA) were not complied with (section 6(2)(b) of PAJA) and because of a failure to comply with sections 195(1)(f) and (g) and section 41(1)(c) of the Constitution.

[95] Section 3(2)(b)(i) of PAJA. Procedural fairness is discussed more fully below.

D.2 The NEMPAA decisions were procedurally unfair

92 The NEMPAA decisions are also reviewable because they were procedurally unfair in breach of section 33(1) of the Constitution and sections 3 and 4 of PAJA.

93 Section 33(1) of the Constitution provides that everyone has the right to administrative action that is procedurally fair. PAJA gives effect to this right in sections 3 and 4 thereof.

94 The following things are clear from section 3[96] of PAJA:

94.1 Administrative action which materially and adversely affects the rights and legitimate expectations of any person must be procedurally fair (section 3(1));

---

[96] "*3 Procedurally fair administrative action affecting any person*

(1) Administrative action which materially and adversely affects the rights or legitimate expectations of any person must be procedurally fair.

(2) (a) A fair administrative procedure depends on the circumstances of each case.
(b) In order to give effect to the right to procedurally fair administrative action, an administrator, subject to subsection (4), must give a person referred to in subsection (1)—
(i) adequate notice of the nature and purpose of the proposed administrative action;
(ii) a reasonable opportunity to make representations;
(iii) a clear statement of the administrative action;
(iv) adequate notice of any right of review or internal appeal, where applicable; and
(v) adequate notice of the right to request reasons in terms of section 5.

(3) …

(4) (a) If it is reasonable and justifiable in the circumstances, an administrator may depart from any of the requirements referred to in subsection (2).
(b) In determining whether a departure as contemplated in paragraph (a) is reasonable and justifiable, an administrator must take into account all relevant factors, including—
(i) the objects of the empowering provision;
(ii) the nature and purpose of, and the need to take, the administrative action;
(iii) the likely effect of the administrative action;
(iv) the urgency of taking the administrative action or the urgency of the matter; and
(v) the need to promote an efficient administration and good governance.

(5) Where an administrator is empowered by any empowering provision to follow a procedure which is fair but different from the provisions of subsection (2), the administrator may act in accordance with that different procedure."

94.2 Whilst *"a fair administrative procedure depends on the circumstances of each case"*,[97] at a minimum procedural fairness requires –

94.2.1 Adequate notice of the nature and purpose of the proposed administrative action;

94.2.2 A reasonable opportunity to make representations;

94.2.3 A clear statement of the administrative action;

94.2.4 Adequate notice of any right of review or internatl appeal, where applicable; and

94.2.5 Adequate notice of the right to request reasons.[98]

94.3 In order to give effect to the right to procedurally fair administrative action, the administrator must comply with the requirements in section 3(2)(b), with only two exceptions, namely if:

94.3.1 If it is reasonable and justifiable in the circumstances to depart from any of the requirements in terms of section 3(2)(b) - which must be determined by the administrator with reference to certain factors;

94.3.2 Where an administrator is empowered by an empowering provision to follow a procedure that is fair but different from the provisions of subsection (2), the administrator may act in accordance with that different procedure.

[97] Section 3(2)(a) of PAJA.
[98] Section 3(2)(b) of PAJA.

95 In addition, if an administrative action materially and adversely affects the rights of the public, the administrator must decide which public participation process to follow in terms of section 4(1)[99] and then follow that procedure. Exceptions are made on the same basis as those provided for in relation to section 3 i.e. firstly, where the decision-maker's empowering statute provides a fair but different procedure[100] and, secondly, where a departure from the requirements for public consultation are justifiable with reference to similar criteria.[101]

96 The Ministers do not dispute that the NEMPAA decisions are administrative action which materially and adversely affects the rights and legitimate expectations of persons and which materially and adversely affects the rights of the public.

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99 "*4 Administrative action affecting public*

(1) In cases where an administrative action materially and adversely affects the rights of the public, an administrator, in order to give effect to the right to procedurally fair administrative action, must decide whether—

(a) to hold a public inquiry in terms of subsection (2);

(b) to follow a notice and comment procedure in terms of subsection (3);

(c) to follow the procedures in both subsections (2) and (3);

(d) where the administrator is empowered by any empowering provision to follow a procedure which is fair but different, to follow that procedure; or

(e) to follow another appropriate procedure which gives effect to section 3.

…

(4) (a) If it is reasonable and justifiable in the circumstances, an administrator may depart from the requirements referred to in subsections (1)(a) to (e), (2) and (3).

(b) In determining whether a departure as contemplated in paragraph (a) is reasonable and justifiable, an administrator must take into account all relevant factors, including—

(i) the objects of the empowering provision;

(ii) the nature and purpose of, and the need to take, the administrative action;

(iii) the likely effect of the administrative action;

(iv) the urgency of taking the administrative action or the urgency of the matter; and

(v) the need to promote an efficient administration and good governance."

100 Sections 4(1)(d) and (e).

101 Section 4(4).

97 It is also common cause that there is no empowering provision in NEMPAA providing for a “fair but different” public participation procedure to be followed before permission may be granted in terms of section 48(1)(b) of NEMPAA.

98 The Ministers admit that they failed to comply with all of the above listed components of a fair procedure required by sections 3 and 4 of PAJA.

99 However they contend that the departure was reasonable and justifiable with reference to the criteria listed in sections 3(4)(b) and 4(4)(b) of PAJA.[102] These require consideration of -

99.1 The objects of the empowering provision;

99.2 The nature and purpose of, and the need to take, the administrative action;

99.3 The likely effect of the administrative action;

99.4 The urgency of taking the administrative action or the urgency of the matter; and

99.5 The need to promote an efficient administration and good governance.

100 The Ministers plead that it was reasonable and justifiable to depart from the requirements of sections 3 and 4 on the following basis:

100.1 Interested and affected parties were invited to make submissions in the mining right process, the EIA (EA) process, the WUL process and

[102] Minsters answering affidavit 742-743: 175.2

the process leading up to the declaration of the MPE, and the Ministers "*incorporated these submissions in the section 48 decision-making process*" (see references in paragraph 88 above);

100.2 A decision in terms of the section 48(1)(b) of NEMPAA does not involve any considerations which are distinctive from those which must be considered for purposes of the other authorisations that were required by Atha;[103]

100.3 To the extent that the public participation processes in the EA and WUL processes were deficient (because certain documents which served before the decision-makers did not form part of the public participation processes pertaining to those applications), that does not matter because these documents "*were only relevant to the WUL process under the NWA*" and the WUL itself shows that "*the Acting DG: DWS considered the SAS 2015 assessment when granting the WUL to Atha*".[104]

101 There are several problems with this answer, including, *inter alia*, these:

101.1 By the Ministers' own admission, they did not consider the urgency or otherwise of taking the administrative action as required by sections 3(4)(b)(iv) and 4(4)(b)(iv) of PAJA;[105]

101.2 The Ministers paid lip service to the requirement to consider the objects

[103] Ministers answering affidavit 718 to 719: 94
[104] Ministers' answering affidavit 718: 93
[105] There is no reference to this factor by the Ministers where they list the factors which they allegedly did consider (742-743: 175.2)

of the empowering provision – no explanation of how this was considered is provided;

101.3 They relied on section 24K of NEMA – this has been dealt with above;

101.4 They equated the nature and purpose of the administrative action with "the overlap between the requirements of other approvals", a non-sequitur;

101.5 They wrongly considered that by avoiding overlap through placing reliance on procedures for other administrative action, this automatically promoted an efficient administration and good governance, whereas it manifestly did not do so;

101.6 None of the public participation processes in respect of the other authorisations was aimed at providing a fair procedure in relation to the decisions in terms of section 48(1)(b) of NEMPAA. Procedural fairness afforded in relation to different administrative action under different statutes (NEMA, the MPRDA and the NWA) can never amount to procedural fairness for the administrative action in question (under NEMPAA), particularly where those purportedly exercising their right to be heard were unaware that they were also meant to be exercising it in relation to the NEMPAA decision-making.

