

**DR PIXLEY KA ISAKA SEME LOCAL MUNICIPALITY  
MUNICIPAL APPEAL AUTHORITY**

In the appeal:

<b>EARTHLIFE AFRICA JOHANNESBURG</b>	<b>First Appellant</b>
<b>BIRDLIFE SOUTH AFRICA</b>	<b>Second Appellant</b>
<b>MINING AND ENVIRONMENTAL JUSTICE COMMUNITY NETWORK OF SOUTH AFRICA</b>	<b>Third Appellant</b>
<b>ENDANGERED WILDLIFE TRUST</b>	<b>Fourth Appellant</b>
<b>FEDERATION FOR A SUSTAINABLE ENVIRONMENT</b>	<b>Fifth Appellant</b>
<b>BENCH MARKS FOUNDATION</b>	<b>Sixth Appellant</b>
<b>ASSOCIATION FOR WATER AND RURAL DEVELOPMENT</b>	<b>Seventh Appellant</b>
<b>GROUNDWORK</b>	<b>Eighth Appellant</b>
and	
<b>GERT SIBANDE DISTRICT JOINT MUNICIPAL PLANNING TRIBUNAL</b>	<b>First Respondent</b>
<b>ATHA-AFRICA VENTURES (PTY) LTD REPRESENTED BY THE PRACTICE GROUP (PTY) LTD</b>	<b>Second Respondent</b>

Directed to:

**THE MUNICIPAL APPEAL AUTHORITY**

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**APPELLANTS' SUBMISSIONS**

**IN TERMS OF SECTION 165 OF THE SPATIAL PLANNING AND LAND USE MANAGEMENT (SPLUM) BY-LAW FOR THE DR PIXLEY KA ISAKA SEME LOCAL MUNICIPALITY**

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## INTRODUCTION

1. This is an appeal of the decision taken by the First Respondent (“the District Municipal Planning Tribunal”) dated 29 April 2019 by Resolution: 12/2/1/10/3 (GSDM Ref no. 12/2/1) (“the decision”). The decision approved the Second Respondent’s (“Atha”) application (“the application”) in respect of Portion 1 of the farm Yzermyn 96 HT (“the subject property”):
  - 1.1 In terms of the provisions of Regulation 18 of the Spatial Planning and Land Use Management Act, 2013 (“SPLUMA”) Regulations to change the use of land; and
  - 1.2 For the incorporation of the land use rights associated with the subject property into the Volksrust Town Planning Scheme, 1974.<sup>1</sup>
2. The effect of the decision was a rezoning of an environmentally sensitive area from agriculture to enable mining.
3. This appeal is submitted by the Centre for Environmental Rights NPC (“CER”) on behalf of a coalition of eight civil society and community non-profit organisations (“the Appellants”) as cited above.
4. The Appellants submit this appeal in their respective individual interest as well as in the public interest. The Appellants comprise non-profit environmental and environmental justice organisations representing communities affected by mining activities in South Africa and by the degradation of the environment associated therewith. Their objectives include environmental conservation, environmental justice and advancing the rights of those who are most vulnerable to the effects of environmental degradation and injustice. Their objectives include protecting the environment, and the people who depend on it for their health, well-being and livelihoods.
5. The Appellants’ interest in the matter stems from the environmental and hydrological significance of the area in respect of which land-use change was sought and approved.
6. The mining right in respect of the subject property is held by Atha. Atha intends to construct an underground coal mine on the subject property (the “proposed Yzermyn Underground Coal Mine” or “proposed Yzermyn mine” or “proposed mine”).
7. The subject property, which is situated in a protected area buffer zone, lies adjacent to the Mabola Protected Environment (“Mabola”) near Wakkerstroom, Mpumalanga. The subject property is a triangular area wedged between (and on the boundaries of) two properties which form part of Mabola – the significance of which is explained in these submissions.
8. Most of the surface workings of the proposed Yzermyn mine border the protected area. However, the underground mining activities, and certain surface workings and infrastructure (notably boreholes and pipelines) will fall directly within the protected area. The proposed mine area – surface and underground activities - also corresponds with various wetlands.

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<sup>1</sup> Refer to the application letter dated 4 April 2018.

9. The land-use change that is sought through Atha's application will consequently have a wide-ranging and significant impact on the environmental uniqueness of the area, water resources, and the essential water services that the area feeds into, of the proposed mine and its surrounds.
10. Furthermore, the application constitutes a development application affecting the national interest, as envisaged by section 52 of the SPLUMA. The effects of the proposed land use change will traverse matters within the exclusive functional area of the national sphere in terms of the Constitution (specifically Schedules 4 and 5) as well as strategic national policy objectives, as it pertains to a priority water ecosystem area.
11. The contents of the following documents form part of the Appellants' submissions in the appeal:
  - 11.1 The Appellant's Notice of Appeal in terms of section 142 of the SPLUM by-law, read with section 51 of SPLUMA (filed on 3 July 2019), which contains the grounds of appeal;
  - 11.2 The Appellant's Supplementary Notice of Appeal in terms of section 143(2) of the SPLUM by-law (filed on 31 July 2019), which contains the supplementary grounds of appeal; and
  - 11.3 The Appellant's Objection (including its annexures) dated 30 May 2019 to Atha's application (Annexure A to the Notice of Appeal) ("Appellants' Objection").
  - 11.4 Further, the Appellants' letter of response (dated 16 July 2018) to Atha's letter (dated 27 June 2018) in reply to the Appellants' Objection ("Appellants' Letter of Response").
12. Copies of all case decisions referred to in these submissions are attached hereto as **Annexure A**.

## **PART A: POINT IN LIMINE**

### **The decision of the District Municipal Planning Tribunal is unlawful and invalid<sup>2</sup>**

13. A decision in relation to Atha's application was taken by a duly constituted Dr Pixley Ka Isaka Seme Local Municipality Joint Planning Tribunal on 14 November 2018. The Local Planning Tribunal resolved to dismiss the application. That decision stands unless reviewed and set aside by a court of law.
14. This is trite law as demonstrated by the following authorities:
  - 14.1 In *Oudekraal Estates (Pty) Ltd v City of Cape Town and Others [2004] 3 All SA 1 (SCA)* the Supreme Court of Appeal held:

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<sup>2</sup> First ground of appeal in Appellants' Notice of Appeal.

*“(para 26): But the question that arises is what consequences follow from the conclusion that the Administrator acted unlawfully. Is the permission that was granted by the Administrator simply to be disregarded as if it had never existed? In other words, was the Cape Metropolitan Council entitled to disregard the Administrator’s approval and all its consequences merely because it believed that they were invalid provided that its belief was correct? In our view it was not. Until the Administrator’s approval (and thus also the consequences of the approval) is set aside by a court in proceedings for judicial review it exists in fact and it has legal consequences that cannot simply be overlooked. The proper functioning of a modern state would be considerably compromised if all administrative acts could be given effect to or ignored depending upon the view the subject takes of the validity of the act in question.”*

14.2 Lord Radcliffe put it thus in *Smith v East Elloe Rural District Council [1956] AC 736 (HL) 769-70:*

*“An [administrative] order...is still an act capable of legal consequences. It bears no brand of invalidity upon its forehead. Unless the necessary proceedings are taken at law to establish the cause of invalidity and to get it quashed or otherwise upset, it will remain as effective for its ostensible purpose as the most impeccable of orders.”*

14.3 In *MEC for Health, Province of Eastern Cape NO and Another v Kirland Investments (Pty) Ltd t/a Eye & Laser Institute 2014 (3) SA 219 (SCA)* the Supreme Court of Appeal dealt with the issue as follows- per Pasket AJA (as he then was):

*“(para 22): I therefore conclude that Boya could not validly take the view that because the decisions taken by Diliza were invalid, he could treat them as nullities and formally revoke them. For as long as the decisions taken by Diliza had not been set aside on review they existed in fact and had legal consequences. As Boya had no authority arising from the empowering legislation to revoke final decisions already taken – much less in the absence of a hearing being granted to Kirland Investments – he was, in relation to the decisions taken by Diliza in her capacity as acting superintendent-general, functus officio.”*

14.4 *Cora Hoexter Administrative Law in South Africa (2 ed) (2012)* at 278 put the situation thus:

*“Ordinarily, however, the administrator will be functus officio once a final decision has been made and will not be entitled to revoke the decision in the absence of statutory authority to do so.”*

15. The above authorities demonstrate that it was not open to anyone simply to ignore a decision already taken by the Local Planning Tribunal on 14 November 2018, i.e. the resolution to dismiss Atha’s application.

16. In paras 2.2 – 2.6 of its Notice to Oppose, the Second Respondent states that:

16.1 the “Gert Sibande District Joint Municipal Planning Tribunal (JMPT)” was the authority that both removed the Second Respondent’s application from the list of application to be considered, and then purportedly considered and granted that application when it was resubmitted to it. This is incorrect. The letter received from the Dr Pixley Ka Isaka Seme Local Municipality (“the Local Municipality”) dated 30 November 2018, and referred to in para 7 of the Appellants’ Notice of Appeal, says that the resolution was made *“during the sitting of Dr Pixley Ka Isaka Seme Local Municipality Joint Municipal Planning Tribunal”* (own emphasis). The Local Municipality’s subsequent letter of 6 May 2019 (subsequently corrected by the Municipality as 12 June 2019) states that it *“serves to confirm the decision of the Gert Sibande District Municipal Planning Tribunal”* (own emphasis).

16.2 In para 2.2 of the Second Respondent’s Notice to Oppose, it asserts that the letter by the Local Municipality dated 30 November 2018 addressed to the parties *“...was not a formal decision for the approval or dismissal of the application by the relevant Tribunal”* and that *“The letter merely stated that the application had been removed from the list of applications to be considered by the Gert Sibande District Joint Municipal Planning Tribunal (JMPT). This was later corrected and reversed by the Municipality.”*

16.3 In its 30 November 2018 letter, the Local Municipality relies on section 90(2)(a) of the SPLUM by-law (“the by-law”) as the basis for the Local Planning Tribunal’s decision to strike Atha’s application off the list of matters that were put up for consideration by it, stating that Atha failed to provide the requisite power of attorney in terms of the by-law.

17. We note that section 92(2) says that the Municipality may refuse to accept an application if, *inter alia*, *“the application is not in the form required by the Municipality or does not contain the documents required for the submission of an application as set out in section 90.”*

18. Section 93(b) instructs the Municipality to notify the applicant of any outstanding information that it may require within the stipulated timeframe, and the applicant to thereafter provide the Municipality with the information or documentation required for the completion of the application within the stipulated timeframe in terms of section 94(1).

19. Notably, section 94 goes on to say the following:

*“(2) The Municipality may refuse to consider the application if the applicant fails to provide the information within the timeframes contemplated in subsection (1).*

*(3) The Municipality must notify the applicant in writing of the refusal to consider the application and must close the application.*

(4) An applicant has no right of appeal to the appeal authority in respect of a decision contemplated in subsection (3) to refuse to consider the application.

