



THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Reportable

Case No: 289/2021

In the matter between:

EZULWINI MINING COMPANY (PTY) LTD

APPELLANT

and

**MINISTER OF MINERAL RESOURCES
AND ENERGY
RESPONDENT**

FIRST

**MINISTER OF ENVIRONMENT,
FORESTRY AND FISHERIES
RESPONDENT**

SECOND

**MINISTER OF HUMAN SETTLEMENTS,
WATER AND SANITATION**

THIRD RESPONDENT

**REGIONAL MANAGER: MINERAL
REGULATION GAUTENG REGION:
DEPARTMENT OF MINERAL RESOURCES FOURTH RESPONDENT**

GFI JOINT VENTURE HOLDINGS (PTY) LTD FIFTH RESPONDENT

GOLD FIELDS OPERATION LIMITED SIXTH RESPONDENT

LUCKY FARMS PARTNERSHIP SEVENTH RESPONDENT

Neutral citation: *Ezulwini Mining Company (Pty) Ltd v Minister of Mineral Resources and Energy and Others* (Case no 289/2021) [2023] ZASCA 80 (30 May 2023)

Coram: Petse AP, Molemela and Makgoka JJA and Basson and Goosen AJJA

Heard: 24 November 2022

Delivered: 30 May 2023

Summary: Environmental Law – mining – whether mine operator has a continuing obligation to pump extraneous water from underground mining area notwithstanding cessation of underground mining activities – whether obligation extends to closure of mine.

ORDER

On appeal from: Gauteng Division of the High Court, Pretoria (Fabricius J sitting as a court of first instance):

1 Paragraph 1 of the order of the high court is set aside and replaced with the following:

‘It is declared that Ezulwini Mining Company (Pty) Ltd remains responsible for the pumping and treatment of extraneous water from the underground workings of Ezulwini Mine until the Minister of Mineral Resources and Energy has issued to it, a closure certificate in terms of s 43 of the Mineral and Petroleum Resources Development Act 28 of 2002.’

2 Otherwise, the appeal is dismissed with costs, including the costs of two counsel.

JUDGMENT

Goosen AJA (Petse AP, Molemela and Makgoka JJA and Basson AJA concurring):

[1] Deep-level mining may require the management of extraneous water that enters the underground mining area. Mine shafts are sunk from the surface occasionally to great depths, in order to access rock seams containing mineral deposits. As these mining areas are worked to extract the mineral-bearing rock, voids are opened. Groundwater from higher and adjacent areas seeps through fissures in the rock, under force of gravity, into the voids. When this occurs, the extraneous water must be pumped out and discharged at the surface of the mine in order to continue safely and effectively working these mining areas. Such dewatering of the underground mining area is, in these circumstances, an

essential feature of underground mining operations affected by the ingress of extraneous water.

[2] The issue in the appeal is whether a mine operator's obligation to continue pumping extraneous water from underground mining areas, endures despite its cessation of underground mining operations. The Gauteng Division of the High Court, Pretoria (the high court) answered that question in the affirmative. It consequently ordered the appellant, Ezulwini Mining Company (Pty) Ltd (Ezulwini) to continue with such pumping, until the first respondent had issued to it, a closure certificate in terms of s 43 of the Mineral and Petroleum Resources Development Act, 28 of 2002 (MPRDA). Ezulwini appeals against that order, with the leave of the high court.

[3] Ezulwini is the holder of a mining permit and operator of a mine on the West Rand of Gauteng (the Ezulwini mine), which it acquired from its predecessor in 2014. The mine has been worked since 1961. The first, second, and third respondents are the Ministers whose departments are, respectively, responsible for the management of relevant legislation. The first respondent, the Minister of Mineral Resources and Energy, is responsible for the MPRDA and the Mine Health and Safety Act, 29 of 1996 (MHSA). The second respondent, the Minister of Environment, Forestry and Fisheries, is responsible for the National Environmental Management Act, 107 of 1998 (NEMA). The third respondent, the Minister of Water and Sanitation, is responsible for the National Water Act, 36 of 1998 (the Water Act). The fourth respondent is an official in the Department of Mineral Resources, based in Gauteng.

