IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

Case No: 11761/2021

In the matter between:

MINING AND ENVIRONMENTAL JUSTICE COMMUNITY NETWORK OF SOUTH AFRICA and others **Applicants**

and

UTHAKA ENERGY (PTY) LTD and others **Respondents**

FILING NOTICE

1.	Date on the roll:	16 March 2021 (urgent roll)
2.	Document filed:	Short Heads of Argument for First Respondent
3.	Filed by:	Attorney for First Respondent

March 12, 2021

SIGNED AND DATED AT PRETORIA THIS .... DAY OF MARCH 2021.

DocuSigned by:
Catherine Stark
FF557880F78C4CC...

Mr GF Joubert
Attorney for First Respondent
Fasken Attorneys
(incorporated in South Africa as Bell Dewar Inc.)
Building 2, Inanda Greens
54 Wierda Road West
SANDTON
Ref: Francois Joubert
Tel: (011) 586-6089
Fax: (011) 586-6189
E-mail: fjoubert@fasken.com
Care of:
Savage Jooste & Adams
Kings Gate
No 5 Tenth Avenue
Menlopark
PRETORIA
Tel: (012) 452-8200
Fax: (012) 452-8201
Ref: R Mntambo/F191

To: **The Registrar of the High Court**
Gauteng Division
PRETORIA

And to: **Centre for Environmental Rights**
Applicants' Attorneys
2nd Floor, Springtime Studios
1 Scott Road
Observatory
CAPE TOWN
Email: chorsfield@cer.org.za
nmia@cer.org.za
tmuponde@cer.org.za
Care of:
Gildenhuys Malatji Attorneys
Harlequins Office Park
164 Totius Street
Groenkloof
PRETORIA
Tel: 012 428 8608/073 135 8770
Email: Jsmalberger@gminc.co.za
Ref: Johan Smalberger

And to: **MEC for Agriculture, Rural Development, Land and Environmental Affairs, Mpumalanga**
Second Respondent
Building 6, 2nd Floor, Riverside Park
7 Government Boulevard
NELSPRUIT
Tel: (013) 766 6074
Fax: (013) 766 8437 / 086 697 8998
Email: uismail@mpg.gov.za;
nndlanya@mpg.gov.za;
sitholenl@mpg.gov.za;
akoojeeaa@mpg.gov.za
Ref: Honourable Mandla Msibi

And to: **Minister of Environment, Forestry and Fisheries**
Third Respondent
Environment House
473 Steve Biko Road
(Cnr. Steve Biko and Soutpansberg Roads)
Arcadia
PRETORIA
Tel: (012) 310 3537 / (012) 399 9141
Fax: 086 593 6526
Email: minister@environment.gov.za;
msipilica@environment.gov.za;
labader@environment.gov.za;
fshaik@environment.gov.za;
mndamase@environment.gov.za
Ref: Honourable Barbara Creecy

And to: **Minister of Mineral Resources and Energy**
Fourth Respondent
Floor 4, Block 2C
71 Trevenna Campus
Cnr Meintjies and Francis Baard Streets
Sunnyside
PRETORIA
Tel: (012) 444 3999 / 3956
Fax: (012) 444 3145
Email: vuyelwa.siyeka@dmr.gov.za;
buang.mokate@dmr.gov.za;
sheila.maweni@dmr.gov.za;
pieter.alberts@dmr.gov.za
Ref: Honourable Samson Gwede Mantashe

And to: **Minister of Human Settlements, Water and Sanitation**
Fifth Respondent
Sedibeng Building
185 Francis Baard Street
PRETORIA
Tel: (012) 336 7500
Email: francois.hugo@dhs.gov.za;
nenesi@dws.gov.za;
centralp@dws.gov.za;
loselop@dws.gov.za
Ref: Honourable Lindiwe Noncebe Sisulu

And to: **Acting Chief Director: Environmental Affairs, Department of Agriculture, Rural Development, Land and Environmental Affairs, Mpumalanga**
Sixth Respondent
Building 6, 2nd Floor, Riverside Park
7 Government Boulevard
NELSPRUIT
Tel: (013) 766 6020
Cell: 082 520 3680
Fax: (013) 766 8429
Email: pnntuli@mpg.gov.za
Ref: Pamela Ntuli

And to: **Gert Sibande District Municipality**
Seventh Respondent
Corner of Joubert and Oosthuisen Streets
ERMELO
Mpumalanga
C/o Mohlala Attorneys
1 Macdonalds Street
ERMELO
Mpumalanga
Tel: (017) 811 3000
Email: info@mohlalainc.co.za;
HabileC@gsibande.gov.za;
centrec@gsibande.gov.za;
info@mohlalainc.co.za
Ref: Mr Mohlala

And to: **Dr Pixley Ka Isaka Seme Local Municipality**
Eighth Respondent
Corner of Dr Nelson Mandela Drive and Adelaid Thambo Street
VOLKSRUST
Mpumalanga
C/o Mohlala Attorneys
1 Macdonalds Street
ERMELO
Mpumalanga
Tel: (017) 811 3000
Email: info@mohlalainc.co.za;
HabileC@gsibande.gov.za;
centrec@gsibande.gov.za;
info@mohlalainc.co.za
Ref: Mr Mohlala

And to: **WATER TRIBUNAL**
Ninth Respondent
Sedibeng Building
185 Francis Baard Street
PRETORIA
Tel: (012) 336 7034/ 7709
Email: maber@dws.gov.za;
madimabes@dws.gov.za
Ref: Robert Mabe (Registrar)

And to: **Estate Late Pierre William Bruwer Uys**
Tenth Respondent
C/o Werskmans Attorneys
The Central
96 Rivonia Road
SANDTON
Tel: (011) 535 8000
Fax: (011) 535 8600
Email: cstevens@wersmans.com
Ref: Chris Stevens

And to: **Occupier of Portion 1 of Yzermyn 96 HT**
Eleventh Respondent
Portion 1 of Yzermyn 96 HT
Mpumalanga

And to: **The Voice Community Representative Council**
Twelfth Respondent
C/o Ayoob Kaka Attorneys
182 Barry Hertzog Avenue
Greenside
JOHANNESBURG
Tel: (011) 726 1710 / (0111) 726 1711
Email: kakalaw@mweb.co.za;
Ebrahim@kakalaw.co.za
Ref: Ebrahim Kaka

And to: **Mabola Protected Environment Landowners Association**
Thirteenth Respondent
Farm Schoongezicht
VOLKSRUST
Mpumalanga
Email: pjuys@icloud.com
Ref: Piet Uys

And to: **State Attorney Pretoria**
SALU Building, Ground Floor
Corner Thabo Sehume and Francis Baard Streets
PRETORIA
Tel: (012) 309 1627 / 1554
Cell: 072 219 0627 / 073 841 5056 / 076 144 6762
Fax: 086 517 5732
Email: simathebula@justice.gov.za;
lnkuna@justice.gov.za
Ref: Sipho Mathebula / Nyiko Lucky Nkuna

And to: **State Attorney Nelspruit**
Mpumalanga High Court Building
R104 Samora Machel Drive
West Acres
3rd Floor, Admin Block, West Wing
NELSPRUIT
Tel: (013) 101 3722
Email: Stateattorneynelspruit@justice.gov.za

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INTRODUCTION

1. The First Respondent[1] is in possession of all of the following statutory authorisations, in terms of which the commencement of mining and mining-related activities for the development of the Yzermyn Underground Coal-mining Project is legally authorised, namely:

1.1 a Mining Right[2] granted under section 23 of the Mineral and Petroleum

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1 Hereinafter referred to as Uthaka.