(5) *If an applicant wishes to continue with an application that the Municipality refused to consider under subsection (3), the applicant must submit a new application and pay the applicable application fees.*” (own emphasis)

20. On the assumption that the Local Planning Tribunal’s decision was, as the Second Respondent alleges in its notice, “*not a formal decision for the approval or dismissal of the application by the relevant Tribunal*” but rather simply a letter which “*merely stated that the application had been removed from the list of applications to be considered by the Gert Sibande District Joint Municipal Planning Tribunal (JMPT)*”, the Local Municipality’s letter of 30 November 2018 appears to be a written notification of the refusal to consider the application in terms of section 94(3) of the by-law as stated above.
21. Thus, in terms of section 94(3) of the by-law, following written notification of the Municipality’s decision to refuse the application, the Municipality must “close the application”. The applicant has no right of appeal in respect of such a decision, and if it wishes to continue with an application that the Municipality refused to consider under section 94(3), the applicant must submit a new application and pay the applicable application fees.
22. In the light of the abovementioned provisions of the by-law, the Appellants submit the following:
  - 22.1 Firstly, the Second Respondent itself originally regarded the Local Planning Tribunal’s decision, as relayed in its 30 November 2018 letter, as a refusal of the Second Respondent’s application. In the Practice Group’s letter of 8 January 2018 – which constituted the Second Respondent’s notice of appeal – it clearly characterised the Local Planning Tribunal’s resolution as refusing the application based on *locus standi*, and regarded the resolution as an appealable decision, hence the submission of its notice of appeal.
  - 22.2 Secondly, it is submitted that even if the nature of the Local Planning Tribunal’s decision was merely a refusal to accept the application as contemplated in sections 92 and 94(4) of the by-law, and not a decision to refuse the application as contemplated in section 114 of the by-law, the Local Planning Tribunal remains *functus officio*. This is because, according to the by-law, a refusal by the Municipality to consider an application effectively “closes” that application and requires the applicant to submit a new application altogether. The District Municipal Planning Tribunal considered the same application which ought to have been ‘closed’ after the Local Planning Tribunal’s refusal to consider it.
  - 22.3 Furthermore, neither the Second Respondent nor the Local Planning Tribunal has provided the Appellants with any proof of that the Tribunal’s decision was

“corrected and reversed”, as is alleged in para 2.2 of the Second Respondent’s Notice to Oppose.

22.4 The Appellants therefore reiterate that the Local Planning Tribunal’s decision, whether it constitutes a refusal of the application or merely a refusal to accept the application, stands as a final decision on the Second Respondent’s application, unless it is reviewed and set aside by a court of law. Therefore, the subsequent decision by the Gert Sibande Tribunal to approve Atha’s application on 29 April 2019 is unlawful and invalid.

23. In regard to this issue, the Local Municipality addressed correspondence to the Appellants on 25 July 2019, received on 2 August 2019, subsequent to the filing of the Appellants’ Supplementary Notice of Appeal. In that correspondence the Local Municipality stated that the contents of the letter issued by it on 30 November 2018 were not a formal decision of the Joint Municipal Planning Tribunal to dismiss Atha’s application; that the purpose of the letter was to confirm that the application would be removed from the list of applications to be considered by the Joint Municipal Planning Tribunal, until such time that the *locus standi* of the applicant could be confirmed; that the applicant (Atha) subsequently responded, and on the basis, the Local Municipality was satisfied regarding the locus standi of the application; and that the application was thus referred to the Joint Municipal Planning Tribunal for consideration, who issued the resolution which is the subject of this appeal. We respectfully submit that the Local Municipality’s correspondence of 25 July 2019 does not dispose of the Appellants’ first ground of appeal.

24. It is submitted that this point *in limine* (the Appellants’ first ground of appeal) is dispositive of the entire appeal. In the event that the Appeal Tribunal is nevertheless minded to entertain the appeal on its merits, the further grounds of appeal are advanced below.

## **PART B: STATUTORY FRAMEWORK**

25. The legislative framework in general widely defines the environment as encompassing both social and biophysical elements and makes it clear that consideration of the environment includes, as a priority, the needs of present and future generations and communities. It is therefore imperative that any development proposal, such as this application, must pay due respect to the existing environmental framework in which it would be located.

26. Section 24 of the **Constitution** provides that:

*“Everyone has the right –*

*(a) to an environment that is not harmful to their health or well-being; and*

*(b) to have the environment protected, for the benefit of present and future generations, through reasonable legislative and other measures that –*

*(i) prevent pollution and ecological degradation;*

*(ii) promote conservation; and*

*(iii) secure ecologically sustainable development and use of natural resources while promoting justifiable economic and social development”.*

27. In terms of the **National Environmental Management Act**<sup>3</sup> (“NEMA”) “environment” means the surroundings within which humans exist and that are made up of –

*(i) the land, water and atmosphere of the earth;*

*(ii) micro-organisms, plant and animal life;*

*(iii) any part or combination of (i) and (ii) and the interrelationships among and between them; and*

*(iv) the physical, chemical, aesthetic and cultural properties and conditions of the foregoing that influence human health and wellbeing;”*

28. **SPLUMA** recognizes the environmental mandate of local government in its preamble, which states that *“sustainable development of land requires the integration of social, economic and environmental considerations in both forward planning and ongoing land use management to ensure that development of land serves present and future generations.”* (own emphasis)

## **PART C: THE STRATEGIC IMPORTANCE OF THE MINE AREA**

29. The area in which the mine would be located has been recognized in spatial development frameworks and national programmes and policies as falling within a strategically important area from a conservation point of view and a national water supply perspective. These are set out below.

### **C.1 The Mabola Protected Environment**

30. The subject property is situated adjacent to the Mabola Protected Environment (“Mabola”), part of a strategic water source area generating critical water supplies for agricultural, industrial and human use. The Mabola Protected Environment was declared as such in terms of section 28 of the National Environmental Management: Protected Areas Act 57 of 2003 (“NEMPAA”) by way of Provincial Notice 20 on 22 January 2014 (“the Provincial Notice”).<sup>4</sup>

31. In terms of the Provincial Notice the purpose of the declaration of the Mabola Protected Environment is as follows:

31.1 To enable the owners of the land to take collective action to conserve biodiversity on their land and to seek legal recognition therefor;

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<sup>3</sup> Act 107 of 1998.

<sup>4</sup> A copy of the Provincial Notice is attached to the Appellants’ Objection as “**Annexure B**” and a copy of a figure of the mine area, including the subject property, in relation to the Mabola Protected Environment, is attached to the Appellants’ Objection as “**Annexure C**”. The figure in Annexure C was prepared by Vanessa Stone of the WWF-SA.

- 31.2 To protect the area if the area is sensitive to development due to its biological diversity, natural characteristics, scenic and landscape value, and the provision of environmental goods and services;
- 31.3 To protect a specific ecosystem;
- 31.4 To ensure that the use of natural resources in the area is sustainable.

## **C.2 Environmental Management Framework**

- 32. The above declaration came on the back of a report dated June 2011 prepared by SRK Consulting at the instance of the then National Department of Environmental Affairs in partnership with the Mpumalanga Department of Economic Development, Environment and Tourism, together with the Municipality.<sup>5</sup> These three spheres of government had commissioned the development of an Environmental Management Framework<sup>6</sup> (“EMF”), including a Strategic Environmental Management Plan, to support decision making that will ensure the sustainable development and management of the natural resources of the Local Municipality.
- 33. According to the report:
  - 33.1 The area comprising the Local Municipality *“is characterised by many wetlands and pan systems, and is an important water catchment area. Many endemic and threatened grassland species occur in the area and of particular significance are the areas around Wakkerstroom and Luneburg. ... The [area] is also strategically important because it contains the sources of three river systems, including an important source of water for the Gauteng region”* (para 1.2);
  - 33.2 The purpose of the Environmental Management Framework is to serve as a management and decision-making tool that provides authorities with information about the “state of the environment” and the associated planning parameters. It will identify and spatially represent areas of potential conflict between sensitive environments and development proposals thus assisting in integrated social, economic, and environmental factors into planning. The Environmental Management Framework will be incorporated into relevant planning documents such as Integrated Development Plans and other Spatial Development Frameworks (para 1.3);
  - 33.3 It notes that a number of national and provincial laws guide the protection and management of the Local Municipality’s environment (para 1.4). The key laws are:

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<sup>5</sup> This Report is the basis for the Dr Pixley Ka Isaka Seme Local Municipality Environmental Management Framework, June 2011.

<sup>6</sup> Provincial Gazette Extraordinary, No. 2013, 21 February 2012.

- 33.3.1 National Environmental Management Act, 107 of 1998 (“NEMA”);
- 33.3.2 National Environmental Management: Biodiversity Act, 10 of 2004 (“NEMBA”);
- 33.3.3 National Environmental Management: Protected Areas Act, 57 of 2003 (“NEMPAA”);
- 33.3.4 National Forest Act, 84 of 1998 (“NFA”);
- 33.3.5 National Environmental Management: Air Quality Act, 39 of 2004 (“NEMAQA”);
- 33.3.6 National Water Act, 36 of 1998 (“NWA”);
- 33.3.7 Water Services Act, 108 of 1997 (“WSA”);
- 33.3.8 Conservation of Agricultural Resources Act, 43 of 1983 (“CARA”);
- 33.3.9 Mineral and Petroleum Resources Development Act, 28 of 2002 (“MPRDA”);
- 33.3.10 National Heritage Resources Act, 25 of 1999 (“NHRA”);
- 33.3.11 National Environmental Management: Waste Act, 59 of 2008 (“Waste Act”);
- 33.3.12 Development Facilitation Act, 67 of 1995 (“DFA”);
- 33.3.13 Provincial Government: Mpumalanga Nature Conservation Act, 10 of 1998;
- 33.3.14 Local Government: Municipal Structures Act, 117 of 1998 (“Structures Act”);
- 33.3.15 Municipal Systems Act, 32 of 2000 (“Systems Act”);

33.4 It outlines the following relevant national and provincial policies and initiatives for the Municipality:

- 33.4.1 Provincial Growth and Development Strategy;
- 33.4.2 Mpumalanga Biodiversity Conservation Plan (being the predecessor to the Mpumalanga Biodiversity Sector Plan dealt with above);
- 33.4.3 Heritage, Greening Mpumalanga and Tourism Programme;
- 33.4.4 Outcome 10: Environmental assets and natural resources that are valued, protected and continually enhanced;
- 33.4.5 National Water Resources Strategy (September 2004);
- 33.4.6 Land Redistribution Policy;
- 33.4.7 Accelerated and Shared Growth Initiative for South Africa;
- 33.4.8 National Spatial Development Perspective;

33.5 In addition, the report sets out International Agreements to which South Africa is party, which provide obligations of relevance to the Municipal area under consideration. These are:

- 33.5.1 Ramsar Convention (1971);
- 33.5.2 Bonn Convention (1979);
- 33.5.3 United Nations Framework Convention on Climate Change (1992);
- 33.5.4 Kyoto Protocol (1997);
- 33.5.5 Agenda 21;
- 33.5.6 Convention of Biological Diversity;
- 33.5.7 Helsinki Rules;
- 33.5.8 SADC Protocol on Shared Waters;

- 33.5.9 The Piggs Peak Agreement;
- 33.5.10 Komati River Basin Treaty;
- 33.5.11 Tripartite Interim Agreement;
- 33.5.12 Interim IncoMaputo Agreement on Water Sharing;
- 33.5.13 Convention of the Control of Transboundary Movements of Hazardous Wastes and their Disposal (Basel Convention) (1994).

33.6 The report further notes, as regards water resources (para 3.2.6), that:

- 33.6.1 The Local Municipality is situated in the headwaters of three major rivers and Water Management Areas, namely the Upper Vaal, Thukela and Usuthu to Mhlatuze (Map 17 of the report);
- 33.6.2 Of further note is that the area of the Local Municipality totally and/or partially contains 14 quaternary catchments<sup>7</sup>;
- 33.6.3 Besides mining activities, discharge from the various Waste Water Treatment Works pose a potential threat to water bodies/streams without treatment;
- 33.6.4 Land uses likely to affect the groundwater quality were identified as human settlements, commercial and subsistence agriculture, commercial forestry and operational mines in the municipal area.

33.7 The total area occupied by wetlands, including dams, within the municipal area, was estimated at 124,734 ha, or 18.9% of the area (para 3.2.7).

33.8 As regards terrestrial ecology (para 3.2.8), the report noted the following:

- 33.8.1 Areas within the municipal area that are rated as Protected or Irreplaceable for terrestrial ecosystems are high lying areas on the eastern side, including the Paardeplaats Nature Reserve, Wakkerstroom vlei, Kastrol Nek and surrounding areas (depicted in Map 22 of the report, also see Map 7 – Environmental Management Zones for the Dr Pixley Ka Isaka Seme Local Municipality and the system of land use management guidelines on page 87 of the EMF);
- 33.8.2 The report noted, then already, the proposed Wakkerstroom Protected Environment area, which involved a process which was being managed by a committee of relevant stakeholders;

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<sup>7</sup> Quaternary catchments are basic units for water resource management in South Africa. They constitute the lowest, i.e. most detailed, level of operational catchment in Department of Water Affairs and Forestry for general planning purposes (Midgley et al., 1994).

