

IN THE CONSTITUTIONAL COURT OF SOUTH AFRICA

Constitutional Court Case No: 203/2019

SCA 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
DEVELOPMENT**

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
LAND OWNERS' 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*)

FILING SHEET

KINDLY TAKE NOTICE THAT the Applicant hereby files the following:

APPLICANT'S REPLYING AFFIDAVIT

Dated and signed at JOHANNESBURG on this the 26TH day of AUGUST 2019.



Mr GF Joubert
Attorney for Applicant
Fasken Attorneys
(incorporated in South Africa
as Bell Dewar Inc.)
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**To: The Registrar of the Constitutional Court
Constitutional Court of South Africa
BRAAMFONTEIN**

**And to: Attorney for First to Eight Respondents
Centre for Environmental Rights**

Tel: 021 447 1647

Care of:

Gildenhuys Malatji Inc
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SERVICE VIA EMAIL

**And to: Attorney for Ninth, Tenth and Twelfth Respondents
Office of the State Attorney**

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SERVICE VIA EMAIL

And to: Eleventh Respondent

Farm Schoongezicht

VOLKSRUST

Mpumalanga Province

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SERVICE VIA EMAIL

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Constitutional Court Case No: 203/2019
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Seventh Respondent
Seventh Applicant in court *a quo*)

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Eighth Applicant in court *a quo*)

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**THE MABOLA PROTECTED ENVIRONMENT
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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)**

APPLICANT'S REPLYING AFFIDAVIT

I, the undersigned



MORGAMBARY MUNSAMY

do hereby declare under oath as follows:

1. I am a major businessman and a Director of the Applicant, Atha-Africa Ventures (Pty) Ltd ("*Atha-Africa*"). I am employed as such at 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 of Catherine Horsfield deposed to on 12 August 2019 on behalf of the first to eighth respondents. The purpose of this affidavit is to reply thereto, in as far as may be necessary, as provided for in Constitutional Court Rule 11(3)(b), alternatively I respectfully apply for leave to file this replying affidavit.
4. The deponent to the answering affidavit seems to have lost sight of the fact that



the two directives in question were not issued by the High Court as part of a fact-specific remedy for the granting of just and equitable relief but were issued on the legal basis of what the High Court regarded as the proper interpretation of section 48(1)(b) of NEM:PAA for the general and future application in all matters where the written permission in terms of that provision is applied for: this is borne out by the judgment itself.

5. This application for leave to appeal concerns constitutional matters which raises arguable points of law of general public importance which ought to be considered by the Constitutional Court - it does not concern the fact-specific merits of the review application that served before the High Court. I will therefore not reply *ad seriatim* to the answering affidavit but limit my reply, in as far as may be necessary, to the points of law and not to the fact-specific merits of the review application that served before the High Court.
6. The first to eighth respondents concede that Atha-Africa's application for leave to appeal concerns at least one constitutional matter, namely aspects of the remedy granted by the High Court in terms of section 8 of the Promotion of Administrative Justice Act 3 of 2000 ("*PAJA*") and the interpretation of section 48(1)(b) of the NEM:PAA.
7. The crucial issue to be determined by this Honourable Court, for purposes of this application for leave to appeal, has been distilled to be whether paragraph 4.3 and paragraph 4.4 of the order made by the Honourable Mr Justice



(Norman) Davis –

- 7.1 created a precedent of general application whenever the Minister of Environment, Forestry and Fisheries and the Minister of Mineral Resources and Energy consider the granting of written permission to an applicant in terms of section 48(1)(b) of the NEM:PAA to mine in a protected environment, in that it laid down the procedures or principles which must be followed in every case – based on the interpretation of that provision by the High Court (which in itself raises a constitutional issue of importance); or
- 7.2 as the first to the eighth respondents now contend, the High Court sought to cater for the particular facts which appeared from the papers in the application for judicial review, and that paragraph 4.3 and paragraph 4.4 of the order are limited in their application only to Atha-Africa and to this particular case – but then also implicating at least the scope and ambit of the remedial power to make such directives under section 8 of the PAJA.
8. In the event that this Honourable Court may find that paragraph 4.3 and paragraph 4.4 of the order made by the Honourable Mr Justice (Norman) Davis created a precedent of general application whenever the Minister of Environment, Forestry and Fisheries and the Minister of Mineral Resources and Energy consider the granting of written permission to an applicant in terms of section 48(1)(b) of the NEM:PAA to mine in a protected environment, both a



constitutional matter and a matter which raises arguable points of law of general public importance which ought to be considered by the Constitutional Court, are engaged and it is in the interests of justice for leave to appeal to be granted.

