

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

Case No: A155/2019

Water Tribunal Case Number: WTO3/17/MP

In the matter between:

ENDANGERED WILDLIFE TRUST	First Applicant
FEDERATION FOR A SUSTAIBABLE ENVIRONMENT	Second Applicant

and

DIRECTOR- GENERAL (ACTING), DEPARTMENT OF WATER AND SANITATION	First Respondent
ATHA-AFRICA VENTURES(PTY)LTD	Second Respondent

FIRST RESPONDENT'S HEADS OF ARGUMENT

INTRODUCTION

1. The Appellants in this matter have twice failed to undo the decision of the First Respondent, dated 7 July 2016 granting a water use licence (WUL) subject to specific conditions to the Second Respondents ("Atha- Africa") ("the decision").

2. The WUL was granted¹ in respect of mining activity to be undertaken by Atha-Africa at its proposed Yzermyn underground coal mine (YUCM) located partially on farm Yzermyn, near Wakkerstrom within the Pixley ka Seme local municipality, in the Mpumalanga province.
3. On the surface, the YUCM's infrastructure is located on the northern Portion 1 of farm Yzermyn 96 HT, Wakkerstroom². and also touches arm of the mine surface infrastructure graphically depicted in the WUL application of Atha-Africa³.
4. The total surface area of the YUCM infrastructure is only 22.4 hectares⁴. This is the above-ground area that would be dedicated to offices, surface plant sites including the underground access adit, administration block, workshops, vehicle wash bays, optional waste water treatment plant, storm water management systems, roads and related services⁵.
5. The underground workings⁶ of the YUCM traverses about 8 360 hectares covering the underground area beneath farms Goedgevonden 95 HT; Portion 1 of farm Kromhoek 93 HT, remainder of farm Kromhoek 93 HT, portion 1 of Yzermyn 96 HT, and farm Zoetfontein 94 HT. Scientific evidence led demonstrated no connection between surface and underground water bodies.

¹ As reflected on the last page of the approved Record of Recommendations at Volume 13 at Appeal Record page 1327.

² Op cit figure 3 at Record page 1283.

³ Volume 25 at page 2428 of Appeal Record in Figure 1.1

⁴ Section 148 appeal paragraph 10 in volume 1 at page 8

⁵ Volume 13 at Appeal Record page 1287 to 1293

⁶ Paragraph 2.2 of WUL at page 1281 in volume 13 at page 1281 of Appeal Record.

6. The YUCM is topographically located in the upper reaches of the Assegai and Mawandlane rivers within the W51A Quaternary Catchment, which encompasses the Usuthu catchment region. The Usuthu contributes to the Heyshope Dam which is located 16.5 km to the North East of the YUCM surface. Geo-hydrologically, the respective watercourses are predominantly perennial in nature, located within the Usuthu to Mhlatuze Water Management Area
7. The mine itself will utilise underground conservative drill and blast, combined with continuous miners in a Bord and Pillar mining method, having an inclined portal or adit sunk from the northern section of the Yzermyn 96 HT target area, used to extract the Alfred and Dundas thermal coal seams forming part of the Utrecht coal field within the Karoo Supergroup geological unit.
8. The mine is prospected with a feasible area of 2 500 hectares⁷. There will be no opencast mining and no coal wash plant on site⁸. The coal is planned to be removed via conveyor systems to a Run-of Mine (ROM) raw coal stockpile at the surface where the coal would be crushed and screened into stockpile and carted by road off-site to the market.
9. The estimated lifespan of the YUCM is 15 years.

⁷ Atha-Africa WUL Application at Volume 25 on page 2427.

