

DEPARTMENT OF MINERAL RESOURCES

Appeal by:

EARTHLIFE AFRICA JOHANNESBURG

FIRST APPELLANT

BIRDLIFE SOUTH AFRICA

SECOND APPELLANT

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

THIRD APPELLANT

ENDANGERED WILDLIFE TRUST

FOURTH APPELLANT

**FEDERATION FOR A SUSTAINABLE
ENVIRONMENT**

FIFTH APPELLANT

GROUNDWORK

SIXTH APPELLANT

**ASSOCIATION FOR WATER
AND RURAL DEVELOPMENT**

SEVENTH APPELLANT

BENCH MARKS FOUNDATION

EIGHTH APPELLANT

Concerning the approval of the Environmental Management Programme for Atha-Africa Ventures (Pty) Ltd's proposed Yzermyn Mine by the Mpumalanga Regional Manager

Directed to:

DIRECTOR-GENERAL (ACTING), DEPARTMENT OF MINERAL RESOURCES

**APPELLANTS' RESPONDING STATEMENT, IN TERMS OF REGULATION 74(8) OF THE
MINERAL AND PETROLEUM RESOURCES DEVELOPMENT REGULATIONS, 2004, TO THE
REASONS FOR DECISION OF THE MPUMALANGA REGIONAL MANAGER**

Introduction

1. The appellants received the reasons for the Mpumalanga Regional Manager of the Department of Mineral Resources' (Regional Manager) (DMR) decision to approve the Environmental Management Programme (EMPR) (the EMPR ROD) by email from the DMR on 13 June 2019.

2. This document constitutes the appellants' Responding Statement, in terms of regulation 74(8) of the Mineral and Petroleum Resources Development Regulations, 2004, to the EMPR ROD. This Responding Statement is submitted timeously, within 21 days of receipt of the EMPR ROD.
3. The appellants have not received from the DMR any replying submissions by any persons whose rights may be affected by the appeal, including, for example, replying submissions by Atha-Africa Ventures (Pty) Ltd (Atha). In terms of regulation 74(8), the DG is required to dispatch any such replying submissions to the appellants and request the appellants to respond thereto in writing within 21 days of receipt. The appellants hereby strictly reserve their rights to respond to any such replying submissions, as they are entitled to do in terms of regulation 74(8), when called upon by the DMR to do so.
4. In this Responding Statement, the appellants deal with the following three documents which appear in the EMPR ROD:
 - 4.1. The record of decision regarding Atha's EMPR (the MEM ROD), which is attached marked 'Annexure T';
 - 4.2. An internal DMR memorandum addressed to the Director-General (DG) requesting him to consider the refusal of Atha's application for a mining right ('the Refusal Memorandum'), which is attached marked 'Annexure U'; and
 - 4.3. An internal DMR memorandum addressed to the DG requesting him to consider the granting of Atha's application for a mining right ('the Granting Memorandum'), which is attached marked 'Annexure V'.
 - 4.4. An internal DMR memorandum addressed to the Minister of Mineral Resources (the Minerals Minister) requesting him to consider withdrawing the decision of the DG to grant a mining right to Atha to amend certain conditions of the granting ('the Withdrawal Memorandum'), which is attached marked 'Annexure W'.
5. In Part B of their Statement of Grounds of Appeal (the Appeal), the appellants set out a detailed chronology of key events.
 - 5.1. In paragraph 30 thereof, the appellants explain that Atha submitted its Original ESIA/ESMP to the DMR on 18 October 2013.

- 5.2. In paragraphs 38 to 40, the appellants detail and attach a letter by the DMR dated 4 February 2014 rejecting Atha's Original ESIA/ESMP (Annexure J to the Appeal), which in turn attached a letter of comments by the DWA on that ESIA/ESMP dated 9 January 2014 (Annexure K to the Appeal).
- 5.3. In paragraphs 41 and 42 the appellants explain that, in order to address the concerns of the DMR and the DWA, EcoPartners and Atha identified alternative surface layouts and commissioned further specialist studies. On 4 March 2014 Atha submitted a revised ESIA/ESMP to the DMR (the Approved ESIA/ESMP; Annexure B to the Appeal).

