

**IN THE HIGH COURT OF SOUTH AFRICA
MPUMALANGA DIVISION, MIDDELBURG**

Case No.: 1344/20

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
BENCHMARKS FOUNDATION	Seventh Applicant

And

GERT SIBANDE DISTRICT JOINT MUNICIPAL PLANNING TRIBUNAL	First Respondent
DR PIXLEY KA ISAKA SEME LOCAL MUNICIPALITY: MUNICIPAL APPEAL AUTHORITY	Second Respondent
UTHAKA ENERGY (PTY) LTD (formerly ATHA-AFRICA VENTURES (PTY) LTD)	Third Respondent
MINISTER OF AGRICULTURE, LAND REFORM AND RURAL DEVELOPMENT	Fourth Respondent
THE MABOLA PROTECTED ENVIRONMENT LANDOWNERS ASSOCIATION	Fifth Respondent

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INTRODUCTION

1. The applicants seek the review and setting aside of the first respondent's decision to approve a land use change on Portion 1 of the farm Yzermyn 96 from agriculture to mining and ancillary purposes ("the Tribunal decision").
2. The applicants also seek the review and setting aside of the second respondent's dismissal of the applicants' appeal against the Tribunal decision ("the appeal decision").
3. The Tribunal and appeal decisions take the third respondent ("Uthaka") one step closer to establishing an underground coal mine in an area of critical biodiversity that is also a strategic water source, important for regional and national water security.¹ Uthaka's proposed mine will have long-term negative environmental impacts on the biodiversity, water resources, and the essential water services that the area provides and feeds into.²
4. The applicants are a coalition of seven non-profit public interest organisations who are working together to ensure the continued conservation of the Mabola Protected Environment and its surrounds.

The strategic importance of land use decisions in critical biodiversity areas

5. Mpumalanga is well known for its globally important biodiversity. Biodiversity – the variability among living organisms from all sources, including diversity within species, between species, and of ecosystems³ – is essential for the processes that support all life on earth, including humans. Without a wide range of animals,

¹ Applicants' founding affidavit (FA); para. 53-85, p. 33-56; annexure FA5, p. 164.

² FA, para. 112-129, p. 81-90.

³ s. 1 National Environmental Management: Biodiversity Act 10 of 2004 ("NEMBA")

plants and microorganisms, we cannot have the healthy ecosystems that we rely on to provide us with the air we breathe, the food we eat, and the water we drink.

6. Mpumalanga's ecosystems are characterised by high levels of both plant and animal diversity and a significant number of unique species that are not known to occur anywhere else.⁴
7. Mpumalanga's freshwater ecosystems are home to important biodiversity and represent high value ecological infrastructure for delivering water for human use. With over 4000 wetlands and the waters of at least five of South Africa's important river systems rising in its highlands, Mpumalanga accounts for a high proportion of South Africa's strategic water source areas and plays a critically important role in terms of regional and national water security.⁵
8. Protected environments are declared to control the cumulative impact on biodiversity and the production of environmental goods (including food, water, fuel, and timber) and environmental services (including clean water supply, air purification, soil formation, and flood attenuation).
9. In its management of a variety of land uses, the Mpumalanga provincial government works within and beyond the boundaries of protected areas that includes protection, restoration, production, and subsistence use, in order to deliver ecological, economic, and social benefits.⁶
10. Decision-makers must understand the management requirements of different ecosystems and what land uses are appropriate in different parts of the

⁴ FA; annexure FA5, p. 164.

⁵ FA; annexure FA5, p. 164.

⁶ FA; annexure FA5, p 165.

landscape. Only well informed decision-makers can assess the relative merits and likely impacts of proposed land use changes on the environment.⁷

11. The land use change that was granted to Uthaka and is the subject of these proceedings will have a wide-ranging and significant impact on the environmental uniqueness of the area, and will impact on water and essential water services that the area feeds into.⁸

The Mabola Protected Environment

12. The farm central to this application – Portion 1 of the farm Yzermyn 96 – is a triangular piece of land that lies between and on the boundaries of two properties which formed part of the Mabola Protected Environment, and is situated in the protected area buffer zone.⁹
13. The Mabola Protected Environment falls within the Pixley Ka Seme Local Municipality close to the town of Wakkerstroom and is situated on Mpumalanga's southern boundary with KwaZulu-Natal.¹⁰ Mabola was declared a protected environment on 22 January 2014.¹¹
14. Mabola was declared a protected environment to (i) conserve biodiversity; (ii) protect the area, which is sensitive to development; (iii) protect specific ecosystems; and (iv) ensure that the use of natural resources in the area is sustainable.¹²

⁷ FA; annexure FA5, p. 165.

⁸ FA, para. 54, p. 33.

⁹ FA, para. 49, p. 32; annexure FA2, p. 135. Portion 1 of Yzermyn borders Portion 1 of Yzermyn and Goedgevonden 96 HT.

¹⁰ FA, para. 19, p. 19; para. 45-46, p. 30-31.

¹¹ FA, para. 56, p. 34; annexure FA4, p. 137.

¹² FA; para. 57, p. 34; annexure FA4, p. 137.

15. The area comprising the Mabola Protected Environment was determined through scientific research, and recognised in the policies of a number of governmental departments, as being an important biodiversity and water source area.¹³
16. On 15 January 2021, the MEC for Agriculture, Rural Development, Land and Environmental Affairs excluded the following properties from the Mabola Protected Environment: (i) portion 1 of Kromhoek 93HT; (ii) remainder of Kromhoek 93HT; (iii) Goedgevonden 95HT; and (iv) remainder of Yzermyn 96HT.¹⁴
17. The decision to exclude these properties from the Mabola Protected Environment is the subject of a review brought by the applicants, which is set down for hearing in the Mbombela High Court on 16 April 2024.
18. At the time of the land use change approval, the properties had not been excluded from the Mabola Protected Environment. The decision to exclude the properties from the Mabola Protected Environment was taken on 15 January 2021,¹⁵ almost two years after the Tribunal decision and more than one year after the appeal decision. We submit that the decision to exclude the properties from Mabola is entirely irrelevant to these proceedings.

The proposed Yzermyn underground coal mine

19. Uthaka intends to construct an underground coal mine with an extensive mining area measuring approximately 1200 hectares.¹⁶

¹³ FA, para. 53-85, p. 33-56.

¹⁴ Applicants' replying affidavit (RA), para. 46, p. 2013.

¹⁵ Second respondent's answering affidavit (AA2); annexure NM6, p. 1813.

¹⁶ FA, para. 48, p. 32.

20. The proposed mine will be established over three of the four properties that have been excluded from the Mabola Protected Environment. The fourth property – remainder of farm Yzermyn 96HT – would house borehole pipelines for the mine and is adjacent to the property on which Uthaka intends to construct the surface infrastructure for the mine.
21. Uthaka intends to construct the surface infrastructure on portion 1 of the farm Yzermyn. In order to do so, Uthaka applied for a land use change on the property from agriculture to mining and ancillary purposes.¹⁷

UTHAKA'S APPLICATION FOR LAND USE CHANGE

22. On 20 April 2018, Uthaka brought an application under section 66 of the Spatial Planning and Land Use Management By-law 2016 ("SPLUM By-law") seeking a change of the land use from agriculture to mining and ancillary purposes.¹⁸ The application was made under regulation 18(1) of the Spatial Planning and Land Use Management Act 2013 (SPLUMA).
23. The applicants filed a detailed objection to Uthaka's application on 30 May 2018.¹⁹ The applicants' recorded from the outset that their interest in the matter stems from the environmental and hydrological significance of the area proposed for land use change, as the area is strategically important for conservation and national water supply.²⁰
24. Uthaka responded to the applicant's objection in a letter dated 28 June 2018 and

¹⁷ FA, para. 89.2, p. 58.

¹⁸ FA, para. 87, p. 57; Tribunal's rule 53 record, p. 15-34.

