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
GROUND WORK	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 MARK 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 PROVINCE	Fifth Respondent

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HEADS OF ARGUMENT

ON BEHALF OF THE

1ST , 2ND AND 5TH RESPONDENTS

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INTRODUCTION

1. The applicants seek the review of decisions taken by the Minister of Mineral Resources (Minister of MR) and the Minister of Environmental Affairs (Minister of EA) under section 48 of the National Environmental Management Protected Areas Act ("NEMPAA") to grant Atha Africa written permission to mine in the Mabola Protected Environment ("MPE"). In this regard, it is significant that underground mining will occur in the MPE while the surface infrastructure required for the mine will be located outside the protected environment.

2. While the consequential relief sought by the applicants is the remittal of Atha's application to both Ministers, the applicants also seek ancillary declaratory relief aimed at prescribing the factors which the Ministers should consider in deciding the section 48 applications. In addition, the applicants also seek orders which will delay the determination of the section 48 applications until other statutory appeals have been finalised.

3. The first, second and fifth respondents oppose this application on a number of bases.

   3.1. The applicants' complaints about procedural unfairness are misplaced. The Ministers took an informed decision that it was reasonable and justifiable to depart from the requirements of section 3 and 4 of PAJA. The applicants have failed to demonstrate that this decision was in any way flawed;

3.2. A critical feature of the decision to depart was the appreciation by the Ministers that there are other inter-related statutory authorisation processes. All of these processes considered the unique features of the protected environment, the MPE. The Ministers therefore incorporated these processes into its decision-making.

3.3. The applicants take issue with this and argues that each authorisation should have been considered separately. This approach (referred to in these submissions as 'the silo approach') envisages that each application be considered in a separate silo. This is however unreasonable and inappropriate in the present matter given that:

3.3.1. NEMA expressly requires (and envisages) that there be intergovernmental co-ordination and harmonisation of decisions[1];

3.3.2. The functionaries deciding the various statutory authorisations are considering the environmental issues within one statutory framework; and

[1] See section 2(l) and section 24 K

3.3.3. The functionaries are specialists in their respective fields[2]. The Ministers are therefore entitled to consider and have regard to their decisions.

3.4. The complaint that the Ministers have failed to follow a mandatory and prescribed procedure is misplaced. Section 48 of NEMPAA does not prescribe a particular procedure for determining section 48 applications;

3.5. The applicants have failed to establish that the Ministers failed to consider relevant factors. Most of the factors raised by the applicants relate to issues carefully considered by the DWS in the WUL process. In this regard, the Ministers carefully considered the decision taken by DWS on the WUL. They were entitled to do so considering that this specialist entity was considering, in great depth, the water-related issues which are relevant to whether or not mining should be allowed in the MPE;

3.6. The applicants have failed to demonstrate that the Ministers have failed to consider the interests of the local communities, and

3.7. The ancillary relief sought should be dismissed out of hand. The applicants rely on a strained and impermissible interpretation of the relevant statutory provisions.

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[2] For example DWS

BACKGROUND FACTS

4. On 24 November 2011, Atha applied to the Minister of MR for the renewal of its prospecting right (granted to its predecessor on 17 August 2006) in terms of section 18 of the MPRDA. Atha's application for renewal was duly approved by the Minister of MR.

5. Subsequently, on 25 April 2013, Atha applied to the Regional Manager: Mineral Resources (Mpumalanga Province) for a mining right in terms of section 22 of the MPRDA. This application was accepted by the Regional Manager and forwarded to the Minister of MR for consideration and approval.

THE DECLARATION OF THE AREA AS AN MPE

6. Before the mining right application could be decided, the MEC published a notice in terms of section 33 (1) of NEMPAA giving notice of her intention to declare the Mabola Protected Environment and the extension to the Kwamandlangampisi Protected Environment ("KPE") as part of the Wakkerstroom Critical Biodiversity Area.

7. Atha objected to the MEC's intention to declare the MPE. The objection centred around the need to exclude 4 of the farms (namely Goedgevonden 95 HT, portion 1 of Kromhoek, 93 HT, remainder of Kromhoek 93 HT, protion 1 of Yzermyn 96 HT) which had a prospecting right attached to them.

8. On 24 December 2013 the MEC informed Atha that she had decided to proceed with the declaration of the MPE. She published this decision on 22 January 2014. In her decision, it was apparent that the MEC did not exclude the possibility of Atha being permitted to mine in the MPE. On the contrary, her decision appeared to specifically cater for that possibility:

8.1. She excluded Portion 1 of the Farm Yzermyn 96 HT, measuring 184.91 hectares in its entirety from the protected area declared. The express purpose of this exclusion was to allow for the requisite surface infrastructure of the mine, subject to the mining right and all other authorisations being granted by the relevant authorities.

8.2. The MEC acknowledged that the purpose of declaring the MPE was not to prohibit mining but to further enhance the socio-economic state of the Mpumalanga province. She pointed out that under NEMPAA, mining activities may still be pursued in a protected environment but only with the consent of the Minister of EA and the Minister of MR.

