



IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG PROVINCIAL DIVISION, PRETORIA

DELETE WHICHEVER IS NOT APPLICABLE

- (1) REPORTABLE: **YES/NO**
- (2) OF INTEREST TO OTHER JUDGES: **YES/NO**
- (3) REVISED: **YES/NO**
- (4) Date: **10 MAY 2023** Signature: _____

CASE NUMBER: A155/2019

In the matter between:

ENDANGERED WILDLIFE TRUST

First Appellant

FEDERATION FOR A SUSTAINABLE ENVIRONMENT

Second Appellant

And

**DIRECTOR GENERAL: DEPARTMENT OF WATER AND
SANITATION (ACTING)**

First Respondent

ATHA-AFRICA VENTURES (PTY) LTD

Second Respondent

JUDGMENT

BALOYI-MERE AJ

Introduction

1. This is an application brought by the Endangered Wildlife Trust and the Federation for a Sustainable Environment (collectively referred to as the Appellants) in terms of section 149 of the National Water Act 36 of 1998 (“NWA”) wherein the Appellants appeal against the whole decision, including both the order granted and the reasons for it, taken by the Water Tribunal established in terms of section 146 and 147 of the NWA on the 22nd May 2019.
2. The Appellants appeal the decision of the Water Tribunal on a question of law as provided for in section 149 (one of the NWA).
3. The Appellants’ grounds of appeal are the failure by the Water Tribunal to consider strategic importance of the mine area for water security and biodiversity; the absence of proof of consent as required by section 24 of the NWA; the failure to apply the precautionary principles; the failure to provide for post-closure treatment of contaminated water; and the failure to appreciate the burden of proof in respect of socio-economic impacts.

The Involvement of the Public Interest Law Centres (“PILCs”)

4. Atha-Africa Ventures (Pty) Ltd (“the Second Respondents”) filed their heads of argument resisting the Appellants’ appeal. At the outset, the Second Respondent attacked the PILCs and accused, in particular, the Centre for Environmental Rights (“CER”) which is the attorneys for the Appellants, for having a direct and substantial interest in the proceedings both before the Water Tribunal and before the Court and as well as the outcome thereof. The Second respondent further alleged that this constituted a clear and unethical conflict of interest in the case of the Centre for Environmental Rights. The Second Respondent also alleged that the Appellants had advanced a partisan and misleading case before the Water Tribunal and this Court.
5. As a result of what the Second Appellant described as an abuse of court process, the Second Respondent asked this Court to direct that the cost of the appeal to be paid on a punitive, attorney and client’s scale, jointly and severally, by the Appellants and by the CER *de bonis propriis* and that the conduct of the CER be referred to the Legal Practice Council.
6. These allegations led to the application for admission as *amicus* by several Public Interest Law Centres, namely, The Legal Resource Centre, The Centre for Applied Legal Studies, Section 27, Equal Education Law Centre, Ndifuna Ukwazi and Centre for Child Law which will collectively be referred to as the Public Interest Law Centres (“PILCs”). These PILCs were admitted as *amici curiae* on the 07th July 2021.
7. Heads of argument were submitted on behalf of all the PILCs including the Southern African Human Rights Defenders Network.

8. In the heads of argument submitted on behalf of the PILCs, an extensive and clear exposition on the role of *amici curiae* in the Court was outlined. The concerns by the PILCs that they should not be threatened by punitive cost orders where they intend to intervene in matters as friends of the Court was clearly articulated. This included the role played by the CER which was accused of having a conflict of interest by the Second Respondent.
9. The Appellants filed an application for striking out the allegations against the PILCs including the punitive cost order sought by the Second Respondent.
10. In the meantime, the Second Respondent withdrew and distanced themselves from the allegations made against the PILCs claiming that those were the allegations made by the previous legal team. Right at the commencement of the hearing of this matter, the legal representatives for the Second Respondent put it on record that the allegations against the PILCs have been withdrawn but the legal representatives did not address the issue of costs.
11. This issue of the PILCs and the threat by the Second Respondent, including the withdrawal of the allegations made against the CER and its attorneys were dealt with as a point in *limine*.
12. It is trite that PILCs act in the public interest when they facilitate the enforcement of rights under section 38(d) of the Constitution of the Republic of South Africa, 1996 ("the Constitution"). The involvement of the PILCs in the Courts where that they were admitted as the friend of the court has been dealt with in our courts extensively such that I do not have to rehash what has been

held by the courts. The Constitutional Court has had the opportunity to deal with the issue of the admission of the PILCS in the matter of ***The National Treasury and Others v Opposition to Urban Tolling Alliance and Others***¹ by Moseneke DCJ, also in ***The Children's Institute v Presiding Officer of the Children's Court, Krugersdorp and Others***² and the Supreme Court of Appeal also dealt with the issue of the PILCs in the matter of ***Maharaja and Others v Mandag Centre for Investigative Journalism NPC and Others***³.

13. After submissions by counsel for all the parties, including counsel for the PILCs, the Court came to the conclusion that there was no merit at all for the Second Respondent to threaten the PILCs and in particular the CER for representing the Appellants and alleging that the CER has a direct and substantial interest in the matter. Therefore, there is a clear conflict of interest. Also, because the Second Respondent had withdrawn the allegations against the CER, the issue was found to be moot. In the premise the Court ruled as follows:

13.1 The Appellants application to strike out dated the 12th October 2020 is granted;

13.2 The portions of the heads of argument of the Second Respondents where they refer to the PILCs' to be conflicted and have a direct and substantial interest in the matter to be struck out;

13.3 The same and/or similar allegations contained in the Second Respondent's rebuttal heads of argument to be struck out;

¹ 2012 (6) SA 223 (CC).

² 2013 (2) SA 620 (CC).

³ 2018 (1) SA 471 (SCA).

13.4 The Second Respondent is ordered to pay the costs of the Appellants' application for striking out, the heads of argument dealing with the vexatious allegations made by the Second Respondent, the costs incurred by all the PILCs in the process of dealing with the vexatious statements made by the Respondents; and

13.5 All these costs to be paid on party and party scale including the cost for the attendance of court to argue on the vexatious allegations, which costs to include the employ of two counsel where necessary.

14. Before I deal with the main application, it needs to be indicated that the fact that there is a ruling on the point *in limine* does not take away the admitted PILCs rights to participate in the main application.

Brief Background of the Matter

15. The Water Use Licence ("WUL") was granted in respect of mining activity to be undertaken by Atha-Africa at its proposed Yzermyn Underground Coal Mine ("YUCM") located partially on farm Yzermyn, near Wakkerstroom within the Pixley ka Seme Local Municipality, in the Mpumalanga Province.

16. On the surface, the YUCM's infrastructure is located on the northern portion 1 of Farm Yzermyn 96 HT, Wakkerstroom and also touches part of the mine surface infrastructure graphically depicted in the WUL application of Atha-Africa.

17. The total surface area of the YUCM infrastructure is 22.4 hectares. This is the above-ground area that would be dedicated to offices, surface plant sites including the underground access adit, administration block, workshop,

vehicle wash bays, optional waste water treatment plant, storm water management system, roads and related services.

18. The underground workings of the YUCM traverses about 8 360 hectares covering the underground area beneath Farms Goedgevonden 95 HT, portion 1 of Farm Kromhoek 93 HT, remainder of Farm Kromhoek 93 HT, portion 1 of Yzermyn 96 HT, and Farm Zoetfontein 94 HT.