¹⁹ FA, para. 95, p. 67; annexure FA23, p. 453.

²⁰ FA, annexure FA23, p. 456.

the applicants' submitted a response to Uthaka's reply on 16 July 2018.²¹

25. This exchange of correspondence was the full extent of any form of engagement and 'public participation process' between the applicants and the first respondent, the Gert Sibande District Joint Municipal Planning Tribunal ("the Tribunal").²²

THE IMPUGNED DECISIONS

26. The irrationality of the decisions of the Tribunal and the second respondent ("the Appeal Authority") to grant Uthaka's application is apparent from their simplistic approach that focused only on the subject property, Portion 1 of the Yzermyn farm, to the exclusion of the area that the property is situated in.
27. We submit that this approach is not in accordance with the requirements of SPLUMA and the SPLUM By-law and failed to take into account the existing environmental framework for the area.

The Tribunal decision

28. The Tribunal approved Uthaka's application on 6 February 2019, subject to the imposition of conditions. On 29 April 2019, the council of Gert Sibande District Municipality approved the resolution and imposed conditions on the approval.²³
29. The applicants were only informed of the Tribunal's decision on 12 June 2019.²⁴
30. The applicants lodged an internal appeal under section 143(1)(c) of the SPLUM

²¹ FA, para. 95, p. 67; annexure FA24, p. 493; annexure FA25, p. 510.

²² FA, para. 95-97, 99-100, p. 68-69.

²³ FA, para. 100, p. 69; annexure FA31, p. 542; SFA, para. 65-67, p. 849; first respondent's answering affidavit (AA1), para. 174-175, p. 926 - 927.

²⁴ FA, para. 100, p. 69.

By-law on 3 July 2019.²⁵

The appeal decision

31. The appeal was considered and subsequently dismissed by the Appeal Authority on 27 November 2019.²⁶

32. We submit that the Tribunal and appeal decisions should be set aside on the following four grounds of review:

32.1. The Tribunal and the Appeal Authority failed to refer the application to the Minister of Agriculture, Land Reform and Rural Development (“Minister of Agriculture”) as required under section 52 of SPLUMA.²⁷

32.2. The Tribunal and the Appeal Authority failed to comply with the criteria under section 53 of the SPLUM By-law.²⁸

32.3. The Tribunal and the Appeal Authority failed to consider environmental considerations.²⁹

32.4. The Tribunal and the Appeal Authority misdirected themselves by engaging in incremental decision-making.³⁰

²⁵ FA, para. 101, p. 70; FA, annexure FA32, p. 551.

²⁶ FA, para. 102, p. 70; FA, annexure FA33, p. 559.

²⁷ FA, para. 175-188, p. 104-108; SFA, para. 30-42, p. 834 - 841.

²⁸ FA, para. 189-220, p. 108-120; SFA, para. 43-55, p. 841 - 846.

²⁹ FA, para. 221-228, p. 120-125; SFA, para. 56-61, p. 846 - 848.

³⁰ FA, para. 229-233, p. 125-127; SFA, para. 62-64, p. 848.

THE LAND USE CHANGE APPROVAL HAS LAPSED

33. The land use change approval was subject to Uthaka's payment of development charges for the provision of engineering services under section 54(2)(a) of the SPLUM By-law.³¹
34. Uthaka was also required to provide proof to the satisfaction of the Dr Pixley Ka Isaka Seme Local Municipality that the conditions had been complied with, in order to bring the approved rights into effect. Uthaka had to do so within twelve months from the date of the approval, or further period as the Municipality may allow, failing which the approval would lapse.³²
35. Section 66(2) of the SPLUM By-law provides that a rezoning approval lapses if the conditions of approval contemplated in section 54 have not been met, and the development charges have not been paid.
36. Section 66(5) provides that upon compliance with section 66(2) the approval of the rezoning is confirmed, and the Municipality (or the applicant) must cause notice to be published in the Provincial Gazette of the amendment of the land use scheme, which comes into operation on the date of publication of the notice.
37. Uthaka was required to pay the development charges for the provision of engineering services and to provide proof to the Municipality that it had done so by 6 February 2020.³³
38. On 24 November 2021, the applicants enquired from the first and second

³¹ RA, para. 4, p. 2001; FA, annexure FA31, p. 542.

³² RA, para. 4, p. 2001; FA, annexure FA31, p. 542.

³³ RA, para. 5, p. 2001.

respondents:

- 38.1. Whether Uthaka had either made payment of the development charges or provided monies for the provision of engineering services in fulfilment of the condition stipulated in the approval notification letter.
- 38.2. When Uthaka had fulfilled the condition, if at all. The first and second respondents were requested to provide proof evidencing Uthaka's compliance.
- 38.3. Whether the first respondent had extended the time period within which Uthaka should make payment, together with proof that an extension was in fact sought and granted.
- 38.4. Whether Uthaka had made application to amend the conditions of the rezoning approval, together with proof of that application, if any.³⁴
39. No response was forthcoming from the first and second respondents.³⁵
40. The applicants also invited the Tribunal to provide proof evidencing that the land use change approval has not lapsed.³⁶ The Tribunal has not done so.
41. In the premises, it is our submission that the rezoning approval has lapsed and the agricultural zoning applicable to the land prior to the approval of the rezoning

³⁴ RA, para. 6, p. 2001; annexure RA1, p. 2020.

³⁵ RA, para. 6, p. 2001.

³⁶ RA, para. 7, p. 2001.

applies as contemplated under section 66(6) of the SPLUM By-law.

THE GROUNDS OF REVIEW

42. The Tribunal and the appeal decisions, in our submission, are reviewable on numerous grounds. We submit that each ground of review is sufficient on its own for a successful review and the setting aside of the decisions.

43. It is trite that the decisions were required to be lawful, rational and reasonable. Below we briefly summarise each independently fatal ground of review, in turn.

The Tribunal and the Municipal Appeal Authority failed to refer the application to the Minister of Agriculture pursuant to section 52 of SPLUMA

44. Section 52(1) of SPLUMA provides that a land use application must be referred to the Minister of Agriculture where such an application materially impacts on (a) matters within the exclusive functional area of the national sphere in terms of the Constitution; (b) strategic national policy objectives, principles or priorities; or (c) land use for a purpose which falls within the functional area of the national sphere of government.

45. Section 87 of the SPLUM By-law incorporates the provisions of section 52 of SPLUMA into the By-law.

46. It is our submission that Uthaka's land use application materially impacts on the management of water resources, an exclusive functional area of the national sphere of government. We say so because:

46.1. The area comprising Mabola, incorporating portion 1 of the farm

Yzermyn, is located in a high-water yield area that contributes significantly to South Africa's overall water supply.³⁷

46.2. The deterioration of water quantity and quality in high-water yield areas, regarded as South Africa's water factories, can have a disproportionately large adverse effect on the overall sustainability of growth and development in the regions they support.³⁸

47. The area forms part of the Enkangala Drakensberg strategic water source area that constitutes the headwaters of the Usutu River System. The Usutu River flows through Swaziland and, after joining the Pongola River, flows into Mozambique, where it is known as the Maputo River. We submit that Uthaka's land use application also materially impacts on foreign affairs and international obligations, an exclusive functional area of the national sphere of government because the health of the Usutu River System is relevant to South Africa's international obligations to Swaziland and Mozambique.³⁹

48. It is also our submission that Uthaka's land use application materially impacts on strategic national policy objectives, principles and priorities. This significance and importance of the area is apparent from its recognition –

48.1. as part of the Wakkerstroom/Luneburg Grasslands, an endangered ecosystem that is under threat and in need of protection;⁴⁰

48.2. as a priority river and wetland ecosystem under the Atlas of National

³⁷ FA, para. 177, p. 104; annexure FA19, p. 434.

³⁸ FA, para. 177, p. 104; annexure FA19, p. 434.

³⁹ FA, para. 178, p. 105.