8.3. The MEC also received other objections from stakeholders about the impact of declaring the area a protected environment under NEMPAA. One such was the community of Pixley Isaka Seme Local Municipality ("the Pixley Community") who reside in the Amersfort, Daggakraal, Mabola, Perdekop, Volksrust and

Wakkerstroom areas. The community objected to the declaration of the area as a protected environment on the basis that the decision will cause mining to be prohibited which in turn will result in poverty being worsened with fewer jobs being created and infrastructure development being minimised. The MEC responded to the Pixley community and pointed out that section 48 of NEMPAA permitted mining to take place in a protected environment if it is authorised by the Ministers.

THE EIA PROCESS

9. Atha submitted its Environmental Impact Assessment Report ("the EIAR") in terms of the MPRDA, NEMA and the EIA Regulations (2010) to the DMR for consideration on 27 January 2014.

10. On 16 May 2014, the DEA considered the EIAR submitted by Atha and rejected it in terms of Regulation 34 (2) (b) of the EIA Regulation of 2010. The basis for the rejection is that the DEA was not satisfied that biodiversity concerns were adequately addressed. In addition, the DEA was not satisfied that the layout (and proposed access routes) sufficiently addressed the sensitivities of the site and the implications for biodiversity.

11. The DEA pointed out that:

11.1. The EIAR concluded that the preferred surface layout design should not be considered for development, given the sensitivities pertaining to the site and recommended that an alternative layout design be considered and that this layout be reassessed to determine whether both environmental and socio-economic aspects can be accommodated. The DEA agreed with this recommendation and requested Atha to propose an alternative layout which will allow the mine to co-exist within the sensitive area given the DEA's concern about biodiversity.

11.2. There were a number of biodiversity concerns which needed to be taken into account. These included the following:

11.2.1. The biodiversity study only looked at Mucina and Rutherford classifications and did not consider the NEMBA listed ecosystems;

11.2.2. The site was classified as *Irreplaceable* in the Mpumalanga Biodiversity Conservation Plan. Unless ground-truthing has been undertaken to prove that the development does not impact on the reason for classification, this may constitute a fatal flaw;

11.2.3. The area has a high occurrence of wetlands of very high ecological importance. The area is critical for the sustained supply of potable water for downstream communities. Dewatering of the area at the rates proposed will lead to lowering of the water table which is likely to have a very high negative impact on biodiversity, food production and water provisioning to areas downstream;

11.2.4. The mine cannot operate without dewatering activities. The application could not be considered without the identification of the downstream water areas, the water users dependent on the water, and a quantification of the dewatering effect on

the economic activities downstream, including increase in droughts and floods;

11.2.5. There had to be additional studies conducted on the potential impact of Acid Mine Drainage;

11.2.6. The application fell within the Grassland Important Bird Area which is critical for the conservation of IUCN Red data List threated bird species (including the critically endangered Rudd's Lark); grassland endemic bird species and congregatory waterbirds; and

11.2.7. The study area was surrounded by protected areas to the south and east of the site. Some of the land parcels included in the application were also part of a declared protected environment.

THE AMENDED EIAR AND THE MINING RIGHT

12. On 02 February 2015, Atha resubmitted an amended EIAR to the DEA for reconsideration and approval which sought to address the issues raised by the DEA in their letter to Atha dated 16 May 2014 .

13. On 14 April 2015, the Minister of MR, acting in terms of section 103(4)(b) of the MPRDA, amended the decision of the Director General: Mineral Resources and replaced it with a decision granting a mining right for the period 08 June 2015 to 07 June 2030 subject to a number of conditions.

14. In assessing the environmental authorisations, the DEA facilitated meetings between DEA, the DMR, the Department of Water and Sanitation ("DWS") and Mpumalanga Province in order to engage on the merits of the application. On 26 August 2015, the officials of the DEA, DMR and DWS held a trilateral meeting and agreed that the Ministers were required to provide a written permission in terms of section 48 of NEMPAA before finalising the decision on the application for environmental authorisation filed by Atha .

15. Consequently, on 3 May 2016, Atha requested permission to mine on the protected environment in terms of section 48 of NEMPAA.

16. On 07 June 2016 the Chief Director: Environmental Authorisation, Mpumalanga Provincial Department of Economic Development, Environment and Tourism ("MDEDET") issued the environmental authorisation for the proposed underground coal mine within the MPE. This was done in terms of section 24 of NEMA and the EIA Regulations of 2014.

17. On 28 June 2016, the Director-General: Mineral Resources approved the EMP submitted by Atha in support of its application for a mining right.

18. On 07 July 2016, the Director-General: DWS granted Atha a WUL in terms of section 22 of the NWA on the MPE.[3]

19. On 19 August 2016, the applicants lodged an internal appeal to the MEC in terms of section 43(2) of NEMA and Regulation 61 of the EIA Regulation of 2010 against the decision by the Chief Director: Environmental Affairs, Mpumalanga to grant environmental authorisation to Atha on 07 June 2016.

20. On 20 August 2016,the Minister of EA considered Atha's application filed on 03 May 2016 under section 48 of NEMPA and granted Atha the written permission to mine on the protected environment. The decision and the reasons therefore are dealt with below. On 21 November

[3] Annexure AA5.

2016, the Minister of MR signed off his co-approval and Atha was given the written permission to mine over MPE in terms of section 48 (1) (b) of NEMPAA.