101.7 The grant of permission under section 48(1)(b) of NEMPAA raises distinctive considerations which are not raised by the statutes under which the other authorisations were granted and in relation to which interested and affected parties were entitled to be heard, including, for

example –

101.7.1 whether the mine could ever be compatible with the distinctive objectives of NEMPAA as set out in section 2;

101.7.2 the State's duty to act as trustee of protected areas as set out in section 3(a) of NEMPAA;

101.7.3 the State's duty in section 3(b) in implementing NEMPAA to act "in partnership with the people" (how can there be a partnership with the people if they are not told that the State is acting in partnership with them?);

101.8 Procedural fairness has as its purpose the opportunity on the part of those affected by administrative action to influence its outcome.[106] But the public, the applicants and the MPELA had no chance of influencing the outcome of the NEMPAA decisions because they did not know what the NEMPAA application said. They had no idea what factors had been placed before the Ministers by Atha for purposes of motivating why commercial mining should take place in the MPE;

101.9 The Ministers, as a matter of fact, did not take into account the submissions which had been made during the public participation process in relation to the application for the WUL under the NWA. The Rule 53 record which was filed by the Ministers on 28 September 2017 contains no record whatsoever of documents emanating from the WUL public participation process. The most serious impacts of the proposed

[106] *Joseph and Others v City of Johannesburg and Others* 2010 (4) SA 55 (CC) para 41

mine are however associated with the water uses which it triggers, including the dewatering of the wetlands and acid mine drainage, to which we return below;

101.10 Even if the Ministers had been entitled to rely on the public participation processes followed in respect of other authorisations (which is denied), those processes were themselves fundamentally flawed.[107] This is not denied by the Ministers.[108]

102 Accordingly, it was not reasonable and justifiable to depart from the requirements of sections 3(2) and 4(1) of PAJA. The Ministers failed to comply with these provisions despite:

102.1 repeated requests by the CER that the applicants be afforded an opportunity to make representations;

102.2 the recognised sensitivity and strategic importance of the MPE; and

102.3 the fact that it appeared from a draft management plan for the MPE, that the management authority of the MPE was of the view that there ought not to be mining in the proposed mine area.[109]

103 We submit that the NEMPAA decisions fall to be reviewed and set aside as having been procedurally unfair (section 6(2)(c) of PAJA).

[107] Founding affidavit 381-382: 13-14
[108] Ministers answering affidavit 753: 190
[109] Founding affidavit 56: 87; Ministers answering affidavit 735-736: 156

D.3 The Ministers misconstrued their distinctive duties in terms of NEMPAA

104 For the reasons given in Part A.6 above, it was incumbent on the Ministers to apply their minds afresh to the decisions which they were required to make in terms of NEMPAA.

105 The Ministers however deny this[110]. They say that they were both fully aware of the complex processes undertaken in respect of the authorisation processes initiated by Atha, and that that their assessment of the NEMPAA application was "*enhanced by the extensive work done in respect of other processes carried out under EIA, NEMA, MPRDA and NWA*".

106 This answer cannot be accepted because:

106.1 Neither of the Ministers were involved in any way in the WUL process and they did not have the record pertaining to the WUL before them when they took the NEMPAA decisions[111] - In other words, the Ministers did not at any stage consider or apply their minds to the impacts of the water uses associated with the mine.

106.2 While it is correct that the Environment Minister acted as the competent authority in respect of Atha's application for EA until the end of February 2015, and that the DEA was therefore involved in the EIA process during that period, it is common cause that it was not the Minister who granted the EA on 17 June 2016, but the Chief Director

[110] Answering affidavit 745: 177.5
[111] Replying affidavit (to the Ministers) 857: 11.3.1

of the Mpumalanga Environmental Department. There is nothing to suggest in the record of decision in the EA appeal (which was to the Mpumalanga Environmental MEC) that the Environment Minister ever engaged further in the EA process in any material way after February 2015[112].

106.3 There is no evidence that the Environment Minister ever saw or considered the DMR-approved EMPR – a version of the EMPR predating the approved version is contained in the NEMPAA Rule 53 Record[113]. And yet it is the EMPR which contains the mitigation and remediation measures to which a developer may be held. (It is also highly unlikely that the Minerals Minister who took the NEMPAA decision ever considered the DMR-approved EMPR because it was not he who approved it, but his delegee, and furthermore it was his predecessor who granted Atha's mining right).

106.4 The Minerals Minister who granted Atha's mining right is not the Minister who took the NEMPAA decision.

107 It is clear that the Ministers relied on the fact that Atha had received its mining right, approved EMPR, EA and WUL, without more, to conclude that everything was in order.

108 The Constitutional Court has made it clear that regardless of what other authorisations may have been required in a particular instance, every authority

[112] Replying affidavit (to Ministers) 882-883: 68
[113] Supplementary founding affidavit 395-396: 58; Replying affidavit (to Ministers) 755-756: 194

which is responsible for granting an authorisation must exercise his or her discretion afresh and independently.[114]

109 Moreover, the role of the Ministers in section 48(1)(b) of NEMPAA, properly construed, is to provide a special additional layer of protection against mining in protected environments, over and above the protective functions of the management authority. (This is elaborated upon below.) In relying on the exercise of power under other provisions, the Ministers overlooked this special protective function.

110 The Ministers admit that they did not exercise a fresh, independent discretion under the NEMPAA provisions.[115]

111 This renders the NEMPAA decisions reviewable on the grounds that –

111.1 they were materially influenced by errors of law (section 6(2)(d) of PAJA);

111.2 they were taken because of the unauthorised or unwarranted dictates of another person or body (section 6(2)(e)(iv) of PAJA); and

111.3 they were influenced by errors of fact and were taken because irrelevant considerations were taken into account and relevant considerations were not taken into account (section 6(2)(e)(iii) of PAJA).

[114] *Fuel Retailers above* at paras 84 – 92.
[115] Ministers answering affidavit 745: 177.5

D.4 NEMPAA envisages that mining will only be permissible in a protected environment in exceptional circumstances

112 The Ministers were required to proceed on the basis that mining will only be permitted in a protected environment in exceptional circumstances, and particularly so where the mining is harmful to the environment[116] That this is so arises from a contextual and purposive interpretation of section 48(1)(b), including the following:

112.1 The primary function of section 48 is to prohibit, not to allow, prospecting and mining in protected areas – simple logic dictates that where an exception to the prevailing prohibition in the section is created, exceptional circumstances must be shown;

112.2 Section 48 reflects an acknowledgement by the legislature that prospecting and mining are ordinarily inimical to the protection of ecosystems recognised as vulnerable and accorded protected status as a result;

112.3 The strength of the protection against prospecting and mining provided by section 48 is apparent from the words "[d]espite other legislation" at the beginning of subsection (1). These words are also a compelling statutory reason why the Ministers could not rely on either on processes or substantive decisions taken under other legislation;

[116] Founding affidavit 88-91: 153;

112.4 The structure of section 48(1)(b), which primarily prohibits mining in a protected area, but then recognises as an exception that it may take place with the permission of both Ministers, suggests that the permission is in the nature of an exception;

112.5 The fact that the matter is required to receive the scrutiny of both Ministers points also to the fact that the circumstances warranting the mining must be exceptional, with each Minister applying his or her mind to the considerations that fall within their respective areas of expertise;

112.6 If section 48(1)(b) is not interpreted as requiring exceptional circumstances to be present, then the provision tends to become meaningless, because sufficient environmental protection would be provided by NEMA and other environmental legislation requiring prior authorisation. Indeed the approach adopted by the Ministers in relying entirely on the decision-making in relation to other authorisations, illustrates the problem with ignoring the need for exceptional circumstances to be shown;

112.7 In terms of its long title, NEMPAA provides for the "*protection and conservation of ecologically viable areas representative of South Africa's biological diversity and its natural landscapes and seascapes*". The terms "conservation" and "protection" indicate that any impact of an activity within a protected area that is inimical to or undermining of either "conservation" or "protection" will be in conflict with the achievement of the purpose of the legislation;

112.8 Objective (e) in section 2 of NEMPAA (again, see paragraph 26 above) envisages the "*sustainable utilisation of protected areas for the benefit of people, in a manner that would preserve the ecological character of such areas*". Activities in protected areas that deplete non-renewable resources of any kind, so that they are not available to future generations, or that change or damage the ecological character of such areas, would, absent exceptional circumstances, be inconsistent with the objectives of the Act.

