HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

CASE NO: 50779/2017

DELETE WHICHEVER IS NOT APPLICABLE
(1) REPORTABLE: YES / NO.
(2) OF INTEREST TO OTHER JUDGES: YES / NO.
(3) REVISED.
DATE
SIGNATURE

In the matter between:

MINING AND ENVIRONMENTAL JUSTICE COMMUNITY NETWORK OF SOUTH AFRICA	First Applicant
GROUNDWORK	Second Applicant
EARTHLIFE AFRICA, JOHANNESBURG	Third Applicant
BIRDLIFE SOUTH AFRICA	Fourth Applicant
ENDANGERED WILDLIFE TRUST	Fifth Applicant
FEDERATION FOR A SUSTAINABLE ENVIRONMENT	Sixth Applicant
ASSOCIATION FOR WATER AND RURAL DEVELOPMENT	Seventh Applicant
BENCH MARKS FOUNDATION	Eighth Applicant

and

MINISTER OF ENVIRONMENTAL AFFAIRS First Respondent

MINISTER OF MINERAL RESOURCES Second Respondent

ATHA-AFRICA VENTURES (PTY) LTD Third Respondent

THE MABOLA PROTECTED ENVIRONMENT LANDOWNERS ASSOCIATION Fourth Respondent

MEC FOR AGRICULTURE, RURAL DEVELOPMENT, LAND AND ENVIRONMENTAL AFFAIRS, MPUMALANGA Fifth Respondent

Coram: Davis J

Environmental Law *– permission to conduct mining activities in a declared protected environment – nature of Minsters' discretions and duties in terms of National Environmental Management: Protected Areas Act 57 of 2003 evaluated.*

Environmental Law *– permission to conduct mining activities in a declared protected environment – Section 48(1)(b) of National Environmental Management: Protected Areas Act 57 of 2003 interpreted and explained.*

Environmental Law *– review of Ministerial permissions – application of sections 3 and 4 of Promotion of Administrative Justice Act 3 of 2003 and possible departure therefrom discussed.*

JUDGMENT

DAVIS, J

[1] Introduction:

This is an application heard in the third motion court as a special application in terms of which the applicants seek to have decisions of the Minister of Environmental Affairs and the Minister of Mineral Resources to permit coalmining activities in a

protected wetlands area reviewed and set aside. There are numerous grounds of review relied on by the applicants, the principal of which are the Ministers' failure to observe the provisions of sections 3 and 4 of the Promotion of Administrative Justice Act No 3 of 2000 ("PAJA"). The Ministers concede non-compliance with these provisions but contend that they were justified in departing therefrom. A further question central to the matter was the proper interpretation of the relevant statutory provisions governing the requisite consent of the Ministers.

[2] The Parties

2.1 The applicants have been described as a range of non-governmental, non-profit community, environmental and human rights organisations. They are the Mining and Environmental Justice Community Network of South Africa, Groundwork, Earthlife Africa, Johannesburg, Birdlife South Africa, Endangered Wildlife Trust, the Federation for a Sustainable Environment, the Association for Water and Rural Development and Benchmarks Foundation. They claim to represent primarily the public interest in the enforcement of the public's constitutional right to an environment that is protected for the benefit of present and future generations and that is not harmful to their health or well-being.

2.2 The first respondent is the Minister of Environmental Affairs and the second respondent is the Minister of Mineral Resources. The third respondent is the prospective coal mining company Atha-Africa Ventures (Pty) Ltd ("Atha"). It is the South African subsidiary of the Atha Group, a group of companies registered in India. It's BEE partner is the Bashubile Trust of which the trustees are Vincent Gezinhleyiso Zuma and Sizwe Christopher Zuma (nephews of the erstwhile president of the Republic of South Africa) and Prince Thabo Mpofu. The relevance of the identity of the BEE partner features in the applicants' submissions regarding the issue of transparency of the administrative acts in question. The fourth respondent is the Mabola Protected Environment Landowners Association. The fifth respondent is the MEC for Agriculture, Rural Development, Land and Environmental Affairs, Mpumalanga ("the MEC").

[3] Postponement:

The application was launched on 24 July 2017. After the exchange of some affidavits, the application became the subject of case management procedures, particularly due to the initial urgent relief sought, the volume of papers and the estimated duration of argument. All the parties participated in the case management process and the plaintiff's counsel, Adv Dodson SC, styled the matter as a textbook case of how case managed litigation should function. By way of a directive of the deputy judge president dated 24 April 2018, the matter was to be set down as a special motion for hearing on 16, 17 and 18 October 2018. This was done and the papers extended beyond 14 lever arch files and the applicants, the first, second and fifth respondents (jointly) as well as Atha were all represented by sets of senior and junior counsel who all filed extensive and useful heads of argument. On the Friday prior to the hearing of the matter in the following week, the MEC without prior notice or warning published a notice in the Mpumalanga provincial gazette of his intention to exclude the proposed mining area from the Mabola Protected Environment (the "MPE"), comprising the wetlands in question. Should such an exclusion take place, it would render the permission of the ministers redundant. Upon being made aware of this consequential impact on the pending application, the MEC instructed the state attorney to apply for a postponement of the application. The court was not satisfied with the explanation given by the state attorney for the postponement and, particularly having regard to the timing of the publication of the notice, required the MEC to furnish a further founding affidavit to the application for postponement, should the MEC persist therewith. Such an affidavit was furnished and the application for postponement was duly argued and dismissed with costs on the attorney and client scale, including costs of two counsel. In dismissing the application for postponement I indicated that the reasons therefor would be included in this judgement, which I shall later do.

[4] Statutory Framework:

4.1. In terms of section 24 of the Constitution of the Republic of South Africa everyone has the right to an environment that is not harmful to their health or well-being and to have the environment protected for the benefit of present

and future generations through reasonable legislative and other measures that prevent pollution and ecological degradation, promote conservation and secure ecologically sustainable development and use of natural resources while promoting justifiable economic and social development.

4.2. The legislation in question to give effect to the abovementioned environmental provision contained in the Constitution are the National Environmental Management Act 107 of 1998 ("NEMA"), the National Environmental Management: Biodiversity Act 10 of 2004 ("NEMBA"), the National Environmental Management: Protected Areas Act 57 of 2003 ("NEMPAA") and the National Water Act 36 of 1998 ("the National Water Act").

4.3 NEMA provides for a set of principles to be applied throughout the Republic by organs of state when taking decisions which "*may significantly affect the environment*". It also prescribes a number of relevant considerations to be taken into account when sustainable development is considered as part of integrated environmental management[1].

