IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

Case number: A155/19

Water Tribunal Case number: WT03/17/MP

In the matter between:

ENDANGERED WILDLIFE TRUST	First Appellant
FEDERATION FOR A SUSTAINABLE ENVIRONMENT	Second Appellant

and

DIRECTOR-GENERAL (ACTING), DEPARTMENT OF WATER AND SANITATION	First Respondent
THE WATER TRIBUNAL	Second Respondent
ATHA-AFRICA VENTURES (PTY) LTD	Third Respondent
MINISTER OF HUMAN SETTLEMENTS, WATER AND SANITATION	Fourth Respondent

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APPELLANTS' REBUTTAL HEADS OF ARGUMENT

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INTRODUCTION AND OVERVIEW

1 This is an appeal against a decision by the Water Tribunal ("**the Tribunal**"), in terms of section 149 of the National Water Act 36 of 1998 ("**NWA**").

2 The parties have filed main heads of argument and are awaiting the allocation of a date for the hearing of the appeal.

3 The main heads of argument and practice note filed on behalf of Atha Africa Ventures (Pty) Ltd ("**Atha**") are replete with serious allegations against the appellants, their attorneys (the Centre for Environmental Rights or "**CER**") and their counsel. In particular, Atha alleges that:

3.1 the CER has a clear, direct and substantial interest in the proceedings before the Tribunal and this Honourable Court,[1] which constitutes a clear and unethical conflict of interest, and which negates any pretence of objectivity on CER's part;

3.2 the appellants have abused the process of a section 149 appeal, by seeking a full and wide rehearing;

3.3 the appellants have advanced a partisan[2] and misleading[3] case before the Water Tribunal and this Honourable Court.

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[1] Para 7 of Atha 's HOA, Additional bundle, pp7-8.

[2] Para 7 of Atha's HOA, Additional bundle, pp7-8.

[3] Para 7, 111.5 , 128.9 , 151.3 , 152 .5, 185 .1, 186 .5, 186 .7, 186 .8, 190, 223 of Atha's HOA, Additional bundle, pp 7-8, 87, 98, 113, 115, 138, 141-143, 145, 161.

4 On 17 August 2020, the parties' legal representatives attended a case management meeting with Acting Deputy Judge President Potterill. At the case management meeting, the appellants' senior counsel referred to Atha's heads of argument and practice note, which he explained contain unjustifiable attacks upon the integrity of the appellants and their legal representatives. Because Atha sought *de bonis propriis* costs against the CER, the censuring of counsel, and the referral of the CER to the Legal Practice Council, the ADJP granted the appellants leave to file further affidavits and heads of argument to address Atha's allegations.

5 The parties have exchanged affidavits regarding the alleged conflict of interest on the part of the CER.

6 The purpose of these heads of argument is to respond to Atha's allegations of unethical and unprofessional conduct. They are structured as follows:

6.1 First, we demonstrate that the CER is not subject to any unethical conflict of interest, and that Atha's gratuitous attack in this regard in fact amounts to an attack on the entire practice of public interest litigation.

6.2 Second, we submit that this appeal is not an abuse of the process envisaged by section 149 of the NWA. On the contrary, the appellants were guided by a previous decision of this Court interpreting section 149 and by a Full Court decision of the Gauteng Division, Johannesburg interpreting a directly analogous provision. They maintain that, in doing so, they interpreted section 149 correctly. At a

minimum however they acted responsibly and properly and cannot conceivably be said to have engaged in an abuse of process.

6.3 Third, we show that the appellants' main heads of argument were not misleading, and address the numerous allegations of non-disclosure and misleading the Court, levelled by Atha.

6.4 Lastly, we address the question of costs.

7 We emphasise, at the outset, that these heads of argument serve a limited purpose. In accordance with the ADJP's directive, their purpose is to respond to allegations of unethical conduct levelled by Atha. Their purpose is not to re-argue the merits of the case or to respond to those parts of Atha's main heads of argument that canvas matters not contemplated by the ADJP's directive. We therefore limit ourselves to those portions of Atha's main heads of argument that make allegations of unprofessional or unethical conduct. Our failure to respond to any particular contention in Atha's main heads of argument should accordingly not be construed as an acceptance of its veracity or validity. The issues not canvassed by the ADJP's directive, including (without limitation) the proper approach to the interpretation of section 24 of the Constitution, the proper place of sustainable development in environmental law, the relevant international law (including the conventions not referred to in Atha's heads), the implications of the area to be mined falling largely within a Protected Environment and a Strategic Water Source Area, the correct understanding of the precautionary principle and more, will be canvassed in detail in oral argument.

THE CER IS NOT CONFLICTED

Atha's allegations of a conflict of interest

8 In its heads of argument, Atha made various allegations to the effect that the CER is subject to an inherent conflict of interest. In particular, at paragraph 7 of its heads of argument, Atha says the following

> "We have environmental lobbyists (which include the Centre for Environmental Rights, professing to be an attorney of record but with a clear, direct and substantial interest in the proceedings both before the Water Tribunal and before the Court, as well as in the outcome thereof, and which situation constitutes not only a clear and unethical conflict of interest in the case of any other attorney[15] but which also negates any pretence of objectivity on their part[16]) advancing a partisan (and even misleading) case before the Water Tribunal and before the Court, selectively emphasising and exaggerating only the adverse ecological impacts and conveniently ignoring everything else on record - ignoring the factual and expert evidence proving that those impacts are not as serious as the Appellants portray as well as the factual and expert evidence (accepted by the Water Tribunal[17]) regarding the adequacy of approved mitigation measures." (original footnote numbers included).[4]

9 At footnote 15,[5] Atha's main heads of argument refer to the case of *Theron v Natal Markagente (Edms) Bpk*[6] as authority for the alleged conflict of interest, where it says *'the attorney had an interest in the matter because he was at the same time a director'*. It also refers to Hoffman Handy Hints on Legal Practice (2011) 70-72, which it says deals with *'personal interest in a matter'*.

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[4] Atha HOA Para 7, Additional bundle pp6-7.

[5] Atha HOA, Additional bundle pp6-7.

[6] 1978 (4) SA 898 (N).

10 At footnote 16,[7] Atha's heads of argument refer to paragraphs 75.1 to 75.3 of the Water Tribunal decision, where it is said that the WWF-SA Coal and Water Futures Report published in 2011 acknowledged the participation of the CER Director, Melissa Fourie, and that the Report was later referenced by the CER in submissions to Parliament and in its advocacy work.

11 On the strength of these allegations, Atha contends that *'because of the abuse of litigation by the Appellants and the conflicted Centre for Environmental Rights, this is a matter where the Appellants and the Centre for Environmental Rights de bonis should be ordered to pay the costs of Atha-Africa*'.[8]

12 It reiterates the *'conflicted position of the Centre for Environmental Rights*' at paragraph 227, and describes this as a matter which should be referred to the Legal Practice Council.[9]

13 In relevant part, therefore, Atha makes the claim that:

13.1 the CER is an environmental lobbyist;

13.2 the CER has a clear, direct and substantial interest in the proceedings, which constitutes 'a clear and unethical conflict of interest';

13.3 the appellants and the CER must be ordered to pay Atha's costs *de bonis propriis* on a punitive scale;

13.4 the CER should be referred to the Legal Practice Council.

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[7] Atha HOA Additional bundle p7.

[8] Atha HOA Para 159, Additional bundle pp119; Atha Practice Note para 7.8, Additional bundle p175.

[9] Atha HOA Para 227, Additional bundle pp162-163.

14 These are grave allegations. Atha has now been provided with multiple opportunities to retract them. Its counsel declined to do so at the 17 August 2020 case management meeting. It declined to do so in answer to first affidavit in these proceedings, deposed to by Ms Horsfield of the CER. It declined to do so in a later exchange of correspondence between the attorneys.

15 In the first affidavit, Ms Horsfield demonstrated that Atha's assertion of a conflict of interest was without any legal or ethical foundation. She invited Atha to point to the specific rule or principle which it alleges the CER has breached or to retract the allegations.

16 Far from retracting, Atha doubled down. It made various further allegations against the CER and Ms Horsfield – most of which are irrelevant and vexatious and none of which support the claim of an unethical conflict. These include allegations that:

16.1 CER has acted for clients in proceedings not before the Court in the present appeal, along with factually incorrect perspectives on the prosecution of those matters;[10]

16.2 CER has published media statements, news articles and publications that Atha does not agree with;[11] and

[10] AA paras 6-14, Additional bundle pp247-260.

[11] AA paras 15-29, Additional bundle pp260-274.

16.3 CER is supposedly using tactics which Atha recognises as being reflected in a Greenpeace Funding proposal for the Australian anti-coal movement from 2011, which CER has nothing to do with.[12]

17 All of this Atha did without compunction and despite CER having respectfully reminded Atha's attorney and counsel of the need to exercise caution before launching an attack on the integrity of officers of the court.[13]

18 Most significantly, in his answering affidavit, Mr Triphathi sought to articulate the rule which apparently forms the basis for Atha's attack on CER, as follows:

> "I respectfully submit that no advocate or attorney may or should, ethically, have any interest of any kind in the outcome of a matter in which he or she is acting as advocate or attorney."[14]

19 The nub of Atha's contention is that because the CER advocates for positions on issues relating to the environment, it is thereby ethically precluded from acting in any environmental litigation consistent with those positions.

20 As we explain below, no such rule exists.

Legal principles

21 The well-known principles regarding conflicts of interest on the part of legal representatives were recently affirmed by this Court in *Moyane v Ramaphosa and Others*.[15]

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[12] AA paras 30-32, Additional bundle pp274-280.

[13] First affidavit paras 59-60 Additional bundle pp201-202, referring to the remarks of Goldstone J (as the then was) in *Protea Assurance Co Ltd v Januskiewicz* 1989 (4) SA 292 (W) at 298D-299A.

[14] AA para 60, Additional bundle p291.

22 The Court explained that a legal representative owes their current client a fiduciary duty to act in their best interests.[16] This fiduciary duty is described by Lord Millett in *Bolkiah* as follows:

> "a fiduciary cannot act at the same time both for and against the same client, and his firm is in no better position. A man cannot without the consent of both clients act for one client while his partner is acting for another in the opposite interest. His disqualification has nothing to do with the confidentiality of client information. It is based on the inescapable conflict of interest which is inherent in this situation."[17]

23 In other words, a legal representative may not act simultaneously for two clients with conflicting interests, because they cannot properly serve both of their interests at the same time.

24 That is the conflict: between two duties that the lawyer owes, with which they cannot simultaneously comply.

25 As the Court in *Moyane* explained, the fiduciary duty to the client exists only while the professional relationship with the client persists. Thereafter, the lawyer owes no duty to that client, and no conflict of interest arises acting against that client.[18]

26 Indeed, *'[t]he <u>only</u> duty that survives the termination of the legal representative's mandate, is the duty to preserve the confidentiality of*

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[15] [2019] 1 All SA 718 (GP).

[16] Para 19.2.

[17] *Prince Jefri Bolkiah v KPMG* (1999] 2 AC 222 at 234.

[18] *Moyane* para 3. See also *Netcare Hospitals (Pty) Ltd v KPMG Services (Pty) Ltd* [2014] 4 All SA 241 (GJ) at par. 7

information imparted to him through his professional relationship with a former client".[19]

27 There was no suggestion in *Moyane*, and there has been no suggestion in any other case of which we are aware, that a conflict of interest arises where a legal representative and her client have aligned views, beliefs or interests. In such a case, there is simply no "conflict". The lawyer is able simultaneously to discharge her fiduciary duty to her client and to pursue her own interests.

28 Mr Michael Evans, an attorney of 31 years' experience, has filed an affidavit indicating that no such rule contended for by Atha exists.[20]

28.1 Mr Evans points to the fact that generations of lawyers have acted in precisely the manner that the CER has, in directing their lives, professionally and extra-professionally, to the goal of ending apartheid and protecting fundamental rights and freedoms – a goal in which they have openly shown themselves to have a direct and substantial interest.[21]

28.2 He notes further that Atha's alleged rule reflects a basic misunderstanding of role of an attorney, in that attorneys always assume a direct and substantial interest in the litigation they are involved by virtue of the agency relationship between lawyer and client; the ethical duty to act in a client's best interests; and the fact that the

[19] *Moyane* para 19.5, emphasis added.

[20] Evans affidavit, Additional bundle p413.

