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' NOTES FOR ORAL ARGUMENT

Table of Contents

INTRODUCTION

1 Our argument will be presented in the following framework:

1.1 The parties.

1.2 The case before the court and the stances of the parties.

1.3 The place of NEMPAA in the constitutional and statutory framework for national environmental management.

1.4 An overview of NEMPAA;

1.5 The review grounds – we will focus on –

1.5.1 the arguments raised in opposition to the review grounds;

1.5.2 why in respect of certain review grounds it is appropriate to make directions in terms of s 8(1)(c)(i) of PAJA;

1.6 The relief sought, including costs. The State respondents were notified yesterday that the applicants would seek a punitive costs order, having regard to their conduct in particular in relation to the first two review grounds.

THE PARTIES

2 The applicants are a range of non-governmental, non-profit community, environmental and human rights organisations, representing primarily the public interest in the enforcement of the constitutional right in section 24 of everyone to have an environment that is protected for the benefit of present and future generations and that is not harmful to their health or well-being.

3 The first, second and third respondents are the State respondents i.e. Ministers of EA and MR, and the MEC for Agriculture, Rural Development, Land and Environmental Affairs in the province of Mpumalanga.

4 The third respondent is Atha-Africa Ventures (Pty) Ltd. It is the South African subsidiary of the Atha Group, a group registered in India. The BEE partner in the third respondent is the Bashubile Trust. Two of its three trustees are Vincent Gezinhliziyo Zuma and Sizwe Christopher Zuma, nephews of the erstwhile President of the RSA, Jacob Gedleyihlekisa Zuma. The third is Prince Thabo Mpofu.

STANCES OF THE PARTIES

5 The case before the court is that set out in Part B of the amended notice of motion:

5.1 Reviewing and setting aside the decisions of each the Ministers of Environmental Affairs and Minerals and Energy. (paras 5 and 6)

5.2 Remittal to the Ministers for decision afresh. (para 7)

5.3 Directions to the Ministers to guide them in their decision-making process in terms of section 8(1)(c)(i) of PAJA. (para 8 and 8.1-8.4)

5.4 The relief in prayers 8 is sought in a main and an alternative form.

5.4.1 The main form seeks to hold the Ministers strictly to the applicants' contentions as to the proper application of NEMPAA;

5.4.2 The alternative form is to require the Ministers to have regard thereto as relevant considerations.

6 The applicants do not persist in relation to prayer 8.3.1 because the applicants' statutory appeal against the grant of the EA was dismissed earlier this year. The other statutory appeals remain pending.

7 The relief sought in para 8 is not declaratory as suggested by the state respondents, it is mandatory and specifically authorised by s 8(1)(c)(1) of PAJA.

8 The state respondents oppose all components of the relief sought.

9 The third respondent, Atha, does not oppose the review components of the relief.

10 It confines its participation to contesting certain of the conditions that the applicants seek to have imposed to ensure a constitutional, lawful and ecologically-principled decision-making process when the matter is remitted.

11 Those they do <u>not</u> contest are the ones contained in –

11.1 paragraph 8.1 – to ensure that there is not a repeat of the denial of procedural fairness; and

11.2 paragraph 8.2 – to ensure that there is not a repeat of the failure to take into account the express requirements of section 48(4) i.e. –

11.2.1 that the Ministers must take into account the interests of local communities; and

11.2.2 the principles in section 2 of NEMA.

12 Those they do contest are those contained in prayers 8.3 and 8.4, although Atha would not object to the grant of the alternative relief, as we understand it, in relation to paragraphs 8.4.1 (ie whether a management plan has been approved for the MPE).

13 The applicants seeks an attorney and client costs order against the State respondents. It does not seek any costs order against Atha, regardless of the outcome in relation to the prayer 8 relief.

THE ENVIRONMENT IN QUESTION

14 The properties that are impacted by the superstructure and the underground mining are depicted in annexure TTN3 p167.

15 The properties that are included in the MPE are depicted by annexure TTN4 p168.

16 The wetlands that are immediately impacted by the underground mining are depicted on TTN5 p169.

CONSITUTIONAL AND STATUTORY FRAMEWORK

17 The starting point in the framework for national environmental management is s 24 of the Constitution. Its wording resonates powerfully in this case. It has

the following features:

17.1 It is a right afforded everyone.

17.2 The first component in paragraph (a) gives everyone the right to an environment that is not harmful to their health or wellbeing. This is important in the present case where the activity that is under consideration poses a potential threat to the drinking water of a substantial part of the South African population on an ongoing basis into the future.

18 The second component entitles everyone to have the environment protected.

19 This protection is expressly for the benefit of present and future generations.

20 The protection is to be achieved *"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."*

21 The legislature has passed a suite of legislation to deal with the management and protection of the environment in response to its obligations in section 24(b) of the Constitution. These include –

21.1 the National Environmental Management Act No. 107 of 1998;

21.2 the National Environmental Management : Air Quality Act No. 39 of

2004;

21.3 the National Environmental Management : Biodiversity Act No. 10 of 2004;

21.4 the National Environmental Management : Coastal Management Act No. 24 of 2008;

21.5 the statute in question, the National Environmental Management : Protected Areas Act No. 57 of 2003; and

21.6 the National Environmental Management : Waste Act No. 59 of 2008.

22 NEMA sets out a number of principles of national environmental management, the most important of which are the factors set out in s 2(4)(a) which must be taken into account when interpreting, administering and implementing both NEMA *"and any other law concerned with the protection or management of the environment"*.

23 This has been held to include the MPRDA. Legislation for the protection of the environment would also include the National Water Act No. 36 of 1998, the National Forests Act No. 84 of 1998 and the National Veld and Forest Fire Act No. 101 of 1998.

24 It is submitted that each of the national environmental management acts has its own unique function and must be interpreted accordingly.

25 If an activity requires consent under more than one of the national

environmental statutes, then, notwithstanding that there may be some areas of overlap, an authorisation under one statute cannot automatically translate into compliance with the requirements under another statute. This is the effect of the judgment of the Constitutional Court in *Fuel Retailers.* This is because, in each case, the activity in question must be considered from the perspective of the particular objects of the legislation concerned.

26 A bundle has been provided of all of the provisions of the relevant legislation that are referred to in all of the parties' heads. It appears in a volume after the volumes of the cases that are referred to by all the parties.

OVERVIEW OF NEMPAA (statute bundle p46-113)

27 We leave this mostly for consideration with reference to the specific review grounds. However we point out the following features of NEMPAA:

27.1 In terms of its long title, NEMPAA has its object, *inter alia*, to provide for the protection and conservation of ecologically viable areas representative of South Africa's biological diversity and its natural landscapes and seascapes;

27.2 NEMPAA has its own distinctive objectives as set out in s 2;

27.3 Section 3 appoints the state as trustee of protected areas;

27.4 Section 5(1)(a) requires that the Act be interpreted and applied in accordance with the national environmental management principles in NEMA; and in terms of paragraph (b), *"read with the applicable provisions of [NEMA]"*;

27.5 Section 6 provides that NEMPAA is "*read, interpreted and applied in conjunction with the Biodiversity Act"*;

27.6 Section 7(1)(a) provides that in the event of any conflict between a section of NEMPAA and other national legislation, the relevant section of NEMPAA prevails if the conflict concerns the management or development of protected areas;

27.7 Section 9 lists all of the different kinds of protected areas including those governed by other legislation; and

27.8 Section 9(a) makes provision for-

(a) special nature reserves

(b) national parks;

(c) nature reserves (including wilderness areas); and

(d) protected environments;

27.9 "*protected environment*", which is what we are concenred with, is defined in s 1 as:

> *"(a) an area declared, or regarded as having been declared, in terms of s 28 as a protected environment;*

27.10 Chapter 3 provides for the declaration of protected areas;

27.11 Section 17 sets out the purposes of protected areas;

27.12 Some of the terms in s 17 and elsewhere in NEMPAA have specifici definitions in s 1, including "*ecological integrity"* and "ecosystem";

27.13 Sections 28 deals with declaration of protected environments by either the Minister or the MEC;

27.14 Section 29 provides for the withdrawal of the declaration or the exclusion of part of a protected environment;

27.15 Sections 31-34 provide for the consultation requirements under the statute in relation to the declaration or withdrawal of declaration of protected areas.

