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bloemfontein sandton

Our ref | Ons verw : CEN19/0002 / J LE RICHE / BIANCA STRYDOM
Your ref | U verw : MR P MYBURGH
Date | Datum : 21 June 2019

THE REGISTRAR
SUPREME COURT OF APPEAL
BLOEMFONTEIN

REGISTRAR
SUPREME COURT OF APPEAL
BLOEMFONTEIN
2019 -06- 21
T D MOSHANE
REGISTRAR'S CLERK

DELIVERED BY HAND

Dear Sir

CASE NO: 531/2019 (157/2019)
17(2)(f) APPLICATION: ATHA-AFRICA VENTURES (PTY) LTD vs MINING AND ENVIRONMENTAL JUSTICE COMMUNITY NETWORK OF SOUTH AFRICA & 11 OTHERS

We hand you herewith the original and 2 copies of the First – Eighth Respondents' duly served Answering Affidavit.

Yours faithfully

PHATSHOANE HENNEY ATTORNEYS
J LE RICHE

per: **Bianca Strydom**
tel: (051) 400 4148
fax: (051) 400 4002
email: bianca@phinc.co.za

Directors: JS Berry (Chief Executive Officer) DP Badenhorst SR Bartlett LE Companie DR Henney DW le Roux† FC Liebenberg† LL Mokgoro LS Moleko JP Monahadi MJ Mophethe PB Nel E Relling DJR Schutte† SCM Smith ND Steenkamp PMS Strauss† I Strydom PF van Aswegen† JAM Volschenk

Associates: L Botha-Peyper T Court JJ Davis† HAE Dudley† CG du Toit† AP Frewen† AA Janse van Rensburg EN Janse van Rensburg JD Krige JC Kruger FJH Le Riche T Liebenberg† C Lillie JD Luttig† N Madlala TB Mokwayi A Moolman† C Mukhari M Muthelo MG Naudé ML Odendaal JP Otto L Prinsloo CL Reynders KH Tshipa C van Zyl JS van Zyl DJ Viviers Y Wessels†

Consultants: JL Smit† FC Fouche† **Cost Consultants:** A Meyer IM Scheepers
Managers: C Bothma (Office / Human Resources) AV Swanepoel (Knowledge Systems) ME Louw (Public Relations / Marketing) F Olivier (Finance)

†Phatshoane Henney Attorneys (Gauteng) Inc.

Phatshoane Henney Attorneys Inc. Reg No 2000/028072/21 is a **Level 1 (Generic) BEE Supplier**

member of phatshoanehenney ASSOCIATED LAW FIRMS

IN THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

REGISTRAR
SUPREME COURT OF APPEAL
BLOEMFONTEIN
2019 -06- 21
T D MOSHANE
REGISTRAR'S CLERK

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 in court *a quo*)**

and

MINING AND ENVIRONMENTAL JUSTICE COMMUNITY NETWORK OF SOUTH AFRICA	**First Respondent** **(First Applicant in court *a quo*)**
GROUNDWORK	**Second Respondent** **(Second Applicant in court *a quo*)**
EARTHLIFE AFRICA, JOHANNESBURG	**Third Respondent** **(Third Applicant in court *a quo*)**
BIRDLIFE SOUTH AFRICA	**Fourth Respondent** **(Fourth Applicant in court *a quo*)**
ENDANGERED WILDLIFE TRUST	**Fifth Respondent** **(Fifth Applicant in court *a quo*)**
FEDERATION FOR A SUSTAINABLE ENVIRONMENT	**Sixth Respondent** **(Sixth Applicant in court *a quo*)**
ASSOCIATION FOR WATER AND THE RURAL DEVELOPMENT	**Seventh Respondent** **(Seventh Applicant in court *a quo*)**
BENCH MARKS FOUNDATION	**Eighth Respondent** **(Eighth Applicant in court *a quo*)**
MINISTER OF ENVIRONMENTAL AFFAIRS	**Ninth Respondent** **(First Respondent in court *a quo*)**
MINISTER OF MINERAL RESOURCES	**Tenth Respondent** **(Second Respondent in court *a quo*)**
THE MABOLA PROTECTED ENVIRONMENT LANDOWNERS ASSOCIATION	**Eleventh Respondent** **(Fourth Respondent in court *a quo*)**

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

Twelfth Respondent
(Fifth Respondent in court *a quo*)

NOTICE OF FILING: FIRST TO EIGHTH RESPONDENTS' ANSWERING AFFIDAVIT

BE PLEASED TO TAKE NOTICE THAT the above-named First to Eighth Respondents file herewith the answering affidavit of **CATHERINE HORSFIELD** to the application made by the Applicant to the President of the Supreme Court of Appeal in terms of the *proviso* to section 17(2)(f) of the Superior Courts Act 10 of 2013.