2 See Caselines p. 6-2756 to 6-2769 (annexure **PT 6**).

Resources Development Act 28 of 2010;[3]

1.2 an approved Environmental Management Programme[4] as contemplated in the now repealed section 39(4) of the MPRDA;

1.3 a Water Use Licence[5] as required in terms of section 22 of the National Water Act 36 of 1998,[6] read with the order of the Water Tribunal;[7]

1.4 the Environmental Authorisation[8] for listed activities as contemplated in section 24 of the National Environmental Management Act 107 of 1998;[9]

1.5 the approved land-use rights as required in terms of the relevant provisions of the Spatial Land Use Management Act 16 of 2013,[10] manifested by the approval of the Local Municipality[11] read with the dismissal of a statutory appeal by the Municipal Appeal Authority;[12] and

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3 Hereinafter referred to as the MPRDA.

4 See Caselines p. 6-2770 to 6-2849 (annexure **PT 7**).

5 See Caselines p. 6-2850 to 6-2900 (annexure **PT 8**).

6 Hereinafter referred to as the NWA.

7 See Caselines p. 6-2901 to 6-2902 (annexure **PT 9**).

8 See Caselines p. 6-2903 to 6-2928 (annexure **PT 10**).

9 Hereinafter referred to as the NEMA.

10 Hereinafter referred to as the SPLUMA.

11 See Caselines p. 6-2929 to 6-2937 (annexure **PT 11**).

12 See Caselines p. 6-2938 to 6-2943 (annexure **PT 12**).

1.6 a permit to pick and relocate certain medicinal plants.[13]

2. These statutory authorisations were all obtained by Uthaka, under the multi-permitting system applicable to the Mineral and Petroleum Extractive Industries,[14] despite the strenuous opposition thereto by the Applicants and their allies over the past decade, and moreover:

2.1 under the Rule of Law as espoused in *Oudekraal*,[15] these administrative acts as well as all acts and consequences flowing therefrom, remain in existence until set aside by a court in proceedings for judicial review; and

2.2 these statutory authorisations are in full legal force and effect.

3. The commencement of this legally-authorised and lawful development project is what the Applicants seek, on an allegedly urgent basis, to stop from any commencing by way of a purported interim interdict.[16] Yet, when push came to shove, this is now the attitude adopted by the Applicants in the replying affidavit:

> "*... However to counter any alleged prejudice that may be occasioned by the grant of an interim interdict, the applicants are amenable to Uthaka commencing with the survey pegging of the surface infrastructure boundary (activity 1 in the Gantt Chart) and the wetland demarcation*

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13 See Caselines p. 6-2944 to 6-2945 (annexure **PT 13**).

14 See Caselines p. 6-24 to 6-25, 6-37, 6-44 and 6-85 (para 27, 35.11, 39.5 and 84.2 of the answering affidavit); p. 6-1679 to 6-1705 (para 33-46 of annexure **PT 4.11**).

15 See *Oudekraal Estates (Pty) Ltd v City of Cape Town* 2004 (6) SA 222 (SCA) par [26].

16 See Caselines p. 1-2 to 1-5 (prayer 1-5 of the Notice of Motion).

pegging of the approved plan (activity 2 in the Gantt Chart) only."[17]

So, Uthaka may commence but it may also not commence?

4. At the outset we point out that whether an interdict is final or interim, depends on its effect upon the issue and not upon its form. Although the relief sought in this urgent application is cast in the form of an interim interdict, we submit that it will be final in its effect:

4.1 Firstly, it will in substance be a judicial suspension of several decisions taken in the executive branch of government.

4.2 Secondly, whether an applicant has a right is a matter of substantive law whilst whether that right has been clearly or *prima facie* established is a matter of evidence. The point is that there has to be a final decision on whether the Applicants have any kind of right to prevent the legally-authorised and lawful development project from commencing.

4.3 Thirdly, this relief is sought pending the "*final determination*" of pending litigation, with final judicial authority vested in the Constitutional Court. There is no estimation of how long it will take to reach the point of final determination and every delay causes increasing overhead costs and prejudice for the project. In the absence of any undertaking or

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17 See Caselines p. 9-9 (para 23 of the replying affidavit).

indemnification by the Applicants, the effect of such an interdict will in substance be the death knell for the project.

5. In the result we respectfully submit that although the relief is formulated as interim, it is substantially final in effect and for that reason the Applicants had to establish a clear right. On their own version, it is clear that they have not attempted to do so and have not done so. This application must therefore be approached on the basis that the Applicants are seeking final relief in motion proceedings, bringing the well-known *Plascon-Evans* rule[18] into play.

6. In approaching the evidential material before Court, there is another aspect to consider.

6.1 The founding affidavit is replete with references to other documents but in some instances only a few pages of a document is attached while in other cases nothing of the document is attached to the founding affidavit. Thus, for example, the Applicants advance the proposition, allege boldly and express the opinion that they have prospects of success with a number of review applications but they do not attach the record of those review applications to their founding affidavit.

6.2 Uthaka responded to this irresponsible manner of litigation with a notice

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[18] See *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623 (A) 634E-635B.

of terms of rule 35(12) of the Uniform Rules of Court.[19]

6.3 Rule 35(12) of the Uniform Rules of Court provides as follows:

> "*(12)(a) Any party to any proceeding may at any time before the hearing thereof deliver a notice in accordance with Form 15 in the First Schedule to any other party in whose pleadings or affidavits reference is made to any document or tape recording to—*
>
> *(i) produce such document or tape recording for inspection and to permit the party requesting production to make a copy or transcription thereof; or*
>
> *(ii) state in writing within 10 days whether the party receiving the notice objects to the production of the document or tape recording and the grounds therefor; or*
>
> *(iii) state on oath, within 10 days, that such document or tape recording is not in such party's possession and in such event to state its whereabouts, if known.*
>
> *(b) Any party failing to comply with the notice referred to in paragraph (a) shall not, save with the leave of the court, use such document or tape recording in such proceeding provided that any other party may use such document or tape recording.*"

6.4 The Applicants failed to comply with the said notice and there is no application for leave before Court.

6.5 Accordingly, the Applicants may not use any of those documents in these proceedings and, in adjudicating the matter, we respectfully submit that the Court should approach the matter on this basis.

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[19] See Caselines p. 5-1 to 5-12 (notice in terms of rule 35(12), listing all the documents).

