IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

CASE NO: 50779/17

In the matter between:

MINISTER OF ENVIRONMENTAL AFFAIRS	First Applicant
MINISTER OF MINERAL RESOURCES	Second Applicant
MEC FOR AGRICULTURE, RURAL DEVELOPMENT, LAND AND ENVIRONMENTAL AFFAIRS, MPUMALANGA	Third Applicant

and

MINING AND ENVIRONMENTAL JUSTICE COMMUNITY NETWORK OF SOUTH AFRICA	First Respondent
GROUNDWORK	Second Respondent
EARTHLIFE AFRICA, JOHANNESBURG	Third Respondent
BIRDLIFE SOUTH AFRICA	Fourth Respondent
ENDANGERED WILDLIFE TRUST	Fifth Respondent
FEDERATION FOR A SUSTAINABLE ENVIRONMENT	Sixth Respondent
ASSOCIATION FOR WATER AND RURAL DEVELOPMENT	Seventh Respondent
BENCH MARKS FOUNDATION	Eighth Respondent
ATHA-AFRICA VENTURES (PTY) LTD	Ninth Respondent

ANSWERING AFFIDAVIT

I,

CATHERINE HORSFIELD

state under oath that:

1. I am an Attorney of the High Court of South Africa, employed as such by the Centre for Environmental Rights NPC, of Springtime Studios, 1 Scott Road, Observatory, Cape Town, attorneys for the applicants herein.

2. The facts and circumstances set out in this affidavit fall within my personal knowledge and belief or appear from documents under my control and are true and correct.

3. I deposed to an affidavit early yesterday morning in which I responded to an affidavit deposed to by Mr Mathebula of the State Attorney in support of an application for a postponement of the main application under this case number ("my previous affidavit").

4. I do not repeat the facts which I describe in my previous affidavit, although they remain relevant to the applicants' opposition to the postponement which is being sought.

5. The MEC has now deposed to an affidavit in support of the postponement application ("the MEC's affidavit"). The purpose of this affidavit is to respond to the MEC's affidavit.

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6 I use the party descriptions in the main application, not the postponement application. I therefore depose to this affidavit on behalf of the applicants and am duly authorised to do so.

7 In paragraphs 10 to 15 of his affidavit, the MEC purports to explain the rationale for the publication of notice of his intention to exclude the protected properties from the MPE ("the exclusion notice").

8 At this stage of proceedings it is neither necessary nor appropriate for either me, or the applicants, to engage with that rationale and the facts allegedly underlying it. Nor is there time to do so. The applicants will make full representations as part of the public participation process which is foreshadowed in the exclusion notice. Suffice it to say that even if the allegations made in this part were correct, which is denied, the averments do not sustain a valid exclusion in terms of s29(b) NEMPAA.

9 In paragraphs 14 to 18 of his affidavit, the MEC purports to deal with the reasons why he did not draw the proposed exclusion notice to his attorneys, and, through them, the Court. Without accepting the veracity of the MEC's claim that his publication of the notice was not intended to disrupt the current proceedings, I assume for purposes of this affidavit in the MEC's favour that (a) the MEC was unaware of the pending proceedings and the impact the notice might have; (b) the MEC is concerned to ensure that in coming to a final decision pursuant to the exclusion notice, he intends to comply fully with the objects and purposes in s 3 and 17 of NEMPAA, with his duties as constitutional trustee of the environment in section 3 of NEMPAA and to take

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into account each and every relevant consideration in coming to his decision under s29(b); and (c) that the MEC is committed to sound environmental management, particularly having regard to the fact that environmental affairs is one of his portfolios as MEC.

10 If this is so, what will immediately be apparent to the MEC is that the judgment of this Court on the issue before it in Part B of the amended notice of motion will be a relevant and important consideration in arriving at his decision pursuant to the exclusion notice. If he is therefore committed to following a lawful process and to sound environmental governance, he should immediately postpone the exclusion process he has started under s 29(b) in order that the Court may arrive at its decision. The reasons for my saying so are set out below.

11 First, the need for the MEC to proceed with the process under s29(b) may well fall away, depending on the outcome of the main application.

11.1 It is clear that the purpose of the exclusion notice is to permit Atha to mine on the farms referred to in it. If the applicants fail in the review proceedings, the Ministers' decisions in terms of s 48(1)(b) will stand and Atha will have permission to conduct commercial mining in the MPE.

11.2 If the applicants are successful in the main application and the NEMPAA decisions are remitted to the Ministers, and the Ministers upon reconsideration decide to grant Atha permission to conduct commercial mining on the farms in question, then in this scenario too it

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would be unnecessary for the MEC to exclude the farms from the MPE in terms of s 29(b).