[1] Section 2 of NEMA:

(a) Sustainable development requires the consideration of all relevant factors including the following:

(i) That the disturbance of ecosystems and loss of biological diversity are avoided, or, where they cannot be altogether avoided, are minimised and remedied;

(ii) That pollution and degradation of the environment are avoided, or, where the y cannot be altogether avoided, are minimised and remedied;

(iii) That the disturbance of landscapes and sites that constitute the nation's cultural heritage is avoided, or where it cannot be altogether avoided, is minimised and remedied;

(iv) That waste is avoided, or where it cannot be altogether avoided, minimised and re-used or recycled where possible and otherwise disposed of in a responsible manner;

(v) That the use and exploitation of non-renewable natural resources is responsible and equitable, and takes into account the consequences of the depletion of the resource;

(vi) That the development, use and exploitation of renewable resources and the ecosystems of which they are part do not exceed the level beyond which their integrity is jeopardised;

(vii) That a risk-averse and cautious approach is applied, which takes into account the limits of current knowledge about the consequences of decisions and actions; and

(viii) That negative impact on the environment and on people's environmental rights be anticipated and prevented, and where they cannot be altogether prevented, are minimised and remedied.

(b) Environmental management must be integrated, acknowledging that all elements of the environment are linked and interrelated, and it must take into account the effects of decisions on all aspects of the environment and all people in the environment by pursuing the selection of the best practicable environmental option.

(c) Environmental justice must be pursued so that adverse environmental impacts shall not be distributed in such a manner as to unfairly discriminate against any person, particularly vulnerable and disadvantaged persons.

(d) Equitable access to environmental resources, benefits and services to meet basic human needs and ensure human well-being must be pursued and special measures may be taken to ensure access thereto by categories of persons disadvantaged by unfair discrimination.

(e) Responsibility for the environmental health and safety consequences of a policy, programme, project, product, process, service or activity exists throughout its life cycle.

(f) The participation of all interested and affected parties in environmental governance must be promoted, and all people must have the opportunity to develop the understanding, skill and capacity necessary for achieving equitable and effective participation, and participation by vulnerable and disadvantaged persons must be ensured.

(g) Decisions must take into account the interests, needs and values of all interested and affected parties, and this includes recognising all forms of knowledge, including traditional and ordinary knowledge.

(h) Community well-being and empowerment must be promoted through environmental education, the raising of environmental awareness, the sharing of knowledge and experience and other appropriate means.

(i) The social, economic and environmental impacts of activities, including disadvantages and benefits, must be considered, assessed and evaluated, and decisions must be appropriate in the light of such consideration and assessment.

(j) The right of workers to refuse work that is harmful to human health or the environment and to be informed of dangers must be respected and protected.

(k) Decisions must be taken in an open and transparent manner, and access to information must be provided in accordance with the law.

(l) There must be inter-governmental co-ordination and harmonisation of policies, legislation and actions relating to the environment.

(m) Actual or potential conflicts of interest between organs of state should be resolved through conflict resolution procedures.

(n) Global and international responsibilities relating to the environment must be discharged in the national interest.

(o) The environment is held in public trust for the people, the beneficial use of environmental resources must serve the public interest and the environment must be protected as the people's common heritage.

(p) The costs of remedying pollution, environmental degradation and consequent adverse health effects and of preventing, controlling or minimising further pollution, environmental damage or adverse health effects must be paid for by those responsible for harming the environment.

(q) The vital role of women and youth in environmental management and development must be recognised and their full participation therein must be promoted.

4.4 In particular, in addition to all the other listed principles, section 2(4) (r) of NEMA provides as follows: " *Sensitive vulnerable, high dynamic or stressed ecosystems, such as … wetlands and similar systems require specific attention in management and planning procedures, especially where they are subject to significant human resource usage and development presure*".

4.5 NEMBA provides for the management and conservation of the country's biodiversity within the framework of NEMA. It contains provisions dealing with the protection of species and ecosystems that warrant national protection. In this respect it also lists "restricted activities" which may threaten or harm threatened or protected species (which includes animal, plant or other organisms). In terms of section 12 of NEMBA both the relevant Minister and a MEC may publish lists of ecosystems that are threatened and in need of protection.

4.6 NEMPAA has as its objectives, stated in section 2 thereof, the provision, within the framework of national legislation, including NEMA, for the declaration and management of protected areas, to provide for co-operative governance in the declaration and management of such areas, including the promotion of sustainable utilisation of protected areas for the benefit of people in a manner that would preserve the ecological character of such areas.

4.7 In terms of section 3 of NEMPAA the State, acting through the organs of state implementing legislation applicable to protected areas, acts as trustee of those areas in securing the rights contained in section 24 of the Constitution.

4.8 Regarding the management and development of protected areas, in the event of conflict with any national, provincial or municipal laws, the provisions of NEMPAA shall prevail[2].

[2] Section 7(1) of NEMPAA:

(1) In the event of any conflict between a section of this Act and –
   (a) Other national legislation, the section of this Act prevails if the conflict specifically concerns the management or development of protected areas;
   (b) Provincial legislation, the conflict must be resolved in term of section 146 of the Constitution; and
   (c) A municipal by-law, the section of this Act prevails.

4.9 The mining industry in South Africa is well-regulated and in particular by the Mineral and Petroleum Resources Development Act 28 of 2002 ("MPRDA").

4.10 Various subordinate legislation regulating various aspects of environmental protection pertaining to mining rights have also been promulgated[3].

4.11 In order for a party to conduct mining activities, it must have obtained the following authorisations:

4.11.1 A mining right in terms of section 23(1) of the MPRDA,

4.11.2 The approval of its environmental management programme ("EMPR") in terms of section 39 of the MPRDA,

4.11.3 An environmental authorisation for listed activities in terms of section 24 of NEMA,

4.11.4 A water use licence ("WUL") in terms of section 22 (1)(b) of the National Water Act and

4.11.4 Permission for a change of land-use of the properties comprising the mining area from agricultural and/or conservation purposes to mining in terms of section 26 (4) of the Spatial Planning and Land Use Management Act 16 of 2013 ("SPLUMA").

4.12 In addition to the above, should the proposed mining area fall within a protected area, the written permission of the Ministers of Environmental Affairs and Mineral Resources are also required in terms of section 48 of

---

[3] Environmental Impact Assessment Regulations, 2010; Extensions of moratorium GN R160 in GG34057 of 28 February 2011 as amended by GN R287 in GG 34171 of 31 March 2011; Mineral and Petroleum Resources Development Regulations, 2004; Moratorium on the granting of all prospecting rights in South Africa – GN R768 in GG 33511 of 31 August 2010; Spatial Planning and Land Use Management Regulations: Land Use Management and General Matters, 2015

NEMPAA[4]. It is this lastmentioned provision which primarily forms the subject-matter of the review in question.

[5] The protected area:

5.1 On 9 December 2011 the late Minister of what was then the combined department Water and Environmental Affairs (the deponent to the 1st, 2nd and 5th Respondents' answering affidavit) published a national list of ecosystems that are threatened and in need of protection. This was done in terms of Section 52 of NEMBA[5]. This list included the Wakkerstroom/ Luneburg Grasslands.

