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	First Applicant
GROUNDWORK	Second Applicant
BIRDLIFE SOUTH AFRICA	Third Applicant
ENDANGERED WILDLIFE TRUST	Fourth Applicant
FEDERATION FOR A SUSTAINABLE ENVIRONMENT	Fifth Applicant
ASSOCIATION FOR WATER AND RURAL DEVELOPMENT	Sixth Applicant
THE BENCH MARKS FOUNDATION	Seventh Applicant
and	
UTHAKA ENERGY (PTY) LTD	First Respondent
MEC FOR AGRICULTURE, RURAL DEVELOPMENT, LAND AND ENVIRONMENTAL AFFAIRS, MPUMALANGA	Second Respondent
THE MINISTER OF ENVIRONMENT, FORESTRY AND FISHERIES	Third Respondent
THE MINISTER OF MINERAL RESOURCES AND ENERGY	Fourth Respondent
MINISTER OF HUMAN SETTLEMENTS, WATER AND SANITATION	Fifth Respondent
ACTING CHIEF DIRECTOR: ENVIRONMENTAL AFFAIRS, DEPARTMENT OF AGRICULTURE, RURAL DEVELOPMENT, LAND AND ENVIRONMENTAL AFFAIRS, MPUMALANGA	Sixth Respondent
GERT SIBANDE DISTRICT MUNICIPALITY	Seventh Respondent
DR PIXLEY KA ISAKA SEME LOCAL MUNICIPALITY	Eighth Respondent
THE WATER TRIBUNAL	Ninth Respondent
ESTATE OF LATE PIERRE WILLIAM BRUWER UYS	Tenth Respondent

Centre for Environmental Rights c/o Gildenhuys Malatji Inc.
Tel: 073 135 8770; (012) 428 8608

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OCCUPIER OF PORTION 1 OF THE FARM YZERMYN 96 HT	Eleventh Respondent
THE VOICE COMMUNITY REPRESENTATIVE COUNCIL	Twelfth Respondent
THE MABOLA PROTECTED ENVIRONMENT LANDOWNERS ASSOCIATION	Thirteenth Respondent

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APPLICANTS' REPLYING AFFIDAVIT

I the undersigned,

NKWANE ELTON THOBEJANE

do hereby make oath and state that:

1. I am the chairperson of MEJCON-SA. I am the deponent to the founding affidavit in this urgent application, and I am duly authorised to represent the applicants and to depose to this replying affidavit.

2. The facts deposed to below are within my personal knowledge. To the best of my belief, the facts are true and correct. Legal submissions are made on advice of the applicants' legal representatives.

3. Words and terms as defined in the applicants' founding affidavit bear the same meaning in this replying affidavit.

4. I have read and considered Uthaka's answering affidavit deposed to by Praveer Tripathi and the twelfth respondent's ("the Voice") answering affidavit deposed to by Thabiso Moses Ncala. This affidavit is the applicants' reply thereto.

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5. I do not intend to deal with the allegations contained in the answering affidavits paragraph-by-paragraph and my failure to do so should not be construed as an admission or acceptance of such allegations. To the extent that the submissions contained in the answering affidavits are in conflict with what is stated in this affidavit and in the applicants' founding affidavit, they must be taken to be denied.

Uthaka's answering affidavit

6. Uthaka's answering affidavit is 95 pages long with annexures that extend to more than 5,800 pages. I submit that the unnecessarily prolix answer is an attempt by Uthaka to have this matter not heard on the urgent roll, burdens this Court and is an abuse of process. Uthaka also incorrectly attempts to have the merits of the pending reviews and appeals determined by this Court.

7. Uthaka suggests that the applicants have misled this Court and makes various allegations regarding the conduct of the applicants and their legal representatives. These are unfounded and are denied.

Jurisdiction and pending applications (ad paras 12-24)

8. Uthaka contends that this application should have been lodged either in the local division of the Gauteng High Court in Johannesburg, or in the main division of the Mpumalanga High Court in Mbombela.

