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' HEADS OF ARGUMENT

IN THE APPEAL IN TERMS OF SECTION 149 OF THE NATIONAL WATER ACT

NO. 36 OF 1998

Table of Contents

INTRODUCTION AND OVERVIEW

1 This appeal concerns the granting of a water use licence for a proposed new coal mine in an area of great environmental vulnerability and significance.

2 The coal mine that is to be constructed by Atha-Africa Ventures (Pty) Ltd ("**Atha**") will have serious negative impacts on the surrounding water resources. These impacts are essentially common cause. They involve the '*dewatering'* of underground water resources in the form of natural aquifers, the decant of contaminated water, including acid mine drainage, and regional groundwater contamination.

3 The state has recognised the mine area as a Strategic Water Source Area; as part of a protected environment in terms of the National Environmental Management: Protected Areas Act 57 of 2003 ('**NEMPAA**'); and as an endangered ecosystem in terms of the National Environmental Management: Biodiversity Act 10 of 2004 ('**the Biodiversity Act**').

4 Nevertheless, on 7 July 2016, the Director-General in the Department of Water and Sanitation granted a water use licence ('**WUL**') to Atha, authorising various water uses under the National Water Act 36 of 1998 ("**NWA**") designed to enable it to proceed with coal mining.

5 On 22 May 2019, the Water Tribunal dismissed an appeal against the DG's decision.

6 This is an appeal against the decision of the Water Tribunal. It is brought in terms of section 149 of the NWA, which provides for an appeal to the High Court on questions of law.

7 Cognisant of the confinement of this appeal to questions of law, we rely in these submissions on facts that were found by the Water Tribunal, or that are common cause. The appellants do not ask this Court to overturn the Water Tribunal on factual grounds.

8 Indeed, the appellants rely primarily on Atha's own facts, as contained in the specialist studies commissioned by it, and as accepted by the Tribunal, to demonstrate that the Tribunal erred on key questions of law.

9 We structure the remainder of these submissions as follows:

9.1 First, we describe the applicable legal framework;

9.2 Second, we describe the proposed mine, as well as the process by which the impugned WUL was granted.

9.3 Third, we identify, with reference to the Tribunal's factual findings, and based on Atha's own specialist studies, the three most significant, common-cause water impacts of the mine.

9.4 Fourth, we address the grounds of appeal under five broad topics:

9.4.1 the Water Tribunal's failure to consider the strategic importance of the mine area as a relevant factor in terms of section 27 of the NWA;

9.4.2 the granting of the WUL in the absence of proof of consent, in contravention of section 24 of the NWA;

9.4.3 the misapplication of the precautionary principle contained in section 2(4)(a)(vii) of the National Environment Management Act 107 of 1998 ("**NEMA**");

9.4.4 the failure to provide for post-closure treatment of contaminated water, based, in turn, on the incorrect interpretation of sections 28(2), 49 and 52 of the NWA, as well as the conditions of the WUL; and

9.4.5 the failure to appreciate the burden of proof imposed by section 148(1)(f), insofar as it relates to the socio-economic impact of water uses; and

9.5 Fifth, we address the question of costs.

LEGAL FRAMEWORK

The Constitution

10 Section 24 of the Constitution provides that:

> 'Everyone has the right –
>
> (a) to an environment that is not harmful to their health or well-being; and
>
> (b) to have the environment protected, for the benefit of present and future generations, through reasonable legislative and other measures that –
>
> (i) prevent pollution and ecological degradation;
>
> (ii) promote conservation; and
>
> (iii) secure ecologically sustainable development and use of natural resources while promoting justifiable economic and social development.'

b) "*The importance of the protection of the environment*", the Constitutional Court has held, "*cannot be gainsaid.*"[1] As Ngcobo J (as he then was) explained in *Fuel Retailers:*

> "Its protection is vital to the enjoyment of the other rights contained in the Bill of Rights; indeed, it is vital to life itself. It must therefore be protected for the benefit of the present and future generations. The present generation holds the earth in trust for the next generation. This trusteeship position carries with it the responsibility to look after the environment. It is the duty of the Court to ensure that this responsibility is carried out."[2]

11 The starting point, in section 24(a), is that every person has the right to a healthy environment. As the SCA explained in *Director: Mineral Development, Gauteng Region and Sasol Mining (Pty) Ltd v Save the Vaal Environment:*[3]

---

[1] *Fuel Retailers Association of Southern Africa v Director-General: Environmental Management, Department of Agriculture, Conservation and Environment, Mpumalanga Province and Others* [2007 (6) SA 4 (CC) ("***Fuel Retailers***") para 102. See *also MEC: Department of Agriculture, Conservation and Environment and Another v HTF Developers (Pty) Limited* 2008 (2) SA 319 (CC) ("***HTF Developers***") para 28.

[2] *Fuel Retailers* para 102.

[3] *Director: Mineral Development, Gauteng Region and Sasol Mining (Pty) Ltd v Save the Vaal Environment* 1999 (2) SA 709 (SCA) ("***Save the Vaal***").

> "Our Constitution, by including environmental rights as fundamental justiciable human rights, by necessary implication requires that environmental considerations be accorded appropriate recognition and respect in the administrative process in our country."[4]

12 Section 24(b) reflects the principle of "*sustainable development*". In *Fuel Retailers*, Ngcobo J, writing for a majority of the Constitutional Court, explained this principle as follows:

> "The Constitution recognises the interrelationship between the environment and development; indeed it recognises the need for the protection of the environment while at the same time it recognises the need for social and economic development. It contemplates the integration of environmental protection and socio-economic development. It envisages that environmental considerations will be balanced with socio-economic considerations through the ideal of sustainable development. This is apparent from section 24(b)(iii) which provides that the environment will be protected by securing 'ecologically sustainable development and use of natural resources while promoting justifiable economic and social development'. Sustainable development and sustainable use and exploitation of natural resources are at the core of the protection of the environment."[5]

13 The Court in *Fuel Retailers* also acknowledged that sustainable development requires an appreciation that economic development cannot occur without environmental protection:

> "[D]evelopment cannot subsist upon a deteriorating environmental base. Unlimited development is detrimental to the environment and the destruction of the environment is detrimental to development. Promotion of development requires the protection of the environment. Yet the environment cannot be protected if development does not pay attention to the costs of environmental destruction. The environment and development are thus inexorably linked."[6]

---

[4] *Save the Vaal* at 719.

[5] *Fuel Retailers* para 45.

[6] *Fuel Retailers* para 44.

National Environmental Management Act

14 The primary legislative measure contemplated in section 24(b) of the Constitution is NEMA. NEMA seeks to give effect to section 24 of the Constitution, and the principles of sustainable development and intergenerational environmental justice that underpin it.[7]

15 Section 2 of NEMA sets out the principles, which '*serve as guidelines by reference to which any organ of state must exercise any function when taking any decision in terms of this Act or any statutory provision concerning the protection of the environment*'.

16 These principles have been held to provide not only the general framework within which environmental management and implementation decisions must be formulated, '*but they also provide guidelines that should guide State organs in the exercise of their functions that may affect the environment*'.[8]

17 They accordingly comprise peremptory norms: "*they must be observed as they are of considerable importance to the protection and management of the environment*".[9]

18 The NEMA principles guide not only the "*interpretation, administration and implementation*" of NEMA itself, but also of "*any other law concerned with the*

[7] *Fuel Retailers* para 56.

[8] *Fuel Retailers* para 67.

[9] Id.

protection or management of the environment."[10] The Constitutional Court has held that NEMA "*demands that all environmental legislation is interpreted in light of its principles*",[11] and this Court has confirmed that the NWA is such a law.[12]

19 Therefore, in determining this appeal, this Court will be informed and guided not only by the NWA, but also by the principles of environmental management set out in section 2(4) of NEMA.

20 Section 2(2) requires that environmental management places people and their needs at the forefront of its concern, and serves their physical, psychological, developmental, cultural and social interests equitably.[13]

21 Section 2(4)(a) concerns sustainable development. This is the principle that environmental considerations must be balanced with socio-economic considerations, and that development cannot subsist upon a deteriorating environmental base.[14] It provides, *inter alia*:

21.1 that decision-makers must comply with the '*hierarchy of mitigation*' (section 2(4)(a)(i)-(iv) and (viii)) which provides that environmental harms

[10] NEMA s 2(1)(e).

[11] *HTF Developers* para 29 (holding that the Environment Conservation Act 73 of 1989 must be interpreted in light of s 2 of NEMA).

[12] *Harmony Gold Mining Company Ltd v Regional Director: Free State Department of Water Affairs and Others* [2012] ZAGPPHC 127 para 17.

[13] See *Wakkerstroom Natural Heritage Association v Dr Pixley ka Isaka Local Municipality* [2019] ZAMPMHC 20 (29 October 2019) para 55.

[14] *Fuel Retailers* para 44.

must be avoided if at all possible, and only if they cannot be avoided should those harms be minimised and remedied; and

21.2 for the '*precautionary principle*', reflected in section 2(4)(a)(vii), which requires decision-makers to adopt a risk-averse and cautious approach, particularly in the face of incomplete information.[15]

22 The precautionary principle requires that, given the limits of our scientific knowledge about future impacts, decision-makers must err on the side of caution. At a minimum, it requires decision-makers to make sure that all reasonable investigations and enquiries are conducted before taking a decision. Where those investigations yield uncertain results, it requires decision-makers to avoid the risks of environmental degradation. Indeed, this was the approach endorsed by the Constitutional Court in *Fuel Retailers,* where the Court berated the authorities for breaching the precautionary principle, as they had failed to ensure that the potential impact of a filling station on local water supplies was fully investigated.[16]

23 In sum, the NEMA principles are based on the understanding that "*the environment is a composite right, which includes social, economic and cultural considerations in order to ultimately result in a balanced environment*".[17]

---

[15] *Fuel Retailers* para 99.

[16] *Fuel Retailers* para 99.

[17] *HTF* para 24.

The National Water Act ('NWA')

24 The NWA is the specific environmental management legislation in terms of which the WUL at issue in these proceedings was granted.

25 The purposes of the NWA are set out in section 2 as follows:

> 'to ensure that the nation's water resources are protected, used, developed, conserved, managed and controlled in ways which take into account amongst other factors-
>
> (a) meeting the basic human needs of present and future generations;
>
> (b) promoting equitable access to water;
>
> (c) redressing the results of past racial and gender discrimination;
>
> (d) promoting the efficient, sustainable and beneficial use of water in the public interest;
>
> (e) facilitating social and economic development;
>
> (f) providing for growing demand for water use;
>
> (g) protecting aquatic and associated ecosystems and their biological diversity;
>
> (h) reducing and preventing pollution and degradation of water resources;
>
> (i) meeting international obligations;
>
> (j) promoting dam safety;
>
> (k) managing floods and droughts.'

26 Section 3 of the NWA provides that the national government, acting through the Minister responsible for water resources, is the 'public trustee' of the nation's water resources, and must ensure that water is protected, used, developed, conserved, managed and controlled in a sustainable and equitable manner, for the benefit of all persons, and in accordance with its constitutional mandate.

27 These strictures come to bear with especial significance where the state has taken steps, through policy and legislation, to protect a particular area from unsuitable development, by recognising it as a Strategic Water Source Area; as

part of a protected environment in terms of NEMPAA; and as an endangered ecosystem in terms of the Biodiversity Act.

28 One policy mechanism by which the state takes such steps is the national water resource strategy, promulgated in terms of section 5(1) of the NWA. Section 5(3) of the NWA provides that the water resources of South Africa must be protected, used, developed, conserved, managed and controlled *in accordance with the national water resource strategy*. Section 6(1) sets out the contents of the national water resource strategy, which must include, *inter alia* (and in summary):

> 'the strategies, objectives, plans, guidelines and procedures of the Minister and institutional arrangements relating to the protection, use, development, conservation, management and control of water resources within the framework of existing relevant government policy in order to achieve –
>
> (i) the purpose of this Act; and
>
> (ii) any compulsory national standards prescribed under section 9(1) of the Water Services Act, 1997 (Act No. 108 of 1997)' (section 6(1)(a)).

29 Section 7 of the NWA stipulates that '*[t]he Minister, the Director-General, an organ of state and a water management institution must give effect to the national water resource strategy when exercising any power or performing any duty in terms of this Act*'.

30 The NWA provides for licensed and unlicensed water uses.[18] Section 22 provides that water may be used without a licence only in the limited circumstances set

[18] *Escarpment Environment Protection Group and Another v Department of Water Affairs and Others* (A666/11, 4333/12, 4334/12) [2013] ZAGPPHC 505 (20 November 2013) ("***EEPOG***") para 19.

out in section 22(1)(a)[19], or if the responsible authority dispenses with the licence requirement. Otherwise, a WUL is required for every water use.

31 It is through the licencing regime that the state conducts its role as 'public trustee' of the country's water resources.

32 Section 27 sets out an open list of the considerations relevant to the decision whether to grant a WUL. Section 27(1) provides that:

> 'In issuing a general authorisation or licence a responsible authority must take into account all relevant factors, including—
>
> a. existing lawful water uses;
> b. the need to redress the results of past racial and gender discrimination;
> c. efficient and beneficial use of water in the public interest;
> d. the socio-economic impact—
> i. of the water use or uses if authorised; or
> ii. of the failure to authorise the water use or uses;
> e. any catchment management strategy applicable to the relevant water resource;
> f. the likely effect of the water use to be authorised on the water resource and on other water users;
> g. the class and the resource quality objectives of the water resource;
> h. investments already made and to be made by the water user in respect of the water use in question;
> i. the strategic importance of the water use to be authorised;
> j. the quality of water in the water resource which may be required for the Reserve and for meeting international obligations; and
> k. the probable duration of any undertaking for which a water use is to be authorised.'