[21] Evans affidavit para 35.1, Additional bundle p424.

attorney derives a fee – some of which is guaranteed by the unsuccessful party in ordinary litigation, and all of which is guaranteed by the unsuccessful party in contingency-fee litigation.[22]

28.3 He explains that the attorney's duty *to the Court* is enforced not through the rules applicable to conflicts of interest, but through the oath or affirmation attorneys swear; the training that attorneys receive; the rules governing the attorneys' profession; and the attorney's own ethical compass.[23]

28.4 What is certainly not the case, as Atha repeatedly asserts, is that a duty exists to prevent a situation arising in which an attorney acts on behalf of a client with common political ideas and objectives.

29 Indeed, the implication of *Moyane* is that a court would be very slow to recognise such a rule. Courts will not lightly disqualify a legal representative, "*because the effect of doing so would be to deprive the current client of his right to freely choose his own Counsel*."[24] It would be unprecedented to prevent environmental organisations from freely choosing to be represented by attorneys that share their vision of environmental justice.

30 Far from pointing to authority justifying the rule that Atha seeks to have applied, the only authority to which Atha has thus far referred – *Theron* – concerned a

[22] Evans affidavit para 49, Additional bundle p430.

[23] Evans affidavit, para 51, Additional bundle pp431-432.

[24] *Moyane* para 20.

conflict of interest of precisely the kind considered in *Moyane*, in which a lawyer is alleged to be subject to multiple conflicting duties.

30.1 The matter concerned the return day of a rule nisi calling upon interested parties to show cause why the respondent company should not be placed under a final order of judicial management. A provisional order placing the company in judicial management was already in place.

30.2 The applicant, favouring judicial management, was one of the respondent's directors and co-shareholder with his wife of the shares in the respondent. The provisional judicial manager had issued a report recommending a final order of judicial management.

30.3 One creditor opposed the application and maintained that the respondent company should be placed in liquidation.

30.4 The attorney acting for the applicant was, at one and the same time, also the provisional judicial manager appointed pursuant to the court's order of provisional judicial management. His duties thus came directly into conflict with one another.[25]

30.4.1 On one hand, his duty as the attorney for the applicant (i.e. a creditor) was to do everything he could to save the respondent from going into liquidation and to obtain a moratorium for his client - including by motivating for the

[25] *Theron* at 900A-B.

respondent to go under judicial management instead of liquidation.

30.4.2 On the other, his duty as the provisional judicial manager was to provide an absolutely impartial assessment of the prospects of judicial management saving the respondent company from liquidation, for the guidance of the respondent's creditors, and for the benefit of the Court.

30.4.3 This gave rise to a 'glaring' conflict. The attorney was unable in that instance to comply with his dual duties.

31 It was a conflict of precisely the kind contemplated in *Moyane* – where a legal representative simultaneously owes two or more fiduciary duties which come into conflict – which arose in *Theron*.

No conflict of interest

32 Despite the gravity of its allegations against the CER, and the stridency with which it advances them, Atha has, quite remarkably, failed squarely to identify the CER's alleged conflict of interest.

33 Most glaringly, Atha has failed to explain how the *Theron* decision - in which a person who was an attorney for the director and shareholder of a company, was at the same time the provisional judicial manager tasked with determining whether the company should be placed in liquidation - finds any application in the present case. Given the seriousness of the attack on the integrity of CER's

attorneys, one would have expected that issue to be fully and properly dealt with in Atha's answering affidavit. Despite being challenged squarely to demonstrate *"How does Theron find application in the present case … what precisely are the two conflicting duties … borne by the CER?"*,[26] Atha provides a bald, single-sentence response, reasserting its applicability on the basis that *"they have their duties as the attorney for the Appellants and they also have their own interests and programmes at heart"*.[27]

34 Certainly, Atha has not alleged that the CER owes any duty or has any interest which comes into conflict, in any way, with its fiduciary duty to its clients in this case.

35 As we explain below, the CER is unapologetic about the work that it does, and submits that it breaches no ethical rules in performing such work.

The role of the CER

36 The CER is a public interest law organisation committed to the realisation of constitutional rights. Its vision is "*to seek a just, equitable, compassionate society which is resilient, celebrates diversity and respects the interdependency between people and the environment.*"[28]

37 The CER is recognised as a non-profit juristic entity, with approval to establish a "law clinic" in terms of section 34(8) of the Legal Practice Act.[29] Section 34(8)

[26] FA para 30, Additional bundle p11.

[27] AA para 56, Additional bundle p113.

[28] FA para 54, Additional bundle p197.

[29] RA paras 17-18, Additional bundle p363.

of the Legal Practice Act permits a registered non-profit juristic entity to establish a "law clinic" to conduct a legal practice, subject to the approval of the Legal Practice Council. The law clinic must provide legal services free of charge to the public, especially:

> "persons who, in the opinion of the Council, would not otherwise be able to afford them, or, with the prior written approval of the Council, services rendered in the public interest; and the Council may from time to time issue guidelines for the assistance of clinics in determining to whom services may be rendered"[30]

38 In terms of its Memorandum of Incorporation, the primary object of the CER is the advancement of environmental rights, including through, *inter alia*, the provision of environmental legal advice, which may include:[31]

38.1 the promotion of human rights and participatory democracy in environmental decision-making;

38.2 the provision of environmental legal services for poor and needy persons, including other environmental donor-funded public benefit organisations;

38.3 educational enrichment, academic support, supplementary tuition or outreach programmes for the poor and needy through an internship programme that provides environmental legal training;

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[30] Rule 36.1.5 of the rules made in terms of section 95(1)(zD) read with section 34(8)(a) of the Legal Practice Act.

[31] FA para 55, Additional bundle p198; RA para 20, Additional bundle p364; CH5, Additional bundle p219.

38.4 engaging in the conservation, rehabilitation or protection of the natural environment, including flora, fauna or the biosphere through the provision of legal support, advice and representation;

38.5 the promotion of, and education and training programmes relating to, environmental awareness, greening, clean-up or sustainable development projects through an internship programme that provides environmental legal training.

39 If Atha were right about what public interest lawyers may and may not do, then many of these objects would be unethical. Promoting the rights in section 24 of the Constitution; providing legal support, advice and representation which is aimed at conservation, rehabilitation and protection of the natural environment; and promoting environmental awareness, all suggest that the CER takes *particular positions on matters affecting the environment*.

40 When the CER sought the approval of the LPC in terms of section 34(8) of the Legal Practice Act, it was required to make available a copy of its Memorandum of Incorporation.[32]

41 The LPC granted approval to the CER on the basis of these objects, and did not require any amendments to the Memorandum of Incorporation. Quite clearly the LPC, the regulator responsible for professional conduct, does not share's Atha's concerns about the CER's activities.[33]

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[32] RA para 24, Additional bundle p365.

[33] RA para 25, Additional bundle p366.

42 As Ms Horsfield has explained, the CER's interests and the appellants' interests are in many ways aligned.[34]

42.1 The vision of the Endangered Wildlife Trust is "a healthy and equitable world that values and sustains the diversity of all life". This vision closely aligns with that of the CER.

42.2 Similarly, the Federation for a Sustainable Environment is an environmental activist organisation that seeks to combat the harms on the environment caused by mining, especially its effects on water. This too aligns with the interests of the CER.

43 In addition to this matter, the CER is engaged in various other work, all of which is in pursuance of the environmental right in section 24 of the Constitution. Some of the matters in which it has been involved are detailed in the first affidavit, and we do not repeat them here.[35] Suffice it to say, in undertaking this work, the CER has used a combination of strategies, including facilitating public participation; engaging other organisations, stakeholders and communities in the environmental decision-making process; providing legal advice; and engaging in research and analysis.

44 None of this conduct gives rise to a conflict of interest of any kind. That is because, in doing its work (including in this matter), the CER is not subject to any competing duties. Indeed, far from giving rise to an unethical conflict of interest, this gives rise to an unremarkable alignment of interests between

[34] FA para 33, Additional bundle p188.

[35] FA para 57, Additional bundle pp157-201.

attorney and client. This is, of course, very often the case for attorneys in public interest organisations permitted to establish and operate a law clinic, who regularly take on like-minded public interest clients.

45 It is also important to bear in mind that section 34(8) specifically envisages, and provides statutory sanction for, organisations like CER. Section 34(8)(a)(i) provides as follows:

> "Subject to the approval of the Council in terms of the rules, a law clinic may be established by -
>
> (i) a non-profit juristic entity registered in terms of the Non-profit Organisations Act, 1997 (Act 71 of 1997), to conduct a legal practice if, in terms of its founding documents -
>
> (aa) the majority of its members of its governing body is comprised of legal practitioners; and
>
> (bb) upon its winding up, dissolution or voluntary deregistration, any asset remaining after all liabilities have been met, are transferred to another non-profit organisations having similar objectives to it".

46 It is essential to the existence of any juristic entity that it has a set of objects. If Atha's contentions are correct, it would be impossible for any juristic entity that is approved to establish a law clinic, to litigate -

46.1 in its own right as a party to achieve any of its objects, because it would be acting as legal practitioner where it had its own interest in the outcome;

46.2 on behalf of any client where the outcome sought by the client in the litigation was the same as an object of the juristic entity.

47 On Atha's approach, such a juristic entity would only be able to litigate -

47.1 in its own right where the litigation does not serve the entity's objects, but that would be *ultra vires* its founding document;

47.2 on behalf of a client where the object of the litigation is different from the entity's objects, but that would be *ultra vires* the entity's founding document; or

47.3 if the entity had a single object, which was to provide free legal representation, but neither section 34(8) of the Legal Practice Act, nor the rules made pursuant to that subsection, contain any such limitation on the objects of a juristic entity that establishes a law clinic. This is demonstrated by the fact that CER has been granted statutory approval to establish a law clinic in terms of section 34(8), notwithstanding that its objects are not so confined.

48 From this analysis, it follows that -

48.1 CER and its attorneys are statutorily entitled to act in precisely the manner that it has done in this litigation and is doing in other litigation;

48.2 other juristic entities established with the object of supporting particular constitutional rights and values in the public interest are fully entitled, once they have approval to establish a law clinic, to litigate in support of their objects; and

48.3 Atha's alleged rule is incompatible with the statutory regime established by section 34(8) of the Legal Practice Act.

The CER was not an interested and affected party

49 The second basis for the attack on the integrity of CER was that, on the facts, it was itself an interested and affected party in the WULA process. CER has demonstrated that this is simply not so.

50 As the Water Tribunal correctly acknowledged on multiple occasions, the CER did not participate in the WULA process, except for obtaining the relevant documentation from Savannah Environmental (Pty) Ltd - the public participation consultant appointed by Atha.[36] As the Water Tribunal explained:

> "A year after the WULA came to their attention, the CER launched a Promotion of Access to Information Act request on 13 July 2016. This was addressed to the First Respondent. This was to seek access to WULA documents submitted after 3 August 2015. On the record, and at the hearing there is no evidence of any further engagements between CER (the Appellants' attorneys) qua interested and affected parties, who had access to WULA documents during the public participation period on 3 August 2015 and Savannah Environmental ('the EAP')".[37]

51 Moreover, the recordal of the CER as an interested and affected party in the Record of Recommendation and Decisions dated 7 July 2016 was plainly in error. It was clarified during the proceedings[38] that the CER did not file an objection to the WUL but merely sent a letter on 2 September 2015, advising

[36] Paras 46 and 161 of the Water Tribunal Decision, Record pp 5129 and 5229; para 43 of the Water Tribunal Decision, Record p 5127; para 46.6 of the Water Tribunal Decision, Record p 5131.

[37] Tribunal decision para 46.6, Record p5131.

[38] Cross-examination of Ms Hasseena Aboobaker, Record, p1318.

that the DWS was wasting resources on processing the WULA and that process should be suspended as it was fatally flawed.[39] The letter was expressly on behalf of the CER's clients.

52 To be clear, even if the CER had participated as an interested and affected person in its own name, that would not have been improper. But it did not do so. Thus, the high-water mark of the CER 's allegedly improper conduct was to address correspondence on behalf of its clients seeking a suspension of the WULA process. That is the everyday conduct of an attorney.

An attack on public interest litigation

53 Perhaps the most disturbing aspect of Atha's attack on the CER, were it to be upheld by this Court, is the chilling effect that it would have on the practice of public interest litigation in South Africa - a practice with a long and rich history of advancing freedom, equality and fundamental rights.