19. The YUCM is topographically located in the upper reaches of the Assegai and Mawandlane Rivers within the W51A Quaternary Catchment, which encompasses the Usuthu Catchment region. The Usuthu contributes to the Heyshope Dam which is located 16.5 km to the North East of the YUCM surface. Geo-hydrologically, the respective water courses are predominantly perennial in nature, located within the Usuthu to Mhlathuzi Water Management Area.

20. The mine itself will utilise underground conservative drill and blast combined with continuous miners in a Board and Pillar mining method, having an inclined portal or adit sunk from the northern section of Yzer 96 HT target area, used to extract the Alfred and Dundas thermal coal seams forming part of the Utrecht coal field within the Karoo Supergroup geological unit. The mine is prospected with a feasible area of 2 500 hectares. There will be no open cast mining and no coal wash plant on site. The coal is planned to be removed via conveyor systems to a Run of Mine (“ROM”) raw coal stockpile surface where the coal would be crushed and streamered into stockpile and carted by rope off- site to the market. The estimated lifespan of the YUCM is 15 years.

The Appellants' Case

21. The Appellants challenge the Water Tribunal's finding on five grounds which are based on questions of law. I now deal with each ground:

The Failure to Consider Strategic Importance of the Mine Area for Water Security and Biodiversity

22. The Appellants submit that according to the report by the Council for Scientific and Industrial Research ("the CSIR") the mine area was identified in March 2018 to fall entirely within the Enkangala Drakensburg Strategic Water Source Area ("SWSA"). The report further explained that SWSA's are absolutely critical for National Water and Economic Security and the report expertly stated that they should receive particular attention in decision making.

23. The mine also forms part of a River Freshwater Ecosystem Priority Areas ("FEPA") in the Atlas of National Fresh Water Ecosystem Priority Areas in South Africa which was published in August 2011 by the Department of Water Affairs and Environmental Affairs. The Appellants further submit that this means that the area has been recognised at national government level as contributing to national biodiversity goals and the sustainable use of water resources and such being an area which should be managed in a way that maintains the good condition of the River Reach.

24. The underground area of the mine falls within the Mabola Protected Environment, which was declared as such by the MEC for Economic Development, Environment and Tourism of Mpumalanga on 22nd January 2014, in terms of section 28(1)(a)(i) and (b) of National Environmental

Management: Protected Areas Act 57 of 2003 (“NEMPAA”). Part of the motivation for declaring the Mabola Protected Environment was to protect the environmentally sensitive area which has irreplaceable biodiversity against coal mining.

The Absence of Proof of Consent as Required by Section 24 of the NWA

25. Section 24 of the NWA provides that a license may be granted to use water found underground on land not owned by the Applicant if the owner of the land consents to the use thereof or if there is a good reason to grant the license. The Appellants contend that the onus is on the license applicant to demonstrate that consent has been obtained from the owner or that good reason exist to grant a license in the absence of consent. The Appellants further contend that if no consent has been obtained and that no good reason exist to grant the license in the absence of such consent then the license application must be refused.

26. The Appellants further contend that the requirements set out in section 24 is a jurisdictional requirement which must exist before the WUL may be granted. The Appellants further argued that this requirement precludes the granting of a license to use water found underground or land not owned by the applicant unless the land owner consents or there is good reason to do so.

The Failure to Apply the Precautionary Principle

27. Section 2(4)(a)(vii) of National Environmental Management Act 107 of 1998 (“NEMA”) sets out the precautionary principle. The principle provides that sustainable development requires the consideration of all relevant factors

including 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.

28. The Appellants contend that the NEMA principle applies to the actions of all organs of the state that may significantly affect the environment and that the principles also serve as guidelines by reference to which any organ of state must exercise any function when taking any decision in terms of, among other laws, the NWA.

29. The Appellants further relied on the principle as articulated in ***The Fuel Retailers Association of Southern Africa v Director General: Environmental Management, Department of Agriculture, Conservation and Environment, Mpumalanga Province and Others*** (“Fuel Retailer”)⁴ and quote paragraph 98 thereof, which states as follows:

“Before concluding this judgment, there are two matters that should be mentioned in relation to the duty of Environmental Authorities which are a source of concern. The first relates to the attitude of Water Affairs and Forestry and the Environmental Authorities. The Environmental Authorities and Water Affairs and Forestry did not seem to take seriously the threat of contamination of underground water supply. The precautionary principle requires these authorities to insist on adequate precautionary measures to safeguard against the contamination of underground water. This principle is applicable where, due to unavailable scientific knowledge, there is uncertainty as to the future

⁴ [2007] (6) SA 4 (CC).

impact of the proposed development. Water is a precious commodity; it is a natural resource that must be protected for the benefit of present and future generations.”

30. The Appellants contend that the precautionary principle must be read together with the hierarchy of mitigation, that is, section 2(4)(a)(i) – (iv) and (viii), which provides that the environmental harm must be avoided if at all possible and only if they cannot be avoided should those harms be minimized and remedied.

31. The Appellants also list five aspects in which they submit that the information before the Water Tribunal was inconclusive and insufficient and on those bases the granting of the WUL flew in the face of the precautionary principle. The five bases are:

31.1 The findings of the Delta H ground water assessment were expressly characterised as being of a low confidence;

31.2 There was uncertainty and inadequate information regarding the risks of dewatering;

31.3 There was uncertainty and inadequate information regarding the sufficiency of mitigation measures of decant of contaminated ground water and Acid Mine Drainage;

31.4 There was uncertainty and inadequate information regarding cumulative impacts; and

31.5 There was uncertainty and inadequate information regarding impacts on downstream users.

Failure to Provide Proposed Closure Treatment of Contaminated Water

32. The Appellants submit that one of the common cause impact of a mine, in the absence of mitigation measures is decant. The severity of the impact associated with post closure decant if uncontrolled is recognised in the IWWMP and various decant related impacts are categorised as high or unacceptable and which warrants abandonment of the project if no mitigation is possible. The Appellants further contend that a water treatment plant would be required post closure in order to treat decant emanating from the mine. They further allege that Atha-Africa has not made any financial provision for a water treatment plant even during the operational phase in either the water use license application process or in terms of the Mineral and Petroleum Resources Development Act 28 of 2002 (“the MPRDA”).

The Failure to Appreciate the Burden of Proof in Respect of Socio-Economic Impact

33. Section 27(1)(d) of the NWA provides that among the factors a responsible authority is required to consider when granting a WUL is the socio-economic impact of the water use or uses if authorised or of the failure to authorise the water use or uses. The Appellant contend that Atha is most likely to source skilled labour from outside the area with management level staff likely to be sourced in India and while there may be a small number of additional unskilled opportunities that could arise, there is unlikely to be significant

opportunities for the local population to be employed during the construction phase and the opportunities are likely to be temporary.

34. The Appellants contend that eco-tourism currently contributes materially to job creation in the Wakkerstroom region as this region is known for, among other things, its abundant and varied bird life. The Appellants further contend that if mitigation measures are not implemented, environmental impacts resulting from the proposed mine may degrade surrounding surface and ground water sources resulting in a reduction of biodiversity in the area and a decline in eco-tourism. The Appellants further contended that the farms on which the mine would be established are in part currently used for the commercial grazing of livestock and thus support agricultural employment opportunities. Several subsistent farmers have made their home on the proposed mining site which has good to excellent grazing capacity. Approximately 8 homesteads are located on the proposed mining site. These are occupied by low income families with between 8 and 30 people in each homestead.

35. The Appellants conclude with the submission that the appeal should be upheld and the order of the Water Tribunal should be replaced with a decision refusing Atha-Africa's WUL Application.