[4] The fifth respondent, GFI Joint Venture Holdings (Pty) Ltd (GFI) is the owner of a mine that is adjacent to Ezulwini mine. The sixth respondent, Gold Fields Operation Limited (Gold Fields) is the operator of the mine owned by

GFI. I shall refer to them collectively as Gold Fields and to the mine as the Gold Fields mine. The Gold Fields and Ezulwini mines are interconnected. The underground connection has, however, been ‘plugged’ or sealed. The seventh respondent, Lucky Farms Partnership (Lucky Farms) conducts a farming operation in the vicinity of the surface operation of the Ezulwini and Gold Fields mines. It draws water from a stream and groundwater resources for its farming operation. It was cited for its interest in the matter. Of all the respondents, only the Minister of Mineral Resources and Energy (the Minister) and Gold Fields participated in the appeal, and opposed the relief sought by Ezulwini. Lucky Farms filed a notice to abide in this Court, and thus also took no part in the proceedings.

[5] It was common ground that the pumping of extraneous water from the underground works at Ezulwini has been carried out for many years by the mine’s previous operators. Indeed, the dewatering of mines has occurred at many mines operated on the West Rand. This has resulted in dewatering of basins, which occur in the dolomite layers between the surface and the deep-level mining areas. Ezulwini has, since it took over mining operations from its predecessor, continued to pump extraneous groundwater from its underground mining areas. The extraneous water is pumped to the surface where it is treated before being discharged into natural water courses on the surface. Its pumping and treatment of the extraneous water is licenced in terms of the Water Act.¹

[6] In September 2016, Ezulwini discontinued its underground mining operations as these were no longer economically viable. It has continued to conduct certain operations involving the processing of mineral-bearing material at its surface mining area. In October 2017, Ezulwini applied to the fourth

¹ Section 21(j) of the Water Act defines a ‘water use’ to include ‘removing, discharging or disposing of water found underground if it is necessary for the efficient continuation of an activity or for the safety of people’. Ezulwini holds a licence issued in terms of this section.

respondent, for an environmental authorisation to cease the pumping of extraneous underground water in terms of s 24 of NEMA (the NEMA application). It also applied to the Provincial Head of the Settlements, Water and Sanitation Department, for an amendment of its water use licence issued in terms of the Water Act (the water use amendment application).

[7] In May 2018, Ezulwini's NEMA application was refused. It lodged an appeal against the refusal, to the first respondent. The appeal was upheld in part, in that the application was remitted for reconsideration following a public participation process.

[8] Neither the NEMA, nor the water use application has been finalised. Acting upon legal advice to the effect that neither application was lawfully required, Ezulwini brought an application before the Gauteng Division of the High Court, Pretoria (the high court) seeking declaratory relief in regard to its legal obligation to continue pumping extraneous groundwater from the underground works (the main application). The main application was commenced on 24 July 2019. The primary declaratory relief it sought was that neither an environmental authorisation (in terms of NEMA), nor an amendment to the water use licence is required to allow Ezulwini to cease pumping extraneous underground water. It sought, in the alternative, an order authorising it to cease the pumping, based on environmental, health and safety and cost considerations. In the further alternative it sought an order to the effect that, if it is obliged continue the pumping, Gold Fields should contribute to the costs of such pumping, on the basis that it is continuing with underground operations at its mine.