The MEM ROD (Annexure T)

6. The MEM ROD is not new to the appellants. A version of the MEM ROD was attached to the appellants' Appeal as Annexure R. As stated in paragraph 61 of the Appeal, the MEM ROD was compiled by the DMR for the purpose of obtaining the Regional Manager's '*agreement to refuse the EMPR*' (in other words, to provide reasons for the rejection of the EMPR by the Regional Manager).
7. Unlike the version of the MEM ROD attached to the Appeal (Annexure R) (see paragraph 63 of the Appeal), the version of the MEM ROD provided as part of the EMPR ROD (Annexure U) was signed by the Regional Manager, on 16 May 2014, in approval of the recommendation to reject the EMPR (p. 8). (Annexure U was also signed, on 15 May 2014, in support of the rejection of the EMPR by the Mpumalanga Deputy Director: MEM, the Mpumalanga Assistant Director: MEM, and the Mpumalanga Environment Officer.)
8. Annexure U is incomplete in that p. 5 / 2851 of Annexure R does not appear in Annexure U.
9. The MEM ROD explains the same timeline set out in paragraph 8 above.
 - 9.1. In respect of the Original ESIA/ESMP it states that:

'During the evaluation of the EMP it was found that the majority of the proposed mining activities are located within a water resources (sic), furthermore the application area (i.e. mining right area) falls within the Wakkerstroom Wetland Grassland and an application in terms of Section 49 of the MPRDA has been submitted to this office for the Minister to exercise her discretion in terms of

Section 49 of the MPRDA ... to further prohibit any further prospecting or mining to declare the area as a protected environment'. (p. 1)

9.2. In apparent summary of the DMR's 4 February 2014 letter of rejection of the Original ESIA/ESMP (Annexure J to the Appeal), the MEM ROD states that Atha was directed to address the following:

- *To reassess the surface layout design in order to re-position the proposed infrastructure to an environment which is not sensitive.*
- *To provide the environmental emergencies and remediation plan and the procedures for the remediation of the environmental related emergencies that might arise during the operation of the mine as a result of the proposed mining activities.*
- *To provide a detailed rehabilitation plan for all components at the mine with the detailed methods of decommission (sic) each mining component and proposed mitigation or management strategy (sic) to avoid, minimize and manage residual or latent impacts.*
- *To provide the cost for capacity to rehabilitate and manage the negative impacts on the environment.*
- *To provide the list of aspects that will be monitored, frequency as well as the plan which shows the monitoring points.*
- *To indicate how the decant post closure will be managed.*
- *To address the concerns from the [DWA] and communicate results with DWA'. (p. 2)*

9.3. The MEM ROD states that the revised ESIA/ESMP that Atha submitted to the DMR on 4 March 2014 (the Approved ESIA/ESMP) *'fails to provide a sustainable measure to mitigate the impacts of the proposed mining activities on the identified wetlands, as such the proposed measures provided by the applicant in the revised EMP cannot be considered reliable to remedy the cause of pollution or degradation as required in terms of section 39(3)(d)(iii) of the Act. It is for this reasons that the current EMP as revised and submitted on 04th March 2014 does not meet the approval criteria as set out in Section 39(4)(a) of the Act' (p. 2; my emphasis).*

9.4. In elaboration, the MEM ROD provides further that:

'SECTION 39(3) (b)(i)

...

Read together Regulation 50 (c) – An assessment of the nature, extent, duration, probability and significance of the identified potential environmental impacts of the proposed mining operation, including the cumulative environmental impacts.

...

