

**IN THE HIGH COURT OF SOUTH AFRICA  
MPUMALANGA DIVISION, MIDDELBURG  
(LOCAL SEAT)**

**CASE NO:**

In the matter between:

<b>MINING AND ENVIRONMENTAL JUSTICE COMMUNITY NETWORK OF SOUTH AFRICA</b>	First Applicant
<b>GROUNDWORK</b>	Second Applicant
<b>BIRDLIFE SOUTH AFRICA</b>	Third Applicant
<b>ENDANGERED WILDLIFE TRUST</b>	Fourth Applicant
<b>FEDERATION FOR A SUSTAINABLE ENVIRONMENT</b>	Fifth Applicant
<b>ASSOCIATION FOR WATER AND RURAL DEVELOPMENT</b>	Sixth Applicant
<b>BENCHMARKS FOUNDATION</b>	Seventh Applicant
and	
<b>GERT SIBANDE DISTRICT JOINT MUNICIPAL PLANNING TRIBUNAL</b>	First Respondent
<b>DR PIXLEY KA ISAKA SEME LOCAL MUNICIPALITY: MUNICIPAL APPEAL AUTHORITY</b>	Second Respondent
<b>ATHA-AFRICA VENTURES (PTY) LTD</b>	Third Respondent
<b>MINISTER OF AGRICULTURE, LAND REFORM AND RURAL DEVELOPMENT</b>	Fourth Respondent
<b>THE MABOLA PROTECTED ENVIRONMENT LANDOWNERS ASSOCIATION</b>	Fifth Respondent

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**FOUNDING AFFIDAVIT**

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I, the undersigned

**NKWANE ELTON THOBEJANE**

state under oath that:

1. I am the Chairperson of the Mining and Environmental Justice Community Network of South Africa ("**MEJCON-SA**"), the first applicant. MEJCON-SA's administrative address is c/o the Centre for Environmental Rights, 2<sup>nd</sup> Floor, Springtime Studios, 1 Scott Road, Observatory, Cape Town.
2. I am duly authorised to depose to this affidavit and to make this application on behalf of the applicants. The applicants have resolved to institute this application and to instruct their attorneys, the Centre for Environmental Rights (the "**CER**"). I attach the resolutions to this effect marked **FA1**.
3. The facts and circumstances set out in this affidavit are, save where the context indicates otherwise, within my personal knowledge or appear from documents under my control, and are true and correct.
4. Where I make submissions of a legal nature, I do so on the advice of the applicants' legal representatives, which advice I believe to be correct. Where I rely on information supplied by others, I believe that such information is true and correct.

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## THE PARTIES

5. As noted above, the first applicant is MEJCON-SA, a non-profit voluntary network of communities, community-based organisations and community members whose environmental and human rights are affected, directly or indirectly, by mining and mining-related activities. The members of MEJCON-SA have played an active role in fighting for the rights of their communities which have been affected by neighbouring mines. The primary objectives of MEJCON-SA include the promotion, defence and advocacy of environmental and human rights of communities affected by mining; and ensuring the sustainable use of mineral resources.
6. The second applicant is **GROUNDWORK**. groundWork is a non-profit environmental justice service and development organisation working primarily in Southern Africa in the areas of, *inter alia*, coal, climate and energy justice, and environmental health. groundWork places particular emphasis on assisting vulnerable and previously disadvantaged people, who are most affected by environmental injustice, to engage with stakeholders in development projects and to promote the expression of their environmental concerns in the public debate carried by the media. groundWork's NPO number is 045-235 and its physical address is 6 Raven Street, Pietermaritzburg.
7. The third applicant is **BIRDLIFE SOUTH AFRICA** ("**BirdLife SA**"), a non-profit and public benefit organisation with a vision of seeing a country and region where nature and people live in greater harmony, more equitably and more

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sustainably. Its mission is to conserve birds, their habitats and biodiversity through, *inter alia*, scientifically based programmes, and supporting the sustainable and equitable use of natural resources. BirdLife SA has NPO number 001-298 and PBO number 930 004 518, and its head office is at Isdell House, 17 Hume Road, Dunkeld West, Johannesburg.

8. The fourth applicant is the **ENDANGERED WILDLIFE TRUST** (“EWT”), a non-profit organisation and public benefit organisation dedicated to conserving threatened species and ecosystems in Southern Africa to the benefit of all people. The EWT believes that the environment in which we live underpins every human need, demonstrated every day by the loss of thousands of lives due to environmental disasters, the lack of access to quality natural resources, as well as the dependence of millions of people on their natural surroundings for their everyday existence. The EWT strives to facilitate the protection and sustainable use of key ecosystems. The EWT’s NPO Number is 015-502 and PBO number is 930 001 777, and its physical address is Building K2, Ardeer Road, Pinelands Office Park, Modderfontein, Gauteng.
9. The fifth applicant is the **FEDERATION FOR A SUSTAINABLE ENVIRONMENT** (“FSE”), a non-profit organisation with the objective of promoting the ecological sustainability of development and the wise use of natural resources in South Africa. The FSE’s non-profit organisation registration number is 2007/033134/08 and its NPO number is 062986-NPO. The FSE has its physical address at 44 Broadlands Estate, c/o Rosewood and Cedar Roads, Fourways, Sandton.