12 In the event that the applicants succeed and the Ministers upon reconsideration decide not to grant Atha permission to mine in terms of section 48(1)(b), then the MEC would not have compromised his position. He could still seek to proceed with the exclusion process, subject obviously to his obligation to proceed constitutionally and lawfully. Certainly, the MEC will not be negatively affected by delaying the process he initiated on 12 October 2018.

13 The second reason why the MEC ought to postpone the administrative process which he has set in motion, is because the Court's judgment will provide guidance as regards the correct interpretation of NEMPAA and the duties NEMPAA places on organs of state, including their role (and therefore that of the MEC) under s 3 of NEMPAA as trustee for purposes of applying s24 of the Constitution in protected areas, as well as the significance of the objects and purposes in sections 2 and 17. These are provisions directly relevant to the exercise of the discretion in section 29(b).

14 Third, insisting on pressing ahead with the exclusion process and pushing the Court's processes aside puts the MEC onto a trajectory that may well lead to judicial review proceedings in respect of any decision under s 29(b) and these are likely to succeed if he has ignored the considerations set out in the immediately preceding paragraphs. On the other hand, following the course above will substantially reduce the likelihood of review proceedings.

15 In the circumstances, it is the MEC who, having now learned of the litigation and its implications, should postpone the proposed administrative process, not the Court its proceedings. The applicants accordingly invite the MEC, out of respect for this Honourable Court and its processes and in the interests of proper and accountable environmental governance, to postpone the section 29(b) exclusion process and enable the Court to do what it and the parties have carefully arranged and prepared to do over the three days for which the matter has been set down.

16 Should the MEC not be minded to accept this invitation, the applicants make the following further submissions:

17 The MEC's affidavit does not provide good cause for why the main application ought to be postponed. The reason the MEC gives is that the main application has been rendered moot by the publication of the notice.

18 That is simply not correct. The appropriate time at which consideration must be given to the mootness or otherwise of a case is, at the latest, at the time of the hearing of the case. As laid down by the Constitutional Court in *MEC for Education: KwaZulu-Natal and Others v Pillay* 2008 (1) SA 474 (CC) at para 32, the question is whether, at the time of the hearing, there exists "*an existing and live controversy*". Manifestly, in this case, there is an existing and live controversy. The protected properties remain part of the MPE until such time as a lawful decision to exclude them is taken. If the MEC acts impartially, fairly and constitutionally, and gives due consideration to the representations received, there is every possibility that he may decide not to proceed with the

exclusion. For as long as the decision to declare the MPE in respect of the protected properties remains in place and is not lawfully terminated, any administrative action that is in conflict with the protected status of the MPE is subject to judicial review. The present is such a case. With respect, the court as the guardian of the Constitution and the right of judicial review in s33(3)(a) of the Constitution and s 6(1) of PAJA, has the constitutional duty to proceed with such a review.

19 As matters stand, there is a live dispute between the parties, which can be resolved by the application of law, and the Applicants accordingly also have a right in terms of section 34 of the Constitution to have it decided.

20 Even if the matter were already moot, that is not the end of the matter. The Constitutional Court in *Pillay* heard a matter (relating to whether or not a school child could on the basis of a voluntary religious practice wear a nose stud at school, when there was a rule the forbade it) despite the fact that it was moot because the child had left the school. The Constitutional Court held as follows:

> *"[32] ... This Court has however held that it may be in the interests of justice to hear a matter even if it is moot if "any order which [it] may make will have some practical effect either on the parties or on others." The following factors have been held to be potentially relevant:*
>
> - *the nature and extent of the practical effect that any possible order might have;*
> - *the importance of the issue;*
> - *the complexity of the issue;*
> - *the fullness or otherwise of the argument advanced; and*
> - *resolving disputes between different courts."*

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21 All of these criteria (which are not cumulative), save the last one, are fulfilled in this case and it would therefore be in the interests of justice if the court were to hear the matter, notwithstanding the threat of possible, future mootness.

22 Even if the MEC is minded, notwithstanding the foregoing, to forge ahead with the process, there remains more than enough time, with respect, for this Court to give its judgment before any decision could be made by the MEC. The public participation process will end 60 days after the publication of the notice on 12 October 2018, being 11 December 2018. The input by the public will then need to be collated and analysed. That is likely to leave several months during which the dispute would remain a live one.