[9] In addition to opposing Ezulwini's application alongside the Minister, Gold Fields also filed a counter-application. As mentioned, the Ezulwini and

Gold Fields mines are inter-connected, although the inter-connection had been sealed. Gold Fields' counter-application was premised on that fact. It sought the following orders:

1. Declaring that [Ezulwini] remains responsible for the pumping and treatment of extraneous water from the underground workings of the Ezulwini mine until at least when the [first respondent] has issued a closure certificate in terms of section 43 of the [MPRDA] to [Ezulwini] or such longer period as contemplated in section 24R of [NEMA].
2. Directing [Ezulwini] to take such steps as are necessary to maintain the shafts and pumping infrastructure required for the pumping and treatment of the water from Ezulwini's underground workings where it has ceased mining for such period as it remains responsible for the pumping and treatment of extraneous water.
3. Directing [Ezulwini] to allow the Fifth and Sixth Respondents access to the Ezulwini mine for purposes of inspecting the condition of the entire Cooke 4 shaft and infrastructure required for purposes of the pumping and treatment of extraneous water from the Cooke 4 shaft.'

[10] Gold Fields contended that Ezulwini's proposed cessation of water pumping had the potential that the seal of the connected underground areas could fail. This would result in the Gold Fields mine being flooded with water from the Ezulwini mine, resulting in significant health and safety risks to the mining operations conducted by Gold Fields, especially to its employees.

[11] The matter came before Fabricius J in December 2020 and was decided without oral argument, and judgment was delivered on 15 January 2021. The learned judge determined the counter-application on the basis that it was dispositive of the disputed issues between the parties. He issued a declaratory order in terms of which Ezulwini remained responsible for the pumping and treatment of extraneous water from the underground workings of its mine. This would endure until at least when the first respondent has issued a closure certificate in terms of section 43 of the MPRDA to it or such longer period as contemplated in section 24R of NEMA. The high court dismissed the relief

sought in prayers 2 and 3 of Gold Field's counter-application. Costs were awarded in favour of Gold Fields.

[12] The issue on appeal, as it was in the high court, is a crisp one. Is Ezulwini obliged in law to continue pumping extraneous water from its underground mining works despite its cessation of underground mining? If so, when does the obligation cease? The answer requires the interpretation of s 43 of the MPRDA and s 24N of NEMA.

[13] The legislative framework regulating all aspects of mining and mineral extraction has its origin and is intended to give effect to the rights enshrined in s 24 of the Constitution.² The primary legislative instrument to give effect to s 24 of the Constitution is NEMA. It establishes a framework for the authorisation of activities that impact or affect the environment, and for management of such impacts so as to meet the objectives of s 24 of the Constitution.³

[14] The concept of the 'environment' is broadly and extensively defined, in line with the Constitution, to cover the 'surroundings within which humans exist' including physical, biological, and chemical elements, the interrelationship between them and the social, economic, and cultural properties and conditions that influence human health and well-being.⁴

² Section 24 provides:

Everyone has the right—

- (a) to an environment that is not harmful to their health or well-being; and
- (b) to have the environment protected . . . through reasonable legislative measures that—
 - (i) prevent pollution and ecological degradation;
 - (ii) promote conservation; and
 - (iii) secure ecologically sustainable development and use of natural resources while promoting justifiable economic and social development.

³ See *Maccsand (Pty) Ltd v City of Cape Town and Others* [2012] ZACC 7; 2012 (4) SA 181 (CC) para 9.

⁴ Section 1 of NEMA; *BP Southern Africa (Pty) Ltd v MEC for Agriculture, Conservation, Environment and Land Affairs* 2004 (5) SA 124 (W) at 145B-E.

[15] Section 2 of NEMA provides for a set of principles that apply to the actions of all organs of state that may affect the environment. These principles serve as a general framework within which environmental management and implementation plans must be formulated.⁵ They also guide the interpretation, administration, and implementation of NEMA, and any other law concerned with the protection or management of the environment.⁶

[16] NEMA provides for a system of environmental authorisation for specified or listed activities. In order to obtain an environmental authorisation an assessment of the impact of the activity must be undertaken. The authorisation, when granted, generally requires the implementation of, and adherence to, an environmental management plan.

