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

---

THIRD RESPONDENT'S HEADS OF ARGUMENT

INTRODUCTION

1. This is a case in which the applicants seek the review and setting aside of the decisions of the first respondent (the Minister of Environmental Affairs, **"Environment Minister"**) and the second respondent (the Minister of Mineral Resources, **"Minerals Minister"**) (collectively the **"Ministers' decisions"**) to grant Atha-Africa Ventures (Pty) Ltd (**"Atha"**) permission to conduct commercial mining in the Mabola Protected Environment ("**MPE**") in terms of section 48(1)(b) of the National Environmental Management: Protected Areas Act 57 of 2003 (**"NEMPAA"**) and certain ancillary relief.

2. Section 48(1)(b) of NEMPAA provides as follows:

> *"**48 Prospecting and mining activities in a protected area***
> *(1) Despite other legislation, no person may conduct commercial prospecting, mining, exploration, production or related activities-*
> *(a) …*
> (b) *in a protected environment without the written permission of the [Environmental] Minister and the Cabinet member responsible for minerals and energy affairs …"*

3. In its answering affidavit, Atha indicated that, as the Ministers were best-placed

to defend their decisions, it would abide the decision of the Court in relation to paragraphs 5 and 6 of the notice of motion regarding the review and setting aside of the Ministers' decisions.[1]

4. The basis of Atha's defence is limited to challenging some of the relief sought by the applicants. The applicants are of the view that both to abide by the Court's decision on reviewing and setting aside the Ministers' decisions, and to oppose some of the consequential relief, is to adopt a contradictory stance.[2] This is not the case.

5. First, Atha does not indicate that it has admitted any of the grounds of review. Atha's opposition is solely based on the relief that is sought by the applicants in relation to certain of the grounds of review.

6. Second, the courts recognise that there is a clear distinction between the constitutional invalidity of administrative action and the just and equitable remedy that may follow from it.[3]

7. If the Court were to review and set aside the Ministers' decisions, Atha does not take issue with the consequential relief sought by the applicants in paragraphs

[1] Application bundle, Atha's AA, p 524, para 6
[2] Applicants' heads of argument. p 100, para 213
[3] AllPay Consolidated Investment Holdings (Pty) Ltd and Others v Chief Executive Officer, South African Social Security Agency, and Others 2014 (1) SA 604 (CC) at paras 25-26

7, 8.1 and 8.2 of the notice of motion.[4] This relief is for the remittal of the decisions to the Ministers and the direction that the Ministers comply with sections 3 and 4 of the Promotion of Administrative Justice Act 3 of 2000 (**"PAJA"**) and take into account the interests of local communities and the environmental principles referred to in section 2 of the National Environmental Act 107 of 1998 (**"NEMA"**).

8. What Atha does take issue with is the ancillary relief sought by the applicants in paragraphs 8.3 and 8.4 of the notice of motion and the prayer for costs against Atha contained in paragraph 9 of the notice of motion.[5]

9. Before turning to the relief in issue between the applicants and Atha, it is necessary to indicate that it would appear that the applicants have abandoned paragraph 8.3.1 of the notice of motion in their heads of argument.[6] This paragraph directs the Environment and Minerals Ministers to defer any decision in terms of section 48(1)(b) of the NEMPAA until after the decision of the applicants' statutory appeal to the fifth respondent against the environmental authorisation (**"EA"**) granted to Atha in terms of NEMA. Since, as the applicants acknowledge in the supplementary founding affidavit,[7] this appeal was dismissed on 23 November 2017, paragraph 8.3.1 of the notice of motion has

[4] Application bundle, Atha's AA, p 525, para 8
[5] Application bundle, Atha's AA, p 525, para 9
[6] There is no reference to the statutory appeal against the environmental authorisation in the applicants' heads at p 97, para 211.3.
[7] Application bundle, Applicants' supplementary FA, p 380, para 7

become academic and is no longer in issue between the parties.[8]

10. Accordingly, the relief which is in issue between the applicants and Atha is contained in paragraphs 8.3.2, 8.3.3, 8.4 and 9 of the notice of motion. In the remainder of these heads we deal with each such paragraph separately.

11. Generally, the basis for Atha's opposition to the ancillary relief sought in paragraphs 8.3.2, 8.3.3 and 8.4 of the notice of motion is that even if the Ministers' decisions are set aside and remitted to the Ministers for reconsideration, it is neither legally required nor practically necessary for such reconsideration to be deferred until the legal processes and alleged conditions described in these paragraphs are completed or fulfilled.