27.16 Section 35 deals with who may initiate the declaration of private land as one of the different types of protected areas;

27.17 Section 36 deals with the endorsement by the Registrar of Deeds where an area is declared or disestablished as a protected area;

27.18 Chapter 4 deals with the management of protected areas, including protected environments;

27.19 Section 38 provides for management authorities and the assignment of the management of the different forms of protected areas to particular persons, organisations or organs of state;

27.20 Section 39 provides for the preparation of a management plan by the management authority assigned for the management of the protected area;

27.21 Section 40 provides the criteria for the management authority to apply in the management of protected areas;

27.22 Section 41 provides for the object, compulsory content and permissible content of a management plan;

27.23 Section 44 provides for the termination of the mandate to manage a protected area if the management authority is not performing its duties in terms of the management plan for the area or is under-performing with regard to the management of the area;

27.24 Section 44(1) provides for the issuing of a notice to the management authority in writing for any failure to perform its duties and directing it to take corrective steps within a specified time;

27.25 Section 44(2) provides for the termination of the management authorities mandate in the event of the its failure to comply with the notice;

27.26 Part 3 of chapter 4 provides for access to protected areas;

27.27 Section 48 provides for the prohibition of prospecting and mining activities in protected areas;

27.28 Section 51 deals with the restriction or regulation by notice in the gazette in a protected environment of other forms of development or activities in a protected area;

27.29 Chapters 5, 6 and 7 are not relevant to this matter.

OVERVIEW OF THE REVIEW GROUNDS

28 There are thirteen grounds upon which the decisions of the Ministers are

challenged.

29 Each one on its own justifies the setting aside of their decisions in terms of section 48(1)(b) of NEMPAA.

30 The order in which they are dealt with in the heads of argument is not exactly the same as the order in the founding affidavit. We follow here the order in the heads of argument.

THE FIRST REVIEW GROUND: TRANSPARENCY

31 This is dealt with in the applicants' heads at pp 43-47 paras 80-91 and in the FA at pp 57-77 paras.

32 Our constitution, in ss 1(d), 41(1)(c) and 195(1)(f) and (g), places great store by transparent, open and accountable government.

33 S 195(1)(g) further lays down that transparency is fostered "by providing the public with timely, accessible and accurate information".

34 Transparency is also a particularly important component of sustainable management of the environment. Thus –

34.1 principle 2(4)(f) of NEMA requires the promotion of participation in environmental governance by all interested and affected parties; and

34.2 principle 2(4)(k) of NEMA requires that decisions impacting the environment must be taken in an open and transparent manner and

with access provided to information.

35 We submit that transparency in the field of environmental governance is particularly important for several reasons:

35.1 Sustainable management of the environment is something that is done primarily in the interests of those who have no voice – that is the future, unborn generations of human beings, the organisms other than human beings that make up the environment and local communities that lack the resources to make themselves heard in relation to environmental governance.

35.2 The only people that are able to speak for the voiceless are those organisations such as the applicants that toil to ensure the sustainable management of the environment. They are non-governmental organisations. By definition, they operate outside of the governmental sphere. They can only be effective in holding government to account to the voiceless, if environmental governance is open and transparent and there is a free flow of information.

35.3 Ethical environmental governance and behaviour, is enhanced simply by exposing it to the glare of public scrutiny. We have a vibrant, largely free press in South Africa. It too can only do its work in the environmental sphere properly if there is a free flow of information.

35.4 We are also a country that has been literally ravaged and continues to be ravaged by corruption and capture and manipulation of State institutions. The potential for corruption in relation to authorisations to

mine is huge. That problem is addressed by scrupulous transparency in the decision-making processes around environmental authorisations in relation to mining.

36 There are additional reasons for transparency in this case:

36.1 The primary beneficiaries of the mining activity sought to be authorised in this case are the Atha Group which is based off-shore. Once they have earned the massive profits that they stand to gain from the mining, there is nothing to suggest that they will still be in South Africa to live up to their on-going environmental responsibilities, possibly the worst of which will manifest 45 years after mining stops, when the mine voids are filled and the mines start to decant toxic acid mine drainage.

36.2 The BEE partners of the Atha Group include family of the former President of the RSA. There was a compelling need for environmental decision-making that stood to benefit such connected individuals, to take place openly.

37 How then did the two Ministers and their departments respond to the constitutional and statutory obligations to act openly and transparently?

38 They did everything in their power to hide what they were doing, to throw the applicants off their tracks and to lead them on a merry dance. They left most letters from the applicants unanswered and where they did respond, when forced by PAIA requests, they acted evasively and in a manner that we submit was dishonest. These events are set out in detail in the FA at chapter E pp

57-67 and in the heads at Part C pp37-43.

39 We will therefore point out only the most egregious features of it.

39.1 Early in 2015, CER, attorneys for the applicants, hear from media reports that a mining right has been granted in MPE. They are concerned because mining is prohibited in a PE, unless permissions are in place. So on 23 February 2015, they address a letter to the DEA – see **TTN16 p274-275**.

39.2 The letter indicates who CER is and who they are acting for. It asks specifically about whether or not they have received a request from Atha for permission in terms of s 48(1) of NEMPAA. And it asks specifically that if such a request is being considered, what public participation process has been initiated or is being contemplated.

39.3 The matter is bounced between officials (annexure TTN17) and nothing is ever heard after that.

39.4 There is then further correspondence/enquiries addressed –

39.4.1 on 2 April 2015 (separate letters to both the Ministers), (annexures TTN18 and 19);

39.4.2 on 16 April 2015, by way of a PAIA request (TTN25);

39.4.3 on 24 June, 1 July and 8 July 2016, they spoke to Departmental officials telephonically (FA 339);

39.4.4 on 20 August 2015 (annexure TTN21) relating to Atha's

attempts to have the MPE disestablished;

39.4.5 on 27 August 2015 (annexure TTN 22 para 2);

39.4.6 on 2 September 2016 (annexure TTN23 para 6);

from all of which it is clear that the applicants (a) are in the dark about whether or not there has been any application under s48(1) of NEMA and (b) want to know about what is going on and (c) do not want the Ministers to proceed with it without hearing from them or while other processes are pending. Yet no substantive response whatsoever is provided.

40 Then follows a PAIA request on 20 October 2016 (TTN27 pp 306-310 esp at 308) in which they ask for both

40.1 any application ito s48(1)(b), <u>including any such application submitted during or about May 2016</u> (based on information from an article by an investigative journalist);

40.2 and <u>any correspondence</u> between Atha and the DEA or Minister regarding such an application.

41 The Department responds on 29 November 2016, more than a month later and sends a copy of Atha's s 48(1) <u>request,</u> which indeed dates back to 3 May 2016 (FA p65 para 108). (annexure TTN28)

42 So for more than 6 months they have been sitting on such a request, but have

declined to divulge it, and only do so when a specific date is pointed out in the PAIA request. It is important to note that date of 29 November 2016.

43 On 2 Dec 2016, the applicants send a detailed letter requesting the opportunity to make representations ito. S3 or s4 of PAJA in response to the s 48(1) application that has now been made available. (annexure TTN29).