21. On 15 December 2016, after the granting of section 48 approval by Ministers, the applicants further lodged the separate internal appeal in terms of section 148 (1) of the NWA against the decision to grant Atha the WUL in terms of section 22 of the NWA and this internal appeal is pending before the Water Tribunal.

22. On 26 March 2017, the Minister of EA exercised her discretion and uplifted the suspension of the WUL held by Atha in terms of section 148(2) (b) of the NWA over the MPE.

23. On 24 July 2017, the applicants lodged this judicial review application in terms of PAJA against NEMPAA decisions (taken on 20 August 2016 and 21 Nov 2016) by Ministers to grant Atha the written permission to mine on the MPE.

THE SECTION 48 DECISION

What section 48 required

24. Section 48 of NEMPAA provides that :

"Prospecting and mining activities in protected area.

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

(a) in a special nature reserve, national park or nature reserve;

(b) in a protected environment without the written permission of the Minister and the Cabinet member responsible for minerals and energy affairs; or

(c) in a protected area referred to in section 9 (b), (c) or (d).

(2) The Minister, after consultation with the Cabinet member responsible for mineral and energy affairs, must review all mining activities which were lawfully conducted in areas indicated in subsection (1) (a), (b) a n d (c)

immediately before this section took effect.

(3) The Minister, after consultation with the Cabinet member responsible for mineral and energy affairs, may, in relation to the activities contemplated in subsection (2), as well as in relation to mining activities conducted in areas contemplated in that subsection which were declared as such after the commencement of this section, prescribe conditions under which those activities may continue in order to reduce or eliminate the impact of those activities on the environment or for the environmental protection of the area concerned.

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

The procedure followed

25. As set out in the factual background above, in order to mine on the property in question, Atha needed a number of authorisations under NEMA, MPRDA, NWA and NEMPAA. These processes were closely inter-related with the fact that this was a protected environment featuring prominently in the statutory authorisation processes.

26. With this in mind, the Minister of EA decided 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 given the comprehensive submissions made in other processes which elicited submissions directly relevant to the section 48 process. This departure is permitted in terms of sections 3(4) and 4(4) of PAJA.

27. In deciding that it was reasonable and justifiable to depart from the procedure, the Minister took into account the following factors:

27.1. The objects of section 48 of NEMPAA;

27.2. That section 24K of NEMA specifically envisaged that decision-makers avoid an unnecessary duplication of public participation processes carried out under NEMA,NWA,NEMPAA and MPRDA;

27.3. The nature and purpose of the decision to grant approval under section 48 of NEMPAA including the overlap between the requirements of other approvals and authorisations

required by Atha before they could mine in the area in question;

27.4. The likely effect of the decision to approve the mining given the fact that mining could not commence unless all other approvals and authorisations were properly granted; and

27.5. The need to promote an efficient administration and good governance and to avoid an unnecessary duplication of processes.

28. Hence, the Ministers took into account submissions which had been in response to the applications for:

28.1. The mining right under the MPRDA,

28.2. Declaration of the MPE under NEMPAA,

28.3. the EIA (including an amended EIAR) and EMP under NEMA and MPRDA; and

28.4. WUL under the NWA.[4]

29. The Minister of EA approved the application first. The application together with all the documents considered was then sent to the Minister of MR for approval.

[4] A summary of these is referred to below.

30. The Minister of MR, considered the application, the documents and the decision of the Minister of EA as articulated in the written decision. The Minister of MR then concurred in the decision not to follow a process envisaged in section 3 and 4 of PAJA. The Minister of MR also approved the application.

The decisions of the Ministers

31. In deciding the grant the written permission to mine[5] the Minister took into account the following considerations:

31.1. The decision by the MEC regarding the MPE and its associated processes. It should be noted that the decision of the MEC expressly stated that it did not exclude the possibility of mining in the MPE. Indeed, the decision seemed to accommodate the possibility of mining;

31.2. The Draft MPE management plan;

31.3. The mining right and approved EMP;

31.4. The EA, EIAR report dated January 2014 (including EIAR report of 2015) and its associated specialist studies;

31.5. The WUL**;**

31.6. The Mining and Biodiversity Guidelines;

31.7. The interests of local communities; and

31.8. NEMA section 2 principles.

32. The reasons show that the following findings were made:

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5 The decision of the Ministers is attached as "**TTN31"** to the founding affidavit

32.1. The Yzermyn Underground Mine has received other required authorization from relevant organs of state which have jurisdiction in respect of the activity, including the WUL, the Mining Right and approved Environmental Management Plan, and the Environment Authorisation. These decisions include measures to minimize impacts on environmental resources.

32.2. The mining activity will not compromise the management objectives of the Mabola Protected Environment as it stipulated in the draft Mabola Protect Environmental Management Plan.

32.3. The Mining and Biodiversity Guidelines, 2013, ("the M and B Guidelines") signed by both Ministers (DEA and DMR) support the development of the country's resources in a manner that will minimize the impact of mining on the country's biodiversity and ecosystem services.

32.4. Potential impacts have been clearly highlighted and the proposed mitigation of impacts identified and assessed in the EIR dated January 2014 adequately curtails the identified impacts.

32.5. This permission further includes specific conditions to ensure that the mineral resources are developed in an orderly and ecologically sustainable manner while promoting

justified social and economic development thus giving effect to the provisions of section 24 of the constitution and NEMA section 2 principles.