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10. The sixth applicant is the **ASSOCIATION FOR WATER AND RURAL DEVELOPMENT (“AWARD”)**, a non-profit organisation specialising in multi-disciplinary, participatory, research-based project implementation aimed at addressing issues of sustainability, inequity and poverty. AWARD recognises that natural resources are limited and undergoing rapid depletion and transformation, negatively affecting the health and functioning of the earth’s social-ecological systems. In consequence, AWARD seeks to contribute to building a more sustainable and equitable society by encouraging active civil society participation in wise water and biodiversity stewardship, management and governance. AWARD’s company registration number is 98/03011/08 and NPO number is 006-821. Its physical address is at Sunset View Office Park, corner Buffel and Koedoe Streets, Hoedspruit, Limpopo.
  
11. The seventh applicant is the **BENCH MARKS FOUNDATION**, a non-profit, faith-based organisation owned by churches in South Africa. The Bench Marks Foundation works in the area of corporate social responsibility and monitors corporate performance against an international measuring instrument, the Principles for Global Corporate Responsibility: Benchmarks for Measuring Business Performance. It is committed to providing leadership and advocacy on issues regarding ethical and socially-responsible investment, as well as linking people and institutions committed to these ideals. The Bench Marks Foundation’s physical address is 6<sup>th</sup> Floor, Khotso House, 62 Marshall Street, Marshalltown, Johannesburg.
  
12. The applicants comprise non-profit environmental and environmental justice organisations with objectives that include environmental conservation,

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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.

13. The applicants bring the application in their own interest under section 38(a) of the Constitution of the Republic of South Africa and under section 32(1)(a) of the National Environmental Management Act 107 of 1998 ("**NEMA**"), on behalf of their members in terms of section 38(e) of the Constitution and in the public interest under section 38(d) of the Constitution and under section 32(1)(d) of NEMA.
14. The first respondent is the **GERT SIBANDE DISTRICT JOINT MUNICIPAL PLANNING TRIBUNAL** (the "**Tribunal**"), situated at Corner Joubert and Oosthuise Street, Ermelo, Mpumalanga.

14.1. The Tribunal is cited as the authority which was established by agreement in terms of section 34(2) and (3) of the Spatial Planning and Land Use Management Act, 16 of 2013 ("**SPLUMA**") published in Public Notice 225 of 2015 in the Mpumalanga Provincial Gazette Extraordinary to hear all category 1 land development and land use applications on behalf of the Chief Albert Luthuli Local Municipality; Dipaleseng Local Municipality; Doctor Pixley Ka Isaka Seme Local Municipality; Lekwa Local Municipality; Mkhondo Local Municipality and Msukaligwa Local Municipality and commenced operations on 15 April 2016.<sup>1</sup>

<sup>1</sup> Spatial Land Use Management Act (16/2013): Notice of The Commencement of the Gert Sibande District Joint Municipal Planning Tribunal, PN 32 in PG 2681, 15 April 2016.

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- 14.2. The Tribunal took a decision on 29 April 2019 to approve a land use change application by the third respondent in respect of Portion 1 of farm Yzermyn 96 HT, Province of Mpumalanga, held under Deed of Transfer T138593/2002 and measuring 193.8289 ha in extent (the **“Subject Property”**) (the **“Tribunal Decision”**).
15. The second respondent is the **DR PIXLEY KA ISAKA LOCAL MUNICIPALITY: MUNICIPAL APPEAL AUTHORITY** (the **“Municipal Appeal Authority”**), situated at Adelaide Tambo Street & Dr Nelson Mandela Drive, Volksrust, 2470, Mpumalanga.
- 15.1. The Municipal Appeal Authority is cited as the appeal authority pursuant to section 51(3) of the SPLUMA read with regulation 20 of the Spatial Planning and Land Use Management Regulations: Land Use Management and General Matters, 2015 (the **“SPLUMA Regulations”**).
- 15.2. The Municipal Appeal Authority took a decision on 27 November 2019 to dismiss the appeal by the applicants and Earthlife Africa, Johannesburg<sup>2</sup> (collectively, the **“Coalition”**) in terms of section 142 of the Spatial Planning And Land Use Management By-Law For: Chief Albert Luthuli, Dipaleseng, Dr. Pixley Ka Isaka Seme, Lekwa, Mkhondo And Msukaligwa Local Municipalities, 2016 (**“SPLUM By-Law”**) against the Tribunal decision (the **“Appeal Decision”**).

<sup>2</sup> Earthlife Africa, Johannesburg (**“Earthlife”**), a non-profit organisation founded in 1988 to mobilise civil society around environmental issues through challenging environmental degradation and promoting a culture of environmental awareness and sustainable development. EarthLife is not a party to these proceedings.

