

**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' PRACTICE NOTE

NATURE OF THE APPEAL

- 1 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.

- 2 The appellants seek an order as follows:
 - 2.1 Setting aside the order in paragraphs 171 and 172 of the decision of the Water Tribunal taken on 22 May 2019;

 - 2.2 Substituting the order of the Water Tribunal of 22 May 2019 with the following:
 - 2.2.1 "The Appellants' appeal in terms of section 148(1)(f) of the National Water Act 36 of 1998 is upheld; and

 - 2.2.2 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."

THE ISSUES TO BE DETERMINED

- 3 The appeal requires the determination of the following issues:

- 3.1 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.
- 3.2 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.
- 3.3 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**”).
- 3.4 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.
- 3.5 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.

BRIEF SUBMISSIONS IN RESPECT OF THE ISSUES TO BE DETERMINED

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

4.1 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.

5 Absence of proof of consent

5.1 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.

5.2 Moreover, it is submitted that:

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

5.2.2 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;

5.2.3 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

5.2.4 it cannot be a good reason in terms of section 24 of the NWA that the landowner failed to respond.

6 Failure to apply precautionary principle

6.1 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.

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

7.1 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.

7.2 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.

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

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

8.1 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.

ESTIMATE OF THE PROBABLE DURATION OF THE APPEAL HEARING

9 2 days

RELEVANT PORTIONS OF THE RECORD

10 The number of pages in the appeal record is 5330 and consists of 52 volumes.

11 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:

11.1 Volume 12: The WUL dated 7 July 2016;

11.2 Volume 13: The Record of Recommendation and Decision regarding the WUL application dated 7 July 2016;

- 11.3 Volumes 48 -51: the heads of argument before the Water Tribunal and the Appeal Decision of the Water Tribunal dated 22 May 2019; and
- 11.4 Volume 52: the pleadings filed in this Court in these appeal proceedings.