The First Respondent's Case

36. The First respondent laid out succinctly and clearly the historical background of the matter which has already been dealt with in the preceding paragraphs of this judgment. The First respondent submits that the principal concern of the Appellants is that the environment within which the YCUM will be undertaken is environmentally sensitive, vulnerable and important from a

regional and national perspective. The surface area of the YUCM site layout and partially the underground working are not pristine nor are they undisturbed. The Appellants conceded the existence of previous adits showing previous mining which proved no material connection between surface and underground water.

37. The evidence presented before the Water Tribunal expressly provided that there will be no daylighting hence no expected decanting of water from the underground tunnels. The First Respondent submits that the reasonableness and the rationality test have been met as the balance of the risk is, in this case, equitable. The First Respondent, for this proposition, relies on the case of ***Khanyisa Community development Organization and Others v Director: Development Management: Western Cape Department of Local Government, Environmental Affairs and Development and Another***⁵.

38. The site location and the wetlands in the vicinity are areas that were subject to historical human activity including agriculture and even previous mining related developments.

39. Atha-Africa had contracted a number of experts in hydro-geology, environmental impact assessments and mining. The relevant reports formed part of Atha-Africa's bundle in the application for the WUL.

40. The First Respondent considered the WUL through a process of record of recommendations. The final decision of the WUL was made subject to

⁵ [2020] 2 All SA 485 (WCC) at paragraphs 36 – 37.

conditions to be complied with by Atha-Africa. The WUL was approved in respect of water uses as contemplated in sections 21(a),(c),(i),(f),(g) and (j) of the NWA.

41. The First Respondent took into consideration mitigating factors in respect of respective possible impacts of each approved water use. In respect of alteration of water use of the existing streams, the WUL required that the downstream flows must be maintained during construction. This would ensure that the water is concentrated way from the collection points and is led to join the main rivers. Also in respect of deterioration of water quality the WUL stipulated that standard best environmental practice housekeeping rules must be applied.

42. In respect of degradation of wetlands, the WUL stipulated a condition that no discard dump and impacts associated with construction and operation of discard dump will be permitted.

43. Further the WUL was only granted following public practice processes and the relevant stakeholders and neighbouring farm owners that registered objections were addressed by Atha-Africa's responses. For instance, Atha-Africa re-engineered their proposed project layout after such public comments were raised and the relevant remedial steps rendered the project acceptable for the public and the WUL.

44. The project was approved as it accorded with the principle in section 2(2) of the NEMA and that it should put people first. Indeed, the tribunal balanced the principle with the other elements in section 2(4) of the NEMA to ensure that

there would be avoidance of significant pollution of the environment, the central focus being to promote sustainable use of water resources.

45. The Constitution provides that everyone has the right to an environment that is not harmful to their health or wellbeing; and have an environment protected for the benefit of present and future generations. The provisions in section 24(b) states that the protection of the environment should be achieved by way of reasonable legislative and other measures that, amongst others, secure ecological sustainable development and use of natural resources while promoting justifiable economic and social development.

46. Section 146(2) of the Constitution provides that national legislation that applies uniformly with regard to the country prevails over provincial legislation if, amongst others, such national legislation is necessary for amongst others, the protection of the environment. The NWA was enacted to provide for fundamental reform of the law relating to water resources amongst others. Section 21 of the NWA provides that the purpose of NWA is to redress the results of past racial and gender discrimination into promoting the efficient, sustainable and beneficial use of water in the public interest and also to facilitate social and economic development.

47. The related policy and strategy obligation in respect of water resources are regulated in terms of section 5 of the NWA. Section 5(4) provides that a national water resources strategy may be established overtime and must be reviewed on intervals of not more than 5 years. Section 5(5) of the NWA provides the procedure which must be complied with by the Minister before

publishing a national water resource strategy or any component of that strategy.

48. The Minister is required to consider further any other steps and all comments received from the public participation process in respect of the application as received before the specified day. Section 21 of NWA provides for the uses of water that are permissible in terms of the NWA or are subject to specified conditions. These include such uses as taking water from a water resource, engaging in a controlled activity, discharging waste into a water resource through a pipe, canal, sea fall or conduit.

49. On considering applications for water use licenses, the responsible authority should be guided by the provisions of section 27 of the NWA. In essence, whilst the provision of section 27(1) of the NWA require that specific factors should be considered in respect of the relevant water use applied for, it is worth noting that the provision of section 27(1) of the NWA requires the responsible authority to take into account all relevant factors.

50. The First Respondent further submitted that none of the criteria set out in section 27 of the NWA is hierarchical, but that all should be balanced, considering the water uses applied for. Some of the factors mentioned in section 27(i) are efficient and beneficial use of water in the public interest; the socio-economic impact of the water use, and the strategic importance of the water use to be authorised.

51. The First Respondent further contends that a number of court judgments have dealt with the balancing exercise as contemplated in section 27(i). One of

these cases is the Supreme Court of Appeal judgment of **Makhanya NO v Goede Wellington Broedery (Pty) Ltd**⁶ where the court held as follows:

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

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

53. The First Respondent further contend that having considered the relevant authorities and its perspective of the facts before it, the Water Tribunal found that it has also been necessary to dispel any notion that there is no right to development in the Constitution. The tribunal further indicated that its decision is informed and grounded in the principles of environment management in terms of section 2(4) of NEMA.

54. The Water Tribunal further relied on the provisions of section 2(2) of NEMA which states:

⁶ [2013] 1 All SA 526 (SCA) at paragraph 33.

“Environmental Management must place people and their needs at the forefront of its concern, and serve their physical, psychological, development, cultural and social interest equitably.” The First respondent further relied on Fuel Retailers⁷ where it provides as follows:

“[45] The Constitution recognises the interrelationship between the environment and development; indeed, it recognises the need for the protection of the environment while at the same time it recognises the need for the social and economic development. It contemplates the integration of environmental protection and socio-economic development. It envisages that environmental considerations will be balanced with socio-economic considerations through the ideal of sustainable development.”

55. In conclusion, the First Respondent contends that the decision of the Water Tribunal, the same as with the decision of the Department, were both based on facts. Including both scientific facts and legally sound evidence presented and thus are lawful, rationally connected to the purpose for which they were exercised as discretionary powers. And are justifiable in the context of the various mitigation factors provided for in the WUL and in the Water Tribunal’s own decision. They ought not to be interfered with, as they were not made out of malice or ulterior consideration.

The Second Respondent’s Case

⁷ *Supra*

56. The Second Respondent opposes the Appellant's case on all the grounds of appeal.
57. The Respondent contend that the Appellants emphasises the environmental factor to the exclusion of social and economic factors and to the exclusion of mitigation measures. Leaving out of account the Anthropocentric Foundation of the South African Law mandated in section 24 of the Constitution and given effect to in section 2(2) of the ("NEMA") that Environmental management must place people and their needs at the forefront of its concern and serve their physical, psychological, developmental, cultural and social interest equitably.
58. The point of departure for Atha-Africa is that the required balance, putting people and their needs at the forefront of environmental management has been achieved in respect of the proposed underground Yzermyn Coal Mining Project.
59. The Second Respondent further contends that the case for the Appellants is that a mining project such as this absolutely cannot co-exist with the special environmental status of the mining area as expressed in various policy instruments premised on a large scale. Whilst a case for Atha-Africa is that not only is such a coexistence the premise of the environmental law but that on the site specific facts of this particular matter the decision to grant the water use licence found the correct balance that would make such a coexistence as well as sustainable development feasible.
60. Fundamental environmental rights clause in section 24 of the Constitution provides for a right to an environment that is not harmful to health and wellbeing and for a right 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 the use of natural resources. While promoting justifiable economic and social development in which the tension between economic and social development on the one hand and the protection of natural resources on the other hand is recognised but of which the underlying premise is a right to the development tempered by sustainability.⁸

61. The social economic rights to adequate housing and access to healthcare, food, water, social security and basic education as provided for in sections 26, 27 and 29 of the Constitution that can only be achieved by economic and social development.