⁴⁰ FA, para. 176, p. 104.

Freshwater Ecosystem Priority Areas in South Africa;⁴¹

- 48.3. as falling within the Enkangala Drakensberg strategic water source area;⁴² and
- 48.4. in the National Protected Area Expansion Strategy.⁴³
49. Section 52(2) of SPLUMA provides that a land development application must be referred to the Minister of Agriculture where the outcome of the application (a) may be prejudicial to the economic, health or security interests of one or more provinces or the Republic as a whole; or (b) may impede the effective performance of the functions by one or more municipalities or provinces relating to matters within their functional area of legislative competence.
50. It is our submission that Uthaka's land use application may be prejudicial to the interests of Mpumalanga, Gauteng and KwaZulu-Natal because the Mabola area is a water catchment area composed mostly of wetlands and pans that feed into the Limpopo, Tugela, Vaal, Usutu, and Pongola Rivers. It generates critical water supplies for downstream, agricultural, industrial, and human water users in Mpumalanga, Gauteng and KwaZulu-Natal.⁴⁴
51. It is clear that the impacts of the proposed development – the establishment of a large underground coal mine – cut across various government departments.⁴⁵
52. These facts demonstrate that the rezoning of a single property can, and does, trigger section 52 of SPLUMA. It is our submission that the Appeal Authority was

⁴¹ FA, para. 85, p. 55-56; para. 177, p. 104.

⁴² FA, para. 64-67, p. 37-39.

⁴³ FA, para. 63, p. 37.

⁴⁴ FA, para. 212, p. 117.

⁴⁵ FA, para. 179, p. 105.

wrong to conclude otherwise.⁴⁶

53. In *Maccsand*, the Constitutional Court found that:

“The Constitution allocates powers to three spheres of government in accordance with the functional vision of what is appropriate to each sphere. But because these powers are not contained in hermetically sealed compartments, sometimes the exercise of powers by two spheres may result in an overlap. When this happens, neither sphere is intruding into the functional area of another. Each sphere would be exercising power within its own competence. It is in this context that the Constitution obliges these spheres to cooperate with one another in mutual trust and good faith, and to co-ordinate actions taken with one another.”⁴⁷

54. Section 41 of the Constitution requires all spheres of government and all organs of state to (i) exercise their powers and perform their functions in a manner that does not encroach on the geographical, functional or institutional integrity of government in another sphere, and to (ii) co-operate with one another in mutual trust and good faith by *inter alia* consulting one another on matters of common interest and coordinating their actions with one another.⁴⁸

55. The Tribunal contends that the Minister of Agriculture can only exercise her power under section 52 after the set of criteria to guide the implementation of the section has been prescribed, as contemplated under section 52(6).⁴⁹

56. We submit that the Tribunal's contention that even if Uthaka's application fell within the ambit of section 52, it would have been futile for the Tribunal to inform

⁴⁶ FA; annexure FA33, p. 563.

⁴⁷ *Maccsand (Pty) Ltd v City of Cape Town and Others* 2012 (4) SA 181 (CC), para. 47.

⁴⁸ s. 41(1)(g) and (h) of the Constitution.

⁴⁹ AA1, para. 88-90, p. 907.

the Minister because the guidelines have not been prescribed, is incorrect. The Tribunal provides no evidence in support of its contention that the Minister would not have dealt with the application at all.⁵⁰ The Tribunal's speculation regarding what the Minister would or would not have done if it had referred Uthaka's application to the Minister is unfounded and should be disregarded.

57. We submit that the fact that the set of criteria required under section 52(6) of SPLUMA has not been published does not render the section unenforceable, and does not impact the Tribunal's obligation to inform the Minister of an application that affects the national interest. The Tribunal was required to inform the Minister of Uthaka's application.

The Town Planner's recommendation

58. Under section 53(1) of the SPLUM By-law, the Tribunal was required to have regard to a written assessment by a professional planner when considering Uthaka's land development application.
59. Mbekanyeni Ramukosi, a Town and Regional Planner at the Pixley Ka Seme Local Municipality compiled the town planner's report in June 2018.⁵¹ Mr Ramukosi recommended that the approval of Uthaka's application be done in terms of section 52(2)(a) of SPLUMA.⁵²
60. The Tribunal was required to have regard to Mr Ramukosi's written assessment.⁵³ Not only did the Tribunal fail to have regard to Mr Ramukosi's recommendation that the application be referred to the Minister, but it also failed to engage with

⁵⁰ AA1, para. 90, p. 907.

⁵¹ SFA, para. 8, p. 826.

⁵² SFA, para. 33, p. 835; Tribunal's rule 53 record, p. 198.

⁵³ s. 53(1)(g) SPLUM By-law.

the facts in support of the recommendation, including the fact that:

- 60.1. the impact of the proposed development will cut across various government departments;
 - 60.2. the environmental significance of the property and surrounding area has been recognised by different government departments at the national level;
 - 60.3. the property is located within an area that is of great strategic importance to South Africa's water supply; and
 - 60.4. the proposed mine may negatively impact on water and flora and fauna, and harm local communities.⁵⁴
61. The Tribunal also allowed Mr Ramukosi to change the recommendation in his written assessment, at the meeting of the Tribunal, to recommend that the Tribunal instead approve the application, and if any matters arise, those can be dealt with in terms of section 52(2)(a) of SPLUMA.⁵⁵
62. We submit that allowing the change in recommendation at the Tribunal meeting is irrational in itself – either the application must be submitted to the Minister under section 52(2)(a) of SPLUMA or it must not. Mr Ramukosi evaluated Uthaka's application against SPLUMA's development principles and norms, the integrated development plan, the spatial development framework as well as related policies and plans, and made a recommendation to the Tribunal.

⁵⁴ SFA, para. 34, p. 835 - 836.

⁵⁵ SFA, para. 34.2, p. 836; Tribunal's rule 53 record, p. 450-451.

63. That recommendation was to refer Uthaka's application to the Minister of Agriculture because the outcome of the application may be prejudicial to the economic, health or security interests of one or more provinces or the Republic as a whole.
64. It is apparent from the record that no evidence was presented and engaged with to counter the various factors that Mr Ramukosi had considered and evaluated in concluding that Uthaka's application may be prejudicial.⁵⁶
65. Instead, it seems that the change in recommendation was in part influenced by Uthaka's interpretation of Mr Ramukosi's recommendation.⁵⁷ It is clear from the record that Uthaka's representative made material and detailed submissions regarding its application, which submissions were considered by the Tribunal in making its decision.⁵⁸
66. We submit that the Tribunal erred in its decision to grant Uthaka's application despite Mr Ramukosi's recommendation that it be referred to the Minister.⁵⁹ The Tribunal also erred in finding that Mr Ramukosi's recommendation meant that there was no need for the Tribunal to meet.⁶⁰ The Tribunal was required to properly consider Mr Ramukosi's recommendation together with all of the information that was available to it at the time, including the applicants' detailed written objection to Uthaka's application. There is no evidence that the Tribunal did so.⁶¹
67. In the premises, we submit that the Tribunal was required to refer Uthaka's land

⁵⁶ SFA, para. 34, p. 835 - 836.

⁵⁷ SFA, para. 34.3, p. 837, para. 37-38, p 1067-1068; Tribunal's rule 53 record, p. 453-454.

⁵⁸ SFA, para. 38, p. 839.

⁵⁹ SFA, para. 39, p. 840.

⁶⁰ SFA, para. 40, p. 840.

⁶¹ SFA, para. 40, p. 840.

use application to the Minister of Agriculture under section 52 of SPLUMA, read with section 87 of the SPLUM By-law. At the very least, the Tribunal should have informed, and provided a copy of Uthaka's application to, the Minister for comment under section 52(4) of SPLUMA and in the spirit of cooperative governance mandated by the Constitution.