THE APPEAL AGAINST THE APPROVAL OF ATHA'S ENVIRONMENTAL MANAGEMENT PROGRAMME ("EMPr")[9]

12. Paragraph 8.3.2 of the notice of motion seeks the deferral of any decision by the Environment and Minerals Ministers in terms of section 48(1)(b) of NEMPAA until after the decision of the applicants' statutory appeal in terms of the Mineral and Petroleum Resources Development Act 28 of 2002 (**"MPRDA"**) against the approval of Atha's EMPr by the Mpumalanga Regional Manager of the

[8] Application bundle, Atha's AA, p 525, para 10
[9] Application bundle, FA, p 131, paras 219-227; Atha's AA, p 526, paras 13-24; RA, p 593, paras 11-35

Department of Mineral Resources ("**DMR**") on 28 June 2016.

13. There is no legal basis to defer a decision in terms of section 48(1)(b) of NEMPAA until after the decision of the EMPr appeal for the following reasons.

14. There is no requirement or even indication in section 48 of NEMPAA that a decision in terms of section 48(1)(b) may only be taken by the Environment and Minerals Ministers after a decision on a statutory appeal against a decision of a different functionary (the Regional Manager of the DMR) in terms of different legislation (the MPRDA). The applicants seek to read a hierarchy of decisions into the legislative scheme that is not to be found in it and that it does not require in order to achieve its objectives.

15. The principle is well-established that a person cannot undertake a mining activity unless all the authorisations required for that activity have been obtained.[10] This principle does not make one authorisation conditional on another. A decision in terms of section 48(1)(b) of NEMPAA is thus not conditional on the outcome of an appeal against a decision to approve an EMPr taken in terms of the MPRDA. Nor are the Ministers' decisions under section 48(1)(b) adequate to permit mining in a protected environment; other approvals, including that of the EMPr, are or may be required.

[10] See eg s 24(7) of NEMA

16. The applicants are concerned that further environmental impacts will be overlooked if the decision under section 48(1)(b) of NEMPAA is taken before the appeal against the EMPr has been finalised.[11] On the facts of this particular case, such impacts would also have been considered in the appeal against the environmental authorisation granted to Atha in terms of the NEMA, which appeal has been finalised.[12] There would accordingly be no purpose in deferring the decision under section 48(1)(b) of NEMPAA until the appeal against the EMPr has been finalised.

17. In response to this argument, the applicants argue that the EMPr is the instrument which, once finalised through the appeal process, will set out the mitigation and remediation measures which the decision-maker requires, and that it will have legal force and effect apart from the EA.[13]

18. This counter-argument does not account for the fact that section 24(4)(a)(ii) of NEMA provides that every application for an EA must be determined according to the very principles of environmental management in section 2 of NEMA that the applicants argue the Ministers must take account of in making their

[11] Application bundle, FA, p 594, paras 13ff
[12] Section 24O(1)(b) of NEMA requires the decision-maker to take account of all relevant factors in environmental authorisation applications. The instances that are given of the relevant factors relate to environmental impacts and are expressed in the widest terms.
[13] Application bundle, RA, p 602, para 32

decisions under section 48(1)(b) of NEMPAA.[14]

19. Furthermore, as part of the environmental authorisation process, sections 24(4)(b)(ii) and 24O(1)(b)(iii) of NEMA provide for mitigation measures, while sections 24O(1)(b)(iiiA) and 24P(1) of NEMA provide for financial remediation.

20. The applicants also argue that they have commissioned several detailed specialist reports for purposes of the various appeals, which contain information that is relevant to the decisions in terms of section 48(1)(a) of NEMPAA.[15] This argument leaves out of account their entitlement to put such relevant information before the Ministers when they are heard in the section 48(1)(a) determination itself.

THE APPEAL AGAINST THE GRANT OF ATHA'S WATER USE LICENCE ("WUL")[16]

21. Paragraph 8.3.3 of the notice of motion seeks the deferral of any decision by the Environment and Minerals Ministers in terms of section 48(1)(b) of NEMPAA until after the decision of the applicants' statutory appeal in terms of the National Water Act 36 of 1998 ("**NWA**") against the approval of Atha's WUL by the Acting Director-General of the Department of Water and Sanitation ("**DWS**") on 7 July

[14] Application bundle, RA, p 595, paras 16-21
[15] Application bundle, RA, p 598, para 26
[16] Application bundle, FA, p 136, para 236-240; Atha's AA, p 530, paras 25-28; RA, p 593, paras 11-37

2016.