62. It is trite law that there is no hierarchy between the fundamental rights and freedoms contained in the Bill of Rights and therefore it is not open for any organ of state to selectively decide which of these Constitutional provisions to apply.⁹

“It seems to me that where the alleged infringement of one fundamental right has to be determined in the context of another, competing, fundamental right, the Constitution creates no hierarchy of fundamental rights. The limitation clause (section 33) is of little help here, because by its very inclusion as a fundamental right in chapter 3 of the Constitution, such a right already by the definition complies with the requirements of section 33, viz that of being reasonable, necessary

⁸ See Fuel Retailers *supra*.

⁹ See *Gardener v Whitaker* 1995 (2) SA 672 (E) 689 J – 690 C.

and justifiable in an open and democratic society based on freedom and equality. It can also hardly be said that one fundamental right can negate fully the content of another fundamental right.”

63. Section 7(2) of the Constitution compels a taking into account of all fundamental rights and freedoms as a general constitutional value system and therefore also commands that a polycentric approach has to be followed in the exercise of the statutory decision making power entrusted to the Water Tribunal under section 148 of the NWA, in so far as the constitutional considerations premised upon the Bill of Rights are concerned.¹⁰

64. The Second Respondent contends that this matter is not complex and to reduce it to its bare essential. The Court is ultimately faced with the tension between two competing or even conflicting interests of fundamental and constitutional importance namely; the fundamental rights to the environment as provided for in section 24 of the Constitution pertaining to the biosphere which makes biological life physically possible and the transformative agenda of the Constitution¹¹ striving to fulfil all the other fundamental rights by addressing the terrible affliction of poverty in our society. And pertaining to the quality of life promised by the Constitution for all citizens which promise is simply impossible without the development and industry in a developing country including the mining industry as well as the coal mining industry.

65. Because the Constitution knows no hierarchy of fundamental rights. The true question is how to balance these competing rights or interests, both in

¹⁰ See *Qwelane v South African Human Rights Commission* 2020 (2) SA 124 (SCA) paragraph 82; *Laugh It Off Promotions CC v SAB International (Finance) BV T/A Sabmark International* 2006 (1) SA 144 (CC) paragraph 47.

¹¹ *Minister of Constitutional Development v South African Restructuring and Insolvency Practitioners Association* 2018 (9) BCLR 1099 (CC) para 1.

principle and as applied to a particular set of circumstances. The appropriate test when one is concerned with balancing these competing rights or interest must be the flexible interest of justice test.¹²

66. The Second Respondents in their argument relied on the **Fuel Retailer's Association** case¹³ and in particular at paragraph 50 where the Court held as follows:

"[50] At the heart of the Rio Declaration principles 3 and, Principle 3 provides that the right to the development must be fulfilled so as to equitably meet developmental and environmental needs of the present and future generations. Principle 4 provides that in order to achieve sustainable development, environmental protection shall constitute an integral part of the development process and cannot be considered in isolation from it. The idea that development and environmental protection must be reconciled is central to the concept of sustainable development. At the core of this principle is the principle of integration of environmental protection and socio-economic development".

67. This brief overview of international development shows that the point of departure has always been a right to development. The debate was about how the right to development should be limited by environmental protection to make outgoing development sustainable. In other words, we learn from international environmental law that the core idea is to find a balance between social, economic and environmental factors, and not to use environmental factors as a trump card to obstruct and prevent the very social and economic

¹² The Citizen 1998 (Pty) Ltd v McBride 2011 (4) SA 191 (CC) para 148 – 149; Independent Newspaper (Pty) Ltd v Minister of Intelligence Services 2008 (5) SA 31 (CC) para 85.

¹³ *Supra*.

development that is especially essential in a developing country such as ours wherein poverty is dehumanizing.

68. The concept of sustainable development is further defined in section 1(1) of the NEMA to mean the integration of social, economic and environmental factors into planning, implementation and decision making so as to ensure that development serves present and future generations.¹⁴

69. A balance can and must be achieved between social, economic and environmental factors so that the integration of these factors contemplates an exercise of reconciliation to find a balance between them.

70. The Second Respondents further contend that the following national environmental management principles are of particular relevance for this matter:

70.1 The anthropocentric principle section 2(2) of the NEMA provides that environmental management must place people and their needs at the forefront of its concern, and serve their physical, psychological, developmental, cultural and social interests equitably. Environmental management including water resource management is therefore primarily for the sake of people and their needs;

70.2 The sustainable development principle in section 2(3) – (4) of the NEMA provides that development must be socially, environmentally and economically sustainable and all relevant factors should be considered,

¹⁴ See Fuel Retailers *supra*.

including a number of factors specifically listed in section 2(4)(a) of the NEMA;

70.3 The integration principle in section 2(4)(b) of the NEMA requires that 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 perusing the selection of the best practical environmental options;

70.4 The environmental justice principle in section 2(4)(c) of the NEMA provides that environmental justice must be pursued so that adverse environmental impact shall not be distributed in such a manner as to unfairly discriminate against any person, particularly vulnerable and disadvantaged people. The cycle of symbiotic interaction between environmentally harmful practices on the one hand and the unequal distribution of wealth and resources in society on the other hand should be broken. This is a goal of equity and equality to be achieved through development; and

70.5 The flagged ecosystem principle in terms of section 2(4)(r) of the NEMA since, sensitive, vulnerable, highly dynamic or stressed ecosystems, such as estuaries and wetlands and similar systems requires specific attention in management and planning procedures especially when they are subject to significant human resource usage and development pressure. On the precautionary principle, the Second Respondent submits that in practice the precise scope and ambit of the

precautionary principle is contagious and different meanings have been attributed thereto in the academic and theoretical debate raging over this principle. The one theoretical meaning that the risk averse and cautious approach has to do mainly with mitigation measures in respect of the consequences of decisions and actions, the limits of current knowledge about the consequences of decision and actions or the lack of scientific certainty cannot be used as a reason for postponing cost effective measures to prevent those consequences.¹⁵

71. The other theoretical meaning relates a risk-averse and cautious approach to the concept of onus of proof in the Civil Law of Evidence and procedure. A development should not be regarded as a sustainable one unless the developer demonstrates the absence of risk, of adverse impacts or of negative consequences of decisions and actions before the development may proceed.¹⁶

72. The formal or traditional sense of this concept was explained as consisting of two distinct concepts, namely either the duty which is cast on the particular litigant in order to be successful or finally satisfying a court of law that he is entitled to succeed on his claim or defence as the case may be or the duty cast upon a litigant to adduce evidence in order to combat a *prima facie* case made by his opponent. Traditionally these concepts are part of the Civil Law of Evidence and procedure, operating within the context of an adversarial procedure in a court of law. I will not dwell much on the theoretical analysis of the meaning of the risk-averse and cautious approach as a concept of onus of

¹⁵ This is consistent with principle 15 of the Rio declaration. See also *WWF South Africa v Minister of Agriculture, Forestry and Fisheries* [2018] 4 ALL SA 889 (WCC) para [110].