The Tribunal hearing was procedurally unfair

68. Only Uthaka was invited to attend the Tribunal meeting.⁶² Mr Ramukosi confirmed at the meeting that no objectors were present as they had not been invited.⁶³
69. The applicants specifically requested an opportunity to amplify their objections to the land use change application in the event of Uthaka being given an opportunity to be heard in person by the Tribunal.⁶⁴ Uthaka similarly requested that all parties be afforded ample notice prior to the hearing date before the Tribunal and for all parties to receive, in advance, the full version of the recommendation report that had been prepared by the local municipality to serve before the Tribunal.⁶⁵ The applicants received no response to their request and subsequent follow-up.⁶⁶
70. Uthaka's representative placed on record at the Tribunal meeting that Uthaka was not going to make any submissions because the objectors were not present at the hearing, as if he did so it would render the Tribunal's decision susceptible to review on the basis of a lack of procedural fairness.⁶⁷ Despite his undertaking, Uthaka's representative did not confine his participation at the Tribunal meeting

⁶² SFA, para. 22, p. 830.

⁶³ Tribunal's rule 53 record, p. 454.

⁶⁴ FA; annexure FA25, p. 510.

⁶⁵ FA, para. 98.4, p. 69; annexure FA29, p. 535.

⁶⁶ FA, para. 99, p. 69; annexure FA30, p. 537.

⁶⁷ SFA, para. 35, p. 837.

to answer any technical questions that may arise.⁶⁸ Instead, he made material and detailed submissions regarding Uthaka's application, which submissions were considered by the Tribunal in making its decision.⁶⁹

71. Affected persons must be afforded the opportunity to meaningfully participate.⁷⁰ The objectors were denied an opportunity to do so. The Tribunal's decision to grant Uthaka's application should be set aside for its failure to invite the applicants and other objectors to the Tribunal's meeting.

72. For the reasons detailed above, we submit that the failure to refer Uthaka's land use change application to the Minister of Agriculture renders the impugned decisions reviewable on the following grounds –

72.1. the Tribunal and Appeal Authority were not authorised by the empowering provision to act in the manner that they did (section 6(2)(a)(i) of the Promotion of Administrative Justice Act 2000 (PAJA));

72.2. the Tribunal and Appeal Authority did not comply with a mandatory and material procedure prescribed by the empowering provision (section 6(2)(b) of PAJA); and

72.3. the impugned decisions were materially influenced by an error of law (section 6(2)(d) of PAJA).

73. Furthermore, it is our submission that by allowing Uthaka's representatives the

⁶⁸ SFA, para. 36, p. 838.

⁶⁹ SFA, para. 38, p. 839.

⁷⁰ *Mogale & Others v Speaker of the National Assembly & Others* 2023 (9) BCLR 1099 (CC), para. 3.

opportunity to participate and make submissions at the Tribunal meeting, and the failure to notify and invite the objectors to the meeting renders the Tribunal's decision reviewable because it was procedurally unfair (section 6(2)(c) of PAJA).

The Tribunal and the Municipal Appeal Authority failed to comply with the criteria under section 53 of the SPLUM By-law

74. Section 53 of the SPLUM By-law lists the criteria that the Tribunal must have regard to when considering a change in land use application. Below we demonstrate that the Tribunal failed to comply with certain provisions of section 53.
75. We also submit that the Appeal Authority was incorrect to conclude that Uthaka complied with the requirements of the SPLUM By-law regarding notice of the application.

The Tribunal and Appeal Authority failed to consider whether the correct procedure was followed in processing the application

76. The principle of good administration applies to land development and land use management. It requires that the amendment of land use schemes include transparent processes of public participation that afford all parties the opportunity to provide inputs on matters affecting them.⁷¹
77. Section 98(1)(b) and (i) of the SPLUM By-law require notice to be given in the media for an application for a rezoning, or an application that materially affects the public interest if approved. Section 99 requires the notice to also be served

⁷¹ s. 7(e)(iv) of SPLUMA.

on any person who has an interest in the matter or whose rights may be affected by the approval of the application.

78. Despite the applicants advising the Pixley Ka Seme Local Municipality, the Tribunal and Uthaka on various occasions of their interest in the matter, no section 99 notices were ever served on the applicants.⁷²
79. The notice that Uthaka published in the local newspaper did not comply with the requirements under the SPLUM By-law.⁷³
80. Despite being interested and affected parties under section 45(2) of SPLUMA, the applicants were not invited to the Tribunal meeting. Uthaka was invited and provided with an opportunity to address the Tribunal regarding the substantive merits of its application. Uthaka's representatives also handed documents to the Tribunal in support of its application.⁷⁴ No contrary view to Uthaka's was provided or engaged with because the objectors had not been invited to or notified of the Tribunal meeting.⁷⁵
81. Public participation is a process in which the public is engaged in a matter of public interest for the purpose of obtaining their views with the aim of ensuring the process is fair, reasonable, and that the public is heard.⁷⁶ The process followed by the Tribunal was neither reasonable nor fair.
82. The Tribunal erred when it found that there was evidence of a public participation process because objections had been recorded.⁷⁷ The recordal of objections,

⁷² FA, para. 194, p. 110.

⁷³ FA, para. 193, 196, p. 110-111; FA, annexure FA22, p. 452.

⁷⁴ SFA, para. 51, p. 844 - 845.

⁷⁵ SFA, para. 50, p. 843 - 844; Tribunal's rule 53 record, p. 454.

⁷⁶ *South African Iron and Steel Institute & Others v Speaker of the National Assembly & Others* 2023 BCLR 1232 (CC), para. 32.

⁷⁷ SFA, para. 52, p. 845.

without more, renders public participation a tick box exercise.

83. The Appeal Authority erred in finding that the applicants' points of objection were considered by the Tribunal before the decision to approve the land use application was made. The rule 53 record filed by the Tribunal in fact confirms that there was no mention or discussion of the applicants' (or any other) objections before the Tribunal.⁷⁸
84. In the premises, we submit that the impugned decisions are reviewable for the failure to comply with section 53(1)(b) of the SPLUM By-law.

The Tribunal and Appeal Authority failed to consider the desirability of the proposed utilisation of land

85. Uthaka sought a land use change in order to progress the establishment and construction of the proposed Yzermyn coal mine. Uthaka intends to construct the surface infrastructure on Portion 1 of the farm Yzermyn 96. The underground coal mine would fall beneath the subject property as well as four adjacent properties.
86. The impact of the development is not limited to Portion 1 of the farm Yzermyn 96. It would extend to the adjacent properties and properties downstream of a strategic water source area.⁷⁹
87. The Tribunal and the Appeal Authority failed to consider the following factors when considering the proposed utilisation of Portion 1 of the farm Yzermyn by Uthaka.

⁷⁸ SFA, para. 53, p. 845 - 846.

⁷⁹ FA, para. 199, p. 111-112.

- 87.1. First, the subject property falls within an area of strategic environmental and hydrological significance.⁸⁰
- 87.2. Second, the proposed utilisation of the subject property will have an impact on water resources and water security.⁸¹
- 87.3. Third, the Spatial Development Framework shows that agriculture and the service sectors provide far more employment opportunities in the area than those provided by mining activities.⁸²
88. It is our submission that the proposed land use change is irreconcilable with the existing land uses on adjacent properties and the surrounding area. Uthaka's application did not engage with or provide any information on the impact of the land use change on the adjacent properties.⁸³
89. In the premises, we submit that the impugned decisions are reviewable for the failure to comply with section 53(1)(c) of the SPLUM By-law.

The Tribunal and Appeal Authority failed to consider relevant frameworks and policies set by national and provincial government

90. Section 53 of the SPLUM By-law requires that the Tribunal have regard to (i) the integrated development plan and spatial development framework; (ii) the applicable policies of the municipalities that guide decision-making; and (iii) the policies, principles and development norms set by national and provincial

⁸⁰ FA, para. 200, p. 112.

⁸¹ FA, para. 201, p. 112-113.