16. The third respondent is **ATHA-AFRICA VENTURES (PTY) LTD** (“Atha”) a private company registered in terms of the laws of South Africa, with registration number 2004/020746/07 and with its registered address at 8<sup>th</sup> Floor, Sinosteel Plaza, 159 Rivonia Road, Sandton, Johannesburg.
- 16.1. Atha is a subsidiary of the Atha Group, a company registered in India. Atha’s black economic empowerment partner for the proposed mining development is the Bashubile Trust, whose trustees are Prince Thabo Mpofu, Vincent Gezinhliziyo Zuma, and Sizwe Christopher Zuma.
- 16.2. Atha applied for the rezoning of the Subject Property, which is the subject matter of this review application.
17. The fourth respondent is the **MINISTER OF AGRICULTURE, LAND REFORM AND RURAL DEVELOPMENT** (“Minister”) of 20 Agriculture Place, Block D, Floor 1, Cnr. Steve Biko and Soutpansberg Roads, Arcadia, Pretoria, and care of the Office of the State Attorney, Pretoria at Salu Building Ground Floor, 316 Thabo Sehume Street, Pretoria.
- 17.1. The Minister is cited by virtue of the interest she has in the matter and the relief sought against her.
- 17.2. In terms of section 52 of SPLUMA, a land development application affecting the national interest must be submitted to the Minister by the applicant and by a municipal planning tribunal with the application before it.

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18. The fifth respondent is the **MABOLA PROTECTED ENVIRONMENT LANDOWNERS ASSOCIATION** (the "MPELA") with its address at Farm Schoongezicht, Volksrust, Mpumlanga.

18.1. The MPELA is the management authority of the Mabola Protected Environment ("Mabola") in terms of section 38(2)(b) of the National Environmental Management: Protected Areas Act 57 of 2003 ("NEMPAA").

18.2. The MPELA is cited by reason of the interest it has in the matter, and no relief is sought against it.

## INTRODUCTION AND OVERVIEW

19. Atha intends to construct an underground coal mine in Mabola outside Wakkerstroom in the Mpumalanga Province.

20. It seeks to do so in an area of utmost environmental vulnerability and significance. The state has taken various steps through policy and legislation to protect this area. These include, but are not limited to, recognising it as a Strategic Water Source Area ("**SWSA**"); declaring it as part of a protected environment in terms of NEMPAA; and as an endangered ecosystem in terms of the National Environmental Management Biodiversity Act, 10 of 2004 ("**NEMBA**").

21. The proposed coal mine is certain to have significant long term negative environmental impacts, including negative impacts on the environmental uniqueness of the area, biodiversity, water resources and the essential water

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services that the area feeds into. Other impacts are uncertain, because insufficient and inconclusive information was placed before the Chief Director: Environmental Affairs, Mpumalanga (“**Chief Director**”) when he granted Atha an environmental authorisation for certain listed activities associated with the proposed underground coal mine, in terms of section 24 of NEMA (the “**Environmental Authorisation**”).

22. On 22 May 2018 the Coalition applied to the Mpumalanga High Court, Mbombela for the judicial review and setting aside of the Environmental Authorisation, and the appeal against the granting of the Environmental Authorisation (“**Environmental Authorisation Appeal**”) under case number 1390/18. The conditions and reasoning underlying the granting of the Environmental Authorisation and Environmental Authorisation Appeal decisions reveal multiple reviewable flaws in the Chief Director and the MEC for Agriculture, Rural Development and Environmental Affairs, Mpumalanga’s (“**MEC**”) decision-making. The review grounds illustrate that the decisions are unconstitutional in that they were irrational, and in conflict with the rule of law as a foundational value in section 1 of the Constitution. The grounds of review in the above matter are:

22.1. the Chief Director and MEC failed to authorise listed activities associated with the proposed mine;

22.2. the Chief Director and MEC did not take the Environmental Authorisation and Environmental Authorisation appeal decision in an open and transparent manner or in a manner that promoted public participation;

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- 22.3. the Environmental Authorisation and Environmental Authorisation appeal decisions were procedurally unfair;
- 22.4. the Chief Director was not the correct competent authority. In the alternative, the Chief Director was not authorised to grant the Environmental Authorisation;
- 22.5. the Environmental Authorisation application had lapsed by the time that the Environmental Authorisation was granted;
- 22.6. the Chief Director and MEC failed to take into account the socio-economic impact of the mine;
- 22.7. the Chief Director and MEC failed to take into account that the use and exploitation of non-renewable natural resources must be responsible and equitable;
- 22.8. the Chief Director and MEC failed to apply the precautionary principle and the vulnerable ecosystems principle;
- 22.9. the Chief Director and MEC failed to ensure intergovernmental coordination and harmonisation and ignored key-planning and other instruments;
- 22.10. the Chief Director and MEC failed to take into account South Africa's international responsibilities relating to the environment;
- 22.11. the Chief Director and MEC failed to take into account that Atha has made inadequate provision for rehabilitation;