54 The significance of this form of litigation has been described by Ms Horsfield in the first and replying affidavits and by Mr Evans. In short:

54.1 Lawyers under apartheid – including many of South Africa's most prominent legal figures – used litigation as a means by which to resist oppressive state conduct, an outcome in which they had a direct and substantial personal interest. If Atha contends that these lawyers, including for example former President Nelson Mandela, former Chief Justice Arthur Chaskalson, the late Chief Justice Pius Langa and

[39] FA paras 42.1 and 42.2, Additional bundle p191; CH4, Additional bundle p216.

various current members of the bench, bar and side-bar, acted unethically, then it should say so.[40]

54.2 Under the constitutional dispensation, many organisations continue in this tradition, seeking the realisation of constitutional rights.[41]

54.3 These organisations do not shy away from the causes they champion. They even sometimes institute or intervene in proceedings in their own name.[42]

54.4 These organisations routinely use advocacy, research, activism and media communication, and a growing literature has developed which emphasises the importance of these various components of an overall litigation strategy on the part of public interest lawyers.[43]

54.5 The CER engages the use of all of these methods, including media strategies, in ensuring the fulfilment of its objectives and its legislatively mandated objective, as a law clinic, to provide services to the public and in the public interest, and those enshrined in its Memorandum of Incorporation.[44]

54.6 Atha's gratuitous attack on the CER is, in fact, an attack on the traditions and methods employed by all public interest law

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[40] FA para 47.3, Additional bundle p193.

[41] FA para 48, Additional bundle p194.

[42] FA para 49, Additional bundle p194.

[43] RA para 30, Additional bundle p367; Evans para 23, Additional bundle p421.

[44] RA para 31, Additional bundle p369.

organisations, which work tirelessly to realise social change and to protect and promote the Constitutional rights of millions of South Africans.

55 The Constitutional Court has actively encouraged litigation of this kind. As O'Regan J recognised in *Mazibuko:*

> "It is true that litigation of this sort is expensive and requires great expertise. South Africa is fortunate to have a range of non-governmental organisations working in the legal arena seeking improvement in the lives of poor South Africans. Long may that be so. These organisations have developed an expertise in litigating in the interests of the poor to the great benefit of our society. The approach to costs in constitutional matters means that litigation launched in a serious attempt to further constitutional rights, even if unsuccessful, will not result in an adverse costs order. The challenges posed by social and economic rights litigation are significant, but given the benefits that it can offer, it should be pursued."[45]

Application to strike out

56 In the first affidavit, in accordance with what was agreed at the case management meeting of 17 August 2020, Ms Horsfield dealt narrowly, and courteously and appropriately, with Atha's allegations against the CER in its heads of argument.

57 Regrettably, Atha did not do the same. Instead, in its answering affidavit, it has impermissibly expanded its gratuitous and baseless attack on the CER.

58 In the process, Atha made various allegations that are utterly irrelevant and vexatious. These include allegations that:

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[45] Mazibuko and Others v City of Johannesburg and Others [2009] ZACC 28; 2010 (3) BCLR 239 (CC) 2010 (4) SA 1 (CC) para 165.

58.1 CER has acted for clients in proceedings not before the Court in the present appeal, and factually incorrect perspectives on the prosecution of those matters;

58.2 CER has published media statements, news articles and publications that Atha does not agree with; and

58.3 CER is supposedly using tactics which Atha recognises as being reflected in a Greenpeace Funding proposal for the Australian anti-coal movement from 2011.

59 These allegations are irrelevant, because they neither respond to the first affidavit nor attempt to demonstrate a conflict of interest on the part of the CER. Quite clearly, they are designed to evoke unwarranted antipathy on the part of the Court towards the appellants and their attorneys. This gives rise to prejudice. Unless they are struck out, they have the potential to prevent a fair adjudication of the appeal.

60 The appellants have accordingly applied for the irrelevant, scandalous and vexatious portions of the answering affidavit to be struck out.

61 Notably, Atha has expressly eschewed any reliance on unethical conduct by the CER.

61.1 It says, in terms, that 'the issue is not the conduct of the Centre for Environmental Rights but the conflict of interest in that both Ms Catherine Horsfield (as attorney) as well as the Centre for Environmental Rights (as a Law Clinic registered with the Legal

Practice Council) clearly have a direct and substantial interest in the outcome of the proceedings.'

61.2 At paragraph 49, Atha says that the real issue is not the fact that the CER's alleged conflict became manifest; instead, 'the real issue is that every attorney and firm of attorneys is under a professional and legal duty to prevent a situation where there may be any conflict between their own interests and the outcome of the proceedings in question'.

62 On its own version, therefore, the issue before this Court is not any unethical conduct on the part of the CER. It is instead a conflict of interest that apparently inheres in the CER representing the appellants in these proceedings. Once that is so, those paragraphs that insinuate but are never so bold as to actually allege unethical conduct - plainly contain matter that, on this basis too, is scandalous, vexatious and irrelevant.

63 On the above bases, the following paragraphs stand to be struck out:

63.1 Paragraphs 6 to 14 of Atha's answering affidavit, which contain an extensive and irrelevant excursus of the legal challenges levelled against Atha's proposed new coal mine. In addition, the inflammatory language used by Atha in these paragraphs has as its sole purpose to demean and malign Ms Horsfield (who is referred to by name - unnecessarily and irresponsibly - 37 times in the affidavit) and the CER, and they are accordingly scandalous and vexatious.

63.2 Paragraphs 15 to 27, which set out media releases, news articles and publications regarding Atha's proposed new coal mine. Atha fails to show how these articles are relevant, does not allege that the CER has acted unethically, but makes allegations and insinuations that bring the CER and the CER's clients into disrepute in a manner that is scandalous and vexatious.

63.3 Paragraphs 28 to 32, where Atha refers extensively to a 2011 funding proposal prepared by Greenpeace (Australia Pacific) entitled "Funding proposal for the Australian anti-coal movement'. These paragraphs are irrelevant.

63.4 Paragraph 45, where Atha, unjustifiably alleges a “cynical strategy to delay the project” on the part of “Ms Catherine Horsfield and the Centre for Environmental Rights”. This is irrelevant to the complaint of an unethical conflict of interest, scandalous and vexatious. In fact, the delays in this matter have been brought about by Atha’s refusal to withdraw its attack on the integrity of the appellants and their legal team.

64 To the extent that the court declines to strike out these paragraphs, CER has pleaded over in its replying affidavit and those paragraphs demonstrate the absence of any basis in these paragraphs for the conclusion that CER’s attorneys have in any way conducted themselves unethically.

Conclusion

65 What becomes apparent from the foregoing analysis is that the allegations of unethical conduct against CER and its attorneys were gratuitous and were made, and persisted in, with egregious disregard for the caution called for when attacking officers of the court. Symptomatic of this is Atha's express (but flawed) reliance on the defamatory allegations against CER and its attorneys having been "made in the course of a privileged opportunity".[46]

66 Even if this Court were to find, contrary to the foregoing submissions, that the ethical rule espoused by Atha exists and that CER's attorneys (along with all other public interest legal practitioners similarly situated) acted where they were subject to a conflict of interest, *Theron* demonstrates that the existence of a conflict does not automatically translate into an unethical conflict or unethical conduct. The court held as follows in this regard:

> "I do not for one moment doubt Mr Meyer's *bona fides*. His connection with the applicant has been open from the start. He has not, for instance, directed the applicant's case from the wings while some other attorney trod the stage. His conflict of interests, however, is glaring."

67 CER's attorneys dispute that they have acted where there was any conflict. But it is clear on the evidence that they too have at all times acted openly and in good faith.

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[46] AA para 38, Additional bundle p107.

68 Given the absence of any basis for the attack on CER's attorneys' integrity, it is impossible to avoid the impression that the strategy behind the attack is to drum up animosity towards the appellants and their attorneys, and thereby to build antipathy on the part of the judges of this Court towards the case that the appellants advance on appeal and to draw attention away from the serious flaws in Atha's case as set out in the appellants' grounds of appeal.

69 This is borne out also by those components of Atha's heads of argument dedicated to ascribing ideological and other stances to the appellants and CER on matters pertaining to the environment (without any evidential basis for doing so), and contrasting the supposedly more reasonable ideologies and other stances of either Atha or the authors of the heads of argument (again with no evidential basis).[47] A prime example of this is the unusual and presumptuous step of including in Atha's heads above the introduction a quote from Mr Hugh Glennister, with an unmistakable and gratuitous innuendo that the appellants and their legal representatives have been guilty of obscuring the truth, sensationalism, emotional rhetoric and deafness to reason.

[47] For example, Atha HOA paras 5, 6, 9.1, 9.2, 10.1,15, 217, Additional bundle pp 4-6, 8-9, 15 and 160. In Atha HOA paragraph 217, p160, there is an attempt to caricature the stance of the appellants and CER with reference to the racist trope of the "noble savage". This too was uncalled for. The appellants ascribe this regrettable term to Jean-Jacques Rousseau. See, however, the article published in The Guardian, titled "Racists created the Noble Savage" (available at: https://www.theguardian.com/world/2001/apr/15/socialsciences.highereducation), in which anthropologist Ter Ellingson, who describes the notion that Rousseau coined or even mentioned the term as "*one of the most widespread misbeliefs of all time*", explains that the term has in fact been invoked by racist anthropologists, and says that "*[t]he mere repetition of the words Noble Savage sufficed to serve as a devastating weapon against any opposition to the racist agenda. The myth of the Noble Savage became a weapon in the Ethnological Society's scientific-racist project of helping to naturalise a genocidal stance towards the "inferior" races*."

70 This *ad hominem* approach was successfully employed by Atha before the Water Tribunal. We submit that it should find no place before this Court, which will doubtless decide the appeal on its substantive merits.

NO ABUSE OF PROCESS

Atha's allegations of an abuse of process

71 Atha's second basis for criticising the appellants is that they have abused the process of a section 149 appeal.[48] According to Atha, while a section 149 appeal is limited to questions of law, the appellants have attempted to '*pursue a full and wide rehearing of the merits'*.

72 Atha says that the correct scope and ambit of the section 149 appeal depends on the meaning to be given to the phrase "question of law". While Atha says that no court has pronounced on that meaning for purposes specifically of section 149 of the NWA,[49] it refers to a lengthy extract from the decision of *Perskor*.[50]

73 On the basis of this quotation, Atha contends that a question of law is a question on the substance of law (or what the law is) and does not include

[48] Atha HOA paras 2 and 159, Additional bundle pp 3 and 119.

[49] Atha HOA para 97, Additional bundle p73.

[50] Media Workers Association of South Africa and Others v Press Corporation of South Africa ("Perskor") 1992 (4) SA 791 (A). See Atha HOA para 100, Additional bundle pp74-78.

matters of discretion.[51] It also suggests that a question of law does not include the question whether the Tribunal correctly applied the law to facts.[52]

74 Atha's criticisms of the appellants are misconceived and unwarranted.

74.1 First, despite making the allegation that the appellants are engaged in an abuse of process, Atha contends that the meaning of the phrase "question of law", as used in section 149, has not been previously decided by a Court.[53]

74.2 Quite how the appellants can be accused of an abuse of process, when, on Atha's version, (i) they were interpreting a provision that is novel and complex;[54] and (ii) in doing so, they relied on recent Full Court authority interpreting an identically worded provision, is unclear.

74.3 It is open to Atha to seek to distinguish that legislation (as it does, unconvincingly, we submit). But it is wrong of Atha to assert, when the appellants have relied on analogous authority, that they are engaged in an abuse of process.

74.4 Second, in any event, Atha is mistaken that the question is entirely novel. The ambit of a section 149 appeal *has* been considered – by this

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[51] Atha HOA para 101, Additional bundle p78.

[52] Atha HOA paras 101, 111.6, 225, Additional bundle pp 78, 87, 162.

[53] Atha HOA para 97, Additional bundle pp73-74.

[54] In other contexts, our courts have described the determination of whether an issue is a question of fact or law as a "vexed question" (*Yates Investments (Pty) Ltd v Commissioner for Inland Revenue* 1956 (1) SA 612 (A)) and as being a distinction not easy to draw (*Mtokonya v Minister of Police* 2018 (5) SA 22 (CC) para 38).

Court, no less. And it has been interpreted in precisely the manner contended for by the appellants.

74.4.1 In *Guguletto*,[55] a Full Bench of this Court (Murphy and Tuchten JJ) considered a section 149 appeal against a decision of the Tribunal.