33 Our courts have held that the proper approach to section 27 is for the responsible authority and the Water Tribunal to take account of <u>all relevant factors</u>, including,

[19] These circumstances are: if the water use is permitted under Schedule 1, if the water use is permissible as a continuation of an existing water use, or if the water use is permissible in terms of general authorisation issued under section 39.

but not limited to the eleven factors specifically mentioned in section 27, and then to balance them all without attaching undue weight to any one, with a view to serving the objects of the NWA.[20] The failure to take into account all relevant factors, and the attachment of undue significance to any one factor, constitutes an error of law.[21]

34 The licence must be issued to a specified water user, for a specified use, for a specific property or area, and must stipulate the user, as well as conditions of use.[22]

35 Licences are not issued in perpetuity; they are valid for a fixed period, which may not exceed 40 years.[23] The NWA makes provision for the periodic review of the licence at intervals which do not exceed five years during the 40-year or lesser period of the licence.[24]

36 Generally speaking, if the land under which water is to be accessed is not owned by the licence holder, then the consent of the landowner is required. Specifically, section 24 provides that a WUL may be granted to use water underground land not owned by the applicant, only if the owner of the land consents, or if there is good reason to do so.

---

[20] *Makhanya NO and Another v Goede Wellington Boerdery (Pty) Ltd* [2013] 1 All SA 526 (SCA) ("***Makhanya***") para 37.See *Guguletto Family Trust v Chief Director, Water Use Department of Water Affairs and Forestry and Another Case No.* (Unreported, Case No: A566/10, North Gauteng High Court, Pretoria)) ("***Guguletto***")

[21] *Guguletto* paras 20 and 22.

[22] Section 28(1)(a)-(d).

[23] Section 28(1)(e).

[24] Section 28(1)(f) read with section 29.

37 Section 146(1) establishes the Water Tribunal. The Water Tribunal is an independent body, with national jurisdiction. Appeals lie to the Water Tribunal in a number of situations identified in section 148(1), which include, in section 148(1)(f), appeals from a decision by a responsible authority on an application for a WUL.

38 An appeal to the Water Tribunal under section 148 constitutes a rehearing *de novo*.[25] This means that it considers all relevant considerations afresh, whether or not they were before the responsible authority.

39 Section 149 of the NWA gives a right of appeal on a question of law to any party in respect of a matter in which the Water Tribunal has given a decision on appeal under section 148. The appeal lies to a High Court.

40 Decisions of the Water Tribunal also constitute administrative action and are subject to review by a competent court.[26] In addition to lodging the present appeal, the appellants have also instituted review proceedings to review and set aside the Water Tribunal's and DG's decisions. The review application is pending under case number 86261/2019. It is trite that both an appeal against and a review of the Water Tribunal's decisions are competent.[27]

---

[25] *Vierplaas Boerdery BK v Department of Water Affairs and Forestry and Another* (WT 06/08/2008) [2011] ZAWT 10 at para 43 ("*[T]he [Water] Tribunal, effectively, hears the matter de novo and does not exercise review jurisdiction.*"); *EEPOG* para 49. See also item 6(3) of Schedule 6 to the NWA, which provides that '*[a]ppeals … to the Tribunal take the form of a rehearing. The Tribunal may receive evidence, and must give the appellant … and every party opposing the appeal … an opportunity to present their case*.'

[26] *Makhanya* paras 26-31.

[27] *Geldenhuys and Others v Cillie and Others* (6928/2005) [2017] ZAWCHC 61 (30 May 2017) para 24; *EEPOG* para 13.

Nature of the appeal

41 Section 149 allows for appeals on questions of law.

42 The appeal is thus a rehearing on the merits, but limited to the evidence or information on which the Water Tribunal's decision was based – that is, the record, and the Water Tribunal's order and reasons. Put differently, this Court is required to determine whether the Water Tribunal's order was correct, on questions of law, on the material which it had before it.[28]

43 Thus, while this Court will not second-guess the conclusions drawn from the evidence (i.e. the findings of fact), it is for this Court to determine whether the Water Tribunal:

43.1 applied the correct law;

43.2 interpreted the law correctly; and/or

43.3 properly applied the law to the facts as found by it.[29]

44 In the light of the limited scope of a section 149 appeal, the factual background that we set out below – regarding the proposed mine, the WUL application process and, thereafter, its significant water impacts – are based largely on the factual findings of the Water Tribunal, or on evidence before the Water Tribunal

---

[28] See *Tikly and Others v Johannes NO and others* 1963 (2) SA 588 (T) 590-591; *Stenersen & Tulleken Administration CC v Linton Park Body Corporate and Another* 2020 (1) SA 651 (GJ) para 33; *Fisher v Community Schemes Ombud Service* 2020 JDR 0214 (GJ) para 3.

[29] See *Stenersen & Tulleken Administration CC v Linton Park Body Corporate and Another* 2020 (1) SA 651 (GJ) para 33 (considering the nature of an appeal on a question of law under section 59 of the Community Schemes Ombud Service Act 9 of 2011).

that was uncontroverted. The appellants do not ask this Court to overturn the Water Tribunal on any findings of fact.

THE PROPOSED MINE

45 The proposed Yzermyn Underground Coal Mine is extensive. The underground mining area is approximately 1 200 hectares, and the surface infrastructure area is approximately 22.4 hectares. The mine is anticipated to produce 2.2 million tons of coal per annum, with an estimated life of mine of approximately 15 years.[30]

46 The mine area – both surface and underground – corresponds with several wetlands.[31] These include '*channelled valley wetlands*', which are valley-bottom wetlands with river channels running through them; and '*seep wetlands*', which are on sloping land and which are characterised by the unidirectional movement of water.[32]

47 The mine area is located in the Quaternary Catchment W51A of the Nkomati-Usutu Water Management Region, located in the upper reaches of the Assegaai River Catchment.[33] It also falls entirely within the Wakkerstroom/Luneburg

---

[30] Water Tribunal decision para 19, Record Vol 50, p 5119.

[31] See the Amended Environmental and Social Impact Assessment Report and Environmental and Social Management Programme by Second Respondent dated January 2015, Record Vol 3, p 323 (illustrating the location of the proposed mine area in relation to Quaternary Catchments).

[32] Water Tribunal decision, para 3, Record Vol 50, pp 5105.

[33] Atha does not deny that mine area also forms part of a River Freshwater Ecosystem Priority Area and associated sub-quaternary catchment. See the image at Record Vol 16 p1571. Two of the tributaries are the Mawandlane and the Mkuzase Rivers (See Le Maitre Transcript, Record Vol 40, p. 3977 lines 4-8).

Grasslands Threatened Ecosystem – an ecosystem listed as endangered and only 2% conserved.[34]

48 The predominant land uses to date in the area are non-industrial, involving commercial and subsistence agriculture and eco-tourism, due to the area's unique biodiversity.[35]

49 If authorised, the Yzermyn coal mine will use the *'bord and pillar*' method. This entails the removal of large areas of coal-containing ore, while leaving in place '*pillars*' of coal to hold up the roof of the underground mine.

50 Two adits (i.e. excavations to give access from the surface) will be sunk to access the underground coal seams. The mine project will involve underground drilling and blasting, the extraction, crushing, screening and stockpiling of coal product, and the transportation of the coal product for sale.[36]

51 Atha appointed Kara Nawa Environmental Solutions to collate and compile the water use licence application ('**WULA**'). The original WULA was submitted on 10 March 2014.[37]

52 On 10 April 2014, pursuant to a meeting on 3 April, the DG addressed a letter to Atha advising it that the WULA was incomplete, and that several documents and

---

[34] Water Tribunal para 19, Record Vol 50, p 5119; See the image at page 323 of the record and the image at page 365 of the record, illustrating the location of the proposed mine area within the Wakkerstroom/Luneburg Grasslands Threatened Ecosystem

[35] Water Tribunal paras 4 and 19, Record Vol 50, pp5106 and 5119.

[36] Water Tribunal para 19, Record Vol 50, p5119. This method is described in the Integrated Water and Waste Management Plan dated March 2015, revised August 2015, Record Vol 25 p.2430.

[37] Water Tribunal para 25, Record Vol 50, pp5121-5122.

studies required revision or resubmission, including an Integrated Water and Waste Management Plan ('**IWWMP**').[38]

53 Therefore, between April 2014 and March 2015, Atha commissioned further studies, or revised its existing studies.[39] In March 2015, Atha compiled its IWWMP.[40]

54 On 22 April 2015, the DG's case manager wrote to Atha.[41] The letter provided extensive comments and criticisms identifying problems in relation to, *inter alia*, missing data, contradictory statements about the mine design and water uses, the incomplete wetlands study, the overburden stockpiles, on-site sewage storage, water treatment brine crystal storage, impacts of access roads and conveyors, the need for geotechnical studies and the inadequacy of the public participation process. The case manager also noted that '*Financial provision has not been included, please submit*'.[42]

55 On 29 May 2015, the Acting CEO of the Pongola-uMzimkhulu Catchment Management Agency, acting on behalf of the DG, gave Atha until 24 July 2015 to comply with its directives and address the deficiencies identified, including the requirement that it conduct a 60-day public participation process. The letter

---

[38] Water Tribunal para 25, Record Vol 50, pp5121-5122.

[39] Water Tribunal para 26, Record Vol 50, p5122. These included, among others: The SAS Wetland Ecological Assessment dated June 2014, Record Vol 10, pp962-1085; The Delta H Numerical Groundwater Model Report dated August 2014, Record Vol 29, pp2831-2981; EcoPartners Downstream Water Usage Report (1 August 2014), Record Vol 28, pp 2761-2830.

[40] Water Tribunal para 27, Record Vol 50, pp5122-5123.

[41] Water Tribunal paras 28 to 29, Record Vol 50, pp5123-5124; Annexure "D1", Record Vol 14, pp 1422-1427.

[42] Id.

explained that because of the substantial amount of critical information that was missing, a meaningful technical assessment was impossible.[43] This period was further extended to 30 August 2015, by a letter of 22 June 2015.[44]

56 On 19 June 2015, Atha, through its consultants Savannah Environmental (Pty) Ltd, published a notice of the public participation process in terms of section 41 of the NWA in various local newspapers. The notice gave the public from 19 June 2015 to 20 August 2015 to submit comments.[45]

57 On 27 August 2015, Atha submitted the final, revised WULA, including the Final IWWMP and the revised SAS Wetland Ecological Assessment dated May 2015, to the DG.[46]

58 On 30 September 2015, EWT sent a letter to the DG indicating its opposition to the WULA.[47]

59 On 20 April 2016, the DG advised Atha that its WULA had met all the formal requirements, and had progressed to the Application Phase.[48]

60 On 27 June 2016, the FSE wrote a letter of objection.[49]

---

[43] Water Tribunal, para 32, Record Vol 50, p5125; Letter dated 29 May 2015, Record Vol 33, pp3312-3314.

[44] Water Tribunal, para 34, Record Vol 50, p5126.

[45] Water Tribunal, para 33, Record Vol 50, p5125-5126.

[46] Water Tribunal, para 36, Record Vol 50, p5127.

[47] Water Tribunal para 37, Record Vol 50, p5127; Letter dated 30 September 2015, Record Vol 23, p 2246.

[48] Water Tribunal para 40, Record Vol 50, p5128.

[49] Water Tribunal para 10, Record Vol 50, pp5110-5111; Letter dated 27 June 2016, Vol 23, pp 2247-2257.

61 The internal Record of Recommendation and Decision ('**ROR**') regarding Atha's WULA was compiled by Ms H Aboobaker on 5 July 2016, recommending the granting of the WUL to Atha.[50]

62 The DG granted the WUL on 7 July 2016 acting under the authority apparently delegated to her by the then Minister of Water and Sanitation.[51]

63 The WUL authorises the following water uses on the farms Kromhoek 93 HT (comprising Kromhoek 93 HT: Remaining Extent ('RE') and Kromhoek 93 HT: Portion 1), Goedgevonden 95 HT, Yzermyn 96 HT: Portion 1, Zoetfontein 94 HT and Vaalbank 74HT, in respect of the proposed Yzermyn underground coal mine:[52]

63.1 taking water from a water resource (section 21(a) of the NWA), in particular the abstraction of groundwater from two specified supply wells (boreholes) on Kromhoek 93 HT: RE and Goedgevonden 95 HT;

63.2 impeding or diverting the flow of water in a watercourse (section 21(c) of the NWA) and altering the bed, banks, course or characteristics of a watercourse (section 21(i) of the NWA) pursuant to the construction and operation of the mine and associated infrastructure, including, amongst others:

---

[50] Record of Recommendation and Decision regarding the WUL application, Record Vol 13, pp 1276-1327.

[51] Water Use Licence ("**WUL**"), Record Vol 12, pp1225-1275.

[52] Water Tribunal paras 6 and 7, Record Vol 50, pp5107-5109; WUL, Record Vol 12, pp1225-1275.

