

IN THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

APPEAL COURT CASE NO: 157/19
COURT A QUO CASE NO: 50779/2017

In the matter between

ATHA-AFRICA VENTURES (PTY) LTD

Applicant

(3rd Respondent in court *a quo*)

and

**MINING AND ENVIRONMENTAL JUSTICE
COMMUNITY NETWORK OF SOUTH AFRICA**

1st Respondent

(1st Applicant in the court *a quo*)

GROUNDWORK

2nd Respondent

(2nd Applicant in the court *a quo*)

EARTHLIFE AFRICA, JOHANNESBURG

3rd Respondent

(3rd Applicant in the court *a quo*)

BIRDLIFE SOUTH AFRICA

4th Respondent

(4th Applicant in the court *a quo*)

ENDANGERED WILDLIFE TRUST

5th Respondent

(5th Applicant in the court *a quo*)

**FEDERATION FOR A SUSTAINABLE
DEVELOPMENT**

6th Respondent

(6th Applicant in the court *a quo*)

**ASSOCIATION FOR WATER AND THE RURAL
DEVELOPMENT**

7th Respondent

(7th Applicant in the court *a quo*)

BENCH MARKS FOUNDATION

8th Respondent

(8th Applicant in the court *a quo*)

MINISTER FOR ENVIRONMENTAL AFFAIRS

9th Respondent

(1st Respondent in the court *a quo*)

MINISTER OF MINERAL RESOURCES

10th Respondent

(2nd Respondent in the court *a quo*)

THE MABOLA PROTECTED ENVIRONMENT
LAND OWNERS ASSOCIATION

11th Respondent

(4th Respondent in the court *a quo*)

MEC FOR AGRICULTURE, RURAL
DEVELOPMENT, LAND AND ENVIRONMENTAL
AFFAIRS, MPUMALANGA

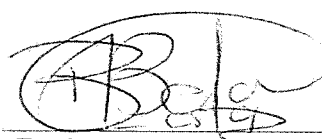
12th Respondent

(5th Respondent in the court *a quo*)

FILING SHEET

TAKE NOTICE THAT the Applicant's replying affidavit in respect of the section 17(1)(f) application is hereby presented for service and filing.

Signed at Johannesburg on 21 June 2019



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(incorporated in South Africa as Bell Dewar Inc.)
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To: **The Registrar of the Honourable
Court
Supreme Court of Appeal South
Africa
Bloemfontein**

And to **Attorney for First to Eighth Respondents** received a copy hereof
Centre for Environmental Rights Date:
 2nd Floor, Springtime Studios
 1 Scott Road
 Observatory
 Cape Town
 Tel: 021 447 1647
 Email:
chorsfield@cer.org.za;
spowell@cer.org.za

Care Of:
Du Plessis and Kruyshaar Incorporated
 Suite No. 2, Route 21 Corporate Park
 118 Sovereign Drive, Irene
 Pretoria
 Ref: Rentia Kruyshaar
 Email: kruyshaar@dupkruys.co.za

Care of:
Phatshoane Henney Attorneys
 35 Markgraaff Street
 Bloemfontein
 9301
 Tel: 051 400 4005
 Ref: J Le Riche / Bianca Strydom

And to **Attorney for Ninth, Tenth and Twelfth Respondents** received a copy hereof
Office of the State Attorney Date:
 SALU Building
 No 316 Thabo Sehume Street
 Pretoria
 Email:
gramutshila@environment.gov.za
Pieter.Alberts@dmr.gov.za
akoojeeaa@mpg.gov.za
nndlanya@mpg.gov.za
 Ref: 7515/2015/Z42/DM

And
to Farm Schoongezicht
Volksrust
Mpumalanga Province
Email: malansp@vodamail.co.za

Served electronically by agreement

IN THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

Appeal Court Case No: 157/2019
Court *a quo* Case No: 50779/2017

In the matter between:

ATHA-AFRICA VENTURES (PTY) LTD

Applicant
(Third Respondent *a quo*)

and

MINING AND ENVIRONMENTAL JUSTICE
COMMUNITY NETWORK OF SOUTH AFRICA

First Respondent
(First Applicant *a quo*)

GROUNDWORK

Second Respondent
(Second Applicant *a quo*)

EARTHLIFE AFRICA, JOHANNESBURG

Third Respondent
(Third Applicant *a quo*)

BIRDLIFE SOUTH AFRICA

Fourth Respondent
(Fourth Applicant *a quo*)

ENDANGERED WILDLIFE TRUST

Fifth Respondent
(Fifth Applicant *a quo*)