Conditionalities

33. The section 48 approval was granted subject to multiple conditions:

33.1. That the permit holder must submit a Plant Rescue and Protection plan (with specific focus on conservation important species from areas to be transformed) and Maintenance Management Plan to the DEA prior to the commencement of any construction activities;

33.2. That no activities will be allowed to encroach into a water resource without a water use authorization being in place from the DWS and no storm-water generated as a result of the development may be channelled directly to any wetland or watercourse. A storm-water and groundwater management system must be designed;

33.3. That all mechanisms for dissipating water energy must be implemented with approval from the DWS;

33.4. That an alien plant control programme must be implemented from the inception date of the site clearing phase in accordance with relevant legislation;

33.5. That the applicant must mitigate and manage acid mine drainage where applicable according to the requirements of the DWS;

33.6. That stringent and appropriate dust suppression measures must be applied;

33.7. That storage of construction materials or hazardous substances must be in accordance with relevant legal requirements;

33.8. That should any material of cultural or archaeological significance be encountered during construction, operations in the vicinity should be stopped immediately and relevant heritage resources authorities informed;

33.9. That an Environmental Management Committee (EMC) must be established before the commencement of mining;

33.10. That a suitable wetland specialist must be appointed to carry out a comprehensive baseline audit of the wetlands in the area and table discussion before the EMC meetings for discussion.

PROCEDURAL FAIRNESS AS A GROUND OF REVIEW

34. The Constitutional Court has repeatedly held that procedural fairness has to be determined according to the context of a particular case.[6] In ***Joseph***[7] Skweyiya J held that :

"…*efficiency and capacity considerations are indeed an important*

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6 See for example Zondi v MEC for Traditional and Local Government Affairs and Others 2005 (3) SA 589 (CC)

7 *Joseph and others v City of Johannesburg* and others 2010 (3) BCLR 212 (CC) ; 2010 (4) SA 55 (CC)

aspect of any contextual determination of the content of procedural fairness."[8]

35. Quoting from the judgment of ***Premier, Mpumalanga***[9] Skweyiya J further explained that, when determining procedural fairness, a court should be slow to impose obligations upon government that would constrain its ability to make and implement policy effectively.

36. In this regard, in ***Premier Mpumalanga*** the Constitutional Court held that:

> *"In determining what constitutes procedural fairness in a given case, a court should be slow to impose obligations upon government which will inhibit its ability to make and implement policy effectively (a principle well recognised in our common law and that of other countries). As a young democracy facing immense challenges of transformation, we cannot deny the importance of the need to ensure the ability of the executive to act efficiently and promptly*"[10]

37. In approaching the issue of procedure followed, a court should be

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8 Para 62

9 *Premier, Mpumalanga, and Another v Executive Committee, Association of State-Aided Schools, Eastern Transvaal* 1999 (2) SA 91 (CC) para 41 at 109H–110A.

10 Para 41

sensitive to the issues considered by an administrative body and the practical and financial constraints under which they operate. According to Hoexter[11]:

> "*The sort of deference we should be aspiring to in administrative law consists of 'a judicial willingness to appreciate the constitutionally ordained province of administrative agencies'. To acknowledge the expertise of those agencies and policy laden or polycentric issues; to give their interpretations of fact and law due respect and to be sensitive in general to the interests legitimately pursued by administrative bodies and the practical and financial constraints under which they have to operate*."

The applicants' contentions

38. The applicants take issue with the manner in which the decisions by the Ministers were reached. They contend that:

38.1. The Ministers were not entitled to have regard to the submissions made during other authorisation processes and the decisions reached by those functionaries;

38.2. The section 48 decisions were not taken in an open and transparent manner;

38.3. Section 24 K does not avail the Ministers;

38.4. Mandatory and material procedures prescribed by empowering provisions were not met;

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[11] *Administrative law in South Africa*, (2nd edition) at 151

38.5. It was neither reasonable nor justifiable for the Ministers to decide to depart from the requirements of section 3 and section 4 of PAJA;

38.6. The Ministers failed to consider that there was no urgency as envisaged in section 3(4) and 4(3) of PAJA;

39. These issues will be considered below.

The overlap between the section 48 process and the other authorisation processes

40. The written permission sought by Atha Africa under section 48 of NEMPAA, forms part of a cluster of authorisations required before Atha can lawfully mine in the MPE.

41. In this regard it is significant that the mining industry is one of the most regulated industries in South Africa. An intricate web of statutory instruments regulate mining activities with a view to not only minimise the degradation or harm to the environment but also to provide for remediation so that the area mined is returned as close as possible to its original state.

42. The authorisations required under differing pieces of legislation include:

42.1. A mining right under MPRDA;

42.2. Environmental authorisations under NEMA;

42.3. A Water Use Licence under the National Water Act.

42.4. If the proposed mining area is in a protected environment, written authorisation to mine is required from the Minister of EA and the Minister of MR.

43. These authorisations all require careful consideration of the protection and conservation of the environment:

43.1. In order to succeed, the mining right application requires an environmental authorisation. The environmental authorisation process focusses, amongst others, on the identification, prediction and evaluation of the actual and potential impact on the environment, socio-economic conditions and cultural heritage;

43.2. Furthermore, in the environmental authorisation process, if the area in question is a protected environment, the environmental authorisation process will, of necessity, focus on the sensitivities of the area in question and the actual and potential impact of the proposed mining activities on the area.