112.9 Section 3 of NEMPAA provides that:

> "*In fulfilling the rights contained in section 24 of the Constitution, the State through the organs of state implementing legislation applicable to protected areas must –*
>
> *(a) act as the trustee of protected areas in the Republic; and*
>
> *(b) implement this Act in partnership with the people to achieve the progressive realisation of those rights*";

112.10 It is a fundamental duty of a trustee that he or she should act to protect, preserve and enhance the asset placed in his or her trust, not to deplete the asset in any way.[117] The Ministers would ordinarily be acting in conflict with their duties as trustees under section 3 were they to permit mining in circumstances that failed to maintain a protected area in its protected state for the benefit of future generations for whom they act as trustees. For a trustee to be permitted to act in a manner that depleted trust assets, there would have to be exceptional circumstances justifying this;

[117] LAWSA second edition Vol 31 : Trusts para 575 *Duty to preserve* p364.

112.11 Section 17 of NEMPAA, quoted in paragraph 28 above, identifies a range of purposes of the declaration of protected areas, from which it is clear that any form of mining that operates in conflict with those protective purposes would ordinarily (and therefore in the absence of exceptional circumstances) be impermissible, particularly where it impacted on –

112.11.1 the preservation of the ecological integrity of protected areas (paragraph (b));

112.11.2 the conservation of biodiversity in protected areas (paragraph (c));

112.11.3 the protection of areas that are vulnerable or ecologically sensitive (paragraph (f));

112.11.4 the sustained supply of environmental goods and services, particularly – in this matter – fresh water (paragraph (g));

112.11.5 the sustainable use of natural and biological resources, particularly – in this matter – fresh water (paragraph (h));

112.11.6 destinations for nature based-tourism (paragraph (i)); and

112.11.7 the promotion of the recovery of endangered and vulnerable species (paragraph (l)) – note particularly the listing of the Wakkerstroom/Luneburg Grasslands as an endangered ecosystem in terms of section 52(1)(a) of the Biodiversity Act (see paragraph 52 above).

113 The likely impacts of the mine proposed by Atha, which are described by the experts whose reports form part of the EIAR, are entirely inconsistent with there being exceptional circumstances present that would justify the Ministers exercising their powers under section 48(1)(b) of NEMPAA in favour of Atha.[118]

114 The following findings point to a complete absence of exceptional circumstances justifying the decision to allow mining in the MPE. They are contained in the most recent specialist reports which Atha's environmental assessment practitioner commissioned for the EA and WUL applications. They were referred to in the supplementary affidavit and are not disputed by the Ministers, nor disputed in any substantial way by Atha:

114.1 The flow of groundwater into the mine void, and the pumping out of such water, during the operational phase will result in reduced groundwater levels in the aquifers above and in the vicinity of the workings ("dewatering"). There will be a maximum drawdown of 9 metres in the shallow aquifer and 50 metres in the deep aquifer. The cones of dewatering in both the shallow and deep aquifers will extend for several kilometres away from the mine[119].

114.2 The dewatering of wetland habitat downgradient of mining activities, will lead to loss of water within wetland habitat and reduced recharge of wetland resources, with 'HIGH' impacts on the study-area wetlands

[118] Founding affidavit 92: 156
[119] Supplementary founding affidavit 390: 39; annexures "SP5" and "SP6" 464-465. This is not denied by the Ministers (Ministers answering affidavit 755: 193)

both unmitigated and with mitigation[120].

114.3 It will take around 45 years for the mine voids to be completely flooded once active dewatering (pumping out of water) is stopped. Thereafter, decant[121] from the underground mine voids via the adit and/or unsealed exploration boreholes in the vicinity is highly likely to occur (which decant is likely to be characteristic of acid mine drainage ("AMD"[122]))[123].

114.4 The potential for post-closure decant of water from the underground mine void via the adit and/or unsealed exploration boreholes "*is of particular concern, as this will have a long term effect on surface water quality of not only the wetlands in the study area, but also on aquatic resources within the greater catchment of the Assegaai River. Should it be considered economically feasible to treat the decant water post-closure until water quality stabilises, which could take many decades, to pre-mining water quality standards in such a way as to support the post closure land use,…the project would be considered feasible, although the impacts on the wetland resources would remain high*."[124] (own emphasis)

[120] Supplementary founding affidavit 390: 40; This is not denied by the Ministers (Ministers answering affidavit 755: 193)
[121] The process by which water which has been in contact with the coal seams in the mine reaches the ground surface
[122] AMD is the process by which contaminants released during the mining process pass into the water in the mine voids, which then decants to the surface and pollutes surface water systems
[123] Founding affidavit 111: 202.1. This is not denied by the Ministers (Ministers answering affidavit 749: 181)
[124] Founding affidavit 112: 202.2. This is not denied by the Ministers (Ministers answering affidavit 749: 181)

115 That there will be lasting negative impacts on the MPE is therefore not in dispute.

116 Moreover, it is clear from the Ministers' reasons that they failed to identify any single exceptional circumstance that would justify mining in the MPE[125]. This is also apparent from the fact that they relied on the ordinary scrutiny processes for mining under other legislation as their basis for permitting the mining.

117 They also manifestly failed to have any regard to their duties as trustees under section 3 of NEMPAA[126].

118 In answer to these allegations, the Ministers say only that NEMPAA does not say expressly or impliedly that mining is permissible in protected environments only in exceptional circumstances; and that the NEMPAA decisions were accompanied by strict conditions[127].

119 We submit that neither of these is an answer to the detailed analysis of NEMPAA which is contained in this Part. As regards the conditions, as is explained in the founding and supplementary founding affidavits, many of them are materially flawed and their likely efficacy is questionable[128], but even if they

[125] Founding affidavit 92: 157
[126] Founding affidavit 92: 158
[127] Ministers answering affidavit 721: 103-106, 745: 178
[128] As to which, see founding affidavit 93-93: 163; 108-110: 199-201; 136-137: 239-240; Replying affidavit (to Ministers) 874-877: 52

were capable of being complied with, and even if Atha were in fact to comply with them, there would still be unacceptable impacts on the MPE[129]

120 The Ministers' failure to approach the NEMPAA decisions on the basis that mining should only be permitted in a protected environment in exceptional circumstances, and particularly so where the mining is harmful to the environment, renders the NEMPAA decisions reviewable on the following grounds-

120.1 mandatory and material procedures and conditions prescribed by NEMPAA were not complied with (section 6(2)(b) of PAJA);

120.2 the Ministers' actions were influenced by errors of law (section 6(2)(d) of PAJA);

120.3 the action itself contravenes a law or is not authorised by the empowering provision (section 6(2)(f)(i) of PAJA); and

120.4 the Ministers' actions were not rationally connected with the purpose of the empowering provision, being NEMPAA (section 6(2)(f)(ii)(bb) of PAJA).

121 Even if the court is not inclined to recognise a requirement that exceptional circumstances need to be shown to justify mining in a protected area, the decision was reviewable, having regard to the facts set out in this section, on the basis that the Ministers failed to take into account relevant considerations

[129] Founding affidavit 109: 201; Supplementary founding affidavit 384-385: 23-25; Replying affidavit (to Minsters) 875-876: 52.6.1

and took into account irrelevant considerations.

D.5 Failure to await approval of the management plan for the MPE

122 Section 38(2) of NEMPAA provides as follows:

"(2) The MEC, in writing-

…

(b) may assign the management of a protected environment to a suitable person, organisation or organ of state..."

123 In terms of section 38(3) of NEMPAA, the person, organisation or organ of state to whom the management of a protected environment has been assigned is the management authority of the protected environment for the purposes of the Act.

124 In terms of section 39(2) of NEMPAA the management authority must, within 12 months of the assignment, submit a management plan for the protected environment to the Minister or the MEC for approval.

125 In terms of section 41(2) of NEMPAA, a management plan must contain, amongst other things: "*a zoning of the area indicating what activities may take place in different sections of the area, and the conservation objectives of those sections"* (section 41(2)(g)).

126 It is common cause that:

126.1 The MPELA was assigned the management of the MPE by the MEC on 17 February 2014[130];

[130] Founding affidavit 54-55: 84; annexure "TTN14" 179-191; Ministers answering affidavit 735: 155

126.2 The MPELA was therefore required in terms of section 39(2) of NEMPAA to submit a management plan by 17 February 2015 to the MEC for approval;

126.3 The MPELA presented a draft management plan to a meeting attended by their representatives and a representative from the MEC's department, representatives of the MPTA and Atha, on 23 January 2015[131];

126.4 The MEC has nevertheless not yet approved a management plan for the MPE.[132]

127 Whatever the reason for the failure to approve the management plan, the NEMPAA decisions could not have been taken validly in the absence of an approved management plan for the MPE.