¹⁶ *South Cape Corporation (Pty) Ltd v Engineering Management Services (Pty) Ltd* 1977 (3) SA 534 (A).

proof in the Civil Law of Evidence and Procedure. This explanation is mainly an academic one.

73. The Second Respondent rely on principle 15 of the Rio declaration which provides as follows:

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

74. Accordingly, so the Second Respondent submit, the precautionary approach is not directed at the desirability of development but at the desirability of the mitigation measures. The very premise of this principle is that a decision was taken to proceed with the development and to introduce cost effective, measures despite the lack of full scientific certainty. Consequently, the precautionary principle in the international environmental law was never a so called zero standard, requiring full scientific certainty before any development is allowed to proceed or calling for a zero risk approach. Section 27(1) of NWA expressly commands that in issuing a license, account must be taken of all relevant factors including a number of factors specifically listed from subsections a – k.

75. From this perspective, the polycentric nature of the statutory decision making power of the responsible authority and/or the Water Tribunal becomes clear. They are called upon to strike a reasonable and appropriate balance between all these different and sometimes conflicting considerations as spelt out in

section 2 and section 27 of the NWA to the extent that they are relevant. However, firstly, the primary duty remains to take into account all relevant factors so that those listed are non-exhaustive and secondly, there is no legislative indication or guideline what significance or weight to attach to any particular factor¹⁷ so that the outcome of any process of evaluation will depend upon the site specific facts and circumstances of a particular application for water use license and a propagandistic or partisan macro scale research report for the sake of context is, with respect, of very little consequence or relevance if any at all.

The National Water Resource Strategy 2(2013)

76. The Second respondent gives context to the National Water Resource Strategy in their submissions.
77. Section 5 of the NWA, commands the Minister to establish a National Water Resource Strategy by way of notice in the government gazette of which the current version was published on 1 August 2013.
78. Section 7 of the NWA commands that the responsible authority and the Water Tribunal as organs of state must give effect to the National Resource Strategy 2(2013) when exercising any power or performing any duty in terms of the NWA.
79. The National Water Resource Strategy sets out how to achieve the following core objectives, the water support development and the elimination of poverty inequality, water contributes to the economy and job creation, and water is

¹⁷ Makhanya *supra*.

protected, used, developed, conserved, managed and controlled sustainably and equitably. These core objectives are a response to the priority set by the government within the National Development Plan.

80. The declared purpose of the National Water Resource Strategy is to ensure that national water resources are managed towards achieving South Africa's growth, development and socio-economic priorities in an equitable and sustainable manner over the next five to ten years. The reason why it was revised in the first place was because the national development plan outlines a new path for Southern Africa which seeks to eliminate poverty and reduce inequality in seeking to: create jobs and livelihoods; expand infrastructure; transition to a low carbon economy; transform urban and rural spaces; improve education and training; provide quality healthcare; build a capable state; fight corruption and enhance accountability; and transform and unite society.

81. None of these can be effectively implemented unless all sectors including the water sector contribute to the vision and objectives of the national development plan. To this end the National Water Resource Strategy responds and outlines the strategy for protecting, using, developing, conserving, managing and controlling South Africa's scarce water resource with water having a key role as an enabler of social stability and economic prosperity.

Acid Mine Drainage

82. The Second Respondent submits that with regard to the management of acid mine drainage and directly in contrast with the exaggerated hypothesis of the Appellants, the sober and realistic contemplation of the national water resource is as follows¹⁸:

“The problems associated with acid mine drainage (“AMD”) result largely from an era, prior to the National Water Act and the National Environmental Management Act when control over mining impacts and closure of mines was far less stringent than they are now. While the pollution from AMD is a significant problem, the potential increase in water availability from treated AMD offers opportunities for making additional water available to supplement traditional water sources.

The additional water comes from changes in run-off and infiltration patterns in heavily mine catchments, which appears to have increased limit in these areas. However, the quality of additional water that can safely and reliably be made available from this sort, this source is yet to be confirmed.

Whether additional water becomes available or not, the AMD must be managed and treated and the polluter-pays principle must apply where mines still have an identifiable owner. The challenge lies in putting reliable institutional arrangements in place that will continue to treat the water even after the mines have closed down.”

83. The Second Respondents contend that the Appellants rely heavily on only one portion of the National Water Resource Strategy which deal with water resource protection, and utilises in this context the concept of a strategic

¹⁸ As contemplated in the National Water Resource Strategy 2 (2013)

water resource area. However, there is no prohibition or clear policy statement against or even discouragement of any mining activities whatsoever in a strategic water source area with the emphasis rather falling on proper and informed management. In fact, the evidence shows that in this document of strategic importance, express provision is made for a scenario of mining within a strategic water resource area. Neither the Appellants nor their witnesses disclosed this upfront to the Water Tribunal or to this Court.

84. The Second Respondent contends that there is a fundamental difference between the adversarial nature of judicial proceedings aimed at a resolution of a dispute between parties in past facts and the inquisitorial nature of the administrative proceedings under consideration aimed at a rational and informed decision regarding authorisation for future water uses. This rule, in regard to the duties or responsibilities of an applicant or an objector in this kind of proceedings is that an applicant should place before the responsible authority and/or the Water Tribunal relevant facts in favour of his application and that an objector should place before the responsible authority and/or the Water Tribunal relevant facts in support of his objection, which rule is furthermore a code in the rule 7 of the Water Tribunal rules. In the rehearing before the Water Tribunal, the Water Tribunal must give every party opposing the appeal an opportunity to present their case with the applicant afforded an opportunity to respond to any information or presentations so forthcoming.

Questions of Law

85. Both the Appellants and the Respondents have gone into great detail in trying to define what the phrase “questions of law” means. The Appellants and the

Second Respondent relied on the ***Gugulethu Family Trust v Chief Director, Water Use: Department of Water Affairs and Forestry***¹⁹. The Second respondent submits that ***Stenersen And Tulleken Administration CC v Linten Park Body Corporate***²⁰ is no authority for the proper meaning of the phrase “question of law” as used in the context of section 149(1) of the NWA. In this latter context the phrase “question of law”, in the Second Respondent’s submission has the meaning of “the question about the contents or substance of the law.”

86. On the other hand, the Appellants submit that the failure to take into account all relevant factors, and the attachment of undue significance of any one factor as required by section 27 of the NWA constitutes an error of law. The proposition is clearly that this is an error of law because there was an erroneous application of the law.

87. In support of this submission, the Appellants relied on paragraph 20 and 22 of the unreported judgment of the **Gugulethu** matter. In paragraph 20 thereof, the ground of appeal is recorded as that the Water Tribunal act in law by finding that the provisions of section 27(1)(b) of the NWA are the only and overriding criteria to be taken into account when determining whether to issue a WUL.

88. In paragraph 22 thereof it is reported that the interpretation by both the Water Tribunal and the responsible authority of that provision was wrong in law and accordingly it was not the failure to take into account that was the error of law as is misleadingly submitted, but the wrong interpretation of a legal provision.

¹⁹ Unreported judgment delivered on 27th October 2011 by Murphy J, Tuchten J concurring in case A566/2010 North Gauteng Court, Pretoria.

²⁰ 2020 (1) SA 651 (GJ).

89. The Second Respondents contend that these two paragraphs are not authority for the proposition of the phrase “question of law”, as the phrase also includes a question about the application of the law to the particular facts and circumstances, but is in fact authority of the proposition that this phrase pertains to a question about the substance of the law itself, in the instance of the **Gugulethu** judgment and the meaning and interpretation of section 27(1)(b) of the NWA.