FEDERATION FOR A SUSTAINABLE ENVIRONMENT

Sixth Respondent
(Sixth Applicant *a quo*)

ASSOCIATION FOR WATER AND
RURAL DEVELOPMENT

Seventh Respondent
(Seventh Applicant *a quo*)

BENCH MARKS FOUNDATION

Eighth Respondent
(Eight Applicant *a quo*)

MINISTER OF ENVIRONMENTAL AFFAIRS

Ninth Respondent
(First Respondent *a quo*)

MINISTER OF MINERAL RESOURCES

Tenth Respondent
(Second Respondent *a quo*)

THE MABOLA PROTECTED ENVIRONMENT
LANDOWNERS ASSOCIATION

Eleventh Respondent
(Fourth Respondent *a quo*)

P
S
RM

MEC FOR AGRICULTURE, RURAL DEVELOPMENT,
LAND AND ENVIRONMENTAL AFFAIRS, MPUMALANGA Twelfth Respondent
(Fifth Respondent *a quo*)

REPLYING AFFIDAVIT: SECTION 17(1)(f) APPLICATION

I, the undersigned

PRAVEER TRIPATHI

declare under oath as follows:

1. I am a major male businessman and the Senior Vice President of the applicant (the third respondent *a quo*), Atha-Africa Ventures (Pty) Ltd ("*Atha-Africa*"). I am employed in this capacity at the 8th Floor, Sinosteel Plaza, 159 Rivonia Road, Morningside, Sandton, Gauteng Province.
2. The contents of this affidavit are within my personal knowledge, unless the contrary is stated or appears from the context, and are to the best of my knowledge and belief both true and correct.
3. I have read the answering affidavit for the non-State respondents, deposed to by Catherine Horsfield on 19 June 2019. The contents thereof consist mostly of lengthy quotations from statutes and legal argument, with little if any allegations of fact. Strictly speaking it is therefore not necessary for a replying affidavit, which is also the reason why no replying affidavit was previously filed in the application for leave to appeal on behalf of Atha-Africa. However, because the crux of the matter is again presented out of context by the non-



State respondents, a short replying affidavit is warranted. As a result I do not respond paragraph-by-paragraph to the said answering affidavit.

4. **Firstly** and although the Water Tribunal on 22 May 2019 dismissed the statutory appeal and confirmed the granting of the Water Use License subject to certain conditions, the appellants in that statutory appeal, who are also represented by the Centre for Environmental Rights, have subsequently lodged a further appeal against the decision of the Water Tribunal to the High Court in terms of section 149 of the National Water Act 36 of 1998. The interpretation by the Court *a quo*, that section 48(1)(b) of NEM:PAA requires a specific sequence of procedures or a stricter measure of scrutiny, informed the directions issued in paragraph 4.3 and 4.4 of the order of the Court *a quo*. I therefore deny that the direction of the Court *a quo*, that the Ministers must defer any decision until after the decision of the Water Use License appeal, has become redundant or academic.

5. **Secondly** this application in terms of the *proviso* to section 17(1)(f) of the Superior Courts Act 10 of 2013 is not based on the particular circumstances of Atha-Africa or based on particular facts (as contended or suggested by the non-State respondents) but is instead directed at the novel interpretation of section 48(1)(b) of NEM:PAA by the Court *a quo*, and the implications of that novel interpretation on the constitutional doctrine of separation of powers, which constitute exceptional circumstances that may justify the reconsideration of the decision of the Honourable Justices Tshiqi and Eksteen. The exceptional circumstances of the implications of the judgment of the Court *a quo*, on the

doctrine of separation of powers, may have been overlooked when leave to appeal was refused by the Honourable Justices Tshiqi and Eksteen, and the administration of justice might be brought into disrepute if no reconsideration occurs.

6. **Thirdly** and while there is no other known judgment on a proper interpretation of section 48(1)(b) of NEM:PAA, the directives issued by the Court *a quo* in paragraph 4.3 and 4.4 of the order -

6.1 are not authorised in law, because they go further than providing a remedial measure;

6.2 are inconsistent with the Constitution because they disregard the doctrine of separation of powers; and

6.3 constitute unwarranted and unjustifiable interference in the procedures entrusted to the executive branch of government, amounting to the Court *a quo* being “*over-prescriptive to administrative decision-makers*” (paragraph 11.9.3 of the judgment).

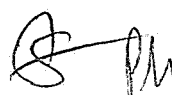
In the result important and significant legal issues are at stake.