22. This appeal is set down for hearing by the Water Tribunal between 24 and 26 July 2018. It is thus likely that this appeal will be finalised before the review application is heard in mid-October 2018 in which case paragraph 8.3.3 of the notice of motion will become academic and will no longer be in issue between the parties

23. Be that as it may, there is in any event no legal basis to defer a decision in terms of section 48(1)(b) of NEMPAA until after the decision of the WUL appeal. This is so for the following reasons.

24. The reasons given above in paragraphs 13 to 15 and 19 in relation to the EMPr appeal apply, *mutatis mutandis*, to the WUL appeal.

25. In addition, and in relation to the principle that no activity may be commenced without all the requisite authorisations having been obtained, it is noteworthy that it is a condition of the NEMPAA decisions under review that no activities will be allowed to encroach into a water resource without a water use authorisation being in place from the DWS.[17] This demonstrates the self-standing nature of the various authorisations required for a mining activity.

[17] Application bundle, FA, p 136, para 239

THE APPROVAL OF THE MANAGEMENT PLAN FOR THE MPE[18]

26. Paragraphs 8.4.1 and 8.4.2 of the notice of motion seek to prevent the Environment and Minerals Ministers from making a decision whether or not to grant permission to Atha to conduct commercial mining in the MPE in terms of section 48(1)(b) of NEMPAA unless a Management Plan for the MPE has been approved by the fifth respondent (the MEC for Agriculture, Rural Development, Land and Environmental Affairs Mpumalanga, "**MEC**") in terms of section 39(2) of NEMPAA and unless the management plan's zoning of the area in which the intended mining is to take place permits such mining.

27. Alternatively, in terms of an amendment to the notice of motion introduced at the time of the replying affidavit, the applicants seek to direct the Ministers to consider whether a Management Plan has been approved and whether the MP's zoning of the area in which the intended mining is to take place permits such mining.

28. It is first important to be clear about the essential facts in relation to the Management Plan for the MPE:

28.1. The Management Authority of the MPE, the Mabola Protected Environment Landowners Association (**"MPELA"**, the fourth

[18] Application bundle, FA, p 141, paras 254-256; Atha's AA, p 532, paras 29-40; RA, p 607, paras 38-44

respondent), prepared a draft MP, which is just that – a draft plan.

28.2. This Management Plan was not submitted to the MEC for approval in accordance with section 39(2) of NEMPAA, as is apparent from the minutes of the meeting on 23 January 2015 that was attended by a representative from the MEC's office.[19] The fact of non-submission is stated by the applicants in their founding affidavit.[20]

28.3. Section 39(3) of NEMPAA provides that, when preparing a Management Plan for a protected area, the management authority must consult municipalities, other organs of state, local communities and other affected parties which have an interest in the area.

28.4. The draft Management Plan was prepared without interested and affected parties, including Atha, an eminently interested party, being afforded an opportunity to participate in the process. Despite the decision taken at the meeting held on 19 February 2015 to subject the compilation of the Management Plan to a proper and inclusive public participation process, no steps were taken to commence this process or to advance the finalisation of the Management Plan for it to be

[19] Application bundle, Annexure "PT3" to Atha's AA, p 548; and see Atha's AA, p 534, para 36
[20] Application bundle, FA, p 57, para 88

submitted to the MEC for approval.

28.5. In conclusion, there is no final, approved Management Plan for the MPE.

29. The applicants argue that the Ministers' decisions in terms of section 48(1)(b) of NEMPAA to permit mining in the MPE before a Management Plan for the MPE has been approved by the MEC, which plan permits mining in the MPE, is to put the cart before the horse. According to the applicants, the Ministers' decisions could not be taken before the approval of the Management Plan since the Management Plan must indicate what activities may take place in different sections of the area and the Ministers would only be able to permit mining if the Management Plan permitted mining in the particular area in question.[21]

30. This is legally incorrect. The language of section 48(1)(b) and the sections in NEMPAA concerning the Management Plan do not require that the Management Plan be approved before the Ministers make a decision in terms of section 48(1)(b).