9. I am advised that there is no merit to Uthaka's contention. The local division (Johannesburg) has concurrent jurisdiction with the main division (Pretoria) until such time that the area of jurisdiction of the local division is determined in terms of section 6(3) of the Superior Courts Act 10 of 2013. I am further advised that

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notwithstanding the judgment referred to by Uthaka at paragraph 5.2 of its answering affidavit, which is distinguishable for reasons that will be addressed in argument, this still persists.

10. Uthaka asserts that there is pending litigation between the same parties based on the same cause of action outlined in the notice of motion, and that this application should be struck from the roll and stayed, at least until the application under case number 1390/2018 in the Mpumalanga Division has either been finalised or withdrawn. I am advised that there is no merit to this contention for the following reasons:

    10.1. The interim relief sought in this application differs from the relief sought in the applications under case number 1390/2018 and 1344/2020 in the Mpumalanga Division. The interim relief sought in those applications is limited to the final determination of the review that is the subject matter of each application. This application seeks an interim interdict pending the finalisation of all pending reviews and appeals, as well as a review of the MEC's decision to exclude the properties from the Mabola Protected Environment to be instituted by the end of April 2021. There are two pending reviews before the Mpumalanga Division of the High Court and there are three pending proceedings before this Division.

    10.2. The 2017 interdict application under case number 41970/2017 culminated in a settlement agreement between the parties that was made an order of court (annexure FA1). I am advised that there is no merit to Uthaka's contention that the application was never finalised or

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that these proceedings are pending and / or exist as an avenue of recourse available to the applicants.

10.3. It is not correct that all the necessary papers have already been filed in the pending review under case number 1390/2018 (Mpumalanga Division) and that the facts and issues have been fully ventilated as asserted by Uthaka. Uthaka fails to disclose to this Court that it only filed its answering affidavit in that pending review on 1 March 2021 (consisting of a 394 page affidavit with 569 pages of supporting annexures and an additional bundle of 3,437 pages), thirty minutes before it gave notice of its intention to commence mining-related activities. The applicants have not filed a reply and the facts and issues have not been fully ventilated.

The applicants' *prima facie* right (ad paras 26-56)

11. It is not correct, as Uthaka contends, that the relief sought by the applicants is final in effect. The applicants deny that the final determination of the pending reviews and appeals will take another decade to complete. The applicants seek interim relief that does not involve or effect the final determination of the applicants' or Uthaka's rights.

12. I am advised that it is trite that when determining whether a *prima facie* right has been established, the right need not be shown by a balance of probabilities. It is sufficient if the right is *prima facie* established, though open to some doubt.

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13. Uthaka alleges that when seeking an interim interdict pending reviews and /or appeals, applicants must show that they will succeed on the merits in those reviews and / or appeals on a balance of probabilities.

14. Uthaka is wrong. Applicants need show only a prospect of success in those appeals and / or reviews. I submit that the applicants have shown a prospect of success in each of the pending reviews and / or appeals.

15. In addition, the applicants have shown that they have a *prima facie* right to stop the commencement of mining related operations/activities because according to section 5 and 5A of the MPRDA, mining operations cannot commence until all authorisations/permissions have been obtained. Uthaka does not have a valid water-use licence. The pending appeal has not lapsed, as alleged by Uthaka. The appeal was allocated 8 June 2021 for hearing but as the parties to the appeal are agreed that 2 days are necessary, in December 2020 CER sought an allocation of 2 days and has been in fairly constant contact with the Appeals Registrar and the Acting Deputy Judge President's office since then reiterating that request for an allocation of 2 days. A copy of the Registrar's notice of allocation is attached as RA1. The remainder of Uthaka's allegations in this regard are legal argument and will be addressed at the hearing of this matter, if required.

16. Given the applicants' strong prospects of success in the pending legal proceedings, there is less prejudice occasioned by a delay in the commencement of mining-related activities and operations. Uthaka should not be permitted to build itself into an impregnable position by the time the pending legal proceedings are heard.