*(Reg. 39 (4) (b) (ii)). According to the comments from the Department of Water Affairs the area applied for is situated within the national freshwater ecosystem priority area. **This is also supported by the information provided in the specialist***

report utilized to compile the EMP. The greatest concern regarding the freshwater ecosystem is the potential impact of the mine on water resources as a result of underground water reduction due to dewatering activities and ground discards facility. Both the cone of depression and the ground water contamination plume extend to wetland. The Department of Water Affairs also indicated that the mitigation measures provided are not sustainable. As such the Department of Water Affairs does not support the project (see copy of the comments attached as Annexure C). (pp. 3-4; my emphasis)

'SECTION 39 (3) (d)

Read together with Regulation 50 (e), (f) and (i), and Regulation 51 (b) (i), (ii) and (iii), a description of the manner in which it is intended to modify, remedy, control or stop any action, activity, or process which causes pollution or environmental degradation, and contain or remedy the cause of pollution or degradation and migration of pollutants, taking into cognizance any prescribed waste standard, management standards or practices.

- Measures to either, modify, remedy, control or stop any actions, activities, processes leading to, or causes of, pollution or degradation have been provided against the identified impacts of each of the aforesaid main mining activities to verify completeness (Regulation 50 (e) and 51 (b) (i)). However, the proposed measures provided for the management of impacts towards water resources (i.e. wetlands, streams) cannot be considered reliable to contain or remedy the cause of pollution or degradation resulting from the proposed mining operations.
- The EMP proposed that offset mitigation will be employed in order to address the impact in relating to the wetlands that are to be destroyed. The proposed offset mitigation measure cannot be considered reliable due to the following reasons:
 - o The area which the application relates to is mostly characterized by wetlands and rivers. The aforesaid water bodies form an integral part of the fresh water system and has also been identified as a source of fresh water supply for the country.
 - o The wetland grassland existing with the application area includes the headwaters of three of South Africa's twenty-two primary catchments. These are the Vaal, Tugela and Pongola Catchments.
 - o In addition to the above, the area applied for comprises of irreplaceable sites that are characterized by highly threatened species and large intact ecosystem. The loss or transformation of this area could preclude the meeting of specific biodiversity conservation targets within the Mpumalanga Biodiversity Conservation Plan.
- Based on the above it is deemed impossible to offset the entire functioning of the fresh water system within the area in question, this also includes the biodiversity thereof.
- The EIA/EMP also revealed that decant formation as a result of the underground operation will also occur and such decent will be managed through the water treatment plant facility. The aforesaid measure is not considered environmentally sustainable, in that the, construction thereof will adversely impact the existing sensitive environment.
- In view of the above, the intended underground operation if allowed to continue without associated infrastructure as proposed over the wetland

areas, will not sustainably benefit the environment due to the anticipated impacts thereof (i.e. migration of decant water).

- The proposed measures are reconcilable with the technical and supporting information attached as appendices however not sustainable due to the sensitivity of the environment (Reg. 50 (i) and Reg. 51 (b) (vii)).
- The measures will not contain or remedy the cause of pollution or degradation and migration of pollutants regarding cumulative impacts considering the sensitivity of the environment within the area applied for as indicated above Reg. 50 (c).

4.2 COMPLIANCE WITH SECTION 39 (4) (A) (II) – FINANCIAL PROVISION

Read together with section 41 (1) – Before the Minister approves the Environmental Management Programme the applicant must make the prescribed financial provision of the rehabilitation of management of negative environmental impacts.

- The applicant undertook to provide a financial provision of R 5, 757, 031.00. However, the said amount cannot be considered to be acceptable since the measures provided are not sustainable to remedy the cause of pollution or degradation considering the sensitivity of the area.

4.3 COMPLIANCE WITH SECTION 39 (4) (a) (iii) – CAPACITY TO MANAGE AND REHABILITATE THE ENVIRONMENT

Read together with section 37 (2) and Regulation 11 (1) (g) (iv) – The applicant has the capacity, or has provided for the capacity, to rehabilitate and manage negative impacts on the environment.