43.3. An application to the DWS for the WUL would investigate the actual and potential impact of the proposed mining activities on water supply in the area.

44. By the time that Atha applied for section 48 written permission, the

other authorisation processes had already been completed. Given the inter-related authorisations required, the Ministers took a decision to incorporate these processes into their decision-making. They decided that, instead of approaching the issues anew, the Ministers incorporated into their decision-making, the processes followed in respect of other authorisations.

The '*silo*' approach

45. The applicants accept that there clearly are areas of overlap between the statutes and authorisations required. They contend however that an authority charged with granting an authorisation must exercise and independent discretion having regard to the factors and objectives contained in the empowering legislation.[12]

46. It goes without saying that the Ministers were required to exercise their discretion. This they did. The point of contention really arises from the fact that, in accumulating the material necessary for the Ministers to exercise their discretion, the Ministers took into account what was considered by other authorities.

47. Furthermore, in relation to the WUL, authority at issue is a specialist on water in the protected environment and the implications thereon of commercial mining. This is a relevant factor in the section 48 process.

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[12] Applicants' HOA p18 and p56

The Ministers were therefore entitled to place reliance on that assessment and decision.

48. The applicants, in effect, contend that decision-making should happen in 'silos' and that authorities should bring a "fresh discretion" to bear in each decision-making process. In relation to the section 48 decision-making process, the effect of their contention is to coalesce all the other authorisation processes into one section 48 process with the Ministers being required to re-evaluate and reconsider all of the issues which have also been considered by the other functionaries. The effect of what they seek is a duplication of functions and roles.

49. They rely on the decision of the Constitutional Court in ***Fuel Retailers Association***[13]to advance their contention.

50. The ***Fuel Retailers Association*** matter is distinguishable from the present matter. In that matter, one of the grounds of review raised by the applicants was that the Department of EA had not considered the requirement of need for and desirability of establishing a new filling station. The Department had indicated that this was an issue to be considered by the local authority (under the applicable Ordinance) and that it did not reconsider this factor.[14]

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

14 At para 22

51. The Court found that the Department had failed to consider *need and desirability* under NEMA, even though it was obliged to. It held that a proposed development may satisfy the *need and desirability* criteria from a town-planning perspective yet fail from an environmental perspective.[15] It was therefore incumbent on the Department to consider this under NEMA.

52. This is distinguishable from the present matter on the following bases:

52.1. The Ministers have never failed to consider any of the pertinent issues which arose in the section 48 applications. They merely considered the decisions reached by other functionaries, and the submissions made in the course of other authorisation processes; and

52.2. The principles to be considered were the same across all the statutory authorisations processes.

52.3. Certain processes (for example the WUL process) involved specialist functionaries who considered the water-related environmental issues (including the water-related issues peculiar to a protected environment); and

52.4. The factual matrix was the same

Fairness and transparency

53. The applicants contend that the decisions were not taken in a fair

[15] Para 85

and transparent manner. This is however incorrect. The decision-makers sought to avoid an unnecessary duplication of processes and waste of resources. They considered it reasonable and justifiable to depart from the provisions of section 3 and 4 of PAJA.

Section 24K

54. The applicants contend that section 24K does not avail the Ministers because it pertains to decision-making under NEMA and because the provision requires that an agreement be concluded as contemplated in section 24K(2).

55. What the applicants lose sight of is that the Ministers did not purport to act under section 24K. Instead, they took into account the spirit of section 24K which is that there should be intergovernmental co-operation and an avoidance of unnecessary duplication of processes.

56. This is specifically recognised as an national environmental management principle under section 2l of NEMA which states that: "There must be intergovernmental co-ordination and harmonisation of policies, legislation and actions relating to the environment."

57. In terms of section 5(1) of NEMPAA, the provisions thereof must be interpreted and applied in accordance with the national environmental management principles.

Reasonableness and justifiability of departing from the requirements of PAJA

58. The applicants contend that it was neither reasonable nor justifiable to depart from the provisions of PAJA.[16] They advance a number of reasons for this contention. Many of these are based on the flaws in the decision-making in respect of the other authorisation processes. This point is however misplaced given that the Ministers could never have anticipated that the applicants would contend that those processes are flawed. [17] The key ones additional are the following:

58.1. *That the Ministers did not consider urgency*. [18]However, urgency did not arise as an issue in the section 48 applications. In any event, the applicants loses sight of the fact that urgency is not a jurisdictional requirement which has to be met before a decision to depart from the requirements of section 3 and 4 of PAJA is made.

58.2. *That the Ministers 'relied' on section 24K of NEMA.*[19]This has already been dealt with.

58.3. *That the Ministers equated the nature and purpose of the administrative action with 'the overlap between the*

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16 See para 10 of applicants' HOA

17 Para 101.6 of applicants' HOA and 101.10

18 Para 101.1 and 2 of applicants' HOA

19 Para 101.3 of applicants' HOA

requirements of other approvals'.[20] However the applicants misconstrue the Ministers' reasoning. The Ministers clearly contemplated the nature and purpose of the section 48 application. In doing so, the Ministers appreciated the overlap between the section 48 process and other processes.