63.2.1 the construction and operation of underground mining activities and voids on various wetland systems on Yzermyn 96 HT: Portion 1, Goedgevonden 95 HT, Kromhoek 93 HT and Zoetfontein 94 HT;

63.2.2 the partial destruction of a wetland system on Yzermyn 96 HT: Portion 1 pursuant to the construction and operation of a pollution control dam ('**PCD**') system;

63.2.3 the construction and operation of the following infrastructure within 500 metres of various wetland systems on Yzermyn 96 HT: Portion 1:

63.2.3.1 an adit;

63.2.3.2 the main workshop platform;

63.2.3.3 two coal stockpile slabs; and

63.2.3.4 an office block and parking area;

63.2.4 the construction and operation of various pipelines and clean- and dirty-water FloDrains (drainage systems) through and/or within 500 metres of various wetland systems on Yzermyn 96 HT: Portion 1, Kromhoek 93 HT, Goedgevonden 95 HT and Vaalbank 74 HT;

63.2.5 the construction and operation of various berms (artificial ridges or embankments) and canals through and within 500

metres of various wetland systems on Yzermyn 96 HT: Portion 1; and

63.2.6 the construction and operation of two access roads through and/or within 500 metres of various wetland systems on Yzermyn 96 HT: Portion 1;

63.3 discharging waste or water containing waste into a water resource through a pipe, canal, sewer or other conduit (section 21(f) of the NWA) and disposing of waste in a manner which may detrimentally impact on a water resource (section 21(g) of the NWA), including:

63.3.1 discharging water containing waste (treated to a specified quality) into a wetland system on Yzermyn 96 HT: Portion 1;

63.3.2 disposing and storing contaminated water in a PCD on a wetland system on Yzermyn 96 HT: Portion 1;

63.3.3 the construction and operation of a sewage treatment plant on a wetland system on Yzermyn 96 HT: Portion 1;

63.3.4 the construction and operation of a wastewater treatment plant within 500 metres of various wetland systems on Yzermyn 96 HT: Portion 1; and

63.3.5 the use of PCD-process water for dust suppression on roads within the mining area within 500 metres of various wetland systems on Yzermyn 96 HT: Portion 1; and

63.4 removing, discharging or disposing of water found underground (section 21(j) of the NWA), in particular pumping out groundwater flowing into the adit and underground workings situated on various wetland systems on Yzermyn 96 HT: Portion 1, Goedgevonden 95 HT, Kromhoek 93 HT and Zoetfontein 94 HT.

64 The WUL has been issued for a period of 15 years, with a discretion on the part of the Department of Water and Sanitation ('**DWS**') to review the WUL every two years.

65 On 16 August 2016, EWT wrote to the DG substantiating its objection of 30 September 2015.[53]

66 On 15 December 2016, the Centre for Environmental Rights ('**CER**') lodged an appeal on behalf of the appellants, against the DG's decision, in terms of section 148(1)(f) of the NWA.[54] The grounds of appeal were amplified on 1 December 2017.[55]

67 Each ground of appeal was dismissed by the Water Tribunal in its judgment of 22 May 2019.[56]

68 We note that, in addition to its WUL, Atha has taken various steps to obtain other regulatory approval necessary for the mine to commence operations.

---

[53] Water Tribunal para 9, Record Vol 50, p5109.

[54] Original Notice of Appeal, Record Vol 1, pp1-5.

[55] Amplified Notice of Appeal, Record Vol 11, pp1159-1162.

[56] Water Tribunal decision, Record Vol 50, p5103.

68.1 On 19 March 2013, Atha applied for a coal mining right. This was finally issued in April 2015.[57] A review of the grant of that right is pending in this Honourable Court.

68.2 On 7 June 2016, Atha was granted environmental authorisation in terms of NEMA, and on 28 June 2016, the Department of Mineral Resources approved Atha's environmental management programme in respect of the Yzermyn mine in terms of the MPRDA. A review application and an internal appeal are pending respectively against those approvals.

68.3 On 20 August 2016 and 21 November 2016, the Minister of Environmental Affairs and the Minister of Mineral Resources respectively granted permission for commercial mining to be conducted in the Mabola Protected Environment in terms of section 48(1)(b) of NEMPAA ("**the NEMPAA decisions**").

68.4 However, on 8 November 2018, this Court reviewed and set aside the NEMPAA decisions, and remitted the matter to the respective Ministers for reconsideration. It held that the decisions, *inter alia*, lacked transparency, were procedurally unfair, were in breach of the Ministers' distinctive duties, failed to take into account the interests of local communities, and, by simply relying on the mitigation and management of acid mine drainage according to the requirements of DWS, breached the precautionary principle and impermissibly abdicated decision-

[57] Water Tribunal para 20, Record Vol 50, pp5120. It was initially granted in September 2013 but then withdrawn and granted again in April 2015.

making authority.[58] Applications for leave to appeal against the decision that were made to the High Court, the Supreme Court of Appeal and the Constitutional Court all failed.

68.5 On 29 April 2019, the Gert Sibande District Joint Municipal Planning Tribunal approved an application by Atha to rezone the proposed mining area from agricultural to mining, which was confirmed following an appeal to the Dr Pixley Ka Isaka Seme Local Municipality: Municipal Appeal Authority. A review application of these decisions is pending before the Mpumalanga Division of the High Court (Middelburg).

[58] *Mining and Environmental Justice Community Network of South Africa and Others v Minister of Environmental Affairs and Others* [2019] 1 All SA 491 (GP).

THE COMMON CAUSE WATER IMPACTS OF THE MINE

69 The mine has three main associated water impacts. These impacts have been identified by Atha's own specialists, and were accepted by the Water Tribunal.

70 The first impact is known as 'dewatering'. This describes the pumping out of groundwater during the operational phase of the mine, which results in a decline in the pre-mining groundwater levels in the aquifers above and adjacent to the mine workings.[59]

70.1 Both the Delta H groundwater assessment[60] and the WSP groundwater assessment[61] commissioned by Atha accepted that there would be a dewatering impact.

70.2 During the construction and operational phases, the groundwater inflow will be pumped out of the underground workings to enable operations. After the cessation of operations, inflow will be allowed to occur and, over time, the mine void will flood.

70.3 According to Delta H and WSP, the groundwater inflow and subsequent pumping will result in reduced groundwater levels as a result of the '*dewatering*' of the aquifers above and in the vicinity of the workings.

---

[59] Water Tribunal para 15.1, Record Vol 50, pp5115; Water Tribunal decision para 112, Record Vol 51, pp5183. For a diagrammatic explanation of the process of dewatering, see Appendix B to the Dennis review dated August 2016, Record Vol 15, p1491.

[60] Delta H report, Record Vol 29, p2831.

[61] WSP groundwater assessment dated 3 September 2013, Record Vol 14, pp1331-1421.

Springs, wetlands and baseflow to streams/rivers which are fed by groundwater are affected by a drawdown in the groundwater levels.

70.4 According to both Delta H and WSP, the so-called '*cones of dewatering*' – that is, diagrams of the simulated dewatering – in the shallow and deep aquifers would extend for several kilometres away from the mine. Delta H reports that '*the ensuing cone of dewatering due to mine inflows will capture groundwater, which would have otherwise contributed to spring discharges, leakages along hill slopes, wetlands, river baseflow or to deeper regional groundwater flow*'.[62]

70.5 Scientific Aquatic Services ("**SAS**") found that this would have '*HIGH*' impacts on the study-area wetlands both unmitigated and with mitigation.[63] This finding was based on the Delta H groundwater assessment.[64]

71 The second impact is 'decant' of contaminated water post-closure of the mine.

71.1 Decanting is the process by which water, which has flooded into the underground mine void after operations have ceased and pumping out has stopped, flows to the surface, and '*daylights*' at '*decant*' points.

71.2 The water which discharges in this way is contaminated, as a result of its contact with the mine workings. Acid mine drainage is a process

[62] Delta H report, Record Vol 29, p2841.

[63] SAS 2015 Assessment, Record Vol 10, p1072-1074.

[64] SAS 2015 Assessment, Record Vol 10, p967.

commonly associated with the closure of coal mines, where the mine voids fill with groundwater, and contaminants exposed during the mining process pass into that water, which may then decant to the surface.

71.3 As Feris & Kotze explain, '*[w]hilst [acid mine drainage] carries a potential threat to the environment as a whole, it poses a particular threat to the country's water resources which will have severe consequences for the health and well-being of people'*.[65]

71.4 Precisely this impact was at issue in *Federation for Sustainable Environment v Minister of Water Affairs and Others*[66] where it was common cause that the water supply in Silobela and Carolina in Mpumalanga was contaminated by 'acid mine water', and was not healthy for human and animal consumption.[67]

71.5 Atha's specialists accept this to be an inevitable consequence of the mine, in the absence of mitigation. We explain later in these submissions that no mitigation has in fact been provided for in the WUL.

71.6 The Delta H groundwater assessment indicates that '*it will take around 45 years for the mine voids ... to be completely flooded once active dewatering [pumping out] is stopped. Thereafter, decant from the*

[65] L Feris & LJ Kotze 'The Regulation of Acid Mine Drainage in South Africa: Law and Governance Perspectives' (2014) *Potchefstroom Electronic Law Journal* 17(5).

[66] [2012] ZAGPPHC 128 (10 July 2012).

[67] Para 4.

underground mine voids via the adit and/or unsealed exploration boreholes in the vicinity are likely to occur.'[68]

71.7 Delta H also assessed the acid production and neutralisation potential of coal samples from a neighbouring mine, and found that the majority of the coal samples were potentially acid-generating.[69]

71.8 The SAS 2015 assessment 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.[70] 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*'.[71]

71.9 Similarly, the ecological assessment by National Scientific Services ("**NSS**") found that, based on the predicted groundwater plume (i.e. the underground flow of contaminated groundwater), and the surface water resources, the receiving environment for contamination is the Assegaai River – a Freshwater Ecosystem Priority Area ('**FEPA**') river.[72]

---

[68] Delta H report, Record Vol 29, p2861.

[69] Delta H report, Record Vol 29, p2868.

[70] SAS 2015 Assessment, Record Vol 10, p1078.

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

[72] See Section G of the NSS Biodiversity and Impact Assessment, Record Vol 33, pp3267-3310.

71.9.1 It describes acid mine drainage as '*the most severe impact of coal mining on water resources' and predicts that '[t]he elevated location of the mine will lead to drainage of contaminated water away from the mine' and 'will threaten more than one water resource and thus users ... in the lower catchment*'.[73]

71.9.2 It describes the potential knock-on effects as including a dramatic decrease in aquatic biota, ceased aquatic ecosystem functionality, and a decline in the health of fauna.[74]

71.9.3 NSS accordingly gives the anticipated impact of decant of contaminated groundwater and the resultant impacts on surface water quality, wetlands, aquatic ecology and biodiversity a **'HIGH'** significance (being NSS's highest significance rating), both without mitigation and with mitigation. In other words, NSS regards mitigation of this impact as impossible.[75]

72 The third impact is that if the water level in the mine void is allowed to recover naturally over the predicted 45 years post-closure (i.e. after active pumping-out ceases), there will be the accumulation of contaminated, toxic water in the groundwater plume (the mixture of groundwater and waste chemicals) from the

[73] Section G of the NSS Biodiversity and Impact Assessment, Record Vol 33, pp3296.

[74] Section G of the NSS Biodiversity and Impact Assessment, Record Vol 33, pp3297.

[75] Section G of the NSS Biodiversity and Impact Assessment, Record Vol 33, pp3295.

mine void, long before the mine begins to decant. The danger of mine void pollution plumes is recognised in Atha's IWWMP.[76]

GROUNDS OF APPEAL

73 We now turn to address each of the appellants' grounds of appeal, in the light of the factual background set out above. The appellants have raised twelve grounds of appeal. However, because certain of these grounds are overlapping, and in order to avoid unnecessary prolixity, we have arranged these grounds under five broad headings, namely:

73.1 The failure to consider strategic importance of the mine area for water security and biodiversity;

73.2 The absence of proof of consent as required by section 24 of the NWA;

73.3 The failure to apply the precautionary principle;

73.4 The failure to provide for post-closure treatment of contaminated water; and

73.5 The failure to appreciate the burden of proof in respect of socio-economic impacts.

[76] IWWMP Record Vol 26, p2628, read with p. 2607.

74 In respect of each ground of appeal, we set out: the relevant law; the common cause facts; the Tribunal's findings; and the manner in which the Tribunal erred as a matter of law.

Failure to consider the strategic importance of the mine area for water security and biodiversity [77]

Law

75 As explained above, section 27 of the NWA sets out an open list of the considerations relevant to the decision whether to grant a WUL. The Tribunal is required to take into account all relevant factors, including but not limited to the eleven factors specifically mentioned, and then to balance them all, without attaching undue weight to anyone.[78]

76 Moreover, the NWA affords important status to the "*national water resource strategy*", a statutorily prescribed instrument. In this regard:

76.1 Section 5(1) provides that "*the Minister must, as soon as reasonably practicable, by notice in the Gazette, establish a national water resource strategy*".

76.2 Section 5(3) requires that the water resources of the Republic "*must be protected, used, developed, conserved, managed and controlled in accordance with the national water resource strategy*".

[77] 1st to 5th grounds of appeal, Notice of appeal, Record Vol 52, pp5250-5277.

[78] *Makhanya* para 40.

76.3 Section 7 requires that "*The Minister, the Director-General, an organ of state and a water management institution must give effect to the national water resource strategy when exercising any power or performing any duty in terms of this Act*".

76.4 The Preamble to Part 1 of Chapter 2 provides that the National Water Resource Strategy "*is binding on all authorities and institutions exercising powers or performing duties under this Act*".

77 NEMPAA regulates the declaration of protected areas. Self-evidently, the authorisation of water uses in respect of a development which is likely to have lasting effects on ground and surface water, and therefore on the ecological integrity and biodiversity of the area, is inconsistent with NEMPAA and the purposes for which a protected area is declared – namely to protect biodiversity and ecological integrity and viability.[79]

78 Section 3 of the Biodiversity Act provides, *inter alia*, that the state must "*manage, conserve and sustain South Africa's biodiversity and its components*". The DG and Water Tribunal are organs of state which implement the NWA, and thus bear this duty.