- Although the cost of each of the measures to either, modify, remedy, control or stop any actions, activities, processes leading to, or causes of, pollution or degradation have been determined and provided. It cannot be concluded that the capacity to manage the potential impacts is adequate or not due to the fact that the proposed measures provided for the management of impacts towards the water resources (wetlands and rivers) cannot be considered reliable to contain or remedy the cause of pollution or environmental degradation and migration of pollutants and therefore it can be concluded that the proposed mining activities will result in unacceptable pollution, ecological degradation or damage to the environment and such is contrary to the provisions of section 23(1)(d) of the Act.’ (pp. 5-7; my emphasis)

10. As stated above, the Regional Manager signed and approved the MEM ROD and its findings, as reproduced above. Thus, the MEM ROD records a decision by the Regional Manager that the Approved ESIA/ESMP does not meet the requirements of section 39(3)(d) of the MPRDA and does not comply with the approval criteria in section 39(4)(a) of the MPRDA.

The Refusal Memorandum (Annexure U)

11. The Refusal Memorandum is undated and unsigned, apart from reflecting the Regional Manager’s signature in support of the refusal of the mining right on 16 May 2014 (p. 5).

(The version of the Refusal Memorandum provided as part of the EMPR ROD was not signed by any of the other DMR officials, namely the DG, the Deputy DG: Mineral Regulation, the Chief Director: Mineral Regulation, the Director: Licensing and Legal Compliance, or the Mpumalanga Deputy Director: Mineral Laws.)

12. Section 4.1 of the Refusal Memorandum, under the heading ‘COMPLIANCE WITH APPLICATION AND GRANTING CRITERIA’ and the sub-heading ‘Assessment of Environmental aspects’ reads:

*‘As contemplated in Section 23(1)(d) of the Act, the Regional Manager confirms that in accordance with the Mine Environmental Management report attached hereto as **(Annexure D)**, the applicant does not meet the requirements of Section 23(1)(d) of the act, in that the EMP does not meet the requirements of Section 39(3)(d) of the Act and does not comply with the approval criteria set out in Section 39(4)(a) of the Act’ (p. 2).*

13. Section 7 of the Refusal Memorandum, under the heading ‘RECOMMENDATION’, reads:

‘7.1 In light of the fact that the applicant has not complied with all the requirements of Section 23(1) of the Act, as indicated in paragraphs 4.2 and 4.3 above (sic) it is recommended that you please,

(i) the applicant does not meet the requirements of Section 23(1)(d) of the act, in that the EMP does not meet the requirements of Section 39(3)(d) of the Act and does not comply with the approval criteria set out in Section 39(4)(a) of the Act.

(ii) sign the attached refusal letter.’ (p. 4)

14. There are no annexures attached to the Refusal Memorandum provided in the EMPR ROD, and the EMPR ROD does not contain anything titled ‘Mine Environmental Management report’ and marked ‘Annexure D’. However, read together, it appears that the MEM ROD is the ‘Mine Environmental Management report (Annexure D)’ for purposes of the Refusal Memorandum.

15. Thus, on the basis of the Regional Manager’s 16 May 2014 approval of the MEM ROD’s finding that Atha’s mining right application does not meet the requirements of section 23(1)(d) of the MPRDA on the basis that the EMPR does not meet the requirements of section 39(3)(d) and does not comply with the approval criteria in section 39(4)(a), on the same date the Regional Manager supported the refusal of Atha’s mining right application in the Refusal Memorandum.

Relevant Events

16. In the appellants’ chronology of key events in their Appeal, it is further explained that:

- 16.1. On 19 September 2014 the DG granted Atha a mining right in terms of section 23(1) of the MPRDA, subject to various conditions pertaining to the environment (see paragraphs 26 and 27 of the Appeal, and Annexure C).
- 16.2. Shortly after receiving notification of the grant of the mining right, Atha submitted a request to the DMR on 19 November 2014 for two of the conditions pertaining to the environment to be amended on the basis that they were impossible to abide by, and posed a significant threat to the entire mining project (see paragraph 28 of the Appeal, and Annexure D).
- 16.3. In a letter dated 14 April 2015 the Minerals Minister, in terms of section 103(4)(b) of the MPRDA, withdrew the decision made by the DG on 19 September 2014 to grant a mining right to Atha, and granted a new mining right but without the environmental conditions that had been imposed by the DG (see paragraph 29 of the Appeal, and Annexure E).
- 16.4. On 28 June 2016 the Regional Manager approved the Approved ESIA/ESMP in terms of section 39(4) of the MPRDA (see paragraph 51 of the Appeal).
17. Both the DG's granting letter of September 2014 and the Minerals Minister's granting letter of April 2015 state that the EMPR will be approved by the Regional Manager (see paragraphs 2 and 3 of those letters, respectively).