⁸ Volume 13 at page 1281

10. The Appellants, dissatisfied or somehow aggrieved by the decision, had filed on internal appeal with the Water Tribunal in the terms of section 148(1)(f) of the National Water Act 36 of 1998("NWA"). The Water Tribunal, exercising its statutory power in terms of section 148, dismissed the Appellants internal appeal on 22nd May 2019.
11. The appeal in this matter was launched thus, on the face of the section 148 internal appeal being dismissed.
12. The principal concern of the Appellants is that the environment within which the YCUM will be undertaken is 'environmentally sensitive', vulnerable and important from a regional and national perspective⁹.
13. It is necessary to underscore that "the surface area of the YUCM site- layout, and partially the underground working, are not "pristine" nor are they "undisturbed". The Appellants conceded the existing of previous audits showing previous mining which also proved no material connection between surface and underground water.
14. The evidence presented before the Water Tribunal expressly and indispensably confirmed that despite the water table being table, there will be no daylighting hence no expected decanting of water from the underground tunnels. Thus, the

⁹ Paragraph 23 at Appeal Record Volume 1 page 14 of the appeal record.

reasonableness and rationality test, are met as the balance of the risks is in this case, equitable¹⁰.

15. The site location (on the surface at least) and the wetlands in the vicinity are areas that were subject to historical human activity including agriculture, and even previous mining related developments.¹¹
16. Atha-Africa had contracted a number of experts in hydro-geology, environmental impact assessments and mining. The relevant reports formed part of Atha-Africa's bundle of application for the WUL¹².
17. The First Respondent considered the WUL through a process of Record of Recommendations (RoR). The final decision on the WUL was made subject to conditions to be complied with by Atha-Africa.
18. The WUL was approved in respect of water uses as contemplated in sections 21(a); 21(c)¹³; 21(i); 21(f); 21(g); and 21(j) of the NWA¹⁴.
19. The WUL was very sensitive to the environmental impact of the water uses applied for. To this extent, the First Respondent took into consideration mitigation factors in respect of the respective possible impacts of each

¹⁰Khanyisa Community Development Organisation and [2020] 2 All SA 485 (WCC) see para 36-37

¹¹ SAS Report paragraph 4.9.1 lines 15-20 at page 2491 Volume 25 of Appeal Record.

¹² See Volumes 13 to 21 of the Appeal Record.

¹³ Possible impacts of water activity on surface water.

¹⁴ WUL at page 1277 Volume 13 of Appeal Record.

approved water use. Thus, it issued the WUL subject to the conditions and mitigation factors listed on the WUL between pages 1311 and 1316 of the appeal record¹⁵.

20. For instance, in respect of alteration of water flows of the existing streams, the WUL required that the “downstream flows must be maintained during construction”. This would ensure that water is concentrated away from the collection points and is led to join the mains rivers.¹⁶
21. Also, in respect of deterioration of water quality, the WUL stipulated that “Standard best environmental practice housekeeping rules must be applied...”¹⁷
22. In respect of degradation of wetlands, the WUL stipulated a condition that “No discard dump and impacts associated with construction and operation of discard dump (i.e vegetation clearance, impact on sensitive species, impact on channelled valley wetlands, disturbance of cultural heritage sites and graves..etc)” will be permitted.¹⁸
23. The WUL, as stated above, followed a RoR process that saw the respective expertise within the Department being consulted. They made their inputs and

¹⁵ Volume 13.

¹⁶ Op cit at page 1311 line 12.

¹⁷ Op cit at page 1311 on line 18-22.

¹⁸ Op cit at page 1315.

recommended the approval subject to their respective comments and proposed conditions.¹⁹

24. Further, the WUL was only granted following public participation processes, and the relevant stakeholders and neighbouring farm owners that made objections were addressed by Atha-Africa's responses.²⁰ For instances, Atha-Africa re-engineered their proposed project lay-out after such public comments were raised and the relevant remedial steps, rendered the project acceptable for the public and the WUL.
25. Above all, the project was approved as it accorded with the principle in section 2(2) of the NEMA that it should put people first. Indeed, the Tribunal balanced the principle with the other elements in section 2(4) of the NEMA to ensure that there would be avoidance of significant pollution of the environment the central focus being to promote sustainable use of water resources.

SYNOPSIS OF GROUNDS OF APPEAL.

26. The Appellants have preferred eleven grounds of appeal in this Honourable Court. In brief, these are:

26.1. First ground of appeal, based on a question of law, whether the relevant factors including "without limitation", the fact that the mine area fell partly

¹⁹ Op cit at pages 1316 to 1317.