[17] Mining and the extraction of mineral and other natural resources, is an economic activity which self-evidently has extensive impact and effect upon the environment. The MPRDA is the primary legislative instrument by which effect is given to s 24 of the Constitution in relation to mining activities. Section 2(h) of the MPRDA provides that its object is:

‘to give effect to section 24 of the Constitution by ensuring that the nation’s mineral and petroleum resources are developed in an orderly and ecologically sustainable manner while promoting justifiable social and economic development.’

[18] Chapter 4 of the MPRDA regulates the acquisition of mining and prospecting rights and permits. In relation to environmental management, s 37 provides that:

‘The principles set out in s 2 of [NEMA],

(a) apply to all prospecting and mining operations, as the case may be, and any matter or activity relating to such operation; and

⁵ NEMA s 2(1)(a).

⁶ NEMA s 2(1)(e).

(b) serve as guidelines for the interpretation, administration, and implementation of the environmental requirements of this Act.’

[19] Section 38A of MPRDA stipulates that the Minister of Minerals and Energy Resources (in this case the first respondent) is responsible for implementing the provisions of NEMA that relate to prospecting, mining, exploration and production or activities incidental thereto. Subsection (2) requires that an environmental authorisation be issued by the Minister as a condition prior to the issuing of a permit or granting of a right in terms of the MPRDA.

[20] The legislative scheme requires that an environmental authorization be obtained for the commencement of mining activity or mining operations. To obtain such authorization, an environmental management program (EMP) must be submitted. Section 24N(2)(a) requires that the EMP must, inter alia, contain information on any proposed management, mitigation, protection, or remedial measures that will be undertaken. This includes environmental impacts or objectives which relate to:

- ‘(i) planning and design;
- (ii) pre-construction and construction activity;
- (iii) the operation or undertaking of the activity in question;
- (iv) the rehabilitation of the environment; and
- (v) closure, if applicable.’

[21] What is envisaged therefore, is that the conduct of the authorized operation is subject to prior assessment of potential impacts and management in accordance with the EMP. The reference to closure plainly refers to mining activities. Subsection 3(b) requires that the EMP must, where appropriate,

‘contain measures regulating responsibilities for any environmental damage, pollution, pumping and treatment of polluted or extraneous water or ecological degradation which may occur inside and outside the boundaries of the operation in question.’

[22] Section 24N(7)(c) obliges the holder of an environmental authorization, to manage all environmental impacts -

‘(i) in accordance with his or her approved environmental management programme, where appropriate; and

(ii) as an integral part of the prospecting or mining, exploration, or production operation, unless the Minister responsible for mineral resources directs otherwise.’

[23] The provisions of NEMA require that all environmental impacts which arise from the conduct of mining operations are managed in accordance with an approved EMP or as an integral part of the production process. They also require that the holder plans for closure. This is specifically stated in s 43(8) of the MPRDA. The effect is that all mining operations are subject to environmental management throughout the life cycle of such activity. It accords with s 2(e) of NEMA which embodies the principle that:

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

[24] Section 43 deals with mine closure. Subsection (1) states that the holder of, *inter alia*, a mining permit,

‘. . . 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 and sustainable closure thereof, until the Minister has issued a closure certificate in terms of this Act to the holder or owner concerned.’

[25] The section imposes an obligation upon the holder of a mining permit to apply for a closure certificate in specified circumstances. These include the

cessation of mining operations.⁷ It provides for a set of procedures to be followed, and the submission of information, plans, and reports as required by the MPRDA and NEMA.⁸ Section 43(7) requires that the holder of a mining permit must plan for, manage, and implement such procedures and requirements at mine closure as may be prescribed. These are provided for in the Mineral and Petroleum Resources Development Regulations.⁹ Regulation 57 specifies what is required upon submission of an application for a closure certificate. This includes a closure plan and an environmental risk report. A closure plan must include, *inter alia*:

‘(f) a description of the methods to decommission each prospecting or mining component and the mitigation or management strategy proposed to avoid, minimize, and manage residual or latent impacts.

