

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

CASE NO: A155/19

WATER TRIBUNAL CASE NO: 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

ATHA-AFRICA VENTURES (PTY) LTD

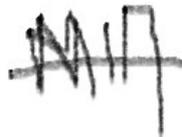
Second Respondent

FILING NOTICE

DOCUMENTS FILED HEREWITH:

1. The Appellants' Updated Practice Note

DATED at **JOHANNESBURG** on this the **8th** day of **DECEMBER 2020**.



CENTRE FOR ENVIRONMENTAL RIGHTS

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**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

ATHA-AFRICA VENTURES (PTY) LTD

Second Respondent

APPELLANTS' UPDATED PRACTICE NOTE

COUNSEL DETAILS

- | | | |
|---|-----------------------|--------------|
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| 2 | For First Respondent: | M Mphaga SC |
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3 For Second Respondent: MM Oosthuizen SC

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J Rust

083 445 2911

NATURE OF THE APPEAL

4 This is an appeal against a decision of the Water Tribunal, which, in turn dismissed an appeal against a decision by the Director-General in the Department of Water Affairs to grant a water use licence to the Second Respondent, Atha-Africa Ventures (Pty) Ltd (**'Atha'**). It is brought in terms of section 149 of the National Water Act 36 of 1998 (**"NWA"**), which provides for an appeal to the High Court on questions of law.

5 The parties have each filed two sets of heads of argument and seek the allocation of a date for the hearing of the appeal and directions for the filing of heads of argument by the amici curiae.

6 The first set of heads of argument and practice note filed on behalf of Atha allege unethical and unprofessional conduct against the Appellants, their attorneys of record (the Centre for Environmental Rights or "CER") and their Counsel. In its first set of heads, Atha seeks *de bonis propriis* costs against the CER, the censuring of counsel, and the referral of the CER to the Legal Practice Council.

7 On 17 August 2020, the parties' legal representatives attended a case management meeting with the then Acting Deputy Judge President Potterill

where the Appellants' counsel and attorneys sought an opportunity to respond to the allegations by way of the filing of further affidavits and a further set of heads of argument. The ADJP granted leave to the Appellants to file further affidavits to respond to the allegations, Atha leave to file an answering affidavit and the Appellants leave to reply thereto. Judge Potterill also granted leave to the Appellants to file rebuttal heads of argument and leave to Atha to file heads in response.

- 8 The affidavits and heads described above have been exchanged. Atha persist in the relief sought against the CER and counsel. The heads raised constitutional issues. It accordingly became necessary for a rule 16A notice to be issued.
- 9 Subsequent to the filing of the second sets of heads of argument by the Appellants and Atha, and in response to the rule 16A notice, in November 2020, seven organisations sought consent from the parties to intervene as *amici curiae*. The Appellants and Atha gave consent, whereafter, such organisations applied to this Honourable Court for leave to intervene as *amici curiae* in two applications, namely the Southern African Human Rights Defenders Network represented by Lawyers for Human Rights, and a joint application by the Legal Resources Centre, Centre for Applied Legal Studies, Section27, Equal Education Law Centre, Ndifuna Ukwazi and Centre for Child Law represented by Cliffe Dekker Hofmeyr. The First Respondent has not given notice of any intention to oppose those applications.
- 10 Accordingly, the Appellant's respectfully ask that the ADJP -

- 10.1 Decide the applications for admission as amici curiae in chambers;
 - 10.2 In the event of their being admitted as amici, determine dates for the filing of heads of argument by the amici curiae;
 - 10.3 Determine dates for the filing of heads in answer to the heads of the amici curiae, if any;
 - 10.4 Determine two days for the hearing of the appeal either on -
 - 10.4.1 1 and 2 March 2021; or
 - 10.4.2 4 and 5 March 2021,when the main parties are available.
- 11 In the appeal, the Appellants seek an order as follows:
- 11.1 Setting aside the order in paragraphs 171 and 172 of the decision of the Water Tribunal taken on 22 May 2019;
 - 11.2 Substituting the order of the Water Tribunal of 22 May 2019 with the following:
 - 11.2.1 “The Appellants’ appeal in terms of section 148(1)(f) of the National Water Act 36 of 1998 is upheld; and
 - 11.2.2 The Second Respondent’s application for a water use licence in terms of section 40 of the National Water Act 36 of 1998 is dismissed.”