DATED at **CAPE TOWN** on this the **19th** day of **JUNE 2019**.

CENTRE FOR ENVIRONMENTAL RIGHTS
First to Eighth Respondents' Attorneys
2nd Floor, Springtime Studios
1 Scott Road
Observatory
Cape Town
Tel: 021 447 1647
Email: chorsfield@cer.org.za; spowell@cer.org.za
Ref: Catherine Horsfield
C/O: DU PLESSIS AND KRUYSHAAR INC.
Suite No. 2, Route 21 Corporate Park
118 Sovereign Drive
Irene
Pretoria
Tel: 0861 000 779
Fax: 086 548 0837
Ref: Rentia Kruyshaar
C/O: PHATSHOANE HENNEY ATTORNEYS
35 Markgraaff Street
Bloemfontein
9301
Tel: 051 400 4005
Ref: J Le Riche / Bianca Strydom

TO: THE REGISTRAR OF THE ABOVE HONOURABLE COURT
Supreme Court of Appeal South Africa
Bloemfontein

AND TO: FASKEN
(Incorporated in South Africa as Bell Dewar Inc.)
Applicant's Attorneys
Building 2, Inanda Greens
54 Wierda Road West
Sandton
Tel: (011) +27 11 586 6089
Fax:(011) +27 11 586 6189
Email: fjoubert@fasken.com
Ref: Francois Joubert
C/O: SAVAGE, JOOSTE & ADAMS
No 141 Boshoff Street
Nieuw Muckleneuk
Pretoria
Tel: (012) 452 8200
Fax: (012) 452 8201
C/O: SYMINGTON AND DE KOK ATTORNEYS
Docex 18 Bloemfontein
169B Nelson Mandela Drive
Westdene
Bloemfontein
Tel: (051) 505 6665
Fax: (051) 430 4806
Email: LVenter@symok.co.za
Ref: Me Lazyja Venter

Served electronically by agreement

AND TO: OFFICE OF THE STATE ATTORNEY
Ninth, Tenth and Twelfth Respondents' Attorneys
SALU Building
316 Thabo Sehume Street
Pretoria
Email: simathebula@justice.gov.za; gramutshila@environment.gov.za
pieter.alberts@dmr.gov.za; nndlanya@mpg.gov.za

Served electronically by agreement

AND TO: THE ELEVENTH RESPONDENT
Farm Schoongezicht
Volkrust
Mpumalanga Province
Email: malansp@vodamail.co.za

Served electronically by agreement

Bianca Strydom

From: Francois Joubert <fjoubert@fasken.com>
Sent: 19 June 2019 03:47 PM
To: Vuyisile Ncube; simathebula@justice.gov.za; gramutshila@environment.gov.za; pieter.alberts@dmr.gov.za; nndlanya@mpg.gov.za; malansp@vodamail.co.za
Cc: moosthui@law.co.za; 'Jolandie Rust'; Praveer Tripathi; 'Morgam Munsamy'; Clare Grainger; LVenter@symok.co.za; Bianca Da Costa; Catherine Stark
Subject: RE: Atha-Africa Ventures (Pty) Ltd / Mining and Environmental Justice Community Network of South Africa and Others (case no. 157/19)

Importance: High

We confirm receipt of service via the email below.

Francois Joubert
PARTNER
T. +27 11 586 6089 | F. +27 11 586 6189

From: Vuyisile Ncube [mailto:vncube@cer.org.za]
Sent: 19 June 2019 03:15 PM
To: Francois Joubert; Clare Grainger; LVenter@symok.co.za; simathebula@justice.gov.za; gramutshila@environment.gov.za; pieter.alberts@dmr.gov.za; nndlanya@mpg.gov.za; malansp@vodamail.co.za
Cc: Catherine Horsfield; Suzanne Powell
Subject: Atha-Africa Ventures (Pty) Ltd / Mining and Environmental Justice Community Network of South Africa and Others (case no. 157/19)

Good day

We hereby serve the First to Eighth Respondents' Answering Affidavit in the above matter, which is attached together with our Notice of Filing.