44 There is no response.

45 On 7 Dec 2016 another PAIA request is sent. It again asks for correspondence and specifically for any s48(1) decision in response to the request and, if so, reasons for the decision. (**annexure TTN30** esp p346)

46 There is no response.

47 The applicants then find out about the decision by chance on or about 31 January 2017 when it is attached to a letter from the Department of Water and Sanitation, a completely different department. (**annexure TTN31 pp 349 – 360**)

48 What is interesting is the correspondence enclosing the decision (FA p351) which must have been sent by the Ministers to Atha on 21 November 2016, when it was signed by the Minister of MR, and which had already been signed by the Minister of EA on 20 August 2016.

49 In the circumstances, the conduct of the Dept of EA on 29 November 2016 in

only making available the request ito s 48(1) in response to the PAIA request, was a dishonest non-disclosure because it failed to divulge the correspondence of 21 November 2016 enclosing the decision and failed to divulge that the Minister had, already on 20 August 2016 made her decision.

50 If it was just an administrative oversight, then they would have provided the s48(1)(b) decision in response to the applicants' letter of 2 December 2016 or the PAIA request of 7 December 2016. They did not do so.

51 The state respondents do not dispute the sequence of unanswered letters and PAIA requests or that the applicants found out about the decision in the manner that they did (State AA p 739 paras 168-169). All that they deny, and it is a completely bare denial, is that the applicants were kept in the dark. (State AA p 739-740 para 170.

52 The state respondents in their AA and heads respond to the review ground based on lack of transparency by conflating the first review ground with the second review ground – procedural unfairness – and rely on ss 3(4) and 4(4) of PAJA for this conduct. (State respondents' heads pp 29-30 para 53.

53 But having regard to the constitutional provisions and the provisions of NEMA, it is a distinct obligation and ignoring it is a basis in itself for setting aside the decisions on review, regardless of the issue of procedural unfairness. By no stretch of the imagination do ss 3(4) and 4(4) permit a breach of the constitutional obligation of transparent and open government.

54 As was pointed out by the Constitutional Court in *Doctors for Life*, *"accountability, responsiveness and openness … are by their very nature ubiquitous and timeless"* and in *M and G Media Limited* they are described as *"the lifeblood of our democracy".* (Applicants' heads p 44 paras 82-83)

55 Apart from being a distinctive review ground, this conduct also justifies a punitive costs order.

SECOND REVIEW GROUND: PROCEDURAL UNFAIRNESS

56 The second review ground is dealt with in the applicant's heads at pp48-55 paras 92-103 and in the FA at pp78-81 paras 129-136.

57 It is not in dispute that there is a complete absence of any procedural fairness as required in –

57.1 ss 3(1), (2) or (5) of PAJA or

57.2 ss 4(1), (2) or (3) of PAJA,

in relation to either of the Minister's decisions in terms of s 48(1)(b) of PAJA.

58 The defence of the Ministers is to contend that they were entitled to "depart from" these requirements in terms of sections 3(4) and 4(4) of PAJA (State respondents' AA p698-699 paras 61-63).

59 It is on these defences that we focus our attention.

Nature of the discretion to be exercised in ss 3(4) and 4(4) of PAJA

60 Ss 3(4) and 4(4) of PAJA are essentially in identical terms. (**Legislation bundle p120-123**) They have the following important features:

60.1 First, they establish an overall criterion that the departure from the requirements for procedural fairness must be "reasonable and justifiable in the circumstances". This is an objective criterion and is not dependent on the discretionary assessment of the administrator. Phrases such as "in the opinion of the administrator" or "if the administrator is satisfied" are not employed.

60.2 This has the consequence that the decisions of the Ministers to depart from the requirements of procedural fairness are fully, objectively reviewable by a Court. The onus is on the administrator in review proceedings to prove that the departure is objectively reasonable and justifiable in the circumstances. There is no room for deference to the executive as contended by the State respondents. Whether or not an administrator was entitled to depart from the requirements of procedural fairness is neither a policy laden nor a polycentric decision.

60.3 Second, the sections are component specific. The assessment must be made separately in relation to each component part of the rights in section 3 and 4. The justification will not automatically apply to the whole of s 3(2) or the whole s 4(1), (2) and (3). This is apparent from the words "any of the requirements" in section 3(4)(a). The word "any" does not appear in section 4(4)(a), but it is submitted that given the symmetry of the provisions, the legislation envisages no different an

approach in relation to the section 4(4) enquiry.

60.4 Moreover, in a situation where both persons and the public are affected by administrative action, there must be a separate consideration in relation to both the components under section 3 and those under section 4.

60.5 This was a case requiring compliance with both ss 3 and 4. The description by the Minister of her approach shows that this was not appreciated at all. She says that *"it was reasonable and justifiable to depart from the requirement of following a procedure set out in section 3 and/or 4 of PAJA"*. There needed to be separate consideration and justification for attenuating the requirements of each of the components section 3 and section 4.

60.6 This is borne out by the decision in *Scalabrini Centre and Others v Minister of Home Affairs and Others* 2013 (3) SA 531 (WCC): In this case, Rogers J considered section 4(4) of PAJA. In testing whether the requirements of section 4(4) had been met in that case, he said the following

> *"Perhaps most importantly, s 4(4)(a) states that the decision-maker may 'depart' from the requirements of s 4(1) to (3) if it is reasonable and justifiable to do so. The word 'depart' does not mean that procedural fairness can be thrown overboard altogether in such circumstances (unless, of course, the circumstances of the case are such as to make a complete abrogation of the requirement fair and reasonable). In my view, the extent of departure must be tailored to meet the circumstances which make a departure fair and reasonable; the departure must be no greater than is justified by those circumstances. This would generally entail that the decision-maker should follow some other procedure calculated to achieve as far as reasonably possible the right to procedurally*

fair administrative action" (para 86) (emphasis provided). In particular Rogers J held that, in the absence of being able to consult with people who would be directly affected by the decision (because their identities were not known and/or they were outside of the country), the Minister ought to have consulted with NGO's which were well known to him (para 87). This dictum was undisturbed on appeal, even though the SCA differed in other respects with the reasoning of Rogers J (Minister of Home Affairs and Others v Scalabrini Centre and Others 2013 (6) SA 421 (SCA)).

60.7 The same point was made by the Constitutional Court in *MEC, Department of Agriculture, Conservation and Environment and Another v HTF Developers (Pty) Ltd* 2008 (2) SA 319 (CC). There the Court held as follows in relation to s 3(4):

> *"[46] Where there is no urgency in the sense that serious harm is merely threatened, not caused, the relevant official may be able to issue an appropriate direction. That direction might call on a particular person to cease his or her harmful activity only after the procedural fairness requirements, set out in s 3 of PAJA, are fully met. However, PAJA contemplates that where it is reasonable and justifiable in the circumstances, these requirements can be deviated from, whereby notice periods may be truncated and the opportunity to make representations may be limited."*

60.8 To illustrate the point, let us assume (without conceding this and although it is unlikely) that the Ministers could justify not holding any public enquiry or notice and comment procedure in terms of s 4 of PAJA, notwithstanding that the s 48(1) decision manifestly affected the public. It was then incumbent upon the Ministers, firstly to show in relation to each component part of s 4 why that component could not be complied with, and then to show why they could not have given a hearing to applicants in terms of section 3(2) of PAJA. The applicants had identified themselves to the Department as interested parties. They had made it clear that they wished to be heard on the matter.

They had important expertise on the matters to be decided. They were familiar with the issues involved. It was incumbent upon the Ministers in these circumstances to provide a separate justification as to why they would also be excused under section 3(4) of PAJA from providing such a hearing (again, with reference to each component of section 3(2)). Yet no such justification is provided.