²⁰ See op cit at pages 1318 to 1322

within Enkangala Drakensburg Strategic Water Source Area as per the CSIR report of July 2013, and that in a further report of the CSIR in March 2018, the area was confirmed to fall entirely within the Enkangala Drakensburg Strategic Water Source Area (“the 2018 Strategic Water Source Areas Report) (i.e. The Strategic Water Source Areas ground of appeal”) (para 1-4)

- 26.2. Second ground of appeal, being that the Water Tribunal erred on the status of National Water Resource Strategy as a draft, and failing to take into account the evidence of Christine Calvin and David Le Maitre on the status of the of the NWRS, 20 (para 5-8) (“The NWRS ground”).
- 26.3. Third ground of appeal being that the Water Tribunal allegedly failed to consider as relevant, that the mine area forms part of a River Freshwater Ecosystem, Priority Area in the Atlas of National Freshwater Ecosystem Priority Areas (“the River Freshwater Ecosystem ground”).
- 26.4. Fourth ground of appeal is that the Water Tribunal erred in regarding it being irrelevant to consider the 2011 Coal and Water Futures Report by WWF-SA as it was not government policy. (“the Coal and Water Futures ground of appeal”);
- 26.5. Fifth ground of appeal is that the Water Tribunal erred in failing consider the special recognition afforded to the mine areas by other government departments (“the special recognition ground of appeal”);

- 26.6. Sixth ground of appeal is that the Water Tribunal erred in its considerations of the implications of section 24 of the NWA regarding the consent required from the owner of adjacent properties in respect of underground water traversing their properties. (“the section 24 ground of appeal”);
- 26.7. Seventh ground of appeal is that the Water Tribunal erred in its interpretation and application of section 2(4)(a) of the National Environment Management Act 107 of 1998 (NEMA), include the precautionary.
- 26.8. Eighth ground of appeal being that the Water Tribunal erred in its finding that the WUL made provision for a post-closure treatment of contaminated water. (“the treatment of water ground of appeal”).
- 26.9. Ninth ground of appeal being that the Water Tribunal erred when it found that the Appellants bore the duty to commission scientific evidence and also, that evidence not placed before the Second Respondent during public participation in terms of section 41(4) of the NWA was irrelevant. (“the section 41(4) ground of appeal”).
- 26.10. Tenth ground of appeal being that the Water Tribunal erred in finding that the Appellants had a duty to place evidence as regards socio-economic impacts when the statutory framework places that duty squarely on Atha-Africa. (“the socio-economic ground of appeal”).

26.11. Eleventh ground of appeal being that the Water Tribunal erred in finding that it could impose additional condition pertaining to financial security and thus dismiss the appeal. (“the additional condition ground of appeal”).

27. In support of each ground of their appeal, the Appellants submit that questions of law are raised thereby.

28. The First Respondent opposes the appeal and supports the decision of the Water Tribunal. The essence is that the appeal was decided after a sound and proper evaluation of the relevant facts and legal principles basis, was rational and the Water Tribunal acted in the interest of justice when it made its decision.

Before we deal with the grounds of opposition, it behoves the First Respondent, we submit, to provide an overview of the relevant legal framework on water use licences and the appeals in respect thereof.

APPEAL LEGAL FRAMEWORK

29. The appeal currently before this Honourable is brought in accordance with the provisions of section 149 of the NWA.

30. Section 149 of the NWA provides that a party dissatisfied with a decision of the Water Tribunal may appeal to this Honourable Court, purely on questions of law against that decision.

31. Section 149(4) of the NWA provides that the appeal to this Honourable Court must be prosecuted as if it were “an appeal from the Magistrates Court.”
32. Section 83 of the Magistrates Court Act provides thus:

“83. Subject to the provision of section 82, a party to any civil suit or proceeding in a Court may appeal to the provincial or local division of the (High) Court having jurisdiction to hear the appeal...”
33. Section 87 of the Magistrate Court Act provides for the procedure in appeals. It grants this Honourable Court with the power to either confirm, vary or reverse the judgement appealed against, “as justice may require.”
34. On the other hand, section 19 of the Superior Court’s Act 10 of 2013 (“the Superior Court’s Act”), provides in relevant portions that the SCA or this Honourable Court “may in addition to any power as may specifically be provided for in any other law ...dispose of an appeal without the hearing of oral argument, or confirm, amend or set aside the decision and render any decision which the circumstances may require.”
35. The fragment of our appeal legal system recognises the need to resist willy-nilly infraction of judicial decisions.