Kindly **urgently** confirm your receipt of service by return email in order for us to file same timeously at Court.

Yours faithfully

Ms Vuyisile H Ncube
Candidate Attorney
Centre for Environmental Rights NPC
A non-profit company with registration number 2009/020736/08
PBO No. 930032226, NPO No. 075-863, VAT No. 4770260653
and a Law Clinic registered with the Legal Practice Council
2nd Floor, Springtime Studios, 1 Scott Road, Observatory 7925, Cape Town, South Africa
Tel 021 447 1647 Fax 086 730 9098
vncube@cer.org.za www.cer.org.za
www.facebook.com/CentreEnvironmentalRights www.twitter.com/CentreEnvRights

Report violations of environmental rights to the 24-hour Environmental Crimes & Incidents Hotline on **0800 205 005**. More reports of environmental violations assist in justifying more investment in more inspectors, and more enforcement of environmental laws. Numbers matter! Take the time to report violations, even if you have done so elsewhere. For more

Bianca Strydom

From:	Mathebula Sipho <SiMathebula@justice.gov.za>
Sent:	20 June 2019 02:14 PM
To:	Francois Joubert; Vuyisile Ncube; gramutshila@environment.gov.za; pieter.alberts@dmr.gov.za; nndlanya@mpg.gov.za; malansp@vodamail.co.za
Cc:	moosthui@law.co.za; 'Jolandie Rust'; Praveer Tripathi; 'Morgam Munsamy'; Clare Grainger; LVenter@symok.co.za; Bianca Da Costa; Catherine Stark
Subject:	RE: Atha-Africa Ventures (Pty) Ltd / Mining and Environmental Justice Community Network of South Africa and Others (case no. 157/19)

Good day

I confirm that we have received the papers and we agreed that we will accept service by emails

Kind regard

S P Mathebula

From: Francois Joubert [mailto:fjoubert@fasken.com]
Sent: Wednesday, June 19, 2019 3:47 PM
To: Vuyisile Ncube <vncube@cer.org.za>; Mathebula Sipho <SiMathebula@justice.gov.za>; gramutshila@environment.gov.za; pieter.alberts@dmr.gov.za; nndlanya@mpg.gov.za; malansp@vodamail.co.za
Cc: moosthui@law.co.za; 'Jolandie Rust' <jolandierust@law.co.za>; Praveer Tripathi <praveer.tripathi@athagroup.in>; 'Morgam Munsamy' <morgam.munsamy@athagroup.in>; Clare Grainger <cgrainger@fasken.com>; LVenter@symok.co.za; Bianca Da Costa <bdacosta@fasken.com>; Catherine Stark <cstark@fasken.com>
Subject: RE: Atha-Africa Ventures (Pty) Ltd / Mining and Environmental Justice Community Network of South Africa and Others (case no. 157/19)
Importance: High

We confirm receipt of service via the email below.

Francois Joubert
PARTNER
T. +27 11 586 6089 | F. +27 11 586 6189

From: Vuyisile Ncube [mailto:vncube@cer.org.za]
Sent: 19 June 2019 03:15 PM
To: Francois Joubert; Clare Grainger; LVenter@symok.co.za; simathebula@justice.gov.za; gramutshila@environment.gov.za; pieter.alberts@dmr.gov.za; nndlanya@mpg.gov.za; malansp@vodamail.co.za
Cc: Catherine Horsfield; Suzanne Powell
Subject: Atha-Africa Ventures (Pty) Ltd / Mining and Environmental Justice Community Network of South Africa and Others (case no. 157/19)

Good day

We hereby serve the First to Eighth Respondents' Answering Affidavit in the above matter, which is attached together with our Notice of Filing.

From:	Hester Malan
To:	Catherine Horsfield
Cc:	Suzanne Powell
Subject:	Yzermyn
Date:	Thursday, June 20, 2019 2:55:32 PM
Attachments:	Catherine.docx Rosolution.docx

Please see attached

Regards
Oubaas Malan

This email has been checked for viruses by Avast antivirus software.
www.avast.com