(g) details of any long-term management and maintenance expected.’¹⁰

[26] Section 43(8) states that procedures and requirements as they relate to environmental authorisation for mine closure are prescribed in terms of NEMA. These include sections 24N, 24P and 24R and the Regulations pertaining to the Financial Provision for Prospecting, Exploration, Mining or Production Operations, 2015 (the Financial Provision Regulations).¹¹ For present purposes it is not necessary to deal with these regulations. It suffices to note that they deal extensively with a holder’s post-closure obligations. The closure plan submitted upon application for closure, must also set out details of the closure costs and financial provision for maintenance and post-closure management as provided in the Financial Provision Regulations.

[27] Section 43(5) states that:

⁷ MPRDA s 43(2)(b).

⁸ MPRDA s 43(4).

⁹ Mineral and Petroleum Resources Development Regulations, GNR446 in GG38855 (3 June 2015).

¹⁰ Ibid Regulation 62.

¹¹ Regulations pertaining to the Financial Provision for Prospecting, Exploration, Mining or Production Operations, GNR 1147 in GG 39425 (20 November 2015).

‘No closure certificate may be issued unless the Chief Inspector and each government department 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.’

[28] It is in the context of this legislative scheme and in the light of the purposes it seeks to achieve that s 43 of the MPRDA and s 24N of NEMA must be interpreted. The approach to interpretation of statutory instruments is, by now, well settled and it is unnecessary to repeat the much-cited passage from *Natal Joint Municipal Pension Fund v Endumeni Municipality*.¹² It is a unitary exercise, not a mechanical consideration of text, context, and purpose.¹³ More recently its essence was expressed by Unterhalter AJA in *Capitec Bank Holdings Limited and Another v Coral Lagoon Investments 194 (Pty) Ltd and Others* as follows:

‘It is the language used, understood in the context in which it is used, and having regard to the purpose of the provision that constitutes the unitary exercise of interpretation. I would only add that the triad of text, context and purpose should not be used in a mechanical fashion. It is the relationship between the words used, the concepts expressed by those words and the place of the contested provision within the scheme of the agreement (or instrument) as a whole that constitutes the enterprise by recourse to which a coherent and salient interpretation is determined. . .’¹⁴

[29] The legislative purpose is to ensure that environmental impacts, whether positive or negative, are identified, assessed, and managed. In the case of mining activity this includes the impacts and consequences of all aspects of

¹² *Natal Joint Municipal Pension Fund v Endumeni Municipality* [2012] ZASCA 13; [2012] 2 All SA 262 (SCA); 2012 (4) SA 593 (SCA) para 18.

¹³ *Chisuse v Director-General, Department of Home Affairs* [2020] ZACC 20; 2020 (10) BCLR 1173 (CC); 2020 (6) SA 14 (CC) para 52; *University of Johannesburg v Auckland Park Theological Seminary and Another* [2021] ZACC 13; 2021 (8) BCLR 807 (CC); 2021 (6) SA 1 (CC) para 65.

¹⁴ *Capitec Bank Holdings Limited and Another v Coral Lagoon Investments 194 (Pty) Ltd and Others* [2021] ZASCA 99; [2021] 3 All SA 647 (SCA); 2022 (1) SA 100 (SCA) para 25.

mining operations. It is to achieve this purpose that the cessation of mining operations and the closure of a mine is extensively regulated.

[30] Ezulwini contended that it is under no legal obligation to continue the pumping operations to remove extraneous water seeping into its now unworked underground mining area. It asserted that the pumping operations were not undertaken pursuant to an imposed obligation, but in order to dewater the mining area, as a necessary adjunct to its mining activity. It obtained a water use licence, in terms of the Water Act, as it was required to do. The water use licence conferred upon it a right of use. It does not, it argued, oblige it to exercise such right.