7. We now turn to our individual submissions.

URGENCY

8. We submit in the **first place** that this application is not urgent.

9. A convenient place to start is with rule 6(12) of the Uniform Rules of Court, which provides as follows (own underlining for emphasis):

> "*(12)(a) In urgent applications the court or a judge may dispense with the forms and service provided for in these rules and may dispose of such matter at such time and place and in such manner and in accordance with such procedure (which shall as far as practicable be in terms of these rules) as it deems fit.*
>
> *(b) In every affidavit or petition filed in support of any application under paragraph (a) of this subrule, the applicant must set forth explicitly the circumstances which is averred render the matter urgent and the reasons why the applicant claims that applicant could not be afforded substantial redress at a hearing in due course.*"

10. Rule 6(12)(a) of the Uniform Rules of Court makes it clear that it lies within the judicial discretion of the Court whether or not to treat an application as urgent.

11. In accordance with the trite principle, that the onus is upon the litigant who wishes a Court to exercise its discretion in favour of that litigant, rule 6(12)(b) of the Uniform Rules of Court makes it clear that the duty of the Applicants is to set forth explicitly the circumstances which is averred render the matter urgent, and the reasons why the Applicants claim that they could not be afforded substantial redress at a hearing in due course.

12. Uthaka gave written notice, as undertaken on 27 June 2017,[20] of its intention to commence with its mining and mining-related activities on 24 March 2021 by only starting with fencing an area of 22.4 hectares on the surface of Portion 1 of Yzermyn.[21] The Gantt Chart shows that the first invasive activity is anticipated for December 2021, with the construction of the decline shaft or adit anticipated to commence during July 2022 and with mining operations anticipated to start during August 2023.[22] Contrary to the false perception upon which the Applicants rely, nobody is going to wake up on the morning of 25 March 2021 with a fully-developed and completely ramped-up coal mine in full production on their doorstep. Preparatory work of approximately three years is required before Uthaka can even start with mining itself.[23]

13. The thrust of the alarmist case for the Applicants on urgency is therefore misconceived and wholly unrealistic. Already on these facts, it should be clear that there is no urgency whatsoever in this matter.

14. The Applicants rely on the following as grounds for urgency:[24]

14.1 the alleged irreparable harm and the alleged permanent damage to the

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20 See Caselines p. 2-42 to 2-47 (the undertaking of 27 June 2017, annexure **FA 1**).

21 See Caselines p. 2-48 to 2-77 (annexure **FA 2**); p. 6-13 (para 8 of the answering affidavit).

22 See Caselines p. 6-13 to 6-15 (para 9 of the answering affidavit); p. 6-111 (the Gantt Chart, annexure **'PT 2'**)

23 See Caselines p. 6-13 to 6-15 (para 9-10 of the answering affidavit); p. 6-111 (the Gantt Chart, annexure **'PT 2'**)

24 See Caselines p. 2-39 to 2-40 (para 101-108 of the founding affidavit).

environment resulting from the "*mining operations set to commence on 24 March 2021*";

14.2 the alleged impacts on the non-existing family occupying the homestead close to the adit;

14.3 the so-called precautionary principle; and

14.4 their alleged appropriate efforts to avoid these proceedings.

15. With regard to **paragraph 14.1 above**, we make the following submissions:

15.1 Firstly, each and every averment, concerning the alleged irreparable harm and the alleged permanent damage that allegedly will in future result, is the expression of an opinion by a deponent who is without personal knowledge of the facts of this matter and who is not an expert, and for which averments or opinions there is no supporting expert evidence.[25]

15.2 Secondly, it is misleading to suggest that "*mining operations*" are set to commence on 24 March 2021.

15.3 Thirdly, the alarmist allegations of future irreparable harm and future permanent damage to the environment are simply false to the knowledge

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25 See Caselines p. 6-10 (para 4.5 of the answering affidavit).

of the deponent and Applicants (as well as their attorneys of record). All environmental consequences and impacts were identified, investigated and assessed by specialists. Those specialists concluded that there were no serious or significant risks, that they were no fatal flaws to prevent the development project from proceeding, that all of the anticipated risks were manageable by means of appropriate mitigation measures and that the affected area can be rehabilitated so as to be again suitable for an agricultural or wilderness area use. In short, all the available evidence demonstrated that there will be no irreparable harm or permanent damage to the environment.

15.4 Fourthly, any minor harm or damage to the environment as there may incidentally be, is authorised by the statutory authorisations referred to in **paragraph 1 above** and will therefor be lawful. Such lawful and minor or acceptable degree of harm or damage to the environment is contemplated in section 24(b) of the Constitution, which provides as follows:

> "*Everyone has the right ... 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.*"

We submit that the protection of the environment is not for the sake of the

environment itself but for the benefit of present and future generations,[26] and that such protection of the environment is to be achieved through sustainable development:

> "*[45] 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 s 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*."[27]

15.5 In the result there is no merit in this alleged ground of urgency.

16. With regard to **paragraph 14.2 above**, we make the following submissions:

16.1 The averments by the deponent of a family allegedly occupying the homestead close to the adit, are clearly false and demonstrate that this deponent has no personal knowledge of the facts of this matter.

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[26] See section 2(2) of the NEMA:
> "*(2) Environmental management must place people and their needs at the forefront of its concern, and serve their physical, psychological, developmental, cultural and social interests equitably.*"

[27] See *Fuel Retailers Association of South Africa v Director-General: Environmental Management, Department of Agriculture, Conservation & Environment, Mpumalanga Province* 2007 (6) SA 4 (CC) (2007) par [45]:

16.2 The true position is that the homestead will not be close to the adit, there is no such family in occupation thereof and the owner of the homestead has no objection against the development project.[28]

16.3 In the result there is no merit in this alleged ground of urgency.

17. With regard to **paragraph 14.3 above**, we make the following submissions:

17.1 Firstly, there is on the level of fact no such alarmist "*indeterminate and catastrophic consequences*" as is insinuated by the Applicants without any foundation in primary fact before the Court;[29] in fact, the available evidence before the Court demonstrates that this will not be the case.

17.2 Secondly, there is on the level of law no such "*precautionary principle*" as contended for by the Applicants.

17.3 Section 2(4)(a)(vii) of the NEMA provides that sustainable development requires the consideration of all relevant factors, including the factor 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. This consideration which is identified in the NEMA as a relevant factor to be taken into account when applying the principle of sustainable

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28 See Caselines p. 6-60 to 6-62 (para 49.4 of the answering affidavit); p. 6-5732 to 6-5734 (annexure **PT 24**).

29 See Caselines p. 2-40 (para 105 of the founding affidavit).

development, is the one that the Applicants chose to label the "*precautionary principle*".

17.4 This "*factor*" is derived from the precautionary principle recognised in the International Environmental Law but has a distinct South African flavour. In terms of section 232 of the Constitution, Customary International Law is law in the Republic of South Africa unless it is inconsistent with the Constitution or an Act of Parliament (such as section 24 of the Constitution or section 2 of the NEMA).

17.5 In essence, the South African version of the "*precautionary principle*", as enacted in section 2(4)(a)(vii) of the NEMA, is not concerned with preventing development from commencement but ensuring that a development proceeds with appropriate mitigation and rehabilitation measures so as to promote sustainable development.

17.6 The "*factor*" of precaution operates within the immediate context of the principle of sustainable development and not within the wider context of environmental management. What is called for, is thus a risk-averse and cautious approach to be applied in the integrated process of considering all the relevant social, economic and environmental factors as called for by the sustainable development principle.

