

**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA**

CASE NUMBER: A155/2019

Water Tribunal Case no: WT03/17/MP

In the matter between:

ENDANGERED WILDLIFE TRUST

First Appellant

**FEDERATION FOR A SUSTAINABLE
ENVIRONMENT**

Second Appellant

and

**DIRECTOR-GENERAL (ACTING),
DEPARTMENT OF WATER AND SANITATION**

First Respondent

ATHA-AFRICA VENTURES (PTY) LTD

Second Respondent

SECOND RESPONDENT'S PRACTICE NOTE

1. Date on roll: Not yet allocated
2. Number on roll: Unknown
3. Counsel for Appellants: A Dodson SC
083 677 0101
M Mbikiwa
72 169 5915
4. Counsel for 2nd Respondent: MM Oosthuizen SC
083 443 3658
J Rust
083 445 2911

5. Nature of appeal:

This is a special appeal to the High Court in terms of section 149(1) of the National Water Act 36 of 1998 (“*the NWA*”) against a decision taken by the Water Tribunal on 22 May 2019, dismissing the administrative appeal of the Appellants that was lodged with the Water Tribunal in terms of section 148(1)(f) of the NWA against the decision by the First Respondent (acting as the Responsible Authority in terms of the NWA) to grant a Water Use License to the Second Respondent (“*Atha-Africa*”) in terms of section 41-43 of the NWA for its proposed Underground Yzermyn Coalmining Project: the outcome before the Water Tribunal was not only that the administrative appeal was dismissed, but also that the granting of the Water Use License to Atha- Africa was confirmed subject to a number of additional conditions.

6. Issues to be determined:

6.1 The meaning to be given to the phrase “*question of law*”, in order to determine the scope and ambit of this special appeal.

6.2 Whether the Appellants’ grounds of appeal constitute a “*question of law*” as contemplated in section 149(1) of the NWA.

6.3 If the Appellants’ grounds of appeal constitute a “*question of law*” as contemplated in section 149(1) of the NWA, whether the Water Tribunal has erred with regard to the substance of any law, and in the event of the

Court finding that the phrase “*question of law*” does indeed cover a question of the correct application of the law to the facts, whether the Water Tribunal has erred with regard to the application of any law on the alleged common cause facts.

6.4 If the Water Tribunal committed an error of law, whether that alleged error of law is material and whether it justifies the setting aside of the poly-centric and discretionary decision of the Water Tribunal.

6.5 Whether the abuse of litigation by the Appellants and the conflicted Centre for Environmental Rights, is a matter where the Appellants and the Centre for Environmental Rights *de boniis* should be ordered to pay the costs of Atha-Africa in this special appeal jointly and severally, the one paying the other to be absolved, on a punitive scale as between attorney and client.

7. Atha-Africa’s submissions:

7.1 In the context of section 149(1) of the NWA, the phrase “*question of law*” must be attributed the meaning of a question on the substance of the law or what the law actually is, and it does not include “*matters of discretion*” pertaining to the application of the NWA by the Responsible Authority and/or the Water Tribunal. The purpose of this special appeal is not to second-guess the Executive Branch of Government in the exercise of a forward-looking, poly-centric judicial discretion, but to bring clarity on the substance of the law for purposes of Water Resource Management. The

scope and ambit of this special appeal is therefore limited to questions on the substance of the law.

7.2 The grounds of appeal advanced by the Appellants do not raise questions with regard to the substance of the law, but the Appellants endeavour to advance selective issues of fact and/or judicial discretion under the false flag of a “*question of law*”. The issues sought to be raised are purely factual in nature and/or an attack on the poly-centric discretionary power exercised judicially by the Water Tribunal on the evidential material before it – the Appellants in effect seek a “*rehearing on the merits*”.

7.3 In the consideration of a “*question of law*” there should be no need for the Court to peruse and analyse a record of 5330 pages of factual and expert evidence, including the transcript of a hearing that took some seven days and an argument that took some three days before the Water Tribunal.

7.4 The Appellants’ proclaimed point of departure is that they rely only on (1) the facts that were found by the Water Tribunal; (2) the facts that are common cause; and (3) the facts that are contained in the specialist studies as commissioned by Atha-Africa. The Appellants however neglect to inform the Court of the following:

7.4.1 The facts that became common cause during the proceedings before the Water Tribunal, either because the express evidence by a witness for Atha-Africa on such aspects were not challenged in

cross-examination, or because a version on behalf of the Appellants was never put to such a witness on such aspects - although now, before the Court in this special appeal, the Appellants wish to revive the issue.

7.4.2 The evidence of two of the main witnesses for the Appellants were discredited during cross-examination so that nothing of their evidence can be regarded as common cause.

7.4.3 Some of the reports - originally (and apparently still) relied upon by the Appellants - were in dispute from the outset so that those reports, of whom the authors were never called as witnesses by the Appellants, were never common cause.

7.5 The Notice of Appeal and the proposed Amendment of the Notice of Appeal do not set out or formulate any "*question of law*" in respect of which the Water Tribunal erred with regard to the contents or substance of the law itself, and even if a "*question of law*" is raised, then the Water Tribunal has not erred with regard to the substance of any law.

7.6 Our alternative submission is that, in the event of the Court finding that the phrase "*question of law*" does indeed cover a question of the correct application of the law to the facts, then we also submit that the Water Tribunal has not erred with regard to the application of any law on the facts that are truly common cause.

7.7 Our further alternative submission is that even if the Appellants somehow demonstrate that the Water Tribunal committed an error of law, that alleged error of law is not material and does not justify the setting aside of the decision of the Water Tribunal.

7.8 In the last place we respectfully submit that, because of the abuse of litigation by the Appellants and the conflicted Centre for Environmental Rights, this is a matter where the Appellants and the Centre for Environmental Rights *de boniis* should be ordered to pay the costs of Atha-Africa in this special appeal jointly and severally, the one paying the other to be absolved, on a punitive scale as between attorney and client.

7.9 This purported appeal in terms of section 149(1) of the NWA is therefore fatally flawed and should be struck from the roll, alternatively be dismissed with punitive costs.

8. Composition of the Court

8.1 Section 149(4) of the NWA provides that the appeal must be prosecuted as if it were an appeal from a Magistrate's Court to a High Court. In terms of section 14(4) of the Superior Courts Act 10 of 2013, the court with jurisdiction is the full bench.

8.2 In light of the importance of the matter, Atha-Africa however requests that a

Full Court be composed for the hearing of the special appeal.

9. Expected time duration: 2 days

10. Urgency:

Atha-Africa requests an urgent allocation of the special appeal because of the long history and delay in this matter.

11. Papers to read:

The approach of the Appellants, namely not to put the truly common cause facts before the Court, necessitates the reading of the record.

MM OOSTHUIZEN SC

J RUST

COUNSEL FOR THE SECOND RESPONDENT

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7 AUGUST 2020