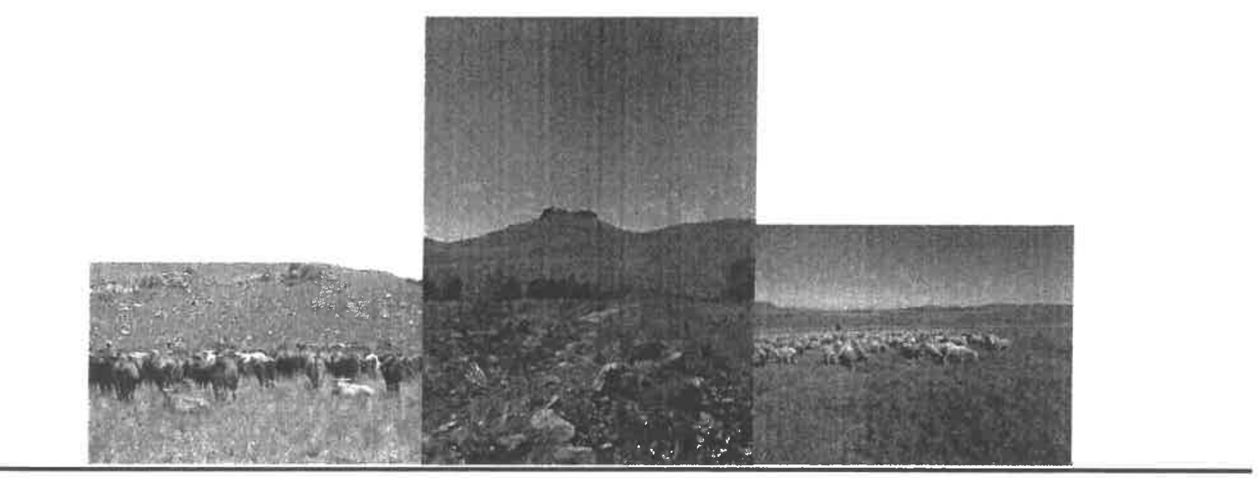
OUDEZICHT TRUST

Trust No: IT3477/04

Posbus 153 VOLKSRUST 2470

Faks No : 086 714 0684 Sel No : 084 320 6071

e-pos : malansp@vodamail.co.za



20 JUNE 2019

Confirming letter mentioned in your whatsapp message that I have received Supreme Court Appeal of South Africa, Court case number 157/2019. Court quo Case number 501779/2017.

I have not read it but presume it to be right.

I attached a letter to the Municipal Manager and the Town Planner re the re-zoning of Yzermyn portion 1.

Regards

Oubaas Malan

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 in court *a quo*)**

and

MINING AND ENVIRONMENTAL JUSTICE COMMUNITY NETWORK OF SOUTH AFRICA	**First Respondent** **(First Applicant in court *a quo*)**
GROUNDWORK	**Second Respondent** **(Second Applicant in court *a quo*)**
EARTHLIFE AFRICA, JOHANNESBURG	**Third Respondent** **(Third Applicant in court *a quo*)**
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BENCH MARKS FOUNDATION	**Eighth Respondent** **(Eighth Applicant in court *a quo*)**
MINISTER OF ENVIRONMENTAL AFFAIRS	**Ninth Respondent** **(First Respondent in court *a quo*)**
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THE MABOLA PROTECTED ENVIRONMENT LANDOWNERS ASSOCIATION	**Eleventh Respondent** **(Fourth Respondent in court *a quo*)**

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

ANSWERING AFFIDAVIT

I,

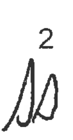
CATHERINE HORSFIELD

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, attorneys of record for the first to eighth Respondents - the Applicants in the court *a quo* ("the NGO respondents").

2 The facts and circumstances set out in this affidavit fall within my personal knowledge and belief or appear from documents under my control, except where the context indicates otherwise, and are true and correct.

3 This affidavit is made in answer to an application by the Applicant ("Atha") in terms of the *proviso* to section 17(2)(f) of the Superior Courts Act 10 of 2013 ("the Superior Courts Act") for the President of the Supreme Court of Appeal ("SCA") to refer the decision refusing leave to appeal, taken on 23 April 2019 by the Honourable Justices Tshiqi and Eksteen ("the 23 April 2019 order") for reconsideration and variation by the Supreme Court of Appeal ("Atha's s 17(2)(f) application").



4 The 23 April 2019 order was preceded by an order on 22 January 2019 by the Honourable Justice Davis in which he refused an application for leave to appeal by Atha in terms of s 17(2)(a) of the Superior Courts Act (pp. 64 to 65).