- 33.8.3 The Mpumalanga Tourism and Parks Agency had by then already applied to the Department of Mineral Resources for a restriction of any mining related activities in large parts of Wakkerstroom due to the high biodiversity value of the area. This application included the subject property;
- 33.9 According to the Local Municipality's Spatial Development Framework, some 70% of households (urban and peri-urban) received purified water via the bulk water supply system. The remainder of the population residing in rural areas were reliant on borehole water and rivers for potable water (para 3.3.3);
- 33.10 Land capability throughout the area was relatively high. The Water Management Areas provided opportunity for irrigation. It was noted that the wetlands contributed to agriculture including through provision of drinking water and supporting sustainable livelihoods, as well as performed functions such as reducing and preventing erosion through control of storm-water and flooding (para 3.4.2);
- 33.11 The EMF referred to in para 16 above, shows that the subject property falls within "Zone 1: Conservation" Environmental Management Zone. The SRK report noted in table 5-3: Management zone guidelines for the Municipality (p 88) that:
- 33.11.1 Mining is among those "undesirable types of activities" which are "not allowed at all" in areas with an environmental attribute of, inter alia, Zone 1: Conservation; Zone 2: Agriculture; Zone 4: Tourism;
- 33.11.2 Zone 1: Conservation areas included critical biodiversity areas, conservation areas; wetlands and associated buffers; pans and lakes, and associated buffers; river and drainage lines, and associated buffers; other natural biodiversity including biodiversity that is deemed important and necessary;
- 33.11.3 Specialist investigation studies required during the planning phase and authorities' decision making in Zone 1: Conservation areas included ecological specialist study; aquatic specialist study; surface water specialist study (including flood line determination); hydrogeological specialist study; wetland delineation and functionality;
- 33.11.4 Zone 2: Agriculture areas included areas of high arable potential (Class I); areas of high to moderate arable potential (Class II); areas of moderate arable potential (Class III); areas of high grazing potential (Class V); areas of moderate grazing potential (Class VI);
- 33.11.5 Specialist investigation studies required during the planning phase and authorities' decision making in Zone 2: Agriculture areas included land capability specialist study and agricultural economics specialist study;

33.11.6 Zone 4: Tourism areas included cultural landscapes, heritage and archaeological sites; potential eco-tourism areas such as Protected/Conservation areas, Conservatories and Important Birding Areas;

33.11.7 Specialist investigation studies required during the planning phase and authorities' decision making in Zone 4: Tourism areas included heritage impact assessment; tourism specialist study; socio-economic specialist study.

33.12 The report further noted that land use management guidelines were linked to each of the Environmental Management Zones, in Map 7 of the report, to ensure that future development within the Municipal area took place in a sustainable manner and would not compromise the integrity of environmental resources (para 5.6).

### **C.3 Recognition in Spatial Development Frameworks**

34. The Local Municipality developed and published its Spatial Development Framework ("SDF") dated 30 November 2010. According to the SDF:

34.1 It must guide and inform all decisions of the Local Municipality relating to land use, development and planning of land (para 1, p 1);

34.2 Its status is similar to that of the Municipality's Integrated Development Plan ("IDP"), it is an extension of the IDP, it is required to be implemented in the same manner as the IDP, and it forms part of the IDP's operational strategies (para 2.4, p 7);

34.3 The SDF constitutes various chapters, which represent the methodology used to develop and prepare the SDF. The land use management guidelines (contained in Chapter 4) include strategies, policies and guidelines for each of the land use components. Based on the vision, planning principles and land use management guidelines of the SDF, spatial development strategies or priority areas were formulated for each of the land use components (Chapter 5). The spatial development strategies provide specific guidance with respect to, inter alia, future land uses (para 4.2, p12);

34.4 Environmental conservation, for purposes of the SDF, entails issues relating to general conservation principles, management and protection of various landscapes including the river valleys, wetlands, hinterland and urban areas (para 3.1, p112);

34.5 The area in which the subject property falls is identified as a "*sensitive natural area*" (para 4.1, p 172). This means that it "*should be considered as protected and development proposed in the area should be directed by the different environmentally sensitive aspects as described in the environmental section the SDF. Furthermore, the abundance of conservation and protected areas should be utilised as part of the natural environment to promote the economy and tourism in the*

*municipal area by developing the areas to attract tourists and promote the attractiveness of the municipality". (para 4.1, p 172)*

35. The environmental section of the SDF (contained in Chapter 2, para 5.0, p 65) states that:
  - 35.1 Operational mines pose a significant threat to underground water quality (para 5.6, p 71);
  - 35.2 The 'spreading of coal mining activities in the Wakkerstroom area is of concern as this area is of high conservation value to the extensive wetlands found there. Mining would seriously threaten the integrity of the wetlands and other habitats' (para 5.10.2, p 76);
  - 35.3 The 'high value of the properly functioning ecosystems particularly in terms of water services provides an economic justification for their protection and restoration' (para 5.11, p 79);
  - 35.4 One of the 'key regulating ecosystem services provided by [the] grasslands areas [is] associated with the water environment given the area's importance at the headwater of three major [Water Management Areas]. ... Numerous wetlands ... are centres of biodiversity, act as carbon sinks and are paramount to the hydrological functioning of drainage systems. The services provide water security for the area and also play a critical role as a 'water factory' area with national importance for water security' (para 5.11, p 79);
  - 35.5 The 'available evidence and observation of the situation in other mining areas indicates a high risk of significant unmitigated cumulative impacts from intensive mining' (para 5.11, p 79).
36. With regard to employment and the Local Municipality's economic profile, the SDF states:
  - 36.1 "The municipality has many different economic sectors that contribute to the economy of the area and the district and ultimately the province and the country. These sectors include agriculture, mining, manufacturing, electricity, construction, transport, finance and community services." (page 45)
  - 36.2 Table 13 on page 45 indicates that agriculture contributes 18.85% of the local municipality's total GVA (Gross Value Added), whereas mining contributes 0.92% of the total GVA. (page 45)
  - 36.3 "The results from the above table indicate that the agricultural sector contributes the most to the GVA of the municipal area with community services and trade as second and third highest..." (page 45)

- 36.4 Table 15 on page 47 indicates that there has been a growth in the contribution by the agricultural sector to the GVA from 16.79% in 2006 to 18.85% in 2009; whereas for the same period there was a reduction in the percentage contribution by mining, from 1.05% in 2006 to 0.92% in 2008. (page 47)
- 36.5 The forecast for levels of employment in the different sectors from 2009 to 2011, indicates a growth in employment in the agricultural sector (3238 in 2009 to 3423 in 2011), whereas the mining sector remains the same (48 jobs) for those three years. (Table 18, page 49)
- 36.6 “The role of environmental management, linked to tourism, job creation and economic growth and development cannot be overemphasised.” (Page 112)
- 36.7 “The potential for local economic development initiatives and job creation in sectors such as commerce: small, medium and micro enterprises: agriculture, forestry, tourism, and labour-intensive public works should be promoted.” (page 176)
37. In November 2014, the Gert Sibande District Municipality published its 2014 SDF in which it reiterated statements in an earlier SDF about the importance of conserving the wetlands and grasslands in the Wakkerstroom area, and stated that: *“[O]wing to their crucial role in maintaining the ecological integrity in the area”* and in *“hydrological management, flood attenuation and water quality maintenance”*, the grasslands and wetlands in the Wakkerstroom region *“have a high conservation value and should be protected at all cost.”*<sup>8</sup>

#### **C.4 Recognition in the Mpumalanga Biodiversity Sector Plan**

38. In terms of the Mpumalanga Biodiversity Sector Plan-2014 (“MBSP”)<sup>9</sup>, the subject property is identified as an “Ecological Support Area: protected area buffer zone”. The MBSP categorises these as “areas around protected areas where changes in land-use may affect the ecological functioning or tourism potential of the adjacent protected area” (p 61). The MBSP provides the following Land-use guidelines for protected area buffer zones (p 66):
- 38.1 The desired management objective is “[t]o minimise the impacts of surrounding land-uses on the ecological integrity, character and tourism potential of protected areas”.
- 38.2 As a specific guideline for meeting minimum requirements: “Land-use change applications within the buffer zone may be referred to the protected area manager or ecologist for evaluation.”

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<sup>8</sup> p 112.

<sup>9</sup> The Mpumalanga Biodiversity Sector Plan is a public document.

39. A figure of the proposed mine area, including the subject property, with an overlay of the MBSP, indicating that the subject property is identified in the MBSP as an “Ecological Support Area: protected buffer zone” was intended to be attached to the Appellants’ Letter of Response as “**Annexure F**”. However, another figure was erroneously attached. The correct figure is attached hereto as **Annexure B**<sup>10</sup>.
40. The broader mine area is depicted in the MBSP as falling within areas largely classified as “Irreplaceable Critical Biodiversity Areas” and “Optimal Critical Biodiversity Areas”. An “Irreplaceable Critical Biodiversity Area” is an area which is “considered critical for meeting biodiversity targets and thresholds ...which are required to ensure the persistence of species and the functioning of ecosystems”. An “Optimal Critical Biodiversity Area” has an irreplaceability of less than 80% but collectively with other such areas it incorporates the most biodiversity in the smallest area and therefore provides the most cost-effective options for biodiversity.
41. The MBSP is a fine-scale plan that identifies a province-wide network of Critical Biodiversity Areas (CBAs) and Ecological Support Areas (ESAs) that:
- 41.1 Achieve national and provincial biodiversity targets on the least amount of land possible;
  - 41.2 Have the least conflict with other forms of land-use;
  - 41.3 Favour areas that are important for freshwater ecosystems and water security;
  - 41.4 Promote adaptation to climate change and connectivity across the landscape.
42. The MBSP was compiled by the Mpumalanga Tourism and Parks Agency in association with the Mpumalanga Department of Agriculture, Rural Development, Land and Environmental Affairs. In his foreword to the MBSP Handbook the MEC, at that time Mr Andries Gumede, stated that: *“The realization is that Critical Biodiversity Areas should remain in a natural state and be managed appropriately in order to meet our commitments to sustainable development and a healthy environment for all. Our natural environment offers us a suite of natural solutions in the face of unemployment, rising poverty and climate change. The Mpumalanga Provincial Government is committed to ensure that the MBSP is implemented by provincial departments and municipalities.”* (p.x).

### **C.5 Recognition as a Strategic Water Source Area**

43. In March 2013, the CSIR completed the Strategic Water Source Areas Report for the World Wide Fund for Nature South Africa (“WWF-SA”). On the basis of this report, in August 2013 WWF-SA published an ‘Introduction to South Africa’s Strategic Water Source Areas’. The following things appear from the latter report:

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<sup>10</sup> The figure in Annexure A was prepared by Vanessa Stone of the WWF-SA.