36. It has been said that “ a court of appeal is not entitled to set aside the decision of a lower court exercising a discretionary power “merely because the court of appeal would, itself, on the facts, have come to a different conclusion²¹.
37. We submit that as was laid profoundly in the matter of *Shepstone and Wylie v Greyling NO* 1998(3) SA 1036(SCA) at 1044J-1045A, the appeal court should be loath to interfere, unless it is established on the facts and the evidence, that the lower court, i.e. the Water Tribunal, acted capriciously or upon an incorrect principle or otherwise did not apply itself to the judgement it made. This was also fortified by the Supreme Court of Appeal in **General Council of the Bar of South Africa & Others** 2013 (2) SA 52 SCA where Nugent JA (as he then was) stated:

[57] At the third stage of the enquiry the sanction that should be imposed lies in the discretion of the court. Where a discretion is conferred it implies that the matter for decision has no single answer and calls for judgment, upon which reasonable people might disagree. That being so a court on appeal is restricted to determining whether the decision-maker has correctly gone about the enquiry. If he or she has correctly gone about the enquiry then a court on appeal may not interfere with the decision, albeit that it considers the decision to be wrong.

[58] That restriction upon the power of a court to interfere on appeal was expressed as follows in *Kekana v Society of Advocates of South Africa*:

'(A)ppellate interference with the trial Court's discretion is permissible on restricted grounds only. In *Beyers v Pretoria Balieraad* 1966 (2) SA 593 (A) at

²¹ *Makhanya NO and another v Goede Wellington Boerdery (Pty) Ltd* [2013]1 All SA 526 (SCA) para 36.

605F – H, *Olivier v Die Kaapse Balieraad* 1972 (3) SA 485 (A) at 495D – F and *Swain v Society of Advocates, Natal* 1973 (4) SA 784 (A) at 786H C ad fin the grounds for interference are stated in slightly different terms, but the approach is essentially the one adopted in all other cases where a Court of Appeal is called upon to interfere with the exercise of a discretion, viz that interference is limited to cases in which it is found that the trial Court has exercised its discretion capriciously or upon a wrong principle, or has not brought its unbiased judgment to D bear on the question, or has not acted for substantial reason. (See *Benson v SA Mutual Life Assurance Society* 1986 (1) SA 776 (A) at 781I – 782A and the cases referred to there.)'

[59] In *Fine v Society of Advocates of South Africa (Witwatersrand Division)* 16 it was expressed differently, but to the same effect, when the court said that —

'the Appeal Court will only interfere with the exercise of this discretion on the grounds of material misdirection or irregularity, or because the decision is one no reasonable Court could make. (See *Nyembezi v Law Society, Natal* 1981 (2) SA 752 (A).)'

[60] There are two enquiries to be made when exercising a discretion. The first is to establish the material facts. The second is to evaluate those facts towards the correct objective. The various grounds for interference referred to in the cases merely identify the failures that might occur in that process. Where the conclusion arrived at has been actuated by bias, or is capricious, there has been no evaluation at all. Where the evaluation proceeds from incorrect facts, or from an incorrect appreciation of the law, or where a wrong principle is applied, the evaluation has gone in the wrong direction. As this court said *S v Pillay*, 17 which related to criminal sentencing in which the same principles apply, 'misdirection in the present context simply means an error committed by the

Court in determining or applying the facts for assessing the appropriate sentence'.

[61] Misdirection of the enquiry might be revealed by the express language of the reasoning, or by necessary inference from that expressed reasoning, or by an outrageous conclusion. For if the conclusion it came to is one that 'no reasonable court could make' 18 it can be inferred that somewhere along the line it must have misdirected its enquiry, or acted with bias or been capricious, or acted upon a wrong principle, notwithstanding the language in which it expresses its reasoning. But in reasoning along those last lines a court must be careful not to cast itself as the archetypal reasonable court, and reason from there that because its view of the matter differs from that of the court below, the decision of that court is one that could not reasonably have been made. The question is not whether a reasonable court could have reached a different conclusion, but instead whether a reasonable court could not have reached the conclusion that it did.