9. Furthermore, a clarification of the correct interpretation of section 48(1)(b) of the NEM:PAA in its current form will be in the interests of justice. The argument of the first to eighth respondents that the National Environmental Laws Amendment Bill ("*NEMLA*") will have the effect of amending section 48 of the NEM:PAA with respect does not take the issue any further - until such time that *NEMLA* in the unforeseen future has been enacted, section 48 of the NEM:PAA in its current form will have to be interpreted as it stands, and it is therefore in the interests of justice that leave to appeal be granted.
10. Even though the Honourable Mr Justice (Norman) Davis in his judgment refusing leave to appeal (annexure 'PT1') made reference to the particular circumstances of the case, it does not follow that this judgment will not be regarded as or constitutes a precedent of general application. The legal conclusions drawn by the High Court with regard to the sequence in which authorisations should be obtained for a mining project, were the very justification or *ratio* given for the decision as reflected in paragraph 4.3 and paragraph 4.4 of the order.
11. The first to eighth respondents regard paragraph 4.3 and paragraph 4.4 of the



order to be defensible as a matter of legal principle, and in doing so by implication concede that paragraph 4.3 and paragraph 4.4 of the order created a precedent or legal principle of general application.

12. I have noted with regret that my attorney of record erroneously, instead of the judgment and order of the High Court (copies of which are attached as annexure "CH1" and "CH2" to the answering affidavit) attached the judgment and order of the Honourable Mr Justice (Norman) Davis when he refused the application for leave to appeal in terms of section 17(1) of the Superior Courts Act 10 of 2013 as annexures 'PT1' and 'PT2' to my founding affidavit. I respectfully request the Honourable Court to grant condonation for that omission.

13. I confirm that the Water Tribunal on 22 May 2019 dismissed the statutory appeal in terms of section 148(1) of the National Water Act 36 of 1998 against the granting to Atha-Africa of a water use licence ("the WUL appeal"). I repeat that this application for leave to appeal is not concerned with the fact-specific merits of the review application that served before the High Court, but rather with the points of law as set out in my founding affidavit. I respectfully submit that the fact that the Water Tribunal has since dismissed the administrative appeal has no relevance to the points of law now before this Honourable Court nor does it have any bearing on the issue whether or not the judgement in the High Court creates a precedent with regard to the proper interpretation and application of section 48(1)(b) of the NEM:PAA.



14. In the result I respectfully pray that leave to appeal be granted to address the implicated constitutional principles and to advance efficient and effective public administration.



Deponent: M. MUNSAMY

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 sandton on this 26th day of AUGUST 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:

KOKETSO LEBOHANG MOLOPE
Commissioner of Oaths Ex Officio
Registered Attorney R.S.A.
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Inanda Greens Business Park
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P.O. BOX 781218, SANDTON, 2146

"PT 1"

50779/2017-jdt
2019-01-22

1

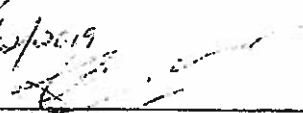
JUDGMENT

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

CASE NO: 50779/2017

DATE: 2019-01-22

DELETE WHICHEVER IS NOT APPLICABLE
(1) REPORTABLE: YES/NO.
(2) OF INTEREST TO OTHER JUDGES: YES/NO.
(3) REVISED. ✓
DATE 27/02/2019
SIGNATURE 

10 In the matter between

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

First Applicant

GROUNDWORK

Second Applicant

EARTHLIFE AFRICA, JOHANNESBURG

Third Applicant

BIRDLIFE SOUTH AFRICA

Fourth Applicant

ENDANGERED WILDLIFE TRUST

Fifth Applicant

20 **FEDERATION FOR A SUSTAINABLE
ENVIRONMENT**

Sixth Applicant

**ASSOCIATION FOR WATER AND
RURAL DEVELOPMENT**

Seventh Applicant

BENCH MARKS FOUNDATION

Eighth Applicant

and

MINISTER OF ENVIRONMENTAL AFFAIRS

First Respondent

MINISTER OF MINERAL RESOURCES

Second Respondent



50779/2017-jdt.
2019-01-22

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JUDGMENT

ATHA-AFRICA VENTURES (PTY) LTD

Third Respondent

THE MABOLA PROTECTED ENVIRONMENT
LANDOWNERS ASSOCIATION

Fourth Respondent

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

Fifth Respondent

10

JUDGMENT (LEAVE TO APPEAL)