- 43.1 The area now comprising Mabola and the mine area, as well as Portion 1 of Yzermyn 96 HT, were identified as comprising part of the Enkangala Drakensberg Strategic Water Source Area;
- 43.2 The Strategic Water Source Areas were described as being the 8% of South Africa's land area that provides 50% of our surface water run-off. They 'provide a disproportionate amount of run-off to the rest of the catchment ... Downstream users and ecosystems are dependent on the healthy functioning of these areas to sustain good quality water supplies ... Disrupting water supply from these 16 strategic WSAs would effectively turn off the taps to our economy and seriously impact our food and water security' (p. 14);
- 43.3 The Enkangala Drakensberg Strategic Water Source Area 'supplies water to South Africa's economic hub, Gauteng...' (p. 46). Numerous headwater and mountain streams flow from the study area into rivers that drain into the Assegaai River. The Assegaai River, in turn, flows into the Heyshope Dam, from which water is diverted into the Vaal River System (the Introduction to South Africa's Strategic Water Source Areas report p. 46). Accordingly, the area constituting the mine area and Mabola is a water source of the Vaal River System which, as stated, supplies water to Gauteng<sup>11</sup>;
- 43.4 Following the Strategic Water Source Areas Report referred to above, in April 2015 the Water Research Commission initiated a 3-year project led by the CSIR with the aim of building on the Strategic Water Source Area work. A project reference group, which included scientific experts, senior planners and policymakers within the Department of Water and Sanitation, Department of Environmental Affairs, SANBI, Water Research Commission and SANParks, guided the work and assessed progress. In terms of the Project Report dated March 2018, the entire Mabola Protected Environment is part of the now expanded Enkangala Drakensberg Strategic Water Source Area.

## **C.6 Recognition by the Mining Sector**

44. On 22 May 2013 the 'Mining and Biodiversity Guideline: Mainstreaming Biodiversity into the Mining Sector' was published by the then Department of Environmental Affairs, the Department of Mineral Resources, the Chamber of Mines, the South African Mining and Biodiversity Forum and the South African National Biodiversity Institute (SANBI). The mine area falls within an area which has been identified in the Mining and Biodiversity Guideline as

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<sup>11</sup> Downstream of the Heyshope Dam, the Assegaai River flows into the Usutu River (the "Hydrological Assessment" by the Appellant's first EA Practitioner dated 16 August 2013). The Usutu River flows through Swaziland and, after joining the Pongola River, flows into Mozambique, where it is known as the Maputo River. Accordingly, the health of the Usutu River System is also relevant to South Africa's international obligations to Swaziland and Mozambique.

a Category B area, having the “Highest biodiversity importance” and being at the “Highest Risk for mining”. The significance of the biodiversity features in a Category B area is that (p. 29):

- 44.1 If the existence of the biodiversity features is confirmed in an environmental impact assessment, ‘the likelihood of a fatal flaw for new mining projects is very high because of the significance of the ... ecosystem services’;
- 44.2 Category B areas ‘are viewed as necessary to ensure the protection of biodiversity, environmental sustainability, and human well-being’; and
- 44.3 ‘An EIA ...should fully take into account the environmental sensitivity of the area, the overall environmental and socio-economic costs and benefits of mining, as well as the potential strategic importance of the minerals to the country. Authorisations may well not be granted. If granted, the authorisation may set limits on allowed activities and impacts, and may specify biodiversity offsets...’

#### **C.7 Related legal challenges of the proposed Yzermyn coal mine**

- 45. It is clear from the above submissions that the area in which the coal mine would be situated is unlike other areas in which coal mines might be situated. Apart from anything else, it is to be located in a declared Protected Area.
- 46. The Appellants have, in the circumstances, launched the following legal challenges of the proposed mine:
  - 46.1 A judicial review of the mining right granted to Atha by the Minister of Mineral Resources, which judicial review is pending in the Pretoria High Court;
  - 46.2 An judicial review of the environmental authorisation issued by the Mpumalanga environment department, which judicial review is pending in the Mbombela High Court;
  - 46.3 An appeal of the Water Tribunal’s decision to dismiss the Appellants’ appeal against the water use licence granted to Atha by the Department of Water and Sanitation, KZN, which appeal is pending in the Pretoria High Court; and
  - 46.4 An appeal against the Environmental Management Programme granted to Atha by the Department of Mineral Resources, which appeal is still pending.
- 47. Furthermore, the Appellants successfully applied for the review and setting aside of the decisions by the Ministers of Mineral Resources and Environmental Affairs under the Protected Areas Act to grant Atha permission to mine inside a Protected Environment. Judgment in favour of the Appellants was handed down by the Pretoria High Court on 8 November 2018.

48. In the High Court decisions of *Le Sueur v Ethekwini Municipality*<sup>12</sup> and *Nel v Hessequa Local Municipality*<sup>13</sup>, it was found that it is competent for the municipal sphere of government to regulate environmental functions. This competency is evident in the Local Municipality's publication of an SDF and an EMF, both of which regulate environmental and water considerations.

#### **PART D: THE ENVIRONMENTAL IMPACT OF THE MINE – SCIENTIFIC REVIEWS OF THE ENVIRONMENTAL IMPACT ASSESSMENTS**

49. Reference will be made to five instructive documents in this regard.
50. First, is an ecological assessment conducted by Natural Scientific Services (“NSS”), an ecological and environmental company appointed by Atha’s environmental assessment practitioner as a specialist environmental consultant. NSS made the following finding (at page 269 of its report) as regards Atha’s proposed Yzermyn mine:<sup>14</sup>

“... is fatally flawed, and should be NO GO in terms of Biodiversity. This is largely because of the impact of the proposed underground mining on the supply of water to the surface water resources (due to the de-watering activities) and the potential groundwater contamination. These aspects will have a significant impact on aquatic and wetland ecosystem functioning and biodiversity in a far greater area than the underground mining area. These and other aspects of the mining project are in strong conflict with international, national and provincial legislation, policies and guidelines. A high number of Conservation Important species were detected, and most habitat in the proposed underground mining and surface infrastructure areas was assigned a Very High or High sensitivity”.

51. Second is an ecological wetland assessment (dated June 2014, revised May 2015) conducted by Scientific Aquatic Services (“SAS”), an ecological and environmental company appointed by Atha’s second environmental assessment practitioner as a specialist environmental consultant. SAS made the following finding (at page vi of its report):<sup>15</sup>

“The ATHA Yzermyn Coal Project is located within an area containing extensive wetlands many of which are presently in very good condition. ... The potential for post-closure decant of water from the underground mine void via the adit and/or unsealed exploration boreholes (Delta H, 2014) is of concern, as this will have a long term effect on surface water quality of not only on the wetlands within the study area, but also on aquatic resources within the greater catchment with special mention of the Assegai River. Should it be considered economically feasible to treat the decant

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<sup>12</sup> *Le Sueur and Another v Ethekwini Municipality and Others* (9714/11) [2013] ZAKZPH 6 (30 January 2013).

<sup>13</sup> *Nel and Others v Hessequa Local Municipality and Others* (Case number 12576/2013).

<sup>14</sup> This report, commissioned by Atha, has not been attached hereto as it is voluminous, but the Appellants will provide it to the decision-maker upon request.

<sup>15</sup> This report, commissioned by Atha, has not been attached hereto as it is voluminous, but the Appellants will provide it to the decision-maker upon request.

water post-closure until water quality stabilizes, which could take many decades, to pre-mining water quality standards in such a way as to support the post closure land use, which is envisaged to be protected wilderness, the project would be considered feasible.

...

**Based on the findings of this study, it is the opinion of the ecologists that the project is regarded as having medium-high to high impacts. A high level of mitigation will therefore be required during all phases of the proposed mining project in order to ensure that the ecological integrity of the wetland and riparian resources in the vicinity of mining activities is not compromised or irrevocably altered.**

..."

52. The Appellants commissioned three scientific reviews of the environmental impact assessments commissioned by Atha in respect of the Yzermyn underground coal mine project. One by Ms S Brownlie (a registered Environmental Assessment Practitioner who has practised as an environmental scientist for more than 35 years), August 2016 ("the Brownlie Review"), one by Prof Ingrid Dennis (of the Centre for Water Sciences and Management at the North-West University, South Africa), August 2016 ("the Dennis Review") and one by GCS Water and Environmental Consultants, December 2017 ("the GCS Review").<sup>16</sup> Reference is made to the reports to demonstrate the consequences and irreparable harm that will arise if the land is rezoned and mining activities are permitted to commence on the subject property.
53. The significant impacts identified in the NSS report were confirmed in the Appellants' independent reviews. Outlined below is an overview of each area of potential harm identified in the reviews:

#### Harm to Strategic Water Source Area

- 53.1 As highlighted in section C.5 above, the mine area, including the subject property, comprises part of the Enkangala Drakensberg Strategic Water Source Area – the source of water supply to South Africa's economic hub, Gauteng.
- 53.2 There are severe risks and consequences posed by the construction and proposed mining activity at the Yzermyn mine. The two most severe consequences are the dewatering of aquifers and the decant of contaminated groundwater and acid mine drainage. These impacts must be considered in light not only of the sensitive ecosystems in the proposed mining area but also with regard to the impact on downstream water users. This at a time following severe drought conditions over

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<sup>16</sup> The Reports are available on the Centre for Environmental Rights' website as follows:  
The Brownlie review: <https://cer.org.za/wp-content/uploads/2017/12/Annexure-E.pdf>;  
The Dennis review: <https://cer.org.za/wp-content/uploads/2017/12/Annexure-F.pdf>;  
The GCS review (revised 2017): <https://cer.org.za/wp-content/uploads/2017/12/Annexure-G-Part-1.pdf> and <https://cer.org.za/wp-content/uploads/2017/12/Annexure-G-Part-2.pdf>.  
Full copies will be made available to the decision-maker or any of the other parties on request.

the whole of South Africa during which it has become apparent that the country faces on-going critical water shortages in the face of a rapidly growing population.

#### Dewatering of the aquifers

- 53.3 There are three aquifer systems underlying the mining footprint: localised perched aquifer systems, a shallow weathered Karoo aquifer system and a deep fractured Karoo aquifer system.
- 53.4 Atha intends to conduct its underground mining activities in the deep aquifer. Digging out the deep aquifer would create an inflow of groundwater into the underground mine workings. During the construction and operational phases of the mine, the groundwater will be pumped out of the underground workings. After the cessation of operations, the inflow would be allowed to occur and, over time, the mine voids would fill up/flood.
- 53.5 The groundwater inflow and pumping will result in reduced groundwater levels in the aquifers above and in the vicinity of the mine. This is also called the 'dewatering' of the aquifers.
- 53.6 The NSS ecological assessment assessed the consequent impacts of the dewatering of the aquifers on the wetlands in the surface and underground mining areas and reported the following findings:
- 53.6.1 "This lowering in groundwater level will have a negative impact on all wetlands fed by the shallow aquifer and the springs within the cone of depression. These springs are one of the main sources of water for the wetlands in the area, supplying water during the drier winter months when the wetlands are not fed by rainfall. As the source of water supplying the wetlands is unknown, and the fact that the groundwater levels will be lowered in the shallow and deeper aquifers, one must assume that the wetlands within the cone of depression will be impacted upon and may possibly dry out." (NSS Report; pp 243 and 246);
- 53.6.2 "The decrease in water input to the wetlands within the study area and surrounds, and the resultant reduction in flow, and potential drying up of wetlands will have a HIGH significance on Biodiversity as a minimum of 40% of the underground mining area and surface infrastructure footprint area constitutes wetland habitat. The impact will also extend into and beyond the greater mine lease area." (NSS Report; pp 243 and 246);
- 53.6.3 "The loss or deterioration of the wetlands will extend beyond the study area and will extend into the wetland FEPAs within the mine lease area and the wetland FEPAs and Wetland Clusters in the immediate surrounds ... These

systems are also the start of the catchment that feeds the Assegai River FEPA, and a decline in water input will, therefore, result in a decrease in flow of this river system.” (NSS Report; p 246);

53.6.4 “Approximately 40% [of the vegetation communities identified] within the mine lease area are moisture dependent. ... If the dewatering activities have a major effect on the wetland systems identified, these vegetation communities and the potential Conservation Important species found within these habitats will be affected and may change in structure in the long term.” (NSS Report; p 251);

53.6.5 “Due to the HIGH and long-term (if not irreversible) status of this impact in an area far exceeding the study area, the project should be a NO GO.” (p253) NSS records this impact as having a ‘HIGH’ significance both without mitigation and with mitigation.” (NSS Report; para 4.2, p 242).