[62] When analysing the language of the decision-maker it needs always to be kept in mind that a judgment is generally written to inform the parties why they have respectively won and lost and not only with an eye to an appeal. For that reason a court of appeal should not scrutinise the language as if it was construing a statute. In particular it must not be thought that a point was overlooked only because it was not expressly mentioned. As this court said in *Lepholletsa v S*, which was an appeal against sentence, in which the same principles apply:

'Soos opgemerk in vorige uitsprake van hierdie Hof (wat ek nie nodig ag om aan te haal nie) dui die blote versuim om 'n besondere feit of aspek van die saak pertinent in 'n uitspraak te opper, nie noodwendig daarop dat dit nie oorweeg is nie.'

GENERAL OVERVIEW OF WATER USE LICENCE LEGAL FRAMEWORK

38. The Constitution provides that everyone has the right to an environment that is not harmful to their health or wellbeing; and to have their environment protected, for the benefit of present and future generations. The provisions in section 24(b) states that the protection of the environment should be achieved by way of “reasonable legislative and other measures that amongst others, secure ecological sustainable development and use of natural resources while promoting justifiable economic and social development.
39. Section 146(2) of the Constitution provides that national legislation that applies uniformly with regard to the country prevails over provincial legislation if, amongst others, such national legislation is necessary for amongst others, the protection of the environment.
40. The NWA was enacted to “provide for fundamental reform, of the law relating to water resources” amongst others. In its preamble, the NWA amongst others, flows from a recognition that “the ultimate aim of water resource management is to achieve the sustainable use of water for the benefit of all the users.”
41. Section 21 of the NWA provides that the purpose of NWA is amongst others, to redress the results of past racial and gender discrimination and to promoting the efficient, sustainable and beneficial use of water in the public interest and also to facilitate social and economic development.

42. The related policy and strategy obligation in respect of water resources, are regulated in terms of section 5 of the NWA. Section 5(4) provides that a national water resource strategy may be established over time and must be reviewed at intervals of not more than five years.
43. Section 5(5) of the NWA provides the procedure which “must” be complied with by the Minister “before publishing a national water resource strategy or any component of that strategy.
44. The Minister is thus, imperatively required to:
- “5(5)...
- (a) Publish a notice in the Gazette-
- i. setting out a summary of the proposed strategy or the component in question,
 - ii. stating the address where the proposed strategy or the component in question is available for inspection;
 - iii. inviting written comments...”
45. The Minister is further required to consider further any other steps and all comments received from the public participation process in respect of the application, as received before the specified date.”
46. Section 21 of NWA provides for the uses of water that are permissible in terms of the NWA or are subject to specified condition. These include such uses as

taking water from a water resource, engaging in a controlled activity; discharging waste into a water resource through a pipe, canal, sea fall or conduit.

47. The use of water in respect of permissible activity, is provided for in section 21 read with section 22 of the NWA. Other than existing lawful use or use under general authorisation (e.g. domestic use of water) all other water uses must be authorised in terms of sections 40 to 42 of the NWA.
48. When considering applications for water use licences, the responsible authority (in this case the Director- General) should be guided by the provisions of section 27 of the NWA.
49. In essence, whilst the provision of section 27(i) of the NWA require that specific factors should considered in respect of the relevant water use applied for it is worth noting that the provision in section 27(i) of the NWA requires the responsible authority to take into account “all relevant factors.”
50. We pause to point out that none of the criteria set in section 27 of the NWA is hierarchical, but that all should be balanced, considering the water uses applied for. Some of the factors mentioned in section 27(i) are efficient a beneficial use of water in the public interest; the socio-economic impact of the water use, and the strategic importance of the water use to be authorised.

51. As pointed out by the Water Tribunal in its decision, a number of Court judgements dealt with the balancing exercise contemplated in section 27(1).