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17. I submit that the interim relief sought by the applicants is indispensable to preserving the integrity of the applicants' position, pending final determination of the matters on review.

Well-grounded apprehension of irreparable harm (ad paras 57-68)

18. The applicants' concerns about irreversible environmental harm are serious precisely because of where that harm will occur – in an area of extreme environmental sensitivity, portions of which are irreplaceable that have been identified and recognised through the investments, research, policies and initiatives to implement those policies referred to in the founding papers. The applicants are not required to establish actual harm on a balance of probabilities (as alleged by Uthaka). They are required only to establish a reasonable fear of irreparable harm. That has been established (if mining related activities/operations were to commence) on reports submitted by Uthaka in support of its applications for various authorisations and licences.

19. The harm that is anticipated in a SWSA is a cause for serious concern and forms one the main grounds for the applicants' efforts to challenge the authorisations granted to Uthaka as irrational and unlawful. As indicated in the founding affidavit and despite Uthaka's contentions otherwise, the proposed mine will result in irreparable harm to the environment. The Water Tribunal found that it was common cause that the mine "will certainly result in a degree of contamination of groundwater and indeed surface water", that the volume and quality of decant post-mining is uncertain, and that there is uncertainty regarding the adequacy of the proposed mitigation measures. Furthermore, the clearing of vegetation which

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consists of irreplaceable biodiversity will result in irreversible environmental harm to the wetlands.

20. The harm is apparent from the activities to be undertaken by Uthaka in its surface infrastructure site preparation in terms of the environmental authorisation, one aspect of which provides as follows:

> "The site for surface infrastructure will be cleared of all vegetation during the construction phase. The area to be cleared has been calculated at approximately 224 028 m^2. According to the Pixley KaSeme Local Municipality EMF (2011), the prospecting right falls within a critical biodiversity area (CBA). Portions of the mine area are also recognized in the Mpumalanga Biodiversity Sector Plan (MBSP) as Irreplaceable and Optimal Critical Biodiversity Areas (CBAs). The mine lies within an Endangered ecosystem; the Wakkerstroom Montane Grassland (Gm 14)." (Emphasis added)

Uthaka's environmental authorisation is attached as PT10 to its answering affidavit. However due to the unreasonable prolixity of those papers, I attach the relevant pages of the environmental authorisation as RA2.

Balance of convenience (ad paras 69-79)

21. The prejudice that will result should the court not grant an interim interdict far outweighs any prejudice alleged by Uthaka.

22. Uthaka cannot now seek to rely on its environmental authorisation lapsing on 7 June 2021 as a basis for prejudice in circumstances where it took more than a year to file its answering affidavit in those review proceedings, and only after it was compelled to do so under notice in terms of rule 30A(1). A copy of the notice in terms of rule 30A as well as correspondence from the applicants' attorneys of record, dated 12 February 2021, is attached as RA3. Had Uthaka filed its

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answering affidavit when it first became due or when first called upon to do so, the review application in respect of its environmental authorisation would likely have been determined by now. The applicants deny the prejudice alleged by Uthaka.

23. The fear is that if it does not commence mining activities, it will lose its environmental authorisation. 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 pegging of the approved plan (activity 2 in the Gantt Chart) only. That should prevent Uthaka's environmental authorisation from lapsing.

24. The applicants do not admit the expenditure that Uthaka is alleged to have incurred. But even if it has incurred that expenditure, it has always known, or reasonably should have known that the environmental sensitivity and significance of the area was going to be a risk in relation to the proposed coal mine. In fact, the applicants' first challenge to its right to mine occurred as far back as 30 March 2015. Since that time, Uthaka assumed the risk of investing in the face of challenges to its right to mine.

25. After it is allowed to start mining, that complaint will strengthen at the just and equitable stage of any of the reviews. It will allege that it has invested even more, and therefore should be allowed to continue, even if a review succeeds, its right or authorisation to mine is unlawful, and in the face of irreparable harm to the environment.