53.6.6 The SAS 2015 assessment identified as an impact on “wetland hydrological function” during the operational phase: “[d]ewatering of wetland habitat downgradient of mining activities, leading to loss of water within wetland habitat and altered hydrological patterns” and “[f]ormation of groundwater cone of dewatering, leading to reduced recharge of wetland resources” (page 98), with “HIGH” impacts on the study-area wetlands both unmitigated and with mitigation (pp 99 – 100).

#### Decant of contaminated groundwater and acid mine drainage

53.7 The NSS ecological assessment reports that:

53.7.1 “[Acid mine drainage] represents the most severe impact of coal mining on water resources. ... The elevated location of the mine will lead to drainage of contaminated water away from the mine. Since the ... mine will be located in the headwaters of the Assegai River ... it will threaten more than one water resource and thus users ... in the lower catchment”. (NSS Report; p 255);

53.7.2 Contamination of groundwater will impact on surface water quality downstream. “This contamination will impact on the PES of the wetlands and the eco-services the wetland sic can provide, the main one of which is the maintenance of Biodiversity.” (NSS Report; p 255);

53.7.3 “Severe deterioration in [water quality] can lead to a dramatic decrease in aquatic biota and ceased aquatic ecosystem functionality.” (NSS Report; p 256);

53.7.4 “Impacts of ... contamination on faunal species can include aspects such as a decline in general health, reduction in fecundity rates and birth defects.” (NSS Report; p 259);

53.7.5 The anticipated impact of decant of contaminated groundwater and the resultant impacts on surface water quality, wetlands, aquatic ecology and biodiversity is of ‘HIGH’ significance (NSS’s highest significance rating) both without mitigation and with mitigation (in other words, NSS regards mitigation of this impact as being impossible). (NSS Report; p 254).

53.8 Reference is also made to SAS’s findings in paragraph 51 above.

#### Impact on flora and fauna

53.9 NSS found that the construction of the mine surface infrastructure, the mining activities and the resultant impact on the groundwater will affect the following vulnerable species found in the proposed mine area:

53.9.1 Six floral species at a high risk of extinction in the wild were found by NSS in the study area, and 30 species which are listed as Protected Species under the Mpumalanga Conservation Act, 10 of 1998 have been found during surveys of the mining area; (NSS Report; pp 53-58 and 64-65);

53.9.2 Twenty-one Conservation Important mammals have been recorded previously in the proposed mining area, and eight Conservation Important mammal species, including one Endangered and five Near Threatened species, were found there by NSS; (NSS Report; pp 95-99);

53.9.3 Eighteen Conservation Important bird species have been recorded in or near the proposed mining area, and NSS observed five Conservation Important species during surveys related to the project; (NSS Report; pp 100-103);

53.9.4 Several globally, nationally or provincially Near Threatened reptiles and frogs are also likely to occur at the site; (NSS Report; pp 104-106) and

53.9.5 The proposed mine will fall within an Important Bird and Biodiversity Area (IBA) identified by BirdLife International, which is considered to be “one of the most important IBAs in Africa and ... vital for the conservation of a number of locally- and globally-threatened bird species, as well as the conservation of other fauna and flora”. (NSS Report; pp 213)

#### Harm to local communities

53.10 The greatest environmental impact of the mine is likely to be felt by vulnerable and disadvantaged persons in the area, namely subsistence farmers and poor rural

communities who depend on the natural soil and water resources in the area to sustain themselves.

- 53.11 Water is sourced by farmers in the area from springs which are used for both domestic and livestock watering purposes. There are twenty-three such springs in the project area. The springs are also a water source for the wetlands. The dewatering of the aquifers will have a negative impact on these springs and the people who rely on them.
- 53.12 There are approximately eight homesteads situated on the proposed mining site which are occupied by low-income families with between eight and thirty people living in each homestead. The households generally rely on limited income from a single family member who works on the host farm, as well as on social grants. This community “is vulnerable from a livelihood perspective, as they do not have access to finances or other resources should their current income come to an end (i.e. farm work) or access to natural resources, such as water and grazing land, be prevented”.
54. Allowing even part of this potential environmental damage to occur would be seriously harmful to the environment. In so far as the initial phase of the mining may be confined to the clearing of the indigenous vegetation to make way for the surface infrastructure, it is well known that re-establishing grasslands to their natural state is very difficult if not impossible. If mining is allowed to continue, a damaged environmental scar will be left on the edge of the protected area.

## **PART E: THE APPLICATION**

55. The application for land use change in respect of the subject property states the following in its executive summary:
- 55.1 That Atha-Africa Ventures (Pty) Ltd, a company incorporated and carrying on its business in South Africa (and which is a subsidiary of the Atha Group, a company registered in India), holds the mining right<sup>17</sup>. Atha apparently holds other mining rights as well which are, however, not related to this matter (para 1.3);
- 55.2 That for the purposes of using the subject property for mining and related purposes (the abstraction of thermal coal for the local and export market through means of underground bord and pillar mining), it is necessary to apply to the local municipality for authorisation for such purpose and to incorporate the subject property into the boundaries of the local town planning scheme whilst simultaneously allocating an appropriate land use zoning category to the subject property and providing for

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<sup>17</sup> The mining right is subject to a judicial review before the Pretoria High Court (Case No:73278/15). The application seeks to set aside the decision of the Minister of Mineral Resources to grant a mining right in an area of recognised environmental significance and sensitivity on the basis that it will cause unacceptable pollution and degradation of the environment.

appropriate development controls with regard to the development intentions of the land development applicant (para 1.3);

55.3 The intended mining activities at grade on the subject property (over the short term) will take up a land area of approximately 22.40 ha and will involve the erection and installation of the following structures and infrastructure:

- 55.3.1 Mine Adit (the access to the mine operation);
- 55.3.2 Stockpile Conveyor;
- 55.3.3 Administrative and Operations Facilities (including an office block);
- 55.3.4 Ablution facilities;
- 55.3.5 Workshop;
- 55.3.6 Oil store/gas and chemical store;
- 55.3.7 Washing plant and silt trap;<sup>18</sup>
- 55.3.8 Discard dump above ground reservoir for slurry/coal wash water;
- 55.3.9 Run of mine stockpile site, primary and secondary stockpiles;
- 55.3.10 Parking area;
- 55.3.11 Sewerage plant;
- 55.3.12 Water treatment plant;
- 55.3.13 Pollution control dam;
- 55.3.14 Weigh bridge and office;
- 55.3.15 Perimeter cut off trench and related facilities

(this part ends by, “not an exhaustive list”).

56. As regards land use and zoning, the application simply states that:

56.1 The subject property is situated in an area which may generally be described as being used for bona fide agricultural purposes. The same land use regime applies to the properties in the immediate vicinity. The area is predominantly used for agricultural purposes. The subject property itself is used for a mix of farming activities, including livestock grazing and the cultivation of crops. Typical homesteads (8 in total) and associated yards are scattered over the extent of the subject property, occupied by farm employees and their families. (para 4.1)

56.2 The subject property is not situated within the boundaries of an existing town planning or land use scheme. The town planning scheme of Volksrust is limited with regard to its geographical extent and does not include the subject property within

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<sup>18</sup> It is to be noted that both the coal wash plant and the discard dump were excluded in the Final Environmental Impact Assessment Report (EIAR), following rejection of Atha’s previous EIAR by the Department of Environmental Affairs. Atha has no authorisation to construct either a wash plant or a discard dump.

its current boundaries. The same applies generally to the properties abutting on the subject property.<sup>19</sup> (para 4.2)

56.3 It follows that the subject property does not enjoy any official land use rights associated with a town planning or land use scheme at present.<sup>20</sup> (para 4.3)

57. As regards the development proposal (para 5) the following is stated:

57.1 The land development applicant intends to construct/install a number of structures on the subject property, a list of which is provided in the application. (para 5.3)

57.2 The aforesaid structures and infrastructure are matters which have been alluded to in the official mining right procured by the land development applicant in this matter in terms of the MPRDA. Although the mining right pertains to properties in addition to the subject property, the development proposal which forms the subject of this matter (as part of the application to authorise the use of the land for mining purposes) is limited to the subject property, where such top structures and infrastructure are to be erected. (para 5.4)

58. As regards socio-economic factors and employment, the application indicates:

58.1 Mining plays an important role “in the South African economy and, more particularly, its ability to generate employment and to contribute in a meaningful manner to rural/local economies. The subject property is inherently part of a rural economy [...] having regard to the results of the socio economic study conducted as part of the application for the mining right [...] it is evident that, what is intended on a small part of the subject property (by way of mining activities) will indeed leverage various economic advantages to the benefit of the receiving rural environment, in a positive alignment with the stated objectives and plans forming part of the National Development Plan 2030.” (para 8.1, page 8)

58.2 “The Economic Growth and Development Path prepared for Mpumalanga Province (MEGDP) has as its focal point the creation of decent labour absorbing jobs which will have positive direct, indirect and induced effects on the provincial economy and the living standards of its people. The document confirms that Mpumalanga Government is committed to local economic development, which promotes shared and inclusive growth by the creation of decent local employment opportunities and sustainable livelihoods.”

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<sup>19</sup> This means that any land use and change thereof is regulated by s26(3) and (4) of SPLUMA read with Reg 18 of the SPLUM Regulations.

<sup>20</sup> Yzermyn 96 HT, Portion 1 is, according to a zoning certificate obtained from the Municipality on 20 January 2017, zoned for agricultural uses. That is according to the land use scheme that is currently in place. In this regard, section 26(2) of SPLUMA, read with Schedule 2 thereof would apply, in terms of which there would need to be a public consultation in terms of s26(5) in order to change the current land use scheme.

59. The Report on Socio-Economic Matters, attached as Annexure J to the Application, indicates:

59.1 “There are potentially 576 employment opportunities during the construction and operational phases, and the anticipated lifespan of the mine is calculated at present to be approximately 15 years.” (Annexure J, page 6). Note, later on in the report this figure is limited to the operational phase of the mine. (Annexure J, page 29)

59.2 “The SIA study revealed a variety of social issues raised by key stakeholders. [...] One of the key aspects was the high level of contention in terms of mining activities within the local area, with high biological diversity value areas and a conflict in terms of lack of economic development, and the largely tourism and agricultural-based local economy. The local and regional government drive for development and service provision often seems to contrast with the rural nature of the area and the key activities and sense of place.

[...]

The overall socio-economic impact of the proposed Yzermyn Underground Coal Mine is likely to be directly related to a number of factors including: the impact of the mine on natural resources (and local livelihoods); the degree to which local communities are involved, trained and employed by Atha within the mine operations; and the social upliftment that the mine provides to local communities...” (Annexure J, page 6)

59.3 **“The low skills level within the local communities is indicative that the skills that are required by Atha for the mine are unlikely to be found within the local communities. [...] Without [active engagement in respect of skills development measures in the local community] this project is unlikely to be socio-economically sustainable within the vulnerable socio-economic landscape which currently exists within the proposed project area.”** (Annexure J, page 6). The Report states further that “there are low skills levels within the ADI and therefore the local population may not meet the labour requirements of the mine” (Annexure J, page 29).