⁸² FA, para. 202-203, p. 113-114.

⁸³ FA, para. 205, p. 114.

government.

91. The applicants detailed the relevant frameworks and policies in their objection to Uthaka's application.⁸⁴ Uthaka's report on environmental considerations does not engage with the integrated development plan, spatial development framework or any environmental policies of government. The report also does not make mention of the environmental significance of the area.⁸⁵
92. The failure to consider the relevant frameworks and policies set by government is apparent from the Tribunal's failure to consider the environmental significance of the area and that the subject property is situated in a strategic water source area – making it undesirable for any type of land use change for coal mining.⁸⁶
93. Similarly, the Appeal Authority erred when it found that the submissions made regarding the strategic importance of the Mabola Protected Environment are misguided as the subject property does not fall within Mabola, and that Uthaka's application does not offend the guidelines in the spatial development framework.⁸⁷
94. In the premises, we submit that the impugned decisions are reviewable for the failure to comply with section 53(1)(h),(i) and (n) of the SPLUM By-law.

The Tribunal and Appeal Authority failed to have regard to the comments in response to the notice and comments received from organs of state

95. The Department of Cooperative Governance provided conditional support for

⁸⁴ FA, annexure FA23, p. 453.

⁸⁵ FA, para. 209, p. 115-116.

⁸⁶ FA, para. 211-214, p. 117.

⁸⁷ FA, para. 215, p. 117-118.

Uthaka's application. The Department's support was conditional upon (i) consultation with the Land Claims Commission, (ii) the Department of Agriculture, Rural Development and Land and Environmental Affairs providing its comments on the application, and (iii) the rights of nearby communities not being adversely affected.⁸⁸

96. There is no evidence in the record to show that the Tribunal considered these comments. To the contrary, the record reflects that Mr Ramukosi incorrectly informed the Tribunal that all of the departments supported the application.⁸⁹
97. In the premises, we submit that the impugned decisions are reviewable for the failure to comply with section 53(1)(d) of the SPLUM By-law.
98. For the reasons detailed above, we submit that the failure to comply with the criteria under section 53 of the SPLUM By-Law renders the impugned decisions reviewable on the following grounds –
 - 98.1. the Tribunal and Appeal Authority did not comply with a mandatory and material procedure or condition prescribed by the empowering provision (section 6(2)(b) of PAJA);
 - 98.2. the impugned decisions were materially influenced by an error of law (section 6(2)(d) of PAJA);
 - 98.3. the impugned decisions were procedurally unfair (section 6(2)(c) of PAJA);

⁸⁸ SFA, para. 44-45, p. 842.

⁸⁹ SFA, para. 45, p. 842; Tribunal's rule 53 record, p. 449.

98.4. the Tribunal and Appeal Authority failed to take into account relevant considerations and took irrelevant considerations into account (section 6(2)(e)(iii) of PAJA); and

98.5. the impugned decisions were irrational and unreasonable (section 6(2)(f) and (h) of PAJA).

The Tribunal and Appeal Authority failed to take environmental considerations into account

99. The Tribunal was required to ensure compliance with environmental legislation when considering Uthaka's application.⁹⁰ There is no evidence that relevant information relating to the environment or environmental legislation was considered by the Tribunal.⁹¹

100. The Appeal Authority incorrectly contends that the Tribunal does not have jurisdiction to pronounce on environmental matters.⁹² The Appeal Authority was satisfied that information relating to environmental authorisations that had previously been determined were before the Tribunal.⁹³ It is not apparent from the record that even the limited information of environmental authorisations was before the Tribunal.⁹⁴

101. The Tribunal and Appeal Authority failed to apply the principles relevant to the actions of all organs of state that may significantly affect the environment, as contained in section 2 of the National Environmental Management Act 1998

⁹⁰ s. 42(2) of SPLUMA.

⁹¹ FA, para. 222, p. 120.

⁹² FA, para. 221, p. 120.

⁹³ FA, para. 222, p. 120.

⁹⁴ SFA, para. 57-59, p. 847.

(NEMA).⁹⁵ The principles serve as guidelines to organs of state when taking decisions in terms of any statutory provision concerning the protection of the environment. They must be adhered to as they are of considerable importance to the protection and management of the environment.⁹⁶

102. The Tribunal and Appeal Authority also failed to consider that the area within which Portion 1 of Yzermyn farm is situated in a critically important area for biodiversity and national water supply.⁹⁷

103. The regulation of environmental functions is within the competency of local government. In *Le Sueur*, the court said:

“It is apparent that although matters relating to the environment may be said, in terms of the Constitution, to be the primary concern or sphere of national and provincial responsibility, that local governments in the form of municipalities are in the best position to know, understand and deal with the issues involving the environment at a local level ... the framers of the Constitution did not intend to allocate legislative powers amongst the 3 spheres of government in hermetically sealed, distinct and water tight compartments.”⁹⁸

104. Municipalities thus have an obligation to take environmental considerations into account, especially in the context of water scarcity.⁹⁹

105. Local government’s competency regarding environmental functions is also evident from spatial development frameworks and environmental management

⁹⁵ FA, para. 226, p. 123.

⁹⁶ *Fuel Retailers Association of Southern Africa v Director-General: Environmental Management, Department of Agriculture, Conservation and Environment, Mpumalanga Province & Others* 2007 (6) SA 4 (CC), para. 67.

⁹⁷ FA, para. 226, p. 123.

⁹⁸ *Le Sueur & Another v eThekweni Municipality & Others* 2013 JDR 0178 (KZP), para. 19-20.

⁹⁹ *Philippi Horticultural Area and Food Campaign & Another v MEC for Local Government, Environmental Affairs and Development Planning & Others* 2020 (3) SA 486 (WCC).

framework reports – both of which regulate environment and water.¹⁰⁰

106. It is our submission that the Tribunal and the Appeal Authority were obliged to take environmental considerations into account, and the failure to do so renders the impugned decisions reviewable because:

- 106.1. the Tribunal and Appeal Authority did not comply with mandatory and material procedures or conditions prescribed by an empowering condition (section 6(2)(b) of PAJA);
- 106.2. the impugned decisions were materially influenced by an error of law (section 6(2)(d) of PAJA);
- 106.3. the impugned decisions were not rationally related to the reasons given by the Appeal Authority (section 6(2)(f)(ii)(dd) of PAJA);
- 106.4. no reasonable decision maker would have overlooked the duty to take environmental considerations into account, as required under the empowering provision (section 6(2)(h) of PAJA).; and
- 106.5. irrelevant considerations were taken into account and relevant considerations were not considered (section 6(2)(e)(iii) of PAJA).

The Tribunal and the Municipal Appeal Authority misdirected themselves by engaging in incremental decision-making

107. We submit that the irrationality of the impugned decisions is best illustrated by the piecemeal approach of the Tribunal and Appeal Authority to Uthaka's

¹⁰⁰ FA, para. 224, p. 123.

application.

108. The impact of the development is not limited to the subject property.¹⁰¹ The establishment of the mine in the area would have numerous far-reaching negative impacts on the surrounding environment. The impact on water would extend to neighbouring provinces and may have a national impact.
109. It is irrational to consider the subject property in isolation to the broader development. The proposed mine would be located across various properties and would measure approximately 1200 hectares.
110. Uthaka's application was only in relation to Portion 1 of the Yzermyn farm. The application should not have been granted by the Tribunal because Uthaka should have applied for, and requires approval of, land use change for the remaining properties that it intends to mine under.¹⁰²
111. We submit that mining cannot proceed without the rezoning of the remaining properties that Uthaka intends to conduct underground mining. Thus, the approval of Uthaka's application for the rezoning of the subject property is irrational.
112. The incremental decision making renders the impugned decisions reviewable because:
 - 112.1. the decisions were taken arbitrarily or capriciously (section 6(2)(e)(vi) of PAJA);

¹⁰¹ FA, para. 230, p. 125.