128 Section 39(2) of NEMPAA makes it clear that it is a peremptory requirement that there be in place a management plan in respect of a protected area, approved by the Minister or the MEC.

129 Section 41(1) provides that –

> *"[t]he object of a management plan is to ensure the protection, conservation and management of the protected area concerned in a manner which is consistent with the objectives of this Act and for the purpose it was declared."*

[131] Founding affidavit 55-56: 86; Ministers answering affidavit 735-736: 156
[132] Ministers answering affidavit 726-727: 125

130 Section 41(2) lays down the minimum content of a management plan, which must include –

> *"(a) the terms and conditions of any applicable biodiversity management plan;*
>
> *(b) a co-ordinated policy framework;*
>
> *(c) such planning measures, controls and performance criteria as may be prescribed;*
>
> *(d) a programme for the implementation of the plan and its costing;*
>
> *(e) procedures for public participation, including participation by the owner (if applicable), any local community or other interested party;*
>
> *(f) where appropriate, the implementation of community-based natural resource management; and*
>
> *(g) a zoning of the area indicating what activities may take place in different sections of the area, and the conservation objectives of those sections …"*

131 Section 39(4) also provides that –

> *"A management plan must take into account any applicable aspects of the integrated development plan of the municipality in which the protected area is situated."*

132 It is immediately apparent that no proper decision, consistent with the objectives of the act and the purposes of the protected area, could be taken by the Ministers in terms of section 48(1)(b) without having regard to the management plan. On a contextual and purposive approach to the interpretation of NEMPAA, it could never have been the intention of the legislation that the Ministers could in exercising their powers under section 48(1)(b), ride roughshod over the management plan or without waiting for its approval.

133 Nor could it have been the intention of the legislation that a failure by the MEC to approve a draft plan put up by the management authority could permit the circumvention of that plan by the Ministers. In circumstances where the Ministers were called upon to act in terms of section 48(1)(b) and it was established that no management plan had been approved, the environment Minister ought to have taken the necessary steps to ensure that the management plan was finalised and put in place, before considering any request for permission in terms of section 48(1)(b).

134 Further, it is submitted that the Ministers would be bound by the plan and the zoning scheme made in terms section 41(2)(g) in deciding whether or not to permit mining. This is a consequence of the environment Minister having assigned the management of a protected environment to an organisation such as MPELA in terms of section 38(1)(b).

135 Even if we are incorrect in this submission, then it was at least incumbent on the Ministers to have regard to an approved management plan as a relevant consideration in their decision-making processes.

136 In this instance, the Ministers failed to await (and to take steps to ensure the approval of) a management plan and, as a consequence, took their decisions without reference to a management plan for the area, as they were obliged to do.

137 Having regard to these errors, the NEMPAA decisions are reviewable on the grounds that –

137.1 a mandatory and material procedure or condition prescribed by an empowering provision was not complied with (section 6(2)(b) of PAJA);

137.2 the action was materially influenced by an error of law (section 6(2)(d) of PAJA);

137.3 relevant considerations were not taken into account (section 6(2)(e)(iii) of PAJA); and

137.4 the action was not authorised by the empowering provision (section 6(2)(e)(i) of PAJA).

D.6 The Ministers failed to take into account the interests of local communities

138 Section 24 of the Constitution contains an obligation on the state to promote justifiable economic and social development. It recognises that the environment and development are inexorably linked. Development cannot subsist upon a deteriorating environmental base and the promotion of development requires the protection of the environment[133].

139 Section 24 therefore requires that development must be ecologically sustainable and that economic and social development must be justifiable in light of the need to protect the environment[134].

[133] *Fuel Retailers* paras 44, 45, 62
[134] *Fuel Retailers* paras 73-79,

140 The Constitution places a duty on the state to promote social and economic development, but to do so in a way which is consistent with its duty to protect the environment, which lies at the core of the well-being of people.

141 This need to ensure that development is socially, environmentally and economically sustainable, and to view the well-being of all people as being central to the right in section 24 of the Constitution, is given expression in several sections of NEMA including:

141.1 "*Environmental management must place people and their needs at the forefront of its concern, and serve their physical, psychological, developmental, cultural and social interests equitably*" (section 2(2));

141.2 "*Development must be socially, environmentally and economically sustainable*" (section 2(3));

141.3 "*Sustainable development requires the consideration of all relevant factors including the following:*

(i) that the disturbance of ecosystems and loss of biological diversity are avoided, or, where they cannot be altogether avoided, are minimised and remedied;

(ii) that pollution and degradation of the environment are avoided, or, where they cannot be altogether avoided, are minimised and remedied; …

(vi) that the development, use and exploitation of renewable resources and the ecosystems of which they are part do not

exceed the level beyond which their integrity is jeopardised." (section 2(4)(a)(i), (ii) and (vi));

141.4 "*Environmental justice must be pursued so that adverse environmental impacts shall not be distributed in such a manner as to unfairly discriminate against any person, particularly vulnerable and disadvantaged persons"* (section 2(4)(c)); and

141.5 "*The social, economic and environmental impacts of activities, including disadvantages and benefits, must be considered, assessed and evaluated, and decisions must be appropriate in the light of such consideration and assessment*" (section 2(4)(i)).

142 Section 48(4) of NEMPAA specifically prescribes that when applying section 48(1)(b), the Environment Minister "*must take into account the interests of local communities*"[135].

143 Local communities would, in the context of this matter refer to both local communities living in or near the MPE and the many local communities dependent on the fresh water that flows into a range of river systems from the area (see paragraph 61 above).

144 When the Ministers took the NEMPAA decisions, they imposed as a condition that "*all social issues inclusive of affected homesteads and relocations must be addressed in accordance with the approved social and labour plan as*

[135] "*Local community*" is defined in section 1 of NEMPAA to mean "*any community of people living or having rights or interests in a distinct geographical area*".

informed by the social impact assessment report and regulated by the [DMR]" (condition 30).

145 It is common cause that a Social and Labour Plan ("SLP") in respect of the proposed mine was not before, or taken into consideration by, the Ministers in making the NEMPAA decisions[136]. An inference must be drawn from this that the Ministers did not themselves apply their minds in terms of section 48(4) of NEMPAA and the aforesaid provisions of section 2 of NEMA.

146 What the Ministers were required to have done was to determine whether the mine would be socially, environmentally and economically sustainable, and to weigh up the benefits of mine to the community, against the costs of the mine to local communities. This should have been done in light of the Social and Labour Plan and all the other relevant considerations including the socio-economic study which formed part of the EIAR.

147 But the Ministers admit that they did not take into account all of the relevant considerations (they relied for example on a summary of the Social and Labour Plan which was incomplete and inaccurate[137]); and an analysis of the benefits and costs of the mine for local communities reveals that had the Ministers done so, they would not (or, acting reasonably, should not) have granted permission in terms of section 48(1)(b) of NEMPAA:

[136] Ministers answering affidavit 721-722: 107-109
[137] Supplementary founding affidavit 386-387: 30-33

D.6.1 The contribution of the mine to the local community

148 Whereas the mine would, according to Atha, generate 576 employment opportunities when fully operational, there is no guarantee contained anywhere in the EMPR, the Social and Labour Plan, the conditions of the EA or the conditions attaching to the NEMPAA decisions that these employment opportunities will be sourced locally. On the contrary the final EIAR records that "*the majority of labour and employees are likely to come from outside the ADI [Area of Direct Influence] due to the lack of skills locally"*[138].

149 For this reason, the socio-economic study which formed part of the EIAR recommended that skills development and training be implemented by Atha prior to the construction phase to ensure that individuals in local communities may qualify for employment. The socio-economic study reported that *"[d]ue to the limited numbers of unskilled, semi-skilled and skilled employment opportunities, the proposed mine will offer little or no economic benefit for the local area without skills development"*[139]. Skills development and training prior to the construction phase has not however been provided for anywhere in the approved EMPR, the Social and Labour Plan, the conditions of the EA or the conditions attached to the NEMPAA decisions.