59.4 “There are, therefore, a number of positive socio-economic impacts that could result from the proposed project, including the potential for employment of local communities and skills development opportunities [...] There are however, also a number of negative impacts anticipated as a direct result and indirect result of the proposed mine. These could include change in sense of place, loss of environmental and economic assets, and social conflict. [...] The overall impact of the proposed mine, if mitigated correctly, could be positive for the local socio-economic environment. These management and mitigation measures will require dedicated resources from Atha to ensure they are effective. These measures also need to be implemented prior to the commencement of the construction phase and carried out throughout the operational and closure phases of the mine to minimise negative socio-economic impacts, and maximise positive impacts. (Annexure J, page 6)

- 59.5 The occupation and key economic activities in the Local Municipality Area, as outlined in the Socio-Economic Study indicates that while the vast majority of occupations listed as “not applicable” (65%) and the next highest are “unspecified” (29%), 359 people are employed as “craft and related workers” and 148 are employed as “skilled agricultural and fishery workers”. (Annexure J, page 13)
- 59.6 The Report further illustrates there are approximately 160 people living within a 2km distance from the site, 11 865 people live within a 15km distance of the site, and a further 6 852 within a 25km of the site. Thus, within just 25km of the site just less than 19 000 people are likely to be affected. (Annexure J, page 17) This does not include additional downstream communities that will be impacted. Income for families in these areas “is more than likely from working on nearby farms”. (Annexure J, page 19)
- 59.7 Upon closure of the proposed mine, and discontinuation of any employment related to the proposed mine, “[t]he reduction in economic activities within the area is particularly significant for the local population as (within the ADI) as they are currently reliant on subsistence agriculture and seasonal farm and mining work. In addition, locally sourced employees may not be able to move to other areas for mining employment [...] the loss of employment could, therefore, impact the socio-economic environment through the loss of income and livelihoods, and affect this may have on the local economic and quality of life for local populations. [...] The return of the local economy to agriculture and tourism is likely to take 10 years (or longer depending on the degree of impact of the mine on the local physical environment). [...] Tourism currently plays a key role in the local economy, specifically in the Wakkerstroom area. Tourism is also a key economic and social development goal for the Gert Sibande District Municipality, as well as the local municipalities. Tourism activities in the local area rely predominantly on the natural environment of the Wakkerstroom area and include outdoor adventure, birding and cultural/heritage tourism. (Annexure J, pages 34 – 35)
60. As regards the application details (para 7) the following is stated:
- 60.1 The application is submitted to the Local Municipality in terms of the provisions of the Spatial Planning and Land Use Management Act, 16 of 2013, read with Regulations in terms of SPLUMA, 2015, and the provisions of the Spatial Planning and Land Use Management by-Law for, *inter alia*, the Dr Pixley Ka Isaka Seme Local Municipality, 2016 (para 7.1);
- 60.2 The application seeks the following relief:
- 60.2.1 To change the purpose of the land use attaching to the subject property from the existing use of “Agricultural Purposes” as per Schedule 2 of SPLUMA to the proposed dual use of “Agricultural Purposes” and “Mining

Purposes” as also contemplated in Schedule 2 of SPLUMA. The application is brought in terms of Regulation 18(1)(a) of the SPLUM Regulations given that no town planning scheme or land use scheme applies to the subject property (para 7.2 (1));

60.2.2 Under Item 2 (Definitions) to the list of land use purposes published under Schedule 2 of SPLUMA, the term “Mining Purposes” is defined as meaning “...purposes normally or otherwise reasonably associated with the use of land for mining”. It is proposed that the latter shall apply to the affected part of the subject property (para 7.2 (2));

60.2.3 In terms of Regulation 18(3) of the SPLUM Regulations, application is made to the local municipality to determine that the land to which this application relates was previously indeed lawfully used for a purpose listed in Schedule 2 of SPLUMA, i.e. Agricultural Purposes (para 7.2 (3));

60.2.4 Given that the existing Volksrust Town Planning Scheme 1974 (which is defined as a land use scheme for the purposes hereof) applies in part to the affected municipal area in which the subject property is situated, the relief sought includes an application for the incorporation of the land use associated with the subject property into aforesaid town planning scheme as contemplated in Regulation 18(1)(a) of the SPLUM Regulations (para 7.2 (4));

60.2.5 By granting relief contemplated above, the determined lawful use of “Agricultural Purposes” is proposed to be changed to also include “Mining Purposes” and simultaneously, to be incorporated as a land use right in the existing Volksrust Town Planning Scheme 1974 under the zoning category of “Special” (para 7.2 (5));

60.2.6 For the purposes hereof the draft amendment scheme documents for the aforesaid incorporation into the Volksrust Town Planning Scheme 1974 are attached to the application as Map 3 (para 7.2 (6));

60.2.7 For the purposes hereof it is proposed that the notification procedures (public participation) provided for in the local by-law (more particularly, sections 97, 98, 99, 100 and 101 of the said by-law) shall apply as contemplated in Regulation 18(4) of the SPLUM Regulations (para 7.2 (7));

60.2.8 (Para 7.2 (8)) - For the purposes of complying with the provisions of Regulation 18 of the SPLUM Regulations with regard to the aforesaid relief, the following information is placed on record as contemplated in Regulation 18(2) of the SPLUM Regulations, namely:

a) Description of the land to which the application relates

The subject property is described as Portion 1 of the farm Yzermyn 96 HT, Province of Mpumalanga, held under Deed of Transfer T138593/2002. The subject property measures 193.8289 ha in extent.

b) Land use requested and reason therefore

The requested land uses are partly for “Mining Purposes” and for “Agricultural Purposes” as contemplated in Schedule 2 of SPLUMA. The reason for requesting the dual land uses stems from the mining right which attaches to the subject property and the ongoing use of the subject property for agricultural purposes. In order to give effect to the aforesaid mining right it requires of the land development applicant to procure authorisation to use the land for such purpose in combination with the agricultural use, and hence this application.

c) Other information that the municipality may require

Having regard to the provisions of the by-law of the municipality, this application is accompanied by the following:

- i. A report on traffic and access
- ii. A report on geotechnical conditions
- iii. A report on Infrastructure Provision
- iv. A summary of Environmental Considerations
- v. A Socio-Economic Study Report
- vi. Stormwater Management Plan

## **PART F: THE GROUNDS OF APPEAL**

### **F.1 Failure to comply with criteria for consideration and determination of application by Municipal Planning Tribunal (section 53 of the SPLUM by-Law)<sup>21</sup>**

#### ***F.1.1 The procedure followed in processing the application (s53(1)(b) of the by-law):***

61. There has been inadequate, if any, public participation in terms of the public participation requirements envisaged in Regulation 18(4) of the SPLUM Regulations.
62. There has been no notification to interested and affected parties known to the Local Municipality, except the publication of the Notice and placing of Notices at the subject property. This is despite the fact that it is clear to the Applicant and to the Local Municipality

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<sup>21</sup> Objection A in the Appellants’ Objection (pp 29 – 33).

that the Appellants herein are interested and affected parties in terms of section 45(2) of SPLUMA. CER has notified the Local Municipality of the Appellants' interest in the matter on a number of occasions in correspondence dated 25 January 2017, 15 February 2017, and 14 June 2017.<sup>22</sup>

63. In so far as the applicant views the Notice as public participation, this is disputed by the Appellants. Regulation 18(4) of the SPLUM Regulations indicates that public participation procedures for an application in terms thereof are the same as determined by the Local Municipality for a land development and land use application.
64. The Local Municipality's SPLUM by-Law indicates that notification in the media is required for an application for, *inter alia*, rezoning, and for applications that materially affect the public interest (s 98(1)(b) and (i)), it must also be served on each owner of an abutting property (s 99(1)(c)) and must be served on any person who in the opinion of the Local Municipality has an interest in the matter or whose rights may be affected by the approval of the application (s 99(1)(d)).
65. In SPLUMA, in the development principles (s 7(e)(iv)), it states that a principle applying to spatial planning, land development and land use management is the principle of good administration whereby the preparation and amendment of spatial plans, policies, land use schemes as well as procedures for development applications, include transparent processes of public participation that afford all parties the opportunity to provide inputs on matters affecting them.
66. Section 28(2) of SPLUMA also indicates a public participation process is necessary when a land use scheme is being amended.
67. It is submitted that public participation should not be conflated with notification, as Atha seems to do. A notice is wholly inadequate to constitute a public participation and comment procedure. Public participation needs to be meaningful.

***F.1.2 The desirability of the proposed utilization of land and any guidelines issued by the Member of the Executive Council regarding proposed land uses (section 53(1)(c) of the SPLUM by-law):***

68. This section relates to the desirability of the proposed utilisation of the subject property. The proposed utilisation is for the development of surface infrastructure in respect of the proposed Yzermyn underground coal mine. The surface infrastructure would be on the subject property. The underground coal mine would be beneath the subject property as well as adjacent properties.
69. Thus, the impact of the development will be on both the subject property as well as adjacent properties, and properties downstream of this water source area. Yet the application for re-

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<sup>22</sup>This correspondence is attached to the Appellants' Objection as "Annexure D".

zoning is only in respect of the subject property, which is not the only property to be affected by the proposed mining activities. (This is dealt with further in Ground F.4 below.)

70. The subject property falls within an area of environmental and hydrological significance. The area is recognised in spatial development frameworks and national programmes and policies as a strategically important area in terms of environmental conservation and water security. The following policies reflect this:

70.1 National Protected Area Expansion Strategy, 2009 (“NPAES”) identifies the majority of the affected area as a priority area for inclusion as a protected area in terms of NEMPAA. This included the subject property<sup>23</sup>;

70.2 The Dr Pixley Ka Isaka Seme Local Municipality Spatial Development Framework (SDF) published in terms of the Local Government: Municipal Systems Act, 32 of 2002, indicates that the area is a “sensitive natural area” which means that is “should be considered as protected and development proposed in the area should be directed by the different environmentally sensitive aspects described in the environmental section of the SDF. Furthermore, the abundance of conservation and protected areas should also be utilised as part of the natural environment to promote the economy and tourism in the municipal area by developing the areas to attract tourists and promote the attractiveness of the municipality”;

70.3 The environmental section of the SDF indicates:

- Operational mines pose a significant threat to the underground water quality.
- The Wakkerstroom area has high conservation value to the extensive wetlands found there, and the spreading coal mining activities is of concern as mining would threaten the integrity of the wetlands and other habitats.
- The high value of the properly functioning ecosystems particularly in terms of water services provides an economic justification for their protection and restoration.
- The area is of national importance for water security and plays a crucial role as a ‘water factory’ area.

71. Impact on water resources and water security:

71.1 The Atlas of National Freshwater Ecosystem Priority Areas in South Africa (“NFEPA Atlas”)<sup>24</sup>, which informs decisions about land use, indicates that the Wakkerstroom area, within which the mine area (including the subject property)<sup>25</sup> is located, is classified as a priority river and wetland ecosystem. This means that the rivers are still in relatively good ecological condition and should remain in relatively good

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<sup>23</sup> See Annexure G attached, prepared by Vanessa Stone of WWF-SA.

<sup>24</sup> Available at

<http://www.wrc.org.za/Pages/DisplayItem.aspx?ItemID=9576&FromURL=%2FPages%2FDefault.aspx%3F>.

<sup>25</sup> See the figure attached as “Annexure H” to the Appellants’ Letter of Response. This figure was prepared by Vanessa Stone of WWF-SA.

condition to contribute to national biodiversity goals and support sustainable use of water resources (page 14). It also indicates that wetlands and wetland clusters have to be maintained if they are in good ecological condition and rehabilitated to the best attainable ecological condition if they are in a substandard ecological condition. (page 14)

- 71.2 The Mabola Protected Environment is located in a high water yield area, which areas are important “because they contribute significantly to the overall water supply of the country. They can be regarded as our water factories, supporting growth and development needs that are often a far distance away. Deterioration of water quality and quantity in these high water yield areas can have a disproportionately large adverse effect on the functioning of downstream ecosystems and the overall sustainability of growth and development in the regions they support. High water yield areas should therefore be maintained in a good condition (A or B ecological category). This requires minimising land use activities that reduce stream flow in these areas (e.g. plantation forestry), as well as any activity that would affect the water quality (e.g. timber mills, mining, over-grazing). Wetlands also play an important role in these areas, regulating stream flow and preventing erosion.” (NFEPA Atlas page 14)
72. The application makes brief reference to the proposed mine providing employment opportunities in the Local Municipality and surrounding areas. However, it fails to assess the impact that the mine will have on employment opportunities, and the job losses that may happen as a result of the associated environmental destruction, as well as the impacts on downstream water uses.
73. The SDF illustrates that agriculture, and the services sectors provide far more employment opportunities in the Local Municipality than those provided through mining activities. In addition, the application itself indicates that the jobs that may be available at the proposed mine, will most likely not benefit the local community as the requisite skills needed are not possessed by members of the local community.
74. The application fails to highlight sufficiently that the potential jobs that might be available at the proposed mine, will only be available (in varying numbers up to a maximum of 576 cumulatively through construction to operation phases) for the anticipated 15-year lifespan of the mine, and will not be sourced locally. Thus, these jobs are temporary and an appropriate cost benefit analysis would show that the loss of income opportunities far outweighs any benefits in terms of employment opportunities offered by the proposed mine.
75. The proposed Yzermyn mine will cause harm to the adjacent landowners and the natural environment. The impact of the development should be measured against aspects including safety and wellbeing of the community, conservation of the natural and developed environment, the impact on present and future employment opportunities within sectors highlighted for growth in the Municipal SDF, and effect of the application on existing rights. A development is desirable when social, economic and physical circumstances improve for all

the affected parties. As detailed in paragraphs 18 to 35 above, this is not the case in the present application.