---

[4] Section 48 NEMPAA:

(1) Despite other legislation, no person may conduct commercial prospecting, mining, exploration, production or related activities-
  (a) In a special nature reserve, national park or nature serve;
    [para. (a) substituted by s. 18 (a) of Act 31 of 2004 (wef 1 November 2005).]
  (b) In a protected environment without the written permission of the Minister and the Cabinet member responsible for minerals and energy affairs; or
  (c) In a protected area referred to in section 9 (b), (c) or (d).
    [para. (c) substituted by s. 18 (b) of Act 31 of 2004 (wef 1 November 2005).]
    [sub-s. (1) amended by s. 12 of Act 21 of 2014 (wef 2 June 2014).]
(2) The Minister, after consultation with the Cabinet member responsible for mineral and energy affairs, must review all mining activities which were lawfully conducted in areas indicated in subsection (1) (a), (b) and (c) immediately before this section took effect.
(3) The Minister, after consultation with the Cabinet member responsible for mineral and energy affairs, may, in relation to the activities contemplated in subsection (2), as well as in relation to mining activities conducted in areas contemplated in that subsection which were declare as such after the commencement of this section, prescribe conditions under which those activities may continue in order to reduce or eliminate the impact of those activities on the environment or for the environmental protection of the area concerned.
(4) When applying this section, the Minister must take into account the interests of local communities and the environmental principles referred to in section 2 of the National Environmental Management Act, 1998.

[5]Section 52 of NEMBA: Ecosystems that are threatened or in need of Protection –

(1)(a) The Minster may, by notice in the Gazette, publish a national list of ecosystems that are threatened and in need of protection.
(b) An MEC for environmental affairs in a province may, by notice in the Gazette, publish a provincial list of ecosystems in the province that are threatened and in need of protection.
(2) The following categories of ecosystems may be listed in terms of subsection (1):
  (a) critically endangered ecosystems, being ecosystems that have undergone severe degradation of ecological structure, function or composition as a result of human intervention and are subject to an extremely high risk of irreversible transformation;

5.2 Following a prior notice and comment procedure, which included a full opportunity for stakeholder participation (including Atha, who at that stage held prospecting rights in respect farms falling within the area covered by the notice), as well as a meeting of and discussion amongst stakeholders, the MEC on 22 January 2014 declared the MPE referred to in paragraph 3 above, in terms of section 28 (1)(a)(i) and (b) of NEMPAA[6]. The MPE included the ecosystem included in the abovementiond list of 2011.

5.3 On 17 February 2014 the MEC concluded an agreement with the fourth respondent in terms of which it was assigned as the management authority for the MPE.

5.4 The MPE comprises of wetlands and grasslands which have been largely classified as "Irreplaceable Critical Biodiversity Areas" and "Optimal Critical Biodiversity Areas" and numerous organs state and other stakeholders have previously recognised the fundamental ecological and environmental importance of the area comprising the MPE[7].

(b) endangered ecosystems, being ecosystems that have undergone degradation of ecological structure, function or composition as a result of human intervention, although they are not critically endangered ecosystems;
(c) vulnerable ecosystems, being ecosystems that have a high risk of undergoing significant degradation of ecological structure, function or composition as a result of human intervention, although they are not critically endangered ecosystems or endangered ecosystems; and
(d) protected ecosystems, being ecosystems that have a high conservation value or of high national or provincial importance, although they are not listed in terms of paragraphs (a), (b) or (c).

(3) A list referred to in subsection (1) must describe in sufficient detail the location of each ecosystem on the list.
(4) The Minister and the MEC for environmental affairs in a relevant province, respectively, must at least every five years review any nation or provincial list published by the Minister or MEC in terms of subsection (1).
(5) An MEC may publish or amend a provincial list only with the concurrence of the Minister.

[6] **Declaration of protected environment**
(1) The Minister or the MEC may be notice in the Gazette-
(a) Declare any area specified in the notice-
(i) as a protected environment; or
(ii) as part of an existing protected environment; and
(b) Assign a name to the protected environment.

[7] Mpumalanga Biodiversity Sector Plan 2013, the Local Municipality Special Development Framework of 30 November 2010 in terms of the Local Government: Municipal Systems Act 32 of 2000 and the District Municipality's Special Development Framework of 2014, the recognition of the area as "environmentally

[6] The proposed mining operations:

6.1 Apart from the surface infrastructure of the proposed mine, the largest part of its underground mining footprint falls within the MPE. Boreholes and pipelines are also proposed over three of the four properties which fall in the MPE. These various mine components are jointly referred to in the various reports as the "mine area".

6.2 The proposed mine is an underground coal mine (titled "the Yzerfontein Underground Coal Mine"). The proposal is to use a conventional "bord-and-pillar" mining method, comprising of the removal of large areas of coal-containing ore and leaving in place underground "pillars" of ore to support the "roof" of the underground mine. The mining activities would also include the extraction, crushing, screening and stockpiling of ore and coal as well as the off-site transportation thereof. The estimated life of the mine is 15 years.

6.3 It is common cause that the mine cannot operate without dewatering activities and that this was one of the biodiversity concerns already considered when the mine conducted its environmental impact assessment.

6.4 In terms of the mine's Social Labour Plan, it proposed to provide about 576 employment opportunities, some of which will benefit the local communities. A proposed amount of R2 million would also be invested towards skills development, including core skills training, internal learnerships, external learnerships, portable skills, bursaries and internships.

[7] The decisions sought to be reviewed:

7.1 The decisions sought to be reviewed are contained in a letter directed to Atha's Senior Vice-President. The relevant portion thereof reads:

---

sensitive" in the Annual Report of 31 May 2012 by the Minerals Minister, the Atlas of National Freshwater Ecosystem Priority Areas of August 2011, the CSIR Strategic Water Source Areas Report of March 2013 prepared for the WWF-SA and the Grasslands Programme included in the Mining and Biodiversity Guidelines: Mainstreaming Biodiversity into the Mining Sector published by, inter alia , the department of the two Minister in question on 22 May 2013.

"*… please be advised that the Ministers of Environmental Affairs and Mineral Resources have decided to grant Atha-African Ventures (Pty) Ltd permission to mine within the Mabola Protected Environment in terms of section 48 of the National Environmental Management: Protected Ares Act (NEMPAA), 2003 (Act no 57 of 2003)"*.

7.2 The letter was signed by the late Minister of Environmental Affairs on 20 August 2016 and, some three months later, by the Minister of Mineral Resources on 21 November 2016. The MEC was copied on the letter.

7.3 Attached to the letter were the "permission and reasons for the decision". They are similarly signed. Therein, the decisions were recorded as follows:

"*The Minster of Environmental Affairs (DEA) and Mineral Resources (DMR) are satisfied, on the basis of information available to them and subject to compliance with the conditions of this permission, that the applicant should be permitted to mine within a Protected Environment in terms of Section 48(1)(b) of the National Environmental Management: Protected Areas Act, 2003 (Act no.57 of 2003) (NEMPAA).*

Non-compliance with a condition of this permission may result in the permission being suspended or withdrawn. These permission is (sic) not transferable should the company change hands.

Details regarding the basis on which the two Ministers reached this decision are set out in Annexure 1".

7.4 Annexure 1 referred to above lists that the minister (singular) has taken into account the decision of the MEC to declare the MPE "and its associated processes", the draft MPE Management Plan, the mining right and its Environment Management Programme, the Environmental Authorisation, Environmental Impact Report dated January 2014 "and its associated

specialist studies", the Water Use Licence, Mining and Biodiversity Guidelines and NEMA Section 2 principles.