17.7 This South Africa risk-averse and cautious approach has to do with

mitigation measures in respect of the consequences of decisions and actions: the limits of current knowledge about the consequences of decisions and actions (or the lack of full scientific certainty) cannot be used as a reason for postponing cost-effective measures to prevent those consequences.[30]

17.8 Principle 15 of the Rio Declaration confirms this interpretation[31] and reads as follows (underlining for emphasis):

> "*In order to protect the environment, the precautionary approach shall be widely applied by States according to their capabilities. Where there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation*."

Accordingly, the precautionary approach is not directed at the desirability of development but at the desirability of mitigation measures: the very premise of this principle is that of a development proceeding but insisting on cost-effective measures despite the lack of "*full scientific certainty*".[32]

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30 This is consistent with Principle 15 of the Rio Declaration. See also *WWF South Africa v Minister of Agriculture, Forestry and Fisheries* [2018] 4 All SA 889 (WCC) par [110]; *Fuel Retailers Association of SA (Pty) Ltd v Director-General, Environmental Management, Mpumalanga* 2007 (6) SA 4 (CC) par [98]:

> "*The precautionary principle ... is applicable where due to unavailable scientific knowledge there is uncertainty as to the future impact of the proposed development.*"

31 See section 39(1)(b) of the Constitution: when interpreting the Bill of Rights, a court, tribunal or forum must consider International Law; section 233 of the Constitution: when interpreting any legislation, every court must prefer any reasonable interpretation of the legislation that is consistent with international law over any alternative interpretation that is inconsistent with international law.

32 See Sands & Peel *Principles of International Environmental Law* (2012) 217-228; Glazewski *Environmental Law in South Africa* (2005) 18.

17.9 In *HTF Developers (Pty) Ltd v Minister of Environmental Affairs and Tourism*[33] the High Court considered the import of section 24 of the Constitution and stated the following in passing (underlining for emphasis):

> "*[16] Section 24(a) of the Constitution guarantees the fundamental right of everyone to an environment that is not harmful to their health or well- being. Section 24(b) imposes programmatic and positive obligations on the State to protect the environment through reasonable legislative and other measures that prevent pollution and ecological degradation; promote conservation; and secure ecologically sustainable development, while promoting justifiable economic and social development. Professor Jan Glazewski, in his seminal work Environmental Law in South Africa (Butterworths, 2000), makes the point that the contemporary international norm implicit in all environmental law is the notion of sustainable development, being development that meets the needs of the present without compromising the ability of future generations to meet their own needs. Such implies limitations imposed by the state of technology and social organisation on the environment's ability to meet present and future needs. Hence, the need to preserve natural systems for the benefit of future generations obliges environmental considerations to be incorporated into economic and other development plans, programmes and projects. The principle of environmental assessment as the means of ensuring intergenerational equity is the practical cornerstone of the principles of sustainable and equitable use of our natural resources and environment. Moreover, the principle of environmental assessment is premised upon and interrelated to a precautionary principle mandating a risk-averse and cautious approach. Where there is a risk of serious or irreversible damage, lack of full scientific certainty should not be used as a reason for postponing measures to prevent environmental degradation (see Glazewski at 1-27). As I understand Prof Glazewski, this schemata of principles and*

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[33] 2006 (5) SA 512 (T) par [16]. This judgment was overturned on appeal but on other grounds not related to the present issue.

obligations underpins the environmental right in s 24 of the Constitution."

17.10 In *Fuel Retailers Association of South Africa v Director-General: Environmental Management, Department of Agriculture, Conservation and Environment, Mpumalanga Province*[34] the Constitutional Court stated as follows (underlining added for emphasis):

> "*The precautionary principle required these authorities <u>to insist on adequate precautionary measures</u> 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 the present and future generations*."

17.11 We submit that the precautionary principle is not a stand-alone principle but operates within the context and gives meaning to the broader and overarching concept of "*sustainable development*".[35]

17.12 To err on the side of caution thus means to insist on mitigation measures despite uncertainty and not to veto development because of uncertainty. The so-called "*precautionary principle*" is therefor not a justification for not allowing a development to proceed simply because of unnecessary fear

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34 See *Fuel Retailers Association of South Africa v Director-General: Environmental Management, Department of Agriculture, Conservation and Environment, Mpumalanga Province* 2007 6 SA 4 (CC) par [98].

35 See Sands & Peel *Principles of International Environmental Law* (2012) 217-228: although the precautionary principle started its life in International Environmental Law as a separate principle, it was linked to sustainable development with the 1990 Bergen Ministerial Declaration on Sustainable Development and came to be recognised as an essential feature of sustainable development.

and anxiety, created in the minds of ordinary people, by alarmist but unfounded allegations, about the alleged impacts of that development.

17.13 The overriding consideration is not the absolute absence of, or zero risk, of future harm or damage[36] but that of an acceptable margin of safety.[37]

17.14 In the result there is no merit in this alleged ground of urgency.

18. With regard to **paragraph 14.4 above**, we make the following submissions:

18.1 The letter written on behalf of the Applicants was not an attempt in good faith to avoid these proceedings. That letter was a letter of direct demands which, in substance, was an attempt to further delay the lawful commencement of the development project.[38]

18.2 In the result there is no merit in this alleged ground of urgency.

19. We therefore submit that this application should be struck from the roll with punitive costs, such costs to include the cost of two counsel.

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36 See Caselines p. 6-4238 (para 158.7 of the judgment of the Water Tribunal, annexure **PT 16**).

37 See Kidd *Environmental Law* (2011) 8-10.

38 See Caselines p. 2-40 (para 106 of the founding affidavit); p. 2-140 to 2-148 (annexure **FA 19**); p. 2-149 (annexure **FA 20**).

JURISDICTION

20. Alternatively we respectfully submit that the Applicants are in the wrong court and that this application should have been launched either in the Gauteng Local Division (Johannesburg) or in the Mpumalanga Provincial Division (Mbombela) of the High Court of South Africa.[39]

21. In the matter of *In re: Nedbank Limited v Thobejane and related matters*[40] a unanimous Full Bench of the Court pointed out the advantage taken by litigants of the concurrent jurisdiction between the Gauteng Division, Pretoria and the Gauteng Local Division, Johannesburg, by enrolling matters in Pretoria even where it involves parties located within the jurisdiction of the Gauteng Local Division, Johannesburg.

22. The only party against whom relief is sought, is Uthaka and Uthaka is located within the jurisdiction of the Gauteng Local Division, Johannesburg.

23. Portion 1 of Yzermyn is located within the jurisdiction of the Mpumalanga Provincial Division, Mbombela.

24. On this alternative ground, we thus submit that this application should be struck from the roll with punitive costs, such costs to include the cost of two counsel.

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39 See Caselines p. 6-11 and p. 6-15 to 6-16 (para 5.2 and 12-15 of the answering affidavit).

40 2019 (1) SA 594 (GP).

LIS PENDENS

25. In *Association of Mineworkers and Construction Union v Ngululu Bulk Carriers (Pty) Limited (In Liquidation)*[41] the Constitutional Court stated the following:

> "*[26] The purpose of lis pendens is to prevent duplication of legal proceedings. As its requirements illustrate, once a claim is pending in a competent court, a litigant is not allowed to initiate the same claim in different proceedings. For a lis pendens defence to succeed, the defendant must show that there is a pending litigation between the same parties, based on the same cause of action and in respect of the same subject matter. This is a defence recognised by our courts for over a century*."