76. Thus, the proposed land-use change is irreconcilable with existing land uses on adjacent and abutting properties. The application fails to determine properly the impact that the land-use change, and associated development, will have on the adjacent properties in terms of negative impacts.
77. Given the above captioned negative impacts associated with the planned mining operations, the project being applied for is highly undesirable.

***F.1.3 Investigations carried out in terms of other laws which are relevant to the consideration of the application (section 53(1)(f) of the SPLUM by-law):***

78. Failure to conduct a public participation process (as required by Regulation 18(4) of the SPLUM Regulations);
79. Failure to conduct a public consultation in terms of s 26(5) of SPLUMA for a change of the Local Municipality's current land use scheme;
80. Failure to conduct specialist investigation studies which in terms of the EMF are required during the planning phase and authorities' decision making in Zone 1: Conservation areas, i.e. ecological specialist study; aquatic specialist study; surface water specialist study (including flood line determination); hydrogeological specialist study; wetland delineation and functionality;
81. Failure to conduct specialist investigation studies which in terms of the EMF are required during the planning phase and authorities' decision making in Zone 2: Agriculture areas, i.e. land capability specialist study and agricultural economics specialist study;
82. Failure to conduct specialist investigation studies which in terms of the EMF are required during the planning phase and authorities' decision making in Zone 4: Tourism areas, i.e. heritage impact assessment; tourism specialist study.<sup>26</sup>

***F.1.4 Municipal spatial development framework; applicable local spatial development frameworks; and the policies, principles, planning and development norms and criteria set by national and provincial government (sections 53(h),(i),(n) of the SPLUM by-law):***

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<sup>26</sup> As regards a socio-economic specialist study, this is contained in Annexure J to Atha's application. It is dated 19 August 2013 (5 years prior to the lodgement of the current application). The executive summary therein states that, "There are potentially 576 employment opportunities [from construction to operational phases of the mine] [...]. The low skills level within the local communities is indicative that the skills required by Atha for the mine are unlikely to be found within the local communities." Without [active skills development] the project is unlikely to be socio-economically sustainable within the vulnerable socio-economic landscape which currently exists within the proposed project area. This is repeated in the Conclusion of that report.

83. The SPLUM by-law states that when the Tribunal considers an application submitted to it, it must have regard to, *inter alia*: the integrated development plan and municipal spatial development framework; the applicable local spatial development frameworks adopted by the Municipality; the applicable policies of the Municipality that guide decision-making; and the policies, principles, planning and development norms and criteria set by national and provincial government.

#### Protected environment buffer zone

84. The subject property falls within an environmentally sensitive area which has been designated a protected environment buffer zone, in terms of the MBSP.
85. It is located within biodiversity priority areas that have been identified as protected environmental buffer zones, in **C.4** above.
86. In the circumstances, a land use change would undermine this special status accorded to the subject property.
87. Atha, the applicant, has attached as annexure I to its application, a report on environmental consideration purportedly prepared by a Ms C Baardjes of Eco Partners. In respect of the report:
- 87.1 The report is undated and unsigned;
- 87.2 It is approximately 5 and a half pages long;
- 87.3 It makes no mention of the IDP, EMF, SDP or any of the mandatory environmental policies of government;
- 87.4 It makes no mention of the environmental significance of the area, the fact that the subject property is situated in a protected environment buffer zone or that it lies adjacent to an area declared a Protected Area.
- 87.5 The environmental practitioner concludes with a far-reaching opinion, i.e. “the impact of the Yzermyn Underground Coal Mine on the environment of the area can be mitigated to ensure ecologically sustainable development and use of natural resources while promoting justifiable economic and social development”. This opinion is not supported by the scientific research and empirical evidence detailed in paragraphs 18 to 35 above.
88. It is submitted that Atha’s report on environmental considerations is seriously flawed and that no weight can be attached to it for the purposes of its application.

#### Adjacent to a declared Protected Area

89. As indicated above, whereas most of the surface workings of the proposed Yzermyn mine will not fall within the protected area, they border it. However, the underground mining activities will fall directly within the protected area, as will some surface workings and infrastructure, notably, boreholes and pipelines.

90. The Mabola Protected Environment is a high-yielding water catchment area composed mostly of wetlands and pans that feed into the Limpopo, Tugela, Vaal, Usutu, and Pongola rivers. It is a strategic water source area, generating critical water supplies for downstream agricultural, industrial and human water users. The area is also made up of the endangered Wakkerstroom Montane grassland ecosystems that support endangered species.
91. The Local Municipality's SDF acknowledges the importance of the ecological wetland as a vital catchment for the abovementioned rivers. The total footprint of the surface infrastructure will be approximately 22.4 ha and will be located on the subject property, which is directly adjacent to the Mabola Protected Environment and within wetlands and grasslands forming part of the ecosystem. The mining site borders the KwaMandhlangampisi Protected Environment.

#### Strategic Water Source Area: impact on water resources

92. The hydrological significance of the greater area within which the subject property is situated makes it undesirable for any type of land-use change involving mining. The subject property, as well as neighbouring properties and the surrounding area where the mine would be located have been recognised in national programmes and policies and in spatial development frameworks as falling within an area that is vital from a national water security perspective.
93. The independent studies mentioned in paragraphs 18 and 19 above clearly illustrate that the impact on valuable water resources will have disastrous consequences not only for the properties in the direct vicinity of the subject property, but also users further afield, downstream, and even neighbouring countries. The land-use change application fails to account for these impacts, or even mention them.

#### **F.2 Flawed process to amendment of land use scheme and rezoning**

94. To the extent that an amendment of the Local Municipality's land use scheme and rezoning are necessary, as prescribed by s 28(2) of SPLUMA, that process has not been followed. As appears hereinbelow, the existing use zoning for the subject property is "Agricultural".
95. The applicant is seeking a change from that which the subject property is currently lawfully used for in terms of Schedule 2 ("agricultural purposes") to mining. The applicant must apply to the Local Municipality for incorporation of the land use in the town planning scheme or for change of land use, and in this regard section 28 of SLUMA would find application. The Appellants are not aware of any lodgement of an application in terms of section 28 of SPLUMA.

#### **F.3 Management zone guidelines**

96. Mining is listed in the 2011 SRK Consulting EMF as among "undesirable types of activities" which were "not allowed at all" in areas with an environmental attribute of, inter alia, Zone 1: Conservation; Zone 2: Agriculture; Zone 4: Tourism.

97. Section 26(1) of SPLUMA provides that a Land Use Scheme has the force of law and binds all owners and users of the land as well as organs of state. Section 26(2) – (4), provide that land may only be used for the purposes permitted by the land use scheme, town planning scheme, and that where no town planning or land use scheme applies, until one is approved in terms of SPLUMA, such land may only be used in terms for purposes listed in Schedule 2 of the Act. The lawful land uses that applied at commencement of SPLUMA were for agricultural purposes, and additionally in respect of properties falling within the Mabola Protected Environment, conservation.<sup>27</sup>

#### **F.4 Incremental decision-making**<sup>28</sup>

98. The Appellants submit that the decision-maker (the District Municipal Planning Tribunal) misdirected itself by engaging in incremental decision-making when approving Atha's application.
99. The proposed mine is intended to be located on various properties.<sup>29</sup> The surface infrastructure will be situated on Yzermyn Portion 1, whilst the underground mining will be undertaken on Yzermyn Portion 1 as well as the other five properties. Whereas the intended location of the surface infrastructure of the mine (Yzermyn Portion 1) is situated adjacent to the Mabola Protected Environment, the majority of the underground mining footprint falls within the Mabola Protected Environment.<sup>30</sup>
100. The application for land-use change which forms the subject-matter of this appeal is in respect of Yzermyn Portion 1 only. This is problematic in two respects:
- 100.1 The District Municipal Planning Tribunal's decision constitutes incremental decision-making in that, in order for Atha to proceed with the proposed mine development, it will require land-use change for the additional five properties that it intends to undermine. Atha has not been granted, indeed it has not even applied for, land-use change of those properties. We submit that this incremental decision-making about a single development project is irrational; and
- 100.2 To the extent that the District Municipal Planning Tribunal's decision extends beyond the scope of the current application (which pertains only to Yzermyn Portion 1), the decision is materially flawed, irrational and unlawful.
101. The impacts of the proposed Yzermyn underground coal mine have been described in detail above, and it is clear that permitting the rezoning of the subject property would not serve any

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<sup>27</sup>This is evidenced by the zoning certificate in respect of the subject property, attached as "**Annexure E**" to the Appellants' Letter of Response.

<sup>28</sup> Third ground of appeal in the Appellants' Notice of Appeal.

<sup>29</sup> Surface infrastructure property: Portion 1 of Yzermyn 96 HT. Underground mining properties: Portion 1 of Yzermyn 96 HT, Goedgevonden 95 HT; Portion 1 and Remainder of Kromhoek 93 HT; Zoetfontein 94 HT; Remainder of Yzermyn 96 HT.

<sup>30</sup> Zoetfontein 94 HT is not in the Mabola Protected Environment.

purpose whatsoever without permitting the change of use of the neighbouring properties which fall in a protected area. Without the rezoning of the properties on which the proposed underground mining will occur, the mining cannot proceed, rendering the present application for the rezoning of the subject property purposeless and therefore irrational. The rezoning of the properties on which the underground mining for this project would occur has not been applied for, is not contemplated in the present application, and would in all likelihood be refused because such a change in land-use would undermine the declaration of the Protected Area. Precisely for this reason, incremental decision-making is not supported in our legal framework. To rezone the subject property in these circumstances would be irrational.

#### **F.5 Failure to consider the Appellants' Objection and to provide reasons for decision**<sup>31</sup>

102. Section 53(1) of the SPLUM by-law states that the Municipal Planning Tribunal or Land Development Officer, when considering an application submitted in terms of this by-law, must have regard to, *inter alia*, "*the comments in response to the notice of the application...*".
103. At no stage has the decision-maker, the District Municipal Planning Tribunal, demonstrated that it engaged with any of the detailed aspects which formed the Appellants' Objection submitted on 30 May 2018. The decision-maker misdirected itself by failing to consider in any demonstrable way the grounds of objection.
104. Atha asserts in para 2.5 of its Notice to Oppose that "*...the objections formed part of the submission to the JMPT and that such objections and the Second Respondent response were in fact considered by the JMPT.*" However, Atha then says in para 2.16 that it "*is not in the possession of the full record of the meeting of the JMPT.*"
105. It is unclear how Atha can, without having had sight of the full record of the Tribunal's proceedings, be certain that the Appellants' Objection was considered by the District Municipal Planning Tribunal in making its decision.
106. Moreover, there is no evidence in the District Municipal Planning Tribunal's resolution of 29 April 2019 that the Appellants' Objection was considered.
107. The Appellants, in paragraph 2 of its Letter of Response (16 July 2018) specifically requested that their full objection, including annexures be made available to the Municipal Planning Tribunal tasked with considering the application, and submitted that any failure to do so would constitute an administrative injustice and a violation of their right to procedural fairness.
108. The District Municipal Planning Tribunal has also not provided the Appellants with reasons for its decision. In this regard, we draw the Appeal Authority's attention to sections 40(5) and (6) of SPLUMA which require that a Tribunal "*must keep a record of all its proceedings*" and "*must provide reasons for any decision made by it.*"

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<sup>31</sup> Second ground of appeal in the Appellants' Notice of Appeal.