150 Instead the following things appear from the Social and Labour Plan:

150.1 The Social and Labour Plan makes no commitment to employing people from the local community.

[138] Founding affidavit 95-96: 168
[139] Founding affidavit 97: 171

150.2 Whereas it appears that Atha may offer 48 learnership opportunities to people from nearby communities for the first five years of the mine, the total budget for these over five years is R342 000. The Social and Labour Plan makes it clear that the learnerships will not precede construction and will not necessarily lead to employment by Atha.

150.3 What Atha does undertake to do is to subsidise an existing local mobile clinic (at a cost of R1 300 000 in total over five years); and to build an extra classroom for Sinethemba Agricultural and Technical Secondary School and employ a guest teacher (at a cost of R4 420 000 in total over five years).

151 This contribution to the local community pales in comparison to the total revenue and profit from the mine which is expected to exceed R1.235 billion per annum for a ten year period[140].

D.6.2 The direct cost of the mine to the local community

152 The final EIAR reports that eco-tourism contributes materially to job-creation in the area and that if mitigation measures are not implemented, environmental impacts resulting from the proposed mine may degrade surrounding surface and groundwater sources resulting in a reduction of biodiversity in the area and a decline in eco-tourism. The area between Wakkerstroom and the mine area is an internationally recognised birding site with four endemic species.

[140] Founding affidavit 98-99: 173-174

The area is surrounded by gazetted protected areas that are significant tourist attractions.[141]

153 As noted above, the mine area supports agricultural employment opportunities and several subsistence farmers have made their homes on the proposed mining site, which has good to excellent grazing capacity. There are approximately eight homesteads situated on the proposed mining site which are occupied by low-income families with between eight and thirty people living in each homestead. The final EIAR records that water is sourced by farmers in the area from springs (referred to locally as "fonteine") which are used for both domestic and livestock watering purposes[142]. There are several springs within the proposed underground mining area.

154 According to the final EIAR, a lowering of groundwater levels will have a negative impact on, among other things, the springs within the "*cone of depression*" of the mine (which is a term used to describe an area of impact of the mine on groundwater levels)[143]. A drawdown of more than 5m is expected to reduce or dry up springs. Moreover, possible "*decant*" points (the points at which contaminated water from the mine void is likely to be released onto the surface post mine closure) are potentially connected to the springs.

[141] Founding affidavit 99: 175
[142] Founding affidavit 101: 179
[143] Founding affidavit 101: 180; See also founding affidavit 111-112: 202.1. 202.2 (not denied in the Ministers answering affidavit 749: 181); 139-140: 248 (not denied in the Ministers answering affidavit 751: 185); Supplementary founding affidavit 389-390: 38 and 40 (not denied in the Ministers answering affidavit 755: 193); and 390-393: 41-47 (not denied in the Ministers answering affidavit 755: 193)

155 The mine will also have direct consequences for a family residing within 500 metres of the proposed adit (entrance) to the mine[144]. The mining activities are likely to result in damage to this homestead, and to have dust, noise, safety and visual impacts, with negative consequences for the family residing there, as well their cattle, crops and quality of life.

156 These negative impacts on the local community do not take into account the long-term consequences of ground and surface water contamination, including acid mine drainage, which the NEMPAA decisions expressly recognise will take place.

D.6.3 Conclusion of this Part

157 It is clear that the Ministers failed to take into account the interests of local communities, including by failing to consider the Social and Labour Plan.

158 If the Ministers had considered the interests of local communities, there is no rational basis on which they could have concluded that the constitutional imperatives of sustainable development would be met.

159 The NEMPAA decisions are reviewable because –

159.1 a mandatory and material procedure or condition prescribed by an empowering provision (section 48(4) of NEMPAA) was not complied with (section 6(2)(b) of PAJA);

[144] Founding affidavit 101: 181 (not denied in the Ministers answering affidavit 746-748: 179)

159.2 the action was materially influenced by an error of law (section 6(2)(d) of PAJA);

159.3 relevant considerations were not taken into account (section 6(2)(e)(iii) of PAJA);

159.4 the action was not authorised by the empowering provision (section 6(2)(f)(i) of PAJA);

159.5 the decision of the Environment Minister to permit the mining was one that no reasonable decision-maker could have reached (section 6(2)(h) of PAJA); and

159.6 the action was not rationally connected to the reasons given for it by the Ministers (section 6(2)(f)(ii)(dd of PAJA).

D.7 The failure by the Ministers to consider the SAS 2015 report

160 In May 2015, Scientific Aquatic Services CC ("SAS"), one of the specialists commissioned by Atha's environmental assessment practitioner, conducted a detailed assessment of the surface infrastructure wetlands (based on the new configuration of the surface infrastructure, or the so-called "*Best Environmental Option*"). It also conducted an assessment of two other wetlands which are located within 500m of the surface infrastructure footprint and underground mining boundary. The results of these assessments are contained in the SAS 2015 assessment.

161 The SAS 2015 assessment does not however form part of the NEMPAA record and did not serve before the Ministers. This is admitted by the Ministers[145].

162 This is a material omission given the DEA's express requirements in May 2014 that there be a new layout plan and an update of the specialist studies to include an assessment of the new alternative layout plan; as well as ground-truthing to prove that the development does not impact on the reason for the classification of the site as "*Irreplaceable*" in the Mpumalanga Biodiversity Conservation Plan (this being the predecessor to the Mpumalanga Biodiversity Sector Plan discussed in paragraph 45 above)[146].

163 Furthermore, the SAS 2015 assessment confirmed that one of the newly assessed wetlands (called "CVB5" in the SAS 2015 assessment), which is a National Freshwater Ecosystem Priority Area (NFEPA) wetland:

163.1 has a Category B "Present Ecological State" (PES), meaning that it is largely natural with few modifications (pp. 25 and 65); and

163.2 falls within a Category A "Ecological Importance and Sensitivity" (EIS), meaning that it is considered ecologically important and sensitive on a national or even international level, and the biodiversity associated with the wetland is usually very sensitive to flow and habitat modifications (pp. 26 and 80)[147].

[145] Ministers answering affidavit 753: 191.1
[146] Founding affidavit 81-82: 139, Ministers answering affidavit 686: 30
[147] Supplementary founding affidavit 385: 24; Annexure "SP1" 402, 406 and 403 and 407; Ministers answering affidavit 753-754: 191

164 CVB5 also falls largely within the MPE[148].

165 This NFEPA wetland is likely to be negatively impacted by the dewatering of the shallow and deep aquifers which will occur during the operational phase of the mine[149]. This impact would be inconsistent with what is required by the NFEPA Atlas which, as is pointed out in paragraph 76.3 of the founding affidavit, requires that NFEPA wetlands which are in good ecological condition must be managed to maintain this condition.

166 The absence of the SAS 2015 assessment from the record shows that the Ministers made the decisions without knowing about this potential significant impact on a NFEPA wetland within the MPE.

167 The Ministers' NEMPAA decisions are accordingly reviewable because –

167.1 the decisions were materially influenced by an error of fact, in that relevant considerations were not taken into account (section 6(2)(e)(iii) of PAJA); and

167.2 the NEMPAA decisions are not rationally connected to the information before the Ministers and the reasons given for the decisions by the Ministers (section 6(2)(f)(ii)(cc) and (dd) of PAJA).

D.8 The Ministers failed to apply the precautionary principle and the

[148] Supplementary founding affidavit 385: 25; Ministers answering affidavit 753-754: 191
[149] Supplementary founding affidavit 385: 26

vulnerable ecosystems principle

168 The principle in section 2(4)(a)(vii) of NEMA requires –

> *"That a risk-averse and cautious approach is applied, which takes into account the limits of current knowledge about the consequences of decisions and actions"* ("the precautionary principle").

169 The principle in section 2(4)(r) of NEMA provides that –

> *"Sensitive, vulnerable, highly dynamic or stressed ecosystems, such as coastal shores, estuaries, wetlands, and similar systems require specific attention in management and planning procedures, especially where they are subject to significant human resource usage and development pressure"* ("the vulnerable ecosystems principle").

170 In *Fuel Retailers*[150], the Constitutional Court held that the precautionary principle requires authorities to insist on adequate precautionary measures specifically 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 present and future generations.*"[151]

[150] *Fuel Retailers* above.
[151] Para 98

171 It is clear from several of the conditions attached to the NEMPAA decisions that the Ministers did not apply these principles:

171.1 As appears from Condition 25,[152] the Ministers anticipate that there may be AMD from the mine but say that this impact must be mitigated and managed according to the requirements of the DWS.[153] Instead of considering the implications of this in the context of the principles described above and applying the requisite caution, the Ministers abdicate this responsibility to the DWS. What is more is that the Ministers did not have regard to the WUL itself and could not have known what the DWS requirements were[154].