60.9 Third, the requirements of both section 3(4)(b) and 4(4)(b) are cumulative or conjunctive and not disjunctive. This appears from –

60.9.1 The words *"must take into account all relevant factors, including …"*; and

60.9.2 The conjunctive word *"and"* at the end of subparagraph (iv) in each of the subsections (4)(b).

60.10 Here the Ministers' decisions immediately fall short because they failed to take into account the factor in s 3(4)(b)(iv) and 4(4)(b)(iv) i.e. *"the urgency of taking the administrative action or the urgency of the matter"*. (See State respondents AA pp 698-699 para 61.1-61.6)

60.11 The State respondents' arguments in regard to urgency are dealt with below. To the extent, however, that they imply that the requirements of section 3(4)(b) and 4(4)(b) are not cumulative, this is simply not sustainable on the wording of the section.

60.12 Fourth, neither s 3(4) nor s 4(4) justify a departure from the component of procedural fairness that requires that an administrator may not be biased or reasonably suspected of bias. That this remains part of

administrative law is confirmed by section 6(2)(a)(iii) of PAJA.

60.13 This has the consequence that an administrator could not afford one party a right to be heard in terms of section 3(2) of PAJA but not another party with conflicting interests. Yet this is exactly what happened here. Atha had a full hearing in terms of s 3(2). A substantial written submission and motivation in support of its request for the grant of written permission in terms of s 48(1)(b) was allowed to be submitted and was considered. Yet no such opportunity was afforded the applicants, despite the Ministers being well aware of their identity, interest and wish to be heard.

60.14 Fifth, the duty to proceed fairly rested on both the Minister of EA and the Minister of ME. If the Ministers both wished to depart from the requirements of procedural fairness, both needed to go through the decision-making process required by s 3(4) and s 4(4) and to set out their reasoning in the answering affidavits from the perspective of their different decision-making roles under s 48(1)(b) of NEMPAA.

60.15 What we are told by the Minister of EA is simply that the Minister of MR *"concurred in the decision not to follow a process envisaged in section 3 and 4 of PAJA"*. (State AA p 699 para 63) That bald assertion is not enough. The Minister of MR had to show from the perspective of his own decision-making process why the departure was justified. The more the one Minister blindly and without any motivation whatsoever follows the other Minister, the less the protection afforded by the requirement in s48(1)(b) that both Ministers provide written permission.

60.16 Even if that bald assertion was enough, it is nowhere confirmed by the Minister concerned. Instead we have a bland confirmatory affidavit from the Director-General (State AA p760). That is pure hearsay. Even if hearsay were to be permitted, he does not say how he knows that the Minister of MR concurred with the Minister of EA and what his reasoning process was. Nor does he provide any legal basis for the admission of the hearsay evidence.

The factors listed for consideration in s 3(4)(b) and s 4(4)(b)

Introduction

61 We proceed to test the Ministers' justification for the departures as set out in the answering affidavit against the factors listed in s3(4)(b) and 4(4)(b).

62 The justification is set out by the Minister of EA at **State respondents AA p698-699 paras 61-61.6**.

Objects of the empowering provision

63 The first factor is *"the objects of the empowering provision"*. *"Empowering provision"* is defined in s 1 of PAJA as *"a law, a rule of common law, customary law, or an agreement, instrument or other document in terms of which an administrative action was purportedly taken."* Clearly the law in question in this case is NEMPAA. Its objects are listed in section 3.

64 The Minister refers to none of these objects. Instead she refers to a different

law, not the empowering provision i.e. section 24K of NEMA which, she says, *"specifically envisaged that decision-makers avoid an unnecessary duplication of public participation processes carried out under NEMA, NWA, NEMPAA and MPRDA"*.

65 When it was pointed out in the applicants' heads that section 24K had no application whatsoever in the context of this matter, the reliance on section 24K became a reliance on the "spirit of section 24K" (State heads paras 54-57). Nor is there any concept in our law of applying the "spirit" of a law in circumstances where the law simply does not apply.

66 In any event, even if the issue of duplication of processes was relevant with reference to subparagraph (i), public participation processes under the other laws provided no substitute for procedural fairness under NEMPAA because *inter alia* –

66.1 The participants in those processes were not told that, although they were commenting on proposed administrative action under one law (NEMA, MPRDA or NWA), they were going to be taken to be commenting also on –

66.1.1 proposed administrative action under another law (NEMPAA);

66.1.2 an application under s 48(1)(b) of NEMPAA, that they had never set eyes on.

66.2 The decision-makers under the other laws were not the decision-makers under NEMPAA, so parties in the position of the applicants

were never given the opportunity of influencing the NEMPAA decision-makers;

66.3 The decisions under the other laws had already all been taken in favour of Atha. This meant that the Ministers in relying on those decision-making processes were biased (or reasonably suspected of bias) from the outset.

66.4 The decisions under NEMPAA raised distinct considerations, different from the laws governing the other public participation processes, on which interested and affected parties were entitled to give, and be heard on, their particular perspectives.

67 In the circumstances, there is no objective justification based on the first factor for consideration, for departing from the normal procedural fairness provisions in ss 3 and 4.

Nature, purpose, need to take, the administrative action

68 The second factor is *"the nature and purpose of, and the need to take, the administrative action"*.

69 As pointed out in the applicants' heads of argument, the Minister's explanation of how she applied this factor is a *non sequitur*. (See State AA p 698 para 61.3).

70 The nature and purpose of a decision to permit mining under s 48(1)(b) cannot by any stretch of the imagination be characterised as *"the requirements of*

other approvals and authorisations required by Atha before they could mine in the area in question".

71 In the circumstances, there is no objective justification based on the second factor for consideration, for departing from the normal procedural fairness provisions in ss 3 and 4.

The likely effect of the administrative action

72 This is the third factor. Again the Minister's explanation is a *non sequitur*.

73 As the likely effect of the administrative action, she refers to *"the fact that mining could not commence unless all other approvals and authorisations were properly granted."*

74 The likely effect of the administrative action was to allow coal mining to go ahead in a protected environment, which included wetlands of great ecological importance and streams that flowed into river and dam systems that supply clean fresh water to millions of people in Gauteng, other parts of South Africa and beyond. That is what the third factor required her to consider in deciding whether or not to depart from the requirements for a fair hearing.

75 The fact that she ignored this effect of the administrative action, which cried out for a public participation process, shows that her consideration of this factor was hopelessly flawed.

76 In the circumstances, there is no objective justification based on the third factor

for consideration, for departing from the normal procedural fairness provisions in ss 3 and 4.

Urgency

77 The fourth factor is *"the urgency of taking the administrative action or the urgency of the matter"*.

78 Of course this works both ways. Urgency tends to justify attenuation. Lack of urgency points to strict compliance.

79 In *HTF Developers*, the Constitutional Court went on to say –

> *"[47] One of the factors that determines reasonableness and justifiability in a particular situation is the urgency attached to that situation. Other factors include the object of s 31A and the purpose of the administrative action taken under that provision, both of which involve the protection of the environment in the face of serious harm. It is evident that the procedural fairness requirements dictated by s 3(2) of PAJA apply to the exercise of power under s 31A; however, urgency and the purpose that the provision serves would dictate the extent of the procedural fairness standard that will be expected of the administrator."*

80 From this extract, it is clear that, along with the first factor, urgency (or otherwise) is the most important factor in deciding whether or not there should be a truncation of procedural fairness as provided for in sections 3 and 4 of PAJA.