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- 22.12. the Chief Director and MEC failed to take into account relevant scientific information; and
- 22.13. a mandatory and material procedure or condition prescribed by an empowering provision (section 24O(1) of NEMA) was not complied with.
23. The Coalition delivered their supplementary founding affidavit on 19 September 2019. No party has yet answered.
24. On 29 April 2019, the Tribunal approved an application by Atha in respect of the Subject Property to change the use of the Subject Property to enable mining and ancillary purposes.
25. The Coalition lodged an appeal with the Municipal Appeal Authority challenging the Tribunal's decision on various grounds. The Municipal Appeal Authority dismissed the application on 27 November 2019.
26. This is accordingly an application in terms of Uniform Rule 53 to review and set aside the decision of the Tribunal to approve the application for land use change of the Subject Property, and the decision of the Municipal Appeal Authority to dismiss the Coalition's internal appeal (collectively the "**impugned decisions**").
27. The remainder of the affidavit is structured as follows:
- 27.1. First, I set out the legal, regulatory and policy framework within which this matter must be understood;

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- 27.2. Second, I provide a factual background, describing the proposed coal mine, highlighting the recognition of the strategic environmental importance of the mine area, detailing the application process and the impugned decisions, and describing the main environmental and socio-economic impacts of the proposed mine;
- 27.3. Third, I set out the applicants' basis for an interim interdict;
- 27.4. Fourth, I set out the applicants' grounds of review;
- 27.5. Fifth, I address the question of the relief sought by the applicants;
- 27.6. Sixth, I turn to the condonation application in terms of section 9(2) of Promotion of Administrative Justice Act, 3 of 2000 ("**PAJA**") explaining that this applications in respect of the impugned decisions have been brought timeously, but that in the alternative and out of an abundance of caution, it is in the interests of justice for this Court to condone any delay; and
- 27.7. Finally, I deal with costs.

## **CONSTITUTIONAL AND LEGISLATIVE FRAMEWORK**

28. The legislative framework 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 imperative that any development proposal, such as the development proposed in the rezoning application, must be considered within the existing environmental framework for the area in which

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it would be located. This is so because the Constitution, which is the supreme law, calls for the protection and preservation of the environment, for current and future generations.

### ***The Constitution***

29. 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.”*

30. The starting point, in section 24(a), is that every person has the right to a healthy environment.

31. I am advised that, broadly speaking, section 24(b) reflects the principle of sustainable development. Section 24(b) requires a balancing exercise between socio-economic development on the one hand, and the protection and preservation of the environment on the other.

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**NEMA**

32. The primary legislative measure contemplated in section 24(b) of the Constitution is NEMA. NEMA seeks to give effect to section 24 of the Constitution and the principles of sustainable development and intergenerational environmental justice that underpin it. NEMA establishes a framework regulating the decisions taken by organs of state in respect of activities by any person or entity that may affect the environment.
33. In terms of 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."*
34. Section 2 of NEMA contains a list of principles that apply to the actions of all organs of state that may significantly affect the environment which "serve as guidelines by reference to which any organ of state must exercise any function when taking any decision in terms of ... any statutory provision concerning the protection of the environment" and which must "guide the interpretation, administration and implementation of [NEMA] and any other law concerned with the protection or management of the environment".

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35. Section 2(2) requires that environmental management places people and their needs at the forefront of its concern, and serves their physical, psychological, developmental, cultural and social interests equitably.
36. Section 2(3) of NEMA provides that, “*development must be socially, environmentally and economically sustainable*”.
37. Section 2(4)(a) concerns sustainable development specifically, and provides, *inter alia*:
  - 37.1. that decision-makers must comply with the ‘*hierarchy of mitigation*’ (section 2(4)(a)(i)-(iv) and (viii)) which provides that environmental harms must be avoided if at all possible, and only if they cannot be avoided should those harms be minimised and remedied; and
  - 37.2. for the ‘*precautionary principle*’, reflected in section 2(4)(a)(vii), which requires decision-makers to adopt a risk-averse and cautious approach.
38. Further NEMA principles that are relevant to this matter include:
  - 38.1. the principle that environmental management must be integrated, acknowledging that all elements of the environment are linked and interrelated, and must take into account the effects of decisions on all aspects of the environment and all people in the environment by pursuing the selection of the best practicable environmental option (section 2(4)(b));
  - 38.2. the principle that the social, economic and environmental impacts of activities, including disadvantages and benefits, must be considered,

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- assessed and evaluated, and decisions must be appropriate in the light of such consideration and assessment (section 2(4)(i));
- 38.3. the principle that global and international responsibilities relating to the environment must be discharged in the national interest (section 2(4)(n));
- 38.4. the principle that the environment is held in public trust for the people, the beneficial use of environmental resources must serve the public interest and the environment must be protected as the people's common heritage (section 2(4)(o)); and
- 38.5. the principle that sensitive, vulnerable, highly dynamic or stressed ecosystems, such as wetlands and similar systems, require specific attention in management and planning procedures, especially where they are subject to significant human resource usage and development pressure (section 2(4)(r)).
39. These principles are quoted and discussed with reference to the specific review grounds below.

