

**IN THE HIGH COURT OF SOUTH AFRICA  
GAUTENG DIVISION, PRETORIA**

**Case No: 50779/2017**

In the matter between:

<b>MINING AND ENVIRONMENTAL JUSTICE COMMUNITY NETWORK OF SOUTH AFRICA</b>	<b>First Applicant</b>
<b>GROUNDWORK</b>	<b>Second Applicant</b>
<b>EARTHLIFE AFRICA, JOHANNESBURG</b>	<b>Third Applicant</b>
<b>BIRDLIFE SOUTH AFRICA</b>	<b>Fourth Applicant</b>
<b>ENDANGERED WILDLIFE TRUST</b>	<b>Fifth Applicant</b>
<b>FEDERATION FOR A SUSTAINABLE DEVELOPMENT</b>	<b>Sixth Applicant</b>
<b>ASSOCIATION FOR WATER AND THE RURAL DEVELOPMENT</b>	<b>Seventh Applicant</b>
<b>BENCH MARKS FOUNDATION</b>	<b>Eighth Applicant</b>
and	
<b>MINISTER OF ENVIRONMENTAL AFFAIRS</b>	<b>First Respondent</b>
<b>MINISTER OF MINERAL RESOURCES</b>	<b>Second Respondent</b>
<b>ATHA-AFRICA VENTURES (PTY) LTD</b>	<b>Third Respondent</b>
<b>THE MABOLA PROTECTED ENVIRONMENT LAND OWNERS ASSOCIATION</b>	<b>Fourth Respondent</b>
<b>MEC FOR AGRICULTURE, RURAL DEVELOPMENT, LAND AND ENVIRONMENTAL AFFAIRS, MPUMALANGA</b>	<b>Fifth Respondent</b>

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**APPLICATION FOR LEAVE TO APPEAL**

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**BE PLEASED TO TAKE NOTICE THAT** the Third Respondent hereby applies for leave to appeal to the Supreme Court of Appeal, alternatively the Full Bench of the Gauteng Division of the High Court, only against that part of the judgment pertaining to, and only against, paragraph 4.3 and paragraph 4.4 of the orders made by the Honourable

Mr Justice Davis, delivered and handed down in the Gauteng Division of the High Court in Pretoria on 8 November 2018 (but dated 6 November 2018), in terms whereof a decision by the First and Second Respondent, to grant the Third Respondent written permission in terms of section 48(1)(b) of the National Environmental Management: Protected Area Act 57 of 2003 ("*NEM:PAA*"), after having been set aside and remitted to them for reconsideration, has to be reconsidered with a directive:

- (a) in terms of paragraph 4.3 of the order, to defer any decision in terms of section 48(1)(b) of NEM:PAA until after the decision of:
  - (i) the Applicants' statutory appeal to the Director-General: Department of Mineral Resources in terms of the Mineral and Petroleum Resources Development Act 28 of 2002 ("*the MPRDA*") against the approval of the Third Respondent's environmental management programme; and
  - (ii) the Applicants' statutory appeal to the Water Tribunal in terms of the National Water Act 36 of 1998 ("*the NWA*") against the decision to issue a water use licence to the Third Respondent;
  
- (b) in terms of paragraph 4.4 of the order, not to consider the granting of permission to conduct commercial mining in the "*Mabola Protected Environmental (sic)*" in terms of section 48(1)(b) of NEM:PAA until a management plan for the Mabola Protected Environment has been approved by the First Respondent in terms of section 39(2) of the NEM:PAA and to consider the contents thereof.

**PLEASE TAKE NOTICE FURTHER THAT** the application will be made on a date and

time arranged in conjunction with the Registrar of this Honourable Court.