7.5 The findings which the Ministers have made "after consideration of the information and factors listed above" were stated as follows:

"(a) The Yzermyn Underground Mine has received other required authorisations from relevant organs of state which have jurisdiction in respect of the activity, including the Water Use Licence, the Mining Right and approved Environmental Management Plan, and the Environmental Authorisation. These decisions include measures to minimise impacts on environmental resources.

(b) The mining activity will not compromise the management objectives of the Mabola Protected Environment as it stipulated in the draft Mabola Protect Environment management plan.

(c) The mining and Biodiversity Guidelines, 2013, signed by both Ministers (DEA and DMR) support the development of the country's resources in a manner that will minimise the impact of mining of the country's biodiversity and ecosystem services.

(d) Potential impacts have been clearly highlighted and the proposed mitigation of impacts identified and assessed in the EIR dated January 2014 adequately curtails the identified impacts.

(e) This permission further includes specific conditions to ensure that the mineral resources are developed in an orderly and ecologically sustainable manner while promoting justifiable social and economic development thus giving effect to the provisions of section 24 of the constitution and NEMA Section 2 Principles".

[8] The grounds of review:

It was common cause that the decisions of the Ministers constituted administrative acts which are as such reviewable by a court. A summary of the thirteen grounds of review relied on by the Applicants is the following:

8.1 Transparency. The Applicants contend that the decisions were not taken in a transparent manner and almost in a clandestine fashion.

8.2 Procedural unfairness. It is common cause that the Ministers did not follow the prescripts of Sections 3 and 4 of PAJA. They contended that they were justified in departing therefrom. Their contention is disputed.

8.3 Ministers' duties. It was submitted on behalf of the Applicants that the Ministers misconstrued their duties and obligations in terms of section 48 of NEMPAA.

8.4 Exceptional circumstances. The Applicants contend that permission to mine in a protected area should only be granted in "exceptional circumstances" and that these words should be read into Section 48 of NEMPAA..

8.5 The management plan. The Applicants contend that the decisions could not be reasonably taken in the absence of a final management plan for the MPE.

8.6 The Applicants pointed out that Atha's Social and Labour Plan was not before the Ministers when they took their decisions and they could therefore not properly have complied with Section 48(1)(b) of NEMPAA, or have applied their minds when they imposed the following condition to their permissions:

> "*30 All social issues inclusive of affected homesteads and relocations must be addressed with the approved social and labour plan as informed by the social impact assessment report and regulated by the Department of Mineral Resources".*

8.7 The Ministers overlooked a SAS 2015 Report. In May 2015, Scientific Aquatic Services ("SAS"), one of the specialists commissioned by Atha's environmental assessment practitioner, conducted a detailed assessment of

the surface infrastructure of the wetlands in question. There is a dispute as to whether the overlooking of this report was immaterial or not.

8.8 The Applicants contend that NEMPAA invokes a "cautionary principle" in dealing with protected areas and that the Ministers overlooked this.

8.9 The Applicants complain about the inadequate provisions for rehabilitation proposed by Atha and the decisions should be reviewable for not sufficiently addressing this issue.

8.10 The tenth, twelfth and thirteenth grounds of review were lumped together and all deal with the accusation of a failure to take the country's international responsibilities relating to the environment into account and the failure to ensure intergovernmental co-ordination and planning in dealing with the use and exploitation of non-renewable natural resources.

8.11 The eleventh ground of review was the Ministers' failure to have awaited the outcome of various statutory appeals regarding the different authorisations required by Atha as referred to in paragraph 4.11 above.

8.12 The review grounds therefore encompass the grounds of not having acted within the ambit of the enabling legislation, having acted procedurally unfair and by failing to take relevant considerations into account and by taking irrelevant considerations into account, all contemplated in section 6(2) of PAJA[8].

---

[8] **Section 6(2) of PAJA**:
Section 6(2) provides: "A court … has the power to judicially review an administrative action if:

(a) The administrator who took it –
  (i) Was not authorised to do so by the empowering provision …
(b) a mandatory and material procedure or condition prescribed by an empowering provision was not complied with;
(c) the action was procedurally unfair;
(d) the action was materially influenced by an error of law;
(e) the action was taken …
  (iii) because irrelevant considerations were taken into account or relevant considerations were not considered; …
(f) the action itself: …
  (i) contravenes a law or is not authorised by the empowering provisions; or

[9] The Respondents' stances:

9.1 The first, second and fifth Respondents (the Minsters and the MEC) opposed both the main and ancillary relief sought by the Applicants. The MEC's stance was somewhat modified by his application for postponement but, when this was dismissed, he threw his weight again behind the Ministers' opposition.

9.2 Atha was not opposed to the review of the Ministers' decisions but opposed the terms of remittal proposed by the Applicants.

9.3 I shall deal with these stances together with the grounds of review, some of which are, as should already be apparent from their formulation in paragraph 8 above, more substantial than others and some overlap with each over.

[10] The nature of the decisions taken:

10.1 Before dealing with the grounds of review, certainty must be established in respect of the proper interpretation of the enabling statutory enactment, being Section 48 of NEMPAA. All counsel were *ad idem* that no judicial interpretation or pronouncement on this section has yet been made. Ms Pillay SC (for the Ministers and the MEC) further pointed out that the permissions sought from the Ministers and the nature of their decisions were novel, as if to say, if they had erred, they should not be blamed. Be that as it may, the interpretation of the section ties in with the Applicants' fourth ground of review (which is vehemently disputed), namely the contention that upon a proper contextual and purposive interpretation of Section 48(1)(b) of NEMPAA, permission to mine should only be granted by the Ministers in exceptional circumstances.

(ii) is not rationally connected to:
(aa) the purpose for which it was taken;
(bb) the purpose of the empowering provisions;
(cc) the information before the administrator; or
(dd) the reasons given for it by the administrator; … "

10.2 Somewhat related to these contentions of the Applicants is their notion of the supremacy of NEMPAA over other legislation (bolstered by the express wording of section 7 of NEMPAA) and the sequence or chronology of the authorisations needed by Atha. The applicants contend that for any prospective mining operations in a protected environment, all the required authorisations should already have been obtained and then one would additionally need the permission of the Ministers, which should only be granted in the aforesaid exceptional circumstances. The opposing respondents pointed out that, contrary to the position in, for example the MPRDA, there is no prescribed sequence or hierarchy of authorisations in NEMPAA. Notionally, one could then first "test the water" by ascertaining the views of the Ministers and their consent could be made subject to the obtaining of other authorisations.

10.3 The issues are therefore twofold: the one deals with the sequence of authorisation vis-à-vis Ministerial permissions and the other deals with the issue of the exceptionality or not of the Ministerial permissions.

10.4 Contrary to what was at some stage suggested by the Respondents, the Applicants do not contend for a "reading in" of the words "exceptional circumstances" into Section 48 on the basis that the provision would otherwise be unconstitutional. They say these words should be read in so as to render the statute and each of its sections as a functional, integrated and meaningful whole. Atha, on the other hand, submits that it is sufficient if one accepts that, the Ministers are (only)obliged to bring a "stricter measure of scrutiny" to bear in applications for their consent under the section.