### **SPLUMA**

40. SPLUMA recognises 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*". (my emphasis)

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41. Chapter 2 of SPLUMA sets out development principles which, pursuant to section 6(1)(b), “*apply to all organs of state and other authorities responsible for the implementation of legislation regulating the use and development of land, and guide... the consideration by a competent authority of any application that impacts or may impact upon the use and development of land.*”
- The most relevant principle for purposes of this matter is the principle of spatial sustainability, specifically “*whereby spatial planning and land use management systems must...uphold consistency of land use measures in accordance with environmental management instruments*”.
42. Section 42(1) deals with considerations that must be taken into account when deciding an application. The section provides as follows:

*“(1) In considering and deciding an application a Municipal Planning Tribunal must-*

- (a) be guided by the development principles set out in Chapter 2;*
- (b) make a decision which is consistent with norms and standards, measures designed to protect and promote the sustainable use of agricultural land, national and provincial government policies and the municipal spatial development framework; and*
- (c) take into account-*
  - (i) the public interest;*
  - (ii) the constitutional transformation imperatives and the related duties of the State;*
  - (iii) the facts and circumstances relevant to the application;*
  - (iv) the respective rights and obligations of all those affected;*
  - (v) the state and impact of engineering services, social infrastructure and open space requirements; and*
  - (vi) any factors that may be prescribed, including timeframes for making decisions.*

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- (2) *When considering an application affecting the environment, a Municipal Planning Tribunal must ensure compliance with environmental legislation.*
- (3) *An application may be approved in whole or in part, or rejected."*

43. Section 52 of SPLUMA deals with development applications affecting national interest. The relevant provisions provide as follows:

*"(1) Subject to the Promotion of Administrative Justice Act, 2000 (Act 3 of 2000), a land development application must be referred to the Minister where such an application materially impacts on-*

- (a) matters within the exclusive functional area of the national sphere in terms of the Constitution;*
- (b) strategic national policy objectives, principles or priorities, including food security, international relations and co-operation, defence and economic unity; or*
- (c) land use for a purpose which falls within the functional area of the national sphere of government.*

...

- (3) Where an applicant believes that his or her application is likely to affect the national interest, he or she must submit a copy of that application to the Minister.*
- (4) Despite subsection (1) or (2), if an application that affects the national interest is lodged with a Municipal Planning Tribunal, such tribunal must inform the Minister and provide him or her with a copy thereof.*
- (5) The Minister, within 21 days of receipt of an application referred to him or her in terms of any of subsections (2), (3) or (4) and within a reasonable period after becoming aware of a land development application that affects the national interest-*
  - (a) may join as a party in such application; or*
  - (b) may direct that such application be referred to him or her to decide.*

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- (6) *The Minister must, before the exercise of a power or the performance of a function contemplated in this section and after public consultation, prescribe a set of criteria to guide the implementation of this section, including-*
- (a) *the types, scale and nature of land development applications that affect the national interest; and*
  - (b) *measures to guide Municipal Planning Tribunals, municipalities and parties to land development applications in determining applications which are regulated in terms of this section.*
- (7) *Nothing in this section authorises the lodgement or referral of an application for land use or land development to the Minister without such application having first been lodged and considered by the relevant municipality in terms of section 33 (1)."*

## **FACTUAL BACKGROUND**

44. I now describe the events that gave rise to this application. Where I do not have personal knowledge of the relevant events, the facts are taken from documents to which I make specific reference. To limit prolixity, I do not attach all of the documents referred to in this affidavit, but rather quote or explain the relevant parts in the text of this affidavit. Inspection of the documents is however tendered to the respondents that choose to oppose the application and to the Court at the hearing of the matter.

### ***The proposed mine***

45. In 2011, Atha acquired the entire equity of Bunengi Mining Services (Pty) Ltd, and thereby assumed ownership of a coal prospecting right over an area of 8 360 hectares. The area is located 58 kilometres southwest of Piet Retief,

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- 13 kilometres southwest of Dirkiesdorp and 21 kilometres northeast of Wakkerstroom, in the Mpumalanga Province.
46. On 19 March 2013, Atha applied for a coal mining right in respect of five farms currently used for agriculture, conservation, grassland, cultivated land, and forestry, and including vacant land with rivers and wetlands, including the Subject Property. The farms on which the proposed Yzermyn underground coal mine (the “**mine**”) would be established are located in Dr Pixley Ka Isaka Seme Local Municipality (the “**Local Municipality**”) and the Gert Sibande District Municipality (the “**District Municipality**”) in Mpumalanga.
47. On 19 September 2014, the Director-General of the Department of Mineral Resources granted a coal mining right to Atha in respect of the proposed Yzermyn underground coal mine in terms of the Mineral and Petroleum Resources Development Act, 28 of 2002 (“**MPRDA**”). On 1 April 2015, the Coalition lodged an internal appeal with the Minister of Mineral Resources against the Director-General’s decision. Within days of receiving notification of the grant of the mining right, Atha submitted a request to the Department of Mineral Resources (“**DMR**”) for two of the conditions pertaining to the environment to be amended on the basis that they were impossible to abide by, and posed a significant threat to the entire mining project. On 14 April 2015, after the internal appeal had already been lodged, the Minister notified Atha that he was amending the decision made by the Director-General, and issued a fresh mining right to Atha in terms of the MPRDA in which the environmental conditions were omitted ( “**mining right**”).