Common cause facts

79 The appellants advanced evidence before the Water Tribunal to the effect that the proposed mine area has been repeatedly recognised as an area of key

[79] See section 17 of NEMPAA.

strategic significance and environmental sensitivity, vulnerability and importance by independent bodies and government departments. While the respondents disputed the *relevance* of these facts, their truth was never seriously in question.

80 The statutorily prescribed National Water Resource Strategy[80] expressly recognises the strategic importance of Strategic Water Source Areas ('**SWSAs**') and of Freshwater Ecosystem Priority Area ('**FEPAs**'), and the need to acknowledge them as such "*at the highest levels across all sectors*".[81]

81 In August 2013, the then Minister of Water and Environmental Affairs published the Second Edition of the National Water Resources Strategy in terms of section 5(4)(b) of the NWA.[82] In particular, the National Water Resource Strategy recognises that:

81.1 SWSAs supply a disproportionately high amount of the country's mean annual runoff in relation to their surface area, making up only 8% of the land area across South Africa, Lesotho and Swaziland, but providing 50% of the water in these countries.[83]

81.2 SWSAs form the foundational ecological infrastructure on which a great deal of built infrastructure for water services depends. They are thus

[80] Record Vol 36, pp3561-3581.

[81] National Water Resource Strategy, Record Vol 36, p3579.

[82] Government Notice No. 845 in Government Gazette No. 36736.

[83] National Water Resource Strategy, Record Vol 36, p3579.

"*strategic national assets that are vital for water security, and need to be acknowledged as such at the highest level across all sectors*."[84]

81.3 Appropriately managing SWSAs can produce significant returns in terms of water quality and quantity, and investing in them "*is also an important mechanism for long term adaptation to the effects of climate change on water provision, growth and development*."

81.4 SWSAs are endorsed and acknowledged as "*strategic national assets at the highest level in all sectors" which "enjoy legal protection that allows land to be managed in a way that does not significantly undermine their role as key water sources*."

81.5 FEPAs provide a "*single, nationally consistent information source for incorporating water ecosystem goals into planning and decision-making processes*".[85]

82 In July 2013, in a report by the Council for Scientific and Industrial Research ('**the CSIR**'),[86] the mine area was identified to fall partly within the Enkangala Drakensberg SWSA ("**the 2013 SWSA Report**"). The mine area in question is, accordingly, vital for water security.[87]

---

[84] National Water Resource Strategy, Record Vol 36, p3579 and 3581.

[85] National Water Resource Strategy, Record Vol 36, pp3574-3575.

[86] Transcript Record Vol 40, p 3990, lines 15 to 21.

[87] Water Tribunal decision para 72, Record Vol 51, p5115.

83 In March 2018, in a further CSIR report commissioned by the Water Research Commission, the mine area was found in to fall entirely within the Enkangala Drakensberg SWSA. This Report explained that SWSAs are absolutely critical for national water and economic security, and said expressly that they should receive particular attention in decision-making.[88]

84 The mine area also forms part of a River FEPA in the '*Atlas of National Freshwater Ecosystem Priority Areas in South Africa*', which was published in August 2011 by, among others, the Department of Water Affairs and the Department of Environmental Affairs, and which the Department of Water Affairs' National Water Resource Strategy, 2013 regards as providing a single, nationally consistent, information source for incorporating water ecosystem goals into decision-making processes. [89]

85 This means that the area has been recognised at national government level as contributing to national biodiversity goals and the sustainable use of water resources, and as being an area which should be managed in a way that maintains the good condition of the river reach.

86 The mine area has also been afforded special status by other spheres of government, and other departments within the national sphere. For example:

[88] Mr Le Maitre confirmed this before the Water Tribunal. He explained in particular that, in terms of the new 2018 report, 10% of the country provides 50% of the water available in South Africa, and that this is what makes these water sources so strategically important. Transcript, Record Vol 40, pp 3976 and 3986.

[89] NFEPA Atlas Record Vol 16, pp1572-1574.

86.1 The underground area falls within the Mabola Protected Environment, which was declared as such by the MEC for Economic Development, Environment and Tourism, Mpumalanga on 22 January 2014 in terms of section 28(1)(a)(i) and (b) of NEMPAA. Part of the motivation for, and purpose of, declaring the Mabola Protected Environment was to protect this environmentally sensitive, unique area, which has irreplaceable biodiversity, against coal mining.[90]

86.2 The underground and surface areas of the proposed mine fall within the Wakkerstroom/Luneberg Grasslands, which are classified as 'Endangered' in terms of the Biodiversity Act.[91]

86.3 The mine area falls within an area identified in the Mining and Biodiversity Guideline, 2013 as having the '*Highest Importance for Biodiversity*', as being at the 'Highest Risk' from mining, and as being necessary to ensure the protection of biodiversity, environmental sustainability, and human well-being. The Mining and Biodiversity Guideline is produced by, amongst others, the Department of Environmental Affairs, the Department of Mineral Resources and the South African National Biodiversity Institute.[92]

---

[90] See Amplified Grounds of Appeal para 29.15, Record Vol 12, pp. 1177-1178.

[91] Water Tribunal decision para 19, Record Vol 50, p5119.

[92] The official citation is the 'Department of Environmental Affairs, Department of Mineral Resources, Chamber of Mines, South African Mining and Biodiversity Forum, and South African National Biodiversity Institute. 2013. Mining and Biodiversity Guideline: Mainstreaming biodiversity into the mining sector. Pretoria.' It is voluminous and is therefore not attached but it may be found on the DEA website.

Tribunal findings

87 The appellants argued before the Water Tribunal that, given the common cause water impacts of the mine, the above factors were relevant considerations in determining whether or not to grant the WUL.

88 However, the Water Tribunal dismissed this evidence as altogether irrelevant. It reasoned as follows.

89 First, it held that the SWSA reports were national level studies and therefore not relevant for a '*micro-level project-based decision*', as decisions on water use licence applications are limited to considering '*project level information'*, and not national, macro-level, strategic research findings. It held that these considerations could not be used to guide specific decision-making on a project level basis.[93] Also in this context, it held that *"impact assessments in South Africa are still project-based and the country has not fully embraced strategic impact assessment"*.[94]

90 Second, it held that the SWSA reports were irrelevant, because they did not comprise, or had not been taken up in, government policy.[95]

91 Third, it held that the 2018 SWSA report was irrelevant, because it had not reached the stage of publication by the Water Research Commission.[96]

---

[93] Water Tribunal decision para 73.2, fn 92, Vol 51, p5156; para 78, Vol 51, p5161.

[94] Water Tribunal decision para 78, Vol 51, p5161.

[95] Water Tribunal decision paras 164.1 and 164.4, Vol 51, pp5237 and 5239.

[96] Water Tribunal decision para 73.1 and fn 191, Vol 51, pp5155-5156 and 5210.

92 Fourth, it held that the National Water Resource Strategy was a *'draft out for comments since 2013'*.[97] It held further that until SWSAs were accorded legally protected status pursuant to the 2013 National Water Resource Strategy, their recognition in the Strategy was irrelevant.

Errors of law

93 The Water Tribunal did not find that the evidence described above was unfounded. Indeed, it was largely uncontroverted. The only issue was its relevance. The relevance of considerations to a decision is plainly a question of law. This is especially so in the light of section 27 of the NWA, which expressly enjoins the responsible authority to consider all relevant factors.

94 We 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 contravened section 27 of the NWA.

95 Put differently, a finding that the strategic importance of the mine area is irrelevant, amounts to a finding that, properly interpreted, section 27 does not include within its ambit of "*all relevant factors*", considerations regarding the strategic importance of the mine area.

96 There are four respects in which the Water Tribunal plainly erred as a matter of law.

[97] Water Tribunal decision paras 164.2, fn 232, Record Vol 51, pp5237-5238.

97 First, its conclusion that the SWSA reports were national and not micro-level studies and therefore not relevant at a project level is mistaken.

97.1 While micro-level considerations are of course relevant, broader strategic questions are too. There can be little question, for example, that the sensitivity, vulnerability and strategic importance for water security of an area is a relevant consideration. This is made plain by section 2(4)(r) of NEMA, which provides that—

> 'Sensitive, vulnerable, highly dynamic or stressed ecosystems, such as coastal shores, estuaries, wetlands, and similar systems require specific attention in management and planning procedures, especially where they are subject to significant human resource usage and development pressure.'

97.2 It is simply mistaken to suggest that South Africa has '*not fully embraced strategic impact assessment*'. Most of the NEMA principles require that in every decision made under the environmental legislative framework, strategic issues such as these are considered.

97.3 Indeed, the NWA itself clearly enjoins the responsible authority to consider various macro-level factors. That is why it makes relevant a consideration such as that in section 27(1)(i), namely, to consider the strategic importance of the water use to be authorised.

97.4 In any event, to a large extent, the considerations *are* project-specific. They do not merely speak broadly and in the abstract about the harm of coal mining. They are project-specific in the sense that they speak about the sensitivity, environmental vulnerability and importance of this specific

mine area. They would not be relevant to every project, irrespective of where it occurs.

98 Second, the Water Tribunal's conclusion that the SWSA reports should not be considered because they did not comprise, or had not been taken up in, government policy, is similarly wrong in law.

98.1 It overlooks the central question that the Water Tribunal is required to consider under section 27(1), namely whether the considerations contained in these reports are relevant to its decision. The obligation to consider relevant factors cannot be met by asking dogmatically whether they have been taken up in government policy. That would entitle our environmental authorities to turn a blind eye to glaring truths about environmental degradation, widely documented in reputable publications, provided that government had not adopted them into policy.

98.2 We submit that this approach would undermine the entire statutory scheme. It is also directly contrary to authority. For example, in *WWF South Africa v Minister of Agriculture, Forestry and Fisheries and Others*,[98] Rogers J explained that the state bears a duty to consider the best and latest scientific evidence in the conservation of marine resources. That is so whether or not the evidence constitutes government policy: the state cannot ignore the best and latest evidence and information.

[98] [2018] 4 All SA 889 (WCC).

98.3 In any event, the 2013 SWSA report *was* taken up in government policy – namely the 2013 National Water Resource Strategy. This is a policy, which, in terms of sections 5(1) and 6(1) of the NWA, is required to set the '*strategies, objectives, plans, guidelines and procedures of the Minister and institutional arrangements relating to the protection, use, development, conservation, management and control of water resources*'.

98.4 In terms of section 7 of the NWA, the Strategy must be used in project-level WULA decisions. Moreover, the SCA has explained that, because the objects of a policy are to achieve and guide reasonable and consistent decision, "*when the government makes a policy, its officials are not entitled to simply ignore it, but must act in accordance with it*."[99] Of course, government cannot allow its discretion to be rigidly fettered; but unless it has good reason to depart from policy, it is requires to act in accordance with it.

98.5 As the Constitutional Court has explained:

> "Policy is not legislation but a general and future guideline for the exercise of public power by executive government. Often, but not always, its formulation is required by legislation. The primary objects of a policy are to achieve reasonable and consistent decision-making; to provide a guide and a measure of certainty to the public; and to avoid

[99] CTP Limited and Others v Director-General Department of Basic Education and Others [2018] ZASCA 156 (20 November 2018). See also MEC for Agriculture, Conservation, Environment and Land Affairs, Gauteng v Sasol Oil and Another [2006] 2 All SA 17 (SCA)

case-by-case and fresh enquiry into every identical request or need for the exercise of public power."[100]

98.6 Thus, when government makes a policy, its officials are not entitled simply to ignore it. They must seek to act in accordance with it, unless there is a reasonable basis for deviating from it, in which case that basis should be clearly articulated.[101]

98.7 This principle is neatly encapsulated by the UK Supreme Court as follows:[102]

> "a decision-maker must follow his published policy (and not some different unpublished policy) unless there are good reasons for not doing so. The principle that policy must be consistently applied is not in doubt: see Wade and Forsyth Administrative Law, 10th ed (2009) p 316. As it is put in De Smith's Judicial Review, 6th ed (2007) at para 12-039:
>
> > 'there is an independent duty of consistent application of policies, which is based on the principle of equal implementation of laws, non-discrimination and the lack of arbitrariness.'

98.8 Therefore, the Water Tribunal was duty-bound to consider the mine area which has been recognised as a "strategic national asset", and which must be managed in a way that does not significantly undermine its role as a key water source.

---

[100] *Arun Property Development (Pty) Ltd v City of Cape Town* 2015 (2) SA 584 (CC) at para 47 (emphasis added).

[101] *Kaunda and Others v President of the Republic of South Africa and Others* 2005 (4) SA 235 (CC), paras 99, 127, and 210; *MEC for Agriculture, Conservation, Environment and Land Affairs v Sasol Oil (Pty) Ltd and Another* 2006 (5) SA 483 (SCA) para 19.

[102] *Lumba v Secretary of State for the Home Department* [2011] UKSC 12 at para 26.

99 Third, the conclusion that the 2018 SWSA report was irrelevant because it had not yet reached the stage of publication by the Water Research Commission, was similarly mistaken.

99.1 Once more, the question that the Water Tribunal ought to have asked itself was whether the contents of the 2018 SWSA were relevant. That question cannot be answered simply by considering the stage of publication of the report.

99.2 In any event, the research itself was complete, and was reflected in the 2018 report. Indeed, the cover of the report bore an inscription reading: *'This report has been reviewed by the Water Research Commission (WRC) and approved for publication.'*

99.3 Moreover, this can provide no basis for ignoring the 2013 version of the SWSA report, which had been finalised, and was not in draft form at the time of the Water Tribunal decision.