¹⁰² FA, para. 231, p. 125.

112.2. the decisions are not rationally connected to the information before the Tribunal and the Appeal Authority (section 6(2)(f)(ii)(cc) of PAJA); and

112.3. no reasonable decision maker would have exercised its power or performed its function in this manner (section 6(2)(h) of PAJA).

Conclusion on the grounds of review

113. We submit that, in light of the grounds of review detailed above, the impugned decisions are unlawful, irrational and unreasonable.

114. We respectfully submit that the Tribunal and the appeal decisions fall to be set aside on any one of the grounds of review.

115. If successful, the applicants seek an order that the Tribunal or the Appeal Authority be directed to refer Uthaka's land use change application to the Minister of Agriculture in terms of section 52 of SPLUMA.

116. In the event that the Minister of Agriculture does not direct that Uthaka's application be referred to her for decision, the application should be remitted to the Tribunal for reconsideration and a direction that the Tribunal must:

116.1. properly take into account all relevant considerations, including –

116.1.1. the Mpumalanga Biodiversity Sector Plan 2014;

116.1.2. the National Protected Area Expansion Strategy 2009;

116.1.3. the National Water Resource Strategy 2013

116.1.4. the National Water and Sanitation Master Plan 2019;

116.1.5. the Mpumalanga Protected Area Expansion Strategy 2009;

116.1.6. the Atlas of National Freshwater Ecosystem Priority Areas in South Africa 2011; and

116.2. comply with section 3 and section 4 of PAJA.

PRELIMINARY POINTS RAISED BY THE TRIBUNAL AND THE APPEAL AUTHORITY

117. The Tribunal and Appeal Authority raise preliminary points that they contend are fatal to the application. Below we demonstrate that there is no merit to these preliminary points.

First point in limine: the applicants have the requisite locus standi

118. The applicants' *locus standi* is founded on sections 38(a), (d) and (e) of the Constitution and section 32(1)(a) of NEMA. The Tribunal alleges that the applicants lack the requisite *locus standi* to bring the review application for several reasons, all of which have no merit and which we will address in turn.

119. The Constitutional Court held unanimously:

“[T]he interests of justice under the Constitution may require courts to be hesitant to dispose of cases on standing alone where broader concerns of accountability and responsiveness may require investigation and determination of the merits. By corollary, there may be cases where the interests of justice or the public interest might compel a court to scrutinise action even if the applicant’s standing is questionable. When the public interest cries out for relief, an applicant should not fail merely for acting in his or her own interest.”¹⁰³

120. First, contrary to the Tribunal’s allegation,¹⁰⁴ the applicants do rely on an infringement or threatened infringement of a right in the Bill of Rights. In terms of section 33 of the Constitution, the applicants have the right to just administrative action. It is settled that the courts adopt a broad approach to standing in constitutional cases,¹⁰⁵ and “reviews under PAJA are a way of enforcing the rights in section 33”, which “implies that the broad standing requirements in section 38 should apply to” reviews.¹⁰⁶
121. Second, to establish own interest standing under section 38(a) of the Constitution, the applicants are not required to show that they have a sufficient, personal and direct interest. Rather, an own-interest litigant only has to “show that the decisions it seeks to attack had the capacity to affect its own legal rights or its interests”,¹⁰⁷ and the right or interest must be real and not hypothetical.¹⁰⁸ The effect need not be personal in addition.¹⁰⁹
122. Third, public interest standing does not require an applicant to demonstrate membership or authority having been given to it by the public it seeks to

¹⁰³ *Giant Concerts CC v Rinaldo Investments (Pty) Ltd* [2012] ZACC 28, para. 41; *Tulip Diamonds FZE v Minister for Justice and Constitutional Development* [2013] ZACC 19, para. 34.

¹⁰⁴ AA1, para. 9.1 p. 883.

¹⁰⁵ *Ferreira v Levin NO and Others; Vryenhoek and Others v Powell NO and Others* 1996 (1) BCLR 1 (CC), para. 165.

¹⁰⁶ *Mkhize NO v Premier of the Province of KwaZulu-Natal* 2018 JDR 2137 (CC), para. 70, *Giant Concerts* para. 29.

¹⁰⁷ *Giant Concerts*, para. 30.

¹⁰⁸ *Giant Concerts*, para. 41.

¹⁰⁹ *Giant Concerts*, para. 41.

represent. The applicants are required to demonstrate objectively that they are genuinely acting in the public interest.

123. Factors to be considered in this determination include whether there was another reasonable and effective manner in which the challenge could be brought, the nature of the relief and whether or to what extent it is prospective, the range of persons or groups who may be directly or indirectly affected by the order sought, and the opportunity those persons or groups have had to place evidence and argument before the court.¹¹⁰ Further considerations include “the egregiousness of the conduct complained of”, the vulnerability of the people affected, the nature of the right infringed and the consequences of the infringement.¹¹¹
124. The applicants’ primary objectives, on the Tribunal’s own version, demonstrate that they are, objectively, genuinely acting in the public interest. From the outset, the applicants’ recorded that their interest in the matter stems from the environmental and hydrological significance of the area proposed for land use change, as the area is strategically important for conservation and national water supply.¹¹²
125. Fourth, the courts have recognised the role played by associations in protecting the public interest,¹¹³ and the Constitutional Court has recognised the right of an association to litigate on behalf of its members.¹¹⁴ A restrictive approach to the

¹¹⁰ *Lawyers for Human Rights v Minister of Home Affairs and Others* 2004 (4) SA 125 (CC), para. 16-17; *Ferreira*, para. 234

¹¹¹ *LHR*, para. 18 (majority judgment) and para. 73 (minority judgment of Madala J).

¹¹² *FA*; annexure FA23, p. 456.

¹¹³ *Society for the Prevention of Cruelty to Animals, Standerton v Nel* 1988 (4) SA 42 (W), 47B-E.

¹¹⁴ *Transvaal Agricultural Union v Minister of Land Affairs* 1997 (2) SA 621 (CC) para 1; *Premier, Mpumalanga v Executive Committee, Association of State-Aided Schools, Eastern Transvaal* 1999 (2) SA 91 (CC) para 3. For a more recent example, see *South African Veterinary Association v Speaker of the National Assembly* 2019 (3) SA 62 (CC) para 6; *Polokwane Local and Long Distance Taxi Association v Limpopo Permissions Board* [2017] ZASCA 44 (30 March 2017) paras 23–4.

standing of voluntary associations would be contrary to the principles contained within and underpinned by the Constitution.¹¹⁵ The court emphasised:

“Those principles include, *inter alia*, the constitutional norms of accountability, responsiveness and openness on which the constitutional state is founded. It would be equally contrary to the ideal of a vibrant and thriving civil society which actively participates in the evolvment and development of a rights culture pursuant to the rights enshrined in the Bill of Rights. To hold otherwise would, in my view, be to disregard the interests of ‘the poorest in our society’ who are often not in a position where legal advice is readily accessible and who are more often than not, dependent upon action taken by informally structured associations of civil society so that legitimate issues may be addressed on their behalf. It will also be contrary to the basic values of human dignity, equality and freedom which underlie the spirit, purport and objects of the Bill of Rights.”

126. An association has standing where its members have a sufficient interest in the remedy sought. The question of the separate existence of an association and its constitution does not remove the association’s standing.
127. For purposes of standing under section 38(e) of the Constitution, there is no requirement that the first applicant must establish that the second to seventh applicants are unable to act on their own.¹¹⁶ In any event, the first applicant has authority to act on behalf of the second to seventh applicants.¹¹⁷
128. Fifth, section 32(1) of NEMA provides in relevant part that “[a]ny person or group of persons may seek appropriate relief in respect of any breach or threatened breach of any provision of this Act, including a principle contained in Chapter 1, or of any provision of a specific environmental management Act, or of any other

¹¹⁵ *Highveldridge Residents Concerned Party v Highveldridge Transitional Local Council and Others* 2002 (6) SA 66 (T), para. 24.