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48. The proposed Yzermyn mining area is extensive – approximately 1200 hectares and the intended surface infrastructure on the Subject Property will take up approximately 22.4 hectares. Atha intends to conduct underground mining on the properties Goedgevonden 95 HT; Portion 1 of Kromhoek 93 HT; Remainder of Kromhoek 93 HT; Portion 1 of Yzermyn 96 HT and Zoetfontein 94 HT. Atha intends to locate borehole pipelines over at least the following properties, the first four of which comprise part of Mabola: Goedgevonden 95 HT; Portion 1 of Kromhoek 93 HT; Remainder of Kromhoek 93 HT; Remainder of Yzermyn 96 HT; and Portion 1 of Yzermyn 96 HT.
49. The Subject Property is situated in a protected area buffer zone as it lies adjacent to Mabola. It is a triangular area between (and on the boundaries of) two properties which form part of Mabola. I attach marked **FA2** an image illustrating the location of the proposed mine.
50. The Yzermyn coal mine proposes to use the '*bord and pillar*' method. This entails the removal of large areas of coal, while leaving in place '*pillars*' of coal to hold up the roof of the underground mine. Two adits (a type of underground access-way) will be sunk to access the underground coal seams. The mine project will involve underground drilling and blasting, the extraction, crushing, screening and stockpiling of coal product, and the transportation of the coal product for sale.
51. The mine is anticipated to produce 2.2 million tons of coal per annum, with an estimated life span of approximately 15 years.
52. Whereas most of the surface workings of the proposed mine will not fall with Mabola, they will border it. However, the underground mining activities and

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certain surface workings and infrastructure, such as boreholes and pipelines, will fall directly within Mabola.

***Recognition of the strategic importance of the mine area***

53. The proposed mine area – both surface and underground – corresponds with several wetlands, as appears from the attached image marked **FA3**. These include “channelled valley wetlands”, which are valley bottom wetlands with river channels running through them; and seep wetlands, which are on sloping land and which are characterised by the unidirectional movement of water.
54. Due to the area’s unique biodiversity, the predominant land uses to date in the area are non-industrial, involving commercial and subsistence agriculture and eco-tourism. The land use change approval that was granted to Atha, permits a land use that will have a wide-ranging and significant impact on the environmental uniqueness of the area, water impacts and essential water services that the area feeds into.
55. The applicants’ interest in the matter stems from the environmental and hydrological significance of the area in which the approval for land use change was granted. The area is recognised 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. Some of these are set out below.

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The Mabola Protected Environment

56. As mentioned in paragraph 49 above, the Subject Property is situated adjacent to Mabola, part of a SWSA generating critical water supplies for agricultural, industrial and human use. Mabola was declared as a Protected Area in terms of section 28 of NEMPAA by way of Provincial Notice 20 on 22 January 2014 (the “**Provincial Notice**”). I attach a copy of the Provincial Notice as **FA4**.
57. In terms of the Provincial Notice the purpose of the declaration of Mabola is as follows:
- 57.1. to enable the owners of the land to take collective action to conserve biodiversity on their land and to seek legal recognition therefor;
- 57.2. 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;
- 57.3. to protect a scientific ecosystem; and
- 57.4. to ensure that the use of natural resources in the area is sustainable.

Recognition in the Mpumalanga Biodiversity Sector Plan

58. In terms of the Mpumalanga Biodiversity Sector Plan 2014 (“**MBSP**”), compiled by the Mpumalanga Tourism and Parks Agency (“**MTPA**”) in association with the Mpumalanga Department of Agriculture, Rural Development, Land and Environmental Affairs, the Subject Property is identified as an “*Ecological*

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*Support Area: protected area buffer zone*". I attach a copy of the relevant extracts of the MBSP Handbook as **FA5**. 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" (page 61). The MBSP provides the following land-use guidelines for protected area buffer zones (page 66):

58.1. 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".

58.2. 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."

59. I attach 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" as **FA6**.

60. 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

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biodiversity in the smallest area and therefore provides the most cost-effective options for biodiversity.

61. The MBSP is a fine-scale plan that identifies a province-wide network of Critical Biodiversity Areas and Ecological Support Areas that:

61.1. achieve national and provincial biodiversity targets on the least amount of land possible;

61.2. have the least conflict with other forms of land-use;

61.3. favour areas that are important for freshwater ecosystems and water security; and

61.4. promote adaptation to climate change and connectivity across the landscape.

62. In his foreword to the MBSP Handbook the then MEC: Agriculture, Rural Development, Land and Environmental Affairs 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.”* (page v).

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Recognition in the National Protected Area Expansion Strategy

63. In March 2009 the National Protected Area Expansion Strategy (the “**NPAES**”) was approved by the national government for implementation. The NPAES identified the vast majority of the area which now comprises Mabola and the mine area, as well as the Subject Property and Zoetfontein 94 HT, as a priority area for inclusion as a protected area in terms of NEMPAA (see “Moist Escarpment Grasslands” (no. 25) on page 28, attached as **FA7**).