81 Despite this, the Ministers did not even consider this criterion. The decisions therefore cannot stand.

82 However, even if they had considered them, the circumstances did not justify any truncation of either s 3 or s 4. Some idea of when truncation may be appropriate can be gained from the decision in *City of Johannesburg v Rand Properties (Pty) Ltd and Others* 2007 (6) SA 417 (SCA). There the Court was concerned with an emergency situation where persons were required to vacate a hazardous building, dangerous to life and limb. The Court applied section 3(4) as follows:

> *[63] The right to be heard has now been constitutionalised and has effectively been codified in s 3 of PAJA. It is not an absolute or immutable right. What is required is a fair administrative procedure and fairness depends on the circumstances of each case. As a general rule, the 'administrator' must give the affected person the opportunity to make representations but if it is reasonable and justifiable in the circumstances the administrator may depart from this requirement (s 3(4) of PAJA). In this case the only issue on which the administrator might have been obliged to hear and consider representations was in relation to the question whether it was necessary for the safety of any person that the buildings be vacated. It is clearly desirable that there should be consultation in matters of this nature but this is not such a case. In cases of crisis the audi principle can hardly apply. There is no suggestion that the jurisdictional facts for the decision did not exist or that the respondents wished to make any representations in that regard. I have already mentioned the problem in establishing the number, apart from the identity, of occupiers of San Jose. I therefore conclude that, taking into account all relevant factors, the city was entitled to dispense with a prior hearing (see s 3(4)(b) of PAJA).”*

83 From this it is apparent that even if the Ministers had dealt with this factor, it provided no basis whatsoever for any form of truncation. There was no urgency whatsoever. The process in relation to s 48 happened at a leisurely pace. The application was lodged at the beginning of May 2016. The Minister of EA decided on 20 August 2016 and the Minister of MR on 21 November 2016. There was ample time for full compliance with both s 3 and s 4 of PAJA.

84 In the circumstances, there is no objective justification based on the fourth

factor for consideration, for departing from the normal procedural fairness provisions in ss 3 and 4.

The need to promote an efficient administration and good governance

85 This is the fifth and final requirement. Here the Minister refers to their having taken into account the submissions made under the other statutes.

86 For the reasons given above, this is no justification.

87 In the circumstances, there is no objective justification based on the fifth factor for consideration, for departing from the normal procedural fairness provisions in ss 3 and 4.

88 In the circumstances, the Ministers were both obliged to comply properly and fully with ss 3 and 4 of PAJA. They failed to do so and the decisions stand to be reviewed and set aside on this ground too.

THIRD REVIEW GROUND: THE MINISTERS' DISTINCTIVE DUTIES

89 The third review ground is dealt with in the applicants' heads at pp56-58 paras 104-111. In the FA it is the fourth review ground and is dealt with at pp86-93 pars 145-152.

90 The essence of the fourth ground of review is simply that the discretion to be exercised in terms of section 48(1)(b) of NEMPAA imposed upon the Ministers distinctive duties arising from the terms of NEMPAA.

91 On a conspectus of the State respondents' answering affidavit, they regarded compliance with other applicable environmental legislation as necessarily satisfying the requirements of NEMPAA. NEMPAA imposed no additional obligations.

92 That the requirements for authorisation under s48(1)(b) NEMA were not synonymous with the requirements for authorisation under the other statutes referred to, arises from –

92.1 The simple fact that NEMPAA is a distinct statute, which cannot be ignored;

92.2 The fact that in terms of s7(1)(a) of NEMPAA, in the event of any conflict between a section of NEMPAA and other national legislation, the relevant section of NEMPAA prevails if the conflict concerns the management or development of protected areas;

92.3 The unique objects of NEMPAA as set out in the long title of NEMPAA;

92.4 The distinctive objectives in s 2 of NEMPAA;

92.5 The fact that section 3 places profoundly important and distinctive duties on the two Ministers, because it renders them trustees with the duty of directly ensuring that the fundamental environmental rights in the Constitution are directly applied in the context of protected areas. It 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";

92.6 The distinctive purposes of establishing protected areas under section 17 of NEMPAA.

93 Of course the Ministers were entitled to rely on information gathered in the decision-making processes under other legislation. As a starting point, the Minister would also have to see that the other legislative environmental provisions had been complied with.

94 But the Ministers would have to go beyond that starting point and -

94.1 engage in a distinctive fact gathering exercise over and above that, with particular attention paid to the unique objectives of NEMPAA in section 2 and the purposes of the declaration of protected areas in section 17;

94.2 in which the Ministers as constitutional trustees acting in a protected area where NEMPAA prevailed over all other legislation (s 7(1)a) and the words "Despite other legislation" in s 48(1)), were entitled to consider and depart from any of the decisions under the other legislation;

94.3 in which NEMPAA was treated as an additional and overriding layer of legislative protection of the protected environment in question.

95 Whilst the Minister in her affidavit pays lip service to having considered *"the specific factors which ought to be considered under NEMPAA"*, she nowhere

says how she or her cabinet colleague went about this. In any event, even if she did, she relied on an inadequate information base by not making any further enquiries of her own whatsoever (beyond the facts made available to her from the other statutory processes) and failing to elicit further information through applying section 3 and 4 of PAJA. Nowhere does she say how she went about exercising her special duties as constitutional trustee.

96 Although she refers to the Minister of MR as having done the same that she did, this is hearsay and is in any event insufficient, as is the confirmatory affidavit of the DG of Mineral Resources.

97 The following assertion in the answering affidavit (p 745 para 177.5) is fatal for the Ministers:

> *"I deny that it was incumbent on the Ministers to 'apply their fresh minds' to the application. Both Ministers were fully aware of the complex processes undertaken in respect of the authorisation processes initiated by Atha"*.

98 In their heads, the State respondents argue that the applicants' approach is a *"silo"* approach in which *"an authority charged with granting an authorisation must exercise an independent discretion having regard to the factors and objectives contained in the empowering legislation"*. If that is a silo approach, so be it. It is what the law, and the Constitution, require.

99 But as pointed out above, that does not mean that the processes under other legislation are ignored. They must be considered. But more is required. And they cannot dictate the outcome of the NEMPAA decision. Nor can the

Ministers defer to other departments on the basis of superior expertise.

100 Contrary to what the State respondents say, the decision of the Constitutional Court in *Fuel Retailers* is directly in point. There too, the authorities sought to rely on the fact that an enquiry that was required to be done under NEMA into need and desirability of a filling station had already been done under the Town Planning Ordinance. There was no need to duplicate. The Constitutional Court rejected this, holding –

> *"[85] There is a fundamental flaw in this approach. Need and desirability are factors that must be considered by the local authority in terms of the Ordinance. The local authority considers need and desirability from the perspective of town-planning, and an environmental authority considers whether a town-planning scheme is environmentally justifiable. A proposed development may satisfy the need and desirability criteria from a town-planning perspective and yet fail from an environmental perspective."*

101 Having regard to *Fuel Retailers*, the concession in the State respondents' heads that they approached the matter on the basis that *"the principles to be considered were the same across all the statutory authorisations processes"* (State heads p29 para 52.2) is also a fatal concession and reveals that they have misinterpreted NEMPAA and made the same error as the authorities did in that case.

102 Also, the relevant provincial MEC was responsible for granting the EA. His perspective would have been a provincial perspective. S 48(1)(b) provides that only the national Ministers of EA and MR may grant written permission to mine. This despite the fact that MEC's are given numerous other powers under the Act. This shows the importance of a separate national perspective

being brought to bear when mining is allowed in a protected environment. And in this case it is important because it affects the water supply to other provinces, particularly Gauteng, with its huge population, and two other countries.

FOURTH REVIEW GROUND: EXCEPTIONAL CIRCUMSTANCES

103 This review is dealt with in the applicants' heads of argument at pages 59 – 67, paragraphs 112 to 121. It is dealt with as the fifth review ground in the FA at pp88-93 paras 153-159.4.

104 We say that upon a proper contextual and purposive interpretation of section 48(1)(ii), permission to mine should only be granted by the Ministers in exceptional circumstances.