5 In each instance, Atha has not sought leave to appeal against the main relief which was granted by Davis J on or about 8 November 2018, namely the review and setting aside of the decisions of the Ministers of Environmental Affairs and Mineral Resources ("the Ministers") to grant Atha written permission to conduct commercial mining in the Mabola Protected Environment ("the Ministers' decisions" and "the MPE"). Nor has Atha sought leave to appeal against the remittal of the Ministers' decisions to the Ministers for reconsideration, or against any of the other directions accompanying the order of remittal.

6 Instead, what Atha seeks leave to appeal against are certain of the terms of such remittal, namely those in paragraph 4.3 of the order of the Court *a quo* (that the Ministers must defer any fresh decisions until after the decisions of two pending statutory appeals pertaining to the proposed mine); and in paragraph 4.4 of the order (that the Ministers may not consider granting permission in terms of section 48(1)(b) of the National Environmental Management: Protected Areas Act 57 of 2003 ("NEMPAA") until a management plan for the MPE has been approved and they have considered the contents of that plan).

7 Before turning to Atha's s 17(2)(f) application, I point out that on the same day as the application was delivered, namely on 22 May 2019, one of the statutory

appeals which, in terms of paragraph 4.3 of the order *a quo*, must be decided before the Ministers can take a fresh decision in terms of s 48(1)(b) of NEMPAA, was in fact decided. This was an appeal by the fifth and sixth respondents to the Water Tribunal in terms of section 148(1) of the National Water Act 36 of 1998 against the granting to Atha of a water use licence on 7 July 2016 ("the WUL appeal").

8 Because this appeal has now been decided, the direction of the court *a quo* that the Ministers must defer any decision until after the decision of the WUL appeal, has become redundant and Atha's s 17(2)(f) application, insofar as it pertained to this aspect, has been rendered academic. In this answering affidavit I therefore do not deal with this aspect of Atha's s 17(2)(f) application.

The test in terms of s 17(2)(f) of the Superior Courts Act

9 Section 17 of the Superior Courts Act provides as follows:

"*(1) Leave to appeal may only be given where the judge or judges concerned are of the opinion that-*

(a) (i) the appeal would have a reasonable prospect of success; or

(ii) there is some other compelling reason why the appeal should be heard, including conflicting judgments on the matter under consideration;

(b) the decision sought on appeal does not fall within the ambit of section 16 (2) (a); and

(c) where the decision sought to be appealed does not dispose of all the issues in the case, the appeal would lead to a just and prompt resolution of the real issues between the parties."

10 Section 17(2)(b) of the Superior Courts Act provides that if leave to appeal has

been refused by the judge against whose decision an appeal is to be made, leave to appeal may be granted by the Supreme Court of Appeal on application to it.

11 Section 17(2)(f) provides that:

"*The decision of the majority of the judges considering an application referred to in paragraph (b), or the decision of the court, as the case may be, to grant or refuse the application shall be final: Provided that the President of the Supreme Court of Appeal may in exceptional circumstances, whether of his or her own accord or on application filed within one month of the decision, refer the decision to the court for reconsideration and, if necessary, variation.*"

12 The above Honourable Court has held as regards s 17(2)(f), that the President would need to be satisfied that the circumstances are truly exceptional before referring the considered view of two judges of this court to the court for reconsideration. The section is not intended to afford disappointed litigants a further attempt to procure relief that has already been refused. It is intended to enable the President to deal with a situation where otherwise injustice might result. An application that merely rehearses the arguments that have already been made, considered and rejected will not succeed, unless it is strongly arguable that justice will be denied unless the possibility of an appeal can be pursued. The power is likely to be exercised only when the President believes that some matter of importance has possibly been overlooked or grave injustice will otherwise result. (*Avnit v First Rand Bank Ltd* [2014] ZASCA 132 paras 6 and 7)

13 In *Liesching and Others v The State and Another* [2016] ZACC 41 (para 54), the Constitutional Court held that s 17(2)(f) of the Superior Courts Act keeps the door of justice ajar in order to cure errors or mistakes and for the consideration of a circumstance, which, if it was known at the time of the consideration of the petition might have yielded a different outcome. It is therefore a means of preventing an injustice. This would include new or further evidence that has come to light or become known after the petition had been considered and determined.

14 In *Liesching and Others v The State* [2018] ZACC 25 (paras 133 to 139), Theron J for the majority in the Constitutional Court elaborated that without being exhaustive, exceptional circumstances should be linked either to the probability of grave individual injustice or a situation where, even if grave individual injustice might not follow, the administration of justice might be brought into disrepute if no reconsideration occurs. The Constitutional Court confirmed that s 17(2)(f) is not intended to afford disappointed litigants a further attempt to procure relief that has already been refused. It does not afford litigants a parallel appeal process in order to pursue additional bites at the proverbial cherry.