52. Foremost of these, is the SCA judgemental of *Makhanya NO v Goede Wellington Boerdery (Pty) Ltd* [2013] 1 All SA 526(SCA) para [33] where the following was said:

“Much like the situation facing the court in *Bato Star*²², section 27(1)(b) contains a wide number of objectives and principles. Some of them may be in conflict with one another, as they cannot be fully achieved simultaneously. There may also be many different ways in which each of the objectives stand to be achieved. The section does not give clear guidance on how the balance an official must strike is to be achieved in doing the counterweighing exercise that is required.”

53. The Water Tribunal when crafting its decision path, sought to “concomitantly harmonise” the need to prevent pollution or environmental degradation with the duty to promote a “justifiable economic and social development” guided by the expert scientific evidence before it.

54. In *Fuel Retailers*²³ case the Constitutional Court found that:

²² *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Others* [2004 \(4\) SA 490 \(CC\)](#) (2004 (7) BCLR 687):

²³ *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)

“[44] What is immediately apparent from section 24 is the explicit recognition of the obligation to promote justifiable” economic and social development. “this Court has recognized that socio-economic rights that are set out in the Constitution are indeed vital to the enjoyment of other human rights guaranteed in the Constitution.”

55. In its approach to the question before it, the Water Tribunal further took cognisance of the relevant international instruments and standards.

56. Having considered the relevant authorities, and its perspective of the facts before it, the Water Tribunal found that “It has also been necessary to dispel any notion that there is no “right to development in the Constitution.” We affirm our firm belief that the Constitution in protecting the right to an environment not harmful [to] health and well-being, in the same section confirmed the right to socio-economic development that is [ecologically] sustainable.”

57. In its findings, in particular in relation to the relevant principles relating to the precautionary principles as required by section 2 of the National Environmental Management Act 107 of 1998 the Water Tribunal correctly held that:

“152. We also set out upfront that our decision is informed and grounded in the principles of environment management is section 2(4) of NEMA.”

Further that:

“The NWA is a specific environmental management act [that] must be guided by the NEMA principles.”

58. The Water Tribunal correctly so- we submit-analysed the section 2 principles as being to:

“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.”

59. In further anchorage of the above precept held by the Water Tribunal, it is necessary to refer to the provisions of section 2(2) of the NEMA, which states:

“Environmental Management must place people and their needs at the forefront of its concern, and serve their physical, psychological, development, cultural and social interests equitably.”

60. The Water Tribunal further underscored its approach on the basis of written authorities on the environment as reflected on page 102²⁴ of its decision.

61. The above was in accordance with the observation in *Fuel Retailers* case that:

*“[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 C 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.” [Our emphasis]*

PRINCIPLED GROUNDS OF OPPOSITION

62. The First Respondent opposes the appeal on the following principles basis:

62.1. First, the Water Tribunal is established as an independent body which has jurisdiction in the Republic of South Africa and may conduct hearings anywhere in the Republic.

62.2. The Water Tribunal is empowered in terms of section 148(1)(f) of the NWA to hear appeals regarding decisions of the responsible authority on an application for a water use licence, by a person who had timeously lodged a written objection against an application.

62.3. The powers and function of the Water Tribunal are equivalent to those of an administrator considering the application as if *de novo*.

- 62.4. The Water Tribunal, empowered by the provisions of section 148, considered the facts and evidence before it and decided to dismiss the section 148 appeal as it did, based on well-reasoned legal grounds.
- 62.5. Several of the grounds of appeal are premised on mere legal interpretation not backed by the scientific evidence on the ground as tested by the First Respondent and/or the Tribunal, and is based on conjecture and reference even to records that were never presented before the two at the time of consideration of the matter when the relevant decision was made.
63. There is no reasonable likelihood, alternatively, no prospects exist for the appeal in this Honourable Court, or any other, to succeed.
64. It is submitted that a level of deference as contemplated in *Bato Star* must be exercised by this Honourable Court. This is much so because the Water Tribunals, as if a magistrate's court, had the optimum or panoramic view of the evidence and testimony of expert witnesses, and it has interacted within that atmosphere of the hearings.
65. In its decision, the Water Tribunal was able to test, review and evaluate each witness and was even presented with demonstrations in respect of the water uses in question.