90. The Second Respondent challenges the Appellants’ submission that the Scientific Aquatics Services Assessment found that the dewatering impact would have a high impact on the relevant wetlands, with or without mitigation. The Second Respondent submits that the true and correct facts are that the Scientific Aquatics Services Assessment was done by the wetlands specialist, Van Staden, who testified orally before the Water Tribunal on his written report.

91. In the report on the pages selected by the Appellants, there is a description in rudimentary table format comparing the assessed impacts during the construction phase, operational phase and the closure phase of the mine. Under unmanaged conditions, that is without any of the mitigation measures with the assessed impact during the same phases; but under managed conditions, that is with mitigation measures applied. In these tables, with specific reference to the operational phase and the closure phase, the significance of the impact both with and without mitigation measures remains numerically the same and assessed as high. However, the true picture

emerges not only from the rest of this report but also from the oral evidence of Van Staden, which evidence was given in the presence of the Appellant.

92. I will now deal in turn with the Second Respondent's Response to the Appellants' grounds of appeal.

The Failure to Consider the Strategic Importance of the Mine Area for Water Security and Diversity

93. The Second Respondent acknowledges that the Water Tribunal did appreciate the factors of strategic importance and environmental sensitivity. However, this is not an appeal in the air but an appeal against a decision. The Second Respondents concede that Mabola Protected Environment is a protected area and falls within the Protected Areas Act and in terms of section 48(1)(b) thereof, commercial mining may be conducted in a protected environment with a written permission of the Environmental Minister and the Minister of Minerals.

94. Section 3 of the Biodiversity Act deals with the state's trusteeship of biological diversity and provides that in fulfilling the rights contained in section 24 of the Constitution, the state through its organs of state that implement legislation applicable to biodiversity must manage, conserve and sustain South Africa's biodiversity and its components and genetic resources and implement the Biodiversity Act to achieve the progressive realisation of those rights. This does not call for a hands off approach to biodiversity but, on a proper contextual and constitutional interpretation based on the fundamental anthropocentric character of the positive law pertaining to the environment, for reasonable access and sustainable use of all resources including mineral

resources. The Second Respondents submit that sustainable development of mineral resources through responsible mining is permissible and contemplated in these areas of strategic importance or environmental sensitivity, wherein mining is not *a priori* dismissed as unsuitable development by the environmental authorities. The green lobby propagates for so called official “no go areas” to become official policy, also in the WWF SA Coal and Water Features Report, but to no avail.

95. The Second Respondent specifically disputed in its documentation and during the hearing before the Water Tribunal that large scale and high level instruments of a general and abstract nature could be used to determine the strategic significance and the environmental sensitivity, vulnerability and importance of the much smaller mining area. This was never common cause. It has consistently been the position adopted by the Second Respondent that the site-specific characteristics of the mining area revealed that it was not so significant, sensitive, vulnerable and/or important from an environmental or biodiversity perspective.

96. The Second Respondents submit that the Appellants are incorrect in claiming that the Water Tribunal held that the Strategic Water Source Areas Report were irrelevant because they did not comprise or had not been taken up in government policy. In the one paragraph relied upon by the Appellants, the common sense point is made that general research documents cannot guide a project level decision making process, there is no reference to “not been taken up in government policy”.

97. In the other paragraph relied upon by the Appellants, the Water Tribunal is dealing with a so called no go proposal that was made already in 2011 in terms of which specific areas should be identified as areas of strategic importance or sensitivity in which, as a matter of law, no mining should be allowed. It is this proposal which has not been taken up in government policy, it is that proposal, still fermenting in the lobby which has been found to be irrelevant.

98. The proposition that the 2018 Strategic Water Source Areas Report was held by the Water Tribunal to be irrelevant because it had not reached the stage of publication by the Water Research Commission is also not supported by the references given by the Appellants. There is no mention of relevancy in those references and that what was recorded, was that the evidence in this regard was of a very high level, lacking specificity and therefore not helpful as a decision-making guideline.

99. The proposition that the Water Tribunal held that the National Water Resource Strategy was a draft out for comments since 2013 is not correct. This is based on a passing reference in a footnote where the evidence of Colvin is summarized, and her evidence was to the effect that the 2011 “no-go” proposal was still in the process of being included as part of the Strategic Water Source Area Management in the National Water Resource Strategy. This proposition is furthermore directly contradicted by what the Water Tribunal stated in the text of the appeal decision, namely, that it had considered the aims, visions and strategic goals of the National Water

Resource Strategy in making its findings and decisions on various grounds of appeal.

Absence of Proof of Consent of the Land Owner

100. The Second respondent contends that the absence of proof of consent is a pure question of fact and therefore cannot be elevated to a question of law. The Second respondent further contend that section 24 does not create a principle of general application to all license applications but applies only in respect of use of water found underground and not all of the water uses for which a license was supplied for by the Second Respondent is in respect of water found underground.

101. The structure of section 24 is not that of a prohibition in favour of owner of the land but that of an empowerment of a responsible authority. The responsible authority may grant a license under these circumstances on one of two scenarios, namely, if the owner of the land consents or if there is good reason to do so. This is therefore a provision entrusting the responsible authority with a discretionary power to be exercise if either of these two scenarios are present.

102. A most important contextual consideration is the institution of the public trusteeship of the nation's water resources, contained in section 3 of the NWA. In this context the purpose of the section 24 of the NWA is to ensure that the owner of land cannot frustrate the exercise of the public powers under the NWA by withholding private consent for a water use to be undertaken in, on or over his or her land.

103. Another important contextual consideration under the NWA is the objects thereof, as contained in section 2 of the NWA, which include the purpose to ensure that the nation's water resources are protected, used, developed, conserved, managed and controlled in ways which take into account, amongst others, promoting equitable access to water and facilitating social and economic development.
104. The National Environment Management Principles are located within the parameters of sustainability, which is a matter of public interest in a developing country afflicted by poverty and cannot be vetoed by a private individual.
105. The Second Respondent further contends that there is no room to read in that "good reason" must mean "good public reason". If Parliament wanted that to be inserted, Parliament could have done so quite easily but, in any event, the prospect of a meritorious sustainable development in line with constitutional imperatives is "good public reason" enough.
106. The case to be met here is not that the discretionary power in question was not exercised judicially or that the required scenario or jurisdictional condition for the exercise of this discretionary power was absent at that time when the decision of the Water Tribunal was taken. The Second Respondent repeats that the Water Tribunal is not a court of law in which the Civil Law of Evidence and Procedure with its baggage of onus of proof finds application and they also point out that the Appellants had the opportunity to deal with the further material put before the Water Tribunal.

Failure to Apply a Precautionary Principle

107. The issue of the application of the precautionary principle has already been dealt with in this judgment in detail and therefore I will not rehash it. It is apposite to point out that the case referred to by the Appellants, the **WWF South Africa v Minister of Agriculture, Forestry and Fisheries**²¹ is authority for the proposition that the main business of the precautionary principle is always that of mitigation measures and not that of a zero standard objection to a development.