58.4. *That the section 48 process raised distinctive considerations which are not raised by the other statutes.* [21] However, the distinctive features of a protected environment were indeed considered in the other processes. The Ministers were therefore entitled to take these into account;

58.5. That the Ministers failed to take into account the submissions made in the WUL process. [22] However, the applicant loses sight of the fact that the EIA process called for and elicited submissions on the water use licence. In this regard:

58.5.1. The initial notice for public comment by WSP,[23] issued on 24 August 2012, gave notice under the MPRDA, NEMA, NEM Waste Act and NWA.

58.5.2. In response, a multitude of submissions were

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20 Para 101.4 of applicants' HOA

21 Para 101.2 of applicants' HOA

22 Para 101.9 of applicants' HOA

23 Record p1796

received dealing with water-related issues. These were all properly considered by the Ministers. Some of them include:

58.5.2.1. Comments by Nigel Mason on water related issues of the proposed project;[24]

58.5.2.2. Comments by unknown participant asking about the impact of the proposed mine on the water supply in the area; [25]

58.5.2.3. Comments by Angus Burns and Viviene Raubenheimer about the progress of the IWUL application and impact of the springs in the area as a result of the proposed mining project; [26]

58.5.2.4. Comments by Glen Ramke representing (Endangered Wildlife Trust-the fifth applicant) about the future of the water area around MPE;[27]

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[24] Record page 876-879

[25] Record page 889

[26] Record page 910

[27] Record page 912-915

58.5.2.5. Comments by BP Greyling (the farmer) about wetlands, birds and rivers; [28]

58.5.2.6. Comments by Tebogo Hlakutsi about water contamination with regard to the proposed mining project; [29]

58.5.2.7. Comments by Charles Makuwere on the mitigation of mine water;[30]

58.5.2.8. Comments by Christina Nomvula Mhlanga about the impact on groundwater quality of the boreholes in the area; [31]

58.5.2.9. Comments by Piet Van Der Linde, Angus Burns about a water treatment plant, capital to run a water treatment and water use licence; [32].

58.5.2.10. Comments by SP Malan on water pollution of the proposed mining project; [33]

58.5.2.11. Comments by Ilse Botha on Acid Mine Drainage,water pollution, AS fauna/flora

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28 Record page 918-920

29 Record page 971

30 Record page 1100

31 Record page 1110

32 Record page 1217-1219

33 Record page 1411

wetland report and treatment plant post-closure; [34]

58.5.2.12. Objection by Johan Uys on the basis of water pollution of the proposed mining project;[35]

58.5.2.13. Comments by Caroline Lotter (Natural Scientific Service) about mine de-watering on affected wetlands**.** [36]

59. In addition, in January 2014, the DWS submitted their comments on Atha's EMPr in terms of section 40 of the MPRDA.[37] These comments raised concerns about the impact of the proposed layout plan (as it existed at that stage) on water.

60. On 16 September 2014, *EcoPartners* released a notice inviting the public to comment on the amended EIAR. The amended EIAR also dealt with the water-related impacts of the proposed commercial mining.[38]It included the following relevant reports:

60.1. Delta H – The report is titled "Numerical Groundwater Model"[39]; and

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34 Record page 1412-1421

35 Record page 1422-1423; 1430-1432

36 Record page 1438 - 1441

37 Record page 1519-1524

38 Record p1259

60.2. WSP – The report is titled "Biodiversity Baseline and Impact Assessment Report";[40] and

60.3. Eco Partners – The report is titled "Wetlands and Ecological Assessment Specialist Studies."[41]

61. As a result, submissions were received in response which also dealt with water-related issues.[42] These were considered by the Ministers.

OTHER GROUNDS OF REVIEW

Section 40 and Exceptional Circumstances

62. The applicants contend that mining may only take place in a protected area in exceptional circumstances. They argue that this arises from a "contextual and purposive interpretation of section 48".

63. However, this interpretation is inconsistent with the trite legal principles which govern the interpretation of statutes. It is settled law that the fundamental tenant of statutory interpretation is that the words in a statute must be given their ordinary grammatical meaning, unless to do so would result in an absurdity.[43] In ***Cool***

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39 Record p2078 - 2162

40 Record p2163 - 2474

41 Record p2475 - 2626

42 See for example submission from MTPA at record p1301 (at p1303); WWF at record p1312 (at p1314/1316); Illse Botha at record p1323 (at p1323)

43 *Cool Ideas 1186 CC v Hubbard* 2014 (4) SA 474 (CC)

Ideas[44], the Constitutional Court held that there are three important interrelated riders to this general principle, namely:

63..1. that statutory provision should be interpreted purposively;

63.2. the relevant statutory provision must be properly contextualised; and

63.3. all statutes must be construed consistently with the Constitution, that is, where reasonably possible, legislative provisions ought to be interpreted to preserve their constitutional validity.