100 Fourth, the Water Tribunal was also mistaken to disregard the National Water Resource Strategy on the basis that it was a *'draft out for comments since 2013'*. The National Water Resource Strategy was published with final effect by the Minister of Water and Environmental Affairs on 16 August 2013 (in notice 845 of 2013, in *Government Gazette* 36736 dated 16 August 2013) in terms of section 5(1) of the NWA.

101 Quite simply, all of these considerations were plainly relevant, in that, properly considered, they ought to have moved the responsible authorities to appreciate that the area is critical for national water and economic security.

Absence of proof of consent[103]

Law

102 Section 24 of the NWA provides that '*A licence may be granted to use water found underground on land not owned by the applicant if the owner of the land consents or if there is good reason to do so*.'

103 Section 24 thus sets out two requirements, one of which must be met before a licence may be granted in respect of land not owned by the licence applicant. It requires that:

103.1 either the owner of the land must consent; or

103.2 there must be good reason to do so.

104 The purpose of the requirement is clear. It is to ensure that the issuing of licences to water users does not deprive owners of land of their rights to full enjoyment of their land. To do otherwise would constitute a significant deprivation of their property rights.

[103] 6th ground of appeal, Notice of appeal, Record Vol 52, pp5250-5277; 12th ground of appeal, Amended notice of appeal, Record Vol 52, pp5290-5292.

105 It is trite that the Act must be interpreted with due regard to its language, read in context, as well as in the manner that best gives effect to its apparent purpose.[104]

106 In addition, wherever possible, courts must construe statutes in a manner that avoids limiting or infringing a right in the Bill of Rights.[105] Where two interpretations of legislation are possible, the Court should prefer the interpretation that better promotes the Bill of Rights.[106]

107 We submit that the following interpretation of section 24 of the NWA gives effect to the language of the provision read in context, would best advance the provision's purpose, and would best promote the spirit, purport and object of the Bill of Rights (particularly the right to property and the right to an environment that is not harmful to health or well-being, and to have the environment protected).

108 First, the onus is on the licence applicant to demonstrate that consent has been obtained, or that good reason exists to grant the licence in the absence of consent. This is plainly so, because it is only the licence applicant that will be in possession of information as to what efforts to obtain consent have been made, and whether consent has in fact been granted. It is also the licence applicant that, by definition, seeks to deprive the landowner of full enjoyment of his or her property rights, and which must thus justify doing so.

---

[104] Natal Joint Municipal Pension Fund v Endumeni Municipality 2012 (4) SA 593 (SCA) para 18.

[105] *Cool Ideas 1186 CC v Hubbard and Another* 2014 (4) SA 474 (CC) para 128; *Wary Holdings (Pty) Ltd v Stalwo (Pty) Ltd* 2009 (1) SA 337 (CC) at para 46. *Investigating Directorate: Serious Economic Offences v Hyundai Motor Distributors (Pty) Ltd* 2001 (1) SA 545 (CC) at para 23.

[106] *Makate v Vodacom (Pty) Ltd* 2016 (4) SA 121 (CC) paras 87-89.

109 Second, section 24 constitutes a jurisdictional requirement, which must be satisfied prior to the granting of a licence. It is not merely a relevant factor to be taken into account and balanced with others. If no consent has been obtained, and no good reason exists to grant the licence in the absence of such consent, then the licence application must be refused. It is insufficient for this purpose simply to allege that consent had been unreasonably withheld or that the relevant landowner had not participated in the proceedings.

110 Third, we submit that "good reason" means good public reason.

110.1 The purpose of the NWA is to establish the national government as the public trustee of the nation's water resources. Water is a public resource that is to be used for the benefit of all people.

110.2 Section 24 of the NWA recognises that there may be circumstances in which a private property owner ought not to be allowed to prevent the use of water.

110.3 But it does so only if the water use is for a public purpose. For example, if a municipality needed access to a high-yielding aquifer for the supply of water to a particular community, then the private property rights of owners of the land where the aquifer is found would not trump the public interest in granting the licence.

Common cause facts

111 On 2 July 2015, Atha wrote to Mr BP Greyling, the owner of Zoetfontein 94 HT204, requesting him to sign a DWS902 form and an 'Agreement to Apply for a Water Use' in respect of Zoetfontein 94 HT203.[107] Mr Greyling never gave consent.[108]

112 Accordingly, before the Water Tribunal, the appellants argued that neither Atha nor the DWS had obtained consent from the owner of the farm Zoetfontein 94 HT, as required by section 24 of the NWA. In the absence of a good reason, a prerequisite for the granting of a WUL was accordingly missing.

113 On 18 January 2019, more than a month *after argument*, Atha's legal representatives sent correspondence to the Water Tribunal and the parties, in which it sought to adduce new evidence and make new submissions.[109] The email to the Water Tribunal claimed that:

> '*Atha did indeed follow due process and exhausted all reasonable avenues to obtain Mr. BP Greyling's consent. As a direct result of Mr. Greyling's refusal and or omission to reply to Atha's requests, Atha had no alternative than to proceed with the Water Use Application as well as a motivation to the DWS explaining the circumstances surrounding Mr. Greyling's refusal to sign the relevant consent form*.'

114 Attached to the email from Atha to the Water Tribunal were:

---

[107] A copy of the letter and its annexures is at Record Vol 33, pp3319-3321.

[108] Water Tribunal para 163.3, Record Vol 51, pp5233-5234.

[109] Email dated 18 January 2019, Record Vol 50, pp5088-5089.

114.1 emails from Atha to Mr Geyling dated 2 July 2015 and 17 July 2015 in which Mr Greyling's consent was sought;[110]

114.2 a letter and DWS902 form, which were attached to the email of 2 July 2015;[111] and

114.3 a letter from Atha to the Department dated 27 August 2015, in which it explained that it had exhausted all possible means to obtain the signature of Mr Greyling.[112]

115 On 25 January 2019, the appellants' legal representatives responded to this correspondence, contending that this further evidence and submissions should not be taken into account, as they did not form part of the appeal record, and had been submitted after argument had closed.[113]

116 On 30 January 2019, the Registrar of the Water Tribunal responded, indicating that '*the arguments in the above matter have been closed on the 5th December 2018 and the panel is drafting the judgment. Finally no further submissions will be entertained by the Tribunal*.'[114]

[110] Letter dated 17 July 2015, Record Vol 50, pp5091-5093.

[111] Letter dated 2 July 2015, Record Vol 33, pp3319-3321.

[112] Letter dated 27 August 2015, Record Vol 50, p5090.

[113] Letter dated 25 January 2019, Record Vol 50, pp5098-5100.

[114] Letter dated 30 January 2019, Record Vol 50, pp5101-5102.

Tribunal findings

117 The Water Tribunal reasoned as follows:[115]

117.1 There was no evidence of any responses by the landowner to the letters and emails from Atha of 2 July 2015 or 17 July 2015, and there is accordingly '*no information to indicate whether he in fact withheld his consent or waived the right created for his benefit under section 24 of the NWA*'.[116]

117.2 Section 24 is merely one factor, amongst others, that the Water Tribunal must consider before it grants or refuses a water use licence, and cannot on its own be determinative of whether or not a water use licence is to be granted.[117]

117.3 In addition, section 24 merely creates a duty to consult with the landowner. The landowner's right may be lost if he or she fails or refuses to participate in a public participation process or an appeal to the Water Tribunal.[118]

117.4 In any event, there were good reasons to confirm the licence in the absence of landowner consent in this instance, including because of the

[115] Water Tribunal decision paras 163-163.7, Record Vol 51, pp5231-5237.

[116] Water Tribunal decision para 163.3, Record Vol 51, pp5233-5234.

[117] Water Tribunal decision para 163.7, Record Vol 51, pp5236-5237.

[118] Water Tribunal decision para 163.5 and 163.6, Record Vol 51, pp5235-5236.

socio-economic considerations, together with the Water Tribunal's assessment of the impacts on the wetlands of affected properties.[119]

Errors of law

118 The Tribunal's reasoning is flawed on a number of grounds.

119 As explained above, section 24 sets out jurisdictional requirements which must exist before a WUL may be granted. It 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. The Water Tribunal was accordingly plainly mistaken to regard compliance with section 24 as only one, non-decisive factor that must be considered.

120 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. It is plainly insufficient for the landowner merely to be consulted, as the Water Tribunal held.

121 Therefore, the Water Tribunal's reasoning by analogy with the consultation process under section 189 the Labour Relations Act[120] is entirely misplaced. Section 189 of the Labour Relations Act requires only that employees are consulted. It does not contain a consent requirement. An employer is not precluded, simply because an employee refuses to consent to his or her dismissal, from effecting such a dismissal. It is in that context that courts have

[119] Water Tribunal decision para 163.7, Record Vol 51, pp5236-5237.

[120] Water Tribunal decision para 163.4, Record Vol 51, pp5234-5235.

held that an obdurate refusal by employees to engage in consultation will constitute a waiver of their rights to be consulted, and will allow the employer to dismiss the employee.

122 By contrast, section 24 of the NWA does not afford landowners a mere right to be consulted. In the absence of a good reason otherwise, their consent is required before a licence to use water in respect of their land may be granted. It is therefore not enough that they are consulted but consultations break down. It is similarly not enough that they refuse to consult. That is equivalent to refusing to consent – something they are expressly entitled to do in law.

123 Section 24 of the NWA is thus akin to the provisions of the Interim Protection of Informal Land Rights Act 31 of 1996, which requires the consent of the holders of informal land rights before they are deprived of such rights. It is not sufficient that such rights-holders are merely consulted.[121]

124 On the facts, it is thus common cause that the landowner did not consent to the use of water found underground on its land. Given where the onus lies, the Water Tribunal was mistaken to find that there was "*no information"* in this regard. The point, simply, was that Atha failed to obtain consent.

125 Moreover, Atha clearly did not demonstrate a good public reason to override the requirement of landowner consent

[121] See *Maledu and others v Itereleng Bakgatla Mineral Resources (Pty) Ltd and Another* 2019 (2) SA 1 (CC).

125.1 It cannot be a good reason that the landowner failed to respond. That simply means that the landowner did not give consent. The mere fact of failing to give one's consent cannot justify the granting of a licence; otherwise the consent requirement would be rendered entirely nugatory.

125.2 The socio-economic considerations, and the tribunals assessment of the impacts on the wetlands on this and other affected properties are, at best, factors why the application for a water use licence should not be refused on its merits in terms of section 27, read with section 41 of the NWA. They are not public reasons to override the consent requirement.

125.3 The effect of the Tribunal's reasoning is to conflate the good public reason requirement in section 24 with the requirements of section 27 of the NWA and thereby renders the former requirement nugatory and superfluous. There is a presumption against interpreting words in a statute as being superfluous.[122]

125.4 Plainly, the water use is not for a public purpose. It is for a private, profit-making mining operation.

126 Lastly, it was improper for the Water Tribunal to admit and rely upon the additional evidence (such as the letter of 17 July, which was located nowhere in the appeal record), which was submitted after the close of proceedings. In doing

[122] LM du Plessis *Statute Law and Interpretation LAWSA* Volume 25(1) Second Edition para 342.

so, the Water Tribunal acted contrary to its own directions that the further evidence and submissions would not be entertained.

127 It also acted contrary to its legal obligations to act fairly, in that the appellants were never provided with an opportunity to respond to, or make legal argument in respect of, the additional evidence, which they were led to understand would not be entertained.

Failure to apply the precautionary principle[123]

Law

128 Section 2(4)(a)(vii) of NEMA sets out the precautionary principle. The principle provides that sustainable development requires the consideration of all relevant factors including that '*a risk-averse and cautious approach is applied, which takes into account the limits of current knowledge about the consequences of decisions and actions*".

129 In terms of section 2(1) of NEMA, the NEMA principles (including the precautionary principle) apply to the actions of all organs of state that may significantly affect the environment. They also serve as guidelines by reference to which any organ of state must exercise any function when taking any decision in terms of, amongst other laws, the NWA.

130 This compels every environmental decision-maker, when faced with impacts in respect of which there is uncertainty or a lack of information, or where the risk of

[123] 7th ground of appeal, Notice of appeal, Record Vol 52, pp5250-5277.

substantial harm to the environment is too great, to err on the side of caution and protection of the environment.

131 The rule was articulated in *Fuel Retailers* precisely in the context of the contamination of underground water supply as follows:

> "Before concluding this judgment, there are two matters that should be mentioned in relation to the duty of environmental authorities which are a source of concern. The first relates to the attitude of Water Affairs and Forestry and the environmental authorities. The environmental authorities and Water Affairs and Forestry did not seem to take seriously the threat of contamination of underground water supply. The precautionary principle required these authorities to insist on adequate precautionary measures to safeguard against the contamination of underground water. This principle is applicable where, due to unavailable scientific knowledge, there is uncertainty as to the future impact of the proposed development. Water is a precious commodity; it is a natural resource that must be protected for the benefit of present and future generations."[124]

132 In *WWF,* Rogers J noted that the precautionary principle features prominently around the world, in various European treaties and policy instruments.[125] Indeed, the Canadian Supreme Court has suggested that because the precautionary principle has emerged in virtually every treaty and policy document regarding the protection and preservation of the environment, it now forms part of customary international law.[126]

---

[124] *Fuel Retailers* para 98.

[125] *WWF* para 102.