- 11.3 Dismissing Atha's applications (contained in their initial heads of argument) for orders -
- 11.3.1 directing CER to pay Atha's costs de bonis propriis;
 - 11.3.2 referring the alleged conduct of CER to the Legal Practice Council;
 - 11.3.3 censuring Appellants' counsel in respect of the heads of argument.
- 11.4 The Appellants' costs in respect of both the appeal and the relief sought against CER and Appellants' counsel are to be paid by Atha on a punitive scale as between attorney and client.

THE ISSUES TO BE DETERMINED

12 The appeal requires the determination of the issues as set out below.

Questions of law pursuant to section 149 of the NWA

- 13 Whether, in light of section 27 of the NWA, as a matter of law, the Water Tribunal was required to take into account the strategic importance of the mine area for water security and biodiversity.
- 14 Whether or not the Water Tribunal erred, as a matter of law, in interpreting the consent requirement set out in section 24 of the NWA, as only one, non-decisive factor that must be considered before a WUL may be granted, rather than a jurisdictional requirement which must exist before a WUL may be granted.

- 15 Whether the Water Tribunal erred in its interpretation and application of the precautionary principle in s 2(4)(a)(vii) of the National Environment Management Act 107 of 1998 (“**NEMA**”).
- 16 Whether the Water Tribunal’s approach to confirming the WUL was fundamentally flawed as a matter of law, especially given that it confirmed the WUL despite its failure to provide for post-closure treatment of contaminated water, and without any evidence that financial provision has been made for such measures.
- 17 Whether or not the Water Tribunal erred as a matter of law by failing to appreciate that the duty of justification or burden of proof was on Atha, as the applicant for the WUL, to identify and justify the socio-economic impacts of the proposed mine.

Issues relating to Atha’s allegations of unprofessional or unethical conduct

- 18 Whether the CER is subject to any unethical conflict of interest because it advocates for positions on issues relating to the environment, and acts for clients in environmental litigation consistent with those positions.
- 19 Whether this appeal is an abuse of the process envisaged by section 149 of the NWA by the appellants?
- 20 Whether the appellants’ main heads of argument were misleading in all of the respects alleged?
- 21 Whether a punitive costs order should be awarded against Atha?

22 Whether the Southern African Human Rights Defenders Network, Legal Resources Centre, Centre for Applied Legal Studies, Section 27, Equal Education Law Centre, Ndifuna Ukwazi and Centre for Child Law should be admitted as *amici curiae* in this matter.

BRIEF SUBMISSIONS IN RESPECT OF THE ISSUES TO BE DETERMINED

23 Failure to consider the strategic importance of the proposed mine area for water security and biodiversity

23.1 The appellants submit that, as a matter of law, the Water Tribunal was required to take into account the special recognition afforded to the area in which the mine will be established. It plainly failed to do so, and thereby misconceived the requirements of section 27 of the NWA.

24 Absence of proof of consent

24.1 The Water Tribunal erred in law in regarding compliance with section 24 of the NWA (which precludes the granting of a licence to use water found underground on land not owned by the applicant, unless the landowner consents, or there is good reason to do so) as only one, non-decisive factor that must be considered.

24.2 Moreover, it is submitted that:

24.2.1 section 24 sets out jurisdictional requirements which must exist before a WUL may be granted;

- 24.2.2 the onus to establish that such consent has been obtained, or that good reason exists for the licence to be granted in respect of private land owned by another person, lies with the licence applicant;
- 24.2.3 the Water Tribunal was incorrect in its holding that it is sufficient for purposes of section 24 for the landowner merely to be consulted; and
- 24.2.4 it cannot be a good reason in terms of section 24 of the NWA that the landowner failed to respond.

25 Failure to apply precautionary principle

- 25.1 The Water Tribunal erred in its interpretation and application of the precautionary principle in s 2(4)(a)(vii) of NEMA. As a result, a WUL has been granted in this case where there is, according to the Water Tribunal's own factual findings, a high risk that the negative water impacts of the mine have been underestimated.

26 Failure to provide for post-closure treatment of contaminated water

- 26.1 The Water Tribunal's approach was fundamentally flawed as a matter of law in that it confirmed a WUL that did not provide for treatment of contaminated water post the closure of the proposed mine.
- 26.2 It did so in full knowledge that there will inevitably be water uses in the future which must be authorised in order to avoid certain, severe

contamination, and without any evidence that financial provision has been made for such measures.

26.3 In doing so, the Water Tribunal misinterpreted and misapplied sections 28, 30, 49 and 52 of the NWA.

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

27.1 It is submitted that the Water Tribunal misconstrued the duty of justification or onus in matters before it. Particularly, the Water Tribunal was incorrect as a matter of law, in its contention that the appellants bore a duty to place evidence as regards the socio-economic impacts of the mine before it. It is submitted that the statutory framework clearly places the duty of justification squarely on Atha as the applicant for the WUL.