26. To avoid a congestion of court rolls and to prevent a party from being subjected to the tyranny of litigation, a Court will not normally deal with pending matters in order to avoid duplication.

27. There are three other applications pending between the same parties or their privies, based on the same cause of action and in respect of the same subject matter.[42]

28. On this alternative ground, we therefore submit that this application should be struck from the roll or postponed with punitive costs, such costs to include the cost of two counsel.

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41 2020 (7) BCLR 779 (CC) par [26]

42 See Caselines p. 6-11 and p. 6-16 to 6-23 (para 5.3 and 16-24 of the answering affidavit).

PRELIMINARY POINT

29. It is trite law that a respondent may take the point, by way of a preliminary objection, that an application does not make out a *prima facie* case for the relief claimed.[43]

30. Where this occurs, the Court, in deciding the objection, proceeds on the basis that the founding affidavit alone must be considered and that the allegations made in the founding affidavit must be regarded as established facts.[44]

31. There is however one important qualification to keep in mind, namely the basic difference between a pleading (in proceedings by way of action) and the founding affidavit (in proceedings by way of motion).[45]

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43 See *Lourenco v Ferela (Pty) Ltd (No 1)* 1998 3 SA 281 (T) 291D-G; *Pearson v Magrep Investments (Pty) Ltd* 1975 (1) SA 186 (D) 187C-H; *Hart v Pinetown Drive-In Cinema (Pty) Ltd* 1972 1 SA 464 (D) at 465E-G; *Bader v Weston* 1967 1 SA 134 (C) at 136B-C; *Aspek Pipe Co (Pty) Ltd v Mauerberger* 1968 1 SA 517 (C) at 519E-F.

44 See *Eagles Landing Body Corporate v Molewa NO* 2003 1 SA 412 (T) at 437I-438C; *Hyperchemicals International (Pty) Ltd v Maybaker Agrichem (Pty) Ltd* 1992 1 SA 89 (W) at 92F-93A; *Bowman NO v De Souza Roldao* 1988 4 SA 326 (T) at 327C-328B; *Switchboard Manufacturers (Natal) (Pty) Ltd v Anmor Electrical Contractors (Pty) Ltd* 1982 2 SA 244 (D) at 247B-D; *Erasmus v Pentamed Investments (Pty) Ltd* 1982 1 SA 178 (W) at 180H-181A; *Poseidon Ships Agencies (Pty) Ltd v African Coaling & Exporting Co (Durban) (Pty) Ltd* 1980 1 SA 313 (D) at 315A-D; *Aspek Pipe Co (Pty) Ltd v Mauerberger* 1968 1 SA 517 (C) at 519F-G.

45 See *Hart v Pinetown Drive-In Cinema (Pty) Ltd* 1972 1 SA 464 (D) at 469F-H:

> "*... It must be borne in mind, however, that where proceedings are brought by way of application, the petition is not the equivalent of the declaration in proceedings by way of action. What might be sufficient in a declaration to foil an exception, would not necessarily, in a petition, be sufficient to resist an objection that a case has not been adequately made out. The petition takes the place not only of the declaration but also of the essential evidence which would be led at a trial and if there are absent from the petition such facts as would be necessary for determination of the issue in the petitioner's favour, an objection that it does not support the relief claimed is sound*."

32. The objection, that a cause of action is not disclosed, is akin to an exception. The objection taken here is in the nature of, and similar to, an application, for absolution from the instance (in that its is aimed at the sufficiency or adequacy of the evidence tendered by an applicant in his founding affidavit).

33. We repeat **paragraph 6 and 15.1 above**.

34. Absent reliance on the various documents referred to but not properly attached to the founding affidavit, absent any admissible expert opinions and ignoring all inadmissible hearsay evidence, absolutely nothing remains of the case for the Applicants.

35. On this alternative ground, we therefore submit that this application should be dismissed with punitive costs, such costs to include the cost of two counsel.

See also *Eagles Landing Body Corporate v Molewa NO* 2003 1 SA 412 (T) at 437I-438C:

> "*[78] This question was the last one raised by Mr Wepener as a point in limine. With reference to authority (including Bowman NO v De Souza Roldao 1988 (4) SA 326 (T) at 327C-328B; Hyperchemicals International (Pty) Ltd and Another v Maybaker Agrichem (Pty) Ltd and Another 1992 (1) SA 89 (W) at 92F-93A) counsel submitted, correctly, that this type of objection was similar to an exception taken to a declaration or a combined summons, with the Court being confined to a consideration of the founding papers; with one difference: the founding papers not only take the place of a declaration, but also contain the essential evidence relied upon, and facts necessary to sustain the claim of the applicant must appear therefrom. On a nice analysis of the founding papers, so counsel's submission proceeded, a prima facie case for the relief claimed was not made out.*"

NO *PRIMA FACIE* RIGHT

36. We repeat what we have stated in **paragraph 4-5 above** but, as a precaution, we proceed to deal with the first requirement for an interim interdict, namely that the Applicants must establish a *prima facie* right for the interim relief.[46]

37. We repeat that whether an applicant has a right, is a matter of substantive law whilst whether that right has been clearly or *prima facie* established, is a matter of evidence. The proper approach to test for the adequacy of the evidence, required to provisionally establish such a right, is to consider the facts as set out by the Applicants together with any facts set out by Uthaka which the Applicants cannot dispute, and to decide whether, with regard to the inherent probabilities and the ultimate onus, the Applicants should on those facts obtain final relief at the trial; the facts set up in contradiction by Uthaka should then be considered, and if they throw serious doubt on the case for the Applicants, the latter cannot succeed.[47]

38. There are also two further important considerations to take into account:

38.1 Firstly, an interim interdict must be concerned with the future only and is not meant to affect decisions already made, such as those decisions

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46 See Caselines p. 2-17 to 2-31 (para 46-74 of the founding affidavit); p. 6-24 to 6-71 (para 26-56 of the answering affidavit).

47 See *Webster v Mitchell* 1948 (1) SA 1186 (W) 1189; *Gool v Minister of Justice* 1955 (2) SA 682 (C) 687-688; *Afrisake NPC v City of Tshwane Metropolitan Municipality* 2014 JDR 0620 (GNP) par [9].

which led to the statutory authorisations referred to in **paragraph 1 above**.[48]

38.2 Secondly, this interim interdict is in effect sought against the exercise of statutory powers with the result that a Court would only exercise its discretion to grant such an interim interdict under exceptional circumstances and where a strong case has been made out for the relief.[49]

39. The Applicants rely, for their alleged *prima facie* right to an interim interdict:

39.1 on the alleged right to protect their right to review;

39.2 on the alleged right to prevent the development from commencing on the basis of an alleged non-compliance with certain purported conditions precedent for mining or mining-related activities to commence; and/or

39.3 on the alleged right to prevent the development from commencing on the basis of an alleged expiry of the Water Use Licence and/or the alleged suspension of the Water Use Licence by reason of a statutory appeal under section 149 of the NWA.