[126] *114957 Canada Ltée (Spray-Tech, Société d'arrosage) v. Hudson (Ville)* 2001 SCC 40 (CanLII); [2001] 2 S.C.R. 241 *See also Castonguay Blasting Ltd v Ontario (Environment)* 2013 SCC 52; [2013] 3 SCR 323

133 The nub of the principle is that, when faced with uncertainty, '*it is better to err on the side of caution and prevent environmental harm which may become irreversible*'.[127]

134 The precautionary principle must be read together with the '*hierarchy of mitigation*' (section 2(4)(a)(i)-(iv) and (viii)), which provides that environmental harms must be avoided if at all possible, and only if they cannot be avoided should those harms be minimised and remedied. In other words, the avoidance or prevention of negative environmental impacts are prioritised over minimising and remedying them.

Common cause facts

135 The appellants do not ask this Court to revisit any of the factual findings reached by the Water Tribunal. Instead, the appellants rely, first, on the risks of environmental degradation *accepted by the Water Tribunal,* and the uncertainty and lack of information *found by the Water Tribunal to exist*, in order to argue that the Water Tribunal failed properly to apply the precautionary principle.

136 There are **five** respects in which the appellants submit the information before the DG and Water Tribunal was inconclusive and insufficient, and on the basis of which granting the WUL flew in the face of the precautionary principle.

136.1 First, the findings of the Delta H groundwater assessment were expressly characterised as being of a low confidence.

[127] *AP Pollution Control Board v Prof. M V Nayudu* AIR 1999 SC 812.

136.2 Second, there was uncertainty and inadequate information regarding the risks of dewatering.

136.3 Third, there was uncertainty and inadequate information regarding the sufficiency of mitigation measures of decant of contaminated groundwater and Acid Mine Drainage.

136.4 Fourth, there was uncertainty and inadequate information regarding cumulative impacts.

136.5 Fifth, there was uncertainty and inadequate information regarding impacts on downstream users.

137 We address these briefly in turn. In sum, we conclude that the uncertainty about the impacts of the mine meant that the WUL should not have been granted. That is primarily because, where the true impacts of the mine are unknown, it is simply impossible to fashion appropriate mitigation measures to prevent or address those impacts.

138 To be clear, we do not ask this Court to make a factual finding as regards the extent of the impacts. All that we seek to illustrate is that there was sufficient uncertainty that, on the proper application of the precautionary principle, the WULA ought to have been refused.

139 As regards the low confidence of the Delta H groundwater assessment:

139.1 The results of the Delta H groundwater assessment, Atha's most recent and sophisticated groundwater study, are of a low confidence.[128]

139.2 While Delta H relied on an assumption of a continuous, unfractured dolerite sill in generating results regarding dewatering of the aquifers and decant of contaminated water, Delta H's own sensitivity analysis revealed that anticipated groundwater inflows into the underground mine workings would increase substantially with a more hydraulically conductive dolerite sill.[129]

139.3 In other words, the water impacts are potentially far worse than those predicted, if the assumption of the unfractured dolerite sill turns out to be mistaken. And this in the context of findings which Delta H accepts are of low confidence.

139.4 The report commissioned by the appellants, titled '*IWULA, IWUL and Specialist Investigation Review of the Yzermyn Colliery Mpumalanga*' by GCS Water and Environmental Consultants ('**the GCS review**'), which reviewed the Delta H report, fully explained these deficiencies and uncertainties.[130]

---

[128] Delta H acknowledges that its model is of a low confidence, because it is based on dry-season groundwater information only, and does not account for the seasonal variability of water levels and attendant impacts. See Delta H report, Record Vol 29, p2908. See also GCS Review, Record Vol 16, p1519-1520.

[129] Delta H report, Record Vol 29, p2889.

[130] GCS Review, Record Vol 16, p1501.

139.5 For example, Delta H failed to assess the cumulative drawdown impact of the dewatering of the aquifers, due to the pumping out of groundwater from the underground mine workings as well as the abstraction of groundwater from two specified boreholes.[131]

139.6 It also failed to simulate the anticipated contaminant plume from the underground mine workings, or – as the Water Tribunal accepted[132] – to determine the anticipated post-closure qualities and quantities of groundwater decant from the underground mine workings.[133]

140 Insofar as the impact of dewatering is concerned:

140.1 The severity of the risks and potential consequences of dewatering could be greater than anticipated. The ecological assessment conducted by Atha's own specialist, Natural Scientific Services ("**NSS**"), which considered the consequent impacts of dewatering found that:

140.1.1 The lowering in groundwater level will have a negative impact on all wetlands fed by the shallow aquifer, as well as the springs within the cone of depression. These springs are among the main sources of water for the wetlands in the area, supplying water during drier months when the wetlands are not fed by

[131] GCS Review, Record Vol 16, p1518

[132] GCS Review, Record Vol 16, p1520.

[133] GCS Review, Record Vol 16, pp 1525-1526.

rainfall.[134] The wetlands within the cone of depression may be impacted upon, and may possibly dry out.[135]

140.1.2 This will have a HIGH significance on Biodiversity, as at least 40% of the underground mining area and surface infrastructure footprint area constitutes wetland habitat.[136]

140.1.3 The loss or deterioration of the wetlands will extend beyond the study area and will extend into the wetland FEPAs within the mine lease area and the wetland FEPAs and Wetland Clusters in the immediate surrounds. These systems are also the start of the catchment that feeds the Assegaai River FEPA. A decline in water input will, therefore, result in a decrease in flow of this river system.[137]

140.1.4 If the dewatering activities have a major effect on the wetland systems identified, vegetation communities will be affected and may change in structure in the long term.[138]

140.1.5 On this basis, and due to these HIGH and long-term, if not irreversible impacts, NSS recommended that the project '*is*

[134] Section G of the NSS Biodiversity and Impact Assessment, Record Vol 33, pp3284.
[135] Section G of the NSS Biodiversity and Impact Assessment, Record Vol 33, pp3284.
[136] Section G of the NSS Biodiversity and Impact Assessment, Record Vol 33, pp3287.
[137] Section G of the NSS Biodiversity and Impact Assessment, Record Vol 33, pp3435.
[138] Section G of the NSS Biodiversity and Impact Assessment, Record Vol 33, pp3292.

fatally flawed, and should be a NO GO in terms of Biodiversity'.[139]

141 As explained above, the SAS 2015 assessment also identified – relying on the Delta H groundwater assessment – dewatering as an impact on wetland hydrological function, leading to loss of water within wetland habitat and altered hydrological patterns and reduced recharge of wetland resources, with '*HIGH*' impacts on the study-area wetlands, with or without mitigation.

142 Notwithstanding this, Atha's IWWMP based its findings regarding the impact of dewatering on Delta H's assumption of a continuous, un-fractured dolerite sill between the shallow and deep aquifers. As explained above, Delta H itself records that its model is of low confidence, and the revised GCS review accordingly found that the anticipated dewatering impact could not have been established sufficiently. Moreover, it acknowledged that its findings are '*highly sensitive to larger than expected conductivity values of the dolerite sill ... Should the dolerite sill ... be more permeable (e.g. fractured or weathered) than assumed, mine inflows are expected to increase substantially*'.[140]

143 In other words, if Delta H's assumption of a non-permeable dolerite sill is mistaken, then, on its own version, the dewatering impacts are likely to be substantially more significant.

---

[139] Section G of the NSS Biodiversity and Impact Assessment, Record Vol 33, pp3310.

[140] Delta H report, Record Vol 29, p2889.

144 Insofar as the adequacy of the mitigation measures to address decant is concerned:

144.1 The Delta H groundwater assessment, as well as Atha's IWWMP and EIAR, all record that decant is expected, and propose either a water treatment plant or the discharging of decant into wetlands.

144.2 Atha's IWWMP states that, *'[i]t is anticipated that water containing contaminants will be generated; therefore, a water treatment plant will be required for the mine*' and that *'[i]t is anticipated that the water treatment plant will also be required to be operational following mine closure in order to treat decant from the mine.*'[141]

144.3 Atha's EIAR recommends that '*decant emanating from the treatment plant must be discharged to the adjacent hillslope seepage wetlands making use of a spigot which then drains into a sand filter along the edge of the hillslope seepage wetland*'.[142]

144.4 We address below, as a separate ground of appeal, the fact that the post-closure treatment of contaminated water is not actually provided for in the WUL, and that no financial provision has been made for it.

144.5 Significantly for present purposes, no environmental specialist has reviewed the concept design of the water treatment plant, and the proposed measure of discharging treated water into the wetlands is

[141] IWWMP Vol 25, p2438.

[142] Environmental Impact Assessment Report, Record Vol 2, p121.

simply untested. As the GCS review explained, this measure has not been assessed by any environmental specialists. It is accordingly entirely unknown what the environmental consequences of the impact will be.[143]

145 As regards cumulative impacts:

145.1 An assessment of cumulative impacts[144] requires a consideration of the impacts of the proposed project, and of existing and reasonably foreseeable impacts of similar or diverse activities.

145.2 Atha's IWWMP states that the cumulative impacts are not considered to be significant.[145] It is unclear how Atha's IWWMP could have come to this conclusion with any degree of certainty.

145.3 Most notably, the IWWMP and EIAR fail to take the Loskop Coal Mine into consideration in assessing cumulative impacts, although this mine is merely 2km east of the proposed Yzermyn project, and falls within the Mabola Protected Environment. As the Brownlie Report, commissioned by the appellants, notes,[146] '*[t]his omission is serious and negates any*

---

[143] GCS Review, Record Vol 16, pp1528-1529.

[144] The Environmental Impact Assessment Regulations, 2014, promulgated under NEMA, define cumulative impact as '*the past, current and reasonably foreseeable future impact of an activity ... that in itself may not be significant, but may become significant when added to the existing and reasonably foreseeable impacts eventuating from similar or diverse activities'*.

[145] IWWMP Record Vol 25, p2422.

[146] '*Review of Environmental Impact Assessment Report & Environmental Management Programme, and Environmental Authorisation, for Yzermyn underground coal project*', by Susan Brownlie, dated 17 August 2016.

conclusions drawn about the severity of cumulative impacts on biodiversity and water resources'.[147]

145.4 Atha's IWWMP accepted that there are currently numerous applications for mining within the greater southern Mpumalanga study region and that, if a significant portion of these are approved, the potential cumulative impacts of anthropogenic land use in the region would include '*reduction and deterioration of regional groundwater*', '*deterioration and loss of wetland habitat, species, ecosystem functioning and services*' and '*reduction in the richness and abundance of floral and faunal species*'.[148]

145.5 And yet, no assessment of the cumulative impacts of these other potential mines was undertaken.

146 <u>Insofar as downstream water users are concerned:</u>

146.1 The final impact in respect of which the information before the DG and Water Tribunal was insufficient and inconclusive was the impact on downstream water users.

146.2 EcoPartners prepared the Downstream Water Usage report for the proposed colliery.[149] But EcoPartners lacks the necessary expertise and

[147] Brownlie Report Record Vol 15, p1436.

[148] IWWMP Record Vol 26, p2632.

[149] Ecopartners Downstream Water Usage Report, Record Vol 28, p2761-2830.

experience to be considered a specialist in this area. Indeed, the Brownlie review found that:

146.2.1 the report is 'unacceptable' in that it lacks rigour and a systematic analysis and 'makes a number of vague and wholly inadequate and inconclusive statements';[150]

146.2.2 the report fails to quantify the predicted effects on economic activities;[151]

146.2.3 the report does not assess the impacts on springs or boreholes, nor does it assess the impacts during floods and droughts;[152] and

146.2.4 the report focuses only on surface water resources, ignoring the potential influence of groundwater recharge affecting water users.[153]

146.3 In addition, the Downstream Water Usage report simply does not square with the Delta H groundwater assessment, the WSP groundwater assessment, the NSS ecological assessment and the SAS 2015 assessment, all of which found that there are likely to be significant environmental impacts well beyond the mining area.

---

[150] Brownlie Report Record Vol 15, p1431.

[151] Brownlie Report Record Vol 15, p1431.

[152] Brownlie Report Record Vol 15, p1432.

[153] Brownlie Report Record Vol 15, p1432.

146.4 And yet the assessment of downstream water users in Atha's IWWMP is based entirely on this inadequate Downstream Water Usage report.

Tribunal findings

147 Before the Water Tribunal, the appellants argued that the DG had failed to consider the likely negative effects of the proposed water uses associated with the mine. They also argued that, on account of the inadequate and inaccurate information regarding the risks and consequences of the water impacts, and the adequacy of mitigation measures to address them, the DG and the Water Tribunal failed to adopt a risk-averse and precautionary approach by granting the WUL.

148 The Tribunal held that:

148.1 It is common cause that a degree of contamination will occur as the mine is dewatered, and that post-mining the mine voids will fill up with water such that decant will happen for a long time and water treatment will be necessary.[154] However, these impacts are manageable.[155]

148.2 It is common cause that the mine '*will certainly result in a degree of contamination of groundwater and indeed surface water*',[156] that the volume and quality of decant post-mining is uncertain,[157] and that there

[154] Water Tribunal decision paras 112-113 and 158.3, Record Vol 51, pp5183-5184 and 5214-5215.

[155] Water Tribunal decision paras 156.11, Record Vol 51, p5210.

[156] Water Tribunal decision paras 158.3, Record Vol 51, p5214.