15 In summary, for Atha's s 17(2)(f) application to succeed, it must demonstrate the probability of grave injustice if no reconsideration occurs, or that the administration of justice might be brought into disrepute. Atha must also go beyond what is argued in its application in terms of s 17(2)(b) of the Superior Courts Act, for otherwise there would be no basis for referring the considered view of two judges of this Court for reconsideration.

16 No case as envisaged in these judgments of the SCA and the Constitutional Court is pleaded, let alone proven, in Atha's affidavit filed in support of the s 17(2)(f) application.

Atha's s 17(2)(f) application

17 Despite the fact that s 17(2)(f) of the Superior Courts Act is not designed to afford disappointed litigants a "second bite at the cherry", Atha's s 17(2)(f) application is, for the most part, a word-for-word repetition of its application in terms of s 17(2)(b) of the Superior Courts Act ("Atha's s 17(2)(b) application", which is at pp. 74 to 92)[1].

18 In order to avoid prolixity, I do not repeat the whole of the contents of the answering affidavit which I deposed to on 15 March 2019 in opposition to Atha's s 17(2)(b) application ("my previous affidavit"). My previous affidavit is at pp. 93 to 111, and I stand by its contents for purposes of this application. For the sake of convenience however, I summarise the main elements of that answer (omitting only those which are specifically and separately reiterated in this affidavit):

18.1 In Atha's s 17(2)(b) application, Atha relied only on s 17(1)(a)(i) of the Superior Courts Act, namely the appeal having reasonable prospects

[1] Paragraphs 1 to 19 of the s 17(2)(f) application correspond almost exactly with paragraphs 1 to 18 of the s 17(2)(b) application. The only exceptions are a new para 3 in Atha's s 17(2)(f) application to describe the purpose of the application; the introduction of a sentence in brackets in the new para 9.2 (the previous para 8.2); the introduction of a sentence in brackets in the new para 13.6 (the previous para 12.6); a new para 14.5 which states that no management plan has been approved to date; a new para 15.1 which states that the directives in question were not issued by the Court *a quo* as part of a fact-specific remedy but were based in the Court *a quo's* interpretation of s 48(1)(b) of NEMPAA; a new para 17 introducing as an annexure the order of Davis J in terms of which leave to appeal was refused; and a reversal in order of the new paras 18 and 19.

of success - In order for Atha's application for leave to appeal to succeed on this basis, there must be a measure of certainty that another court would differ from the learned Judge *a quo* as regards the aspects of the order which form the subject of the application for leave to appeal, which, as already noted, are limited to two of the directions which accompanied the order of remittal;

18.2 The directions against which Atha seeks leave to appeal comprise part of relief which was granted by the court *a quo* in terms of s 8 of the Promotion of Administrative Justice Act 3 of 2000. Accordingly, the relief:

18.2.1 was required to be effective – It had to be just and equitable in the light of the facts; its purpose being to pre-empt or correct an improper administrative decision and to advance efficient and effective public administration;

18.2.2 was granted as part of a wide remedial power bounded only by considerations of justice and equity; and

18.2.3 involved the exercise of a discretion in the true or strong sense with the result that it would ordinarily be inappropriate for an appellate court to interfere unless it is satisfied that the discretion was not exercised judicially, or that it was influenced by wrong principles or a misdirection on the facts, or which could not reasonably have been made by a court properly directing itself to all the relevant facts and principles.

18.3 The direction that any decision in terms of s 48(1)(b) of NEMPAA be deferred until the decision of the Applicants' statutory appeal in terms of Mineral and Petroleum Resources Development Act 28 of 2002 against the approval of Atha's environmental management programme (the second of the administrative appeals referred to in paragraph 6 above) ("the EMPR appeal"), was justifiable as a matter of general principle, but also in the particular circumstances of this case:

18.3.1 The EMPR is one of the statutorily prescribed documents which contains the mitigation and remediation measures with which Atha must comply in conducting the proposed mining – It is a key document which will determine the nature and ambit of what has been authorised in relation to the proposed mine and what Atha's duties and responsibilities will be;

18.3.2 The EMPR appeal is a wide appeal and until it is determined, it cannot be known with any certainty what Atha's obligations as regards mitigation and remediation will be in an area which has been recognised as being of fundamental ecological importance;

18.3.3 In the circumstances of this case, the Minsters relied on the existence of the EMPR in the making of their decisions (judgment para 7.5(a)), but they nevertheless argued that they had not been required to await the outcome of the

statutory appeal (judgment para 11.10) – An order compelling them to do so would constitute effective relief; and

18.3.4 The Court *a quo* sought in para 4.3 of the order to correct the previous failings of the Ministers and to cater for the particular facts which appeared from the papers in the application for judicial review.