74.4.2 The appellants had been denied a water use licence by the responsible authority on the basis that their application did not promote redress of past racial and gender discrimination.[56] They appealed to the Tribunal against the refusal. The Tribunal dismissed the appeal.[57]

74.4.3 On appeal to this Court, the appellants contended that the Tribunal erred in law "*by finding that the provisions of section 27(1)(b) of NWA are the only and overriding criteria to be taken into account when determining whether to issue a licence*" and by applying the "*nebulous*" provisions of the AGRIBEE Charter.[58]

74.4.4 The Court (per Murphy J) upheld the appeal. It found that the Tribunal had erred by only taking two factors into account, when it was required by law to "*take into account <u>all</u> relevant*

[55] *Guguletto Family Trust v Chief Director, Water Use Department of Water Affairs and Forestry and Another Case No.* (Unreported, Case No: A566/10, A566/10).

[56] Para 10.

[57] Para 12.

[58] Paras 13 and 20.

factors as stipulated in section 27(1) of the NWA". The proper interpretation, the Court held, was that "*the responsible authority and the Tribunal should take account of all relevant factors, including the eleven factors specifically mentioned in section 27, and then balance them all without attaching undue weight to any one with a view to serving the objects of the Act*".[59]

74.4.5 The Court also found that the Tribunal had failed to examine or evaluate pertinent information in the relevant scientific report, which was relevant to the other factors in section 27(1).[60]

74.4.6 The Court thus held that the Tribunal had failed to consider the other factors referred to in section 27(1), and had thus failed to "*weigh and balance the need for transformation against other relevant factors, such as the efficient and beneficial use of the water resource in the public interest*."[61]

74.4.7 Most significantly, at paragraph 25, the Court concluded as follows:

"In conclusion, therefore, both the Tribunal and the responsible authority erred in the interpretation and application of section 27 to the licence application of the appellant. Nothing in the provisions

[59] Para 22.

[60] Para 17.

[61] Para 17.

of the NWA is to the effect that redressing the results of past racial and gender discrimination is a compulsory and overriding factor that must of necessity be satisfied when an existing water user wishes to transfer part of a water use quota to another potential user. Of equal or perhaps greater importance, depending on the circumstances, as I have said, is the efficient and beneficial use of the quota in the public interest, especially where the issue of past discrimination has been deemed by the experts on the ground to be of less strategic importance at the present time. For those reasons the appeal should succeed."[62]

74.4.8 In the light of *Guguletto*, Atha cannot genuinely contend that a "*question of law*" does not include the question as to whether the Tribunal properly applied the law to the facts.

74.4.9 Notably, Atha dealt with *Guguletto* at some length in its heads of argument.[63] Atha isolated the two paragraphs upon which the appellants had relied, and contended that "*Those two paragraphs are therefore, despite the submission made in the Appellants' Heads of Argument, no authority for the proposition that the phrase "question of law" also includes a question about the application of the law to the particular facts and circumstances*".[64]

74.4.10 But it did not mention that, three paragraphs later, the *Guguletto* judgment confirms that the Court has jurisdiction to correct the incorrect application of the law to the facts.

[62] Para 25.

[63] Atha HoA paras 67 and 111, Additional bundle pp56 and 86.

[64] Atha HoA para 111.6, Additional bundle pp87-88.

Unlike Atha, we make nothing of this omission. We accept that it is for the appellants to point this out.

74.5 Third, *Perskor* does not provide Atha with the support that it claims from the decision. At the very least, it serves to highlight that there are various different ways in which the phrase "question of law" can be used and that much depends on the particular statutory context. But upon closer scrutiny, it supports the appellants' case on the meaning to be attributed to a question of law. We return to this below.

74.6 Fourth, in any event, Atha is quite mistaken to suggest that the appellants seek a full and wide rehearing of the merits.

74.6.1 All that the appellants mean when they say that the appeal is a "rehearing on the merits" is that it is an *appeal* – in the sense used in *Tikly*[65] – which is subject to a *correctness* standard.[66]

74.6.2 That is precisely what the Court in *Stenersen* held. It is not enough, therefore, to determine that the Water Tribunal made an error on a question of law; it is necessary to determine that the Tribunal would have come to a different *conclusion* had it applied the correct law.

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[65] *Tikly and others v Johannes NO and others* 1963 (2) SA 588 (T).

[66] See *Turley Manor Body Corporate v Pillay* 2020 JDR 0430 (GJ).

74.6.3 That, we submit, necessarily requires this Court to apply the law to the facts. And the appeal is, *in that limited sense*, a rehearing on the merits.

74.6.4 While levelling criticism at the appellants for the suggestion that the appeal constitutes a rehearing of any kind, Atha is conspicuously silent as to where a section 149 appeal falls in the *Tikly* schema.

75 In our submission, the precise ambit of a section 149 appeal is a genuinely difficult question. In the context of the Community Schemes Ombud Service Act ("CSOS Act"), as we explain below, it is an issue that has given rise to divergent approaches in the different divisions. It is a pity that instead of engaging in that debate in a manner that is productive and of assistance to the Court, Atha uses it as an opportunity to accuse the appellants and their legal representatives of bad faith and abuse.

The nature of a section 149 appeal

76 The import of *Perskor* can only be properly appreciated if regard is had (a) to the factual and statutory context in which it was decided and (b) to how it went on to apply the extract upon which Atha relies. These are matters that Atha might have considered exploring before, on the basis of *Perskor*, accusing the appellants of abuse of process and seeking the censure of the appellants' heads for misleading the court.

77 *Perskor* was decided in the context of the powers of assessors in an earlier incarnation of the Labour Appeal Court under the then Labour Relations Act No. 28 of 1956. There was in each provincial division of the Supreme Court a Labour Appeal Court consisting of a judge of the Supreme Court as chairperson, assisted by two assessors.[67] The Labour Appeal Court had the power to decide *inter alia* "any appeal in respect of a dispute concerning an alleged unfair labour practice determined by the Industrial Court".[68] However, only the chairperson of the Court was entitled to decide on a question of law. There the chairperson decided that the decision as to whether the proven facts constituted an unfair labour practice was a question of law and the assessors had no part to play in that component of the decision-making process.[69]

78 The Appellate Division ("AD") overturned this decision. In doing so, it paid close attention to the statutory scheme involved and the fact that it provided for involvement of the assessors in both the "findings" and the "decision" of the Labour Appeal Court.[70] It went on to enquire as to whether this could be reconciled with their exclusion from decisions on questions of law.[71] The AD held that it could, on the basis that the decision on whether or not the proven facts constituted an unfair labour practice (which it termed "the ultimate

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[67] At 793B.

[68] At 793C-D.

[69] At 793D-E.

[70] At 798,

[71] At 797.

question") was neither a question of fact nor a question of law, but rather fell within a third category, being a question of judicial discretion.[72]

79 Atha seeks to characterise the issues on appeal as falling within this third category. In doing so it misconstrues *Perskor*. The third category is explained by the AD as follows:[73]

> "The position then is that the definition of an unfair labour practice entails a determination of the effects or possible effects of certain practices, and of the fairness of such effects. And, when applying the definition, the Labour Appeal Court is again expressly enjoined to have regard not only to law but also to fairness. In my view a decision of the Court pursuant to these provisions is not a decision on a question of law in the strict sense of the term. It is the passing of a moral judgment on a combination of findings of fact and opinions. It follows that the chairman's prerogative of deciding questions of law … need not stand in the way of the conclusion suggested by the other provisions of the Act considered above, namely that the Act contemplates that assessors should participate in answering the ultimate question.
>
> …
>
> In the present case the ultimate question can clearly fall into such a category [i.e. Salmond's third category of questions of judicial discretion] - as I have pointed out above, it is a question which, in the final analysis, has to be answered in accordance with conceptions of fairness. It cannot be answered by applying rules of law, nor can it be determined by way of proof or demonstration in the matter in which facts are proved." (emphasis added)

80 None of the questions of law which form the subject matter of the present appeal involve the "passing of a moral judgment on a combination of findings of fact and opinions". Nor do they involve any question that "in the final analysis

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[72] At 799.

[73] At 798H-799F.

has to be answered in accordance with conceptions of fairness". Accordingly they do not involve exercises of discretionary powers falling within the third category, as contended by Atha.

81 On the contrary they all involve questions that can be answered by "applying rules of law" and thus fall squarely within Salmond's first category of "[m]atters and questions of law - that is to say, all that are determined by authoritative legal principles".[74] (emphasis added)

82 In *Mtokonya*,[75] the Constitutional Court was required to consider whether, for purposes of section 12(3) of the Prescription Act, when a person says that A's conduct is wrongful and actionable, that is a statement of fact or law. The Court relied expressly on *Perskor*, and referred to the following passage in Clarence Morris' "Law and Fact":

> 'A conclusion of law results when legal effects are assigned to events. A conclusion of law stands for more than the happening of events, it is a step in the legal disposal of events. If a rule of law must be applied before a conclusion is reached, that conclusion is one of law.' (emphasis added)

83 On that definition, the incorrect application of the law to the facts would plainly constitute a question of law.

84 In the tax context, various iterations of the Income Tax Act have required, when a "question of law" arises, the statement of a case for the High Court to give a

[74] At 796G.

[75] Mtokonya v Minister of Police 2018 (5) SA 22 (CC).

ruling. In this context, courts have interpreted a “question of law” in wider terms than Atha says is permissible in the present context.

84.1 In *Morrison v Commissioner for Inland Revenue*,[76] the Appellate Division held that even findings of fact are assailable in a Superior Court *‘if there was no evidence on which the findings could be properly reached'*; and

84.2 In *Commissioner of Taxes v Levy*, the Court held that a finding of fact could be challenged *'by showing that it was a finding at which no reasonable person could arrive'*.[77]

85 To be clear, the appellants do not advance an interpretation of section 149 of the NWA that would allow for the overturning of factual findings. They accept, as they always have, that the phrase must be understood within the specific context of an *appeal* from the Water Tribunal.

86 So when the appellants referred to analogous authority interpreting the phrase “appeal on a question of law”, they were not being opportunistic. They did not simply select the interpretation ”out of thin air”[78] that was most favourable to them. Instead, they were cognisant of the fact that, like the NWA, the CSOS Act reserves determinations of fact to the inquisitorial adjudicator, and empowers the Court, on appeal, to determine questions of law.

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[76] 1950 (2) SA 449 (AD) at 457.

[77] 1952 (2) SA 413 at p. 421 (AD).

[78] Atha HoA para 107.4, Additional bundle p84.

87 It was for this reason that we relied, in the appellants' main heads of argument on the Full Court decision in *Stenersen*.[79] In *Stenersen*, the Court was required to interpret section 57 of the CSOS Act, which provides for an appeal to the High Court against the decision of an adjudicator, but only "*on a question of law*".

87.1 The Full Court in *Stenersen* began by interpreting section 57. It held that the determination of questions of fact is "*exclusively afforded to the adjudicator who conducts the proceedings inquisitorially and has powers to investigate, examine documents and persons, and to conduct inspections*".[80] Therefore, the High Court should adopt a deferential attitude to the determination of the adjudicator on questions of fact.[81]

87.2 The Full Court held that the determination of a question of law includes considering whether the adjudicator:[82]

87.2.1 applied the correct law;

87.2.2 interpreted the law correctly; and/or

87.2.3 properly applied the law to the facts as found by the adjudicator.

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[79] *Stenersen and Tulleken Administration CC v Linton Park Body Corporate and Another* 2020 (1) SA 651 (GJ).

[80] Para 32.

[81] Id.

[82] Para 33.

87.3 Atha suggests that this was a reference "in passing".[83] But it was not. The Court was squarely confronted with the proper interpretation of section 57 of the CSOS Act and thus the nature and ambit of the appeal.

87.4 The Full Court then referred to the three meanings of an "*appeal*" articulated in *Tikly*, namely:[84]

87.4.1 an appeal in the wide sense (i.e. a complete re-hearing of, and fresh determination on the merits, with or without additional evidence or information);

87.4.2 an appeal in the ordinary strict sense (i.e. a re-hearing on the merits, but limited to the evidence or information on which the decision under appeal was given, and in which the only determination is whether that decision was "right or wrong");

87.4.3 a review, that is, a limited re-hearing with or without additional evidence or information to determine, not whether the decision under appeal was correct or not, but whether the arbiters had exercised their powers and discretion honestly and properly.

[83] Atha HoA para 104, p82.

[84] Stenersen para 39.

87.5 The Court held that an appeal under section 57 of the CSOS Act is an appeal in the ordinary strict sense, "*with the proviso that the right of appeal is limited to questions of law only*."[85] The Court is accordingly limited to the record, and the question for decision is whether the order of the adjudicator was right or wrong on the material before it.