Recognition as a SWSA

64. In July 2013, a report by the Council for Scientific and Industrial Research (“**CSIR**”) identified the mine area as partly falling within the Enkangala Drakensberg SWSA. I attach the report as **FA8**. The Enkangala Drakensberg SWSA 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.
65. That report identified SWSAs as the 8% of the land in South Africa, Lesotho and Swaziland which provides 50% of the fresh surface water in those countries. The 2013 SWSA report recognises SWSAs, including the mine area in question, as being vital for water security. The 2013 SWSA research was taken up in the Department of Water Affairs’ 2013 National Water Resource Strategy under the heading ‘Protection of Strategic Water Source Areas’ (page 42 attached as **FA9**). It reads as follows:

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*“These areas form the foundational ecological infrastructure on which a great deal of built infrastructure for water services depends. They are thus strategic national assets that are vital for water security, and need to be acknowledged as such at the highest level across all sectors.*

*Appropriate management of Strategic Water Source Areas, can produce significant returns in terms of water quality and quantity. Investing in Strategic Water Source Areas is also an important mechanism for long-term adaptation to the effects on climate change on water provision growth and development.”*

66. In March 2018, a subsequent CSIR report commissioned by the Water Research Commission found the mine area to fall entirely within the Enkangala Drakensberg SWSA (see attached image marked **FA10**). This report explains that SWSAs are absolutely critical for national water and economic security, and states expressly that they should receive particular attention in decision-making. The report confirms that 10% of the country provides 50% of the water available in South Africa, and that this is what makes these water sources so strategically important.
67. This was subsequently confirmed by the Department of Water and Sanitation (“**DWS**”) in the National Water and Sanitation Master Plan (“**NWSMP**”) ultimately launched by the DWS in November 2019. I attach relevant extracts of the NWSMP as **FA11**. The NWSMP recognises the importance of SWSAs and also notes:
- 67.1. the threat that mining in SWSAs poses to water security in both the short and long term (page 35);

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- 67.2. that the Department of Environmental Affairs (“**DEA**”) and South African National Biodiversity Institute (“**SANBI**”) have received funding from the Global Environment Facility “*for improving financial flows for restoring ecological infrastructure and for strengthening institutional capacity*” for the protection and maintenance of SWSAs (pages 35-36); and
- 67.3. the declaration of SWSAs as protected areas must be undertaken by 2021 (page 66).

#### Recognition by the Mining Sector

68. On 22 May 2013 the ‘Mining and Biodiversity Guideline: Mainstreaming Biodiversity into the Mining Sector’ was published by the then DEA, the DMR, the then Chamber of Mines, the South African Mining and Biodiversity Forum and SANBI. The mine area falls within an area which has been identified in the Mining and Biodiversity Guideline as a Category B area, having the “Highest Biodiversity Importance” and being at the “Highest Risk for mining” (relevant extracts of the guideline are attached as **FA12**). The significance of the biodiversity features in a Category B area is that (page 29):
- 68.1. 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*” [my emphasis];

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- 68.2. Category B areas “are viewed as necessary to ensure the protection of biodiversity, environmental sustainability, and human well-being”; and
- 68.3. “An [Environmental Impact Assessment]... 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...’
69. Atha’s Final Environmental Impact Assessment Report (“**Final EIAR**”) confirms that the mine area falls within a Category B area, having the “*Highest biodiversity importance*” and being at the “*Highest Risk for mining*”. A copy of the relevant pages of the Final EIAR are attached marked **FA13**.

#### Environmental Management Framework

70. The declaration of Mabola as a Protected Area came on the back of a report dated June 2011 prepared by SRK Consulting at the instance of the then DEA in partnership with the Mpumalanga Department of Economic Development, Environment and Tourism, together with the Local Municipality (this report is the basis for the Dr Pixley Ka Isaka Seme Local Municipality Environmental Management Framework, 2011) (the “**EMF Report**”). I attach a copy of the EMF Report as **FA14**. The three abovementioned spheres of government had commissioned the development of an Environmental Management Framework (“**EMF**”), including a Strategic Environmental Management Plan, to support

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decision making that will ensure the sustainable development and management of the natural resources of the Local Municipality.

71. According to the EMF Report:

71.1. 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).

71.2. The purpose of the EMF 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 EMF will be incorporated into relevant planning documents such as integrated development plans and other spatial development frameworks (para 1.3).