Issues relating to Atha's allegations of unprofessional or unethical conduct

28 Whether the CER is subject to any unethical conflict of interest because it advocates for positions on issues relating to the environment, and acts for clients in environmental litigation consistent with those positions

28.1 Despite the allegations against the CER, Atha has failed squarely to identify the CER's alleged conflict of interest.

28.2 The CER is a public interest law organisation committed to the realisation of constitutional rights. It is also 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.

28.3 The CER and its attorneys are statutorily entitled to act in precisely the manner that they have done in this litigation and is doing in other litigation. 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;

28.4 Atha's alleged rule, whereby "*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*" is incompatible with the statutory regime established by section 34(8) of the Legal Practice Act.

28.5 In addition, Atha's attack on the CER, were it to be upheld by this Court, will have a chilling effect on the practice of public interest litigation in South Africa, and on public interest law organisations seeking to advance constitutional rights, who do not shy away from the causes they champion.

29 Whether this appeal is an abuse of the process envisaged by section 149 of the NWA by the appellants?

29.1 Atha has accused the Appellants of abusing the process of a section 149 appeal. 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*'.

29.2 The Appellants submit that properly interpreted, section 149 of the NWA empowers the Court to consider on appeal whether the Tribunal correctly applied the law to the facts. Binding authority for this proposition is to be found in two judgments of the Gauteng Division:

29.2.1 in an appeal under this very provision in *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);

29.2.2 in a full court judgment in an appeal under the Community Schemes Ombud Service Act in *Stenersen and Tulleken Administration CC v Linton Park Body Corporate and Another* 2020 (1) SA 651 (GJ).

29.3 On this basis every one of the questions raised in the Appellants' grounds of appeal constitute questions of law as contemplated by section 149.

29.4 Atha's allegations that the Appellants, their counsel and attorneys abused the appeal process are accordingly without any foundation whatsoever.

30 **Whether the appellants' main heads of argument were misleading?**

30.1 The Appellants neither intended to advance, nor advanced, a misleading case. Nor was there any non-disclosure. Atha's insistence otherwise appears to be based on its mistaken belief that the Appellants must anticipate every conceivable argument that may yet be made by the respondent, and rebut it to avoid being accused of non-disclosure or misleading the court. It is only in unopposed proceedings that such a duty (or something like it) rests on counsel.

30.2 The Appellants and their legal representatives have not conducted themselves improperly and stand by the submissions in the Appellants' main heads of argument, save in the limited respects identified in their rebuttal heads of argument.

31 **Costs**

31.1 There is nothing in the conduct of the appellants or their legal representatives that justifies a costs order on a punitive scale and *de bonis propriis*. The appellants have not conducted themselves in a manner that would render the *Biowatch* exceptions applicable. 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.

31.2 However, the conduct of Atha in this case warrants a punitive costs order against it. Atha's main heads of argument made allegations against the

appellants, the CER and their counsel that have been shown to be indefensible. When provided with the opportunity to reflect and retract those allegations, they used the opportunity to file an affidavit that went still further in gratuitously disparaging and attacking the integrity of the appellants and the CER.

- 31.3 Unwarranted attacks on the integrity of officers of the court justify a punitive costs order. Reference will be made to the relevant case law.

ESTIMATE OF THE PROBABLE DURATION OF THE APPEAL HEARING

32 2 days

COMPOSITION OF THE COURT

- 33 Pursuant to section 14(3) of the Superior Court's Act read with section 149(4) of the National Water Act (which provides that the appeal must be prosecuted as if it were an appeal from a magistrate's court to a High Court), the appeal must be heard before two judges.

RELEVANT PORTIONS OF THE RECORD

- 34 The number of pages in the appeal record is 5330 and consists of 52 volumes.
- 35 It is not necessary to read all 52 volumes constituting the record. Essential parts of the record relevant to the determination of the appeal are those cited in the heads of argument, as well as the following portions:

- 35.1 Volume 12: The WUL dated 7 July 2016;
- 35.2 Volume 13: The Record of Recommendation and Decision regarding the WUL application dated 7 July 2016;
- 35.3 Volumes 48 -51: the heads of argument before the Water Tribunal and the Appeal Decision of the Water Tribunal dated 22 May 2019; and
- 35.4 Volume 52: the pleadings filed in this Court in these appeal proceedings.