108. The Second Respondent contends that the fallacy of this ground of appeal is further demonstrated by the Appellants themselves where the Appellants want the Court to consider whether there has been the proper application of the precautionary principle but at the same time they do not ask the Court to make a factual finding as regards the extent of the impacts. The precautionary duties must not only be triggered by the suspicion of concrete danger but also by justified concern of risk potential.²²

Failure to Provide for Post-Closure Treatment of Contaminated Water

109. The Second Respondent contends that this ground of appeal is not a question of law. The Second Respondent contends that the real issue on the level of fact, although pursued under the guise of the question of law by the Appellants, is that the alleged and disputed failure to make provision today for a water treatment plant that would be required for the post-closure treatment of decant predicted to commence 45 years in the future and that the alleged and disputed failure to make provision today for financial security in respect of the post-closure treatment of decant predicted to commence 45 years in the

²¹ 2018(4) ALL SA 889 (WCC)

²² AP Pollution Control Board v Nayudu Air 1999 SCA 812 (CA) 368 – 371 of 1999 (1999/01/ 27) paragraph 27.

future. The two factors mentioned above should be considered against the background of the evidence of one of the experts, that is Smit, who is an environmental assessment practitioner.

110. Smit testified that, given the unpredictable and variable volumes of possible decant, he recommends a modularised water treatment plant, of which the capacity can be up scaled or downscaled depending on the water volumes to be treated post closure or in future. He further testified that monetary data and information can be collected only after mining commences, to determine with any degree of certainty the possible volumes of quality of decant water to be treated in future decant.

111. This modularised water treatment plant will be installed and financed from operational capital during the operational phase so that the plant will be available subject to adjustment for the post-closure treatment of decant.

112. It is for this practical reason that condition 1.15 requires an environmental management plan and a rehabilitation plan for the decommissioning of any of the water use activities as listed in table 1 to be submitted 5 years before commencing with closure for written approval.

113. On this common sense basis, the water Tribunal found that the planned water treatment plant to be used during the operational phase is sufficient. Especially given the modularised design of the plant which makes the plant flexible and adaptable to change in the volumes of water to be treated, as well as future technological advances. Even Johnstone agreed that a modularised plant is a reasonable solution. The claim in the GCS

review and Appellants' experts that there is no provision for a water treatment plant post mining was found to be clearly unfounded.

The Legal Implications of Mine Closure

114. The Second respondent took a moment to explain the legal implications of the technical concept of mine closure. Mine closure takes place and the post-closure phase begins when a closing certificate is issued in terms of section 43 of the MPRDA.

115. Section 43(1) of the MPRDA provides that the Second Respondent remains responsible for any environmental liability, pollution, ecological degradation, the pumping and treatment of extraneous water, compliance to the conditions of the environmental authorisation and the management sustainable closure thereof until the Minerals Minister has issued a closure certificate.

116. Section 43(2) of the MPRDA requires that the Second Respondent must apply for a closure certificate in terms of section 43(4) thereof, and that application must be accompanied by the required information programs, plans and reports prescribed in terms of the MPRDA and the NEMA.

117. Section 43(5) of the MPRDA commands that no closure certificate may be issued unless the chief inspector and each government charged with the administration of any law which relates to any matter affecting the environment have confirmed in writing that the provisions pertaining to health and safety and management of pollution to water resources, the pumping and

treatment of extraneous water and compliance to the conditions of the environmental authorisation have been addressed.

118. The Second Respondent further dealt with relevant sections in terms of NEMA that deals with mine closure. A mere reading of the sections indicates that the two sections from NEMA and the MPRDA mirror one another. Section 24p – 24r of the NEMA provide that sufficient financial provision must be made for the rehabilitation or management of negative environmental impact. In line with the legal dispensation under the NWA, condition 14.1 of the WUL requires a budget sufficient to complete and maintain the water use and for the successful implementation of rehabilitation program with condition 14.2 thereof empowering the department at any stage of the process, to request proof of budgetary provisions.

Failure to Appreciate Burden of Proof

119. The Second Respondent contend that this ground of appeal pertains to the alleged incorrect application of the law instead of raising squarely a question of the law on the substance thereof. The Second Respondent refers to the Civil Law of Evidence and Procedure and I have already dealt with Civil Law of Evidence and Procedure in the preceding paragraphs. What needs to be pointed out and is of importance is that the Appellants rely on the Brownlie Report where the Author was never called as a witness in the tribunal hearing.

120. The Second Respondent further alleges that the Appellants do not advance any caselaw or other legal authority for the various propositions advanced in respect of this ground of appeal and more specifically there is no authority for the proposition that the Appellants were entitled to rely only on a

reasoned critique of the evidence put up by the Second Respondent regarding socio-economic.

121. The Second Respondent argues that even in the event where there was such burden of proof, that burden of proof has been fully and finally discharged when the expertise and the creditability of the witness for the Second Respondent were demonstrated while the desktop case as advanced by the Appellants was held to be shallow and unscientific without any attempt at ground-truthing.

122. Before I get to the conclusion I need to deal with a few points that were made by the Second Respondent and were disputed by the Appellants as inaccuracies.

123. The Second Respondent dealt with the evidence of Dr Botha and submitted that the evidence was very important. The evidence was uncontested. It dealt with how water can be successfully treated.

124. The Second Respondent further made reference to Ms Colvin who had filed a report. The Second Respondent alleges that she was the Appellants' expert witness. The Second Respondent alleges that the Appellants in their rebuttal heads of argument considered that they are not relying on Ms Colvin's report at all.

125. The Second Respondent pointed out that the Appellants relied on the Brownlie and Dennis reports. The Second Respondents contend that these reports were only submitted to the Water Tribunal and both the authors of

these reports were never called to testify. The Appellants in their rebuttal heads indicated that they no longer rely on these reports.

126. The Second Respondent further indicated that they had filed a WSP initial report which was later substituted by Delta H report. The author of the Delta H report was called to give evidence at the tribunal. The Second Respondent submits that the evidence by the author of the Delta H report was never contested. The Second Respondent further submitted that the Appellants, notwithstanding the fact that the WSP report was amended and updated by the Delta H report, they kept on quoting the old WSP report as part of their science.

127. The Second Respondent also alleges that the Appellants' reports were what is called desktop reports where none of their witnesses visited the site and made physical examination of the site itself.

128. The Second Respondent indicated that Van Staden's report was completely discredited and his evidence was rejected by the tribunal. The report used the phrase "high impact without mitigating factors" and was varied by Mr Van Staden himself to "medium and low with mitigation,". The Second Respondent further indicated that Van Staden conceded that his assessment is different with mitigation. He conceded that the project can proceed with mitigation factors in place. Van Staden's version was that they even put his version to the Second Respondent's witnesses and he exaggerated the impact of dewatering.

129. The Appellants indicated in reply that Van Staden is actually the Second Respondent's witness. The Appellants further indicated that the

Second Respondent distanced themselves from reliance on the SAS Report which was their own report.

130. The Second Respondent further submitted that Johnstone in cross-examination conceded that the mine can go ahead with mitigation factors. Therefore, the Second Respondent submits that all the witnesses conceded that there is nothing that should stop the mine from proceeding. The second respondent also submitted that, that is why Appellants distanced themselves from their own witnesses and decided to rely on the Respondents' experts. On the other hand, the Appellants submitted that they relied on the Respondent's expert to show that even in their own version, there are factors that vitiate against the granting of the WUL.

131. The Second respondent also referred to the GCW review and indicated that it was completely discredited and the reason was that the Second Respondent's expert explained that one cannot get a class 2 or 3 report until the mine has commenced. The Second Respondent's expert explained that it is impossible scientifically to do a class 2 or 3 report until the mine starts operating. The expert indicated that this is an Australian scientific model which is applied throughout the world in mining.

132. The Second Respondent went further and referred to Colvin who according to the Second Respondent conceded that the precautionary principle was concerned with mitigation. The Second Respondent concluded that the Appellants own witness applied the precautionary principle and also indicated that that is not how the precautionary principle should be applied. The Second Respondent further submitted that the Appellant's case was that

the Second Respondent should give an absolute guarantee before starting with mining activities in order to satisfy the precautionary principle.