**PLEASE TAKE NOTICE FURTHER THAT** the Third Respondent will contend that there is a reasonable prospect that another court will come to a different decision to that of the High Court and that the grounds, on which this application for leave to appeal are founded, are any one or more or all of the following:

1. With regard to paragraph 4.3 of the order:
  - 1.1 The Learned Judge deferred a decision on the exercise of the statutory power in terms of section 48(1)(b) of NEM:PAA until certain other conditions have been met.
  - 1.2 There is no legal or statutory basis in any legislation upon which a decision or the exercise of the statutory power in terms of section 48(1)(b) of NEM:PAA has to be deferred, either in general pending any other statutory process or procedure for the relevant authorisations or permissions pertaining to the development of mineral resources, or in particular pending the outcome of an administrative or statutory appeal in terms of the MPRDA against the approval of an environmental management programme and/or to the Water Tribunal in terms of the NWA against the decision to issue a water use licence.
  - 1.3 On a proper interpretation of section 48(1)(b) of NEM:PAA, it does not

prescribe, either expressly or by necessary implication, a fixed sequence or rigid hierarchy in terms of which the relevant authorisations or permissions for the development of mineral resources must first be obtained, and/or does not require that, before an application for the written permission of the Minister of Environmental Affairs and the Minister of Mineral Resources, in terms thereof, may be considered and/or decided upon, such relevant authorisations or permissions must already be in place and/or finalised.

**1.4** The written permission of the Minister of Environmental Affairs and the Minister of Mineral Resources in terms of section 48(1)(b) of NEM:PAA, to conduct commercial prospecting or mining in a protected environment, is but one of the required authorisations or permissions before any development of mineral resources may be commenced with.

**1.5** Any other interpretation of section section 48(1)(b) of NEM:PAA is not only impractical, but it will cause inevitable delay so that it is open for abuse by any person or entity opposing any kind of development and more specifically the development of mineral resources in a protected environment.

**1.6** The Learned Judge should have concluded accordingly.

**2.** With regard to paragraph 4.4 of the order:

- 2.1 The Learned Judge in substance and in effect elevated the finalisation or approval of a management plan for a protected environment to a jurisdictional condition for the exercise of the statutory power under section 48(1)(b) of NEM:PAA.
- 2.2 There is no legal or statutory basis in NEM:PAA, or in any other legislation, on which an approved management plan, as contemplated in section 39 of NEM:PAA and in accordance with which the management authority is expressly commanded by section 40(1)(b)(i) thereof to manage the protected environment under its control, can be elevated to a jurisdictional condition for the exercise of the statutory power entrusted by Parliament to the Minister of Environmental Affairs and the Minister of Mineral Resources under section 48(1)(b) of NEM:PAA.
- 2.3 Any such interpretation of section 48(1)(b) of NEM:PAA is not only impractical and un-businesslike, but it will cause inevitable delay so that it is open for abuse by any person or entity opposing any kind of development and more specifically the development of mineral resources in a protected environment.
- 2.4 Any delay with the finalisation of a management plan, whether innocently or negligently or even deliberately and by design, will mean that the entitlement of the Third Respondent to apply for such written permission in terms of section 48(1)(b) of NEM:PAA is at the mercy of a third party

and to be held in a limbo of uncertainty, which is contrary to the constitutional imperatives for public administration as contained in section 195 of the Constitution and/or an infringement of the fundamental right to administrative justice under section 33 of the Constitution.

**2.5** The Learned Judge should have concluded accordingly.

**3.** In general with regard to both paragraph 4.3 and paragraph 4.4 of the order:

**3.1** The proper interpretation of section 48(1)(b) of NEM:PAA has to be informed not only by the fundamental right to the environment contained in section 24 of the Constitution and/or the general environmental management principles contained in section 2 of the National Environmental Management Act 107 of 1998 ("*NEMA*") but also has to be informed by the other fundamental rights and freedoms contained in the Bill of Rights and furthermore such interpretation must also be consistent with the Constitution in general.

**3.2** Section 8(1)(c)(i) of the Promotion of Administrative Justice Act 3 of 2000 empowers (but also commands) the Honourable Court to grant an order that is just and equitable, including an order setting aside the administrative action and remitting the matter for reconsideration by the administrator, with or without directions.