[157] Water Tribunal decision para 158.8, Record Vol 51, pp5217-5218.

is uncertainty regarding the adequacy of the proposed mitigation measures.[158]

148.3 However, said the Tribunal, this uncertainty is not because of uncertainty in scientific knowledge, and the relevant data can be obtained once mining commences. Scientific evidence demonstrates a clear understanding of the potential risks to water resources of coal mining.[159] It held that the situation is thus unlike that in *WWF*, where Rodgers J was confronted with real scientific uncertainty.[160]

148.4 It held further that these are not issues on which scientific knowledge is limited or uncertain, in that *'[w]e know that some of the environmental impacts may be irreversible*'.[161] In addition, it held that '*the possibility of a high risk of post-closure water contamination does not translate to uncertainty about the scientific nature of that contamination*' – and acknowledged that *'[t]here is uncertainty on whether the proposed mitigation measures are adequate*'. The Water Tribunal went on to remark (capriciously and in a manner indicative of disregard for the precautionary principle), that *"[c]atastrophizing coal mine decant and AMD does not of itself provide the level of uncertainty the precautionary principle envisages."*[162]

---

[158] Water Tribunal decision para 158.10, Record Vol 51, p5219.

[159] Water Tribunal decision paras 158.10-158.12, Record Vol 51, pp5219-5222.

[160] Water Tribunal decision para 158.9, Record Vol 51, p5218.

[161] Water Tribunal decision para 158.8, Record Vol 51, pp5217-5218.

[162] Water Tribunal decision para 158.9, Record Vol 51, p5218.

148.5 Considering the precautionary principle together with principles of sustainable development, and given that the precautionary principle does not require unequivocal scientific certainty, the Water Tribunal concluded that, on the basis of evidence adduced and the reports before it, the precautionary principle did not warrant refusing the WUL.[163]

Errors of law

149 We submit that a WUL has been granted in this case where there is, according to the Water Tribunal's own findings, a high risk that the negative water impacts of the mine have been underestimated. In resigning itself to this risk, the Water Tribunal erred in its interpretation and application of the precautionary principle in s 2(4)(a)(vii) of NEMA, as it has been articulated by the Constitutional Court in *Fuel Retailers*.

150 First, the Water Tribunal acknowledged significant uncertainty – as regards decant volumes, mitigation measures and the like. The fact that it categorises 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. That is a necessary and sufficient condition for it to exercise caution.

151 Second, the Water Tribunal misdirected itself by finding that the uncertainty could be cured by relevant data being obtained once mining commences. By then it will be too late; the degradation associated with the mining activity will be

[163] Water Tribunal decision para 158.12, Record Vol 51, pp5220-5221.

underway, and the authorities responsible for the protection of our water resources will be powerless to stop it.

152 Third, there is a great deal more uncertainty than the Water Tribunal acknowledges. As we have explained above, the information before the DG and the Water Tribunal was inconclusive as regards the impacts of dewatering, the risks and impacts of decant and the methods of mitigation, cumulative impacts given other mining in close proximity and the impacts on downstream water users.

153 Fourth, it is no answer to say that there was certainty of *irreversible negative impacts.* That is the kind of certainty that requires the refusal of a WUL. It can never be a reason in favour of granting a WUL. Employing this as a reason to uphold a decision to grant a WUL is plainly a misapplication of the precautionary principle.

154 Based on what was before the DG and the Water Tribunal, it is plain that the information was, at best for Atha, inconclusive as to likely negative impacts, the extent to which they could be mitigated, and the likely impacts of those mitigation measures. In those circumstances, the DG and Water Tribunal were duty-bound under the precautionary principle to refuse to grant the WUL.

Failure to provide for post-closure treatment of contaminated water[164]

Law

155 Subject to limited exceptions, every water use must be licenced. Therefore, any water uses associated with proposed mitigation measures must be included in a WUL, lawfully granted under section 41 of the NWA.

156 Section 28 of the NWA sets out the essential requirements for licences. Among the essential requirements is that, in terms of subsection (1)(d), any licence must specify the conditions subject to which it is issued. Section 28(2) provides that a licence remains in force until it expires, is suspended or terminated, or unless, in terms of section 28(3), it is extended as part of a general review of licences in section 49.

157 Section 49 of the NWA allows for the review and amendment of licences. It permits the responsible authority to review the licence at periods stipulated in the licence and, upon reviewing the licence, to amend the conditions if, *inter alia*, it is necessary or desirable to prevent deterioration of the quality of the water resource.

158 Section 52 of the NWA allows a licensee, before the expiry of the licence, to apply to the responsible authority for the renewal or amendment of the licence.

[164] 8th and 11th grounds of appeal, Notice of appeal, Record Vol 52, pp5250-5277.

159 Lastly, section 30 of the NWA empowers the responsible authority, if it is necessary for the protection of water resources or property, to require a WUL applicant to give security in respect of an obligation or potential obligation.

Common cause facts

160 As explained above, one of the common-cause impacts of the mine – in the absence of mitigation measures – is decant. The severity of the impact associated with post-closure decant (if uncontrolled) is recognised in the IWWMP, and various decant-related impacts are categorised as "High (Unacceptable)", and which warrant abandonment of the project if no mitigation is possible.[165]

161 Atha contends that this impact is sufficiently mitigated by the fact that water will be treated in a water treatment plant. However, the water treatment plant has been authorised only for the *operational* phase of the mine. 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.

162 This is evident from the fact that the anticipated volume to be discharged from the water treatment plant is precisely the amount anticipated to be discharged during the operational phase. It is also evident from paragraph 4 of the WUL, which explains that it is valid for a period of only fifteen years (being the 'life of mine' referred to in paragraph 3.3 of the WUL).

[165] IWWMP Record Vol 26, p2607.

163 In other words, it is simply assumed that the mine void will be allowed to fill passively over the 45 years predicted by Delta H, and that the resultant decant will then be treated by Atha. No provision is made for active flooding of the mine void by Atha, which, because it would constitute taking water from another water resource, would itself comprise a water use under section 21(a)[166] and 21(c)[167] of the NWA.

164 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.[168]

165 But it is also common cause – as set out in the SAS 2015 assessment, and the IWWMP – that a water treatment plant will be required *post-closure* in order to treat decant emanating from the mine. Indeed, as a mitigation measure to prevent acid mine drainage, Atha specifically proposed a water treatment plant post-closure.[169]

166 Various clearly-anticipated water uses associated with the proposed mine have therefore not been authorised post-closure, namely:

---

[166] "taking water from a water resource".

[167] "impeding or diverting the flow of water in a watercourse".

[168] See licence condition 1.15, Record Vol 12, p1245, which provides that an environmental management plan and rehabilitation plan for the decommissioning of the water use activities must be submitted five years before the commencement of closure to the "Provincial Operations" for written approval.

[169] IWWMP Record Vol 26, pp2607 and 2621.

166.1 the discharging of water containing waste into a water resource (section 21(f) of the NWA); and

166.2 disposing of waste in a manner which may detrimentally impact on a water resource (section 21(g) of the NWA).

167 Atha has also not made any financial provision for a water treatment plant (even during the operational phase) in either the water use licence application process or in terms of the Mineral and Petroleum Resources Development Act 28 of 2002 ("the MPRDA"). On her own evidence,[170] the responsible authority in this case did not require the applicant to give security pursuant to the provisions of section 30(1) prior to issuing the licence.

Tribunal findings

168 Before the Water Tribunal, the appellants argued that:

168.1 The post-closure impacts of the mine are not provided for by the WUL; and

168.2 Atha has not made financial provision for a water treatment plant (even during the operational phase) in either the water use licence application process or in terms of the MPRDA.

169 The Water Tribunal found that the WUL does provide for post-closure treatment of contaminated water in two ways:

[170] Water Tribunal, Record Vol 51, p5171. Transcript Vol 42 p.4228-4230.

169.1 First, it includes conditions requiring Atha to prepare a closure plan five years before the end of mining (i.e. ten years after mining commences). At that stage, Atha will have to apply for amendments in terms of section 49 and 52 to implement closure operations.[171]

169.2 Second, the WUL provides for a review of its conditions in terms of section 49 of the NWA after every two years.[172]

170 As regards financial provision for the post-closure plan, the Tribunal held that:

170.1 the MPRDA, read together with NEMA, contain provisions entrusting the Department of Mineral Resources with responsibility for post-closure rehabilitation; [173]

170.2 Financial Provisioning Regulations promulgated by the Minister of Environmental Affairs require financial provisioning for the pumping and treatment of polluted and extraneous water;[174]

170.3 such financial provisioning may make it unnecessary to give security under section 30 of the NWA;[175]

170.4 on this basis, while the provision made by Atha under the MPRDA does not sufficiently provide for post-closure water contamination

[171] Water Tribunal decision para 156.8, Record Vol 51, p5209.

[172] Water Tribunal decision para 157.3-157.4, Record Vol 51, p5212-5213.

[173] Water Tribunal decision para 167, Record Vol 51, pp5244ff.

[174] Water Tribunal decision para 167, Record Vol 51, pp5244ff.

[175] Water Tribunal decision para 167.1, Record Vol 51, pp5244-5245.

management,[176] if the appellants perceive the financial provisioning to be inadequate, their recourse is to address it with the Ministers responsible for determining and setting the financial provision in terms of section 24P of NEMA and the Financial Provisioning Regulations.[177]

171 Nevertheless, in its Order, the Water Tribunal imposed additional conditions in the WUL, namely:[178]

171.1 that Atha must provide the DG, in terms of clause 14.1 of the WUL, with proof of financial provision made in terms of legislation other than the NWA;

171.2 that the DG must, within 60 days of the judgment and before commencing mining, review the adequacy of the budgetary provision and if necessary require further financial security in terms of section 30 of the NWA.

Errors of law

172 The Water Tribunal's approach is fundamentally flawed as a matter of law.

173 It confirmed the WUL, in full knowledge that there will inevitably be water uses in the future which must be authorised in order to avoid certain, severe

[176] Water Tribunal decision para 168, Record Vol 51, pp5246-5247.

[177] Water Tribunal decision para 169.1, Record Vol 51, p5247.

[178] Water Tribunal decision para 172, Record Vol 51, pp5248.

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

174 Its errors are four-fold.

175 First, the Water Tribunal is required now, when granting the licence, to authorise water uses that will inevitably result in the future as a result of the water uses that it has licenced. It will be 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. Even if the closure plan is rejected, the mining activities giving rise to the threat of contaminated water will have been substantially completed and cannot be undone. There will also be no legal basis, at that stage, to compel Atha to create and operate the infrastructure necessary to treat contaminated water post-closure.

176 Second, the Water Tribunal erred in finding that sections 28 and 49 of the NWA will require Atha to apply for amendments to the WUL.

176.1 Section 28(2) of the NWA expressly provides that a WUL expires at the end of the licence period, which, in the present case, is *'fifteen years from the date of issuance'*.

176.2 Section 49(2) recognises the power of the responsible authority to amend any condition of the licence when conducting a review of the licence in terms of section 49(1). However, this expressly excludes any power to extend the period of the licence.

176.3 The responsible authority accordingly has no power under the NWA to compel Atha to apply for an amendment or extension of the WUL.

177 Third, the WUL itself contains no condition compelling Atha to apply for a renewal of the licence. In circumstances where Atha is not obliged to apply for a renewal, and the responsible authority has no power to compel a renewal, it simply cannot be contended that adequate provision is made for post-closure treatment through the possibility of renewal.

178 Fourth, even if Atha were to apply for a renewal in due course, the outcome of that application is not a foregone conclusion. The responsible authority cannot now bind or fetter the discretion that it would later have to exercise in terms of section 27(1) of the NWA to determine an application to renew the WUL.[179]

179 These four problems are compounded by the fact that Atha has not made financial provision for a water treatment plant – even during the operational phase, not to mention post-closure.

180 This is not in dispute. In oral evidence, the first respondent's witness, Ms Aboobaker, said that there is no way for the DG to secure actual financial guarantees or to know whether in fact a licensee has made financial provision.[180]

---

[179] See *Rederaktiebolaget 'Amphirite' v R* [1921] 3 KB 500 ("it is not competent for the Government to fetter its future executive action, which must necessarily be determined by the needs of the community when the question arises"). Also *Sachs v Donges NO* 1950 (2) SA 265 (A) at 299 and 310-11 and *Waterfalls Town Management Board v Minister of Housing* 1957 (1) SA 336 (SR) at 340-1.

[180] Transcript Record Vol 42 p.4228-4230.

181 Ms Aboobaker is mistaken. Section 30 of the NWA provides expressly that the responsible authority may require the provision of security in respect of obligations or potential obligations arising from the WUL. Although the responsible authority's function is cast as a power, we submit that it is what our courts have described as "*a power coupled with a duty to use it if the requisite circumstances were present*."[181] In other words, where it is necessary to protect water resources against environmental degradation, the responsible authority is duty-bound to require the provision of financial security.

182 The Water Tribunal's reliance on the financial provision requirements under the MPRDA and NEMA renders section 30 nugatory. It is unlawful and irregular for one organ of state to disregard a statutory power, duty or function imposed on it, simply because another organ of state bears a similar power, duty or function.[182] To do so also amounts to an abdication of a discretionary power; that is, a violation of "*the principle that the responsibility for a discretionary power rests with the authorised body and no one else*".[183]

183 The Water Tribunal was also entirely mistaken to suggest that the appellants should address the lack of financial provisioning with the Ministers under section 24P of NEMA read with the Financial Provisioning Regulations. If Atha is

---

[181] *South African Police Service v Public Servants Association* 2007 (3) SA 521 (CC) para 15; *Van Rooyen and Others v The State and Others (General Council of the Bar of South Africa Intervening)* 2002 (5) SA 246 (CC) para 181; *Democratic Alliance v Public Protector; Council for the Advancement of the South African Constitution v Public Protector* [2019] 3 All SA 127 (GP) paras 98, 104-105.