105 Contrary to what is suggested by the respondents, we do <u>not</u> ask for a reading in of the words "*exceptional circumstances*" on the basis that the provision is otherwise unconstitutional. We accept that the provision is constitutional. However, it must be interpreted, as we say in the heads, ex *visceribus actus*, ie so as to render the statute and each of its sections and provisions as a functional, integrated and meaningful whole. That approach is also consistent with the purposive approach to interpretation which is required by the Constitutional Court. In *Department of Land Affairs and Others v Goedgelegen Tropical Fruits (Pty) Ltd* 2007 (6) SA 199 (CC), the Constitutional Court described the approach as follows:

> *"[51] This Court has reiterated that the Constitution must be interpreted purposively. Many pronouncements in this Court and other courts endeavour to encapsulate this purposive approach. …*

[52] In Bato Star Fishing Ngcobo J explains the proper approach to statutory interpretation:

> *'The emerging trend in statutory construction is to have regard to the context in which the words occur, even where the words to be construed are clear and unambiguous. Recently, in Thoroughbred Breeders' Association v Price Waterhouse the SCA has reminded us that:*
>
> > *"The days are long past when blinkered peering at an isolated provision in a statute was thought to be the only legitimate technique in interpreting it if it seemed on the face of it to have a readily discernible meaning. As was said in University of Cape Town v Cape Bar Council and Another 1986 (4) SA 903 (A) at 914D - E:*
>
> *I am of the opinion that the words of s 3(2)(d) of the Act, clear and unambiguous as they may appear to be on the face thereof, should be read in the light of the subject matter with which they are concerned, and that it is only when that is done that one can arrive at the true intention of the Legislature.'"*

[53] It is by now trite that not only the empowering provision of the Constitution but also of the Restitution Act must be understood purposively because it is remedial legislation umbilically linked to the Constitution. Therefore, in construing 'as a result of past racially discriminatory laws or practices' in its setting of s 2(1) of the Restitution Act, we are obliged to scrutinise its purpose. As we do so, we must seek to promote the spirit, purport and objects of the Bill of Rights. We must prefer a generous construction over a merely textual or legalistic one in order to afford claimants the fullest possible protection of their constitutional guarantees. In searching for the purpose, it is legitimate to seek to identify the mischief sought to be remedied. In part, that is why it is helpful, where appropriate, to pay due attention to the social and historical background of the legislation. We must understand the provision within the context of the grid, if any, of related provisions and of the statute as a whole, including its underlying values. Although the text is often the starting point of any statutory construction, the meaning it bears must pay due regard to context. This is so even when the ordinary meaning of the provision to be construed is clear and unambiguous."

106 NEMPAA is similarly umbilically linked to the Constitution. It is specifically one of the legislative measures envisaged by section 24B of the Constitution. Precisely the same broad, purposive approach, giving the fullest possible protection to the fundamental environmental rights, must be applied.

107 It is well-established that an implied provision may be read into a statute. In *Masetlha v President of the Republic of South Africa and Another* 2008 (1) SA 566 (CC) the Constitutional Court, at para [192], formulated the test as follows:

> *"...words cannot be read into a statute by implication unless the implication is a necessary one in the sense that without it effect cannot be given to the statute as it stands. In addition, such implication must be necessary in order to 'realise the ostensible legislative intention or to make the [legislation] workable."*

108 We have given in our heads of argument the reasons why a proper purposive approach renders it necessary that permission to mine in a protected environment only be given in exceptional circumstances. Those reasons show that the reading into the statute of such a requirement is indeed necessary to realise the purpose of the legislation and to make it workable.

109 Additional to the reasons given in the heads, mining is specifically identified in NEMPAA as an activity potentially harmful to protected environments and special provisions are therefore made to either prevent it completely or permit it only, we submit on a proper interpretation, in exceptional circumstances, overseen by the two Ministers.

110 The clearest indication of why the reading in of an implied provision is necessary, is the arguments made to the contrary by the state respondents in their heads (at para 66). All that the respondents are prepared to admit of, on their approach, is that the sole guidelines as to how the decision is to be arrived at are those set out in section 48(4), ie the interests of local communities and the environmental principles referred to in section 2 of NEMA.

111 This ignores completely the provisions of section 2, 3 and 17 referred to earlier. Particularly revealing is the following extract from p38 of the State respondents' heads:

> *"66.3 Neither section 48(1) nor section 48(4) provides that mining should only take place in exceptional circumstances. It merely requires that prior written permission be obtained from the two Ministers."*

112 If this was so, the provision would have read:

> *"Mining is permitted in a protected environment with the permission of the Minister and the member of cabinet responsible for mineral resources."*

113 That is an emaciated construction of section 48(1)(b) which would render NEMPAA a meaningless and unworkable statute. That level of protection already exists in other statutes. It is destructive of any statutory functionality of NEMPAA.

114 Yet that is in fact how the Ministers have, incorrectly, interpreted section 48(1)(b). Evidence of this is to be found in the Ministers' decision to rely entirely on decision-making processes under other statutes and not to apply their minds afresh, disavowing any obligation to do so.

115 Having failed to give the provision its proper meaning and having failed to consider whether there were any exceptional circumstances to justify the mining, their decisions stand to be set aside.

116 Moreover, having regard to the avowed incorrect approach of both Ministers, there is good reason to ensure that the proper approach is followed on remittal.

Hence the importance of the relief sought in prayer 8.4.3 of the notice of motion.

117 Atha disputes that the words are necessarily to be read in, but concedes the applicants' contention 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."* But that relates to process. It begs the question as to how exactly the provisions of s 48(1)(b) are to be interpreted and, substantively, in what circumstances permission to conduct mining, an activity inimical to environmental protection, is to be permitted.

118 Atha argues further that the term "*exceptional circumstances*" is vague. The applicants disagree. It is a phrase widely employed in legislation. And it allows the Ministers to exercise their broad discretion. Statutory guidance in the exercise of that discretion is provided by having reference to sections 2, 3 and 17 of NEMPAA.

119 Accordingly the applicants are justified in persisting in the relief sought in prayer 8.4.3 of the notice of motion.

FIFTH REVIEW GROUND: AWAITING APPROVAL OF MANAGEMENT PLAN

120 This review ground is dealt with at pages 67 to 71 of the applicants' heads. It is the thirteenth review ground in the FA and is dealt with at pp141-142.

121 It is a matter of logic and the consequence of a purposive interpretation of the legislation that if-

121.1 section 38(1)(b) of NEMPAA permits the Minister in writing to assign the management of a privately-owned protected environment to a suitable person or organisation, with the latter's consent; and

121.2 the Minister has done so; and

121.3 the organisation assigned the responsibility of managing the protected environment is obliged in terms of section 39(2) of NEMPAA to submit a management plan for the protected area to the Minister or the MEC for approval; and

121.4 it is obligatory in terms of section 41(2)(g) that the management plan include *"a zoning of the area indicating what activities may take place in different sections of the area, and the conservation objectives of this section"*;

then any decision of the Ministers under section 48(1)(b) cannot proceed without that essential building block of the protective regime under NEMPAA being in place.

122 The fact that the management authority has not timeously carried out its obligation (seemingly through no fault of its own), particularly in circumstances where the Minister and the MEC have the powers to compel a management authority properly to perform its functions (s 44(1)), is no reason for a decision in terms of s48(1)(b) to proceed in disregard of the management plan and its zoning scheme. Rather, the Minister or the MEC should have ensured that the plan was submitted and approved, if necessary, using their powers in

terms of s 44(1). Their officials are aware of the fact that there is a substantial draft already prepared.

123 Significantly, the state respondents correctly concede that the Ministers would not be able to permit mining in an area, which was zoned in the management plan so as to exclude mining as a permissible activity. (State respondents' heads p 39 para 69.3) It is therefore essential that the management plan approval process be completed.

124 And the Ministers were wrong to proceed without regard to a finalised management plan and its zoning scheme. The decision is therefore reviewable on this ground.

125 Moreover, it is essential that conditions be imposed that will have the effect of ensuring that a management plan, compliant with the legislation and incorporating a zoning scheme, is adopted and that it is applied in the Ministers' decision-making process on remittal. That is what prayers 8.4.1 and 8.4.2 of the amended notice of motion achieve.