88 *Stenersen* has been followed in at least two subsequent decisions.[86] In *Turley Manor Body Corporate*, Unterhalter J endorsed the *Stenersen* approach, and held further that:

88.1 Section 57 permits of an "ordinary" appeal, which is strictly limited to whether the adjudicator's order was correct in law. Such an appeal may not be brought to correct a mistake of fact.[87]

88.2 A section 57 appeal is not concerned with reviewable irregularities. A section 57 appeal is limited in scope to whether an order is correct in law; it is not concerned with the regularity of the process and does not generally include review grounds. A review, Unterhalter J explained, would be considerably broader in scope.[88]

89 However, in the Western Cape and KwaZulu-Natal, the provision has been interpreted differently.

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[85] Para 42.

[86] *Fisher v Community Schemes Ombud Services* 2020 JDR 0214 and *Turley Manor Body Corporate v Pillay* 2020 JDR 0430 (GJ)

[87] Paras 13-14.

[88] Paras 15-18.

89.1 In *Trustees for the Time Being of the Avenues Body Corporate v Shmaryahu and Another*,[89] Binns-Ward J held that the section 57 appeal was one that was *'most comfortably*' niched within the third category of appeals identified in *Tikly* – that is, as a review.

89.2 The same approach was followed in *Durdoc Centre Body Corporate v Singh.*[90]

89.3 Most recently, in *Kingshaven Homeowners' Association v Botha*,[91] Binns-Ward J reaffirmed the approach in *Shmaryahu*, and declined to follow the approach in Gauteng.

90 Again, if the appellants were truly abusing the section 149 process and seeking to be opportunistic, they would have sought to argue that section 149 also permits of a review. That would entail various advantages for the appellants, not least that:

90.1 the Court would not be confined to the record that served before the Tribunal;

90.2 the appellants would not need to succeed on the correctness standard; it would be sufficient only to establish that the Tribunal erred;

90.3 mistake of fact would be a ground available to the appellant.

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[89] [2018] ZAWCHC 54 (10 May 2018)

[90] 2019 (6) SA 45 (KZP)

[91] *The Kingshaven Homeowners' Association v Botha* 2020 JDR 1783 (WCC).

91 We did not advance this argument because, in our view, it is not sustainable. Unlike the appeal under the CSOS Act, the procedure for a section 149 process is expressly stipulated: it must be prosecuted as if it is an appeal from the Magistrate's Court. The exclusion of an application process, and the requirement of a notice of appeal, strongly indicates that it is not intended to be a review.

92 We therefore re-iterate that the section 149 appeal is an appeal in the ordinary strict sense, subject to the proviso that it is limited to questions of law.

93 When the appellants, following *Stenersen*, described the appeal as a "*rehearing on the merits*" limited to questions of law, they were not saying that the Court would rehear or redetermine the *facts or evidence.* Instead, they were distinguishing the process of an appeal from a review. That is, while for purposes of a review a court would not be concerned with the correctness of the Tribunal's decision, but with the fairness and lawfulness of the process independent of the result,[92] a court faced with an appeal (including on a question of law) is concerned with whether the Tribunal was ultimately correct or not.

94 This was, to be clear, a concession on the appellants' part. The concession is this: even if the appellants are able to persuade the Court that the Tribunal erred on a pure question of law, they must still persuade the Court that, had the Tribunal not erred, the outcome would have been different. For that is the

[92] *See Allpay Consolidated Investment Holdings (Pty) Ltd and Others v Chief Executive Officer of the South African Social Security Agency and Others* 2014 (1) SA 604 (CC) para 23ff.

question that confronts an appeal court: the question of the lower tribunal's correctness.

95 But this, we submit, necessarily requires that the questions of law include the application of the law to the facts. The Court can only determine whether any errors on the part of the Tribunal affect the outcome of the Tribunal's order if it is empowered to consider whether the law was properly applied to the facts. It, is, to that extent, a rehearing on the merits.

96 This is precisely what the Court in *Guguletto* held. It concluded that, while section 149 does not expressly mention the powers of the High Court, given that it requires the appeal to be prosecuted as if it were an appeal from a Magistrate's Court, "*[t]he intention in part is to confer on the High Court those powers bestowed by section 87 of the Magistrate's Court Act which include the power to confirm, vary or reverse the decision and to take any other course which may lead to a just and speedy resolution of the matter*."[93] It was on this basis that the Court held that it had the power – as an appeal court ordinarily would – to substitute its own decision as to whether the licence should be granted.

97 Indeed, in other contexts, our courts have held that a question of law includes a question as to the proper application of the law to the facts. For example, in *S v Basson*,[94] where the accused had been acquitted on 67 counts, the State

[93] Guguletto para 26.

[94] S v Basson 2005 (1) SA 171 (CC)

applied for the reservation of three questions of law in terms of section 319 of the Criminal Procedure Act.

97.1 These concerned the bias of the trial judge and his non-recusal; the refusal to admit the bail record into evidence; and the quashing of certain evidence.

97.2 In considering the distinction between questions of law and fact, the Court referred to the decision of Corbett J in in *Magmoed*, where it was confirmed that an issue of law "*involves an enquiry as to the essence and scope of the crime charged by asking whether the proven facts in a particular case constitute the commission of the crime".*[95]

97.3 As regards the recusal challenge, the Court held that because a recusal application involves a normative and evaluative inquiry, the correctness of such an evaluation raised a question of law.

The appellants' grounds of appeal raise questions of law

98 The appellants have made clear that they do not ask this Court to overturn the Water Tribunal on any findings of fact.[96] Instead, as explained above, the appellants contend that the Court is empowered to consider whether the Tribunal:

98.1 applied the correct law;

[95] Para 48.

[96] Appellants' HOA paras 7 and 44.

98.2 interpreted the law correctly; and/or

98.3 properly applied the law to the facts as found by the Tribunal.

99 Atha does not appear to dispute that the Court has the power to determine questions in the first or second categories above. The only debate is whether, in addition to pure questions of law, the High Court can consider the application of the law to the facts.

100 For the reasons set out above, we submit that the Court indeed has such a power. However, even if we are mistaken:

100.1 we submit that the appellants acted reasonably and in good faith in advancing such grounds;

100.2 in any event, each of the appellants' grounds of appeal raise questions which are pure questions of law, along with questions that involve the application of the law to the facts.

101 That is, even on the narrowest understanding of what a question of law entails, each of the grounds of appeal raised by the appellants raises such questions.

102 In broad terms, the first ground of appeal (as set out in the appellants' main heads of argument) raises at minimum, the following pure question of law:

102.1 On a proper interpretation, does section 27 of the NWA, which requires a consideration of "*all relevant factors*", require a consideration of the strategic importance of the mine area?

103 There should, in truth, be no debate that this is a question of law for purposes of section 149 of the NWA. In *Guguletto,*[97] Murphy J held that the determination of whether particular factors are relevant for purposes of section 27 constitutes a question of law.

104 Yet, once again, Atha describes the appellants' submissions on this score as misleading.[98] But in doing so it only confirms the appellants' submission to be entirely accurate. Atha says that what was at issue in *Guguletto* was the proper interpretation of section 27.[99] Exactly. That is precisely what is at issue in the first ground of appeal: the proper interpretation of section 27.

105 In broad terms, the second ground of appeal (as set out in the appellants' main heads of argument) raises at the very minimum the following pure questions of law:

105.1 On a proper interpretation, does section 24 of the NWA preclude the granting of a licence unless the landowner consents or there is good reason to do so, or is it simply a factor to be taken into account?

105.2 Does the grant of a licence to use water found underground on land not owned by the applicant, involve a deprivation of property as contemplated in section 25(1) of the Constitution?

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[97] *Guguletto Family Trust v Chief Director, Water Use Department of Water Affairs and Forestry and Another Case No.* (Unreported, Case No: A566/10, A566/10) ("***Guguletto***") paras 20 and 22.

[98] Atha HOA para 111.5, Additional Bundle p87.

[99] Id.

105.3 On a proper interpretation, does “good reason” in section 24 of the NWA mean “good public reason”?

105.4 Was the Tribunal permitted, as a matter of law, to admit and rely upon evidence -

105.4.1 submitted after the close of proceedings?

105.4.2 in respect of which the appellants were not heard?

106 We note that Atha disputes that these give rise to questions of law. But that is because Atha appears to misunderstand the legal question: it is not *whether* such consent was given[100] (it plainly was not); it is, instead, whether as a matter of law such consent is required, and the circumstances in which it can be dispensed with.

107 Indeed, Atha’s contention that this is not a question of law is belied by the fact that it then asserts fundamental disagreement with the appellants’ interpretation of section 24 and engages in pages of legal argument regarding the proper interpretation of section 24.[101]

108 In broad terms, the third ground of appeal (as set out in the appellants’ main heads of argument) raises at very minimum the following pure questions of law:

108.1 On a proper interpretation of section 2(4)(a)(vii) of NEMA, which sets out the precautionary principle, is a risk-averse and cautious approach

[100] Atha HOA para 177.

[101] Atha HOA paras 178 to 183, Additional Bundle pp135-138.

unnecessary where uncertainty is a result of absence of mine data rather than gaps in scientific knowledge?

108.2 Is certainty as to irreversible negative consequences a basis for a risk averse and cautious approach not to be adopted under section 2(4)(a)(vii) of NEMA?

109 Again, Atha confirms the raising of a pure question of law insofar as it devotes some 11 pages of its heads of argument[102] to the proper interpretation of section 2(4)(a)(vii) of NEMA.

110 In broad terms, the fourth ground of appeal (as set out in the appellants' main heads of argument) raises at the very minimum the following pure questions of law:

110.1 Does the NWA require that every anticipated water use must be licenced?

110.2 In circumstances where it is clear that a water treatment plant will be required in future, is a water use licence legally required, for its validity, to authorise water uses that will inevitably arise in the future (after expiry of the term of the current licence) as a result of the water uses that it has licenced?

110.3 In particular, is it legally necessary in such circumstances for the water use licence to authorise the post-closure discharging of water

[102] Atha HOA paras 46 to 61 Additional Bundle pp 41 to 52.

containing waste into a water resource (section 21(f) of the NWA) and the post-closure disposing of waste in a manner which may detrimentally impact on a water resource (section 21(g) of the NWA)?

110.4 Does a condition requiring a closure plan five years prior to the end of mining, and the ability of the licence-holder to apply for a renewal of its licence at that stage, obviate the need for the licence to provide for post-closure water uses?

110.5 Does section 30 of the NWA impose a duty, and not merely a power, on the part of the responsible authority to obtain financial security where it is necessary to protect water-resources against environmental degradation?

110.6 Did -

110.6.1 the MPRDA, at the relevant time, read with the regulations, as they were at the relevant time, or,

110.6.2 NEMA and the Financial Provisioning Regulations promulgated by the Minister of Environmental Affairs,

make it unnecessary to give security under section 30 of the NWA?

110.7 Does the insufficiency of financial provisioning mean that a water use licence should not be granted by the responsible authority, or is the recourse of a party in the position of the appellants to address it with

the Minister responsible for determining and setting the financial provision at the relevant time?

111 In broad terms, the fifth ground of appeal (as set out in the appellants' main heads of argument) raises at very minimum the following question of law:

111.1 Does the applicant for a water use licence bear a duty of justifying the socio-economic impacts of the mine?

112 In conclusion, we submit that:

112.1 properly interpreted, section 149 of the NWA empowers the Court to consider whether the Tribunal correctly applied the law to the facts. Binding authority for this proposition is to be found in a judgment of this division in an appeal under this very provision in *Guguletto*. Atha nowhere argues that the decision was wrong. On the contrary, it supports it;

112.2 on this basis every one of the questions raised in the appellants' grounds of appeal constitute questions of law;

112.3 even if this Court were to conclude that *Guguletto* was wrongly decided about this and that *Stenersen* and the cases following it were either wrongly decided or distinguishable:

112.3.1 it was entirely reasonable for the appellants to rely on the most recent jurisprudence known to it at the time of

preparing the heads regarding appeals on questions of law and to frame their appeal accordingly;

112.3.2 in any event, as set out above, every ground of appeal raises pure questions of law, even on Atha's highly restrictive definition of the concept;

112.4 the appeal cannot seriously or responsibly be described as an abuse of process.