18.4 The direction that the Ministers not consider granting permission in terms of s 48(1)(b) of NEMPAA until a management plan for the MPE has been approved and they have considered its contents was also justifiable as a matter of general principle, but also in the particular circumstances of this case:

18.4.1 NEMPAA prescribes that the management authority of a protected environment must submit a management plan to the Minister or MEC for approval, which must contain among other things a zoning of the area indicating what activities may take place in different sections of the area;

18.4.2 Until a management plan has been approved, the Ministers cannot know how the mining area is proposed to be managed in this sensitive and environmentally strategic area;

18.4.3 The direction ensures that decision-making will be consistent with the objectives in s 2 of NEMPAA and is based on an integrated and purposive application of the legislation; and

18.4.4 It appears from a draft management plan for the area that an approved management plan may militate against the granting of permission in terms of s 48(1)(b) of NEMPAA; and

18.5 Lastly, as the Constitutional Court has made clear, the powers conferred by section 8 of PAJA and section 172 of the Constitution to make remedial orders that are just and equitable, are very wide.[2] Remittal conditions are expressly provided for in PAJA. In making the directions in paragraphs 4.3 and 4.4 of the order, the learned Judge acted both lawfully and constitutionally.

19 The only contentions which are new in Atha's s 17(2)(f) application are the following:

19.1 Apart from the appeal having a reasonable prospect of success in terms of s 17(1)(a)(i) of the Superior Courts Act, there are also compelling reasons why the appeal should be heard in terms of s 17(1)(a)(ii) of the Superior Courts Act. These compelling reasons are that:

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[2] In explaining the reach of the power under s 172 to grant a just and equitable remedy, the Constitutional Court has said: "*The outer limits of a remedy are bounded only by considerations of justice and equity. That indeed is very wide. It may come in different shapes and forms dictated by the many and varied manifestations in respect of which the remedy may be called for. The odd instance may require a singularly creative remedy. In that case, the court should be wary not to self-censor. Instead, it should do justice and afford an equitable remedy to those before it as it is empowered to.*" *Electoral Commission v Mhlope and Others* [2016] ZACC 15; 2016 (8) BCLR 987 (CC); 2016 (5) SA 1 (CC) at para 83. In *Allpay Consolidated Investment Holdings (Pty) Ltd and Others v Chief Executive Officer, South African Social Security Agency, and Others* 2014 (1) SA 604 (CC) (2014 (1) BCLR 1; [2013] ZACC 42) at para 25 the Constitutional Court held that "*[o]nce a ground of review under PAJA has been established there is no room for shying away from it. Section 172(1)(a) of the Constitution requires the decision to be declared unlawful. The consequences of the declaration of unlawfulness must then be dealt with in a just and equitable order under s 172(1)(b). Section 8 of PAJA gives detailed legislative content to the Constitution's 'just and equitable' remedy.*"

19.1.1 The direction that the Ministers must defer the making of any fresh decisions until after the decisions of the WUL and EMPR appeals, will cause material prejudice and/or irreparable harm to Atha because of the time-consuming nature of "*the overall procedure (which will no doubt and inevitably include judicial reviews of each and every statutory decision taken in favour of Atha, and judicial appeals including constitutional litigation in respect thereof)*" (p. 19 para 20.1);

19.1.2 There will be no expeditiousness in the public administration with regard to the authorisations required for the development of mineral resources in the Republic (pp. 19 to 20 para 20.1);

19.1.3 Such interpretation of s 48(1)(b) of NEMPAA as is manifested in the two directives is open for abuse and therefore can impede the attainment of justice (including administrative justice) (p. 20 para 20.2); and

19.1.4 A proper interpretation of s 48(1)(b) of NEMPAA is a matter of great public importance and/or in the public interest (p. 20 para 20.3); and

19.2 These allegedly compelling reasons are also said to constitute exceptional circumstances for purposes of the *proviso* to s 17(2)(f) of the Superior Courts Act (p. 20 para 21).