10.5 The Applicants and the Respondents agree (as they should) that statutory provisions should be interpreted purposively[9]. In such interpretation, however, the reading in of an implied provision is only permissible if the

[9] Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism and Others 2004 (4) SA 490 CC at para [91]; Department of Land Affairs v Goedgelgen Tropical Front (Pty) Ltd 2007 (6) SA 199 CC at [51] and Cool Ideas 1186 CC v Hubbard 2014 (4) SA 474 CC.

implication is a necessary one without which the statutory provision is ineffectual or incapable of realising the legislative intention[10].

10.6 The proper approach to a purposive interpretation of a statutory provision consists of the process of attributing meaning to the words used, having regard to the context provided by reading the provision in light of the document (in this case NEMPAA) as a whole and the circumstances attendant upon its coming into existence (in this case Section 24 of the Constitution)[11].

10.7 In my view, if one follows the process outlined above, it is unnecessary to "read into" section 48 the qualification of exceptional circumstances (which wording, by itself, might set the bar higher than the legislative intention). To purposively give effect to the envisaged environment within and manner in which the Ministers are obliged to exercise their discretions, section 48 (1)(b) and 48 (4) should be interpreted to mean the following: despite the fact that a person may have obtained all the necessary authorisations required in terms of all other applicable statutory provisions in order to lawfully conduct mining activities on a certain portion of land, should that land fall within a protected environment as contemplated in NEMPAA, then such a person would, in addition, need to obtain the written permission of both the Ministers of Environmental Affairs and Mineral Resources to do so. In considering a request for such permission, the ministers shall act as custodians of such protected environment and with a strict measure of scrutiny take into account the interests of local communities and the environmental principles referred to in Section 2 of NEMA. Effect is given by this interpretation to all the words expressly used in the section as well as the intentions of the Legislature contained in sections 2, 3, 5 and 7 of NEMPAA referred to in paragraph 4 above and the Act as a whole. It also deals with the issue of sequence of authorisations.

---

[10] Masetlha v President the Republic of South Africa 2008(1) SA 566 CC at [192]

[11] See: Natal Joint Municipal Pension Fund v Endumeni Municipality 2012 (4) SA 593 (SCA) at [18] and the numerous annotations thereon, a recent one of which deal with the legality of certain conduct in an environmentally sensitive area (although in a different context) in Goncggose & others v Minister of Agriculture & others 2018 (5) SA 104 (SCA) and most recently in this court in Proxismart Services (Pty) Ltd v Law Society of South Africa 2018 (5) SA 644 GP at para [51]

[11] I shall now deal with the grounds of review:

11.1 Transparency:

11.1.1 Sections 3 and 4 of PAJA prescribes the components of procedurally fair administrative action. Sections 3(2)(b) and 4(1), 4(2) and 4(3) prescribe either adherence to direct *audi alterem partem*-principles or public participation respectively. Both these two routes demand and would result in transparency.

11.1.2 In the present instance, it was conceded that these provisions were not followed and the Ministers allege that they were justified in departing therefrom (as envisaged in sections 3(4) and 4(4)(a)). The consequence of their departure was that there was no transparency in the decision-making process but whether this constitutes a separate substantive ground for review in this case, shall depend on the issue of whether the departure from sections 3 and 4 were justified or not. I.e. if the Ministers were justified in not affording the Applicants either a hearing or participation in a public process, then the issue of transparency becomes a separate issue or ground of review.

11.1.3 Before dealing with the aforesaid justification issue, it needs to be mentioned that there is a disturbing feature in the conduct of the Ministers or their departments which gave rise to one of the complaints of a lack of transparency and it is this: the primary beneficiaries of the mining activity sought to be permitted are based off-shore and their local BEE component is, to an extent, “politically connected”. There was therefore, apart from the statutory requirements, a compelling need for environmental decision-making to take place openly. As the advocates who appeared for the Applicants put it: “ethical environmental governance and behaviour is enhanced simply by exposing it to the glare of public scrutiny”. When the Applicants heard from media reports that Atha might be in

the process of obtaining the Ministers' permission as contemplated in Section 48 of NEMPAA, they started making written enquiries. Officials "bounced" the correspondence between various officials to such an extent that formal PAIA requests for information had to be made by the Applicants during the second half of 2016. In response to these requests, only given on 29 November 2016, the relevant officials forwarded Atha's section 48(1) request, dated then as long ago as 3 May 2016 without informing the Applicants that the request has already been acceded to by the Minister of Environmental Affairs on 20 August 2016 and by the Minister of Mineral Affairs on 21 November 2016. This, the Applicants only found out by chance on 31 January 2017 when the Ministers' permissions were attached to a letter from a completely different department, namely that of the Department of Water and Sanitation. The relevant Respondents admit the correspondence and sequence of events but by way of a bare denial deny that the Applicants were kept in the dark.

11.2 Procedural unfairness

11.2.1 In no less than six instances in the answering affidavit deposed to by the late Minister of Environmental Affairs on behalf of herself and the Minister of Mineral Resources it is conceded that the prescripts for procedurally fair administrative action prescribed in sections 3(1), 3(2), 3(3) and 4(1), 4(2) and 4(3) of PAJA were not followed but that it had been reasonable and justifiable to depart from those prescripts as contemplated in sections 3(4) and 4(4) of PAJA.

11.2.2 The result of the non-compliance was that the Applicants were never granted an opportunity to be heard in respect of Atha's request of 3 May 2016. The Ministers' contention that other functionaries had heard the Applicant's objections in respect of the different component authorisations referred to in paragraph 4.11 above is no answer or justification: in dealing with, for example, a water use licence appeal, the Applicants cannot be expected to present

arguments which they may have presented in respect of a Section 48(1)(b) of NEMPAA request. Neither were the functionaries who heard these various processes the same.

11.2.3 Despite this, the late Minister of Environmental Affairs said in her affidavit that she considered the aforesaid departure justifiable in the circumstances and that the Minister of Mineral Resources "concurred".

11.2.4 Apart from the aforesaid *ipse dixit*, the evidentiary difficulty the court had, was that this departure decision was not reflected in the letter containing the permission (referred to in paragraph 7.1 above) and, more importantly, neither in the reasons and findings for their permission (referred to in paragraphs 7.3 – 7.5 above). There was no evidence, written or otherwise (apart from the answering affidavit) indicating that, prior to the launching of the review application, the departure from the procedural requirements referred to above was motivated, considered or "concurred" with or that any of the component specific factors listed in Sections 3(4)(b) and 4(4)(b) of PAJA had been considered as the Minsters had been required to do[12]. No internal documents or memoranda in this regard could be pointed out by Ms Pillay SC who appeared for the Ministers and had to play the hand she was dealt.

11.2.5 My initial impression of the Ministers' method of exercising their discretion was simply to apply a "tick-box" approach, namely, had all the other organs of state given their approvals? If so, then permission is granted. Counsel for the Respondents vehemently argued that this was not the case and that the Ministers simply sought to avoid a duplication of previous investigations and considerations and relied on the documents submitted in respect of each of the other required authorisations.