71.3. 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:

71.3.1. NEMA;

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71.3.2. NEMBA;

71.3.3. NEMPAA;

71.3.4. National Forest Act, 84 of 1998;

71.3.5. National Environmental Management: Air Quality Act, 39 of 2004;

71.3.6. National Water Act, 36 of 1998 ("**NWA**");

71.3.7. Water Services Act, 108 of 1997;

71.3.8. Conservation of Agricultural Resources Act, 43 of 1983;

71.3.9. MPRDA;

71.3.10. National Heritage Resources Act, 25 of 1999;

71.3.11. National Environmental Management: Waste Act, 59 of 2008;

71.3.12. Development Facilitation Act, 67 of 1995;

71.3.13. Provincial Government: Mpumalanga Nature Conservation Act, 10 of 1998;

71.3.14. Local Government: Municipal Structures Act, 117 of 1998; and

71.3.15. Municipal Systems Act, 32 of 2000;

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

71.4.1. Provincial Growth and Development Strategy;

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- 71.4.2. Mpumalanga Biodiversity Conservation Plan (being the predecessor to the MBSP dealt with above);
  - 71.4.3. Heritage, Greening Mpumalanga and Tourism Programme;
  - 71.4.4. Outcome 10: Environmental assets and natural resources that are valued, protected and continually enhanced;
  - 71.4.5. National Water Resources Strategy (September 2004);
  - 71.4.6. Land Redistribution Policy;
  - 71.4.7. Accelerated and Shared Growth Initiative for South Africa; and
  - 71.4.8. National Spatial Development Perspective.
- 71.5. In addition, the EMF Report sets out International Agreements to which South Africa is party, which provide obligations of relevance to the Municipal area under consideration. These are:
- 71.5.1. Ramsar Convention (1971);
  - 71.5.2. Bonn Convention (1979);
  - 71.5.3. United Nations Framework Convention on Climate Change (1992);
  - 71.5.4. Kyoto Protocol (1997);
  - 71.5.5. Agenda 21;
  - 71.5.6. Convention of Biological Diversity;

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71.5.7. Helsinki Rules;

71.5.8. SADC Protocol on Shared Waters;

71.5.9. The Piggs Peak Agreement;

71.5.10. Komati River Basin Treaty;

71.5.11. Tripartite Interim Agreement;

71.5.12. Interim IncoMaputo Agreement on Water Sharing;

71.5.13. Convention of the Control of Transboundary Movements of Hazardous Wastes and their Disposal (Basel Convention) (1994).

71.6. The EMF Report further notes, as regards water resources (paras 3.2.6) that:

71.6.1. the Local Municipality situated in the headwaters of three major rivers and Water Management Areas, namely the Upper Vaal, Thukela and Usuthu to Mhlathuze (Map 17 of the EMF Report);

71.6.2. of further note is that the area of the Municipality totally and/or partially contains 14 quaternary catchments;<sup>3</sup>

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<sup>3</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).

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- 71.6.3. besides mining activities, discharge from the various Waste Water Treatment Works pose a potential threat to water bodies/rivers without treatment;
- 71.6.4. 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; and
- 71.6.5. 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).
- 71.7. As regards terrestrial ecology (para 3.2.8), the EMF Report noted the following:
- 71.7.1. areas within the municipal area that are rated as Protected or Irreplaceable for terrestrial ecosystem are high lying areas on the eastern side, including the Paardeplaats Nature Reserve, Wakkeestroom vlei, Kastrol Nek and surrounding areas (depicted in Map 22 of the EMF Report, also see Map 7 – Environmental Management Zones for the Local Municipality and the system of land use management guidelines on page 87 of the EMF);
- 71.7.2. the EMF Report noted, then already, the proposed Wakkerstroom Protected Environment area, which involved a

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process which was being managed by a committee of relevant stakeholders;

71.7.3. the MTPA had by then already applied to the DMR 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.

71.8. According to the Local Municipality's Spatial Development Framework (discussed in more detail below), 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).

71.9. 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).

71.10. The EMF referred to in paragraph 70 above, shows that the subject property falls within "Zone 1: Conservation" Environmental Management Zone. The EMF Report noted in "Table 5-3: Management zone guidelines for the Municipality" (page 88) that:

71.10.1. mining is among those "undesirable types of activities" which are "not allowed at all" in areas with an environmental attribute

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of, *inter alia*, Zone 1: Conservation; Zone 2: Agriculture; Zone 4: Tourism;

71.10.2. 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;

71.10.3. 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;

71.10.4. 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);

71.10.5. 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;

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71.10.6. 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; and

71.10.7. 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.

72. The EMF Report further noted that land use management guidelines were linked to each of the Environmental Management Zones, in Map 7 of the EMF 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).

#### Recognition in Spatial Development Frameworks

73. The Local Municipality developed and published its Spatial Development Framework ("**SDF**") dated 30 November 2010. I attach relevant extracts of the SDF as **FA15**. According to the SDF:

73.1. it must guide and inform all decisions of the Local Municipality relating to land use, development and planning of land (para 1, page 1);

73.2. 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, page 7);

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- 73.3. it 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, page 12);
- 73.4. 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, page 112); and
- 73.5. the area in which the Subject Property falls is identified as a "sensitive natural area" (para 4.1, page 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, page 172).
74. The environmental section of the SDF (contained in Chapter 2, para 5.0, p.65) states that:

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- 74.1. operational mines pose a significant threat to underground water quality (para 5.6, page 71);
- 74.2. 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, page 76);
- 74.3. 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, page 79);
- 74.4. 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, page 79);
- 74.5. 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, page 79).
75. With regard to employment and the Local Municipality’s economic profile, the SDF states that:

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