[31] In regard to s 43 of the MPRDA, Ezulwini argued that the section establishes liability only, and does not impose any obligations. The section, it was submitted, must be read with s 24R of NEMA, which deals with mine closure upon environmental authorisation and s 24P which requires financial provision for remediation of environmental damage. None of these provisions, according to Ezulwini, imposes an obligation to pump extraneous water. Ezulwini is entitled, so it was argued, to cease such pumping because it has ceased underground mining operations.

[32] Counsel for the Minister submitted that the obligation to pump extraneous water does not arise from s 43(1) of MPRDA, but pursuant to s 24N(7)(f) of NEMA. Ezulwini is the holder of a mining permit. Its mining operations are authorised in terms of an approved EMP. This constitutes an environmental authorisation. The section provides that:

‘(7) The holder and any person issued with an environmental authorisation—

...

(f) is responsible for any environmental damage, pollution, pumping and treatment of polluted or extraneous water or ecological degradation as a result of his or her operations to which such right, permit or environmental authorisation relates.’

[33] It was argued on behalf of the Minister that the need to pump extraneous water arises because of the inherent conditions under which the mining operations occurred. The seepage of water into the underground mining area, is a consequence of the mining operations, which open voids into which the water flows. The cessation of pumping will, over time, result in the mining voids being filled. That process necessarily impacts the immediate mining areas and the dolomite formations above the mine. Whether such impacts are positive or negative, is, for present purposes, irrelevant. They are impacts which flow from the cessation of mining operations and, therefore, fall within the ambit of the regulated process of mine closure. Gold Fields supported the position advanced by the Minister, save that it argued that upon a proper interpretation, s 43(1) also imposes an obligation upon Ezulwini to continue to pump extraneous water from the mine until permitted to cease pumping by an environmental authorisation issued for mine closure.

[34] Sections 43(1) of the MPRDA and 24N(7)(f) of NEMA both employ the phrase ‘responsible for . . . the pumping and treatment of extraneous water’. Section 43(1), stripped of unnecessary words not relevant for the present, provides that, ‘the holder of a mining permit remains responsible for . . . the pumping and treatment of extraneous water . . . until the Minister has issued a closure certificate.’ The word ‘responsible’ in its ordinary meaning means ‘having an obligation to do something’, or ‘having control over something or someone’. It also means, being the cause of something, or having to account for or be answerable for something or to someone. It covers a broader ambit than the word ‘liable’. The latter, in its ordinary sense, connotes that which is

obligated by law. It is, by definition, a narrower concept. The phrase ‘pumping and treatment’ when used with ‘responsible’ suggests responsibility for the activity of pumping and treatment of water.

[35] As indicated, Ezulwini contended that s 43(1) of the MPRDA deals with legal liability, which persists until a closure certificate is issued. It does not impose an obligation and cannot be construed as imposing an obligation where no *antecedent* obligation existed. (Emphasis added). There are several difficulties with the argument. Section 43(1) addresses the status of obligations of a holder of a mining permit as they exist during the operation of the mine. It directs that the holder remains responsible. The use of the adjective form ‘responsible’ and its noun ‘responsibility’, is to be contrasted with ‘liability’ used elsewhere in s 43. Subsection (2) provides that ‘the Minister may ‘transfer such environmental liabilities and responsibilities’ as may be identified as a closure plan to a person suitably qualified. In subsection (12), which addresses the closure of interconnected mines of which social, health and environmental impacts are integrated, the Minister may apportion liability for mine closure.

[36] Subsection (1) also makes use of the two concepts of responsibility and liability. It does so because it deals with both legal obligations and activities. Pumping and treatment of extraneous water is one such activity which remains the responsibility of a holder until mine closure.¹⁵ Section 43(1), when read in

¹⁵ The word ‘mine’ has a defined meaning in terms of s 1 of the MPRDA. When –

‘(a) used as a noun, it means:

(i) any excavation in the earth, including any portion under the sea or under other water or in any residue deposit, as well as any borehole, whether being worked or not, made for the purpose of searching for or winning a mineral;

(ii) any other place where a mineral resource is being extracted, including the mining area and all buildings, structures, machinery, residue stockpiles, access roads or objects situated on such area and which are used or intended to be used in connection with such searching, winning or extraction or processing of such mineral resource . . . ;

(b) [When] used as a verb . . . it includes any operation or activity which is incidental [to the mining or extraction of a mineral].’