THE MAIN HEADS OF ARGUMENT ARE NOT MISLEADING

113 Atha accuses the appellants of having advanced a partisan and misleading case before the Court, selectively emphasising and exaggerating only adverse impacts and conveniently ignoring all else on record.[103]

114 It is false that the appellants either intended to or did advance a misleading case. Atha's insistence otherwise appears to be based on its mistaken belief that every submission advanced by the appellants must be accompanied by every conceivable rebuttal that might be advanced by either of the respondents. It is only in unopposed proceedings that such a duty (or something like it) rests on counsel.[104]

115 Here Atha are represented in opposed proceedings by a leading law firm specialising in mining and environmental law, and both junior and senior counsel having similar expertise. As their 169 pages of heads of argument demonstrate, they are quite capable of themselves providing any rebuttal they considered necessary in response to the appellants' heads. The failure in the appellants' heads to put up Atha's submissions in rebuttal does not amount to unethical non-disclosure as suggested over and over again in Atha's heads. Nor does repetition of this incorrect submission afford it any weight.

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[103] Atha HOA para 7 Additional Bundle p 6.

[104] See *Thint (Pty) Ltd v National Director of Public Prosecutions and Others; Zuma v National Director of Public Prosecutions and Others* 2009 (1) SA 1 (CC) paras 101 and 102. See also Herbstein and Van Winsen The Civil Practice of the Superior Courts in South Africa 5th ed at 441 and fn 145 and the authorities cited there.

116 As explained at the outset of these submissions, we respond only to the allegations that the appellants and their legal representatives have conducted themselves improperly. We do not use this as an opportunity to re-argue each ground of appeal, and we stand by the submissions in the appellants' main heads of argument.

General overview

117 Atha commences its overview of the factual background by criticising the appellants for relying on the Dennis Review, the Brownlie Review, the GCS Report and the evidence of Johnston and Brownlie, all of which Atha says was discredited and rejected by the Tribunal.[105]

118 These criticisms are unwarranted – and frankly surprising.

118.1 The Dennis Review is referenced <u>once</u> in the main heads of argument, and for no purpose other than to refer the court to a helpful diagrammatic explanation of the process of dewatering.[106] Quite how the appellants can be criticised on this score is unclear.

118.2 The Brownlie review and the GCS review were not themselves suggested to be common cause. It was always made clear that they had been commissioned by the appellants, and they were relied on only in two ways:

[105] Atha HOA para 117, Additional Bundle p90.

[106] Appellants' HOA fn 59.

118.2.1 First, both reports were used to show that the project entailed risks and that the information before the Tribunal was inconclusive and insufficient in various respects, thus engaging the precautionary principle.[107] The Brownlie review and GCS review do not need to be accepted as common cause for the limited purpose of showing that risks existed and that the evidence before the Tribunal was insufficient or inconclusive.

118.2.2 Second, the Brownlie review was also used to show that Atha's own EIAR failed to address socio-economic impacts in a balanced and objective way and failed to incorporate the findings of the socio-economic specialist report.[108] But this point was made firstly, and primarily, with reference to the findings of the socio-economic specialist itself.[109] The appellants' reliance on the Brownlie Report adds little, if anything, to Atha's own specialist.

118.3 The appellants' main heads of argument do not once refer to the oral evidence of Mr Johnstone or Ms Colvin.

119 Therefore, where the appellants relied on the record, for the most part they did so based on specialist studies commissioned by Atha and prepared by its own

[107] Appellants' HOA paras 139.4-139.6, 142, 145 and 146.

[108] Appellants' HOA para 190.5.

[109] Appellants' HOA paras 189 and 190.

experts. This was appropriate where no appeal is available on questions of fact and such evidence is appropriately described, for purposes of an appeal of this nature, as being common cause.

120 Atha suggests that reliance by the appellants on certain of Atha's own documents is also improper. In particular, it says that the appellants should not have relied on the WSP hydrological assessment and the Natural Scientific Services studies, which have overstated and/or incorrectly assessed the environmental and/or ecological impacts of the project.[110]

121 But again this criticism is unwarranted.

121.1 The WSP Report was relied on only where it was consistent with the Delta-H report (which Atha describes as the common cause groundwater modelling), and was only ever referred to together with the Delta-H report.[111]

121.2 As for the NSS Report, nowhere in the proceedings was it put to a witness that all of the NSS studies were entirely discredited and to be ignored as Atha now suggests. Nor did the Tribunal make any findings in this regard, other than to say that the SAS Wetland Assessment and Delineation is based on revisions of the NSS work.[112]

121.3 It was certainly never suggested that NSS's specific findings regarding the risks of decant of contaminated groundwater are to be ignored.

[110] Atha HOA paras 128.1-128.2 and 128.6, Additional Bundle pp 96-98.

[111] See appellants HOA paras 70.1, 70.3, 70.4, 146.3.

[112] Tribunal Decision para 39, Record p5128.

Having failed to do so in evidence, Atha cannot now seek to retreat from the findings of its own specialist study.

121.4 In fact, in the cross-examination of Mr Johnstone, counsel for Atha sought to rely on the NSS report to suggest that the impacts as far as wetlands are concerned will be localised. [113] While this was corrected in re-examination,[114] Atha cannot claim, having relied on the NSS Report, that it must be disregarded in its entirety.

Dewatering

122 In respect of dewatering – that is, the pumping out of groundwater during the operational phase of the mine – Atha criticises the appellants, in the first instance, for relying on the Dennis review.[115] As explained above, the Dennis review is referred to once in the appellants' heads of argument and only for purposes of providing a useful diagram of dewatering.

123 Atha then criticises the appellants for relying on the findings in its own Scientific Aquatic Services ("**SAS**") Assessment that the dewatering impact would have a "High" impact on the relevant wetlands, whether with or without mitigation.[116] Atha says the appellants did not disclose various features of the evidence of van Staden.

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[113] Record Vol 39, p3893.

[114] Record Vol 39, pp3959-61.

[115] Atha HoA para 131 Additional Bundle p99.

[116] Atha HOA para 132, Additional Bundle p100.

123.1 However, Atha appears to accept that the table in the SAS report to which the appellants referred indicated that the significance of the impact both with and without mitigation measures remains numerically the same and is assessed as “High”.[117] So there can be no suggestion that the appellants’ heads of argument were misleading on this score.

123.2 However, says Atha, it was incumbent on the appellants to refer to other parts of the SAS report and the oral evidence of van Staden to contextualise this.[118]

123.3 But that is not what the appellants were required to do. An expert report, commissioned and relied upon by Atha, says in terms that an aspect of the dewatering impact, even with mitigation, would be high.

123.4 The “context” referred to by Atha does not change the appellants’ basic submission.

123.4.1 Atha refers to the fact that the “wetland ecological impact” changes from “high” without mitigation to “medium-high” with mitigation in the construction and operational phase, and to “medium-low” with mitigation in the closure phase.[119]

123.4.2 But Atha never addresses or disputes what the impact that the appellants referred to, namely that the impacts on

[117] Atha HOA para 132.3, Additional Bundle p101.

[118] Atha HOA para 132.4, Additional Bundle p101.

[119] Atha HOA para 132.5, Additional Bundle p132.5.

"hydrological function" will remain high in the operational phase, with or without mitigation.[120]

123.4.3 The fact that Mr van Staden testified that the impacts did not in his view constitute a "fatal flaw" does not change the fact that his report identified certain impacts that would remain high even with mitigation.

123.4.4 Moreover, even in respect of those aspects where the impact with mitigation remained "medium-high" or "medium-low" – which Mr van Staden confirmed under cross examination[121] – this only provides further confirmation that, on the evidence of Atha's own specialist, even with mitigation, the mine will have dewatering impacts.

123.5 Atha also makes the submission that a cross examiner is required to put to an opposing party's witness, those parts of the witness' own report that support the cross-examiner's case, before they can be relied upon.[122] There is no such rule.

Decant

124 Atha also criticises the appellants for the manner in which they describe the decant impact of the proposed mine.

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[120] See SAS 2015 Assessment, Record Vol 10, pp1072-1074.

[121] Vol 46, page 4612.

[122] Atha HOA para 132.7, Additional Bundle p102.

125 They say, for example, that to describe decant as *"contaminated*" is not a true reflection of the evidence on record, and that the "*inflated picture*" of decant of contaminated water presented in the appellants heads of argument was "*rubbished*" by the expert witnesses.[123]

126 The starting point on this score is the Water Tribunal decision itself. The appellants surely cannot be criticised for describing as common cause those facts found by the Tribunal – particularly where they came from Atha's own witnesses.

126.1 The Tribunal explained that the possibility of decanting or contaminated water that will fill the mine voids post-mining is a major concern.[124] It went on to explain that -

> "once mining stops, water is likely to fill the voids left behind and eventually cause the underground levels to rebound and decant onto the surface. Depending on the presence of pyrite, this decant could become acidic and lead to acid min draining ('AMD') contaminating both underground and surface water. This will materialise once dewatering stops, and naturally the mine voids fill up. It is estimated that it will take 45-60 years post-closure of the voids to fill up."[125]

126.2 It found that Atha's own expert, Smit, "*noted that the specialist reports predicted that the mine will decant after closure*", and that therefore

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[123] Atha HOA paras 136, 137, Additional Bundle pp104.

[124] Tribunal Decision para 16, Record Vol 50, pp5115-5116.

[125] Tribunal Para 16.1, Record Vol 50 p5116. Note that where the issue was disputed or formed the subject matter of a contested submission, this was noted by the Tribunal. See in this regard paras 15.1, 16.2 and 16.3. No similar qualification is found in relation to para 16.1.

water treatment would be necessary to treat the decant post-mining.[126] (It goes without saying that treatment is only required if the water is contaminated.) It also found that Smit accepted that the decant would be of "*unpredictable and variable volumes*",[127] and that "*decant will happen for a long time and treatment may need to continue constantly until there is less oxygen (as voids fill) and the need for treatment becomes reduced and eventually limited*".[128]

126.3 Despite Atha's protestations otherwise, the Tribunal also confirmed that a certain degree of groundwater contamination was common cause. As it explained: "*It was common cause that there is groundwater on the proposed mining site and that a degree of contamination will occur as the mine is dewatered*".[129]

126.4 Atha, in other words, describes it as misleading for the appellants simply to advance what the Tribunal expressly accepted.

126.5 As for acid mine drainage, while Atha claims that it "*boggles the mind that the appellants are peddling the spectre of acid mine drainage as an alleged 'inevitable consequence of the mine'*",[130] it was Atha's own expert, Dr Witthuser, who testified that:[131]

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[126] Tribunal Para 107 Record Vol 51, p5182.

[127] Tribunal Para 107 Record Vol 51, p5182.

[128] Tribunal Para 113, Record Vol 51, p5183-5184.

[129] Tribunal para 112, Record Vol 51, p5183.

[130] Atha HoA para 138 Record Vol 50 p5193, Additional bundle p106.

[131] Page 4495 Record Vol 45.

126.5.1 a mine with similar geology had been tested for acid mine drainage;

126.5.2 the results showed acidity (Potentially Acid Generating) which was partially but not entirely neutralised[132] by neutralising agents such as calcites;

126.5.3 his overall conclusion was that "these samples are potentially acid generating and need to be treated as such"; and

126.5.4 in any event, in accordance with the precautionary principle, all coal mining sites should be regarded as potentially acid generating.[133]

127 In addition, in terms of Atha's environmental impact assessment report (EIAR), the majority (67%) of Yzermyn coal samples are classified as potentially acid generating.[134]

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[132] Atha's heads of argument do not mention that Dr Witthuser made clear that there was not a *complete* neutralising effect. His testimony, recorded at pages 4495-6 of the record, was -

> *"I classified most of the tested samples as PAG (Potentially Acid Generating) because the acidity produced by the sulphur … bearing minerals produced in the presence of an oxidised agent like oxygen, or ferric iron and water sulphuric acid. (sic) This is partially offset by the neutralising minerals contained within these materials because you have some calcite. You know so you can balance some of the acidity but not all and this is what we call acid base accounting to which side does the scale tip? Is it more acid generating minerals or more acid neutralising minerals?*
>
> *Here you will see for most of the samples it tipped to the acid generating side and a few were border line which we then typically classify as inconclusive and precautionary acid generating.*
>
> *MS MBANJWA: What was then your overall conclusion?*
>
> *DR WITTHUSER: The overall conclusions were that these samples are potentially acid generating and need to be treated as such.."* (emphasis added)

[133] Tribunal Decision para 137, Record Vol 50.

[134] Para 8.7.2.3, Record Vol 5 p461

128 Atha's contention that contamination was merely "assumed" and mitigation measures developed in accordance with the precautionary principle is not borne out from the evidence described above. Contamination was not merely assumed; it was accepted by the Tribunal as common cause and inevitable.