64. While this means that judicial officers must prefer an interpretation of legislation that falls within constitutional bounds over one that does not, the Constitutional Court has emphasised that such an interpretation must be one which the text is reasonably capable of meaning. In ***Hyundai***,[45] Langa DP warned that such an interpretation should not be unduly strained.[46] Quoting with approval a passage from ***National Coalition for Gay and Lesbian Equality***,[47] Langa DP pointed out that interpreting legislation in a way which "*promotes the spirit, purport and objects of the Bill of Rights are required by s 39(2) of the*

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44 *Cool Ideas 1186 CC v Hubbard* 2014 (4) SA 474 (CC)

45 *Investigating directorate: Serious Economic Offences and Others v Hyundai Motor Distributors (Pty) Ltd and Others In re: Hyundai Motor Distributors (Pty) Ltd and Others v Smit NO and Others* 2001 (1) SA 545 (CC)

46 At para 24

47 *National Coalition for Gay and Lesbian Equality and Others v Minister of Home Affairs and Others* 2000 (2) SA 1 (CC)

Constitution…is limited to what the text is reasonably capable of meaning".[48] (Emphasis added)

65. The import of the above is that this Court is obliged, when interpreting section 48(1)(b) of the Act, to remain faithful to the actual wording of the statute.[49]

66. In this regard, it is noteworthy that:

66.1. Section 48(1)(b) merely provides that no person may conduct commercial prospecting, mining, exploration, production or related activities in a protected environment without the written permission of the Minister of EA and the Minister of MR;

66.2. Section 48(4) provides guidelines as to how this decision should be arrived at. It states that "When applying this section, the Minister must take into account the interests of local communities and the environmental principles referred to in section 2 of NEMA.

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.

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[48] At paras 23 – 24

[49] *Bertie Van Zyl (Pty) Ltd and Another v Minister for Safety and Security and Others* 2010 (2) SA 181 (CC)

67. The applicants' interpretation requires that the words "in exceptional circumstances" be read into section 48(4). This is impermissible in the absence of a declaration of constitutional invalidity. [50] In order to succeed in their interpretation, the applicants ought to have brought a constitutional challenge.

Failure to await the final approved management plan

68. The applicants contend that the NEMPAA decisions could not have been validly taken in the absence of an approved management plan.

69. This however fails to have regard to the following:

69.1. The Act does not specifically require that the management plan be considered prior to a section 48 decision being taken;

69.2. In any event, the Ministers took into account the draft management plan which was in existence at the time; and

69.3. The section 48 approval is subject to Atha obtaining all other authorisations in order to mine. Needless to say, if mining is not permitted in a particular zone (under the management plan), then Atha may not lawfully mine there.

70. There was therefore no need for the Ministers to await the final

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50 *Investigating directorate: Serious Economic Offences and Others v Hyundai Motor Distributors (Pty) Ltd and Others In re: Hyundai Motor Distributors (Pty) Ltd and Others v Smit NO and Others* 2001 (1) SA 545 (CC)

approval of the management plan.

The interests of local communities

71. The applicants contend that the Ministers failed to take into account the interests of local communities. They contend that:

71.1. The Ministers failed to consider the final Social and Labour Plan ("SLP");

71.2. An analysis of the benefits and costs of the mine reveals that the Ministers should not have granted the permission to mine.

72. However, the applicants fail to have regard to the fact that the interests of local communities were taken into account in, amongst others, the following way:

72.1. The Minister took into account that the EIAR was rejected by the DEA on 16 May 2014 because of the sensitivities pertaining to the site. During that process, it was specifically conveyed to Atha that the DEA agreed with the recommendation in the EIAR that an alternative layout design be considered and that this layout be reassessed to determine whether both environmental and socio-economic aspects can be accommodated. Atha was specifically asked to propose an alternative layout which will allow the mine to co-exist within the sensitive area given the DEA's concern about biodiversity. These concerns were addressed by Atha in the amended EIAR dated 02 Febuary 2015. Hence the DEA's biodiversity concerns were addressed

by the amended EIAR as well as the conditions attached to the section 48 approval. These conditions addressed concerns about potential ground and surface water contamination including acid mine drainage.

72.3. The Mpumalanga Province and the Wakkerstroom area in particular, is economically depressed. The Ministers were alive to the challenge to strike a balance between socio-economic development and environmental sustainability (as required by the Mining and Biodiversity Guideline). The final EIAR recorded that semi-skilled and unskilled labour will be sourced from local communities;

72.4. Local government representatives appeared to support Atha's mining application. In this regard, the concerns raised by ward councillors was that the mine should employ previously disadvantaged members of the community and they should utilise local business enterprises for outsourced operations associated with mining. These representatives also raised concerns that only a small number of the community benefitted from eco-tourism in the area and that it was expected that additional job opportunities can be offered from the proposed mining project.

72.5. The DWS has thoroughly investigated water-related issues (including groundwater levels) and had decided to grant the

WUL to Atha. The decision to grant the WUL was considered in the section 48 process.[51] In this regard it is significant that:

72.5.1. The WUL is valid for 15 years from date of issuance;

72.5.1. The WUL may be reviewed every 2 years;

72.3. These water-related issues also featured in the EIA process and reports considered by DG:DWS before granting WUL. Notwithstanding this, the final EIAR was approved.

72.4. The Ministers considered the influx of people into the area and the impact that would have in traffic, dust, noise and risks to safety;

72.5. Access to food was considered; and

72.6. A cost-benefit assessment was conducted.

73. Furthermore, the applicants accept that the EIAR recommended that skills development and training be implemented by Atha prior to construction phase to ensure that people from local communities qualified for employment.[52]

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51 The WUL can be found at p792.