**PART G: DEVELOPMENT APPLICATION AFFECTING NATIONAL INTEREST (SECTION 143(1)(e) OF THE SPLUM BY-LAW)<sup>32</sup>**

109. Section 52 of SPLUMA deals with development applications affecting national interest. In terms thereof, a land development application must be referred to the Minister (Minister of Rural Development and Land Reform) where such an application materially impacts on matters within the exclusive functionality of the national sphere in terms of the Constitution; strategic national policy objectives,<sup>33</sup> principles or priorities including... international relations and co-operation; land use for a purpose which falls within the functional area of the national sphere of government.
110. On 9 December 2011 the Minister of Water and Environmental Affairs published in terms of section 52(1)(a) of the NEMBA, a national list of ecosystems that are threatened and in need of protection (GN 1002 in GG 34809 dated 9 December 2011). The Wakkerstroom/Luneburg Grasslands (MP11) was listed as an endangered ecosystem. The area now comprising the Mabola Protected Environment and the proposed mine area, as well as the subject property, is located in the Wakkerstroom/Luneburg Grasslands endangered ecosystem.
111. On 31 May 2012 the Minister of Mineral Resources signed off on the DMR's Annual Report for 2011/12. The Minister stated that "[t]he previous extension of the moratorium in Mpumalanga was due to the complex nature of environmental challenges in that province. It culminated in over 41 rights that are located in Wakkerstroom and Chrissiesmeer being identified as those belonging to the category of environmentally sensitive areas and consequently action has been taken to prohibit mining within those areas."
112. In August 2011 the Water Research Commission, the Council for Scientific and Industrial Research (CSIR), South African National Biodiversity Institute (SANBI), the Department of Water Affairs (now the Department of Water and Sanitation) and the Department of Environmental Affairs published the NFEPA Atlas.<sup>34</sup> The Minister of Water and Environmental Affairs said in the foreword to the NFEPA Atlas that it was essential that water is dealt with in an integrated and cooperative manner across key government departments and that the NFEPA Atlas would inform decisions about land use. The following things appear from the NFEPA Atlas:

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<sup>32</sup> Part D of the Appellants' Notice of Appeal; Part G of the Appellants' Objection.

<sup>33</sup> The National Development Plan 2030 (NDP), provides that there is an urgent need to "ensure protection of water resources and the environment in Mpumalanga Highveld coal fields, upstream of the Vaal and Loskop dams" and that "local planning should also ensure that groundwater resources are optimally used" (page 180). It further states that a key policy issue is the guidance of water management approaches and strategic planning decisions "on general economic and social development, as well as environmental protection" and that geographic areas where this is needed include "Mpumalanga Highveld coalfields – a balance between environmental protection, agriculture, energy requirements and water resources" (page 181). In addition, the NDP 2030 also recognizes the importance of policy and regulatory frameworks determining "the environmental and social costs of new developments and ensur[ing] the conservation and restoration of protected areas" (page 199).

<sup>34</sup> See para 71.1 above.

- 112.1 The Wakkerstroom area, within which the proposed mine area is located, is classified as a priority river and wetland ecosystem (pp. 20 and 22);
- 112.2 River Freshwater Ecosystem Priority Areas are rivers that are still in relatively good ecological condition occurring in healthy catchments and should remain in relatively good condition to contribute to national biodiversity goals and support sustainable use of water resources. The surrounding land and stream networks need to be managed in a way that maintains the good condition of the river reach (p. 14);
- 112.3 Freshwater Ecosystem Priority Wetlands and Wetland Clusters must be maintained if they are in good ecological condition and rehabilitated to the best attainable ecological condition if they are in a substandard ecological condition (p. 14); and
- 112.4 The area now comprising the Mabola Protected Environment is located in a high-water yield area, which areas are important “because they contribute significantly to the overall water supply of the country. They can be regarded as our water factories, supporting growth and development needs that are often a far distance away. Deterioration of water quantity and quality in these high water yield areas can have a disproportionately large adverse effect on the functioning of downstream ecosystems and the overall sustainability of growth and development in the regions they support. High water yield areas should therefore be maintained in a good condition (A or B ecological category). This requires minimising land use activities that reduce stream flow in these areas (e.g. plantation forestry), as well as any activity that would affect water quality (e.g. timber mills, mining, over-grazing). Wetlands also play an important role in these areas, regulating stream flow and preventing erosion...” (p. 44)
- 112.5 The impacts of the proposed development will clearly cut across various government departments. The environmental issues pertaining to the subject property and surrounding areas have already been receiving ministerial attention at national level from various perspectives including the environment, mining, water, etc.
- 112.6 Mention has been made above of the scientific environmental studies that have been undertaken by environmental specialists which highlight, inter alia, dewatering of aquifers; decant of contaminated ground water and acid mine drainage; impact on flora and fauna; harm to local communities in a water source area that is strategic at a national level.
- 112.7 The SRK Consulting Report making up the Local Municipality’s EMF stated that the South African government is a signatory to a number of relevant international agreements in respect to which the decisions relating to the proposed mining development will have a direct impact.

- 112.8 The EMF furthermore says that the Local Municipality is situated in the headwaters of three major rivers and Water Management Areas, namely Upper Vaal, Thukela and Usutu to Mhlathuze. This area has 14 quaternary catchments. The Thukela Water Management Area is the source of water for the Thukela-Vaal Transfer Scheme which, inter alia, transfers water from Thukela River catchment to the Sterkfontein Dam in the Vaal River system (para 3.2.6).
- 112.9 In addition, this area forms part of the Enkangala Drakensberg Strategic Water Source Area that constitutes the headwaters of the Usutu River System, via Assegai River. The Usutu River flows through Swaziland and, after joining the Pongola River, flows into Mozambique, where it is known as the Maputo River. Accordingly, the health of the Usutu River System is also relevant to South Africa's international obligations to Swaziland and Mozambique.<sup>35</sup>
113. It is submitted that on the above evidence s 52(2) of SPLUMA applies in that a positive outcome to the application:
- 113.1 May be prejudicial to the economic or health interests of one or more provinces (i.e. Mpumalanga, KwaZulu Natal and Gauteng) or the Republic as a whole;
- 113.2 May impede the effective performance of the functions by one of more municipalities or provinces relating to matters within their functional area of legislative competence.
114. In the premises, it is submitted that this is an application envisaged in s 52 of SPLUMA which would affect the national interest. The Local Municipality must recommend that the Tribunal must accordingly refer the application to the Minister.
115. There is no evidence that Atha has submitted this application to the Minister. Accordingly, in terms of section 52, read with section 87 of the SPLUM by-law, it is incumbent upon the

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<sup>35</sup> The Strategic Water Source Areas of SA were mapped in terms of the National Freshwater Ecosystem Priority Area Project – referred to in C.5 above.

In addition, the Revised Protocol on Shared Water Courses in the SADC (which was signed in 2000 and came into effect in 2003) lists the Usuthu/Pongola river system as a major river system shared with neighbouring countries: Mozambique and Swaziland. One of the aspects that need to be considered in terms of the general principles of international customary law in this regard is the principle of prevention of significant harm (which is also mentioned in the UN Watercourses Convention).

Art 3(10) of the Revised Protocol says: *“State Parties shall, in utilising a shared watercourse in their territories, take all appropriate measures to prevent the causing of significant harm to other Watercourse States.”*

Art 4(1) provides for a communication procedure for implementation of planned measures. This includes consultations and negotiations between the States. In addition, Art 4(2) provides specifically for environmental protection and preservation, including protection and preservation of ecosystems and prevention, reduction and control of pollution.

Available at: [http://www.sadc.int/files/3413/6698/6218/Revised\\_Protocol\\_on\\_Shared\\_Watercourses\\_-\\_2000\\_-\\_English.pdf](http://www.sadc.int/files/3413/6698/6218/Revised_Protocol_on_Shared_Watercourses_-_2000_-_English.pdf).

Municipal Planning Tribunal to direct that such application be referred to her to decide, alternatively, to inform the Minister of the application and supply her with a copy of the application for her comment as a party to an application affecting the national interest.

116. Atha asserts, in its response to the Appellants' Objection, that the Appellants' view that section 52 of SPLUMA applies to the present land-use change application because it affects national interest "is premised on an incorrect interpretation of the provisions of SPLUMA with particular reference to Section 52 thereof"<sup>36</sup>. Although not explicitly referenced, this assertion by Atha appears to be based on an erroneous interpretation of the Constitutional Court's decision in **Maccsand v City of Cape Town**<sup>37</sup> ("Maccsand").

117. The Constitutional Court in *Maccsand* in fact found that:

*"The Constitution allocates powers to three spheres of government in accordance with the functional vision of what is appropriate to each sphere. But because these powers are not contained in hermetically sealed compartments, sometimes the exercise of powers by two spheres may result in an overlap. When this happens, neither sphere is intruding into the functional area of another. Each sphere would be exercising power within its own competence. It is in this context that the Constitution obliges these spheres of government to cooperate with another in mutual trust and good faith, and to co-ordinate actions taken with one another."*

118. This finding of the Constitutional Court is exactly what is envisaged by section 52 of SPLUMA. When a development application affects the national interest, which the Appellants have coherently explained that the present land-use change application does, the Local Municipality, District Municipal Planning Tribunal and the Minister of Rural Development and Land Reform must apply s 52 of SPLUMA in the spirit of cooperative governance.

## **PART H: THE RELIEF SOUGHT ON APPEAL**

### **H.1 The relief sought**<sup>38</sup>

119. For the reasons given above, it is respectfully submitted that:

- 119.1 the appeal be upheld;
- 119.2 the Municipal Appeal Authority revoke the decision of the Gert Sibande District Joint Municipal Planning Tribunal in terms of section 169(1) of the SPLUM by-law read with Regulation 26(1) of the SPLUM Regulations;
- 119.3 the Municipal Appeal Authority refer the application to the Minister in terms of section 52 of SPLUMA;

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<sup>36</sup> See paragraph 9.14 of Atha's response.

<sup>37</sup> *Maccsand (Pty) Ltd v City of Cape Town and Others* 2012 (4) SA 181 (CC); 2012 (7) BCLR 690 (CC).

<sup>38</sup> Section 143(d) of the SPLUM by-law.

1194 in the event that the Minister does not, in terms of section 52(5)(b) of SPLUMA, direct that the application be referred to her to decide, that the Municipal Appeal Authority:

119.4.1 replace the decision of the Gert Sibande District Joint Municipal Planning Tribunal with a decision to refuse the application; or, in the alternative

119.4.2 remit the application to the Municipal Planning Tribunal for reconsideration.

## **H.2 Motivation of an award for costs**<sup>39</sup>

1. The Appellants note that section 169 of the SPLUM by-law gives the appeal authority the power to include an award of costs in its decision.
2. The Appellants submit that should the appeal be dismissed, an award of costs should not be granted against them as the Appellants are acting in the public interest. Moreover, this appeal remedy provided by SPLUMA and the SPLUM by-law is a remedy available to affected parties and they should therefore not be made to pay costs for utilising this remedy.
3. The Appellants also point out that there is no provision in SPLUMA which empowers the appeal authority to make an award of costs, and that section 169 of the SPLUM by-law is therefore incompetent. As such, should the Municipal Appeal Authority make such an award of costs against the Appellants, we will be obliged to challenge it.

**SIGNED AT CAPE TOWN ON THIS 23<sup>rd</sup> DAY OF OCTOBER 2019.**

**CENTRE FOR ENVIRONMENTAL RIGHTS**

per: 

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Attorney

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<sup>39</sup> Section 143(1)(f) SPLUM by-law.