[12] See: Scalabrini Centre v Minister of Home Affairs 2013 (3) SA 531 WCC) and MEC, Department of Agriculture, Conservation and Environment v HTF Developers (Pty) Ltd 2008 (2) SA 319 CC at [46]

11.2.6 It is, to my mind, astounding that in an admitted novel procedure, the Ministers decided (if indeed they had done so) that it would be procedurally fair not to hear the applicants whilst well-knowing that each and every preceeding authorisation had been hotly contested. Whatever the case, it resulted in an unjustifiable and unreasonable departure from the PAJA prescripts and lead to procedurally unfair administrative action which should be reviewed and set aside on this ground alone.

11.2.7 The further attempted justification by relying on the conditions imposed by the Ministers also does not hold water: one would only be able to assess if the conditions were fair, justified or sufficient after one has heard and considered input from all relevant parties thereon. Here, this was not done.

11.3 <u>The Minsters' distinctive duties</u>

11.3.1 The essence of this ground of review is simply that the discretions which the Ministers were called upon to exercise, imposed on them distinctive duties arising from the terms of NEMPAA.

11.3.2 NEMPAA is a distinct statute, dealing with the environmental management of protected areas. Although it fits into the overall environmental statutory framework set out in paragraphs 4.1 – 4.8 above, it has supremacy in terms of section 7 of NEMPAA over other conflicting statutory provisions when it deals with protected environments and the state's trusteeship thereof.

11.3.3 The late Minister of Environmental Affairs was therefore simply wrong where she said in her answering affidavit:

> "*I deny that it was incumbent on the Minister to "apply their fresh minds" to the application. Both Ministers were fully aware of the*

complex processes undertaken in respect of the authorisation processed initiated by Atha".

11.3.4 Apart from the fact that the Ministers were expected to do exactly that, namely apply their minds and not rely on decisions taken by other officials in terms of other provisions, this contention also runs contrary to the scrutiny required in the purposive interpretation of section 48(1)(b) of NEMPAA set out in paragraph 10.6 above.

11.3.5 Further, apart from raising the spectre of an impermissible "tick-box" approach, the approach mooted by the Ministers fall foul of the Constitutional Court decision in Fuel Retailers Association of South Africa (Pty) Ltd v Director-General Environmental Management Mpumalanga Province 2007 (6) SA 4 (CC). The principle, as I see it, is that each functionary operates within the purpose and ambit of his or her own enabling statutory provisions when taking administrative action and the satisfaction of the requirements of a specific section or act does not necessarily equate to satisfaction of a similar requirement in a different section or act, particularly when lastmentioned is to be adjudicated by a different functionary.

11.3.6 On more than one level therefore, the Ministers have not appreciated their distinctive duties and neither have they fulfilled them in the manner in which they came to their conclusions. Their decisions should therefore be reviewed and set aside,

11.4 The fourth ground of review, dealing with the issue of whether exceptional circumstances must exist for a party to be able to obtain permission to conduct mining activities within a protected environment, has been dealt with above in the interpretation of section 48(1)(b).

11.5 The management plan

11.5.1 In terms of Section 39(2) of NEMPAA the assigned management authority of any protected area (which includes a declared protected environment) must, within 12 months of the assignment, submit a management plan for the protected area in question.

11.5.2 The fourth respondent is the management authority for the MPE but had to date only prepared a draft management plan which has not yet undergone all its consultative and approval processes.

11.5.3 The Applicants' argument is, in short, that until the Ministers know how the specific part of the protected environment in which the proposed mining area is situated is going to be managed or how the management criteria set out in section 40 of NEMPAA is going to be applied, they should be precluded from exercising their discretion in terms of section 48(1)(b) of NEMPAA.

11.5.4 If this is not a substantive ground for review it should form part of the directives or conditions when the matter is remitted to the Ministers, so the Applicants contend.

11.5.5 I agree. On the same basis as the Ministers would need to know what the position is in respect of all the other prescribed authorisations so as to be able to exercise their discretion in an informed manner pertaining to a protected environment in respect of which they represent the trustee, they can only do so once they have been able to consider how their consent, if granted, will either fit in with or impact on the management of the specific environment. Logic dictates this, not only in general, but even more so in the present instance where the management of water and all aspects pertaining thereto are a common feature of both the wetlands and the proposed mine. The importance and status of a management plan in respect of a protected area in terms of the context of NEMPAA appears from the recent Supreme Court of Appeal judgment in Umfolozi Sugar Planters Ltd & others v Isimangaliso

Wetland Park Authority and others (as yet unreported) SCA 873/2017 1 October 2018.

11.6 Interest of local communities

11.6.1 Section 48(4) of NEMPAA obligates the Ministers to take the interests of local communities into account when exercising their discretion. They allege that they have done so but state in their answering affidavit that "*there was no need for the Ministers to consider the SLP during this process to the exclusion of other socioeconomic specialist studies*". In addition to the ambiguity of this statement, the Ministers added compliance with the approved social and labour plan as a condition to their consent.

11.6.2 I agree that the reliance on a document, particularly one which directly impacts on a specified aspect expressly determined in Section 48(4), without even seeing or considering the contents of such a document, renders the administrative action manifestly reviewable. It clearly constitutes a failure to consider relevant information.

11.7 The SAS 2015 Report

11.7.1 The Ministers concede that they had overlooked this report but contend that this oversight was immaterial.

11.7.2 However, the fact that the report deals with the assessment (or re-assessment) of two wetlands which are located within 500 metres of the proposed underground mining boundary, clearly renders the report and consideration of its contents material and relevant. It should also be noted that various biodiversity sectors of the protected environment have been classified as "protected", "irreplaceable" or at least "highly significant". Therefore the same argument and finding applies as in paragraph 11.6.2 above.

11.8 Cautionary rule

11.8.1 The Applicants contend that, with reference to the principles set out in section 2 of NEMA (incorporated in Section 48(4) of NEMPAA), decision-making authorities should apply a risk-averse and cautious approach when dealing with “sensitive, vulnerable, highly dynamic or stressed ecosystems, such as … wetlands and similar systems”.

11.8.2 The Applicants further contend that, in particular with regard to the management of acid mine drainage post closure of the proposed mine, no cautionary approach had been adopted.

11.8.3 Without raising the “cautionary approach” to a substantive ground of review beyond its compulsory inclusion in the decision-making process by means of Section 48(4) of NEMPAA, it is clear from the findings and reasons for their decisions and from the conditions imposed by the Ministers, that they simply relied on the mitigation and management of “*acid mine drainage, where applicable, according to the requirements of DWS*” (this is a quotation of one of the conditions and “DWS” refers to the Department of Water and Sanitation).

11.8.4 The above constitutes both an impermissible abdication of decision-making authority and a non-compliance with Section 48(4) of NEMPAA, rendering the decisions reviewable.

11.9 Rehabilitation

11.9.1 The Applicants complain that too little financial provisions have been made or conditions imposed to ensure complete rehabilitation of the MPE in consequence of the proposed coal mining activities.

11.9.2 From the concessions made by the Ministers, it appears that they did not independently and distinctively consider this, but relied on the

approval of the environmental programme submitted in respect of the mining licence. There appears not to have been any separate application of their minds as to whether the rehabilitation proposed therein would be sufficient for the MPE or whether, as trustees of a protected environment, they should be satisfied therewith.