171.2 Condition 34 of the NEMPAA decisions is to the effect that, should the integrity of any category A and B wetlands be reduced by more than 20% from baseline, a biodiversity offset agreement must be negotiated. Condition 34 reveals a similar disregard for the two NEMA principles. The Ministers clearly anticipate that there will be serious damage to the wetlands. Yet, extraordinarily, they are willing to tolerate damage of up to 20% of the integrity of the pristine and environmentally sensitive wetlands, with no consequences for the party responsible for the destruction. They anticipate and are willing to permit even higher levels of damage, provided that an offset agreement is reached, which is itself problematic.[155]

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[152] "*The applicant must mitigate and manage acid mine drainage where applicable to the requirements of DWS*"
[153] AMD is the process by which contaminants released during the mining process pass into the water in the mine voids, which then decants to the surface and pollutes surface water systems.
[154] Supplementary founding affidavit 394: 53; Ministers answering affidavit 755-756: 194
[155] Founding affidavit 109-110: 201; Ministers answering affidavit 749: 181

172 That there will, as a matter of certainty, be AMD and lasting damage to wetlands is confirmed in the reports commissioned by Atha's Environmental Assessment Practitioners (paragraph 114 above), as well as in various independent scientific reviews of those reports that have been commissioned by the applicants[156].

173 The material gaps in knowledge about the precise extent and nature of the future impacts of the mine are also described in detail in the specialist reports commissioned by the applicants. These include the following:[157]

173.1.1 The groundwater specialist whose report covered the impacts related to groundwater for purposes of the EA and WUL (Delta H), failed to simulate the anticipated contaminant plume from the mine workings. In the absence of a simulated contaminant plume, it is not possible to identify the water users, wetlands and areas most likely to be affected by groundwater contamination.

173.1.2 Delta H failed to assess the hydrogeological characteristics of the dolerite sill which it conceptualised to be present between the shallow and deep aquifers, accordingly:

173.1.2.1 the migration of potential contaminant plumes from the underground mine workings could not have been – and has not been – established sufficiently;

[156] Founding affidavit 111-117: 202; These reports are not denied by the Ministers (Ministers answering affidavit 749: 181)
[157] Founding affidavit 114-116: 202.6 read with supplementary founding affidavit 389: 37 and 390-393: 41-49

173.1.2.2 the migration of potential contaminant plumes from the underground mine workings could not have been – and has not been – established sufficiently; and

173.1.2.3 the veracity of the groundwater modelling results as regards mine inflows may be significantly compromised, and the inflows may have been underestimated.

173.1.3 Delta H failed to utilise geochemical modelling and failed to conduct a site-specific assessment to determine the anticipated post-closure decant water qualities and quantities. Accordingly this information – which is necessary for the conceptual design of the water treatment plant – is not available.

173.1.4 The concept design of the water treatment plant (as described in Atha's IWWMP) has not been reviewed by any environmental specialists. The design of the water treatment plant should have been reviewed and finalised pre-mining in order to determine whether the mine is financially viable.

173.1.5 The mitigation measures of pre-grouting fractures in the rock to avoid the ingress of water and of discharging treated water into the wetlands have not been assessed by any environmental specialists, and it is entirely unknown whether these mitigation measures are likely to be effective and what the environmental consequences of the mitigation measures are likely to be.

174 These and other significant gaps in vital information (which gaps were present in all of the administrative authorisation processes) ought to have prevented the Ministers from granting permission in terms of NEMPAA without ensuring that they were first filled.

175 The failure by the Ministers to apply the precautionary principle and the vulnerable ecosystems principle renders the Ministers' decisions reviewable on the grounds that –

175.1 a mandatory and material procedure or condition prescribed by an empowering provision (section 48(4) of NEMPAA read with section 2(4)(a)(vii) and 2(4)(r) of NEMA) was not complied with (section 6(2)(b) of PAJA);

175.2 the NEMPAA decisions were materially influenced by an error of law (section 6(2)(d) of PAJA);

175.3 relevant considerations were not taken into account (section 6(2)(e)(iii) of PAJA);

175.4 the NEMPAA decisions were not authorised by the empowering provision (section 6(2)(e)(i) of PAJA);

175.5 the NEMPAA decisions were not rationally connected to the reasons given for them by the Ministers (section 6(2)(f)(ii)(dd) of PAJA); and

175.6 no reasonable decision-maker would have overlooked the precautionary principle and the vulnerable ecosystems principle in the way that the Ministers did (section 6(2)(h) of PAJA).

D.9 The Ministers failed to take into account that Atha has made inadequate provision for rehabilitation

176 A reasonable decision-maker would consider as elementary to a decision under section 48(1)(b) of NEMPAA that, if mining were to take place in a protected area, there would have to be in place the fullest possible guarantee of post-mining rehabilitation of the affected environment.

177 Yet the Ministers in arriving at their decision failed to consider whether there was any such guarantee. Indeed their written decision reveals that they gave no direct or specific attention to the issue of rehabilitation at all. Moreover, they failed to take into account the fact that Atha has not made adequate financial provision for the significant costs associated with rehabilitating the Yzermyn mine, including the high costs of water treatment.

178 Before Atha's EMPR could be approved, Atha was required to make the prescribed financial provision in terms of section 41(1) of the MPRDA, as it was then[158].

179 Atha however failed to make financial provision for the treatment of polluted water. The fact that Atha had so failed was evident from the EMPR which formed part of the NEMPAA Rule 53 Record.

[158] At the time that Atha submitted its mining right application, as well as at the time that its mining right was granted, the legal regime applicable to Atha's financial provision was section 41 of the MPRDA and the Mineral and Petroleum Resources Development Regulations, read with the DME Guideline Document for the Evaluation of the Quantum of Closure-Related Financial Provision Provided by a Mine (January 2005)

180 The Minsters admit that they did not consider the question of financial provision as part of the NEMPAA decision-making process but deny that they were obliged to[159].

181 It goes without saying however that this should have been a key consideration in determining whether commercial mining should be permitted in the MPE. The fact that it was not considered means that the Ministers failed to take into account an important and relevant consideration, namely that Atha has made no financial provision for the most significant of the impacts associated with the mine, despite having been required to do so.

182 That –

182.1 neither Atha, nor the Ministers in their decision-making, were entitled to rely on financial provision for rehabilitation under the MPRDA; and

182.2 the Ministers had to apply their minds separately to this question in the NEMPAA decision-making process,

is also a consequence that flows from the words "[d]espite other legislation" at the beginning of section 148(1).

183 For this reason too, the NEMPAA decisions fall to be set aside on the grounds that –

[159] Ministers answering affidavit 751: 185

183.1 relevant considerations were not taken into account (section 6(2)(e)(iii) of PAJA);

183.2 the decisions were not rationally connected to the purpose of NEMPAA, nor to the information before the Ministers (section 6(2)(f)(ii)(bb) and (cc) of PAJA); and

183.3 no reasonable decision-maker would have arrived at such a decision without giving proper consideration to the question of provision for full rehabilitation (section 6(2)(h) of PAJA).

D.10 The Ministers failed to take into account South Africa's international responsibilities relating to the environment

184 Section 2(4)(n) of NEMA requires that – "*Global and international responsibilities relating to the environment must be discharged in the national interest"*.

185 The Ministers failed, however, to make any reference to their international responsibilities in their reasons for the NEMPAA decisions and indeed failed to give effect to several of their international responsibilities.

186 These international responsibilities are fully set out in the founding affidavit and include the following[160]:

186.1 The general obligation imposed by the Convention on Wetlands of International Importance to protect and promote the conservation of wetlands in its territory;

[160] Founding affidavit 121-131: 211-217

186.2 The duties imposed by the Convention on Biological Diversity to promote the protection of ecosystems, natural habitats and the maintenance of viable populations of species in natural surroundings; and to promote environmentally sound and sustainable development in areas adjacent to protected areas with a view to protecting these areas;

186.3 The duty to enforce the provisions of the Biodiversity Act pertaining to threatened species or species with significant conservation value, which Act was passed by Parliament to give effect to the Biological Diversity Convention; and

186.4 The duty imposed by the United Nations Framework Convention on Climate Change and the Paris Agreement to reduce greenhouse gas emissions.