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48 See *Afrisake NPC v City of Tshwane Metropolitan Municipality* 2014 JDR 0620 (GNP) par [8].

49 See *Afrisake NPC v City of Tshwane Metropolitan Municipality* 2014 JDR 0620 (GNP) par [9].

40. With reference to **paragraph 39.1 above**, we make the following submissions:

40.1 It is by now trite law that an applicant is not entitled to an interdict to protect its right to review.

> "*[50] Under the Setlogelo test the prima facie right a claimant must establish is not merely the right to approach a court in order to review an administrative decision. It is a right to which, if not protected by an interdict, irreparable harm would ensue. An interdict is meant to prevent future conduct and not decisions already made. Quite apart from the right to review and to set aside impugned decisions, the applicants should have demonstrated a prima facie right that is threatened by an impending or imminent irreparable harm. The right to review the impugned decisions did not require any preservation pendente lite.*"[50]

40.2 Even if we are wrong in this regard, and on the pre-constitutional approach which was less concerned with the Doctrine of Separation of Powers, we respectfully submit that the Applicants have in any event not shown good prospects of success in the various review applications. On the one hand, they have failed to do so in their founding affidavit through not even attaching and canvassing the contents of the record in those review proceedings. On the other hand, the answering affidavit demonstrated how misconceived, even mendacious and out of both the relevant legal as well as factual context, the case for the Applicants has

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50 See *National Treasury v Opposition to Urban Tolling Alliance* 2012 (6) SA 223 (CC) par [50[(footnotes omitted); *Afrisake NPC v City of Tshwane Metropolitan Municipality* 2014 JDR 0620 (GNP) par [10]; *KGP Media Investments (Pty) Limited v Passenger Rail Agency of South Africa* 2016 JDR 0758 (GP) par [15].

been presented in the founding affidavit.[51]

40.3 Also, the statutory authorisations, referred to in **paragraph 1 above**, remain in full force and effect until set aside by a court in a review application.

40.4 In the result there is no right, not even *prima facie*, to relief which prevent the development project from commencement simply because there are pending review applications.

41. With reference to **paragraph 39.2 above**, we make the following submissions:

41.1 The Applicants rely on four propositions,[52] namely that:

41.1.1 Uthaka does not have the written permission as contemplated in section 48 of the National Environmental Management: Protected Areas Act 57 of 2003[53] to conduct commercial mining in the Mabola Protected Environment;

41.1.2 the Mining Right of Uthaka has expired because mining has not commenced, as required by section 25(2)(b) of the MPRDA, within a period of one year or such extended

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51 See Caselines p. 6-28 to 6-55 (para 32-44 of the answering affidavit).

52 See Caselines p. 6-55 to 6-63 (para 45-51 of the answering affidavit).

53 Hereinafter referred to as the NEMPAA.

period as permitted in writing by the Minister for Mineral Resources;

41.1.3 before Uthaka may commence mining, it must first comply with the provisions of section 54 of the MPRDA; and

41.1.4 Uthaka must allegedly, prior to commencement of construction, develop a so-called Resettlement Plan in terms of condition 3.61 of its Environmental Authorisation.

41.2 To the knowledge of the Applicants, the Yzermyn Underground Coal-mining Project will no longer take place within or under the Mabola Protected Environment.

41.3 A Mining Right does not lapse or expire by virtue of non-compliance with section 25(2)(b) of the MPRDA.

41.3.1 Section 25(2)(b) of the MPRDA provides that the holder of a Mining Right must commence with mining operations within one year from the date on which the mining right becomes effective in terms of section 23(5) or such extended period as the Minister may authorise.

41.3.2 This did not happen because the Applicants prevented it

from happening with all of their litigation.

41.3.3 Section 56 of the MPRDA provides expressly for the circumstances under which a Mining Right expires or lapses.[54] An instance of non-compliance with section 25(2)(b) of the MPRDA is not one of those circumstances.

41.3.4 Clause 3.2 of the Mining Right[55] provides expressly what the sanction is for an instance of non-compliance with section 25(2)(b) of the MPRDA: the Mining Right may be cancelled or suspended.

41.3.5 A Mining Right is to be suspended or cancelled in terms of section 47 of the MPRDA but to date there has not been any such cancellation or suspension.

41.3.6 In the analogous case of section 19(2)(b) of the MPRDA,

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[54] Section 56 of the MPRDA provides as follows:

"***56. Lapsing of right, permit and permission.***
Any right, permit or permission granted or issued in terms of this Act shall lapse, whenever—
(a) it expires;
(b) the holder thereof is deceased and there are no successors in title;
(c) a company or close corporation is deregistered in terms of the relevant Acts and no application has been made or was made to the Minister for the consent in terms of section 11 or such permission has been refused;
(d) save for cases referred to in section 11(3), the holder is liquidated or sequestrated;
(e) it is cancelled in terms of section 47; or
(f) it is abandoned."

[55] See Caselines p. 6-2761 (clause 3.2 of the Mining Right, annexure **PT 6**).

this Court has already decided and ruled that a non-compliance with that provision does not result in the automatic expiry or lapsing of a Prospecting Right.[56]

41.3.7 The legal assumption upon which this proposition by the Applicants is based, is wrong.

41.4 Section 54(1) of the MPRDA provides that the holder of a Mining Right must notify the relevant Regional Manager if that holder is prevented from commencing or conducting any mining operations because the owner or the lawful occupier of the land in question—

(a) refuses to allow such holder to enter the land;

(b) places unreasonable demands in return for access to the land; or

(c) cannot be found in order to apply for access.

41.4.1 Only if one of these sets of circumstances is present, is it necessary to follow the procedure contemplated by section 54 of the MPRDA because no one is allowed to take the law into his or her own hands.

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56 See *Sephaku Tin (Pty) Ltd v Kranskoppie Boerdery* (Unreported judgment by Tuchten J in Case for 7561/2010 in the North Gauteng High Court, Pretoria, delivered on 7 May 2012) par [46]-[64] and especially par [65], where the Court concluded that a failure to commence prospecting activities within the prescribed period does not of itself and absent a decision validly taken under section 47 of the MPRDA, result in the lapsing of the Prospecting Right. An electronic copy of this judgment is available on the website of the Centre for Environmental Rights, the attorneys of record for the Applicants in this matter. There was no attempt in the founding affidavit, deposed to with the knowledge of those attorneys, to disclose this adverse judgment the Court.

41.4.2 None of the three circumstances as contemplated by section 54(1) of the MPRDA is present.

41.4.3 Not only is the legal proposition advanced by the Applicants wrong, there is also no factual basis triggering the applicability of section 54 of the MPRDA.

41.5 The development of a Resettlement Plan in terms of condition 3.61 of its Environmental Authorisation is not a condition that has to be fulfilled prior to commencement of the development project.

41.5.1 Condition 3.61 of the Environmental Authorisation[57] reads as follows (underlining for emphasis):

> "*If any of relocations of that homesteads are required, these must be addressed in accordance with the Resettlement Plan that is to be compiled as per the approved EMPr and in line with the relevant legislation, and also in accordance with the Social and Labour Plan to be regulated by the Department of Mineral Resources. The Resettlement Plan must be informed by the recommendations of the Socio-Economic Impact Assessment study as attached to the Amended EIR dated January 2015.*"

41.5.2 There is no time-frame provided or stipulated.

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[57] See Caselines p. 6-2920 (clause 3.61 of the Environmental Authorisation, annexure **PT 10**).