¹¹⁶ AA1, para. 9.5, p. 884 - 885.

¹¹⁷ RA, para. 12, p. 2002; annexures ‘RA2’ to ‘RA7’.

statutory provision concerned with the protection of the environment or the use of natural resources”,¹¹⁸ and thereafter reiterates the standing provisions in section 38 of the Constitution, with the addition of a person “acting in the interest of protecting the environment”.¹¹⁹

129. However, assuming that the applicants are correct that they have standing under one of the section-38 provisions, this court need not determine whether they also have standing under NEMA.

130. Accordingly, we respectfully submit that the applicants evidently have standing under section 38(a), (d) or (e) of the Constitution, and the first point in limine should be dismissed.

Second point in limine: all parties with a direct and substantial interest have been joined

131. The Tribunal and Appeal Authority have each raised a non-joinder point *in limine*, which we address in turn. The legal principles underpinning the issues of joinder and non-joinder are trite. In summary:

131.1. A court may not make findings that are adverse to a person’s interests without that person having been made a party to the proceedings.¹²⁰

131.2. The test is whether or not a party has a “direct and substantial interest” in any order which the court may make – that is, a legal

¹¹⁸ Section 32(1) of NEMA.

¹¹⁹ Section 32(1)(e) of NEMA.

¹²⁰ *Matjhabeng Local Municipality v Eskom Holdings Ltd* 2018 (1) SA 1 (CC).

interest in the subject matter which may be prejudicially affected by the court's judgment¹²¹ – or if the order cannot be given effect to without prejudicing that party.¹²²

131.3. A non-joinder objection should not be taken idly or as a technical one, “to cause delays and not from a real concern to safeguard the rights of those concerned”.¹²³

132. In order to succeed in their non-joinder points, the first and second respondents are accordingly required to show that the persons allegedly not joined have a direct and substantial legal interest in the court's order, not merely in the principles at issue.

133. The Tribunal contends that the applicants have failed to join three categories of persons, whom it alleges have a direct and substantial interest in the litigation and that their joinder is not only convenient but necessary in the circumstances, namely: the owners of adjacent properties, the Premiers of the provinces of Mpumalanga, KwaZulu-Natal and Gauteng, and the local community.¹²⁴ However, they fail to demonstrate that each category should be joined for at least the following reasons:

133.1. The fact that this court's order “may” be prejudicial to the economy or health of a province does not meet the threshold of a direct and substantial, legal interest in the outcome of the proceedings. There is nothing to demonstrate that there would be a prejudicial or

¹²¹ See for example, *South African History Archive Trust v South African Reserve Bank and Another* 2020 (6) SA 127 (SCA), para. 30.

¹²² See for example, *Watson NO v Ngonyama and Another* 2021 (5) SA 559 (SCA), para. 51 and *One South Africa Movement and Another v President of the RSA and Others* 2020 (5) SA 576 (GP), para. 21-22.

¹²³ *Matjhabeng*, para. 94.

¹²⁴ AA1, para. 12-15, p. 886.

adverse effect on the rights or interests of the Premiers, or that the order could not be effectively enforced if they are not parties to the proceedings.

133.2. Similarly, the fact of harm arising from mining for the local community or adjacent land owners if the relief sought by the applicants is not granted does not rise to the level of a direct and substantial interest.

134. The fifth respondent, the Mabola Protected Environment Landowners' Association, is a party to this application and has chosen not to participate in the proceedings.¹²⁵

135. The Voice Community Representative Council ("the Voice") brought an application to intervene in this review on 21 October 2020. The applicants did not oppose the intervention application.¹²⁶ The application for intervention was struck from the roll on 16 February 2021. The applicants tried to establish the status of the intervention application from the Voice's legal representatives, but no response was forthcoming.¹²⁷

136. The Appeal Authority contends that the applicants have failed to join the MEC responsible for environmental affairs in Mpumalanga, alleging that the MEC is a necessary party since:

136.1. it issued environmental authorisations on which the land use change decision "was based, amongst others",¹²⁸

¹²⁵ FA, para. 18, p. 19; return of service, p. 2116.

¹²⁶ RA, para. 15, p. 2003.

¹²⁷ RA, para. 15.1, p. 2003; annexure RA8, p. 2052.

¹²⁸ AA2, para. 14, p. 1110.

136.2. it was the MEC's responsibility to ensure NEMA was applied in the impugned decisions; and

136.3. it "has as much of, if not a greater interest" in the matter as the fourth respondent.¹²⁹

137. The fact that an environmental authorisation was issued by the MEC does not establish a direct and substantial interest in any order this court may make. The applicants have not sought in these proceedings to review the MEC's environmental authorisations and any order this court may make will have no impact on those authorisations.

138. Moreover, it was not the MEC's responsibility to ensure that NEMA was applied – that was the responsibility of the Tribunal and Appeal Authority as the authorities established and empowered to take the impugned decisions in terms of the SPLUMA, the SPLUMA By-law and the regulations. The Tribunal and Appeal Authority are the decision-makers under the relevant legislation and it is their decisions which will form the subject matter of any order the court makes.

139. Accordingly, we respectfully submit that there is no merit in the first and second respondents' non-joinder points and they ought to be dismissed.

¹²⁹ AA2, para. 15, p. 1110.

Third point in limine: there is no pending litigation between the same parties on the same cause of action

140. The principles applicable to a plea of *lis pendens* are settled. The Tribunal is required to establish that there is pending litigation between the same parties, based on the same cause of action and in respect of the same subject matter.¹³⁰

141. The applicants submit that the Tribunal has not established the elements for the following reasons. On its own version, the prior proceedings are not between the same parties, based on the same cause of action and in respect of the same subject matter. In particular:

141.1. The prior proceedings are challenges brought against different approvals, granted under different statutory regimes, by different decision-makers, to Uthaka.¹³¹ The parties in the proceedings are therefore different, as is the subject matter. Although the relief sought does not have to be identical, the question of whether the applications are in respect of the same subject matter is to be determined by the issues defined in the pleadings.

141.2. The review relief sought in other proceedings regarding the grant of the mining right and the environmental authorisation is not determinative of a question necessary for the review of the decision(s) at issue in this application, nor would the outcome of such proceedings be substantially determinative of the outcome of this application.

¹³⁰ Association of Mineworkers and Construction Union v Ngululu Bulk Carriers (Pty) Ltd (In Liquidation), para. 26.

¹³¹ FA, para. 104, p. 72-73.

141.3. In *Nestle*, the Supreme Court of Appeal emphasised:

“There is room for the application of that principle only where the same dispute, between the same parties, is sought to be placed before the same tribunal (or two tribunals with equal competence to end the dispute authoritatively). In the absence of any of those elements there is no potential for a duplication of actions.”¹³²

141.4. The Tribunal makes reference to two internal appeals lodged against specific decisions taken by other decision-makers and in terms of a different legislative regime. These are internal remedies for purposes of PAJA, and would still be subject to judicial review by a court thereafter. All else being equal, it is clear that the internal appeal bodies and this court are not tribunals with equal competence and the internal appeal bodies are not in a position to end the dispute authoritatively.

142. However, a plea of *lis pendens* is not an absolute bar to the proceedings. The applicants submit that these proceedings are not vexatious, and even assuming that the elements have been established by the Tribunal (which is denied), this court has a discretion to allow the application to proceed if it deems it just and equitable to do so or where the balance of convenience favours it.¹³³

143. We submit that it is in the interests of justice and the balance of convenience favours this court allowing this review application to proceed. It is trite that administrative action is binding and enforceable unless or until reviewed and set aside by a court.

¹³² *Nestle (South Africa) (Pty) Ltd v Mars Inc* 2001 (4) SA 542 (SCA), para. 17.

¹³³ See for example, *Keyter NO v Van der Meulen and Another NNO* 2014 (5) SA 215 (ECG), para. 11-12 and cases cited therein.