31. Furthermore, for a decision in terms of section 48(1)(b) of NEMPAA to precede the approval of the Management Plan is not to put the cart before the horse. The contrary is in fact true. Should the finalisation and approval of the

[21] Application bundle, FA, p 141, paras 254-255

Management Plan precede the Ministers' decisions in terms of section 48(1)(b), the Ministers' decisions could be rendered irrelevant. This would occur, for example, if the Management Plan precluded mining in the protected environment or imposed conditions contrary to the wishes of the Ministers. This is likely to occur in the present case given MPELA's declared opposition to commercial mining in the MPE as evidenced in the draft Management Plan for the MPE. In the circumstances, the imposition of the approval of the Management Plan by the management authority as a pre-condition of the Ministers' decisions would effectively deprive the Ministers of their discretion to permit mining in the area.

32. The applicants attempt to create a space for the Ministers to exercise their discretion under section 48(1)(a) of NEMPAA by arguing that where the Management Plan permits mining, the Ministers may exercise their discretion whether or not to permit mining.[22] The effect of this interpretation is that the Ministers are bound by the Management Plan where it prohibits mining but not where it permits mining. There is no warrant for this distinction in the legislation. Either the Ministers are bound by the Management Plan or they are not.

33. Atha does not object to the alternative direction introduced by the amendment to the notice of motion to the effect that, whether or not there is an approved Management Plan is a relevant consideration albeit not a precondition to the

[22] Applicants' heads, p 99, para 211.4.3

decision of the Ministers under section 48(1)(a) of NEMPAA.

EXCEPTIONAL CIRCUMSTANCES[23]

34. Paragraph 8.4.3 of the notice of motion states that the Environment and Minerals Ministers are not to grant permission to conduct commercial mining in the MPE in terms of section 48(1)(b) of NEMPAA unless exceptional circumstances have been shown by Atha to exist which justify the mining of coal within the MPE.

35. Alternatively, in terms of the amendment to the notice of motion introduced at the time of the replying affidavit, the applicants seek to direct the Ministers to consider <u>whether</u> exceptional circumstances have been shown by Atha to exist which justify the mining of coal within the MPE.

36. Atha does not quibble with the applicants' statement that: *"A proposed mining operation will thus attract a much higher level of scrutiny if it is to take place in a protected environment than if it is not to."*[24]

37. However, Atha disputes the applicants' subsequent statement that "*it is difficult to conceive of any circumstances under which coal mining would be permitted*

[23] Application bundle. FA, p 88, paras 153-159; Atha's AA, p 537, paras 41-46; RA, p 610, paras 45-49
[24] Application bundle, FA, p 91, para 154

in a protected environment".[25]

38. Section 48(1)(b) of NEMPAA does not impose a requirement of exceptional circumstances. The fact that permission by the Ministers is required in order to mine in a protected area, does not indicate that that the bar must be set so high that it is highly unlikely that the Ministers will permit mining.

39. The term *"exceptional circumstances"* is vague. On the one hand, it connotes an exception to the rule, and, at the other extreme, it refers to the highest of standards. At the most, section 48(1)(b) of NEMPAA can be interpreted to mean the former. The applicants slip from the former connotation to the latter connotation.

40. The vagueness of the term *"exceptional circumstances"* renders its use as a direction to the Ministers undesirable.

41. The applicants are seeking to impose an interpretation of section 48(1)(b) on the Ministers that is partial and restricts the Ministers' discretion unduly. The courts have held that when the law entrusts a functionary with a discretion, involving the weighing up of a number of considerations, the law gives recognition to the evaluation made by the functionary to whom the discretion is

[25] Application bundle, FA, p 91, para 155

entrusted, and it is not open to a court to second-guess his or her evaluation.[26]

42. For the aforementioned reasons, Atha also objects to the alternative direction introduced by the amendment to the notice of motion.

FINANCIAL PROVISION FOR REHABILITATION[27]

43. Paragraph 8.4.4 of the notice of motion states that the Environment and Minerals Ministers are not to grant permission to conduct commercial mining in the MPE in terms of section 48(1)(b) of NEMPAA unless 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.

44. Alternatively, in terms of the amendment to the notice of motion introduced at the time of the replying affidavit, the applicants seek to direct the Ministers to consider whether Atha has made financial provision for such rehabilitation.