133. The Second Respondent also referred to Smit's evidence on the mitigation measures which the Second Respondent submits that it was uncontested and is accordingly common cause.

134. In contradicting the submissions by the Second Respondent, the Appellants in reply indicated that the evidence of Mr Johnstone, that the mining process would introduce a daylighting point that is going to lead to decant was contradicted by their own expert. The Appellant further indicated that during the hearing in the tribunal, they read out the Delta H report where professor Witthuser specifically discusses what it means when he talks about class 1, 2, 3 level confidence. The Appellants submit that the Court need not go further than that. The Appellants also indicated that there was no need to rely on Mr Johnstone's evidence as far as that aspect was concerned.

135. From a proper reading of the papers and from the submissions made by both counsel for the Appellants and the Second Respondents, the contradictions and the inaccuracies as pointed out by the Appellants in reply are found to be immaterial. I will therefore not attach any particular weight to the two or three inaccuracies that were pointed out by the Appellants.

Findings

136. The National Environmental Management Principles do not demand a so called zero standard which frown upon any kind of impact on the environment. Those impacts are to be avoided in the first place, but where

they cannot be avoided they should in the second place be minimised. Lastly, they should be remedied and this is where adequate mitigation as well as post-closure treatment for mining related impacts come in.

137. The National Environmental Management Principles do not constitute a checklist for ticking of each requirement that a proposed development has to comply with nor are these principles rigid rules of the positive law which must be complied with in each instance. These principles are normative guidelines, all of which have to be considered but none of which stands in any particular hierarchical relation to the other and all of which, after consideration may not necessarily find application in a particular set of circumstances or apply to the same extent.

138. Section 2(4)(a)(vii) of the NEMA provides that sustainable development requires the consideration of all relevant factors including the factor that a risk-averse and cautious approach is applied which takes into account the limits of current knowledge about the consequences of decisions and actions. This consideration which is identified in the NEMA as a relevant factor to be taken into account when applying the principle of sustainable development is the one that is labelled as the precautionary principle.

139. The one theoretical meaning is that a risk-averse and cautious approach has to do mainly with mitigation measures in respect of the consequences of decisions and actions. The limits of current knowledge about the consequences of decisions and actions or the lack of full scientific certainty cannot be used as a reason for postponing cost effective measures to prevent those consequences. This is a generally accepted view which

effectively means that the precautionary principle operates traditionally in a dimension where there is a scientific uncertainty about the existence or extent of the risks or consequences of a decision or action. However, there is also a more controversial dimension where the risk or the consequences of a decision or action are known but there is scientific uncertainty about the efficiency of the mitigation measure in preventing or reducing the risk or consequences. I am therefore satisfied that the precautionary principle. has been met in this case.

140. The finding by the Water Tribunal that the expert evidence for the Second Respondent on the Delta H ground water assessment indicate that scientifically some methods were used to conduct the wetland typological studies and that the findings thereof were scientifically defensible is accepted by this court. The tribunal indicated that this was indeed a sophisticated model and this court agrees with the finding by the tribunal.

141. The Second Respondent demonstrated that the mere lack of a review or absence of an assessment by an environmental specialist that the mitigation measures providing for a water treatment plant or using a spigot for the release of treated water are inadequate, does not logically follow. The Respondent showed that the modular water treatment plant was proposed by an expert and qualified environmental practitioner and was designed by engineers. The Second Respondent further demonstrated that the use of the spigot was proposed by a wetland specialist, Van Staden, who was never challenged during the oral hearing as to whether or not this measure was

adequate and this court accepts that adequate measures have been put in place to deal with water treatment, both in the present and in future.

142. In relation to the cumulative impact, the Second Respondents have shown in their statement of response that the Loskop Coal Mine is an existing activity in another watershed and any of the impact. Thereof, it is already accounted for as part of the background monitoring as well as the baseline assessment and that there was no need for its existence to be specific in any of the reports. Furthermore, the Loskop Coal Mine does not seem to have any measurable impact based on the specialist in stating that the water quality is pristine and the monitoring results show seemingly no impact. This Court is satisfied that the respondents have demonstrated that all the precautionary measures have been taken and that compliance with the relevant sections of the NWA and NEMA have been satisfied.

143. As it was profoundly laid in the matter of **Shepstone and Wylie v Greyling NO**²³, the appeal court should be loath to interfere unless it is established on the facts and evidence that the lower court, that is the Water Tribunal, acted capriciously or upon an incorrect principle or otherwise did not apply itself to the judgment it made. This was also fortified by the Supreme Court of Appeal in the **General Council of the Bar of South Africa v Geach and Others**²⁴. where Nugent JA (as he then was) stated:

“[57] At the third stage of the enquiry the sanction that should be imposed lies in the discretion of the court. Where a discretion is conferred it implies THAT the matter for decision has no single answer

²³ 1998 (3) SA 1036 (SCA) at 1044 J2 – 1045A.

²⁴ 2013(2) SA 52 SCA.

and calls for judgment, upon which reasonable people might disagree. That being so a court on appeal is restricted to determining whether the decision-maker has correctly gone about the enquiry. If he or she has correctly gone about the enquiry then a court on appeal may not interfere with the decision, albeit that it considers the decision to be wrong.

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

*“Appellate interference with the trial court’s discretion is permissible on restricted grounds only. In **Beyers v Pretoria Balieeraad**²⁵ the grounds for interference are stated in slightly different terms but the approach is essentially the one adopted in all other cases where a court of appeal is called upon to interfere with the exercise of a discretion, viz that interference is limited to cases in which it is found that the trial court has exercised its discretion capriciously or upon a wrong principle or has not brought its unbiased judgment to bear on the question or has not acted for substantial reason.”*

144. This Court accept that the Water Tribunal when crafting its decision path sought to concomitantly harmonise the need to prevent pollution or environmental degradation with the duty to promote a justifiable economic and social development guided by the expert scientific evidence before it. In its

²⁵ 1966 (2) SA 593 (A) at 605 F-AH.

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

145. Having considered the relevant authorities and its perspective of the facts before it, the Water Tribunal found that it has also been necessary to dispel any notion that there is no right to development in the Constitution.

146. Having weighed all the information provided, the documents and the oral submissions made on behalf of the parties, I propose that the following order be made:

1. That the Appellants' appeal be dismissed with costs and such costs to include the employment of two counsel where necessary.

BALOYI-MERE AJ
ACTING JUDGE OF THE HIGH COURT

I agree

NYATHI J

JUDGE OF THE HIGH COURT

Matter heard on the 18th and 19th October 2022

Judgment handed down on 10 May 2023

Appearance

On behalf of the Appellants: Centre For Environmental Rights

Counsel: Adv Dotson SC with Adv Mbikiwa

On Behalf of the First Respondent: State Attorney, Pretoria

Counsel: Adv Mphaga SC with Adv Mathaphuna

On behalf of the Second Respondent: Taitz & Skikne Attorneys

Counsel: Adv Zimmerman

On behalf of the *Amici Curiae*: Cliffe Decker Hofmeyr

Counsel: Ngukaitobi SC with Hassim SC

Adv Lekokotla

Adv Tabata

Adv Nyembe

Delivery: This judgment was handed down electronically by circulation to the parties' legal representatives by email, and uploaded on the CaseLines electronic platform. The date for hand-down is deemed to be 10 May 2023.