41.5.3 Nowhere in any of the other documents is it required that the Resettlement Plan must be finalised before the commencement of any activities.

41.6 In the result there is no right, not even *prima facie*, to relief which prevent the development project from commencement simply because of these alleged non-compliances.

42. With reference to **paragraph 39.3 above**, we make the following submissions:

42.1 The Applicants advance the proposition that Uthaka is not in possession of a valid Water Use Licence[58] on essentially three grounds, namely:

42.1.1 that, by virtue of condition 15 in appendix I of the Water Use Licence, the Water Use Licence has lapsed through the expiry of time;

42.1.2 that, by virtue of the non-compliance by the Director-General of the Department of Water and Sanitation with an order of the Water Tribunal (to, within 60 days of the decision by the Water Tribunal and before commencement of mining, review the adequacy of the financial provision provided for rehabilitation), the Water Use Licence has

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[58] See Caselines p. 2-27 to 2-29 (para 56-63 of the founding affidavit).

lapsed; and

42.1.3 that the decision of the Water Tribunal, to confirm the Water Use Licence, has been suspended by the statutory appeal on a legal question as contemplated in section 149 of the NWA.

42.2 With regard to condition 15 in appendix I of the Water Use Licence:[59]

42.2.1 The effect of this condition is that, if the water use described in the licence is not exercised within three years of the date of the licence, the authorisation is to be withdrawn by way of a separate administrative action and it does not lapse automatically by operation of law.

42.2.2 The provisions regulating the suspension or withdrawal of a Water Use Licence are to be found in section 54 of the NWA.[60]

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59 See Caselines p. 6-2855 (condition 15 in appendix I of the Water Use Licence, annexure **PT 8**).

60 Section 54 of the NWA provides as follows:

"***54. Suspension or withdrawal of entitlements to use water.***
(1) Subject to subsections (3) and (4), a responsible authority may by notice to any person entitled to use water under this Act suspend or withdraw the entitlement if the person fails—
(a) to comply with any condition of the entitlement;
(b) to comply with this Act; or
(c) to pay a charge which is payable in terms of Chapter 5.
(2) An entitlement may be suspended under subsection (1)—
(a) for the period specified in the notice of suspension; or

42.2.3 To date, the Water Use Licence of Uthaka has not been suspended or withdrawn.

42.2.4 There is no provision in the NWA nor any condition in the Water Use Licence that provides for the automatic lapsing or expiry of the Water Use Licence for non-use within three years of the date of the licence.

42.2.5 The legal assumption upon which the Applicants rely, is wrong.

42.3 With regard to the non-compliance by the Director-General of the Department of Water and Sanitation with an order of the Water Tribunal:[61]

42.3.1 The case for the Applicants is that, because the review was not done within 60 days, therefore the Water Use Licence lapsed automatically and by operation of law as if this was

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(b) until the responsible authority is satisfied that the person concerned has rectified the failure which led to the suspension.
(3) A responsible authority may only suspend or withdraw an entitlement under subsection (1) if the responsible authority has directed the person concerned to take specified steps to rectify the failure within a specified period, and the person concerned has failed to do so to the satisfaction of the responsible authority.
(4) The person concerned must be given an opportunity to make representations, within a reasonable period, on any proposed suspension or withdrawal of an entitlement to use water.
(5) A responsible authority may, for good reason, reinstate an entitlement withdrawn under subsection (1)."

61 See Caselines p. 6-2901 (para 172.2 of the order of the Water Tribunal, annexure **PT 9**).

a resolutive condition in a contractual sense.[62]

42.3.2 Firstly, the order of the Water Tribunal is not formulated as a condition for validity of the Water Use Licence. What the Applicants do, is to opportunistically transpose the rules and principles concerning conditions as found in the context of the General Law of Contract to the context of the Administrative Law.

42.3.3 Secondly, the order commands the review within 60 days and before mining commences. Mining has not yet commenced.

42.3.4 Thirdly, this order has been complied with: although not reviewed within 60 days of the order, the review has been done prior to the commencement of mining.[63]

42.3.5 There is also no substance in this proposition.

42.4 With regard to the alleged suspension of the Water Use Licence by reason of a statutory appeal under section 149 of the NWA:

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62 See Caselines p. 2-29 (para 63 of the founding affidavit).

63 See Caselines p. 6-66 (para 54.2 of the answering affidavit).

42.4.1 In terms of section 148(2)(b) of the NWA, the Water Use Licence was suspended pending the administrative appeal to the Water Tribunal, which was finalised on 22 May 2019.

42.4.2 As a result, the Water Use Licence itself is no longer suspended.

42.4.3 Whatever may be the legal effect on the decision of the Water Tribunal, of a statutory appeal on a legal question under section 149 of the NWA, it does not revive, either expressly or by necessary implication, the original suspension of the Water Use Licence.

42.4.4 In any event the special statutory appeal in terms of section 149(1) of the NWA is not an "*appeal*" as contemplated in section 18 of the Superior Courts Act 10 of 2013[64] and therefore the confirmation of the Water Use Licence by the Water Tribunal is also not suspended pending the outcome of this judicial appeal.

42.4.5 Firstly, the Water Tribunal is not part of the hierarchy of courts in the judicial branch of government as contemplated by section 18 of the Superior Courts Act.

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64 Hereinafter referred to as the Superior Court Act.

42.4.6 Secondly, the appeal decision by the Water Tribunal is not in the nature of a "*judicial action or decision*" (taken within the judicial branch of government) but rather in the nature of an "*administrative action*" as defined in section 1 of the Promotion of Administrative Justice Act 3 of 2000, taken within the executive branch of government.

42.5 Accordingly the Water Use Licence is valid, fully operational and in full force and effect.

43. In the result, the Applicants have not established any *prima facie* right whatsoever for the interim relief.

44. On this alternative ground, we therefore submit that this application should be dismissed with punitive costs, such costs to include the cost of two counsel.

NO REASONABLE APPREHENSION OF IRREPARABLE HARM

45. Nothing contained in the case for the Applicants, regarding an alleged reasonable apprehension of irreparable harm, is reliable or truthful, because everything is presented out of context and without disclosing to the Court all the relevant facts.

46. In the first place, the Applicants do not make out a case for any alleged

irreparable harm that they themselves (or even their alleged members) would suffer.

47. In the second place, the Applicants selected snippets of information from selected reports without putting the full reports before the Court. Once those full reports are considered in their proper context, it becomes apparent that the Applicants are misleading the Court.

48. In the third place, the Applicants presented their selected snippets of information without any regard for the proper context in which the various statements were made. The purpose of these reports and studies are to anticipate and identify potential consequences and impacts of the development. Typically this is done on a worst-case scenario, and it is this theoretical worst-case scenario that the Applicants chose to present to the Court as the unavoidable and inevitable consequences and impacts of the development project. However, this is not where the assessment process stopped. These potential consequences and impacts are also evaluated to determine the likelihood of any of them occurring, and all of the relevant potential consequences and impacts, as identified, were assessed to present an acceptable level of risk. This assessment was done on the basis of site-specific features and characteristics.