52 See applicants' HOA; p75; para 149

The SAS 2015 Report

74. The applicants contend that the Ministers failed to have regard to the SAS 2015 report. This, it contends, is a material omission. [53]

75. However, while it is correct that the SAS 2015 assessment did not serve before the Ministers, it is notable that this document was more relevant to the WUL process. The fact that it was not considered during the section 48 process does not amount to a material omission.

76. The DWS is a competent authority for water use authorisation and the WUL issued indicates that DG:DWS considered the SAS 2015 assessment before granting the WUL under the NWA and the SAS 2015 assessment is the subject of the statutory appeal pending before the Water Tribunal-the competent forum to adjudicate on water use authorisation issued under the NWA.

The precautionary principle

77. The applicants contends that the Ministers failed to apply the *precautionary principle* set out in section 2(4)(a)(vii) of NEMA and the *vulnerable ecosystems principle* set out in section 2(4)(r) of NEMA.

78. However, the Ministers did indeed apply the precautionary principle

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53 See applicants' HOA; p80; para 162

and considered the post-closure decant of water from the underground mine. However, the Ministers were not obliged to consider the impact of dewatering of aquifers in the same amount of detail as the DWS, the competent authority for water use authorisation, did in the WUL process since the section 48 decision was expressly made conditional on other authorisations being obtained. Furthermore, the DWS' approval of the WUL was taken into account in the section 48 process.

79. The same applies to potential Acid Mine Drainage. The conditions imposed by the Minister refer to the requirements of the DWS. This shows that the Ministers did take the principles into account. They dealt with these in a manner they deemed appropriate by referring to the requirements of the specialist body, namely the DWS.

Provision for rehabilitation

80. The applicants allege that the Ministers failed to give direct and specific attention to post-closure rehabilitation in that they failed to take into account that Atha has made no financial provision for post-closure treatment of decant from mine. They also allege that the Ministers failed to appreciate that the WUL does not in fact authorise a water treatment plant post–closure.[54]

81. This is however incorrect. While the Ministers did consider post-closure

[54] Applicants' HOA, p87, para 177

rehabilitation, the question of whether financial provision has been made is dealt with under section 24P of NEMA and the regulations promulgated thereunder as well as under the MPRDA. This means that Atha's application for a mining right could only be approved if this requirement was met. There was therefore no need to consider this more closely in the section 48 process.

STATUTORY APPEALS

82. The applicants contend that the legislative scheme requires that a decision under section 48(1)(b) must take into account the terms and conditions of the "final EA, EMPR and WUL"[55].

83. This however loses sight of the fact that the Ministers, like all administrative functionaries, are obliged to decide applications in an efficient and effective manner. Each of the other statutory authorisation processes may be drawn out over protracted periods of time. Potential judicial reviews cannot be excluded. This means that the Ministers would be required to wait indefinitely before deciding the section 48 application.

84. This cannot be correct given that, under section 48(3), the Ministers are empowered to prescribe conditions in relation to the written permission to mine. In the present matter, the Minister made it a condition that tall other statutory authorisations be obtained. This

55 Applicant's HOA p91 para 191

means that, if the authorisation is not obtained, the permission to mine falls away.

REMEDY

85. The applicants have failed to make out a case for the review and setting aside of the decisions under section 48. The application should accordingly be dismissed.

86. However, in the event that the review is successful, given the complexity of the decisions, the applications should be remitted to the Ministers for reconsideration.

87. The applicants make out absolutely no case for declaratory orders which curtail the discretion granted to the Ministers under section 48. The ancillary declaratory orders are based on a strained and impermissible interpretation of NEMPAA and NEMA and should accordingly be dismissed.

Kameshni Pillay SC
Louis Gumbi
Chambers, Sandton
09 July 2018

LIST OF AUTHORITIES

1. *Bertie Van Zyl (Pty) Ltd and Another v Minister for Safety and Security and Others* 2010 (2) SA 181 (CC)
2. *Cool Ideas 1186 CC v Hubbard* 2014 (4) SA 474 (CC)
3. *Fuel Retailers Association of Southern Africa v Director-General: Environmental Management, Department of Agriculture, Conservation and Environment, Mpumalanga Province and Others* 2007 (6) SA (4) CC
4. *Investigating directorate: Serious Economic Offences and Others v Hyundai Motor Distributors (Pty) Ltd and Others In re: Hyundai Motor Distributors (Pty) Ltd and Others v Smit NO and Others* 2001 (1) SA 545 (CC)
5. *Joseph and others v City of Johannesburg and others* 2010 (3) BCLR 212 (CC) ; 2010 (4) SA 55 (CC)
6. *National Coalition for Gay and Lesbian Equality and Others v Minister of Home Affairs and Others* 2000 (2) SA 1 (CC)
7. *Premier, Province of Mpumalanga and Another v Executive Committee of the Association of Governing Bodies of State Aided Schools: Eastern Transvaal* 1999 (2) SA 91 (CC)
8. *Zondi v MEC for Traditional and Local Government Affairs and Others* 2005 (3) SA 589 (CC)