11.9.3 It is for the above reasons that the Applicants contend that this issue be included in the directions to be given to the Ministers as part of the remittal of Atha's request for permission. In my view, once fair administrative procedures are followed during the re-consideration their decisions, the Applicants will have sufficient opportunity to bring the specifics of their contentions regarding the sufficiency of rehabilitation conditions to the attention of the Ministers. They will be the ones to ultimately take the decisions and exercise their discretions and courts should be vigilant in not overstepping the borders of the separation of powers by being over-prescriptive to administrative decision-makers. I am therefore of the view that this aspect need not and should not form part of the remittal directions.

11.10 Failure to await the statutory appeals

11.10.1 This was the Applicant's eleventh ground of review. At the time when the decisions were taken, statutory appeal procedures were pending in respect of the environmental authorisation granted to Atha in respect of its environmental management programme and its water use licence.

11.10.2 The parties were *ad idem* that all the appeals in terms of NEMA, the MPRDA and the National Water Act fall into the category of so-called "wide appeals", i.e. they consist of re-considerations of the original decisions and authorisations and new evidentiary material may be introduced. "Wide appeals" refer to appeals in the "wide sense" as characterised in Tikly v Johannes NO 1963 (3) SA 588 (T) at 590G – 591A. See also, in the environmental sphere and Sea Front for All

and Another v MEC, Environmental and Development Planning and others 2011 (3) SA 55 (WCC) at [24] - [28].

11.10.3 In similar fashion as set out in paragraph 11.5 above regarding management of the protected area, where the permission of the Ministers envisaged in Section 48 of NEMPAA is an additional requirement to be obtained by a mining company in respect of prospective mining operations in a protected environment after all other authorisations had been obtained, it must follow that, until all internal remedies have been exhausted in respect of such authorisations, their existence, nature or any conditions attached thereto, would not have been determined.

11.10.4 Insofar as the Ministers had also contended, both in their answering affidavit in general and, in their attempt to justify their departure from Sections 3 and 4 of PAJA, that they had relied on the decisions reached and processes followed by the various decision-makers in respect of all the other authorisations required by Atha, it must also follow that, until all internal appeals have been concluded, the processes, submissions and possible new or updated evidentiary material in the form of further submissions and/or reports are incomplete.

11.10.5 The Ministers' contention that, in pursuance of effective governance, they could not wait for these other processes to conclude before exercising their discretions, is no answer. Their conduct also runs contrary to the interpretation of Section 48(1)(b) of NEMPAA referred to in paragraph 10.6 above. Mr Lazarus SC, who appeared for Atha, correctly in my view, was constrained to agree that, in the course of being called upon to exercise a discretion, "more information is always better than less".

11.10.6 The requirement to wait until finalisation of internal appeal procedures (and the possible furnishing of further evidence and

information) will therefore be one of the directives to be made in the remittal of the Ministers' decisions.

11.11 Grounds ten, twelve and thirteen

These grounds have largely been encompassed by the interpretation placed on section 48(1)(b) and 48(4) of NEMPAA earlier in this judgment. In view of the conclusion having been already reached in the preceding paragraphs that the Ministers' decisions should be reviewed, set aside and be remitted, it is neither apposite nor necessary to make further comments in respect of these grounds save for the following: a failure to take South Africa's international responsibilities relating to the environment into account and a failure to take into account that the use and exploitation of non-renewable natural resources must take place in a responsible and equitable manner would not satisfy the "higher level of scrutiny" necessary when considering whether mining activities should be permitted in a protected environment or not. Such failures would constitute a failure by the state of its duties as trustees of vulnerable environments, particularly where it has been stated that "most people would agree, when thinking of the tomorrows of unborn people that it is a present moral duty to avoid causing harm to the environment". See: Du Plessis, Climate change, Public trusteeship and the tomorrows of the unborn, 2015 SAJHR 260. Such failures might also amount to impermissibly failing to take relevant considerations into account.

[12] The postponement application

12.1 The Matter was, as already stated, set down for argument on Tuesday 16, Wednesday 17 and Thursday 18 October 2018. The extent of the papers (including affidavits, documents, correspondence, maps, diagrams and reports) as well as heads of argument were extensive.

12.2 Apparently without notice or recourse to his legal team, the MEC published his intention to exclude the area of the proposed mining area from the MPE in terms of section 29 (b) of NEMPAA on Friday 12

October 2018. Members of the public were invited to submit representations within 60 days of the publication of the notice.

12.3 His purpose for his intention was set out in the notice as the following:

1. *To ensure balance towards use of natural resources for socio-economic benefits of all the citizens/community of Pixley Ka Seme Local Municipality and the country, while promoting environmental protection and sustainability;*

2. *To ensure/promote economic growth of the country and the community of the area;*

3. *To promote co-existence of mining activities and conservation within the area on the properties, the boundaries of which are as indicated on addendum 1 and 2 hereto*".

12.4 How the notice got to the attention of the state attorney is not clear and neither was it disclosed, but the state attorney received instructions to apply for a postponement of the application on the following basis:

> "*This document was only brought to the attention of the legal team acting for the first, second and third Applicants on 12 October 2018. I was advised by the legal advisor acting for the MEC that the reason is that the MEC did not, at the time, appreciate the link between the notice (annexure A) and the litigation currently before court. Once I explained that the two were closely related, and that any decision to exclude the land in question from the MPE would render the main application moot, I was instructed to bring this application and bring the annexure "A" to the attention of the court*".

12.5 The State Attorney's affidavit and the application for postponement were brought to my chambers on the afternoon of Monday 15 October 2018.

12.6 Should the MEC exclude the area in question, it would render the Ministers' decision unnecessary and moot. The timing of the publication of the notice and the possible prevention or avoidance of a decision by a court in respect of a pending matter of the nature as set out above was unfortunate, to say the least. The fact that costs were tendered did not alleviate the situation and would constitute yet another instance of public funds being wasted by way of unnecessary litigation.

12.7 In view of the unsatisfactory (or absent) explanations as to the timing of the notice and its motive, I stood the main application down in order for the MEC to produce his own affidavit, which he did on Tuesday 16 October 2018. In it, he confirmed his instructions to apply for a postponement of the main application and stated as his rationale for publishing the notice the receipt of a memorandum dated 6 March 2018 from a large portion of the local community in the Dr Pixley Ka Isaka Seme Municipality (accompanied by a petition of 8500 community members). The community apparently expressed concerns about the declaration of the MPE (which had already been done four year ago), the lack of a management plan and the impoverishment of the community due to a lack of development in the area. The MEC's explanation for the lengthy time lapse since receipt of the memorandum is sparse in the extreme save for the facts that he had raised the memorandum with his "counterparts" in the Mpumalanga Provincial Government and, significantly also, the late Minister of Environmental Affairs. In any event, on 27 September 2018 (6 months after receipt of the memorandum) he decided to embark on a public participation process which is foreshadowed in the notice. He was oblivious of the impact of his conduct on the pending litigation in which he features prominently.