DAVIS (J):

The main application dealt with a review of the decisions of the Minister of Environmental Affairs and the Minister of Mineral Resources to permit coal mining activities in a protected wetlands area. At issue was the interpretation and application of section 48(1)(b) of the National Environmental Management Protected Areas Act 157 of 2003 ("NEMPAA"). In the main application I handed down the judgment and
20 orders on 6 November 2018. For the present purposes I shall refer to the parties as in the main application.

Initially the statutory respondents were the two Ministers in question. Yesterday, that is the day before the hearing of this application, the state attorney representing those two respondents by way of a notice dated 21 January 2019 withdrew their application for leave to appeal and tendered the wasted costs occasioned by such application. The initial third respondent persists with its separate application for leave to appeal.

In the judgment of 6 November 2018 and at the conclusion thereof I granted orders whereby the Minister's decisions and permissions were set aside and the application for permission to conduct the commercial mining in the Mabola Protected Environment was referred back to the Ministers. These decisions are not attacked.

I further directed that in reconsidering the third respondent's application for written permission, the ministers were directed to consider all relevant considerations, including the interest of local
10 communities and the environmental principles referred to in section 2 of National Environmental Management Act 107 of 1998. That direction is also not attacked and neither is the direction to comply with sections 3 and section 4 of the Promotion of Administrative Justice Act 3 of 2000. What the third respondent sees to attack or seeks leave to appeal against are the directions in paragraph 4.3 and 4.4 of my order.

In paragraph 4.3 I directed that the decisions in terms of section 48(1)(b) of NEMPAA be deferred until the finalisation of the applicant's statutory appeal to the Director General: Department of Mineral Resources in terms of Mineral and Petroleum Resources
20 Development Act 82 of 2000 and an appeal to the Water Tribunal regarding the Water Use License in terms of National Water Act 36 of 1998. At the time that the main application was heard both these appeals were pending.

It is further true as set out in the judgment and which finding was not attacked that the Water Tribunal appeal is an appeal in the wide

sense in respect of which new submissions, considerations and expert evidence will be tendered and considered. Both these aspects, namely the consent in terms of the Mineral Resources Development Act and the Water Use License impact on the third respondent's rights, including its application for permission to conduct commercial mining activities in the protected environment.

I have set out in the judgment why, particularly in the circumstances of this case, logic dictates that those two processes be finalised prior to consideration of the permission to conduct commercial
10 mining activities. Despite arguments to the contrary regarding my interpretation of the act and despite arguments that the statutes permit parallel processes to be followed, I have not heard argument to the effect that it would be illogical, improper, impractical or not in the interests of justice to wait until those decisions and processes have been finalised and concluded.

Similarly, in paragraph 4.4 of my order I directed that the consideration of the granting of permission be deferred until a management plan for the Mabola Protected Environment has been concluded. Without doing injustice to the argument against that
20 direction, Mr Oostenhuizen SC who appeared for the third respondent, argued that there is no need to wait for the implementation or formulation of a management plan and that the act does not provide therefor and that the Ministers can add conditions to whatever consent they give.

The argument however does not detract from the position set

out in paragraph 11.5.5. of my judgment regarding the importance of the impact of such a management plan. I am of the view that the directions, particularly in this case, firstly meet the requirement of rendering my initial order effective, secondly would lead to just and equitable results and thirdly did not constitute any improper exercise of a discretion. In fact, I have not heard any argument suggesting anything of that nature.

Even if Mr Oosthuizen SC or his client might differ from my interpretation of the statute, I have not been convinced that in the present instant the third respondent has satisfied the section 17(1)
10 requirement in the Superior Courts Act, by either indicating that there is a reasonable prospect that on appeal a court of appeal will amend or, as contended for, completely delete the deferment directions contained in paragraphs 4.3 and paragraph 4.4. of my order.

Accordingly, the test required for the granting of leave to appeal has not been satisfied. I therefore make the following order:

- 1) The third respondent's application for leave to appeal is refused with costs, including the costs of two counsel.
- 2) The state respondents are ordered to pay the wasted costs occasioned by their application for leave to appeal as contained in
20 their tender of 21 January 2019.