The Granting Memorandum (Annexure V)

18. The Granting Memorandum was signed in support of the granting of the mining right by the DG (on 19 September 2014), the Deputy DG: Mineral Regulation (on 12 September 2014), the Chief Director: Mineral Regulation Northern Regions (on 11 September 2014), and the Regional Manager (on 10 September 2014) (and not by the Director: Licensing and Legal Compliance, or the Mpumalanga Deputy Director: Mineral Laws). It therefore appears to be the internal memorandum which resulted in the DG's granting letter of 19 September 2014 (see paragraph 17.1 above).

19. Section 4.1 of the Refusal Memorandum, under the heading 'COMPLIANCE WITH APPLICATION AND GRANTING CRITERIA' and the sub-heading 'Assessment of Environmental aspects' reads:

'As contemplated in Section 23(1)(d) of the Act, the Regional Manager confirms that in accordance with the Mine Environmental Management report attached hereto as (Annexure C), although the MEM ROD state that the applicant does not meet the requirements of Section 23(1)(d) of the act, in that the EMP does not meet the requirements of Section 39(3)(d) of the Act and does not comply with the approval criteria set out in Section 39(4)(a) of the Act. It has been established that the matter revolved around mitigation measures and it is therefore proposed that, the following mechanisms/condition be set to address this:

- (i) The granting shall exclude any areas that constitute wetlands*
- (ii) Surface mining or related activity, as well as erection/installation of surface infrastructure shall be prohibited from taking place in any area that constitute wetlands or is deemed to be a sensitive environment*
- (iii) The applicant shall formulate proper mitigation measures relative to the area in consultation with other stakeholders/authorities that administer matters affecting the environment at National and Provincial (Mpumalanga) level.*
- (iv) A proper plan/map shall be submitted with a clear depiction of such exclusions as indicated on (i) above.*

NB: These conditions shall be met prior to the execution of the mining right' (pp. 2-3; my emphasis).

20. Conditions (i) to (iv) above then appeared word-for-word in the DG's September 2014 granting letter (paragraph 6 of Annexure C to the Appeal) with the stipulation that '**NB:** *The abovementioned conditions shall be fulfilled to the satisfaction of the Department before the right can be considered further for notarial execution'*.

The Withdrawal Memorandum (Annexure W)

21. The Withdrawal Memorandum was compiled by the DMR for purposes of requesting the Minerals Minister to consider withdrawing the decision of the DG to grant a mining right to Atha to amend the conditions of the granting (reproduced in paragraph 20 above), and substituting that decision with a decision to grant the mining right but without those conditions, all in terms of section 103(4) of the MPRDA. The Withdrawal Memorandum was signed in approval of the withdrawal and substitution recommendation by the Minerals Minister (on 14 April 2015), as well as by the Deputy DG: Mineral Regulation and the Chief Director Legal Services. Indeed, as stated in paragraph 17.3 above, by letter dated 14 April 2015 the Minerals Minister withdrew the DG's decision to grant a

mining right to Atha, and granted a new mining right but without the environmental conditions that had been imposed by the DG.

22. On the face of the document, the Withdrawal Memorandum appears to be incomplete in that one or more pages following paragraph 2.6 appear to be missing. However, that part of the Withdrawal Memorandum that the appellants do have access to provides, in its paragraph 2.3, that:

'The Directorate Mine Environment compiled the report stating the Environmental Management Programme did not meet the requirements of Section 39 (3) (d) of the Act and therefore the application was recommended for refusal. The reason was that, the applicant did not put measures proposed to address the impact in relating to the wetlands and other water bodies within the area applied for. The recommendation for refusal of the application by Mine Environment Management was not upheld and it was substituted by granting. This application is on Wakkerstroom area, which area is characterized by Wetlands and grassland and as a result has been classified as a highly environmental sensitive area. The Department has embarked on a process of prohibiting mining in the area through the provisions of Section 49 of MPRDA. In order not to interfere with the security of tenure of this applicant and others, section 49 prohibitions will not affect the holders of prospecting rights like Atha Africa Ventures (Pty) Ltd in this case.' (my emphasis)