[182] See Fuel Retailers para 86; *Earthlife Africa Johannesburg v Minister of Environmental Affairs and Others* 2007 (6) SA 4 para 97.

[183] *Freedom Under Law v National Director of Public Prosecutions and Others* 2014 (1) SA 254 (GNP) paras 206-208 and 215-216.

financially incapable of providing for a post-closure water treatment plant, then – *especially* in circumstances where such a plant is neither authorised nor required by the WUL, and is subject to inclusion in Atha's closure plan in due cours*e* – the WUL should, on that basis, not have been granted.

184 Lastly, the inclusion by the Water Tribunal, in its Order, of additional conditions pertaining to financial security takes the matter no further.

184.1 Most significantly, because the Order refers only to clause 14.1 of the WUL, which concerns activities during the life of mine of 15 years. It still does not address post-closure mitigation measures at all. Atha is therefore not required to provide any proof of financial security as regards the post-closure treatment of contaminated water.

184.2 Moreover, and in any event, it was for the Water Tribunal itself to make a finding of budgetary adequacy, and to determine the appeal on that basis. It failed to do so. Instead, it abdicated this decision to the DG to determine in due course.

184.3 This is directly akin to the error made in *Earthlife Africa*, where the Minister granted an environmental authorisation, but subject to a climate change impact assessment to be undertaken thereafter. That was irrational and unlawful, because, if the climate change impact assessment indicated that environmental authorisation ought not to have been granted in the first place, "*the Chief Director and the Minister would*

have no power to withdraw the environmental authorisation on this basis."[184]

184.4 The same is true here. Financial security must be provided before a licence is issued. No purpose is served by including financial provision as a condition of the WUL, for, if such security cannot be provided, the DG lacks the power to withdraw the licence.

185 The upshot is that, in circumstances where it is common cause that a post-closure treatment plant is required to prevent decant and acid mine drainage:

185.1 The DG is powerless to require Atha to apply to renew its licence or to build a post-closure treatment plant.

185.2 The DG has no way of knowing whether Atha in any event has the financial means to construct such a plant in due course.

185.3 Therefore, no provision, either in the licence or financially, is made for one of the key mitigation measures acknowledged by Atha as necessary, and accepted by the Water Tribunal. In the absence of this mitigation measure, it is common cause that the mine will result in unacceptable levels of decant.

[184] *Earthlife Africa Johannesburg v Minister of Environmental Affairs and Others* [2017] 2 All SA 519 (GP) paras 9 and 114.

Failure to appreciate the burden of proof in respect of socio-economic impacts[185]

Law

186 Section 27(1)(d) of the NWA provides that, among the factors a responsible authority is required to consider when granting a WUL, is *'the socio-economic impact of the water use or uses if authorised; or of the failure to authorise the water use or uses'*.

187 Moreover, various NEMA principles require the socio-economic impact of activities to be considered in all environmental management decision-making. Most significantly, section 2(4)(i) of NEMA provides that '*[t]he social, economic and environmental impacts of activities, including disadvantages and benefits, must be considered, assessed and evaluated, and decisions must be appropriate in the light of such consideration and assessment'*.

Common cause facts

188 Atha claims in its IWWMP that the mine will generate 576 employment opportunities when fully operational. The IWWMP states that '*these employees are anticipated to be sourced from the surrounding local communities as far as practicable*'.[186] This was accepted by the DG and reiterated in the RoR.

[185] 10th ground of appeal, Notice of appeal, Record Vol 52, pp5250-5277.

[186] IWWMP, Record Vol 26, p2655.

189 However, Atha's own socio-economic specialist study conducted by WSP Environmental (Pty) Ltd ("**WSP**")[187] casts serious doubt on the likelihood of any substantial number of the mine's employees being sourced from the surrounding local communities:

189.1 As regards employment in the construction phase, the report indicates that skilled labour is likely to be sourced from outside the area, with management level staff likely to be sourced in India, and that while '*there may be a small number of additional unskilled opportunities (e.g. security, community liaisons, general labourers and cleaners) that could arise, there is (sic) unlikely to be significant opportunities for the local population to be employed during the construction phase, and the opportunities are likely to be temporary*.'[188]

189.2 In respect of the operational phase, WSP found that because of the low skills levels within the area '*the local population may not meet the labour requirements of the mine*' and any opportunities sourced from the immediate area are likely to be unskilled, such as security and cleaning staff.[189]

190 In fact, WSP warns of the potential for harmful socio-economic impacts.

---

[187] Socio-Economic Impact Assessment, Record Vol 17, pp1581-1643.

[188] Socio-Economic Impact Assessment, Record Vol 17, pp1610.

[189] Socio-Economic Impact Assessment, Record Vol 17, pp1610.

190.1 For example, eco-tourism currently contributes materially to job-creation. The Wakkerstroom region is known, amongst other things, for its abundant and varied birdlife. If mitigation measures are not implemented, environmental impacts resulting from the proposed mine may degrade surrounding surface and groundwater sources, resulting in a reduction of biodiversity in the area and a decline in eco-tourism.[190]

190.2 Similarly, the farms on which the mine will be established are, in part, currently used for the commercial grazing of livestock and thus support agricultural employment opportunities. Several subsistence farmers have made their home on the proposed mining site, which has good to excellent grazing capacity.[191]

190.3 Approximately eight homesteads are located on the proposed mining site. These are occupied by low-income families, with between eight and thirty people in each homestead.

190.4 The households generally rely on limited income from a single family member who works on the host farm, as well as on social grants, and are '*vulnerable from a livelihood perspective, as they do not have access to finances or other resources should their current income come to an*

[190] Socio-Economic Impact Assessment, Record Vol 17, pp1612.

[191] Socio-Economic Impact Assessment, Record Vol 17, p1612.

end (i.e. farm work) or access to natural resources, such as water and grazing land, be prevented.'[192]

190.5 This led the Brownlie review to conclude that the EIAR failed to address socio-economic impacts in a balanced and objective way, and failed to incorporate relevant findings of the socioeconomic specialist report.*[193]*

Tribunal findings

191 The appellants argued before the Water Tribunal that the DG was not in a position to consider the socio-economic impact of the water uses as required in terms of section 27(1)(d) of the NWA, because Atha's IWWMP and EIAR failed to report objectively and fully on the possible effects of the proposed colliery on people living in the area.

192 The Water Tribunal rejected this. It did so on the basis that the *appellants* bore a duty to place evidence as regards socio-economic impacts before it, which they had failed to discharge.[194] In particular, it held that the *appellants* ought to have called witnesses as regards the socio-economic impacts of the mine.[195]

Errors of law

193 As a matter of law, the Tribunal's approach is fundamentally flawed. In particular, it misconstrued the duty of justification or onus in matters before it. Quite clearly,

---

[192] Socio-Economic Impact Assessment, Record Vol 17, p1598, 1600 1609, 1613.

[193] Brownlie Report Record Vol 15, p1443.

[194] Water Tribunal decision paras 156.9 and 160, particularly 160.3 and 160.6, Vol 51, pp5209-5210 and 5222-5227.

[195] Id.

the statutory framework places the duty of justification squarely on Atha as the applicant for the WUL. It is not for a third-party appellant to amass evidence of socio-economic harm before the Water Tribunal. The appellants were quite entitled to rely, as they did, on a reasoned critique of the evidence put up by Atha regarding socio-economic impact. This, on its own terms, demonstrated the inadequacy of the information before the Water Tribunal.

194 There was no basis for the Water Tribunal to hold that the appeal did not encompass this ground. It was expressly pleaded as the appellants' fifth ground of appeal before the Water Tribunal.[196]

CONCLUSION AND COSTS

195 For the reasons set out above, we submit that the appeal should be upheld and the order of the Water Tribunal should be replaced with a decision refusing Atha's WULA.

196 We submit that, if the appeal succeeds, the first and second respondents, and any other respondent who opposes the application, should be ordered to pay the appellants' costs, including the costs of two counsel.

197 The matter is one as contemplated in section 32(3) of NEMA and falls within the ambit of the *Biowatch* principles governing costs in constitutional matters. The

[196] Amplified grounds of appeal before Water Tribunal, para 7.5, Record Vol 11, p1161.

attorneys and advocates involved[197] have provided to the appellants free legal assistance as contemplated in section 32(3)(a) of NEMA.

198 If, however, 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. The appellants are non-profit public interest bodies, acting in the public interest in these proceedings. They have not acted vexatiously, frivolously or unprofessionally.

ALAN DODSON SC

083 677 0101

aladodson@law.co.za

MICHAEL MBIKIWA

072 169 5915

mbikiwa@group621.co.za

Chambers, Sandton

26 June 2020

[197] Senior counsel has provided free legal assistance as contemplated in section 32(3)(a). Junior counsel has acted for a substantially reduced fee, which is not payable by the appellants. The appellants' attorneys of record have provided free legal assistance to the appellants.

TABLE OF AUTHORITIES

South African cases

1. Arun Property Development (Pty) Ltd v City of Cape Town 2015 (2) SA 584 (CC)

2. Cool Ideas 1186 CC v Hubbard and Another 2014 (4) SA 474 (CC)

3. CTP Limited and Others v Director-General Department of Basic Education and Others [2018] ZASCA 156 (20 November 2018)

4. Democratic Alliance v Public Protector; Council for the Advancement of the South African Constitution v Public Protector [2019] 3 All SA 127 (GP)

5. Director: Mineral Development, Gauteng Region and Sasol Mining (Pty) Ltd v Save the Vaal Environment 1999 (2) SA 709 (SCA)

6. Earthlife Africa Johannesburg v Minister of Environmental Affairs and Others [2017] 2 All SA 519 (GP)

7. Escarpment Environment Protection Group and Another v Department of Water Affairs and Others (A666/11, 4333/12, 4334/12) [2013] ZAGPPHC 505 (20 November 2013)

8. Federation for Sustainable Environment v Minister of Water Affairs and Others [2012] ZAGPPHC 128 (10 July 2012)

9. Fisher v Community Schemes Ombud Service 2020 JDR 0214 (GJ)

10. Freedom Under Law v National Director of Public Prosecutions and Others 2014 (1) SA 254 (GNP)

11. Fuel Retailers Association of Southern Africa v Director-General: Environmental Management, Department of Agriculture, Conservation and Environment, Mpumalanga Province and Others [2007 (6) SA 4 (CC)

12. Geldenhuys and Others v Cillie and Others (6928/2005) [2017] ZAWCHC 61 (30 May 2017)

13. Guguletto Family Trust v Chief Director, Water Use Department of Water Affairs and Forestry and Another Case No. (Unreported, Case No: A566/10, North Gauteng High Court, Pretoria))

14. Harmony Gold Mining Company Ltd v Regional Director: Free State Department of Water Affairs and Others [2012] ZAGPPHC 127

15. Investigating Directorate: Serious Economic Offences v Hyundai Motor Distributors (Pty) Ltd 2001 (1) SA 545 (CC)

16. Kaunda and Others v President of the Republic of South Africa and Others 2005 (4) SA 235 (CC)

17. Makate v Vodacom (Pty) Ltd 2016 (4) SA 121 (CC)

18. Makhanya NO and Another v Goede Wellington Boerdery (Pty) Ltd [2013] 1 All SA 526 (SCA)

19. Maledu and others v Itereleng Bakgatla Mineral Resources (Pty) Ltd and Another 2019 (2) SA 1 (CC).

20. MEC for Agriculture, Conservation, Environment and Land Affairs v Sasol Oil (Pty) Ltd and Another 2006 (5) SA 483 (SCA)

21. Mining and Environmental Justice Community Network of South Africa and Others v Minister of Environmental Affairs and Others [2019] 1 All SA 491 (GP)

22. Natal Joint Municipal Pension Fund v Endumeni Municipality 2012 (4) SA 593 (SCA)

23. Sachs v Donges NO 1950 (2) SA 265 (A)

24. South African Police Service v Public Servants Association 2007 (3) SA 521 (CC)

25. Stenersen & Tulleken Administration CC v Linton Park Body Corporate and Another 2020 (1) SA 651 (GJ)

26. Tikly and Others v Johannes NO and others 1963 (2) SA 588 (T)

27. Van Rooyen and Others v The State and Others (General Council of the Bar of South Africa Intervening) 2002 (5) SA 246 (CC)

28. Vierplaas Boerdery BK v Department of Water Affairs and Forestry and Another (WT 06/08/2008) [2011] ZAWT 10

29. Wakkerstroom Natural Heritage Association v Dr Pixley ka Isaka Local Municipality [2019] ZAMPMHC 20 (29 October 2019)

30. Wary Holdings (Pty) Ltd v Stalwo (Pty) Ltd 2009 (1) SA 337 (CC)

31. Waterfalls Town Management Board v Minister of Housing 1957 (1) SA 336 (SR)

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

Foreign cases

33. 114957 Canada Ltée (Spray-Tech, Société d'arrosage) v. Hudson (Ville) 2001 SCC 40 (CanLII); [2001] 2 S.C.R. 241

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

35. Castonguay Blasting Ltd v Ontario (Environment) 2013 SCC 52; [2013] 3 SCR 323

36. Lumba v Secretary of State for the Home Department [2011] UKSC 12

37. Rederaktiebolaget 'Amphirite' v R [1921] 3 KB 500

Other sources

38. L Feris & LJ Kotze 'The Regulation of Acid Mine Drainage in South Africa: Law and Governance Perspectives' (2014) Potchefstroom Electronic Law Journal 17(5)

39. LM du Plessis 'Statute Law and Interpretation' LAWSA Volume 25(1) Second Edition