20 In answer, I turn first to the reasons provided by Atha in paragraphs 19.1.2 to

19.1.4 above. These reasons are all directed at aspects of the reasoning of the Court *a quo*. None of these relates to aspects of the order itself because there was no general declaratory order which formed part of the relief which was granted. The aspects of the order which Atha seeks to overturn, all pertain specifically and uniquely to what should happen before the Ministers take fresh decisions in terms of NEMPAA as regards Atha's application for permission to conduct commercial mining in the MPE in terms of s 48(1)(b) of NEMPAA.

21 It is trite that an appeal lies against an order, and not the reasons for it (*Absa Bank v Mkhize and Two Similar Cases* 2014 (5) SA 16 (SCA) para 64).

22 What is more is that the directions were imposed, at least in part, because of the particular facts of this case, including that the Ministers had relied on the existence of the authorisations which are the subject of the appeals (para 11.10.4 of the judgment *a quo*), and because the Court *a quo* considered that the directions in this case ought to include that a management plan should be in place before fresh decisions are taken (para 46 of the judgment).

23 It therefore does not avail Atha to direct its attack at the aspects of the Court's reasoning which it has identified.

24 In any event, there is nothing wrong with the reasoning of the court *a quo*. The conditions imposed upon remittal are rationally and logically consistent with the basis for setting aside the decisions of the Ministers and are directed at ensuring lawful and constitutional decision-making when they reconsider the matter.

25 Furthermore, as regards the contention that the learned Judge erred in interpreting section 48 of NEMPAA as requiring that a final approved management plan must be in place before permission can be granted in terms of section 48(1)(b), as noted in my previous answering affidavit, the learned Judge did not make an explicit finding in the regard. It is also not correct, as Atha contends, that this interpretation/direction would "*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*" (a complaint which is implicit in one of the new allegations in Atha's s 17(2)(f) application – see paragraph 19.1.3 above).

26 That is because NEMPAA sets a clear timeframe of 12 months within which a management authority must submit a management plan to the Environment Minister or the MEC for approval (section 39(2)). Delay by the management authority in finalising a management plan can be addressed through the Minister or MEC's power in terms of section 44 to compel it to perform its duties within a specified period of time. These remedies for delay remain available during remittal.

27 Turning to the reason in paragraph 19.1.1 above, the order in paragraph 4.3.1 manifestly does not contemplate judicial reviews of each and every statutory decision taken in favour of Atha, and judicial appeals including constitutional litigation in respect thereof. It contemplates only the decisions of the statutory appeals themselves, and only the WUL and EMPR appeals. Because the WUL appeal has been decided, the only appeal which remains outstanding is the EMPR appeal. Once that appeal has been decided, the direction in

paragraph 4.3 will become redundant.

28 In short, none of the reasons in paragraph 19 above constitute compelling reasons for granting leave to appeal. The order of the Court *a quo* is limited in its application, affecting only Atha and the Ministers in the context of a particular mining project. The order does not itself purport to establish the meaning or proper interpretation of provisions of NEMPAA or to lay down principles which must be followed in every case. If legal interpretation informed part of the reasoning of the Court *a quo*, that was not all that informed it. The Court *a quo* took into account the particular facts of the case and decided that the Ministers ought to be directed to await the outcome of processes which will better inform any future decisions in an area of particular ecological importance.

29 But even if the new reasons introduced by Atha were compelling, which is denied, Atha is required to demonstrate something more than that. Atha must establish that there are <u>exceptional circumstances</u> which justify the reconsideration of the decision of the Honourable Justices Tshiqi and Eksteen.

30 Atha has failed to demonstrate anything of the nature described by this Court or the Constitutional Court as constituting an exceptional circumstance. There has been no error or mistake or new evidence which has come to light, and there is no suggestion of a grave injustice being done if no reconsideration occurs.

Conclusion

31 In the circumstances set out in this affidavit and my previous affidavit, I request that Atha's application in terms of s 17(2)(f) of the Superior Courts Act be dismissed and that the costs of the application be awarded to the first to eighth respondents, including the costs of two counsel. I submit further in the circumstances – culminating in paragraph 30 above - that a punitive costs order is warranted. I therefore request that costs be awarded to the first to eighth respondents on an attorney and client scale.

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 **CAPE TOWN** on this the **19TH** day of **JUNE 2019**, 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.

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