129 Lastly, Atha is, with respect, unable to dispute the veracity its SAS 2015 assessment, which found that possible decant was particularly concerning, as it would have long term effects on surface water quality both on the wetlands, and on aquatic resources within the greater catchment, including the Assegaai River. It also found that, even if it were economically feasible to treat the decant post-closure until water quality stabilizes, it '*could take many decades*' and that '*the impacts on the wetland resources would remain high*'.[135]

130 The "*proper perspective*" that Atha offers in this regard does not assist it.[136] While Mr van Staden indicated in evidence that he was satisfied that impact with mitigation was acceptable and not a fatal flaw, he did nothing in evidence to retract or revisit the findings of the 2015 SAS report.

131 In the circumstances, we submit that the appellants' description of post-closure decant was entirely fair and consistent with the facts.

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[135] SAS 2015 Assessment, Record Vol 10, pp1078-1079.

[136] Atha HOA para 140.2, Additional bundle p107.

Contamination by seepage

132 In the main heads of argument, the appellants described a third water impact of the proposed mine as the accumulation of contaminated, toxic water in the groundwater plume from the mine void, before the mine begins to decant.

133 The full extent of the appellants' submission was that this is a common cause impact. The appellants advanced no argument as to its extent.

134 Atha criticises the appellants for saying that there "*will be*" the accumulation of contaminated water. We have explained above that it is entirely fair to describe contamination as common cause. Insofar as the post-closure accumulation of contaminated water is concerned, we refer, in addition, to the evidence of Atha's own expert, Mr Smit, who recognised this:[137]

> MR KENNEDY: Now post operations, post closure, there will be a situation that has to be dealt with and that is that there will be water that has collected in the void left behind from the mining extraction process. Correct? Is that correct?
> MR SMIT: Yes, that is correct. Sorry, ja, ja, that is correct.
> MR KENNEDY: I know it can be a bit tedious but just bear in mind we have to deal with it.
> MR SMIT: Ja, there will be water collecting in the void.
> MR KENNEDY: And that itself there is a substantial potential that that will have a measure of contamination. Correct?
> MR SMIT: That is correct.
> MR KENNEDY: And that is one of the big issues that our clients are obviously interested in in these proceedings and hopefully the Panel is also interested in that concern. So our real concern here in this part of the evidence is really to do with how you are going to deal with that issue.
> MR SMIT: Yes.

135 Atha also criticises the appellants for referring to the portion of its IWWMP where the impact was assessed without mitigation.

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[137] Cross-Examination – Pieter Johannes Lodewyk Smit, Record Vol 44, p4406.

135.1 All that the appellants said was recognised in the IWWMP was the danger of mine void pollution plumes. The pages of the IWWMP to which the appellants referred confirm precisely that. They indicate the extent of these impacts with and without mitigation.

135.2 These references make plain that even with mitigation, there remains an impact – albeit, according to the IWWMP a lower impact – associated with, the *"[o]ngoing risk of discharge, seepage and runoff from mining infrastructure to the groundwater regime beyond closure resulting in contamination of wetland water, leading to a reduction of potable water within the catchment*."[138]

135.3 Moreover, from the appellants' perspective, the unmitigated impacts of the mine are highly relevant, because the appellants contend that no proper provision has been made in the water use licence for the post-closure measures that would mitigate these impacts. The fact, therefore, that the IWWMP regards this impact in the absence of mitigation as "High (unacceptable)", is an important and relevant fact in its own right.

136 Atha's remaining allegations of non-disclosure on this score are simply without basis. The appellants made a modest submission, which was entirely justified.

[138] IWWMP, Record Vol 26, p2627.

Other aspects

Description of land uses

137 Atha criticises the appellants for: [139]

137.1 "*conveniently*" including in their description of the predominant land uses in the area "*eco-tourism due to the area's unique biodiversity*" when this was not common cause; and

137.2 "*conveniently*" leaving out the reference to historical mining when this was found by the Tribunal.

138 Atha says that the description is, at the level of fact, "misleading".[140]

139 While Atha is free to disagree with the description of the land uses, the allegation of this being misleading and expedient is regrettable.

139.1 Atha's own EIAR explains that eco-tourism contributes materially to job-creation in the area.[141] It also warns that any negative environmental impacts from the proposed mine could result in a reduction in biodiversity and thus a potential decline in eco-tourism.[142] Moreover, it acknowledges that the Mpumalanga Biodiversity Conservation Plan

[139] Atha HOA para 151.1, Additional bundle p112.

[140] Atha HOA para 151.3, Additional bundle p113.

[141] EIAR para 4.13. Record 7 Vol 3 p 245.

[142] Id.

recognises parts of the surrounding area as "*irreplaceable*", meaning that it supports "*unique biodiversity features*".[143]

139.2 If the appellants' description of eco-tourism as a current land use, and unique biodiversity as a feature of the area was misleading, then so too is Atha's EIAR.

139.3 Moreover, it cannot seriously be suggested that the appellants were duty-bound to refer to historical mining in describing the current land uses in the area. If Atha wishes to draw the Court's attention to the fact that, in addition to the current land uses, the area was also historically used for mining, it is free to do so. What it may not do, however, is accuse the appellants and their legal representatives of being selective and misleading – effectively dishonest – in limiting their description of the land to its current uses.

Confidence level of the Delta-H report

140 Atha provides a further example, which, it says, demonstrates how "economical" the appellants are with the facts. It says that while the appellants claim that Delta-H acknowledges that its model is of low confidence, because it is based on dry-season groundwater information only, and does not account for the seasonable variability of water levels, in fact:

140.1 the Delta-H assessment makes no mention of dry-season groundwater information and the failure to account for seasonable variability of water

[143] EIAR para 7.16.7.4 and Figure7-50 Vol 4 p 369.

levels as the reason for the low confidence; it is only the GCS review which says this, and which is not common cause; [144]

140.2 the explanation for basing the modelling on dry-season groundwater information was because this models the worst-case scenario;[145]

140.3 the appellants present the low-confidence of the Delta-H assessment "out of context" and in a manner that is "calculated to mislead" in that it does not in fact make the Delta-H assessment unreliable.[146]

141 There was no calculation on the appellants' part to mislead. We respectfully submit that this is not an allegation that should be made lightly.

142 The starting point is that the Delta-H report is of low confidence – or, as Dr Witthuser explained, a Class 1 model. There remains no dispute as to that fact.

143 Moreover, the appellants never suggested in their heads of argument that a Class 2 or Class 3 model – that is, a model of higher confidence – could, or should, have been used. That was never the purpose of drawing attention to the confidence level of the Delta-H assessment. So, while Atha describes it as the appellants' "*unfounded hypothesis*" that a Class 2 or 3 model should have been developed,[147] that is simply not so. There was no such hypothesis. (It is not the only example in Atha's heads of hypotheses incorrectly being ascribed to the appellants.)

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[144] Atha HOA para 152.2 and 152.3, Additional bundle p114.

[145] Atha HOA para 152.4, Additional bundle pp114-115.

[146] Atha HOA para 152.5, Additional bundle, p115.

[147] Atha HOA para 153, Additional bundle p117.

144 Instead, the confidence level of the Delta-H report is used by the appellants to serve only one purpose: to demonstrate the inherent uncertainty as to the impacts of the mine. That is why it was under the heading of *"[f]ailure to apply the precautionary principle*": the appellants contend that, faced with various aspects of uncertainty – including but not limited to the confidence level of the Delta-H assessment – the Tribunal ought to have applied the precautionary principle to refuse the WULA. That is also why the confidence level is described as one of the *"respects in which the appellants submit the information before the DG and Water Tribunal was inconclusive and insufficient".*[148]

145 Indeed, the fact that, as Dr Witthuser testified, a greenfield project cannot be modelled with any greater confidence[149] only serves to highlight our submission. As he says in the portion quoted by Atha, "*this is a formal classification that we cannot predict an unknown variable with high confidence if we do not have any measurements of these variables. Meaning I cannot predict a mine inflow at high confidence if I do not have any data on which I can stand, observations monitoring data*".[150]

146 Dr Witthuser therefore acknowledged that the Delta-H model was not – indeed could not be – of high confidence, because of the absence of mine data.

147 We therefore repeat what we said in our main heads of argument: the Water Tribunal acknowledged significant uncertainty, and the fact that it categorised

[148] Appellants' HOA para 136.

[149] Atha HOA para 153, Additional bundle p117.

[150] Record Vol 46 pp4592-4594.

this uncertainty as the *absence of mine data*, rather than *gaps in scientific knowledge*, is of no moment: the Water Tribunal was faced with the circumstance of uncertainty, and, *as a matter of law*, the precautionary principle thus required it to exercise caution.

148 We do, however, acknowledge that the reason given in the appellants' initial heads for the low confidence level was erroneously included under a heading "common cause facts", when it was based on the GCS report, which was not accepted by Atha. We apologise for suggesting that this was common cause. This oversight on the part of the appellants, however, provided no justification for the overblown allegations made by Atha. The error related to the heading. The relevant parts of the appellants' heads make it clear that reliance is placed on the GCS report in this regard.[151]

Grounds of appeal

149 We now turn to the appellants' grounds of appeal. Again, cognisant of the limited function of these submissions, and the ambit of the Acting Deputy Judge President's directive, the purpose of this section is not to re-argue the grounds of appeal.

150 The appellants stand by those grounds and the submissions made in the main heads of argument. Our primary purpose in this section is to respond to the allegations of misleading the court in respect of the merits of the appeal.

[151] Appellants' heads at paras 139.1-139.6.

Failure to consider the strategic importance of the mine area

151 Atha disputes that the relevance of considerations to a decision is a question of law. But it goes further. It describes the appellants' failure to refer to the 1960 decision in *R v Matthews*[152] – which, says Atha, suggests that relevance and admissibility are not questions of law – as an instance of non-disclosure on the part of the appellants.[153]

152 The appellants did not rely on *R v Matthews* or the other authorities referred to by Atha for good reason. Those authorities are entirely inapplicable in this case.

152.1 Unlike in *R v Matthews*, in the present case there is a statute requiring the decision maker to take all relevant factors into account, including those specifically listed. The appellants rely squarely on the *proper interpretation and application* of section 27 of the NWA. Properly interpreted, we submit, it requires the strategic importance of the mine area to be taken into account as a relevant factor. This Court has already confirmed that this is a question of law.[154]

152.2 While Atha acknowledges that statutory interpretation raises a question of law,[155] it never mentions that the appellants' primary submission is that, properly interpreted, section 27 of the NWA required the strategic importance of the mine area to be taken into account. Nor does Atha

[152] 1960 (1) SA 752 (A).

[153] Atha HOA para 165, Additional bundle p122.

[154] Guguletto paras 20, 22 and 24.

[155] Atha HOA para 111.6, Additional bundle p87.

mention that the Guguletto judgment confirms that the issue raised by the appellants in this regard is a question of law. But, unlike Atha, we make nothing of this. It is for the appellants to point this out.

Absence of proof of consent

153 Atha has not alleged in respect of this ground of appeal that the appellants have misled the court. We accordingly do not address this ground any further and stand by our submissions in the main heads of argument.

Failure to apply the precautionary principle

154 We make two broad submissions in respect of this ground of appeal, which we submit are dispositive of the suggestion that the main heads of argument were misleading.

155 First, we did nothing to mislead the Court in the main heads of argument in respect of the law.

155.1 Atha contends that:[156]

155.1.1 the appellants' reliance on a “contentious offshoot” of customary international law is misleading;

155.1.2 the appellants’ reliance on a Canadian decision is misleading;

[156] Atha HOA paras 186.5, 186.7, 186.8, Additional bundle pp141-143.

155.1.3 the appellants' reliance on the Supreme Court of India's decision in *A.P Pollution Control Board v Nayadu* as authority for the "nub of the principle" is misleading.

155.2 Again, if Atha disagrees with the appellants' legal submissions, it can say as much. It can present its own argument and assert, stridently and vigorously if that is its inclination, that it disagrees. But we respectfully submit that it should be more cautious before it levels an allegation that the appellants have misled the Court.

155.3 The allegation is, once again, entirely unfounded.

155.4 It is not even clear to us why we are described as having relied on a "contentious offshoot of customary international law". Our submission was nothing more than that the precautionary principle has been increasingly embraced globally, and has been recognised by the Canadian Supreme Court as possibly forming part of customary international law.