Conclusion

23. The MEM ROD records a 16 May 2014 decision by the Regional Manager that the Approved ESIA/ESMP does not meet the requirements of section 39(3)(d) of the MPRDA and does not comply with the approval criteria in section 39(4)(a) of the MPRDA. To reiterate, the very same version of the ESIA/ESMP that was the subject-matter of the MEM ROD was, on 28 June 2016, approved the Regional Manager in terms of section 39(4) of the MPRDA.
24. Faced with the MEM ROD, the DG made the decision to grant the mining right subject to conditions directed at the protection of the environment. In terms of those conditions, Atha was prohibited from mining on or under any wetlands. While it is true that this condition rendered mining impossible, this is precisely the point. Faced with the MEM ROD, the DG found that mining on or under any wetlands would be in contravention of section 23(1)(d) of the MPRDA.
25. Paragraph 2.3 of the Withdrawal Memorandum (*'The recommendation for refusal of the application by Mine Environment Management was not upheld and it was substituted by*

granting.) is incorrect insofar as the finding of the MEM ROD was implemented by the DG by way of his environmental conditions.

26. The statement in the Withdrawal Memorandum that '*[i]n order not to interfere with the security of tenure of this applicant and others, section 49 prohibitions will not affect the holders of prospecting rights like Atha Africa Ventures (Pty) Ltd in this case*' misses the point. The proposed mine area is not subject to a section 49 prohibition, and indeed the MEM ROD lists various reasons for its rejection of the Approved ESIA/ESMP over and above the pending section 49 application, including:

26.1. The fact that the mine area is situated in a National Freshwater Ecosystem Priority Area;

26.2. '*the proposed measures provided for the management of impacts towards water resources (i.e. wetlands, streams) cannot be considered reliable to contain or remedy the cause of pollution or degradation resulting from the proposed mining operations*';

26.3. The mine area is mostly characterized by wetlands and rivers which form an integral part of the fresh water system and has also been identified as a source of fresh water supply for the country;

26.4. The mine area comprises of irreplaceable sites that are characterized by highly threatened species and large intact ecosystem, the loss or transformation of which preclude the meeting of specific biodiversity conservation targets within the Mpumalanga Biodiversity Conservation Plan;

26.5. The treatment of the anticipated post closure decant through a water treatment plant is not considered environmentally sustainable; and

26.6. The financial provision of R 5, 757, 031.00 cannot be considered to be acceptable since the measures provided are not sustainable to remedy the cause of pollution or degradation considering the sensitivity of the area.

27. In any event, the MEM ROD is the only document in the EMPR ROD which constitutes a detailed assessment of the Approved ESIA/ESMP for purposes of determining whether it should be approved in terms of section 30(4) of the MPRDA. The MEM ROD found that

the Approved ESIA/ESMP does not meet the requirements of section 39(3)(d) of the MPRDA and does not comply with the approval criteria in section 39(4)(a) of the MPRDA. Despite this, on 28 June 2016, the Regional Manager approved the Approved ESIA/ESMP in terms of section 39(4) of the MPRDA. It is therefore patently clear that the Approved ESIA/ESMP does not meet the requirements of section 39(3)(d) of the MPRDA and does not comply with the approval criteria in section 39(4)(a) of the MPRDA.

Relief

28. In the premises the appellants persist in their appeal, and request that the DG: DMR set aside the Regional Manager's approval of Atha's EMPR for its proposed Yzermyn Mine.

SIGNED AND DATED AT CAPE TOWN THIS 15TH DAY OF JULY 2019.



CENTRE FOR ENVIRONMENTAL RIGHTS

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Appeal Ref. No.: 9/2/4/3/333

DMR Ref. No.: MP30/5/1/2/2/10069MR

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