187 In answer, the Ministers say that the site is not protected under any international instruments in that it does not fall within the RAMSAR or World Heritage Site and that there has been no contravention of the Biodiversity Act.

188 These answers are both incorrect as appears from the detailed discussion in the Part G.10 of the founding affidavit.

D.11 The Ministers ought to have awaited the outcome of the various statutory appeals

189 The review ground under this head is found in Part G.11 of the founding

affidavit[161].

190 The Ministers say that there was no legislative requirement for them to await the outcome of the various administrative appeals before taking the NEMPAA decisions[162].

191 As we have shown above however, the legislative scheme, properly interpreted, requires that a decision in terms of section 48(1)(b) of NEMPAA in relation to a proposed commercial mine must take into account the terms and conditions of the final EA, EMPR and WUL in respect of that mine.

192 In circumstances where an EA, EMPR or WUL are the subject of an appeal, they cannot be taken as being final, and their terms cannot be relied upon by the Ministers in order to satisfy themselves as regards the principles listed in section 2 of NEMA. The Ministers cannot accept that the conditions which attach to the authorisations for the protection of the environment or the terms of the EMPR are what they will be when mining commences.

193 In addition, appeals in terms of NEMA, the MPRDA and the NWA are wide appeals. Appellants are entitled to introduce further information, including further specialist input, to be taken into account by the appellate authority. This information is clearly relevant to any decision in terms of section 48(1)(b) of NEMPAA.

[161] Founding affidavit 131-137: 218-240
[162] Ministers answering affidavit 751: 184.2

194 For these reasons the Ministers were required to take into account both the contents of the administrative appeals, and the outcomes of those appeals before they took the NEMPAA decisions. The precise form which the mining will take, and which must be considered for authorisation by the Ministers under section 48(1)(b) of NEMPAA, will not be known until these appeals have been finalised.

195 The fact that the outcomes of the EMPR, EA and WUL appeals were not taken into account by the Ministers renders the NEMPAA decisions reviewable on the ground that relevant considerations were not considered (section 6(2)(e)(iii) of PAJA).

D.12 The Ministers failed to ensure intergovernmental co-ordination and harmonisation and ignored key planning and other instruments

196 This ground of review has been covered to a large extent in Part B above.

197 The Minsters admit that they did not take into account several of the key planning and other instruments described in Part B for purposes of making the NEMPAA decisions. In respect of others, they misdirected themselves by assuming that they either did not apply, or that they applied differently to what the applicants allege.

198 But section 2(4)(l) of NEMA requires that *"There must be intergovernmental co-ordination and harmonisation of policies, legislation and actions relating to the environment".*

199 The failure by the Ministers to consider these instruments properly, and in

some cases at all, renders the NEMPAA decisions reviewable on the following grounds:

199.1 a mandatory and material procedure or condition prescribed by an empowering provision (section 48(4) of NEMPAA read with section 2(4)(l) of NEMA) was not complied with (section 6(2)(b) of PAJA);

199.2 the action was materially influenced by an error of law (section 6(2)(d) of PAJA);

199.3 relevant considerations were not taken into account (section 6(2)(e)(iii) of PAJA);

199.4 the action was not authorised by the empowering provision (section 6(2)(e)(i) of PAJA); and

199.5 the action was not rationally connected to the reasons given for it by the Ministers (section 6(2)(f)(ii)(dd) of PAJA).

D.13 The Ministers failed to take into account that the use and exploitation of non-renewable natural resources must be responsible and equitable

200 This ground of review is fully set out in Part G.7 of the founding affidavit.

201 The Ministers' answers in relation to this ground are that[163]:

201.1 The Ministers considered that Atha had a prospecting right prior to the MPE being declared a protected environment; and

201.2 It was not necessary under NEMPAA or NEMA for the Ministers to

[163] Ministers answering affidavit 748-749:180

consider Atha's saleable coal product or the quality of coal to be produced by Atha.

202 These answers gives rise to a further review ground, namely that the NEMPAA decisions were materially influenced by errors of law (section 6(2)(d) of PAJA).

203 The fact that Atha had a prospecting right before the MPE was declared a protected environment was irrelevant to the question of whether commercial mining should be permitted in terms of section 48(1)(b) of NEMPAA. A prospecting right does not give rise to a right to mine. In any event, permission in terms section 48(1)(b) of NEMPAA is required regardless of other authorisations obtained.

204 The requirement in section 2(4)(a)(v) of NEMA that the use and exploitation of non-renewable resources must be responsible obliged the Ministers to give consideration to the quantity and quality of coal which would be extracted from the mine in light of the substantial environmental degradation which such extraction would cause. If there are large quantities of better quality coal which can be extracted in an area which is not a protected environment (which is the case, as is demonstrated in the founding affidavit), that is a relevant consideration.

PART E: THE RELIEF SOUGHT

E.1 The review and ancillary relief sought

205 Having regard to the foregoing, the Ministers' decisions in terms of section 48(1)(b) of NEMPAA stand to be reviewed and set aside as contemplated in section 8(1)(c) of PAJA.

206 The applicants do not seek to make out a case for substitution by this court of its decision for that of the Ministers. They accept that the matter must be remitted to the Ministers for reconsideration and decision afresh.

207 It is clear that the Ministers when making their decisions under review, fundamentally misconstrued –

207.1 the legal conception of their roles when exercising their discretionary powers in terms of section 48(1)(b) of NEMPAA;

207.2 the objectives of NEMPAA as set out in section 2;

207.3 the purposes that underlie the declaration of an area as a protected area as set out in section 17 of NEMPAA;

207.4 how decision-making under NEMPAA is to be co-ordinated with decision making under other environmental legislation that applies.

208 The primary evidence of this was the extent to which they relied on processes under other legislation in coming to their decisions, when NEMPAA contains unique considerations relevant to decision-making under it, and fulfils a particular role in the statutory framework for the national management of the

environment. The approach of the Ministers negated the special environmental protection that NEMPAA seeks to accord protected areas.

209 If the matter is remitted to the Ministers without clear guidance as to the requirements of NEMPAA and the decisional referents to which the Ministers must have regard under the Act, it is likely that the re-exercise of their discretionary powers under section 48(1)(b) will once again be flawed and the courts will again be faced with review proceedings.[164]

210 This can be avoided if the court makes use of its wide powers[165] under section 8(1)(c)(i) of PAJA to give directions to the decision-maker for purposes of his or her decision on remittal. This also provides an opportunity to ensure that a purposive interpretation of NEMPAA by this Court is practically carried through and implemented when the matter is decided afresh, thereby achieving the objectives of the Act and the purposes of conferring of the status of protected area.[166]

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[164] In *Alexander Maintenance and Electrical Services CC and Another v Nyandeni Local Municipality and Another* (2896/11) [2012] ZAECMHC 10 (21 June 2012) at para 25, the court made the observation that a second round of review proceedings might have been avoided if the court had given directions as to the reconsideration of the decision in the first review proceedings.

[165] See *Vodacom (Pty) Ltd and Another v Nelson Mandela Bay Municipality and Others* 2012 (3) SA139 (ECP) at paras 10-11. *See also Earthlife Africa Johannesburg v Minister of Environmental Affairs and Others* (65662/16) [2017] ZAGPPHC 58; [2017] 2 All SA 519 (GP) (8 March 2017) where this court in an environmental matter gave directions upon remittal as follows:

> *"The first respondent is directed to consider:*
> *126.3.1 a climate change impact assessment report;*
> *126.3.2 a paleontological impact assessment report;*
> *126.3.3 comment on these reports from interested and affected parties;*
> *126.3.4 any additional information that the first respondent may require in order to reach a decision on the applicant's fourth ground of appeal."*

[166] In *Sea Front for All and Another v MEC: Environmental and Development Planning, Western Cape Provincial Government and Others* (15974/07) [2010] ZAWCHC 69; 2011 (3) SA 55 (WCC) (26 March 2010), the court directed the decision-maker on remittal to take into account the principles established in the court's judgment.