7. **Fourthly** and whilst section 8 of the Promotion of Administrative Justice Act 3 of 2000 empowers a court to grant “*any order that is just and equitable*”,



inclusive of directives directing the administrator to act in the manner the court requires, any legal interpretation of this section on the precise nature, scope and ambit of this judicial power (in contradistinction with a fact-based application thereof to a particular case, which is the premise of the answering affidavit for the non-State respondents) must not only have regard to the context and purpose of this provision but must also be consistent with the Constitution, including the doctrine of separation of powers. The novel interpretation of section 48(1)(b) of NEM:PAA by the Court *a quo*, to the effect that any application or process in terms thereof is subordinated to or requires that applications or processes in terms of other legislation first be completed before a decision in terms thereof can be made, was influenced by wrong principles and could not reasonably have been made by a court properly directing itself to all the relevant principles, rendering the directives issued by the Court *a quo* firstly ultra vires because they are not truly remedial and secondly inconsistent with the Constitution and therefore in principle not just and equitable.

8. **Fifthly** the specific sequence of procedures that the Court *a quo* had in mind, when it issued the directions as set out in paragraph 4.3 and 4.4 of the order, did not take into regard the dictum of the Constitutional Court in *Fuel Retailers Association of Southern Africa v Director-General Environmental Management, Department of Agriculture, Conservation and Environment, Mpumalanga Province and Others* 2007 (10) BCLR 1059 (CC) at paragraph [96], where the Constitutional Court found it to be “*incumbent on the environmental authorities to consider the matter afresh in the light of the provisions of NEMA.*” No specific



sequence of the procedures required by different legislative provisions may therefore have an influence on the obligation of each functionary to conduct a fresh and independent consideration of each application, on the material and information before that functionary, in terms of the separate procedure and function entrusted to that functionary: as a general principle of law in a constitutional democracy, respecting the Rule of Law, a functionary under one statute cannot defer or delay a decision until another functionary under another statute has first taken a decision unless this is expressly or by necessary implication required by law.

9. **Sixthly** I submit that Atha-Africa has a reasonable prospect of success in the appeal because of the exceptional circumstances to be found in the implications of the judgment and the particular directive given in the order of the Court *a quo*, based on a novel interpretation of especially section 48(1)(b) of NEM:PAA, on the doctrine of separation of powers. A proper interpretation of section 48(1)(b) of NEM:PAA is a matter of great public importance and in the public interest as it concerns not only the need for environmental protection, but also the need for development. These two fundamental needs are to be balanced within an overarching concept of sustainable development, underlying section 24 of the Constitution and defined in section 2 of NEMA as well as in section 1 of the MPRDA. A proper interpretation of section 48(1)(b) of NEM:PAA furthermore concerns the interaction between the multiple suites of legislation applicable to mining activities.



10. **Lastly** and with reference to the contention by the non-State respondents that decision-making under section 48(1)(b) of NEM:PAA must be deferred until such time as a management plan in terms of section 41 thereof is in place, I have to point out that a management plan for the Mabola Protected Environment (even if taken as a form of subordinate legislation) is not a legal requirement for, nor can it deprive the two ministers of, the power to grant the necessary written permission for conducting commercial mining activities therein (which the non-State respondents seem to suggest, based on the order of the Court *a quo*). Such a management plan cannot take away statutory powers entrusted by Parliament to the Ministers and cannot be in conflict with NEM:PAA. Because the finalisation or approval of such a management plan is also not under the control of an applicant seeking written permission under section 48(1)(b) of NEM:PAA for conducting commercial mining activities in a protected environment, this provision can also not be legitimately interpreted in a manner which places the burden of another hurdle to overcome or of an inevitable delay on such an applicant (which is effectively what the Court *a quo* did).
11. In the result I respectfully pray that the relief be granted to the applicant as set out in the Notice of Motion.

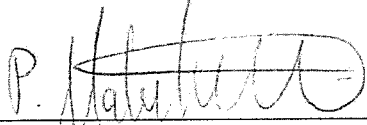


Deponent: P Tripathi

I certify that the deponent acknowledged that he knows and understands the contents of this affidavit, that he has no objection to the making of the prescribed oath and that he considers this oath to be binding on his conscience. I also certify that this affidavit



was signed in my presence at Pretoria on this ²¹ day of ~~May~~ ^{June} 2019 and that the Regulations contained in Government Notice R1258 of 21 July 1972, as amended by Government Notice R1648 of 19 August 1977, have been complied with.



COMMISSIONER OF OATHS

FULL NAMES:

STREET ADDRESS:

CAPACITY:

AREA:

PAMELA PASCALINE PASEKA MALULEKE

Commissioner of Oaths Ex Officio

Registered Attorney R.S.A.

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