49. In the fourth place, the Applicants completely (and deliberately) ignore the copious provision that was made for rehabilitation and mitigation measures. These measures were introduced on the basis of specialist recommendations

and all of them show that the potential consequences and impact of the development will not be, and are not, irreversible but will indeed be manageable. All of the relevant statutory authorisations were given precisely because the totality of the available information convinced the authorities, entrusted with the specialised task of investigating this very issue, that the development will not cause any alleged "*irreversible harm*".

50. In the fifth place, the Applicants also have no regard for the constitutional imperative for sustainable development. Instead of taking into account the constitutional context which requires an integration of social, economic and environmental factors into planning, implementation and decision-making so as to ensure that development serves present and future generations, the Applicants exclusively and only focus on the environmental factor. Of course there is going to be an impact on the environment. No development whatsoever can take place without impacting to a larger or lesser degree on the environment. However, those environmental factors have been considered and assessed, together with site-specific detail and the recommended mitigation and rehabilitation measures. They were found not to be irreversible and to be manageable. The anticipated environmental impact was weighed against the social and economic benefits presented by the development. The outcome was an approval for a development that provides the most benefit or causes the least damage to the environment as a whole, at a cost acceptable to society, in the long term as well as in the short term.

51. In the result, the Applicants went out of their way to present a typically alarmist but false picture.

52. On the available facts and in truth there simply cannot be any apprehension of irreparable harm.

53. On this alternative ground, we therefore submit that this application should be dismissed with punitive costs, such costs to include the cost of two counsel.

BALANCE OF CONVENIENCE

54. We submit that the proper test for the balance of convenience is to weigh up the hypothetical situation if the interim interdict is not granted against the hypothetical situation if an interim interdict is granted.[65] Instead, the Applicants speculate on the various consequences and implications regarding the potential outcomes of the barrage of pending review applications, for which they have in any event not demonstrate any prospects of success.[66]

55. The *status quo* is that the development is lawfully-authorised, all the relevant statutory authorisations are in place and Uthaka is legally entitled to commence with mining and mining-related activities.[67]

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65 See Harms Civil Procedure in the Superior Courts: Volume 1 (Service Issue 69: October 2020) par A5.1

66 See Caselines p. 6-79 (para 70 of the answering affidavit).

67 See Caselines p. 6-79 (para 71 of the answering affidavit)

56. The Applicants gloss over the prejudice already suffered by Uthaka as a result of the delay over the past decade, caused by the Applicants and their allies. Only the holding costs, caused by the delay in commencement with this project, already amounts to some R 107,7 million of wasted costs.[68]

57. There is also no offer or tender by the Applicants to compensate or indemnify Uthaka for the loss or cost of any further delays that may be caused by such an interim interdict.[69]

58. Furthermore and if Uthaka does not commence with this project by at least fencing off the surface area required, Uthaka is at risk that some of its statutory authorisations may lapse through expiry of time[70] and then Uthaka will lose the millions already invested in this project.

59. Under the circumstances and if an interim interdict was to be granted, for which the Applicants have in the first place not established any *prima facie* right or any reasonable apprehension of irreversible harm, Uthaka will face a significant prejudice without any right of recourse.

60. Moreover, this development project represents a significant foreign investment in the capital-intensive mining industry of the Republic of South Africa. That mining industry is dependent on foreign investments for its survival. The

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68 See Caselines p. 6-81 (para 72.5 of the answering affidavit).

69 See Caselines p. 6-81 (para 73 of the answering affidavit).

70 See Caselines p. 6-2915 (para 3.7 of the Environmental Authorisation, annexure **PT 10**).

granting of an interim interdict under these circumstances will have the ripple effect of undermining the confidence of foreign investors in the mining industry of the Republic of South Africa.

61. On the other hand, and if an interim interdict was to be refused, the Applicants have not shown which real or actual prejudice they themselves (or their alleged membership) may suffer as a result. Prejudice in the air will not do. The evidence shows the environmental impacts or consequences will be neither permanent nor irreversible.[71]

62. Under the circumstances we respectfully submit that the balance of convenience is in favour of refusing the application for an interim interdict.

63. On this alternative ground, we therefore submit that this application should be dismissed with punitive costs, such costs to include the cost of two counsel.

COSTS

64. Firstly, the Applicants come to Court on the basis of the strength of their case in other matters but without attaching the record of those matters and without canvassing the *conspectus* of evidence in those matters. This is a reckless, vexatious and unreasonable manner of litigation.

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[71] See Caselines p. 6-82 to 6-83 (para 77 of the answering affidavit).

65. Secondly, when the Applicants are taken to task in a notice under rule 35(12) of the Uniform Rules of Court, they simply ignore the rule and do not provide the multitude of documents that they referred to in their affidavit but are not attached to the papers and are thus not before Court.

66. Thirdly, the Applicants, clearly deliberately, failed to disclose a number of material, significant and very relevant facts in their founding affidavit .[72] This shows an absence of faith, vexatiousness, an attempt to mislead the Court, unscrupulousness and even mendacity.

67. Fourthly, in addition to a failure to disclose, the Applicants in fact attempt to actively mislead the Court.[73]

68. Fifthly, the alarmist picture portrayed by the Applicants is clearly and deliberately false, to the knowledge of the Applicants, by amongst others abusing large scale instruments and ignoring the site-specific details of the mining area.[74]

69. Sixthly, this application is an abuse of the process of the Court, launched with the ulterior motive of deliberately delaying a legally-authorised development project from commencing.

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72 See Caselines p. 6-9, p. 6-32 to 6-33, p. 6-39 to 6-40, p. 6-52 to 6-53, p. 6-71 to 6-73 and p. 6-95 (para 4.3, 35.6, 36.3, 39.10, 57.2 and 113 of the answering affidavit).

73 See Caselines p. 6-52 to 6-53, p. 6-71 to 6-73, p. 6-98 to 6-99 and p. 6-100 to 6-101 (para 39.10, 57.2, 122 and 127 of the answering affidavit).

74 See Caselines p. 6-11, p. 6-45 to 6-51, p. 6-52, p. 6-74 to 6-75, p. 6-84 and p. 6-98 to 6-99 (para 5.5, 39.7, 39.9, 58, 59, 60, 64, 83 and 122 of the answering affidavit).

70. Seventhly, we refer the Court to the case law mentioned in **paragraph 41.3.6 above**. That case law was already known to the attorneys for the Applicants when the founding affidavit was being settled.

71. In the result we respectfully submit that there are special considerations in this matter which justifies a punitive costs order: not only are the circumstances such that it will be just to make an order so that Uthaka is not out of pocket but the conduct of the Applicants, leading up to and in these proceedings, should also be censured by the Court.

72. We therefore submit that this urgent application should be struck from the roll, alternatively postponed indefinitely, further alternatively dismissed, in each instance with costs on a punitive scale as between attorney and client, such costs to be paid jointly and severally by the Applicants, the one paying the other to be absolved, and such costs to include the cost of two counsel.

Adv MM Oosthuizen SC
Adv J Rust
Counsel for First Respondent
Parc Nouveau Chambers
Pretoria

11 March 2021