211 The applicants accordingly ask that the remittal be subject to the directions set out in Part B of the amended notice of motion, which include directions that:

211.1 The Ministers must comply with sections 3 and 4. This direction is necessary because the Ministers unlawfully sought to bypass sections 3 and 4 of PAJA,[167] when, for the reasons given above, they were not entitled to do so. Atha does not oppose this component of the relief;

211.2 The Ministers must take into account the interests of local communities and the environmental principles refer to in section 2 of NEMA. This is necessary because of the Ministers' demonstrable failure adequately to do so. Atha does not oppose this component of the relief;

211.3 The Ministers must defer their decision on reconsideration until after the EMPR and WUL appeals have been determined (the EA appeal has been decided against the applicants).[168] We refer to the submissions in paragraphs 39 to 42 and 190 to 194 above.[169] Of particular importance amongst these is that the precise nature, form and extent of the mining is not known until the appeals have been decided. That is manifestly information that must be available to the Ministers before they can make a proper decision as to whether or not the mining is consistent with the protected status of the area. The reports and evidence that becomes available in the course of the appeal hearings will generate highly relevant and current information that will need to be considered by the Ministers in deciding the matter

[167] Amended notice of motion 4: 8.1
[168] Amended notice of motion 4: 8.3.2 and 8.3.3
[169] This issue is also dealt with the replying affidavit (to Atha) 593-607: 11-37

afresh;

211.4 The Ministers must not grant permission in terms of section 48(1)(b) of NEMPAA unless a management plan for the MPE has been approved by the MEC in terms of section 39(2) of NEMPAA[170] and the management plan's zoning of the area in which the intended mining is to take place permits such mining.[171] We refer in this regard to paragraphs 122 to 127 above. To these submissions, we add the following:

211.4.1 The courts have a constitutional duty to interpret a statute *ex visceribus actus*, i.e. so as to render a statute and each of its sections and provisions a functional, integrated and meaningful whole;[172]

211.4.2 Allowing the Ministers in acting in terms of section 48(1)(b) to ignore a statutory requirement that there be in place a management plan, including a zoning scheme, for the proper management of the area would breach this principle of interpretation and undermine the objectives of NEMPAA and the purposes of declaration of protected areas; and

211.4.3 Allowing the Ministers to bypass a management plan and its zoning scheme tends to ignore the special supervisory and protective role that is meant to be played by the Ministers. It

[170] Amended notice of motion 5: 8.4.1
[171] Amended notice of motion 5: 8.4.2
[172] Law of South Africa Vol 25(1) – 2nd Ed Statute Law & Interpretation para 322; *Kaknis v Absa Bank Ltd, Kaknis v MAN Finanaical Servides SA (Pty) Ltd* [2017] 2 All SA 1 (SCA) at para 31.

is submitted that the role of the Ministers is there as an additional layer of protection against mining in protected environments. Absent section 48(1)(b), a management authority such as MPELA might be able itself to permit mining either by way of its zoning scheme or in the exercise of its managerial function. It is submitted that the role of the Ministers is to ensure that this does not happen and that mining can only take place with their special permission;

211.5 The Ministers must not grant permission unless exceptional circumstances have been shown by Atha to exist which justify the mining of coal within the MPE.[173] We refer to paragraphs 112 to 115 above. We submit that the requirement that there must be exceptional circumstances before commercial mining may be permitted in a protected environment follows also from the principle that a court must interpret a statute *ex visceribus actus*;

211.6 The Ministers must not grant permission unless Atha has made full and secure financial provision for the complete rehabilitation of the MPE in consequence of coal mining, upon termination of mining.[174] We refer to paragraphs 176 to 181 above. We submit that there must be secure financial provision in place for rehabilitation before commercial mining may be permitted in a protected environment. Additionally we submit:

211.6.1 This requirement is also a consequence of the interpretation

[173] Amended notice of motion 5: 8.4.3
[174] Amended notice of motion 5: 8.4.4

of the legislation *ex visceribus actus*; and

211.6.2 Not applying this requirement will result in the NEMA principles referred to earlier in these heads being overlooked in conflict with the requirement in section 48(4) and the violation of the purpose identified in section 17(f) of NEMPAA *"to protect an area which is vulnerable or ecologically sensitive".*

212 The contention by Atha that the directions called for *"would or are likely to have the effect of … making it unlikely (if not impossible) for the Ministers to permit Atha to mine in the MPE",*[175] is not only flawed, given that all that the directions require is a proper application of the statute in the reconsideration process, but is also revealing insofar as it suggests that Atha's intentions in relation to the area are not consistent with its status as a protected environment.

213 Atha's opposition to the directions is also inconsistent with its position that it abides the decision of the Court as regards the review and setting aside of the NEMPAA decisions. That is because the review relief is based on several review grounds which have as their basis the same legal premises as those which underpin the directions which Atha opposes[176]. Atha cannot have it both ways. It cannot approbate and reprobate. If it abides by the main relief sought,

[175] Atha's answering affidavit 541: 55.1

[176] These grounds are that the Ministers ought to have awaited the outcome of the various statutory appeals (D.11 above); the Ministers ought to have awaited the approval of the management plan (D.5 above); the Ministers were required to proceed on the basis that mining will only be permitted in a protected environment in exceptional circumstances (D.4 above); and the Minsters failed to take into account the fact that Atha has not made adequate financial provision for the significant costs associated with rehabilitating the Yzermyn mine (D.9 above)

then it cannot oppose directions that are consistent with the legal basis for that relief.

214 The introductory part of paragraph 8.4 of the notice of motion (pursuant to an amendment) incorporates an alternative form of relief that, rather than holding the Ministers in re-deciding the matter to the decisional directions listed in paragraphs 8.4.1 to 8.4.4 of the notice, requires them to treat these as relevant considerations to which they must apply their minds.

215 It is submitted that, at the very least, the applicants have made out a case for directions on this basis.

E.2 Costs

216 We submit that if the NEMPAA decisions are set aside on review and are remitted to the Ministers for reconsideration (whether or not such remission is accompanied by directions), that the applicants will have been substantially successful in obtaining the relief which they seek.

217 However, the litigation has essentially been against the State. Atha has chosen to abide the decision of the court in relation to the main components of the review.

218 In those circumstances, we submit that the first, second and fifth respondents, who have opposed the application, ought to be directed to pay the costs of the application including the costs of two counsel, jointly and severally, the one paying, the other to be absolved.

219 This includes–

219.1 the costs of senior counsel, junior counsel and the applicants' attorneys in terms of section 32(3)(a) of NEMA, they having acted for free in this litigation; and

219.2 the costs and disbursements incurred by the applicants and their attorneys in their investigation of the matter, preparation for the proceedings and the conduct of the litigation, as contemplated in section 32(3)(b) of NEMA.

220 Atha has not opposed the primary review relief and the litigation is essentially against the State.[177] Atha has opposed some of the directions that the applicants ask the court to give on remittal in terms of section 8(1)(c)(i) of PAJA. As pointed out above, this is internally contradictory, because the review grounds dictate the content of the directions. Provided that Atha genuinely abides the decision of the court, and does not seek to oppose the review and setting aside through the back door of challenging the basis for the directions, the applicants do not seek any costs order against it. However, Atha needs to make a clear election as to whether or not it opposes the main relief. If in truth it does oppose the main relief, costs are also sought against the third respondent, jointly and severally with the first, second and fifth respondents, the one paying, the other to be absolved.

221 Should the applicants fail in having –

[177] *Biowatch Trust v Registrar, Genetic Resources, and Others* 2009 (6) SA 232 (CC) at para 56.

221.1 the NEMPAA decisions set aside on review; or

221.2 the court give directions to the Ministers for their decisions upon reconsideration,

we submit that the applicants have acted reasonably, out of a concern for the public interest and in the interest of protecting the environment. They have made due efforts to use other means reasonably available for obtaining the relief sought. This has included active participation by the applicants and their attorneys in the statutory public participation processes where these have been made available, and active attempts by them to secure a public participation process through addressing appropriate correspondence to the authorities where they have not. We would accordingly request that the Court exercise its discretion in terms of section 32(2) of NEMA and under the common law as laid down in *Biowatch*[178] against awarding costs against the applicants should they fail to achieve substantial success in securing the relief sought in Part B of the notice of motion.

Alan Dodson SC
Chambers
Johannesburg

Aymone du Toit
Chambers
Cape Town

15 June 2018

[178] *Biowatch* above at pars 21 – 23