66. The Water Tribunal is its capacity on an internal appeal mechanism, contemplated in section 148, is empowered to consider and decide on principle the question whether, in the circumstances of the Atha-Africa WUL, the responsible authority exercised the discretion to grant such WUL, correctly? And if not, based on the record and any new facts and evidence before it, whether it can come to a different decision?
67. The Water Tribunal found that the initial decision was thus warranted and itself having considered new evidence and specialist expert testimony upheld the decision with necessary modifications.
68. In the premises the Water Tribunal's decision is on a discretionary power conferred in respect of the granting of WUL. Not only that, but in this case that discretion was judiciously exercised on the basis of solid legal reasoning.
69. The decision of the Water Tribunal carried in about 147 pages, clearly, was based on an analysis of the documentary material presented which is voluminous and extensive and was led over 7-days. The Water Tribunal regarded the evidence as being summarised in "high level synopsis" of the relevant aspects.
70. Evidently, the Water Tribunal analysed the evidence of the various witnesses presented by the parties. The Water Tribunal quite profoundly, also noted several contradictions and concessions made by the witnesses of the Appellants which contradict the grounds of appeal.

71. For instance, at paragraph 65.8(Record page 5149), the Water Tribunal noted with concern that “in cross examination Mr Johnstone’s evidence was demonstrated to be unrealistic and later on unequivocally controverted by Dr Witthüser (the Second Respondent’s expert).
72. Further still, the Water Tribunal found that the Appellant’s evidence relating to the mitigation measures and the post-closure treatment plant was, after being subjected to field-based evidence of Atha-Africa proved to be merely “a desktop review” of field based reports, and thus there were “ consequently visible contradiction, baseless assumption and gaps” in the Appellants’ witness testimony. It is this testimony on the basis of which the Appellants mounts legal arguments on this appeal.
73. Several other instances present in the Water Tribunal’s decision, point out- we respectfully submit a number of defects in the Appellants case and thus their objective to the Yzermyn Project, became unsubstantiated and thus baseless. It is merely driven by a campaign against any form of use of coal, whether lawful or not. Even if a WUL applicant, as in this case, complies with all the legal prescripts and standards, the Appellants admitted that they will always oppose such decisions.
74. The reasonable and just conclusion to be made, we submit, is that indeed, the Water Tribunal’s decision was based on a proper analysis of the relevant facts and the proper application of the law to the specific case before it. Critical

national reports and policy documents are important, yet when it comes to legal decision-making, the specific circumstances of a case should be addressed. The Appellants failed to show, and in this appeal have not demonstrated, that under the circumstances of this WUL the decision arrived at is incorrect. It is not, we submit, a decision capriciously or unreasonably made, and neither is it made without basis in law.

75. The grounds on which the Appellants found their appeal largely concern the assessment and evaluation of scientific evidence about risk, certainty and probabilities which informs application of the relevant legal principles. On those that are relevant to points of law, we submit that the Water Tribunal properly interpreted and applied the law and there is no basis to fault its approach and reasoning purely on points of law. Any other view entails second-guessing factual scientific expert evidence which is beyond the scope to appeals from the Water Tribunal.

76. In the premise, the decision of the Water Tribunal, as with the decision of the Department, were both based on facts, including both scientific facts and legally sound evidence presented, and thus are lawful, rationally connected to the purposes for which they were exercised as discretionary powers, and are justifiable in the context of the various mitigation factors provided for in the WUL and in the Water Tribunal's own decision. They ought not be interfered with, as they were not made out of malice or ulterior consideration. It is not for this honourable court to simply overturn the decision appealed against because the

Appellants posit another alternative reasonable outcome, or that they ideologically disagree with the consequences of the Water Tribunal's decision.

77. In the premises, in it submitted that the respective grounds of appeal, do not detract from the legality, reasonableness, and constitutionality of the decision of the Water Tribunal.

WHEREFORE the First Respondent prays that the appeal be dismissed with costs including the costs of counsel.

M MPHAGA SC

M MATHAPHUNA

COUNSEL FOR THE FIRST RESPONDENT

PRETORIA

14 AUGUST 2020