26. Such developments are by their very nature high risk and require intensive capital investment, frequently while those risks remain in place. In any event, I submit that

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the alleged financial prejudice suffered by Uthaka does not outweigh the harm that stands to be inflicted on the environment and the people who depend on it, given the demonstrated national strategic importance of the area from a biodiversity and water security perspective.

27. If Uthaka is allowed to commence with its mining-related activities, the applicants will be severely prejudiced at the just and equitable stage of any of the reviews. At that stage, the prejudice will have swung against applicants and in favour of Uthaka. It would then make it practically impossible for the applicants to obtain the relief sought in the pending legal proceedings.

No alternative remedy (paras 80-81)

28. There is no satisfactory or adequate alternative remedy available to the applicants to stop Uthaka's mining-related activities from commencing on 24 March 2021.

29. Uthaka's contention that mining will not commence on 24 March and only the fencing on the surface is opportunistic and is in any event contradicted by the slew of activities Uthaka intends undertaking from 24 March 2021. Uthaka has failed to provide an answer to the fact that the applicants have no alternative remedy at their disposal.

Urgency

30. Uthaka will commence with mining-related operations on 24 March 2021. Uthaka's statement that it will specifically commence only with the fencing of the area on Portion 1 of the Farm Yzermyn required for purposes of the surface infrastructure of the mine is not only misleading but is also contrary to its Gantt Chart. The mining-

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related operations Uthaka intends to undertake are clearly not limited to perimeter fencing.

31. It is also incorrect and misleading to assert that the only invasive activities will commence in December 2021. As indicated in the founding affidavit, by virtue of the fact that Uthaka requires a water use licence in order to establish a perimeter fence, that activity alone is invasive and harmful. Such fence will run through two wetland systems. On its own version, Uthaka will as soon as May 2021 pick and relocate protected medicinal plants in terms of a permit issued by the Mpumalanga Tourism and Parks Agency.

32. Applicants cannot obtain an order to stop the commencement of mining activities after 24 March 2021. Commencement would have begun after that date.

The Voice's affidavit

33. The applicants note the content of the Voice's affidavit. The Voice does not oppose the relief sought by the applicants and does not respond to the applicant's founding affidavit. I respectfully submit that the Voice's affidavit thus has no bearing on the issued to be determined by this Court.

Costs

34. If successful, Uthaka and any other respondent who opposes this application should be ordered to pay the applicants' costs, including the costs of two counsel.

35. However, if this application is dismissed, in accordance with section 32(2) of NEMA and the *Biowatch* principle, no costs order should be made against the

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applicants. The applicants are non-profit public interest bodies, acting in the public interest in these proceedings. They have not acted vexatiously, frivolously or unprofessionally. They have made every effort to use other means reasonably available, as evidenced by the comprehensive approach they have taken to challenging the licences awarded to Uthaka that they assert were unlawfully granted. Furthermore, the applicants addressed a comprehensive letter to Uthaka's attorneys on 3 March 2021 (FA19) providing Uthaka with an opportunity to, *inter alia*, advise the applicants of the precise activities (including full details of the precise location and extent of the fencing and every activity that will follow on the fencing) and the timetable going forward of each of such activities that it intends to undertake pursuant to the notice of commencement dated 1 March 2021. This was important because the applicants were required to make an assessment of the degree of urgency and to tailor any urgent application accordingly. Uthaka's only response was a bare indication that its position remained as per its notice of intention to commence.

NKWANE ELTON THOBEJANE

The deponent has acknowledged that he/she knows and understands the contents of this affidavit, which was signed and sworn to or solemnly affirmed before me at Pretoria on this the **11th** day of **MARCH 2021**, the regulations contained in Government Notice No. R1258 of 21 July 1972, as amended, and Government Notice No. R1648 of 19 August 1977, as amended, having been complied with.

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