- 143.1. The applicants have a right to administrative action that is lawful, reasonable and procedurally fair. The Tribunal and appeal decisions in this case are administrative action, and the first and second respondents were at all times obliged to comply with administrative justice principles in taking those decisions. That other challenges to various approvals granted to Uthaka under different legislation and by different decision-makers does not strip the applicants of their right to review an unlawful and arbitrary decision taken by the first and second respondents, independent of any of the other approvals, solely on the basis that all of the various approvals were granted to the same entity (Uthaka).
- 143.2. In terms of PAJA, the applicants are required to institute review proceedings without unreasonable delay and in any event not later than 180 days after the exhaustion of any internal remedies. The applicants were therefore required to institute this review on or before 25 May 2020.¹³⁴
- 143.3. Had the applicants waited for the conclusion of the (different) review proceedings and internal appeals, they would then have been met with a defence of unreasonable delay and arguments to the effect that the applicants ought not to have waited for the outcome of those review applications as they should have been aware that the issues in dispute in those applications would not be determinative of some or all of the relief sought in this case.

¹³⁴ FA, para. 240, p. 128.

144. The applicants no longer persist in the relief sought in paragraph 1 of the notice of motion, and for this reason that relief was not replicated in the amended notice of motion.¹³⁵ To that extent, the defence of *lis pendens* cannot succeed in relation to this aspect.
145. The applicants accordingly submit that the first respondent has not established the elements of a defence of *lis pendens* and the point *in limine* ought to be dismissed on that basis. But even if the elements have been established, the applicants submit that the application is not vexatious, in that the interests of justice and the balance of convenience favour the hearing and determination of this application.

Fourth point in limine: the principle of subsidiarity has no impact on the relief sought

146. The review does not offend against the principle of subsidiarity. The principle of subsidiarity entails that –

“a litigant cannot directly invoke the Constitution to extract a right he or she seeks to enforce without first relying on, or attacking the constitutionality of, legislation enacted to give effect to that right. ... Once legislation to fulfil a constitutional right exists, the Constitution’s embodiment of that right is no longer the prime mechanism for its enforcement. The legislation is primary. The right in the Constitution plays only a subsidiary or supporting role.”¹³⁶

147. It is trite that where an applicant seeks to review administrative action, that review is to be brought in terms of PAJA, as the principle of subsidiarity requires.

¹³⁵ RA, para. 17, p. 2004.

¹³⁶ *My Vote Counts NPC v Speaker of the National Assembly and Others* 2016 (1) SA 132 (CC), para. 53.

However, PAJA only applies to administrative action. If an applicant seeks to review a decision that does not constitute administrative action, but which still amounts to the exercise of a public power or performance of a public function, then that review is brought under the principle of legality. To ward off a potential opposition to a review application to the effect that the decision is not administrative action and therefore not reviewable under PAJA, applicants often bring an application for review under PAJA, alternatively under the principle of legality. There is nothing untoward in this.

148. In this case, the applicants' seek the review and setting aside of the first and second respondents' decision under PAJA, on the basis that the decision constitutes administrative action. This complies with the principle of subsidiarity. In the alternative, the applicants brought the review under the principle of legality. This was a "belts-and-braces" approach, and the point *in limine* taken by the first respondent is irrelevant, unnecessarily technical and idle.
149. The applicants respectfully submit that the point *in limine* ought to be dismissed out of hand.

Costs in relation to the points in limine

150. The applicants have not demonstrated any "unbecoming conduct" as alleged by the Tribunal or at all. There is accordingly no basis on which a punitive costs order ought to be made, even if this court ultimately upholds any of the points *in limine*.
151. The Tribunal (and the Appeal Authority to a lesser degree) have taken idle, overly technical and unmeritorious points *in limine* against the applicants.

THE TRIBUNAL'S COUNTER APPLICATION

152. The Tribunal seeks an order staying the determination of this application, pending the determination of the applicants:

152.1. review of the decision of the Minister of Mineral Resources and Energy's decision to grant Uthaka a mining right, which proceedings are pending in the Pretoria High Court;

152.2. review of the decision of the Minister of Forestry, Fisheries and the Environment to grant environmental authorisation to Uthaka, which proceedings are pending in the Mbombela High Court; and

152.3. appeal of the decision of the Water Tribunal to grant a water use license to Uthaka, which proceedings are pending in the Pretoria High Court.¹³⁷

153. The Tribunal contends that the outcome of these pending proceedings will affect the status of the Tribunal's approval of the Uthaka's change in land use application.¹³⁸ According to the Tribunal, the approval of the rezoning application will automatically lapse if the applicants successfully review either the decision to grant Uthaka a mining right or the decision to grant Uthaka environmental authorisation.¹³⁹

154. In support of its contention, the Tribunal relies on the following paragraphs in the

¹³⁷ Tribunal's notice of motion in the counter-application, p. 878.

¹³⁸ AA1, para. 183, p. 928.

¹³⁹ AA1, para. 184, p. 929.

resolution approving the change in land use:

“4. The approval of the special zoning shall lapse in terms of section 54(2)(v) of the SPLUM By-law under the following conditions:

4.1 on 7 June 2030, being the same period as the expiry of the mining right (Protocol No: 5012/2016) granted in terms of the Mineral and Petroleum Resources Development Act 2002 or on the date as may be extended from time to time by the department responsible for issuing mining rights in the Republic,

4.2 non-compliance with environmental authorisation number 17/2/3/GS-131.

5. The zoning of the subject property shall revert back to agriculture as per applicable Town Planning or Land Use Scheme upon the lapse of the mining right.”¹⁴⁰

155. We submit that there is no merit to the Tribunal’s counter application because:

155.1. There is no condition in the land use change approval that requires a valid environmental authorisation or water use license. The land use change approval is not subject to any of the authorisations under review.¹⁴¹

155.2. The approval of the rezoning application will not automatically lapse should the applicants successfully review the decision to grant a mining right.

¹⁴⁰ AA1, para. 20, p. 887 - 888; FA, annexure FA31, p. 545.

¹⁴¹ RA, para. 38, p. 2011.

155.3. Paragraph 4.1 provides that the special zoning approval will lapse on the expiry of the mining right.

155.4. Paragraph 5 indicates that upon the lapse of the mining right, due to the expiration of time as contemplated in paragraph 4.1, the zoning of the property will revert to agriculture. This interpretation is consistent with the definition of lapse: *become invalid because it is not used or renewed*.¹⁴²

155.5. When a decision is set aside on review, the decision not only ceases to have effect but is also treated as if it never existed.¹⁴³ The effect is not the same as when a license or right lapses.

155.6. There is no condition in the resolution that provides that the rezoning application will automatically lapse if the mining right is set aside on review.¹⁴⁴

156. In the premises, we submit that the Tribunal's counter-application should be dismissed with costs.

COSTS

157. The applicants rely on section 32(3) of NEMA and the *Biowatch* principle governing costs in constitutional matters. The applicants seek costs in the event that the review is successful. If the review is dismissed, then in accordance with section 32(2) of NEMA and the *Biowatch* principle, no costs order should be made

¹⁴² Compact Oxford Dictionary and Thesaurus, 3rd ed.

¹⁴³ *National Energy regulator of South Africa v PG Group (Pty) Ltd* 2020 (1) SA 450 (CC), para. 89.

¹⁴⁴ RA, para. 39.4, p. 2012.

against the applicants.

158. The applicants are non-profit public interest bodies, acting in the public interest in these proceedings which are constitutional in nature. They have not acted vexatiously, frivolously or unprofessionally.

CONCLUSION

159. In the premises, the applicants respectfully seek an order in terms of the amended notice of motion.
160. The applicants further seek an order that the Tribunal's counter application is dismissed with costs.

NYOKO MUVANGUA
KATHLEEN HARDY

Chambers, Sandton
30 October 2023

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