- 3.3** In context this judicial directive power is concerned with a failure or omission on the part of the executive in the administrative process and is thus to be interpreted as a remedial measure, especially when the scope and ambit thereof are considered within the parameters of the doctrine of separation of powers.
- 3.4** In the result the directives issued by the Honourable Court in paragraph 4.3 and paragraph 4.4 of the order are, firstly, not authorised in law (because it goes further than providing a remedial measure) and, secondly, inconsistent with the Constitution because it disregards the doctrine of separation of powers.
- 3.5** In the result the directives issued by the Honourable Court in paragraph 4.3 and paragraph 4.4 of the order are an unwarranted and unjustifiable judicial interference in the processes and procedures entrusted to the executive branch of government
- 3.6** The Learned Judge should have concluded accordingly.
- 4.** There is a reasonable prospect that another court will come to a different decision to that of the Learned Judge.

**WHEREFORE THE THIRD RESPONDENT PRAYS FOR THE FOLLOWING ORDER:**

1. that Leave to Appeal be granted to the Third Respondent to appeal to the Supreme Court of Appeal, alternatively the Full Bench of the Gauteng Division of the High Court, against that part of the judgment pertaining to, and only against, paragraph 4.3 and paragraph 4.4 of the orders made by the Honourable Mr Justice Davis, delivered and handed down in the Gauteng Division of the High Court in Pretoria on 8 November 2018 (but dated 6 November 2018), in terms whereof a decision by the First and Second Respondent, to grant the Third Respondent written permission in terms of section 48(1)(b) of the National Environmental Management: Protected Area Act 57 of 2003 ("*NEM:PAA*"), after having been set aside and remitted to them for reconsideration, has to be reconsidered with a directive:

- 1.1 in terms of paragraph 4.3 of the order, to defer any decision in terms of section 48(1)(b) of NEM:PAA until after the decision of:

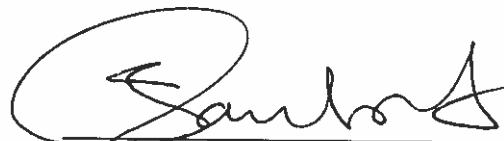
- 1.1.1 the Applicants' statutory appeal to the Director-General: Department of Mineral Resources in terms of the Mineral and Petroleum Resources Development Act 28 of 2002 against the approval of the Third Respondent's environmental management programme; and

- 1.1.2 the Applicants' statutory appeal to the Water Tribunal in terms of the National Water Act 36 of 1998 against the decision to issue a water use licence to the Third Respondent;



- 1.2 in terms of paragraph 4.4 of the order, not to consider the granting of permission to conduct commercial mining in the Mabola Protected Environment in terms of section 48(1)(b) of NEM:PAA until a management plan for the Mabola Protected Environment has been approved by the First Respondent in terms of section 39(2) of the NEM:PAA and to consider the contents thereof;
  
2. that the cost of this Application for Leave to Appeal to be costs in the appeal;  
and
  
3. that such further and/or alternative relief be granted to the Third Respondent as the Honourable Court deems fit.

SIGNED AND DATED AT PRETORIA THIS 28<sup>TH</sup> DAY OF NOVEMBER 2018.



**Mr GF Joubert**  
**Attorney for 3<sup>rd</sup> Respondent**  
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**To:**           **The Registrar of the High Court**  
**Gauteng Division**  
Corner of Paul Kruger & Madiba Streets  
PRETORIA

**And to:**       **Applicants' Attorney**  
**Centre for Environmental Rights**  
Care of:  
Du Plessis and Kruyshaar Incorporated  
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Ref: Rentia Kruyshaar

**And to:**       **First Respondent**  
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**And to:**       **Second Respondent**  
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**And to:**       **Fourth Respondent**  
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**And to:**       **Fifth Respondent**  
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