‘A ‘mining operation’ is defined to mean ‘any operation relating to the act of mining and matters directly incidental thereto.’

conjunction with subsections (4), (5), (7) and (8), obliges the holder of a mining permit to submit its mining operations to regulated closure. Section 24N(7)(f) of NEMA is to similar effect.

[37] In this case Ezulwini undertook the pumping of extraneous water from its underground mining area. The pumping was an essential and integral component of its underground mining operation. It can hardly be suggested that the ingress of extraneous water was not an impact of the act of mining underground. Ezulwini managed the impact during its production operations by pumping extraneous water, treating it, and discharging it on the surface. It was authorized to do so in the light of its approved EMP and its water use licence.

[38] It can also not be suggested that the cessation of pumping will have no impact upon the immediate physical environment of the underground mining area, or that of the adjacent underground environment. On the contrary, the cessation of pumping will result in a significant impact: the mine will fill with water and, in time, the dolomitic voids above the mine, from which the ground water has drained, will fill. This impact plainly requires full and proper assessment before it occurs, as is required by the mine closure process.

[39] Section 43(5), it should be stated, cannot be given effect to where pumping of extraneous water is stopped before the procedures for closure have been met. The subsection envisages that 'provisions pertaining to the pumping and treatment of extraneous water' must be stipulated in the closure process. If not, the Chief Inspector would not be able to confirm that they 'have been addressed'. It cannot be the case that a mine operator who for operational reasons has pumped extraneous water from its mine works, may simply cease pumping, and then allow the mine to fill with water without assessment of the consequential impacts. Such an interpretation of s 43 of the MPRDA and s 24N

of NEMA would give rise to absurdity. It would, in my view, conflict with s 2(4)(vii) of NEMA, which serves as a guiding principle of interpretation. That principle requires 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.’

[40] This Court rejected a similar argument in *Harmony Gold Mining Company Ltd v Regional Director: Free State Department of Water Affairs and Others*.¹⁶ In that matter a directive had been issued in terms of s 19(3) of the Water Act, requiring Harmony, which managed gold mining operations on behalf of a landowner, to take anti-pollution measures in respect of water contamination caused by the mining operations. The entire mining operation and the land were sold to another entity, which assumed the obligations imposed upon Harmony. When that company went into liquidation, Harmony resumed its obligations. Harmony, however, took the position that since it no longer had any connection to the land, the directive was unenforceable against it since it was not the landowner. It requested the directive to be withdrawn. When that was refused, it unsuccessfully challenged the decision on review. On appeal, this Court held that,

‘An interpretation that does not impose the limitation on the Minister’s powers under ss (3) contended for by Harmony is consistent with the purpose of the NWA (reducing and preventing pollution and degradation of water resources); accords with the NEMA principles that pollution be avoided or minimized and remedied and that the costs of preventing, minimizing, controlling and remedying pollution be paid for by those responsible for harming the environment; and gives expression and substance to the constitutionally entrenched right of everyone to an environment that is not harmful to health or wellbeing and to have it protected through reasonable measures that, amongst others, prevent pollution and ecological degradation.’¹⁷

¹⁶ *Harmony Gold Mining Company Ltd v Regional Director: Free State Department of Water Affairs and Others* [2013] ZASCA 206; [2014] 1 All SA 553 (SCA); 2014 (3) SA 149 (SCA).

¹⁷ *Harmony* para 25.

[41] Ezulwini argued that its expert assessment was that allowing the re-watering of the mine and the aquifer and dolomitic voids, would be the best possible environmentally sensitive approach. Whether that is so or not is, for present purposes, of no relevance. The assessment of such an impact and any risks which may flow from it is a matter to be addressed in the process of mine closure.