155.5 That was our submission because that is what the Canadian Supreme Court said: as a result of the widespread acceptance of the principle, "there may be currently sufficient state practice to allow a good argument that the precautionary principle is a principle of customary international law".[157]

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[157] *114957 Canada Ltée (Spray-Tech, Société d'arrosage) v. Hudson (Ville)* 2001 SCC 40 (CanLII); [2001] 2 S.C.R. 241.

155.6 It is similarly unclear why we are criticised for our description of the "*nub*" of the principle in the Indian case of *AP Pollution Control Board v Prof. M V Nayudu*.[158] The passage we cited from that decision was precisely the passage cited by Rogers J in *WWF,*[159] and described the "*inadequacies of science as the real basis that has led to its emergence*".

156 Second, Atha's accusation that the appellants were selective and relied on facts that were not common cause is similarly unfounded.

156.1 It is important, in this context, to distinguish between what this ground of appeal is and what it is not.

156.2 In the main heads of argument, we listed five respects in which "*the information before the DG and the Water Tribunal was inconclusive and insufficient*".[160] It was never the appellants' submission that these five respects were themselves common cause facts.

156.3 The appellants also made clear that:

156.3.1 they do not ask this Court to revisit any of the factual findings reached by the Water Tribunal; [161]

156.3.2 they rely for this ground of appeal on the risks of environmental degradation accepted by the Water Tribunal,

[158] AIR 1999 SC 812.

[159] *WWF South Africa v Minister of Agriculture, Forestry and Fisheries and Others* [2018] 4 All SA 889 (WCC).

[160] Appellants' HOA para 136.

[161] Appellants' HOA para 135.

and the uncertainty and lack of information found by the Water Tribunal to exist;[162] and

156.3.3 they do not ask this Court to make a factual finding as regards the extent of the impacts, but merely seek to illustrate that there was sufficient uncertainty that, on the proper application of the precautionary principle, the WULA ought to have been refused.[163]

156.4 Thus, the purpose of this ground of review is to point to risks and uncertainties. It is, in other words, the fact that the Tribunal was faced with risk and uncertainty that is common cause; not the evidence in the Brownlie, GCS and other disputed reports.

156.4.1 The Tribunal indeed referred to the scientific uncertainty it confronted on a number of occasions. For example:

156.4.1.1 It explained that the contrasting evidence of Dr Le Maitre and Dr Withusser confirmed the complexity of the issues and the "inexactness of scientific evidence as an instrument to guide decision making";[164]

156.4.1.2 Smit expressed uncertainty in respect of the water impacts. As the Tribunal explained, one could not

[162] Appellants' HOA para 135.

[163] Appellants' heads of argument para 138.

[164] Tribunal para 69, Record Vol 50, p5153.

estimate with certainty how the voids will naturally fill.[165] He also conceded that no one knew at this stage whether the water quality in the existing adits was due to the underlying geological formations.[166]

156.4.1.3 The Tribunal, while finding that the mitigation measures were sufficient, accepted that there is uncertainty as to whether the proposed mitigation measures were adequate and the volume of any decant.[167]

156.5 Once it is accepted that a level of risk and uncertainty exists, the question is a legal one. It is this: whether the precautionary principle – a principle of law – requires the decision-maker to refuse the WULA in the face of this level of uncertainty. If that is not what the precautionary principle requires, then the ground of appeal will fail. But if, as we submit, that is what the precautionary principle indeed requires, then the Tribunal erred in law, and the ground of appeal must succeed.

[165] Tribunal para 114, Record Vol 50, p5184.

[166] Tribunal para 115, Record Vol 50, pp5184-5185.

[167] Tribunal para 158.10, Record Vol 51, p 5219.

Failure to provide for post-closure treatment of contaminated water

157 Atha describes the submissions advanced in respect of this ground of appeal as "*pure and unadulterated sophistry*".[168] However, it is clear from Atha's submissions that, in fact, it has no real answer to the appellants' submissions.

158 First, this ground of appeal plainly raises questions of law.

158.1 The question of law is not as Atha claims "*an alleged failure to provide for the post-closure treatment of contaminated water in the Water Use Licence*".[169]

158.2 That failure is a fact. The water treatment plant has been authorised only for the *operational* phase of the mine, but the WUL, which is valid for 15 years (being the estimated life of mine), does not make any provision for what is to happen post-closure.

158.3 Instead, what the WUL makes clear is that what will ultimately happen post-closure will be determined shortly before closure, by including conditions requiring Atha to prepare a closure plan five years before the end of mining.

158.4 The question of law that arises from this is whether, if there will be water uses in the future which must be authorised in order to avoid contamination, the initial WUL is legally required at the time of being issued to provide for those anticipated uses.

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[168] Atha HOA para 199, Additional bundle p150.

[169] Atha HOA para 200, Additional bundle p150.

158.5 The fallacy in Atha's approach is apparent in paragraph 206 of its heads of argument. It says that *"[t]here is no legal requirement that anticipated and future water uses…must now be authorised by way of a Water Use Licence*". In the same breath, Atha says "*this contention does not raise a legitimate question of law*".[170]

158.6 But Atha's submission is a classic submission of law. It addresses the question whether there is a legal requirement that future water uses must be authorised when issuing a WUL. The fact that Atha thinks that the question should be answered in the negative does not make the question any less of a legal one.

158.7 The same is true of the requirement to make financial provision for the post-closure treatment of contaminated water.

158.7.1 Atha says that section 30(1) of the NWA does not impose such a jurisdictional requirement, but merely provides for a discretionary power to call for financial security if necessary.[171]

158.7.2 It also says that section 54(1)(a) of the NWA expressly empowers the Responsible Authority to suspend or withdraw

[170] Atha HOA para 206, Additional bundle pp156-157.

[171] Atha HOA para 208, Additional bundle p157.

the water use entitlement if that person fails to comply with a condition in the licence.[172]

158.7.3 It contends that these issues, therefore, do not raise questions of law. But that is mistaken. Whether or not a question of law is raised does not depend on whether Atha thinks it is right about its legal argument.

158.7.4 This ground of appeal raises clear questions of law pertaining to the legal requirements of a WUL and the legal obligation to require financial security. The appellants stand by the submissions advanced in their main heads of argument as to the merits of this ground of appeal.

159 Second, the findings of the Tribunal and the evidence of Smit as to a modularised treatment plant, which can be scaled up or down as necessary, are irrelevant to the legal questions raised by the appellants.

159.1 What is never disputed is that the WUL itself does not make provision for these post-closure water uses. Everyone accepts, in other words, that the WUL currently makes no provision for post-closure water uses, and that such uses will have to be regulated in the future.

159.2 Indeed, that is why the Tribunal reasoned that any subsequent water uses can be dealt with in the final closure plan, and by way of periodic review of the licence conditions.[173]

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[172] Atha HOA para 209, Additional bundle pp157-8.

159.3 Likewise, Smit was constrained to contend that – while he thought the treatment plant provided for in the WUL was sufficient – the WUL is a "living document" whose conditions can be reviewed and adapted based on monitoring data.[174]

159.4 That is also why Atha says that "*a mechanism is in place for this mitigation measure to be developed with the benefit of new science, technology and understanding which will become available over the next 15 and/or 45 and/or 60 years*".[175]

159.5 The appellants submit that these contentions are mistaken. They are mistaken as a matter of law, in that they misapprehend the *legal requirements of a water use licence*. The appellants submit that a WUL issued now must, as a matter of law, authorise water uses that will inevitably result in the future as a result of the water uses that it has licenced.

159.6 As we explained in our main heads of argument, it is too late if, ten years into the project, when the damage is done or is inevitable, Atha prepares a closure plan that inadequately addresses post-closure treatment of contaminated water. Or if, following the preparation of

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[173] Tribunal para 157.3, Record Vol 51, p5212.

[174] Tribunal para 116, Record Vol 51, p5185.

[175] Atha HOA para 202.8, Additional Bundle p154.

such a plan, Atha is deregistered or wound up during the 45 to 60 year period before the decant begins.

160 Quite clearly, therefore, far from "*pure and unadulterated sophistry*", this is a compelling ground of appeal on questions of law, which has been seriously and responsibly advanced.

Failure to appreciate the burden of proof in respect of socio-economic impacts

161 Atha has not alleged in respect of this ground of appeal that the appellants have misled the court. We accordingly do not address this ground any further and stand by our submissions in the main heads of argument.

COSTS

No basis for a costs order against the appellants or CER

162 In their heads of argument, the appellants relied on section 32(3) of NEMA and the *Biowatch* principle governing costs in constitutional matters. In other words, the appellants seek costs in the event that the appeal is upheld, but, if the appeal is dismissed, then, in accordance with section 32(2) of NEMA and the *Biowatch* principle, no costs order should be made against the appellants.

163 The appellants are non-profit public interest bodies, acting in the public interest in these proceedings. Despite Atha's contentions otherwise, they have not acted vexatiously, frivolously or unprofessionally.

164 Indeed, Atha seeks a costs order of a most exceptional kind. Notwithstanding that this is plainly constitutional litigation, brought by organisations seeking to uphold section 24 of the Constitution, Atha seeks costs on a punitive scale, and it seeks them *de bonis propiis*.

165 We submit that there is nothing in the conduct of the appellants or their legal representatives that justifies a costs order of this kind. The appellants have not conducted themselves in a manner that would render the Biowatch exceptions applicable.[176] In particular, the CER is not subject to an unethical conflict of interest, the appellants have not abused the process of a section 149 appeal; and the appellants' main heads of argument are not misleading.

Atha's conduct warrants a punitive costs order

166 We submit that the conduct of Atha in this case warrants a punitive costs order against it. The appellants seek such an order on the following bases set out below.

167 It is incumbent upon the drafter of affidavits and heads of argument to exercise caution before attacking the integrity of attorneys and colleagues. An unjustified attack on them impugns the dignity of the court of which they are officers.[177]

168 Atha's main heads of argument made allegations against the appellants, the CER and their counsel that have been shown to be indefensible. And yet, when

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[176] Cf *Lawyers for Human Rights v Minister in the Presidency and Others* 2017 (1) SA 645 (CC); *Gelyke Kanse and others v Chairperson, Senate of the University of Stellenbosch and others* 2020 (1) SA 368 (CC) para 50; *South Durban Community Environmental Alliance v MEC for Economic Development, Tourism and Environmental Affairs, KwaZulu-Natal Provincial Government and Another* 2020 (4) SA 453 (SCA) para 55-67 and 68-75.

[177] *Protea Assurance* above.

provided with the opportunity to reflect and retract those allegations, Atha used the opportunity to file an affidavit that went substantially further in gratuitously disparaging and attacking the integrity of officers of the court, who were doing nothing more than demonstrating their commitment to the oath they swore to "uphold and protect the Constitution and the human rights entrenched in it".

169 In this regard, this Court's recent observation in *One South Africa Movement*[178] is apposite:

> "Our system of adversarial litigation occurs within a society in which freedom of expression is a fundamental part of the constitutional order. The consequence is often what is described as 'no holds barred litigation', which for some may translate to mean that there should be no boundaries to the manner in which parties litigate. This cannot be so and cannot be consistent with the values of human dignity and respect that the Constitution seeks to advance."

170 As the Court observed, "*even in an adversarial system that must countenance frank and robust litigation, there must be room for recognising, at the very least, the dignity and worth of all those involved*."

171 We submit that Atha's conduct in this case overstepped the bounds and was inconsistent with the values of human dignity and respect that the Constitution seeks to advance. It fully warrants a punitive costs order against Atha. Absent such an order, organisations like CER and the women (CER is a woman-led and predominantly women-staffed organisation) and men who work in them, become fair game for abuse in litigation. Inevitably that will have a chilling

[178] *One South Africa Movement and Another v President of the RSA and Others* 2020 (5) SA 576 (GP).

effect on litigation that has been recognised as breathing life into our Constitution.

172 However, neither the appellants, nor CER seek any *de bonis propriis* costs order or other censure against Atha's counsel or attorney. This is because their preference remains, as it should do, to focus on the substantive issues in the appeal and thereby assist the Court in coming to a correct and just decision.

ALAN DODSON SC

MICHAEL MBIKIWA

Chambers, Sandton

30 October 2020

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3. AP Pollution Control Board v Prof. M V Nayudu AIR 1999 SC 812

4. Durdoc Centre Body Corporate v Singh 2019 (6) SA 45 (KZP)

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9. Mazibuko and Others v City of Johannesburg and Others [2009] ZACC 28; 2010 (3) BCLR 239 (CC) 2010 (4) SA 1 (CC)

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27. Yates Investments (Pty) Ltd v Commissioner for Inland Revenue 1956 (1) SA 612 (A))