12.8 The application for postponement was vehemently and substantively opposed by the Applicants.

12.9 It was clear that the published intention by the MEC may result in various possible permutations. If, after receipt of written submissions by 12 December 2018, the MEC decided to exclude the proposed mining area from the MPE then Atha would no longer need the Ministers' permission in terms of section 48(1)(b) of NEMPAA. To this extent, the main application for review of their decisions might be moot. Having regard to the nature and extent of the Applicants' expressed concerns about the wetlands in question, an attack on such a decision of the MEC is quite foreseeable, which attack may or may not be successful. If successful, the current review would then re-surface with all the present costs (and time) having been lost and which would have to be expended again. The same would happen if the MEC decides not to exclude the area in question.

12.10 The Applicants contended that currently, the decisions of the Ministers are not moot, are the subject matter of a pending review application in respect of which all parties had expended substantial resources and in respect of which the applicants insist on exercising their Constitutional rights of access to a court of law set out in section 34 of the Constitution.

12.11 Even if an issue of true mootness had arisen, the court has a discretion to still hear a matter. Examples have featured in appellate litigation such as Centre for Child Law v Hoërskool Fochville 2016 (2) SA 121 (SCA), *Natal Rugby Union v Gould* 1999 (1) SA 432 (SCA), Executive Officer, Financial Services Board v Dynamic Wealth and Others 2012 (1) SA 453 (SCA). As set out in the Centre for Child Law-case at [11], the broad distinction between the cases where an appeal had been heard despite mootness of the order appealed against and those cases where a court has refused to entertain the merits, is that in the former a discrete legal issue of public importance arose which would effect

matters in the future and on which adjudication is required, whilst in the latter, no such issue arose See: Qoboshiyane NO v Avusa Publishing Eastern Cape (Pty) Ltd 2013 (3) SA 315 (SCA) and IEC v Langberg Municipality 2001 (3) SA 925 (CC) .

12.12 Apart from the issue of wastage of costs and time, I was of the view that the Applicants' contentions referred to in paragraph 12.10 above should be upheld. Moreover, the Ministers' decisions are not yet irrelevant (and may possibly not ever become irrelevant) and true mootness does not yet exist. Even if it did and, applying the same principles as in appellant litigation, all parties agreed that clarity on the interpretation of Section 48 and the Ministers' duties and approach thereto are needed, not only for this matter but for future similar matters.

12.13 I have therefore, for the reasons as set out above and, in the exercise of my discretion, refused the application for postponement. I also found that there was no reason to depart from the customary approach that costs should follow the event. Having regard to the timing of the application for postponement and the manner in which it was launched, I found that its refusal justified a punitive cost order, which I granted.

[13] Costs:

I find, in respect of the main application, that the Applicants have clearly been substantially successful and are entitled to their costs. The matter does not fall in the class of constitutional litigation envisaged in Biowatch Trust v Registrar, Genetic Resources and others 2009 (6) SA 232 CC where costs should not be awarded against the state, even if unsuccessful. Ms Pillay SC further argued that, were the Applicants to be successful and entitled to costs, it should not be on a punitive scale. She argued that the Ministers' "handling" of the Section 48 application was based on a "genuine interpretation of a statutory provision which has thus far not been interpreted by a court". Their interpretation of Section 48 aside, there was no justification for the lack of

transparency or the departure from sections 3 and 4 of PAJA, both of which could have gone a long way in possibly even preventing litigation. Compliance therewith would certainly have removed a large portion of the grounds of review which featured in this matter. A punitive costs order is therefore justified. Atha was a necessary, but not voluntary, party to the litigation and did not seek costs from either the Applicants or the other respondents. It opposed certain of the ancillary relief in the event of remittal but otherwise sought to remain out of the fray. It should therefore neither be liable nor entitled to costs.

[14] Order:

In the premises, I grant an order as follows:

1. The decision of the First Respondent on 20 August 2016 to grant the Third Respondent written permission to conduct commercial mining in the Mabola Protected Environment in terms of section 48(1)(b) of the National Environmental Management: Protected Area Act, No. 57 of 2003 ("NEMPAA") is reviewed and set aside.

2. The decision of the Second Respondent on 21 November 2016 to grant the Third Respondent written permission to conduct commercial mining in the Mabola Protected Environment in terms of section 48(1)(b) of NEMPAA is reviewed and set aside.

3. The Third Respondent's application for written permission to conduct commercial mining in the Mabola Protected Environment in terms of section 48(1)(b) of NEMPAA is remitted to the First and Second Respondents for reconsideration.

4. In reconsidering the Third Respondent's application for written permission to conduct commercial mining in the Mabola Protected Environment in terms of section 48(1)(b) of NEMPAA, the First and Second Respondents are directed to consider all relevant considerations and -

    4.1 to comply with sections 3 and 4 of the Promotion of Administrative Justice Act, No. 3 of 2000;

    4.2 to take into account the interests of local communities and the environmental principles referred to in section 2 of the National Environmental Management Act, No. 107 of 1998 ("NEMA");

    4.3 to defer any decision in terms of section 48(1)(b) of NEMPAA until after the decision of –

        4.3.1 the Applicants' statutory appeal to the Director General: Department of Mineral Resources in terms of the Mineral and Petroleum Resources Development Act, No. 28 of 2002 against the approval of the Third Respondent's environmental management programme; and

        4.3.2 the Applicants' statutory appeal to the Water Tribunal in term of the National Water Act, No. 36 of 1998 against the decision to issue a water use licence to the Third Respondent;

    4.4 not to consider the granting of permission to conduct commercial mining in the Mabola Protected Environmental in terms of section 48(1)(b) of NEMPAA until a management plan for the MPE has been approved by the Fifth Respondent in terms of section 39(2) of NEMPAA and to consider the contents thereof.

5. In the event that, prior to the completion of the reconsideration contemplated in paragraphs 3 and 4, the Fifth Respondent decides in terms of section 29 (b)

of the National Environmental Management: Protected Areas Act No. 57 of 2003, to exclude the farms referred to in Provincial Notice 127 of 2018 ("Gazette notice"), from the Mabola Protected Environment, any party may apply to court on the same papers, duly supplemented, on notice to the other parties, for an order varying paragraphs 3 and 4 or granting such alternative, further or interim relief as may be just and equitable in the circumstances.

6. The First, Second and Fifth Respondents are directed to pay the applicant's costs of this application, jointly and severally of the attorney and client scale, the one paying the other to be absolved, such costs to include the costs of two counsel.

_____

N DAVIS
Judge of the High Court
Gauteng Division, Pretoria

Date of Hearing: 17 and 18 October 2018

Judgment delivered: 8 November 2018

APPEARANCES:

For the Applicants:	Adv. A Dodson SC with Adv. A du Toit
Attorney for Applicants:	Centre for Environmental Rights c/o Du Plessiss & Kruyshaar Inc, Pretoria

For the 1st, 2nd and 5th Respondents:	Adv. K Pillay SC with Adv L Gumbi
Attorney for 1st, 2nd and 5th Respondents:	The State Attorney, Pretoria
For the 3rd Respondent:	Adv. P Lazarus SC with Adv. A Pantazis
Attorney for 3rd Respondents:	GF Joubert Attorneys, Pretoria