[42] Upon a proper interpretation of s 43(1) of the MPRDA and s 24N of NEMA, Ezulwini is obliged to continue to pump and treat extraneous water from its underground mining areas until authorized to cease pumping in accordance with the procedures for mine closure.

[43] This brings me to the ancillary question raised in the appeal, namely, when the obligation ceases. The question arises because the order of the high court incorporated a reference to s 24R of NEMA.

[44] Section 24R of NEMA has as its heading ‘mine closure and environmental authorisation’. It provides:

‘(1) Every holder, holder of an old order right and owner of works remain responsible for any environmental liability, pollution or ecological degradation, the pumping and treatment of extraneous water, the management and sustainable closure thereof notwithstanding the issuing of a closure certificate by the Minister responsible for mineral resources in terms of the [MPRDA] to the holder or owner concerned.

(2) When the Minister . . . issues a closure certificate, he or she must return such portion of the financial provision contemplated in section 24P as the Minister may deem appropriate to the holder concerned, but may retain a portion of such financial provision referred to in subsection (1) for any latent, residual or any other environmental [impact], including the pumping of polluted or extraneous water, for a prescribed period after issuing a closure certificate.’

[45] Section 24R (1) of NEMA, in contrast to s 43(1) of the MPRDA, however, at face value, extends responsibility beyond the issuing of a closure certificate. Counsel for Ezulwini argued that, in the first instance, the section relates to the provision of financial guarantees for remediation of environmental damage. A mine owner is required to make financial provision at the stage that a mining permit is sought. Section 24R therefore deals with the liability of the permit holder after closure has been certified. It does not impose a perpetual obligation to pump extraneous water, even beyond authorised closure of the mine. Seen in this light, the ‘responsibility’ imposed by s 24R is confined to ‘liability’ and does not impose an obligation to carry out an activity such as continued pumping of extraneous water, after closure.

[46] In my view, it is unnecessary to decide the ambit of s 24R. It addresses a post-closure situation and the financial provision provided in terms of s 24P of NEMA. It accords with the so-called ‘polluter pays’ principle embodied in s 2(4)(p) of NEMA. On the facts of this case, the process of mine closure has not yet been initiated. Until that occurs and the process of determining appropriate conditions upon which the closure certificate may be issued, any consideration of post-closure obligations would be premature, if not inappropriate.

[47] The incorporation of a reference to s 24R of NEMA in the order of the high court was, in the circumstances, unwarranted. It follows that the order as framed cannot be confirmed. However, for the reasons I have set out, the high court was correct in its determination of the obligations of Ezulwini until a closure certificate is issued. The appeal must, subject to the correction of the order of the high court, therefore fail. There is no reason why costs should not follow the event.

[48] In the result, the following order is made:

1 Paragraph 1 of the order of the high court is set aside and replaced with the following:

‘It is declared that Ezulwini Mining Company (Pty) Ltd remains responsible for the pumping and treatment of extraneous water from the underground workings of Ezulwini Mine until the Minister of Mineral Resources and Energy has issued to it a closure certificate in terms of s 43 of the Mineral and Petroleum Resources Development Act 28 of 2002.’

2 Otherwise, the appeal is dismissed with costs, including the costs of two counsel.

G GOOSEN
ACTING JUDGE OF APPEAL

Appearances

For appellant: C D A Loxton SC (with him P Lazarus SC)

Instructed by: Warburton Attorneys, Johannesburg
Lovius Block, Bloemfontein

For second respondent: J Rust SC (with her N Fourie)

Instructed by: State Attorney, Pretoria
State Attorney, Bloemfontein

For fifth and sixth respondents: G L Grobler SC (with him J L
Gildenhuis SC)

Instructed by: Werksmans Attorneys, Johannesburg
Webbers Attorneys, Bloemfontein