SIXTH REVIEW GROUND: INTERESTS OF LOCAL COMMUNITIES

126 The sixth ground of review is set out in detail in the applicants' heads at pp 71 to 79, paras 138-159. It is also the sixth ground of review in the FA at pp93-103 paras 160-185.

127 Central to this challenge by the applicants is the Ministers having dealt with the interests of local communities by attaching condition 30 to the decisions made under section 48(1)(b). It reads as follows:

> *"30. All social issues inclusive of affected homesteads and relocations must be addressed in accordance with the approved social and labour plan as informed by the social impact assessment report and regulated by the Department of Mineral Resources."*

128 It is not in dispute that the social and labour plan ("SLP") was not before them when they made their decision. Instead what they had before them was an incomplete and inaccurate summary of the SLP (applicants supplementary affidavit p 386 – 387 paras 29 – 33; state respondent's answering affidavit pp 721-722 paras 107 – 109).

129 Later in their answering affidavit (p 754 para 192.2) the state respondents say-

> *"There was no need for the Ministers to consider the SLP during this process to the exclusion of other socioeconomic specialist studies."*

130 However, that is no answer because it is specifically the SLP which they relied on in the conditions they attached to their decision purportedly to ensure that the interests of local communities were catered for.

131 Their reliance on a document that they had never read or considered was manifestly reviewable.

SEVENTH REVIEW GROUND: THE SAS 2015 REPORT

132 The argument in this regard is set out in the applicants' heads at pp 79 – 81, paras 160 – 167. It is the amended version of the third review ground in the

founding affidavit and is based on the supplementary affidavit commencing at p 382.

133 The Ministers do not dispute that they overlooked this crucial report (state respondents heads p 43 para 75). The Ministers seek to argue that the oversight was immaterial.

134 However if regard is had to the content of the report this argument is not sustainable. It deals with the assessment of two wetlands which are located within 500 metres of the surface infrastructure footprint and underground mining boundary. Most importantly, it deals with a newly assessed wetland called CVB5, which has a category B Present Ecological State, meaning that it is largely natural with few modifications and a category A Ecological Importance and Sensitivity, 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. CVB5 also falls largely within the MPE.

135 There is no basis for suggesting that the report was immaterial and this review ground is also established.

EIGHTH REVIEW GROUND: FAILURE TO APPLY PRECAUTIONARY PRINCIPLE

136 This review ground is dealt with in the applicants' heads at pp81-86 paras 168-175 and in the FA at pp108-118 paras 197-203.

137 The precautionary principle is encapsulated in two of the section 2 NEMA principles which are set out at paragraph 168 and 169 on page 82 of the applicants' heads.

138 Essentially what is required by decision-making authorities is a risk-averse and cautious approach when there are limits on current knowledge as to what future impacts are going to be. It has particular importance when applied to decision-making involving "*sensitive, vulnerable, highly dynamic or stressed ecosystems, such as ... wetlands and similar systems."*

139 Damningly, the failure to apply the precautionary principle is apparent from the very conditions which the Ministers purported to attach to the grant of permission to mine in the MPE. This condition acknowledges that there will be acid mine drainage as a result of the mining and simply passes the buck to the Department of Water and Sanitation by saying-

> *"The applicant must mitigate and manage acid mine drainage where applicable according to the requirements of DWS."*

140 It is well known that acid mine drainage is toxic and has implications for both aquatic and human life.

141 As will appear in relation to a subsequent ground of review, there is no plan or cost provision for managing acid mine drainage after the closure of the mine. The proper application of the precautionary principle simply would not allow mining to be permitted in these circumstances.

142 Secondly, it is common cause that there will be dewatering of underground water as a result of the mining and that this will impact on wetlands and streams above the mining operation.

143 In a protected environment, it is therefore crucial that there be a clear plan in place to prevent any long-term damage to the streams and wetlands.

144 This aspect is dealt with in condition 34 which reads:

> *"Should the integrity (PES score) of any category A and B wetlands be reduced by more than 20% from baseline, a biodiversity offset agreement must be negotiated with the Mpumalanga Provincial Environmental Department and DEA: Branch: Biodiversity and Conservation (its successors in title) within the timeframe stipulated by these authorities."*

145 What this means is that causing damage representing up to 20% loss of crucial category A and B wetlands is simply authorised, with no consequences for Atha. And this in a "protected environment".

146 Damage to such wetlands beyond 20% is further permitted provided that a "*biodiversity offset agreement"* is negotiated with the Mpumalanga Provincial Environmental Department and Department of Environmental Affairs. Essentially, biodiversity offset agreements involve imposing on the developer an obligation to recreate a similar environment to the one destroyed elsewhere.

147 The difficulties with this approach in the present matter are that-

147.1 it is common cause that the wetlands in question are considered to be "irreplaceable"; and

147.2 there is no certainty that Atha will be around to deal with obligations that arise long after mining has stopped; and

147.3 there is no guarantee that the envisaged negotiations will result in agreement; and

147.4 there are no standards whatsoever set for the quality or relocation of the replacement wetland.

148 Once again, this is a clear breach of the precautionary principle.

149 The state respondents in their heads suggest that it was sufficient for the Ministers simply to rely on the Department of Water and Sanitation. This was a serious and impermissible abdication of a decision-making authority vested in the Ministers themselves.

150 For reasons already given, the additional layer of protection envisaged by NEMPAA precludes abdication of responsibility in favour of other authorities (state respondents heads pp 43-44 paras 77 – 79).

151 The remaining bases upon which the Ministers failed in relation to the precautionary principle are set out in the applicants' heads at pp 84 – 86 paras 173 – 175).

152 This ground of review is clearly established, on the basis of the content of the decision itself.

NINTH REVIEW GROUND: INADEQUATE PROVISION FOR REHABILITATION

153 This review ground is dealt with at pp 87 – 89 paras 176 – 183 of the applicants' heads of argument and in the founding affidavit as the 12th review ground at pp 137-.141 paras 241-253.

154 This is one of the review grounds that has as a corollary the prayer for a direction in terms of s 8(1)(c)(i) of PAJA that upon remittal, permission should not be granted unless there is financial provision for complete rehabilitation of the Mabola protected environment in consequence of Atha's coalmining, upon termination of the mining, including the treatment of any polluted water that may be decanting from the mine at the time of the termination or that may decant from the mine at any time in the future.

155 It is not in dispute that there will be future decant of acid mine drainage from the mine. This is so on the version of Atha's experts.

156 The issue of decant of contaminated water in the form of acid mine drainage is dealt with in the founding affidavit at **pp 111 – 117 para 202 – 202.7** to which reference is made.

157 To make matters worse, the most serious impact anticipated from acid mine drainage would appear to be likely to take place some 45 years after mine closure when all of the mining voids have been filled with water.

158 It is also not in dispute, as appears from the foregoing paragraphs of the founding affidavit and, in particular, paragraph 202.4, that a water treatment plant will be required to be in place and operational both during the operation of the mine and following mine closure (p 114 para 202.4).

159 In those circumstances, it was clearly necessary that the Ministers for purposes of their decision in terms of s 48(1)(b) and in the interests of protecting a protected environment ensure that everything, including financial provision, was in place to guarantee that the water treatment plant would be in place and operational throughout any period of acid mine drainage decant following closure of the mine, even if that was in 45 years time.

160 Despite this, the Ministers' written decision shows that they gave no direct or specific attention to the issue of rehabilitation whatsoever (FA p 137 para 242).

161 The Minister of EA denies that they failed to consider post-mining rehabilitation and relies on the Minister of MR having considered Atha's financial provision for the post-mining rehabilitation in compliance with s 41(1) of the MPRDA and regulation 54, before proving Atha's environmental management programme.