23 The applicants propose that, should the Court be minded to find in favour of them and uphold the review, then a paragraph could be included in the Court's order as follows to cater for a scenario where a decision is taken by the MEC to exclude the farms before the reconsideration process by the Ministers in terms of s 48(1)(b) is complete:

> *"In the event that, prior to the completion of the reconsideration contemplated in paragraphs 3 and 4, the fifth respondent decides in terms of section 29(b) of the National Environmental Management: Protected Areas Act No. 57 of 2003, to exclude the farms referred to in Provincial Notice 127 of 2018 contained in Provincial Gazette No. 2975 of 12 October 2018 ("Gazette notice"), from the Mabola Protected Environment, any party may apply to court on the same papers, duly supplemented, on notice to the other parties, for an order varying paragraphs 3 or 4 or granting such alternative or further relief as may be just and equitable in the circumstances."*

24 By way of contrast, if the MEC persists in his insistence that the main application be postponed, the Applicants will be prejudiced, and the interests of justice will not be served for the following reasons:

24.1 If the MEC proceeds to exclude the protected properties from the MPE, and if the Applicants then successfully apply to have the exclusion decision set aside on review, the protected properties would still fall within the MPE and the NEMPAA decisions would stand. The Applicants would be obliged to come back to Court to have the NEMPAA review determined. The preparation which has been done now, would have to be done all over again. The parties and the people they represent would need to travel again to Pretoria, and counsel and the Court would need to read themselves back into the matter. This would result in an unnecessary waste of time and resources.

24.2 Similarly, if the MEC were to decide not to exclude the protected properties from the MPE the Applicants would need to come back to Court to resurrect the NEMPAA review. They would in the process incur, for a second time, all of the costs which were incurred in preparation for the current hearing.

25 There are, we submit, the following further compelling reasons for the court to proceed to adjudicate the matter now:

25.1 It will promote, not retard, progress towards the ultimate resolution of all of the various pending disputes in the matter – the postponement will have the opposite effect;

25.2 On a balancing of the scales of justice, it is the applicants who should have the benefit of any doubt as to whether or not the matter should proceed. They have complied with scrupulously with all of their obligations as *dominus litis* in ensuring that the matter is properly before court. They have waited patiently for their court date. They have not brought any last minute interlocutory proceedings that have the effect of delaying and disrupting, whether or not this conduct on the part of the MEC was innocent;

25.3 If regard is had to the judgment of the Constitutional Court in *Fuel Retailers*, the Constitutional Court has emphasized the central role of the courts in the realization of the sustainable management of the environment through a prominent role in the adjudication of environmental disputes.[1] There is a particular need for the ongoing

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[1] *[102] The role of the courts is especially important in the context of the protection of the environment and giving effect to the principle of sustainable development. The importance of the protection of the environment cannot be gainsaid. Its protection is vital to the enjoyment of the other rights contained in the Bill of Rights; indeed, it is vital to life itself. It must therefore be protected for the benefit of the present and future generations. The present generation holds the earth in trust for the next generation. This trusteeship position carries with it the responsibility to look after the environment. It is the duty of the court to ensure that this responsibility is carried out. Indeed, the Johannesburg Principles adopted at the Global Judges Symposium underscore the role of the judiciary in the protection of the environment.*

[103] On that occasion members of the judiciary across the globe made the following statement—

"We affirm our commitment to the pledge made by world leaders in the Millennium Declaration adopted by the United Nations General Assembly in September 2000 'to spare no effort to free all of humanity, and above all our children and grandchildren, from the threat of living on a planet irredeemably spoilt by human activities, and whose resources would no longer be sufficient for their needs'".

In addition, they affirmed—

". . . that an independent Judiciary and judicial process is vital for the same implementation, development and enforcement of environmental law, and that members of the Judiciary, as well as those contributing to the judicial process at the national, regional and global levels, are crucial partners for promoting compliance with, and the implementation and the enforcement of, international and national environmental law".

[104] One of these principles expresses—

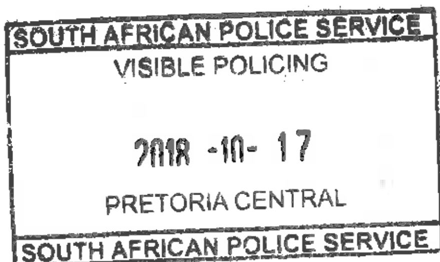
involvement of the Court in this matter, particularly because of the complex nature of the disputes that have developed. This is not achieved if the Court is pushed aside by the procedure that the MEC has initiated.

26 We submit that the balance of convenience against the granting of a postponement falls in favour of the Applicants in this case.

27 We accordingly persist in asking that the postponement application be dismissed with attorney and client costs, including costs of two counsel.

CATHERINE HORSFIELD

I hereby certify that the deponent knows and understands the contents of this affidavit and that it is to the best of the deponent's knowledge both true and correct. This affidavit was signed and sworn to before me at Pretoria on this the 17th day of OCTOBER 2018, and that the Regulations contained in Government Notice R.1258 of 21 July 1972, as amended by R1648 of 19 August 1977, and as further amended by R1428 of 11 July 1989, having been complied with.



COMMISSIONER OF OATHS
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Capacity: A/C

"A full commitment to contributing towards the realization of the goals of sustainable development through the judicial mandate to implement, develop and enforce the law, and to uphold the Rule of Law and the democratic process . . . "

Courts therefore have a crucial role to play in the protection of the environment. When the need arises to intervene in order to protect the environment, they should not hesitate to do so."

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