45. This relief is ill-conceived for the following reasons.

[26] MEC for Environmental Affairs and Development Planning v Clairison's CC 2013 (6) SA 235 (SCA) at para 18
[27] Application bundle, FA, p 137, paras 241-253; Supplementary FA, p 393, paras 50-59; Atha's AA, p 538, paras 47-52; RA, p 612, paras 50-53

46. There is no basis for the applicants to insist on Atha making additional financial provision for rehabilitation other than that already imposed and approved under the legislation. Section 24P(1) of NEMA provides that before the Minerals Minister issues the EA, the applicant must comply with the prescribed financial provision for the rehabilitation of negative environmental impacts. Section 41(1) (now repealed) of the MPRDA provided that before the Minerals Minister approved the EMPr, the applicant had to comply with the prescribed financial provision for the rehabilitation of negative environmental impacts. The Financial Provisioning Regulations[28] made under NEMA prescribe for rehabilitation costs.

47. Insofar as the applicants argue that there was an improper consideration of rehabilitation when the EMPr was approved, there is no need for the Court to direct a reconsideration of this issue during the section 48(1)(b) of NEMPAA decision-making process, given that there is provision for a statutory appeal against the approval of the EMPr which the applicants have availed themselves of.

48. The applicants seek to direct the Minister to compel Atha to make financial provision not only for the rehabilitation of the potential negative environmental impacts associated with its mining activities [which in terms of the legislation referred to above requires that financial provision be made for the rehabilitation, closure and ongoing post decommissioning management of negative

[28] GN R1147 in GG 39425 of 20 November 2015

environmental impact], but to make "*full and secure financial provision for the complete rehabilitation of the MPE in consequence of the coal mining*". To the extent that this is wider than what the legislation already requires, there is no basis for such wide and unlimited relief in NEMPAA.

49. For the aforementioned reasons, Atha also objects to the alternative direction introduced by the amendment to the notice of motion.

COSTS[29]

50. In the event that the applicants are successful, they claim costs not only from the Environment and Minerals Ministers (whose decisions comprise the target of their application), but also from Atha if Atha persists in its opposition to some of the directions. Atha does so persist.

51. Atha's stance is not contradictory for the reasons given above. The applicants elide the main relief and the directions impermissibly.

52. Section 32(3) of NEMA provides as follows:

> *"Where a person or group of persons secures the relief sought in respect of any breach or threatened breach of any provision of [NEMA], or of any provision of a specific environmental management Act, or of any other statutory provision concerned with the protection of the environment, a court*

[29] Application bundle, FA, p 147, paras 275-276; Atha's AA, p 540, paras 53-54; RA, p 615, para 54; Applicants' heads of argument, p 101, paras 216-221

may on application-

(a) award costs on an appropriate scale to any person or persons entitled to practise as advocate or attorney in the Republic who provided free legal assistance or representation to such person or group in the preparation for or the conduct of the proceedings;

(b) *and order that the party against whom the relief is granted pay to the person or group concerned any reasonable costs incurred by such person or group in the investigation of the matter and its preparation for the proceedings." (emphasis added)*

53. It was held in Biowatch Trust v Registrar, Genetic Resources, and Others[30] that, generally, where the state is shown to have failed to fulfil its constitutional and statutory obligations, and where different private parties are affected, the state should bear the costs of litigants who have been successful against it, and ordinarily there should be no costs order against any private litigants who have become involved.[31] This is because such litigation is not truly litigation between private parties.[32]

54. In the present matter, Atha, is a private party that is necessarily yet not voluntarily drawn into constitutional litigation as a consequence of it being eminently affected by the relief sought. Thus, in the event that the applicants are successful regarding the review and setting aside of the Ministers' decisions, they are not entitled to costs against Atha.

55. Even if the applicants are successful regarding the ancillary relief sought in

[30] 2009 (6) SA 232 (CC)
[31] Para 56
[32] Para 54

paragraphs 8.3.2, 8.3.3 and 8.4 of the notice of motion, they are still only entitled to costs against the state and not Atha.

56. However, if the applicants are unsuccessful regarding the ancillary relief sought in paragraphs 8.3.2, 8.3.3 and 8.4 of the notice of motion, Atha submits that the applicants should pay its costs. As mentioned above, Atha is a private party that has necessarily yet not voluntarily been drawn into the litigation as a consequence of it being eminently affected by the ancillary relief sought and has incurred significant costs in this regard.

CONCLUSION

57. Accordingly, Atha asks for the dismissal of the relief sought in prayers 8.3 and 8.4 of the applicants' notice of motion together with a costs order in the terms set out above.

PETER LAZARUS SC

ANGELO PANTAZIS

5 July 2018