162 This is no answer because -

162.1 The Minister of EA effectively concedes that she gave no consideration to it;

162.2 The Minister of MR only considered it in the context of approval of the environmental management programme and it was in any event a

different minister of MR, Minister Ramathlodi, not Minister Zwane, who made the s 48(1)(b) decision;

162.3 In any event, a distinctive consideration of rehabilitation separate from the processes relating to the environmental management programme and the mining rights was manifestly required (state respondents AA p 751 para 185).

163 Atha, in their answering affidavit, deal with the issue of failing to make financial provision for post-closure water treatment evasively, in circumstances where s 24 of the Constitution required them to make full and open disclosure in this regard. They say:

> *"52. ... As the applicants indicate, before Atha's EMPr could be approved, it had to make the prescribed financial provision in terms of [the now repealed] s 41(1) of the MPRDA. The applicants allege that Atha failed to include the costs of water treatment in the calculation of its financial provision for rehabilitation in the EMPr. ... It is denied that Atha failed to make adequate financial provision for rehabilitation."*

164 Atha's failure to deal specifically with the allegation of a failure to provide financially for post-closure water treatment is disingenuous, to say the least, and must be taken as a bare denial not creating any dispute of fact.

165 In any event, it is possible to demonstrate with reference to the documentary record that no financial provision for post-closure water treatment has been made:

165.1 the water use licence applied for by Atha and granted, only authorises a water treatment plant during the operational phase of the project (see

supplementary affidavit p 394 para 54). It makes no provision for treatment of post-closure decant. This is not disputed by either of the respondents in their answering affidavits. The Minister of EA merely denies the allegations "*to the extent that it is inconsistent with what is contained in this affidavit*", but given that this issue is entirely left to the Department of Water and Sanitation, no dispute is raised.

165.2 There is, in annexure **TTN33, at p 369** a list of the items in the closure cost financial estimate. It is so that item 13 relates to "*water management*" in an amount of R304 966. However, this item is described on p 368 as follows:

> *"The Master Rate developed by the DMR is considered to be over-conservative and too generic to be applied in the case of Yzermyn where the predictive modelling suggests that mine decant will not occur."*
>
> *An allowance has been made of monitoring of surface water and groundwater for a period of three years, with management measures estimated at R 120 000. This cost estimate will need to readjusted during the Life of Mine as real data on groundwater level and water quality is obtained and the predictive decant modelling can be properly calibrated."*

166 From this it is quite clear that no provision is made for long term operation of water treatment plant in respect of decanting contaminated acid mine drainage. Nor could an amount of R304 966 ever be expected to cover post-closure water treatment of AMD. The suggestion that there will not be decant is in conflict with the views of Atha's own experts.

167 It is submitted that these are precisely the kinds of enquiries that ought to have been made by the Ministers were they properly to have applied their minds in

the exercise of their discretions under s 48(1)(b) of NEMPAA. Their failure to do so was a dereliction of duty.

168 In those circumstances, and particularly having regard to the evasive dealing with this important item by Atha's senior vice-president in para 52 of his answering affidavit, it is most appropriate that the direction in prayer 8.4.4 of the notice of motion be given.

TENTH, TWELFTH AND THIRTEENTH REVIEW GROUNDS:

169 These review grounds are sufficiently canvassed in the heads of argument,

169.1 the 10th review ground at pp 89-90 paras 184-188; FA p 121-131 paras 211-217.5;

169.2 the 12th review ground at pp 92-93 paras 196 – 199.5; 9th review ground in the FA pp 118-121 paras 204-210.5;

169.3 the 13th review ground at pp 93-94 paras 200-205; 7th review ground in the FA pp 103-107 paras 186-196.5.

ELEVENTH REVIEW GROUND: FAILURE TO AWAIT THE STATUTORY APPEALS

170 This review ground is dealt with in the heads of argument at pp 90-92 paras 189-195; 11th review ground in the FA pp 131-137 paras 219-240.

171 The point in relation to this review ground is simple. Until the remaining statutory appeals are finalised, particularly bearing in mind that those appeals are wide appeals, the Ministers acting under s 48(1) can never know precisely

what activity impacting the protected environment, the relevant authorities are or are not permitting.

172 Because they are wide appeals, the parties are entitled to introduce further information, including further specialist input, to be taken into account by the statutory appellate authority.

173 That evidence may have a substantial impact on the shape and form of the authorisations, if any, that emerge from those appellate processes.

174 Because in terms of section 7(1)(a) and the opening words of s 48(1), NEMPAA trumps or prevails over all other national legislation where management or development of protected areas is concerned, it is a matter of logical necessity that the precise form of the activity authorised in terms of the other national statutes is finalised, before scrutiny under NEMPAA, and s 48(1)(b) in particular.

175 The state respondents' argument in response is that the Ministers have the power, under s 48(3) to prescribe conditions when making their decisions under s 48(3) and, accordingly, they can (and the Ministers did) make it a condition that all other statutory authorisations be obtained.

176 This, however, is no answer.

177 Firstly, s 48(3) does not provide for the imposition of conditions in making a decision under s 48(1)(b). Instead, it is a special provision dealing with

situations where there was active mining being conducted, at the time when NEMPAA was promulgated on 1 November 2004 –

177.1 in pre-existing protected areas; or

177.2 where protected areas are subsequently established.

178 The provision is of no application here because the mining activities were not being conducted when NEMPAA came into force on 1 November 2004.

179 That is not to say that the Ministers did not have the power to impose conditions. It is a power which is implicit in the legislation and it shows that the state respondents, on their own version, accept that a proper interpretation and application of the legislation is not solely and literally confined to the words expressly used in the statute.

180 Nor is it sufficient that a condition be imposed that the necessary consents be obtained under the other legislation. Those consents may give rise to a form of mining which is permissible under other statutes but incompatible with the objects of NEMPAA. The Ministers approach will therefor incorrectly risk allowing noncompliant mining to proceed in conflict with the objects and provisions of NEMPAA.

181 Atha's response is, in principle, little different from that of the Minister. They contend that all relevant environmental impacts will already have been considered in the process completed under NEMA and that the same principles of environmental management in section 2 of NEMA apply to

decision-making under NEMPAA.

182 Similar arguments are advanced in relation to the pending appeal against Atha's water use licence, which has not yet been finally heard or adjudicated.

183 What these arguments overlook is that NEMPAA has distinctive requirements over and above those contained in NEMA, NWA and the MPRDA. These can only be properly applied and considered, once the precise nature of the mining is known, and that, in turn, is only known once the statutory appeals have been finalised.

RELIEF AND COSTS

184 The applicants accordingly persist in seeking the main relief as set out in the amendment notice of motion, alternatively, the alternative relief.

185 As far as the State respondents are concerned, their conduct in relation to the first and second review grounds, directly in conflict with a number of provisions of the Constitution and smacking of dishonesty, warrants a punitive costs order. All the more so in the light of their disingenuous attempts to avoid the hearing.

186 The applicants do not seek an order of costs against Atha.

187 There is no basis for Atha to be entitled to a costs award against the applicants, regardless of the outcome of the relief under s 8(1)(c)(i) of PAJA. A debate around appropriate just and equitable relief was a necessary consequence of

the review proceedings, in respect of which Atha has not taken issue on the merits. Apart from the fact that –

187.1 Biowatch would not permit of an order in favour of Atha against the applicants; and

187.2 The applicants have the protection of the relevant provisions of NEMA discussed in the applicants' heads (p101-103 paras 216-221),

Atha cannot sit on the sidelines in the main dispute, watch the decisions be set aside that it asked for on a flawed basis in the first place, and then attempt to generate an entitlement to costs against the applicants by entering the fray on a narrow aspect of the appropriate relief. Atha already concedes the correctness of significant components of the s 8(1)(c)(i) relief. Whether or not the remaining relief is granted, there is no basis for an award of costs in favour of Atha against the applicants. Nor do the applicants claim costs against Atha.

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16 October 2018